

BC FINANCIAL SERVICES AUTHORITY

**IN THE MATTER OF THE *REAL ESTATE SERVICES ACT*
SBC 2004, c 42 as amended**

**AND IN THE MATTER OF
TRENTON WARD MASON
(173060)**

**REASONS FOR DECISION REGARDING
ADMINISTRATIVE PENALTY RECONSIDERATION REQUEST**

[These Reasons have been redacted before publication.]

DATE AND PLACE OF HEARING: Via Written Submissions

HEARING OFFICER: Gareth Reeves

Introduction

1. On October 16, 2024, the BC Financial Services Authority (“**BCFSA**”) issued a Notice of Administrative Penalty (the “**NOAP**”) in the amount of \$5,000 to Trenton Ward Mason pursuant to section 57(1) and 57(3) of the *Real Estate Services Act*, RSBC 2004, c 42 (“**RESA**”).
2. In the NOAP, BCFSA determined that Mr. Mason had contravened section 30(i) of the *Real Estate Services Rules*, BC Reg 209/2021 (the “**Rules**”) by failing to take reasonable steps to avoid a conflict of interest when he engaged in dual agency in respect of a trade in real estate concerning a property in Cranbrook (the “**Property**”), when the circumstances did not qualify as an exemption to the prohibition on dual agency.
3. Mr. Mason applied for a reconsideration of the NOAP under section 57(4) of RESA. The application proceeded by written submissions.

Issues

4. The issue is whether the October 16, 2024 NOAP should be cancelled or confirmed.

Jurisdiction and Standard of Proof

5. This application for reconsideration is brought pursuant to section 57(4) of RESA, which requires the Superintendent of Real Estate (the “**superintendent**”) to provide a person who receives an administrative penalty with an opportunity to be heard upon request.
6. Section 57(4) of RESA permits the superintendent to cancel the administrative penalty, confirm the administrative penalty, or, if the superintendent is satisfied that a discipline hearing under section 40 of RESA would be more appropriate, cancel the administrative penalty and issue a notice of discipline hearing.

7. The superintendent has delegated the statutory powers and duties set out in section 57 to Hearing Officers.
8. The standard of proof is the balance of probabilities.

Background and Findings

9. The evidence and information before me consists of an investigation report completed by BCFSA, the tabs thereto, and the information provided by Mr. Mason in the application for reconsideration. The following is intended to provide some background to the circumstances and to provide context for my reasons. It is not intended to be a recitation of all of the information before me.

Licensing History

10. Mr. Mason was first licensed as a representative in the trading category on February 29, 2016. He became licensed as a managing broker on January 17, 2019 and has been licensed in that fashion since then. Mr. Mason was the managing broker of 2 Percent Realty Kootenay Inc. at all material times. Mr. Mason has no disciplinary history before the superintendent.

The Transaction

11. In February or early March 2023, Mr. Mason was contacted by one of the two owners (collectively the “**Sellers**” or when referring to the seller with primary contact with Mr. Mason, the “**Lead Seller**”) of a property in Cranbrook, BC (the “**Property**”) who asked for an evaluation of the Property to be listed for sale. It is not clear precisely when this happened, but the specific date is not particularly relevant.
12. The Property was located within Cranbrook itself, just off the main highway that runs through the town.
13. Mr. Mason’s evidence is that the Lead Seller, while looking for an agent to market the Property, had been told by other realtors in the area not to contact Mr. Mason’s brokerage because of the commission amount Mr. Mason’s brokerage used. At Mr. Mason’s brokerage, sellers would agree to pay Mr. Mason’s brokerage a 2% commission for listing their property if it sold. If the property sold, Mr. Mason’s brokerage would split that commission with any buyer’s agent in the event of a successful sale.¹ According to Mr. Mason, those licensees told the Lead Seller that if she listed with Mr. Mason’s brokerage, buyer’s agents would be less interested in showing the Property to their clients. Mr. Mason says that instead of dissuading the Lead Seller, these comments in fact piqued the Lead Seller’s curiosity.
14. As a result, the Lead Seller contacted Mr. Mason who explained his brokerage’s commission structure and how he would work with buyers’ agents. In this conversation, Mr. Mason explained his role as an agent and the possibility that he might show the Property to his own buyer clients which resulted in a conversation regarding the possibility of dual agency in certain circumstances.
15. After these initial discussions, the Sellers engaged Mr. Mason to list the Property in mid-March.
16. The eventual buyers of the Property (the “**Buyers**”) were referred to Mr. Mason by a financial advisor or mortgage broker in Alberta. They were a married couple that lived in Lethbridge, Alberta

