

The Regulator September 2010

Council Message

Welcome to the September Regulator. This will be my final message as Chair of Council as I'm leaving the Council at the end of October, having served two terms as the Public Member appointed by the Government of Alberta.

In reflecting back on my six Council years, I want to share how impressed I've been with the professionalism and dedication of the Members of Council, the Staff of RECA, as well as the many Industry Members I have met.

Upon joining the Council in November 2004 I had a very limited knowledge of the workings of the Real Estate Industry. I really appreciated the time and effort Industry Members, Council Members and Staff took to help me learn about the industry. Over the last six years I have had the opportunity to participate in, and watch the industry grow both in numbers, but more importantly in its professionalism when dealing with clients and the public.

There have certainly been challenges, such as the New Rules and Act, and implementing the Agency Task Force Recommendations. While there has been and continues to be debate about some of these initiatives, I have never doubted the sincerity of all involved in trying to achieve a more professional industry to serve Albertans.

The Real Estate Industry in Alberta is particularly fortunate, in that we have the privilege of being self regulated, which means that the industry gets to have a very substantial say in how it is governed. It's important we use this privilege carefully. As a self regulated industry, we need to ensure allocation of both the resources and time. This ensures a quality staff and quality volunteers on Council, Hearing Panels and Advisory Committees. I get upset when I hear Industry Members who've offered their volunteer time to RECA being referred to as having gone over to the "dark side". The Industry Members who do devote their time to RECA are the ones protecting and enhancing our privilege of self regulation. We should support and encourage them - not criticize them, even if in a joking manner. Without quality Industry Members devoting their time and skills, self regulation will not work. Having said that, I'd urge you to consider offering your services to RECA should the opportunity arise.

Finally, my thanks to the Alberta Government for appointing me, to the Staff, Council Members and Industry Members for supporting me in my role both as a Council Member and as Chair for the last year. It has been an honour and privilege and I look forward to watching RECA and the Industry move forward and provide an even better service to all Albertans.

Renew Now

The September 30, 2010 deadline to renew your registration with the Real Estate Council of Alberta is fast-approaching - are you ready?

Remember, Real Estate, Property Management and Mortgage industry members must complete their appropriate [Re-Licensing Education Program \(REP\)](#) to become eligible for registration renewal.

Click the appropriate link below to find out more.

Real Estate Industry Members - [CLICK HERE](#)

Property Management Industry Members - [CLICK HERE](#)

Mortgage Brokerage Industry Members - [CLICK HERE](#)

Real Estate Appraisal Industry Members - [CLICK HERE](#)

RECA Wins Two International Awards in 2010

The Association of Real Estate License Law Officials (ARELLO), the international organization of real estate regulators, has presented the Real Estate Council of Alberta with two awards in 2010.

RECA won the 2010 ARELLO Communication Award for the revamped Regulator newsletter you're reading right now. Our state-of-the-art Flash flip book design, combined with sleek aesthetics and valuable content, contributed greatly to receiving the award. Congratulations to RECA's Communications team for this well deserved award.

RECA also won the 2010 ARELLO Education Award for the *Real Estate Update 2009-2010* course. Updated content and innovative, online course delivery illustrated RECA's commitment to cutting edge education programs. Congratulations to the RECA Education department and to Media Learning Systems for their hard work in course development and delivery.

RECA officially accepts these awards at the 2010 ARELLO Annual Conference in Anchorage, Alaska in September 2010.

Assurance Fund Fee Changes for Mortgage Brokers

In July, Council approved a budget proposal suspending the Assurance fund levy for renewing brokers and associates in the mortgage broker industry sector, paving the way for a one-time assurance fund levy of \$100 dollars for new brokers and associates. This change is consistent with the assurance fund levy assessed on new brokers and associates in the Real Estate sector.

In accordance with the Real Estate Act and Ministerial Regulation AR113/96, the amount of the Real Estate Assurance Fund (the “Fund”) is prescribed at \$2 million.

Errors & Omissions Consultation with Mortgage Industry

During 2009, the Mortgage Broker Advisory Committee worked extensively in the syndicated mortgages and private lenders area. As part of its deliberations, the Committee also considered the issue of mandatory professional errors and omissions liability insurance. Based on this consideration, the need for consumer protection was identified.

In the spring of 2010, RECA’s Mortgage Broker Advisory Committee (Committee) recommended Council consider mandatory Errors & Omissions insurance for all mortgage broker industry members in Alberta as a requirement for issuance of an authorization, with an aggregate coverage level of \$1,000,000.

RECA recently concluded a consultation process with mortgage broker industry members and other stakeholders on whether Council should amend the *Real Estate Act* Rules (Rules) to require all mortgage broker industry members registered in Alberta to have minimum E&O coverage.

Results of this survey will be reviewed by Council at their next meeting in November, the outcome of which will be reported in the November issue of the Regulator.

Service Agreement for Buyers Working with Common Law Brokerages

Summary: An industry member in a common law brokerage who is providing brokerage services to a buyer **should** enter into a written service agreement with the buyer. If the

agreement is an Exclusive Brokerage Agreement (right to represent the buyer), it **must** be in writing. The *Real Estate Act* Rules establish the minimum requirements of a written service agreement. **For residential real estate, the Rules further identify mandatory content for Exclusive Brokerage Agreements.** Whether or not the agreement is an exclusive or non-exclusive right to represent the client is a decision that must be made by mutual consent.

[See: *Real Estate Act* s.1(1)(w.1), *Real Estate Act* Rules s.43(2), s.44(1), s.48, s.55(1)(2)(3), s.56, s.58, s.60.1 and Schedule 1]

Note: For the purposes of this Information Bulletin, and where the context permits, “real estate broker” refers to all four categories of real estate broker license i.e. brokerage, broker, associate broker and associate.

Are written service (brokerage) agreements mandatory in common law agency when representing buyers?

No; however, a written service agreement is preferable. This is reflected in the *Real Estate Act* Rules. Section 43(1) states that an industry member who establishes a client relationship **should** enter into a written service agreement with that client. Section 43(2) outlines the minimum requirements for any written service agreement.

Are written service (brokerage) agreements widely used in common law agency when representing buyers?

In common law brokerages today, the most common practice when representing buyers is to establish a verbal non-exclusive agreement. Typically in this relationship, the real estate broker and the buyer have verbally consented to an agency relationship. In the case of residential real estate, RECA’s [Agency Relationships Guide](#) or similar guide containing mandatory content has been used to assist in the process.

