

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

AND IN THE MATTER OF  
DAVID CHRISTOPHER LEE  
(189294)

**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 July 17, 2024, the BC Financial Services Authority (“**BCFSA**”) issued a Notice of Administrative Penalty (the “**NOAP**”) in the amount of \$10,000 to David Christopher Lee 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. Lee had contravened sections 30(a) and 34 of the *Real Estate Services Rules*, BC Reg 209/2021 (the “**Rules**”) by failing to review a seller’s changes to a Contract of Purchase and Sale with his buyer clients before the acceptance period expired thereby causing his clients to lose the opportunity to purchase the Property.
3. Mr. Lee 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 administrative penalties issued in the July 17, 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

9. The evidence and information before me consists of an investigation report completed by BCFSA, the tabs to that report, and the information provided by Mr. Lee 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.

### *General Background*

10. Mr. Lee was first licensed as a trading services representative on September 2, 2021 and has been so licensed since. Mr. Lee has no formal disciplinary record before BCFSA. He was previously issued a letter of advisement on an advertising issue, but that was not a formal disciplinary matter.
11. This matter involves the attempted purchase by Mr. Lee's buyer client (the "**Client**") of a co-op property in New Westminster (the "**Property**") in July and August 2023.
12. During the course of July 2023, the Client obtained the necessary approval from the co-op board for the Property. This included attending an interview with the board on July 21, 2023. The Client obtained that approval in the evening of July 21, 2023 with formal confirmation following on July 25, 2023.
13. After this approval, the Client conducted certain due diligence on the Property and then discussions on terms and price followed. This resulted in the Client signing an offer on the Property on the evening of July 29, 2023 offering to purchase the Property for \$220,000. Mr. Lee sent the seller's agent that offer that evening. That offer had a deadline for acceptance of noon on July 30, 2023.
14. On July 30, 2023, shortly before the deadline for acceptance on the first offer, Mr. Lee sent a text message to the seller's agent asking for an update. The seller's agent responded, "check your email". On checking his email, Mr. Lee found an email from the seller's agent with the subject "seller signed CPS" the email had no content but attached a counteroffer from the seller (the "**Counteroffer**"). That Counteroffer deleted and amended certain terms from the contract of purchase and sale. These included terms regarding provision of a cleaning receipt by the seller, provision of a survey by the seller, the use of certain insulation in the Property, insertion of a possession time and amendment of the deadline for acceptance to 9:00 pm on July 30, 2023.
15. Mr. Lee did not review the Counteroffer because he took the email attaching it to mean that his client's offer had been accepted by the seller. Mr. Lee then sent text messages to his client to advise "Seller has signed. You have a deal!", "Congrats!", and "We will need the deposit tomorrow morning. Will have to grab that from you tomorrow". Text discussions then followed between Mr. Lee and the Client regarding payment of the deposit on the Counteroffer.
16. At roughly the same time, Mr. Lee sent text messages to the seller's agent to thank him and to advise that his client would deliver the deposit the next morning. The seller's agent did not respond to these messages.
17. The next day, it was discovered that the Counteroffer was, in fact, not an acceptance of an offer, but a counteroffer that would have required the Client to accept the changes made to form a binding contract. Thereafter, Mr. Lee attempted to revive the deal between his client and the seller by communicating with the seller's agent that the Client was willing to accept the changes and that the Client had delivered a draft for the deposit to Mr. Lee. The exchanges between Mr. Lee and the seller's agent including submitting a revised written offer with the seller's changes.

18. Finally, on August 1, 2023, the seller's agent sent a text to Mr. Lee to advise that his client had received an offer "in the \$250K range". I do not have any evidence that establishes the exact amount of the new offer on the Property or whether that offer resulted in a sale. There is some reference in the correspondence disclosed to me to this number, but I have not been provided with any contract documents that support it.
19. The only correspondence before me in which Mr. Lee delivered the Counteroffer to his client is dated August 2, 2023, although the details of it had been communicated to the Client on August 1, 2023.