¹ I understand this to be the general commission structure employed by most licensees selling residential property in British Columbia: the sellers pay the commission to their licensee’s brokerage which then pays a portion of that commission to the buyer’s licensee’s brokerage. The difference in the case of Mr. Mason’s brokerage, as I understand it, is that the gross commission, and therefore the available funds to be split with a buyer’s agent, is lower than generally agreed to in the industry.

with a young family. They had sold their property in Lethbridge and were looking for a new home. While searching for homes in the Cranbrook area, Mr. Mason showed them approximately 11 properties. Some of those showings occurred in person and some of them occurred virtually. During this process, the Buyers made offers on two properties other than the Property, but neither were successful because they required a financing subject in the contract and, as a result, were unable to secure a contract against competing offers. During his work for the Buyers, Mr. Mason came to know what the Buyers were looking for in a property and what motivated them to buy in Cranbrook.

17. On April 7, 2023, near the beginning of their search, the Buyers came to view the Property. The Buyers were interested, but they expressed that there were some possible issues with the Property. The Buyers did not make an offer on the Property at that point.
18. On April 29, 2023, when Mr. Mason submitted the first unsuccessful offer on a property for the Buyers, the Buyers signed a Disclosure of Representation in Trade form confirming that Mr. Mason disclosed that he would represent them as their agent and detailing the duties that went along with that.
19. At some point in May 2023, the Sellers decided to lower the listing price on the Property. As a result, the Buyers decided to make an offer on the Property.
20. On May 13, 2023, as a result of the Buyers' interest in making an offer on the Property, Mr. Mason discussed the nature of his representation of them and the possibility of changing to a dual agency relationship. During this discussion he presented them with a numbered of options in that regard. The Buyers' evidence is that Mr. Mason provided three options: the Buyers could be unrepresented, hire another realtor, or engage Mr. Mason as a limited dual agent.
21. Mr. Mason's evidence is that he provided these three options in addition to a fourth option: Mr. Mason could withdraw and both parties could obtain new representation.
22. On May 14, 2023, one of the Buyers sent a text message to Mr. Mason to state the following:

"What's the difference between Option 2 and 3 again from that conversation last night?"

"We want you as our realtor which is option 1 and 2 on [the Property] just can't remember what the difference is between the 2 [grimacing face emoji]"
23. Mr. Mason replied that evening with the following message:

"Options :)

 1. I write the offer. You would be "unrepresented", which means I can't give advice (but will make sure things are done properly)
 2. I represent both you and the seller. Seller would need to agree as well. I can't give advice on price, share confidential information or motivation.
 3. You use another Realtor."
24. The Buyers responded with "Number 2 is our pick". The Buyers' evidence is that they liked Mr. Mason, thought he acted in their best interests, did not want to shop around for other representation, and did not have "a lot of time" to find other representation. I note that the Buyers' evidence is that they did not feel pressured at any point.
25. It is not clear to me if Mr. Mason explained to the Buyers whether he would represent the Sellers in options 1 and 2 above. From the Buyers' evidence, I find that they understood that the three options provided above meant Mr. Mason would continue to act in the transaction. I find it more likely than not that Mr. Mason only provided the Buyers with the above three options and that he did not advise them that an option was to have Mr. Mason withdraw from the transaction entirely if

the parties could not agree to one of the above three options. In my view, had he done so that would have been reflected in the options noted in his text messages with the Buyers.