The use of written service agreements for buyers in common law agency is gaining greater acceptance by real estate brokers and consumers. The requirements of a written service agreement include the requirements of s.43 of the Rules as well as the other requirements of the Rules and provide additional clarity in meeting all requirements over those of a verbal agreement. As well, in the absence of a written service agreement, there is a degree of risk to the real estate broker that the proper disclosures have not been made and the role and services of the real estate broker may not be clear in the minds of the buyer.

In common law agency, does a written service agreement (buyer brokerage agreement) have to be an exclusive right to represent?

No, written service agreements in common law agency can be either exclusive or non-exclusive. Regardless of the type of relationship they enter into with consumers, real estate brokers should have a clear understanding of their obligations to all parties. While consumers should make an informed choice about the type of relationship they wish to have with a real estate broker, they should also understand the implications of the options available to them.

In common law agency, what is the difference between an exclusive and a non-exclusive buyer brokerage agreement?

In common law agency, an **exclusive** buyer brokerage agreement is an agreement between a buyer client and a brokerage whereby the buyer gives the brokerage the exclusive right to act on behalf of the buyer on the terms and conditions outlined in an Exclusive Buyer Brokerage Agreement. In this type of agreement, the buyer warrants to the brokerage that he or she is not currently represented by any other brokerage and will not enter into another buyer brokerage agreement with another brokerage during the term of the agreement.

In other words, in an exclusive buyer brokerage agreement, the buyer agrees only to use the services of and be represented by the common law agency brokerage to assist them in purchasing a property during the term of the agreement.

A **non-exclusive** brokerage agreement for buyers is significantly different from an exclusive right to represent. The key difference is that the buyer is not limited to using the brokerage they have entered into the brokerage agreement with. In other words, they can enter into non-exclusive buyer brokerage agreements with other brokerages during the same period of time.

In common law agency, when a client agrees to enter into a written service agreement, are there specific forms I must use when representing a buyer?

The answer to this question will depend on two factors. Will you be representing a buyer who is interested in a residential property? Will you be entering into an exclusive or non-exclusive buyer brokerage relationship?

If the answer to **BOTH** of these questions is “yes”, the agreement must contain the mandated wording as set out in the *Real Estate Act* Rules, section 60.1. The mandated content of an *Exclusive Buyer Brokerage Agreement* for use in residential real estate transactions is contained in Schedule 1 of the Rules. The *Exclusive Buyer Brokerage Agreement* is posted on RECA’s website under [industry member tools](#).

If the service agreement does not relate to a trade in residential real estate **OR** does not involve an exclusive right to represent the client, you are not required to use the same wording as provided in the mandated form. However, it is important to recognize you must comply with section 43(2) of the *Real Estate Act* Rules when employing a written service agreement.

Can the wording in an ***Exclusive Buyer Brokerage Agreement*** contained in Schedule 1 of the Real Estate Act Rules be changed or altered by the brokerage?

If an industry member uses a different form than the *Exclusive Buyer Brokerage Agreement* contained in Schedule 1 of the Rules, the form must contain the mandatory content set out in Schedule 1 and this mandatory content must not be directly or indirectly altered by the industry member.

Any form used by the industry member may, in addition to the mandatory content, include additional or supplementary content; however, such additional or supplementary content must not directly or indirectly alter the meaning or effect of the mandatory content and must not alter the obligations or requirements of industry members outlined in the *Real Estate Act* or the Rules. That said, upon the initiative and request of a client the forms may be amended by having the parties to the agreement agree to and initial the changes.

Practice Tip for ***Non-Exclusive Common Law Brokerage Agreements***

When a brokerage has decided to develop its own non-exclusive brokerage agreement for either residential or non-residential transactions (e.g. commercial, industrial, investment, farm, ranch etc.), RECA recommends the brokerage refer to the Common Law Brokerage: Agreement Outline with Example Clauses document posted on RECA's website under [industry member tools](#) as this is intended to assist brokerages in developing forms that meet the minimum requirements established in s.43(2) of the *Real Estate Act* Rules.

Brokerages may include additional terms and / or clauses to these minimum requirements as may be appropriate for their chosen business model and the needs of the consumers they represent.

For additional information about written service agreements please review the Information Bulletin on RECA's website entitled [Service Agreements - Real Estate Brokerage](#).

Appraiser and Property Management Council Member Recommendation Update

RECA officially launched their Social Media (SM) communications on Twitter in May. Our move into the Twitter **stream** is another way RECA connects with industry members – participating in conversations, solving problems and providing timely information.

By the beginning of July we were at 100 followers. This was marked with the following tweet:

Thank-you @ShirleyPorter for being our 100th follow. RECA swag is on the way! Happy Friday & best Stampede wishes!

1,278,709,928,000.00 via web

Much to our surprise, our one hundredth follower posted the following tweet:

RECA kudos rt@ ShirleyPorter @benjaminbach DRAMATIC difference! @reca is our RECO. NO comparison Alberta is forward thinking & progressive.

1,279,219,889,000.00 via web

RECA is pleased to receive this accolade and continues to work hard to enhance this reputation.

But utilizing Social Media as a communications vehicle isn't just about increasing your number of followers. It's about what you do with the followers you have. After all, Social Media is about building relationships.

The following messages were sent to us directly:

@RECA Having problems logging into your system to take my mandatory education...help

9:46 AM Aug 24th via TweetDeck in reply to RECA

And we responded within 10 minutes.

@kelloyskar Hey Kelly. Some server issues this a.m. What's your phone number? Brenda in Education and she'll call u back asap.

9:50 AM Aug 24th via web in reply to kelloyskar

This industry member tweeted about esigning documents, which started a conversation, resulting in the following highlights.

@RECA Thanks for the link. I was actually trying to use docuSign which is not the same as Tablet. <http://www.docuSign.com/>

2:01 PM Aug 24th via web in reply to RECA

Thanks to @RemaxCalgary for the Esign question. The answer is YES to electronic signatures on Tablet. NO to Esign until a court decides.

6:33 AM Aug 30th via web

@reca I am so happy with #RECA on Twitter. they are doing a great job being accessible.

