

# CONFLICT OF INTEREST – BUYING A CLIENT’S PROPERTY

**Purpose:** To explain how you work in transaction brokerage when you represent a buyer and seller in the same transaction.

**This bulletin applies to real estate brokers, associate brokers, associates, directors, shareholders, officials, employees of a real estate brokerage or their immediate family members.**

Clients hire real estate professionals to sell or manage their properties because of their specialized real estate knowledge. You, as a real estate professional, have special education and work experience in real estate. You also have an insider’s knowledge of current market conditions, property values and land use.

When you act for a client who wants you to sell or manage their property, you become aware of your client’s confidential information. This information may include an offer the client is willing to accept or their motivation for selling.

When you know this confidential information and you then try to buy the property for yourself, your client is at a disadvantage. How can your client get the best price, terms and conditions possible for their property when the person buying the property knows the lowest price and other terms that they will accept and has insider knowledge?

Your client does not know the highest possible price that you are willing to pay or your motivation to buy.

You must not use confidential information you obtain from any person for personal gain. You can only use this information for the purpose it was obtained.

Your desire to buy the property constitutes an inherent conflict of interest with the seller’s interest. In a common law brokerage, this conflict extends to any industry professional or employee of your brokerage. The agency relationship is with the brokerage and the seller and you have an agency relationship with the brokerage.

## **Fiduciary duty**

When you represent a client in a transaction, you have a fiduciary duty to act in your client’s best interests. This means that you must put your client’s interests and well-being over your own, maintain utmost loyalty

to the client, avoid, and disclose all conflicts of interest. The client expects you will exercise care and skill, not misuse the client's confidential information, act honestly and obey the client's lawful instructions.

It will be more difficult as an industry professional to defend the position you put your client's best interests over your own when you purchase their property while knowing confidential information. There have been cases where clients will either complain to the Real Estate Council of Alberta (RECA) or sue (or both) because they feel their real estate professional took advantage of them when the professional bought their property.

### Requirements

When a person associated with a brokerage wishes to buy an interest in a seller's property the brokerage has for sale or manages the brokerage must disclose in writing to the seller the following facts:

- a conflict of interest exists because you as an industry professional is the buyer
- a conflict of interest exists because the buyer is a person associated with the brokerage
- the name of the buyer(s) and their association with the brokerage
- who represents the buyer in the transaction
- all the their confidential information the buyer may already have about the seller
- the seller should take get independent legal advice (i.e. see a lawyer who has no connection to you or your brokerage)
- the seller should get independent advice about the value of the property

Buying a property includes any interest, either directly or indirectly.

### Best practice requirements

If you are to fulfill your fiduciary duties when a conflict of interest arises, you have additional obligations you must meet. These include:

- to make full disclosure of all facts the brokerage knows that might affect the value of the property
- the price they obtain must be as advantageous to the seller as they would obtain from a third party with the exercise of your due diligence on the seller's behalf
- the price must be advantageous and the transaction must be honest and blameless
- you shall not make any profit from your position unless the seller and brokerage agree for the seller to pay remuneration
- you should not use your position, or information gained by virtue of the position, unjustly and to your own ends

- the onus is on you to prove you comply with legislation and fiduciary duties
- you should seek the written acknowledgement from the seller of the relationship and disclosures

If the seller agrees to the brokerage to continue to represent the seller, the brokerage should make every effort to ensure the seller receives independent and impartial advice.

It is impossible for you as the industry professional to represent any client in a transaction that you have a personal interest in either direct or indirect. RECA recommends its industry professionals **NOT** purchase their clients' properties. Similarly, the RECA recommends to brokers to have a policy in place not allowing their real estate professionals to buy properties from the brokerage's clients.

### Reminder

In a common-law brokerage, the client is a client of the brokerage. Common law assumes all brokerage industry professionals know all brokerage clients' confidential information - even if only one industry professional is working with the client. These same principles apply when another industry professional of the brokerage, who the client is not working with directly, is the one who is buying the client's property.

### Related information

#### Legislation

- *Real Estate Act* Rules - sections 1(1)(h), s.41(a) to (g), s.44, s.51(f), s.57(e), s.62