26. The text messages between the parties and Mr. Mason suggest, and I find, that Mr. Mason then had a discussion with the Lead Seller regarding dual agency on the morning of May 15, 2023. Mr. Mason's evidence is that this discussion included the four options noted above. The Lead Seller provided no evidence regarding that conversation. I find that Mr. Mason only provided the three options discussed above and did not advise the Seller that it was an option to have Mr. Mason withdraw entirely from the transaction.
27. After this conversation, the Lead Seller agreed to have Mr. Mason act as a limited dual agent for the transaction. It is not clear to me when Mr. Mason discussed this issue with the other owner, but that owner eventually signed off to agree to a limited dual agency.
28. Mr. Mason did not advise the Sellers or the Buyer to obtain independent legal advice prior to agreeing to a limited dual agency, though he did refer the Sellers to lawyers regarding the sale of the Property generally before he listed the Property. He did not contact any other agents who may have been available to act for the Buyers in relation to the Property; instead, he relied on his experience in the market and his prior dealings with other licensees in the area to determine that other licensees would be unavailable or willing to work on the transaction.
29. On May 15, 2023, the Buyers signed an Understanding the Risks of Dual Agency ("**URDA**") form in the form required by the superintendent. Later that day, the Buyers made an offer to purchase the Property.
30. On May 16, 2023, after the Sellers made a counteroffer, the parties executed a contract of purchase and sale for the Property (the "**Contract**"). The completion date for the Property was June 30, 2023. Both the Sellers and the Buyers initialed next to the dual agency portion of the "Agency Disclosure" section of the Contract which set out that Mr. Mason and his brokerage would represent both parties.
31. On May 16, 2023, the Sellers signed an URDA form as well.
32. Both signed URDA forms explain dual agency and describes the limited services that a dual agent can provide, including the dual agent's inability to provide certain information and to give advice regarding pricing or terms. The URDA form requires the managing broker of the licensee's brokerage, in this case Mr. Mason, to provide a detailed description of how the requirements of section 64(1) of the Rules had been met. In both of the forms signed by the Sellers and Buyers, Mr. Mason wrote the following:

"No agents currently available based on the terms offered by the seller/listing brokerage."

Report to BCFSA and Investigation

33. On May 31, 2023, Mr. Mason delivered the signed URDA forms to BCFSA as required by section 64(3) of the Rules.
34. Searches by BCFSA Investigations during the investigation of this matter confirmed that there were six other brokerages with offices or branch offices in Creston, BC with 27 licensees including the licensees at Mr. Mason's brokerage at the time of the search. In addition, Cranbrook, BC had five brokerages with 45 licensees at the time of the search.
35. On June 16, 2023 and in response to a request from BCFSA, Mr. Mason provided a copy of the Contract and stated that dual agency was appropriate because no other licensees in the area were willing to provide services on the 1% commission his brokerage offered to buyers' agents on transactions. He stated other licensees at his brokerage could not act on the transaction, because

he was the managing broker. Further, the Buyers had made offers on other properties in multiple-offer situations and had no success, had sold their home already, and needed to secure a property.

36. On June 20, 2023, Mr. Mason provided a further statement to reiterate the urgency of the circumstances in which he had provided dual agency and to emphasize that other licensees were unwilling to work for the commission his brokerage offers. He stated that other licensees often require agreements with buyers to provide further remuneration when working on the buyers' side of transactions with his brokerage. He stated, "we did not enter into this dual agency agreement without thought and careful consideration of all facts."
37. On August 8, 2023, the Lead Sellers responded to BCFSA Investigations' request that she advise how Mr. Mason explained his representation and her understanding of dual agency. She responded as follows, in part:

"Trent Mason said he works for 2% realty and represented both me, the seller, and the buyers as well. He said it is not common, but that it can be done if both parties agree to it. I trusted him so I went with the idea."
38. On August 22, 2023, BCFSA Investigations interviewed one of the Buyers. The important portions of their evidence are set out above in "The Transaction" section.
39. On September 11, 2023, Mr. Mason submitted a statement in response to an investigation letter from BCFSA. Much of Mr. Mason's evidence is set out above in the "The Transaction" section. In addition to the information included above, Mr. Mason also stated that there are "only a few brokerages" in Cranbrook and those brokerages are "outspoken about not being willing to work for a lesser commission", which results in the area being underserved. He stated that there was urgency because the Seller was moving overseas and the Buyers needed a home because their Lethbridge home had sold and would close soon. He also said that the transaction occurred over Mother's Day weekend and the Buyers were out of province making it difficult for them to meet an agent and view the Property with that agent in time to make an offer in accordance with the Buyers' timeline. He noted that the Buyers were concerned about ending up in another multiple offer situation as they had with previous offers.
40. He further stated that he has seen other instances of dual agency in the area and that this was the first time his brokerage had used the dual agency exemption.
41. On November 9, 2023, Mr. Mason attended a virtual interview conducted by BCFSA Investigations. Much of what he stated during that interview has been incorporated into the "The Transaction" section above. In addition, Mr. Mason stated that in his view the Property was "niche" and a "heritage home" with asbestos and vermiculite concerns and that he would not trust all agents to provide proper representation without them having viewed the Property with the Buyers.
42. On November 17, 2023, Mr. Mason made a further written statement following his interview. He stated that he did not regret how he acted, but would if his clients felt they were not fairly represented or if BCFSA found he had misconducted himself. He stated the clients were advised to seek legal advice "when necessary". He stated that two brokerages in the area controlled 80% of the market and that neither would work for a 1% commission. He stated he had confirmed this with their brokers and when negotiating with their agents. He referenced a transaction in which a buyer paid an extra \$5,000 as a buyer's agent's commission and the agent said they make their clients sign similar agreements when dealing with Mr. Mason's brokerage.
43. Mr. Mason stated that, in his professional judgment, dual agency was "the most appropriate path forward." He stated that he would need to release both clients if he could not act for both the Buyers and Sellers. He stated that it would be unreasonable to require an out of province buyer to rely on an agent they had never met and who had not seen the Property and then also to pay more in commission.