3 minutes ago via web

RECA thanks those of you currently following us on Twitter - keep those Tweets coming. We'll do our best to ensure you have the information you need for success – whatever your communication vehicle should be. As for the rest of you, we invite you to [click here](#) and follow us on Twitter.

Ontario and B.C. Change to Harmonized Sales Tax

As you may or may not be aware, the HST is now in effect in both British Columbia and Ontario. This change may affect industry member transactions in these provinces. If this applies to you, it's important you review the Canada Revenue Agency guidelines on whether GST/HST Is payable. <http://www.cra-arc.gc.ca/tx/bsnss/tpcs/gst-tps/gnrl/hst-tvh/menu-eng.html>

The HST is a combination of the federal goods and services tax (GST) and the provincial sales tax (PST) and is administered by the Canada Revenue Agency.

Advertising as an Industry Member – Material Representations and Verifiable Statements

A statement like: “We sell every home we list in 60 days or less!” is a material representation that may have a direct impact on a consumer’s choice of listing brokerages. Though RECA does not prohibit such statements, claims along these lines must be able to be proven with accurate documentation.

Likewise, making statements along the lines of an industry member being the “#1 industry member” is meaningless without additional information. In order to use such an identification statement in an advertisement, there must be enough information to prevent the public from being deceived or misled. In other words, a verifiable and quantifiable identification statement in any advertising must:

- Provide enough information so that a member of the public cannot attribute more than one meaning to the message.
- Upon request from any person, be justifiable by the industry member using factual and solid proof.
- Conclusions made in industry member advertising must be factual, and based on adequate and proper tests.

This ad makes a statement claiming this industry member is in the top 5% of industry members in the city of Red Deer, which could entice a consumer to choose this industry member to represent them.

REAL ESTATE KNOWLEDGE. | JAKEJACKSON.COM

Top 5% in Red Deer!

Century 21
123 REALTY

JAKE JACKSON
Real Estate Knowledge

However, this industry member is actually only in the top 5% in number of sales within his brokerage in Red Deer. The ad to the left contains more accurate information about the statement, and the public would not attribute more than one meaning to the message, as they would in the above ad.

REAL ESTATE KNOWLEDGE. | JAKEJACKSON.COM

Top 5% in number of homes sold in Century 21 123 Realty in Red Deer

Century 21
123 REALTY

JAKE JACKSON
Real Estate Knowledge

An industry member wishing to refer to him or herself as “#1” needs to include more information in the ad – such as information about the market in which the industry member is #1 and information about what makes the industry member #1 (i.e. most homes sold, most homes listed, most money made).

This bus bench states that the industry member is “specializing in inner city properties.” An industry member holding themselves out as a “specialist,” should be aware that if a complaint arises, the industry member will be held to a higher standard than one who has not held themselves out to have such special attributes.



Likewise, an industry member holding oneself out as an 'expert' will be held to a higher standard should a complaint arise.

MaxWell
123 REALTY

The Country Home Expert!

Home Listings Profile Buyers Sellers Mortgage Center Contact Home Evaluation Links

Jake Thompson

These words describe a top producer in the Calgary Real Estate market. In the last years I have been in the business, I am consistently of the top 3 Agents at Royal LePage Executive 100 and in the top 1% of realtors in Calgary and Canada. These 3 marketing plan that works, proven with every sale put together. Call me today for better deals on my proven home marketing plan and to provide agents to real estate.

Feature Property

Click for more Details

Agent Login Privacy Policy © 2006 Royal LePage Web Design & Marketing by

This guideline is reflected in Article 15 of the CREA REALTOR® Code, which reads:

15. Advertising Claims

Claims or offerings in Advertising must be accurate, clear and understandable.

15.1 Advertising of Compensation shall include the details of services provided and whether any additional charges may apply. If the services to be provided for the advertised Compensation do not include listing on MLS®, a statement to that effect must be included.

15.2 Representations of performance (e.g. "#1," "topselling," etc.) must include the geographical area referred to, the relevant time-frame (e.g. January-June 2004) and the source or basis on which the claim is based (e.g. based on the number of sales on the MLS® system of the relevant Board for the specified time period).

15.3 Advertising of programs, initiatives or guarantees (e.g. "Buy a house with 0% down," "If I don't sell your house, I will buy it from you," must clearly set out all significant details of how the program works, including, but not limited to, exceptions and time frames.

15.4 Significant conditions, restrictions, limitations and additional charges shall be fully and prominently displayed in the body of the advertisement near the claim or offering in easily readable form and shall comply with all applicable laws.

15.5 A condition, restriction, limitation or additional charge shall be considered "significant" if it would likely affect a consumer's decision to retain the REALTOR® brokerage.

15.6 Any claims or offerings in advertising must also comply with all applicable laws, including the Competition Act.

15.7 Interpretation 13.1 Applies to Article 15

Licence Suspensions

Ronan Kamdar – Real Estate Associate Licence Suspended

On July 14, 2010, pursuant to section 53(1)(a) of the Real Estate Act, the Real Estate Council of Alberta temporarily suspended the licence of Ronan Kamdar, real estate associate formerly registered with Sterling Realty (Alberta) Ltd. o/a Sterling Real Estate in Edmonton, pending the outcome of conduct proceedings under Part 3 of the Real Estate Act. As a result of this suspension, Mr. Kamdar cannot trade in real estate in Alberta at this time.

Bradley M. Oneil – Real Estate Associate Licence Suspended

On July 14, 2010, pursuant to section 53(1)(a) of the Real Estate Act, the Real Estate Council of Alberta temporarily suspended the licence of Bradley M. O'Neil, real estate associate formerly registered with Century 21 Terrace Real Estate Ltd. in Calgary, pending the outcome of conduct proceedings under Part 3 of the Real Estate Act. As a result of this suspension, Mr. O'Neil cannot trade in real estate in Alberta at this time.

Blake Charles Jolin - Real Estate Associate Licence Suspended

On July 15, 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 Blake Charles Jolin real estate associate registered with Alpine Realty 2003 INC o/a Remax Alpine Realty. The licence suspension resulted from Mr. Jolin's failure to comply with a condition attached to his licence. As a result of this suspension, Blake Charles Jolin may not trade in real estate in Alberta at this time.

Gerard Yoofi Hagan – Real Estate Associate License Suspended

On July 26, 2010, Gerard Yoofi Hagan's authorization to trade in real estate was suspended by

order of a Hearing Panel of the Real Estate Council of Alberta (RECA) for a period of one month. Mr. Hagan 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.