### Submissions and Proceeding

20. Throughout the investigation and his initial submissions in this matter, Mr. Lee admitted what occurred.
21. Mr. Lee submitted that the seller's agent should have advised him more clearly that the seller was making a counteroffer and had not accepted his Client's offer. He said he assumed, based on the subject line, that the email attached a binding contract. He said that in his experience, agents on the other side of transactions usually communicate the nature of changes in a document.
22. He further submits that he was in his car, driving to an appointment, at the time and was not able to open the attached document.
23. Finally, he submitted that he is seeking a reduction in the total fine amount issued because he had no malicious or fraudulent intent and did not act to better his own self-interest. He said there were no false representations, no misrepresentations, and no conflict of interest. He submitted that the amount of the penalty "is overly disproportionate to these specific circumstances and [his] honest, non-malicious intent."
24. On my review of Mr. Lee's submissions, he appeared to raise the issue of double jeopardy by submitting that the penalties imposed were "overly disproportionate to these specific circumstances". Because Mr. Lee was self-represented and could not have been expected to raise such a technical legal issue, I issued directions on November 7, 2024 to the parties to address the issue of whether the imposition of administrative penalties for the alleged contraventions of sections 30(a) and 34 of the Rules ran afoul of the principle against double jeopardy as set out in *Kienapple v R*, 1974 CanLII 14 (SCC); *R v Prince*, 1986 CanLII 40 (SCC); and *McLeod v Law Society of British Columbia*, 2022 BCCA 280. I set a submission schedule for the parties. On November 13, 2024, BCFSA Hearings Division provided some further information in response to questions from Mr. Lee.
25. On November 21, 2024, I granted an extension to the submission deadlines at Mr. Lee's request after he had engaged legal counsel.
26. Mr. Lee's further submissions reproduce and expand on much of what he raised in his initial submissions. In them, he emphasizes that his conduct was the result of the lack of communication from the seller's agent. He argues that he communicated transparently while the other licensee did not. He submits that he took steps to mitigate the effects of his conduct but was met with a lack of response from the seller's agent. He says that his conduct should not be viewed "in a vacuum". He submits that issuing a penalty for conduct that arose from another licensee's failure is "unfair and counterproductive to ethical practice within the industry."
27. Regarding the double jeopardy question, Mr. Lee argues that the alleged contraventions arise from a "singular act of oversight" and not two distinct breaches. Regarding the elements of the alleged contraventions, he submits two things:

- a. The contraventions address “opposite sides of the same issue: one focusing on the client’s best interests and the other on care standards”; and
  - b. His actions arose from a “single lapse in judgment”, which resulted in the same loss of opportunity for his client.
28. Mr. Lee then goes on to submit that the purpose of regulatory penalties is “to guide and support professionals” and not to excessively penalize them. He submits that *McLeod v Law Society of British Columbia*, 2022 BCCA 280 confirms that proportionality is an important aspect of disciplinary proceedings and that imposing two administrative penalties would be disproportionate to the conduct here, which he characterizes as an “inadvertent mistake”.
29. BCFSA’s response submission accepts that the two alleged contraventions address “substantively the same conduct”. BCFSA requests the cancellation of the administrative penalty for the alleged section 34 contravention and confirmation of the section 30(a) contravention.
30. Mr. Lee’s reply agrees with the cancellation of the administrative penalty for the section 34 contravention and relies on his other arguments with regard to the section 30(a) contravention. He seeks cancellation of both administrative penalties.

## Reasons and Findings

### *Applicable Legislation*

31. Sections 30(a) and 34 of the Rules read as follows:
- 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:
- (a) act in the best interests of the client;
  - ...
- 34** When providing real estate services, a licensee must act with reasonable care and skill.
32. 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.
33. 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.
34. At the material time, section 26(2) of the Rules identifies four categories, Category A, B, C, and D for designated contraventions for the purpose of determining the amount of an administrative penalty. Sections 30(a) and 34 of the Rules were placed in Category C. Section 27(3) of the Rules provided that Category C contraventions attracted a \$5,000 penalty for a first contravention and a \$10,000 penalty for subsequent contraventions.
35. 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 their right to be heard respecting the matter.