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44. Finally, he stated that both the Buyers and Sellers “were fully informed and proper disclosures were made.”

Submissions

45. In Mr. Mason’s submissions he argues that he has seen 51 dual agency transactions in the Kootenays since January 1, 2022, with this transaction being the only one involving his brokerage. He argues that the Kootenays should qualify as under-served and remote within the context of the dual agency exemption. He notes that residents of the Kootenays and Cranbrook often must travel hundreds of kilometers for health services and that Cranbrook is in a different time zone from the rest of the province. He states that every agent in Cranbrook has refused to work for the commission offered by his brokerage.
46. Mr. Mason argues that in addition to being remote, the area is under-served by virtue of there being no other licensees willing to work for the commission his brokerage offers. He submits that “[f]orcing the buyers and/or sellers to pay additional commissions ... could have made this transaction impossible” as a result of the tight budgets involved.
47. Mr. Mason argues that the number of brokerages and licensees in Creston and Cranbrook combined is not relevant given Creston is 100 km away from Cranbrook and in a different time zone for half the year. He submits that the fact that he lives near Creston and works in both Creston and Cranbrook is not relevant.
48. Mr. Mason submits that other licensees in the area specifically indicated to the Lead Seller that she would not get interest in the home with Mr. Mason’s brokerage at a 1% commission.
49. Mr. Mason argues that it was impractical for the parties to be separately represented in the circumstances because of the parties’ affordability and commission concerns, the urgency, and his duties to keep his clients’ financial interests in mind. He argues that the parties were fully informed of what was occurring.
50. Regarding the urgency, Mr. Mason reiterates that the Buyers needed to close on the Property by end of June and had little time to find a new agent or visit the Property for another viewing. He submits that renting was not an option for the Buyers, who had a young family. He submitted that lawyers in the area were requiring more time to process transactions. He reiterates that the Lead Seller was moving overseas with her young family and that delaying the sale might cause problems with the other owner permitting the sale and that move.
51. Mr. Mason submits that BCFSA’s guidelines, published online and entitled “Use of Dual Agency Exemption” dated May 7, 2020, do not mention commissions and that therefore their relevance to the exemption is “open to interpretation.” He submits that his competitors’ commissions and their business practices, which I take to mean their refusal to represent buyers for a 1% commission, makes the area under-served. He submits that his competitors are attempting to price fix contrary to the *Competition Act*.
52. He also reiterated that his brokerage is interested in compliance with the Rules and that his brokerage needs clarity regarding the application of the dual agency exemption.

Reasons and Findings

Applicable Legislation

53. The Rules provides as follows:

1 In these rules:

"dual agency" means the representation, in respect of a trade in real estate, by a brokerage of any of the following:

- (a) both the seller and the buyer as clients;
- (b) both the lessor and the lessee as clients;
- (c) both the assignor and the assignee as clients;
- (d) 2 or more buyers, lessees or assignees, as the case may be, as clients who have conflicting interests in respect of the trade in real estate;

30 Subject to sections 31 [modification of duties] and 32 [designated agency], if a client engages a brokerage to provide real estate services to or on behalf of the client, the brokerage and its related licensees must do all of the following:

...

- (i) take reasonable steps to avoid any conflict of interest;

...

63 (1) A brokerage must not engage in dual agency.

- (2) The designation of one or more licensees as a designated agent does not constitute dual agency under this section unless the licensee designated as the designated agent represents the parties referred to in paragraph (a), (b), (c) or (d) of the definition of "dual agency" as clients in respect of a trade in real estate.