At times relevant to this disciplinary action, Mr. Hagan was registered as a real estate associate with XCD Realty Inc. o/a XCD Realty and with Sterling Realty (Alberta) Ltd. o/a Sterling Real Estate.

Mr. Hagan acted contrary to the Real Estate Act Rules when he made an inaccurate representation which misled a person at RECA. In particular, he failed to act honestly in making several misrepresentations that he had no prior criminal conviction and swore two affidavits attesting to the truth of this misrepresentation.

Marc Jonathan St. Arnaud - Real Estate Associate Licence Suspended

On August 17, 2010, the executive director of the Real Estate Council of Alberta suspended the authorization of Marc Jonathan St. Arnaud, most recently registered as a real estate associate with Royal LePage Arteam Realty in Edmonton.

The suspension is in accordance with s. 38(4.2) of the Real Estate Act and occurred as a result of Mr. St Arnaud's refusal to cooperate with a person conducting an investigation. As a result of this suspension, Marc Jonathan St. Arnaud may not trade in real estate in Alberta at this time.

Tracey Kelly - Real Estate Associate Authorization Suspended

On August 24, 2010, pursuant to section 38(4.2) of the Real Estate Act, the executive director of the Real Estate Council of Alberta suspended the authorization of Tracey Kelly, real estate associate with ReMax Realty Horizon in Strathmore, Alberta. As a result of this suspension, Tracey Kelly may not trade in real estate in Alberta at this time.

Shields, Thomas David - Real Estate Associate Authorization Suspended

On August 31, 2010, pursuant to section 38(4.2) of the Real Estate Act, the executive director of the Real Estate Council of Alberta suspended the authorization of Thomas David Shields, real estate associate with ReMax Grande Prairie, Alberta. As a result of this suspension, Thomas David Shields may not trade in real estate in Alberta at this time.

Case Summaries

Letters of Reprimand

July - August 2010

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

- 1 breach no person shall act as a real estate appraiser unless that person hold the appropriate authorization for that purpose issued by the Council [s.17(c) of the *Real Estate Act*]

- 2 breaches of failure to disburse money received or held in trust ...only in accordance with the rules [s.25(1)(d) of the *Real Estate Act*]
- 1 breach of a brokerage must immediately notify the executive director in writing of a change in officers or directors of a corporation if the brokerage is a corporation [s.32(g) of the *Real Estate Act Rules*]
- 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*]
- 3 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 breaches of immediately notifying, in writing, the Executive Director when the industry member is convicted of any criminal offence or any other offence under any law [s.40(1)(h) of the *Real Estate Act Rules*]
- 2 breaches of fulfilling fiduciary obligations to clients [s.41(d) of the *Real Estate Act Rules*]
- 3 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 broker must not employ a person to trade in real estate unless that person meets the requirements of the Act, Regulations, Rules and Bylaws [s.50(b) of the *Real Estate Act Rules*]
- 1 breach of a real estate broker must not pay a commission or remuneration directly or indirectly, in connection with a trade in real estate except i) to a broker, associate broker or associate employed by the brokerage ii) to a brokerage that is licensed under these Rules iii) to an auctioneer qualified under the regulations under the Fair Trading Act [s.50(c) of the *Real Estate Act Rules*]
- 1 breach of a real estate broker and associate must ensure all trades in real estate and relevant documentation meet legislative requirements [s.53(b) of the *Real Estate Act Rules*]
- 1 breach of a real estate associate broker and associate must provide to the broker in a timely manner all original documentation and copies of original documents provided to all parties or maintained by other brokerages [s.53(c) of the *Real Estate Act Rules*]
- 1 breach of the basic obligations of an industry member who is in a sole agency relationship with a buyer are 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*]
- 1 breach of the industry member shall, in a timely manner, provide the party to a trade in real estate with a true copy of that offer or acceptance [s.61(a) of the *Real Estate Act Rules*]
- 1 breach of the industry member shall, in a timely manner, deliver a true copy of that offer or acceptance to the other parties to that trade [s.61(b) of the *Real Estate Act Rules*]
- 1 breach of a mortgage associate must provide to the broker in a timely manner all original documentation and copies of original documents provided to all parties or maintained by other brokerages related to dealings in mortgage [s.69(c)(i) of the *Real Estate Act Rules*]
- 1 breach of a mortgage associate must provide to the broker in a timely manner all original documentation and copies of original documents provided to all parties or maintained by

other brokerages required under the *Act* and these Rules [s.69(c)(ii) of the *Real Estate Act* Rules]

- 1 breach of a brokerage must provide documentation referred to in this section (requirements for real estate brokerages) within a reasonable period of time following a request from a client or as otherwise agreed to [s.100(2) of the *Real Estate Act* Rules]

Audit administrative penalties

July 2010

Base Mortgage & Investments

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

West Venture 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

Gibraltar Mortgage 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

Seniors Money Limited

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

Administrative Penalties

July 2010

John A. Hourie, associate, the Real Estate Company

- Failure to be notify the Executive Director of commencement of bankruptcy proceedings [s.40(1) (e) of the *Real Estate Act* Rules]
- Mr. Hourie commenced bankruptcy proceedings on November 18, 2008 and informed on RECA May 25, 2010.
- \$1,000

R. Graham Ogden, associate with MacDonald Realty at all relevant times and currently associate with Re/Max Accord

- Failure to disclose, in a timely manner, to the seller all relevant facts affecting the transaction known to the industry member [s.57(k) of the *Real Estate Act* Rules]
- Mr. Ogden was acting on behalf of the Sellers who received an offer on their property. Clause 3.1 of the contract stated that all deposits would be delivered in trust to MacDonald Realty 3 days after acceptance. No deposit was ever received by the Sellers, the Seller's lawyer or by MacDonald Realty. Mr. Ogden did not disclose to the Sellers that the deposit had not been received as per the contract. The sale eventually collapsed as no monies were ever received from the Buyers.
- \$1,500