### ***Analysis***

36. 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. I note that certain types of contravention include an analysis of whether a licensee exercised due diligence: for example, a contravention of section 34 requires a finding that the licensee failed to act with the appropriate degree of care in the circumstances. 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.

### **Contraventions**

37. I find that Mr. Lee's conduct could be found to have contravened both sections 30(a) and 34 of the Rules by failing to advise his client that the seller of the Property had issued a counteroffer before that counteroffer expired.
38. Mr. Lee's obligations to his client included an obligation to deliver the Counteroffer to the Client. Given the Client was interested in the Property, it was clearly in the Client's interest to receive the Counteroffer.
39. I also accept, because the Client instructed Mr. Lee to make an offer with effectively the same content as the Counteroffer, that the Client would have accepted the Counteroffer had Mr. Lee presented it to him.
40. Given the lack of clarity in the evidence regarding what the Property eventually sold for, I make no finding regarding the quantum of harm suffered by the Client; however, for the purposes of this decision, I find it is sufficient to conclude that the Client lost an opportunity to acquire the Property at a price the Client desired to acquire it at. That is more than sufficient actual harm to the Client's interest to justify a finding that Mr. Lee failed to act in his client's best interest contrary to section 30(a) of the Rules.
41. Regarding both due diligence and the failure to act with reasonable care and skill, I find that Mr. Lee failed to act with sufficient care in this matter. I am of the view that a reasonable licensee in Mr. Lee's circumstances would have reviewed the Counteroffer within the approximately nine hours between when Mr. Lee received the Counteroffer and when the Counteroffer expired. Mr. Lee does not dispute this position and appears to accept it in his submissions when he notes that the expiry of the Counteroffer provided a reasonable amount of time for Mr. Lee to consult his client.
42. I reject Mr. Lee's submission that he was unable to check the content of the seller's agent's email because he was driving at the time. First, this submission is defeated by the fact that Mr. Lee was able to send a text message to the seller's agent to ask for an update, the fact that Mr. Lee then sent a text message to thank the seller's agent, and the fact that he sent a text message to his Client to congratulate him. I find Mr. Lee was able to pay sufficient attention to his phone to attend to a series of text messages and could therefore have opened and perused the Counteroffer, which he should have done.
43. Second, and more importantly, the submission that he was driving does not explain his failure to read the Counteroffer in the hours between when he received it and when it expired. In my view, Mr. Lee had more than enough time to review the Counteroffer and report its contents to his client

during those nine hours. I find that a reasonably prudent licensee in that circumstance would have reviewed the Counteroffer within that time.

44. I note that I do give some credence to Mr. Lee's submission that his correspondence with the seller's agent led him to believe that the seller had accepted his Client's offer. The lack of communication and the wording of the email's subject line do tend to suggest the document was a finalized contract. That said, even accepting Mr. Lee believed he had received an acceptance of his client's offer, a reasonable licensee in Mr. Lee's situation would have promptly read the document to ensure it was properly and fully executed. It is entirely possible that a party could deliver what they intend to be a binding acceptance of an offer that lacks the necessary initials or signatures to properly evidence their acceptance of the offer, and a reasonably prudent licensee would have reviewed the Counteroffer promptly to ensure the agreement was binding.
45. Mr. Lee's submissions spend a significant amount of time maligning the seller's agent's conduct in this case. Although the seller's agent could have communicated more clearly and consistently with Mr. Lee, that does not displace Mr. Lee's obligation to check the documents on his client's behalf.
46. Therefore, Mr. Lee's conduct could fall under both sections 30(a) and 34 of the Rules; however, if the double jeopardy principle applies, I can only ground a finding under one of the two sections.