64 (1) Despite section 63, a brokerage may engage in dual agency in respect of a trade in real estate if the real estate is in a remote location that is under-served by licensees and where it is impracticable for the parties to be provided trading services by different licensees.

- (2) Before providing any trading services that constitute dual agency, a licensee must

- (a) make a disclosure to each party, in a form approved by the superintendent, that includes

- (i) a statement of the brokerage, signed by the managing broker, clearly setting out the reasons why subsection (1) applies, and

- (ii) the following terms and information:

- (A) the duties and responsibilities of the licensee to the clients of the licensee in a dual agency relationship;

- (B) the risks associated with a dual agency relationship, and

- (b) enter into a written agreement of dual agency with each party under section 31 [modification of duties] after making a disclosure under paragraph (a) of this subsection.

- (3) A brokerage must provide the superintendent with the disclosure made under subsection (2) (a) promptly after entering into a written agreement of dual agency under subsection (2) (b).

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- 65** (1) If the provision of trading services by a licensee to or on behalf of multiple clients in respect of a trade in real estate would constitute dual agency, other than under section 64, the licensee must either
- (a) not provide trading services to any client in respect of that trade in real estate, or
 - (b) represent only one of the clients, as a client, in respect of that trade in real estate.
- (2) A licensee must not represent a client under subsection (1) (b) unless the licensee has obtained written agreement from all clients in respect of the trade in real estate that meets the requirements of subsection (3).
- (3) The written agreement referred to in subsection (2) must be in a form approved by the superintendent and must include the following information:
- (a) a description of the conflict of interest;
 - (b) a description of the duties and responsibilities that the licensee will no longer have to the client with whom the licensee is terminating client representation;
 - (c) a statement that the licensee may have confidential information about the client with whom the licensee is terminating client representation, and that the licensee is prohibited from disclosing any of that information;
 - (d) a statement that the advice and information that the licensee may provide to the client whom the licensee will continue to represent may be limited due to the licensee's ongoing duty to maintain the confidentiality of the information of the client with whom the licensee is terminating client representation;
 - (e) a recommendation that the clients seek independent professional advice in respect of the trade in real estate.
54. Section 56 of RESA provides that BCFSA may designate specific provisions of RESA, the Real Estate Regulation (the “**Regulations**”), or the Rules as being subject to administrative penalties, and may establish the amounts or range of amounts of administrative penalty that may be imposed in respect of each contravention of a specified provision. Pursuant to section 56(2), the maximum amount of an administrative penalty is \$100,000.
55. Section 26(1) of the Rules indicates that for the purposes of section 56(1) of RESA, contraventions of the Rules listed in section 26(2) of the Rules are designated contraventions to which Division 5 (Administrative Penalties) of Part 4 of RESA applies.
56. At the material time, section 26(2) identified four categories, Category A, B, C, and D, for designated contraventions for the purpose of determining the amount of an administrative penalty. Section 30(i) of the Rules was placed in Category C. Section 27(3) of the Rules provided that a Category C contravention could attract a \$5,000 administrative penalty for a first contravention or a \$10,000 administrative penalty for a subsequent contravention.
57. At the material time, section 65 of the Rules was not designated as being subject to an administrative penalty. On July 1, 2024, it became designated in Category C.
58. Section 57(1) of RESA sets out that if the superintendent is satisfied that a person has contravened a provision of RESA, the Regulations, or the Rules designated under section 56(1)(a) of RESA, the superintendent may issue a notice imposing an administrative penalty on the person. Section 57(2) requires that a notice of administrative penalty indicate the rule that has been contravened, indicate the administrative penalty that is imposed, and advise the person of the person's right to be heard respecting the matter.

Analysis

59. The imposition of an administrative penalty under section 57 of RESA is a discretionary decision. A request to reconsider the imposition of an administrative penalty requires a Hearing Officer to consider not only whether a contravention of RESA, the Regulations, or the Rules has occurred, but also whether a licensee exercised due diligence, that is: took reasonable steps or precautions, to prevent the contravention of the designated sections identified in the notice of administrative penalty. Some provisions, like section 30(i) of the Rules, include a requirement to exercise diligence. In the case of section 30(i), that takes the form of a requirement to take reasonable steps in an effort to avoid a conflict of interest. A Hearing Officer may also consider information on any extenuating circumstances that prevented compliance, or any other information the licensee believes a Hearing Officer should consider.