Dennis Smith

- Trading in real estate while unauthorized on 4 separate occasions [s.17(c) and/or (d) of the *Real Estate Act*]
- Mr. Smith was not authorized to act as a real estate appraiser and has never held an authorization to act as a real estate appraiser. On 4 separate occasions, Mr. Smith attended properties and prepared appraisal reports which included an appraised market value for each property. The reports showed Mr. Smith as an appraiser with Floen and Sloan Appraisals (1985) Ltd. At no time was Mr. Smith employed with this company. On three reports the name of a retired real estate appraiser who did not hold authorization at the time was entered on the supervisor section of the report; two had no signatures included, one had a signature purporting to be the appraiser's. On the fourth report the signature of the supervisor was not hers.
- \$2,500 for each of 4 Administrative Penalties

The Timberwolf Renovators Inc. and Rick Pombert

- Trading in real estate while unauthorized for a period of approximately four months [s.17(a) and/or (d) of the *Real Estate Act*]
- Timberwolf has never held an authorization to trade in real estate or applied for an authorization to trade in real estate through the Real Estate Council of Alberta nor has it ever been authorized to advertise or hold itself out as a real estate broker. Timberwolf entered into a property management agreement with the owner of a duplex in Edmonton. Mr. Pombert signed the property management agreement on behalf of

Timberwolf. Among other duties on behalf of the owner, Timberwolf agreed to lease and rent units; negotiate and administer all contract work; collect rents and security deposits and hold in trust and act on behalf of the owner on all actions with tenants. Timberwolf was paid a fee for these services or deducted those amounts from rent monies it held.

- \$6,000

Ian Quinn, real estate associate, Re/Max Landan and Re/max Landan Real Estate

- Failure to have the written service agreement clearly show all terms and conditions of the agreement including the amount or method of calculating the remuneration or alternate compensation to be paid and the circumstances on which it will be payable [s.43(2)b)(viii) of the *Real Estate Act* Rules]
- The Sellers entered into an agreement with Beattie Homes for the purchase of a Beattie home under the Free List Program which provided free listing services through a team at Re/Max Landan. Mr. Quinn was the associate authorized to represent Re/Max Landan in the transaction. The Residential MLS Listing Contract Exclusive Seller Brokerage Agreement set out what the Seller would pay the Brokerage. The agreement between Beattie and Re/Max Landan in this transaction was that Beattie would pay a fixed rate of \$3,500 to Re/Max Landan for listing the Seller's property. Nowhere in the written listing agreement did it clearly set out the amount of remuneration or compensation that Mr. Quinn would be paid, specifically it did not set out that Mr. Quinn would be paid a fixed rate for listing the Seller's property by Beattie Homes.
- \$1,000

Country Hills Homes Sales Inc.

- Failure to be authorized to trade in real estate [s.17(a) and/or (d) of the *Real Estate Act*]
- Country Hills is a corporation registered in Alberta. Country Hills is not presently and never has been authorized to trade in real estate by the Real Estate Council of Alberta.
- On or about July 2, 2008, Country Hills entered into a Listing Agreement for the sale of a property in Strathmore. This property is a manufactured home that was situated on a site that was used for residential purposes.
- The Listing Agreement stated that the seller will assign to the purchase any lease or rights that the seller may have to the site on which the manufactured home is located.
- \$1,000

Robert Payne

- Trading in real estate while unauthorized [[s.17(a) and/or (d) of the *Real Estate Act*]
- Mr. Payne was authorized as a real estate associate between June 25, 1993 and September 30, 1994. Mr. Payne has not been authorized to trade in real estate since then nor is he currently authorized.
- On or about July 2, 2008, Country Hills entered into a Listing Agreement for the sale of a property in Strathmore. Mr. Payne was listed as the listing broker for Country Hills and witnessed the seller's signature on the Listing Agreement. This property is a manufactured home that was situated on a site that was used for residential purposes.
- \$1,000

Donald Gray, real estate associate with Oakwood Management Ltd. at all relevant times and currently real estate broker with DMG Asset Management and Realty Ltd. o/a DMG Management

- Failure to trade in real estate only in the name that appears on that individual's licence and in the name of the brokerage with which that individual is registered [s.53(a) of the *Real Estate Act Rules*]
- \$1,000
- Accepting a commission referral fee of 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*]
- \$1,500
- Mr. Gray, authorized to trade in real estate at the time with Oakwood Management Ltd., managed a number of properties through his company DMG Property Management which was not authorized to trade in real estate. The property management activities done by Mr. Gray through DMG Property Management included the collection of rent monies for the use of the real estate. Mr. Gray charged and collected fees directly from those individuals whose properties he managed.

Olay Rasa, former real estate associate with Century 21 A.L.L. Stars Realty Ltd.

- Failure to be notify the Executive Director of commencement of bankruptcy proceedings [s.40(1)(e) of the *Real Estate Act Rules*]
- Mr. Rasa commenced bankruptcy proceedings on February 1, 2008. Mr. Rasa did not immediately report this bankruptcy to the Executive Director. On or about October 16, 2008 RECA received the 2008/2009 application forms with a 'yes' answer to question 19. The application was completed and sworn on September 25, 2008.
- \$1,000

Noel Simpson, former associate with Verico Mortgage Planning Centre Inc.

- Failure to keep the broker informed of the activities being performed by the associate on behalf of the brokerage [s.69(d) of the *Real Estate Act Rules*]
- Mr. Simpson began acting as a transaction facilitator between a borrower and mortgage lender and was involved in arranging three mortgages for the borrower in relation to the purchase of a property. Mr. Simpson was advised not to proceed with this file by T.L., a mortgage associate and part owner of Verico, as the second mortgage rate exceeded 100%. C.O. an experienced mortgage associate and part owner of Verico also advised Mr. Simpson of the same issues relating to the interest rate of the second mortgage and instructed him not to proceed on the file. Mr. Simpson proceeded on the file, contrary to those instructions and did not advise his broker that he was proceeding on this file. His broker only became aware that Mr. Simpson had proceeded on the file after the brokerage received a finder's fee for Mr. Simpson from the sellers.
- \$1,000
- Participated in fraudulent or unlawful activities in connection with the provision of services or in any dealings [s.42(b) of the *Real Estate Act Rules*]
- During the summer of 2007, Mr. Simpson was involved in arranging three mortgages for a borrower for the purchase of the property. The second mortgage for the borrower had

an effective annual rate including brokerage, lender's and insurance fee in excess of the 60% effective annual rate of interest that is permitted under the Criminal Code of Canada

- \$1,500

Amanda Bodson, real estate associate

Johnson Real Estate Group Ltd. o/a Realty Executives Johnson Real Estate Group

- Failure to provide competent service [s.41(b) of the *Real Estate Act Rules*]
- Ms Bodson listed a property on MLS with the description that the hot water tank and furnace at the property were only a few years old. The hot water tank had been installed 14 years previously and the furnace was 8 years old at the time. The purchaser relied upon this information when making an offer to purchase the property.
- \$1,500

Keith Fraser, real estate associate, Maxwell Real Estate Solutions Ltd. and formerly registered with Coldwell Banker – Ontrack Realty

- Failure to trade in real estate only in the name that appears on that individual's licence and in the name of the brokerage with which that individual is registered [s.53(a) of the *Real Estate Act Rules*]
- While registered with Coldwell Banker –Ontrack Realty and while registered with Maxwell Real Estate Solutions Ltd., Mr. Fraser and his brokers received advisory information about Mr. Fraser using a trade name in conjunction with the brokerage's name and the requirements to clearly disclose the name of the brokerage. A review of Mr. Fraser's websites showed "The Keith Fraser Team" advertised in large print in several locations on the home pages. The generic Coldwell Banker logo and the generic Maxwell logo were located next to the team name. The logos did not specify which Coldwell Banker brokerage or which Maxwell brokerage Mr. Fraser and his team were registered with. These advertisements held out that "The Keith Fraser Team" was the entity that people would be hiring and not the brokerages where Mr. Fraser was registered at the time.
- \$1,000 each of 2 Administrative Penalties

Monica A. McLeod, broker, Casita Mortgage Corp.

- Failure to notify the Executive Director, in writing, when any business the industry member owns or has participated in as a partner, director or officer in the past three years, has any judgment(s) rendered against the business and when the industry member is the subject of any bankruptcy proceedings [s.40(1)(d) and (e) of the *Real Estate Act Rules*]
- Ms McLeod failed to notify the Executive Director about a judgment against Casita Mortgage Corp. and failed to notify the Executive Director that she commenced bankruptcy proceedings.
- \$1,000 each of 2 Administrative Penalties

Darrel Borbely, real estate associate broker, 416212 Alberta Ltd. o/a Re/Max Real Estate-Lethbridge

- Failure to provide competent service [s.41(b) of the *Real Estate Act* Rules]
- The Listing Contract provided an agreement on alternate remuneration where the Buyer defaults on a purchase and deposits are forfeited. Mr. Borbely failed to point out the remuneration provision to the associate contained in the Listing Contract and/or Mr. Borbely failed to follow the clause in the Listing Contract that stipulated what remuneration was owed to the brokerage where the Buyer defaults on the purchase and instead, he authorized the associate to file a caveat on the Sellers' property, causing delay for the Sellers in selling their property.
- \$1,500

Perry Comin

(this Administrative Penalty is currently under appeal)

- Trading in real estate while unauthorized [[s.17(c) and/or (d) of the *Real Estate Act*]
- Mr. Comin was authorized as a real estate appraiser from October 1, 2004 to September 30, 2006. On October 1, 2006, RECA had not received a renewal of Mr. Comin's licence and since that time he has acted as a licenced real estate appraiser without authorization and performed 166 or more real estate appraisals for which he earned money.
- \$5,000

Michael Koski, mortgage broker, CMSI Alberta Inc.

- Trading in real estate while unauthorized [[s.17(b) and/or (d) of the *Real Estate Act*]
- Mr. Koski was registered as a mortgage broker with Preferred Realty Capital Inc. between February 9, 2007 and November 21, 2008. On or about January 6, 2009, Mr. Koski became registered as a mortgage broker with Insight Commercial Mortgage Corp. o/a CMSI Alberta Inc. Between November 22, 2008 and January 5, 2009, Mr. Koski was not registered and therefore not authorized to deal as a mortgage broker. Mr. Koski performed mortgage activities without being registered.
- \$1,000

Marcelle West, Real Estate Associate Broker Seabolt Holdings Ltd. o/a Sutton Group – Canwest

- If the situation arises where a brokerage represents a seller with whom it has an agency relationship and a buyer with whom it has an agency relationship is interested in the seller's property, in order to facilitate the purchase and sale of the property, the buyer and the seller and the brokerage may enter into a written dual agency agreement with respect to that property [s.59(1) of the *Real Estate Act* Rules]
- Ms West, the authorized associate broker registered with the brokerage, was shown as representative for both the Buyer and Sellers on a Residential Real Estate Purchase Contract. The offer to purchase was accepted on the same date. The Dual Agency with Limitations Agreement with Sutton Group-Canwest was not signed by the Buyer and Sellers until the day after the Purchase Contract was signed and accepted.
- \$1,500

Glen Gregory, real estate broker, Realty Executive Meridian

(this Administrative Penalty is currently under appeal)

- Failure to ensure proper management and control of documents or records related to licensing, registrations and related regulatory requirements [s.51(1)(j) of the *Real Estate Act* Rules]
- Mr. Gregory registered an associate using the RECA on-line system despite the associate having indicated a positive response to question 19 of the Application for licence and registration
- \$1,500

Todd Fyfe, Fernie Real Estate Company (2009) Ltd

- Trading in real estate while unauthorized [[s.17 (d) of the *Real Estate Act*]
- Mr. Fyfe attended a home and garden show in Calgary and held himself out to be a real estate broker by distributing promotional material and his business card. Mr. Fyfe is not authorized by RECA to trade in real estate.
- \$2,500

Frederica Henry

- Trading in real estate while unauthorized [[s.17 (b) and/or (d) of the *Real Estate Act*]
- Ms Henry was not authorized to deal as a mortgage broker at all relevant times and has never held authorization to deal as a mortgage broker. Ms Henry advertised herself as an Executive Credit Consultant with MCG – Monolog Consulting Group and an Account Executive – Edmonton with the Accredited Home Lenders Canada Ltd. Ms Henry met with two borrowers on separate occasions who wished to apply for mortgages in order to purchase properties. Ms Henry collected the borrowers' information for the mortgages and requested that the borrowers provide her money in relation to the mortgages which would be credited towards the purchase price of the properties. On each occasion, the borrower gave money to Ms Henry in cheques and money orders. After the cheques and money orders were cashed, the borrowers were unable to contact Ms Henry and never heard from her again. Ms Henry never returned the money to the borrowers.
- \$5,000 fine each for 2 Administrative Penalties