Conflict of Interest

60. I have no trouble in concluding that Mr. Mason's conduct gave rise to a conflict of interest. Mr. Mason represented both sides of a real estate transaction. He could not have done so without representing conflicting interests in that transaction.
61. Not all conflicts of interest fall afoul of the Rules. The Rules acknowledge that certain conflicts of interest cannot be reasonably avoided and therefore requires only that licensees take reasonable steps to avoid a conflict of interest and that they advise their clients of any conflicts of interest that do arise: see sections 30(i) and (j) of the Rules.
62. Mr. Mason disclosed to the Buyers and Sellers what the nature of the change in the relationship from his existing agency relationships to a dual agency would mean in terms of his representation of each party. He did this both through the URDA forms and through conversations with the parties. Although he did not disclose to them that if the parties could not agree on his role moving forward, he would have to withdraw, I find that the parties understood that they could choose whether to have Mr. Mason continue to represent them or not. I also find that Mr. Mason did not pressure the parties to make a particular choice, as was confirmed by the Buyers. In these circumstances, I find that Mr. Mason took the steps necessary to disclose the conflict of interest to his clients.
63. That said, even where the conflict is eventually disclosed, a licensee must still take reasonable steps to avoid that conflict arising. In this case, the most substantial question is whether Mr. Mason took those reasonable steps to avoid the conflict of interest that arose here.

Reasonable Steps

64. Although Mr. Mason was not formally alleged to have contravened section 65 of the Rules by acting in a dual agency in circumstances where the prohibition in section 63 applied and the exemption from that prohibition was not available, in my view those provisions must inform the issue of whether Mr. Mason took reasonable steps to avoid the conflict of interest created by him acting in a dual agency.
65. The exemption permitting dual agency is found in section 64(1) of the Rules. That section permits dual agency where all of the following elements are met:
- a. The real estate is in a remote location;
 - b. That remote location is under-served by licensees; and
 - c. It is impracticable for different licensees to act on the transaction.

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66. I note that these elements inform each other to some extent. A property may be under-served and it may be impracticable for different licensees to act on the transaction precisely because a property is remotely located.
67. That said, the elements do not completely overlap and fundamentally address different aspects of the circumstances.
68. The remoteness of the property is focused on the geographical location of the property. It may consider the property's distance and accessibility from other places within the province, the sparsity of the population in the surrounding area, and the licensees operating in the area.
69. The requirement that the property be under-served specifically refers to the availability of other licensees to act in relation to the sale of the property. This can arise from a variety of factors including the remoteness of the property, peculiar aspects of the property that require specialized knowledge or skill to address in the transaction, or the number of licensees working in the area.
70. The impracticability of having another licensee act on the transaction speaks to the practicalities of providing real estate services for the property. It can be informed by the remoteness of the property, the availability of other licensees, the specialized knowledge or skill required to provide services in relation to the transaction, the urgency of the transaction, the location of the parties, the means of communicating with the parties, or the difficulty in accessing the property.²
71. Mr. Mason raises several arguments in regard to why this transaction qualifies for the exemption in section 64(1) of the Rules. Those arguments are as follows:
- a. The Property, being in Cranbrook, is remotely located;
 - b. The refusal of other licensees in the area to work for the cooperating commission his brokerage offers renders the location under-served;
 - c. The Buyers lived in Calgary and it was impracticable for them to travel back to Cranbrook to view the Property with a new licensee;
 - d. The transaction was urgent as a result of the Buyers' need for a home and the Lead Seller's imminent international move;
 - e. The Property was niche and required some degree of specialized knowledge to address that uniqueness in the transaction; and
 - f. 51 other dual agency transactions have occurred in the Kootenays since January 1, 2022.
72. Starting with the issue of remoteness, I do not agree with Mr. Mason that the property was remote. It was located within the town limits of Cranbrook and close to the main highway that runs through town. It is located reasonably close to Creston, the town in which Mr. Mason's brokerage has its head office.
73. I do not accept that the fact that medical services are more limited in Cranbrook than in other places in British Columbia requires the inference that real estate services are as well.
74. In my view, both the geographical remoteness argument and the argument for remoteness based on limited services in the area are rebutted by the fact that there were five brokerages operating in Cranbrook with a total of 45 licensees among them combined with the fact that there were six brokerages with a total of 27 licensees working in Creston. Mr. Mason submits that the number of

² I note in this regard that the letter enclosing the NOAP in this matter indicated that the urgency of the matter was irrelevant to the application of the dual agency exemption. I disagree. The urgency of the situation is relevant to the practicability of engaging another licensee to act on the transaction. This is reflected in BCFSA's "Use of Dual Agency Exemption" guidance dated May 7, 2020 and published on BCFSA's website.

licensees in Creston is irrelevant, but I do not agree given Mr. Mason himself is licensed in Creston and works in Cranbrook.