August 2010

Greg Hanson, sales associate, Tobacco Plains Realty, Eureka, Montana

- Trading in real estate while unauthorized [[s.17 (d) of the *Real Estate Act*]
- Mr. Hanson attended a home and garden show in Calgary and held himself out to be a real estate broker by distributing promotional material and his business card. Mr. Hanson is not authorized by RECA to trade in real estate.
- \$1,000

Edric Vredenburg, broker, Tobacco Plains Realty, Eureka, Montana

- Trading in real estate while unauthorized [[s.17 (d) of the *Real Estate Act*]
- Mr. Vredenburg attended a home and garden show in Calgary and held himself out to be a real estate broker by distributing promotional material and his business card. Mr. Vredenburg is not authorized by RECA to trade in real estate.
- \$2,500

Terrill Comstock, sales associate, Tobacco Plains Realty, Eureka, Montana

- Trading in real estate while unauthorized [[s.17 (d) of the *Real Estate Act*]
- Mr. Comstock attended a home and garden show in Calgary and held himself out to be a real estate broker by distributing promotional material and his business card. Mr. Comstock is not authorized by RECA to trade in real estate.
- \$1,000

Valerie G. Read, appraiser

- Trading in real estate while unauthorized [[s.17 (c) of the *Real Estate Act*]
- Ms Read was not authorized to act as a real estate appraiser from October 1, 2009 to October 21, 2009. During that time Ms Read was involved in 13 real estate appraisals.
- \$1,500

Matthew MacKay, Century 21 Northumberland Realty (1987) Ltd, Prince Edward Island

- Trading in real estate while unauthorized [[s.17 (d) of the *Real Estate Act*]
- Mr. Mackay attended a home and garden show in Calgary and held himself out to be a real estate broker by distributing promotional material and his business card. Mr. Mackay is not authorized by RECA to trade in real estate.
- \$1,000

James C. Richl, broker, Greystone Property Management Corp.

- Trading in real estate while unauthorized [[s.17 (a) of the *Real Estate Act*]
- On January 1, 2009, Greystone Property Management Corp. entered into a property management agreement. At the time of the events, Greystone was not authorized to trade in real estate. On January 2, 2009, Greystone received trust funds in the amount of \$989,509.55 for 33 of its clients of Greystone Properties. On February 2, 2009, Greystone Properties became licensed in the province of Alberta.
- \$10,000

Patrick Chi-Hang Law, real estate associate, Royal LePage Solutions

- Failure to notify the Executive Director in writing when the industry member is the subject of any bankruptcy proceedings [s.40(1)(e) of the *Real Estate Act Rules*]
- Mr. Law commenced bankruptcy proceedings on September 17, 2009 and failed to notify the Executive Director until March 5, 2010.
- \$1,000

Dean Truant, broker, Roman Real Estate

- Failure to ensure there is an adequate level of supervision for associate brokers or associates, as the case may be, within the brokerage and employees who perform duties on behalf of the brokerage [s.51(1)(3) of the *Real Estate Act* Rules and s.51(1)(k) of the *Real Estate Act* Rules]
- Mr. Truant informed a RECA auditor, who noted that a number of properties did not have records available at the office, that an associate was managing properties from elsewhere other than the brokerage's business office and that he was aware the associate hadn't provided him with the trade records.
- \$1,500 each for 2 Administrative Penalties

Duane Morse

- Trading in real estate while unauthorized [[s.17 (a) of the *Real Estate Act*]
- Mr. Morse received compensation for showing properties to potential tenants, for renting properties and for handling tenant's complaints on behalf of a third party. Mr. Morse was not authorized at the time.
- \$2,000

Carolyn Leece, associate broker, 4th Street Holdings Ltd. o/a Re/Max Real Estate Central

- Failure to notify the Executive Director in writing when the industry member is disciplined by any real estate board, real estate association, mortgage broker association, appraiser association or an professional, occupational or regulatory body [s.40(1)(b) of the *Real Estate Act* Rules]
- Ms Leece was fined by CREB for contravening CREB's Rules and Regulations and Standards of Business Practice and did not notify the Executive Director of RECA.
- \$1,000

Hearing Panel Decision

Gerard Yoffi Hagan, formerly registered as a real estate associate with XCD Realty Inc. o/a XCD Realty Inc. and currently registered with Sterling Realty (Alberta) Ltd. o/a Sterling Real Estate as a real estate associate

Issue:

- Failure to act honestly [s.4(a) of the *Real Estate Act* Rules].

Facts:

- Mr. Hagan provided a false answer concerning a prior criminal conviction in an authorization application.
- Mr. Hagan then swore an Affidavit that his 'no' answer concerning a prior criminal conviction was true.
- RECA relied on this answer and the Affidavit to issue authorization to Mr. Hagan
- Mr. Hagan provided a false answer concerning a prior criminal conviction in an authorization renewal application.
- Mr. Hagan then swore an Affidavit that his 'no' answer concerning a prior criminal conviction was true.
- RECA relied on this answer and the Affidavit to issue a renewal authorization to Mr. Hagan

Results:

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

Education Corner

REP Tips

- Remember: Your RW-number is different than your AREA ID number.
- You can obtain your RW- number from your broker.
- Remember to type in the dash in your RW number when you enroll. "RW-00000000".

How to enroll in your REP Course

- Obtain your RW- number (for real estate) or MW- number (for mortgage) from your broker.
- Go to RECA Education at
- 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
- You will receive a password that allows you to access the course. The password will also be emailed to you.
- Once you begin you can log off at any time and the course will remember your progress. When you log back in and enter your password you will begin where you left off.

Server Disruption and Upgrade

RECA experienced a server disruption on August 24, 2010. The problem was resolved quickly and RECA Education is running at normal capacity. We apologize for any inconvenience. The RECA education server has also been upgraded to better handle large amounts of traffic.

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 September 2, 2010.

Real Estate Update 2009-2010

- All course completions total 7,391 industry members.
- This represents approximately 58% of individual real estate industry members.

Mortgage Broker Update 2009-2010

- We have 1,500 online completions.
- This represents approximately 51% 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

This Legal Corner features the appeal outcome of the ICR Brokerage Inc. v. Crescent Restaurants Ltd. case featured in the [March 2009 Regulator](#).