75. Regarding the refusal of other licensees to work for the commission Mr. Mason's brokerage offers, I do not find that this supports an argument that the location is under-served. I do accept that Mr. Mason's commission structure would be less attractive to other licensees. I also accept that other licensees may insist on additional payment beyond that offered by Mr. Mason before they agree to act as buyers' agents on properties his brokerage lists.
76. That said, I do not conclude that this renders Cranbrook under-served because there is insufficient evidence before me to conclude that real estate licensees are charging exorbitant fees or rigging the market. I am given some pause in that regard by Mr. Mason's evidence that the Seller was told not to use his brokerage because of the commission Mr. Mason offers and that Mr. Mason has been told by other licensees that they will not work with him on properties. Even given that evidence, I do not find it unlikely that the licensees or brokerages working in Mr. Mason's area would independently conclude that Mr. Mason's commission offering was insufficient. Individual licensees can choose not to work for the fee Mr. Mason offers. I am simply not convinced that there is enough evidence to establish that the other licensees are engaged in anti-competitive practices. Instead, I find it more likely that Mr. Mason is facing a difficulty presented to many businesses who offer less expensive services and concurrently rely on the cooperation of other individuals who do not offer services at that price.
77. Regarding the location of the Buyers and the inability to conduct a showing for them through a new licensee, I reject this argument on the basis that the Buyers had seen the Property themselves, had conducted virtual tours of the Property, and did not feel the need to conduct further viewings of the Property. In my view, had a new licensee come on to act for the Buyers they could have viewed the Property themselves and conducted a virtual viewing of the Property. I do not accept that this kind of viewing or even a viewing by the licensee alone, in circumstances where the Buyers had seen the Property beforehand, would necessarily preclude a new licensee from acting on the transaction for the Buyers. Further, even if it were the case that the Buyers needed a licensee who had seen the Property with them, it would have been possible for Mr. Mason to only represent the Buyers in the transaction and to release the Sellers to find new representation or to represent themselves in the context of this offer. In my view, Mr. Mason did not adequately explore that possibility.
78. Regarding the urgency, I find that the urgency was not an inherent aspect of the transaction but arose largely because Mr. Mason failed to address the possible conflict early enough. Mr. Mason's evidence is that he showed the Buyers the Property on April 7, 2023, more than a month before they submitted an offer, and that they were interested in the Property. He says that he was transparent with both the Sellers and the Buyers that he was the listing agent and was acting for the Buyers and that this might result in a conflict of interest that might necessitate a dual agency. What he did not do, however, is take steps at that time to proactively address how that conflict of interest would be addressed should the Buyers want to make an offer on the Property.
79. In my view, Mr. Mason knew in early April that the Buyers were facing time pressure as a result of the sale of their property in Lethbridge and that the Lead Seller was planning an international move and would need the cooperation of the other owner. I conclude this because it would have been unreasonable for Mr. Mason to not have asked his clients about these issues and because Mr. Mason's own evidence indicates that he canvassed these points with the parties, including recommending the Sellers obtain legal advice regarding the sale in their circumstances.
80. In that context, it was unreasonable for Mr. Mason to wait until mid-May to develop a contingency plan to address the possibility that a conflict of interest would arise between him and his clients. In my view, it was entirely foreseeable that the time pressures and desires of the parties could result in the conflict that arose here. That conflict was sufficiently foreseeable that Mr. Mason actually

discussed the possibility with his Buyers and the Sellers early in the process and he should have had a plan for it arising in future.