Original Case Details

This case dealt with the sale of a restaurant. The parties, Mr. D (seller) and Mr. H (real estate agent) signed an exclusive listing agreement, which eventually expired without a sale. Although the listing agreement was not extended, Mr. D agreed that if the property sold he would pay Mr. H his commission. Mr. H then continued to market the property without a renewed listing agreement. He approached a chain restaurant twice, but they weren't interested. A short time later, Mr. H found a buyer - Mr. K. It's important to note that Mr. K was only interested in the property because of its price; he wasn't interested in running a restaurant, as he was looking for a tenant.

On December 21 or 22, 2001, Mr. D accepted a conditional offer to purchase the restaurant for \$1.5 million from Mr. K. The conditions were to be removed by January 31, 2002, with the sale closing March 1, 2002. Prior to the condition removal date Mr. K (the buyer), with the assistance of Mr. H (the agent), entered into an agreement to

resell the restaurant to the chain restaurant approached earlier for \$1.85 million. This agreement was unknown to Mr. D (the seller), as Mr. H repeatedly denied rumours that a chain was buying the restaurant.

A contract was then signed between Mr. K and the chain, with a condition removal date of January 31, 2002 and a closing date of March 4, 2002. Later the chain requested a two-week extension for condition removal. Mr. K then asked for a two-week extension on his contract with Mr. D (the original seller). Although Mr. H became concerned about his position in the two sales and consulted a lawyer, he continued to act for both Mr. D (the seller) and Mr. K (the buyer). Eventually the deals went through with the agent collecting commission on both sales.

When Mr. D learned of the *flip* sale through the transfer of land from his company directly to the Chain, he then sued Mr. H for breach of fiduciary duty.

Original Trial Findings

The court looked at whether the agent was indeed acting as ***the agent of the seller***, in the absence of a current listing contract. The court concluded that Mr. H's actions in continuing to market the property were those of an agent. They also stated that Mr. H was in dual agency –owing fiduciary duties to both– the moment Mr. K's offer was presented to Mr. D.

The court also suggested the agent and seller's relationship met the criteria for a fiduciary relationship as listed below.

- The fiduciary has scope for the exercise of some discretion or power
- The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests
- The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

Although Mr. H (the agent) testified he didn't disclose the flip to Mr. D because of his fiduciary duty to Mr. K, the court concluded he breached his fiduciary duties to Mr. D by failing to fully disclose the flip and by deceiving him with his silence.

The court awarded Mr. D (the original seller) damages of \$337,750. This amount was the difference between the two sale prices (\$350,000) less the commission that would have been payable to the appellants.

Appeal Findings

Upon review, the appeal judges stated that because Mr. D had **refused the listing agreement extension**, this didn't place any obligations on Mr. H to do anything in particular. They found there was no legal basis in finding that Mr. H had a fiduciary obligation to disclose to Mr. D every approach he made to interest buyers in the property. It was also found that the duty to disclose only went as far as disclosing information that **would** or reasonably **could** have influenced Mr. D's decision. Mr. H did not have a duty to disclose all communication or marketing efforts regarding the sale of the restaurant, as the trial judge previously had suggested.

The selling of the restaurant to Mr. K, in the appeal judges view, was not a matter of concern to Mr. D, as long as it didn't affect his agreement with Mr. K. The information wasn't material to any decision open to Mr. D to make, and therefore, Mr. H had no obligation to disclose it to him. If the Chain had shown interest **prior** to the agreement to sell to Mr. K, the situation would have been different. In that case, the information **would** have been material to Mr. D's decision whether to accept Mr. K's offer, and Mr. H would have been obliged to disclose.

However, the situation changed when Mr. H brought forward the deadline extension request on Mr. K's offer. At this point, he was obliged to disclose any information known to him that might reasonably affect Mr. D's decision. Mr. agents argument that Mr. D didn't rely on him when making this decision because he had sought legal advice was clearly invalid. Neither Mr. D nor his lawyer had the crucial information regarding why Mr. H was seeking an extension. In fact, when Mr. D asked for the information Mr. H didn't respond. The appeal judge agreed with the trial judges' findings that Mr. H had a fiduciary duty **at that point** to fully disclose the information and to discuss Mr. D's options. He breached this duty by not doing so.

The question then became what options would have been open to Mr. D had he known of the agreement between Mr. K and the Chain. If Mr. D had refused to extend the deadline as requested by Mr. K, the only effect would have been to increase Mr. K's risk of having to forfeit his deposit (his offer would then have been unconditional) if the Chain didn't proceed with the purchase. No evidence was presented that showed Mr. K would have abandoned his contract, leaving Mr. D free to pursue a sale with the Chain.

Furthermore, it would not have been logical for Mr. K to do this, as he would have abandoned a potential profit of \$350,000 on the flip sale, instead of waiting two weeks to see whether the chain would remove their offer conditions on February 15. Given that the Chain did proceed with Mr. K's agreement, Mr. D would never have had the opportunity to seize the benefit of the flip sale. In effect, there was no evidence that, had

Mr. D been fully informed of the Chain's interest in the property, he could have benefitted from the knowledge. All logic suggests that he could not.

Two of the appeal judges agreed that based on the analysis of the facts and evidence, it was clear Mr. D, in the circumstances, suffered no loss or damage as a result of Mr. H's breach of fiduciary duty. They concluded that the trial judge erred in awarding damages to the respondent on the basis of a perceived loss of opportunity to benefit from the flip sale to the Chain. The appeal court allowed the appeal and set aside the damages against Mr. H.

The third appeal judge was in dissent and found that when looking at the matter objectively, it **must** be considered material for a seller to know that his or her real estate agent is continuing to market the property, particularly when it's being marketed for someone else's benefit. Further, Mr. H himself treated the information as material. He expressly denied the existence of dealing with the Chain, and he evaded the question at the time the extension was granted. His own actions suggested he understood the materiality of the non-disclosure.

Based on this, the third appeal judge concluded that the trial judge made no reviewable error in finding material non-disclosure. The discussion regarding what Mr. D would have done had he known about the Chain offer is pure speculation.

The third judge, if deciding alone, would have dismissed the appeal and reinstated the trial decision.

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Axcess Capital Partners

Appointed by members of Council (excluding member appointed by Minister of Service Alberta)

Represents industry members who are not members of the Alberta Real Estate Association

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

KEVIN CLARK

Re/Max House of Real Estate

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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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First term 11/01/04 - 10/31/07 Second term 11/01/07 - 10/31/10

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

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