81. In the circumstances, I decline to opine on whether the circumstances were sufficiently urgent as to render bringing another licensee on board impracticable once the Buyers decided to make an offer in mid-May 2023. In my view, that issue is irrelevant given the urgency could have been reasonably avoided. I note in this regard that, in my view, the degree to which a property is remote,, the possibility that other licensees might not be available, and the impracticability of other licensees acting in the transaction each increase the need for licensees to proactively address possible conflicts of interest.
82. Regarding the argument that the property was “niche” or a “heritage home” and required specialized knowledge because of the possibility of vermiculite or asbestos issues, I am not convinced that these issues are so unique as to render the property niche or make it impracticable to have other licensees represent the parties to the transaction. Mr. Mason has not supplied any evidence that indicates that the Property was designated as a heritage home, even if it was old, or required special handling. The Contract does not contain any unusual terms or conditions precedent. In my view, the Property may have presented some issues, but none that could not have been handled by a competent licensee.
83. Regarding the prevalence of other dual agency transactions in the Kootenays, I have been provided little information. Mr. Mason says there have been 51 such transactions since January 1, 2022. I have no particular reason to doubt that; however, I have not been provided with any detail regarding those transactions or the circumstances surrounding them. The Kootenays are a reasonably large region of British Columbia encompassing properties that would range significantly in remoteness, accessibility, and servicing. I therefore cannot conclude that any of those transactions bear a reasonable similarity to the present one such that I could draw any inference from the use of dual agency in those cases. I do not have any information regarding whether those transactions were reported to BCFSA as required by section 64(3) of the Rules. I do not have any information regarding how BCFSA or the superintendent addressed those transactions, if at all.
84. In any event, even if I had all of that information, the issue before me is this transaction and whether Mr. Mason took reasonable steps to avoid a conflict of interest by ensuring this transaction qualified for the exemption under section 64(1) of the Rules from the prohibition on dual agency under section 63 or if Mr. Mason was required to take the steps noted under section 65. I acknowledge that consistency with prior decisions and approaches taken by the regulator is something that I should consider in assessment of the scope and application of the Rules, but I have nothing in the record before me that would indicate BCFSA or the superintendent has indicated that the exemption would apply to properties like the Property. In my view, this is a circumstance in which the exemption simply does not apply.
85. In my view, this circumstance did not qualify for the exemption under section 64(1). Therefore, I do not find that Mr. Mason took reasonable steps to avoid a conflict of interest by virtue of the fact that the dual agency exemption applied.
86. That does not necessarily conclude the question of whether Mr. Mason took reasonable steps to avoid a conflict of interest because it is at least possible that a conflict of interest could arise in circumstances where the dual agency exemption does not apply which is also not reasonably avoidable by a licensee. In other words, it is possible for a licensee to engage in a dual agency in circumstances that offend the prohibition in section 63 without necessarily also contravening section 30(i). Circumstances could conspire to render such a dual agency unavoidable in a location

which is not remote or under-served. In my view, those circumstances will be rare, but they are not logically impossible.³

87. As should be apparent from my discussion above regarding the urgency issue, I do not find that Mr. Mason took sufficient reasonable steps in this case. In my view, he should have acted earlier to address the probability that a conflict of interest would arise between his clients and his failure to do so constitutes a failure to take reasonable steps to avoid that conflict of interest.
88. I therefore find that Mr. Mason failed to take reasonable steps to avoid a conflict of interest when he acted as a limited dual agent for the Buyers and the Sellers in the sale of the Property, contrary to section 30(i) of the Rules.

Penalty Amount

89. The amount of the administrative penalty issued in this case is the base amount set out in the Rules for a contravention of a Category C contravention. I have no authority to vary the amount of the penalty and can only confirm it. In my view, the penalty is appropriate in the circumstances. Although it is possible that a lesser sanction could achieve the compliance focused goals of regulatory legislation, I am not convinced that the sanction in this case is outside the realm of appropriate approaches in the circumstances consider the importance of the obligation to take reasonable steps to avoid a conflict of interest, the lack of demonstrated harm to the Buyers or Sellers, and Mr. Mason's conduct in the circumstances.

Conclusion

90. I find that Mr. Mason failed to take reasonable steps to avoid a conflict of interest when he acted as a limited dual agent for the Buyers and the Sellers in the sale of the Property, contrary to section 30(i) of the Rules.
91. I confirm the \$5,000 administrative penalty issued in the NOAP.
92. The \$5,000 administrative penalty is now due and payable to BCFSA.

DATED at North Vancouver, BRITISH COLUMBIA, this 9th day of January, 2025.

"Original signed by Gareth Reeves"

Gareth Reeves
Hearing Officer

³ I note that if an individual licensee engaged in dual agency in such a circumstance, that would still likely fall afoul of sections 63 and 65 of the Rules, even though it (i) of the Rules.