#### Double Jeopardy

47. The principle of double jeopardy precludes sanctioning an individual twice for the same contravention. It arises where the allegations made arise from the same factual conduct and the contraventions include the same elements, or they form the same "delict". In the administrative law setting, the same conduct can give rise to two contraventions and appropriate sanctions where the conduct results in different delicts: see *McLeod v. Law Society of British Columbia*, for a case where a lawyer was found to have contravened two sections by a single course of conduct, but this resulted in two wrongs by reason of the harm to opposing counsel and to the court. Applying this "principle is an inherently fact-specific and record-dependent exercise": *McLeod v Law Society of British Columbia*, at para 83.
48. For the principle to apply, and to preclude two sanctions, there must be both a factual nexus between the events and a legal nexus between the contraventions: *R v Prince*, para 14. For a factual nexus to be present, the alleged contraventions must arise from the same act, transaction, or occasion: *R v Prince*, paras 17-20.
49. Even where there is a significant factual nexus between the allegations, there must also be a nexus between the contraventions. Assessing that nexus requires assessment of whether there are distinguishing elements of the contravention, if one of the alleged contraventions was merely a particularization of the other, or if the two contraventions are simply two methods of proving the same wrong: *R v Prince*, paras 32-37. As suggested by that assessment, consideration of the legal nexus does not involve a mere recitation of the elements of each alleged contravention to find a technical difference; instead, the overarching question is whether the "same cause, matter, or delict underlies both charges" or if they seek to address a different harm, fault, wrongdoing, or concern: *R v Prince*, para 39.
50. In this case, the same conduct underlies the allegations against Mr. Lee: his failure to review the Counteroffer and deliver it to his client before it expired. In addition, the same consequences flowed from the conduct: the Client lost an opportunity to purchase the Property. The factual nexus between the allegations is therefore present.
51. Regarding the elements of the alleged contraventions, in my view, the two allegations substantially overlap. The contravention of section 30(a) focusses on the fiduciary obligations owed by licensees to their clients and the need to place their personal interests and the interests of convenience aside

to properly represent their client's or clients' interests. In my view, that analysis includes a determination of whether the licensee's conduct was in the client's or clients' best interests or not. A contravention of section 30(a) can be established where the licensee acted to intentionally compromise their client's interests or failed to exercise due diligence in performing their services to their client. The section therefore covers a range of conduct that includes both intentional misconduct and negligence.

52. The contravention of section 34 is concerned primarily with the exercise of care and skill in providing real estate services. The section is aimed at ensuring licensees meet industry standards regardless of their role in the transaction and the specific duties owed.
53. At least superficially, the two sections seem aimed at separate issues: section 30(a) is aimed at the licensee's fiduciary obligations and section 34 is aimed at industry standards. So, it is possible for the same underlying action to contravene both sections and also contravene those sections in a way that speaks to different interests. For example, a licensee could fail to act in their client's best interest and by the same conduct fail to meet industry standards in a way that caused harm to other parties to the transaction. It is also possible to contravene one of these sections and not the other.
54. However, the question is not merely whether the contraventions overlap, but whether they address "substantially the same elements" or "one [contravention] embraces the other" in the circumstances of the case: *R v Prince*, para 16 citing *R v Kienapple*. This requires assessing whether, on the facts, there is "no additional and distinguishing element that goes to guilt contained in the [contravention] for which a conviction is sought to be precluded by the" double jeopardy principle: *R v Prince*, at para 31.
55. On the facts of this case, the alleged contraventions subsume each other. Yes, each appears to be aimed at separate aspects but finding a contravention of each section on the facts of this case involves the same
  - a. conduct (failure to review the Counteroffer and provide it to the Client),
  - b. failure to comply with a duty (the duty to act in the Client's best interest),
  - c. object of the duty (the Client),
  - d. person harmed (the Client), and
  - e. degree of intentionality (a failure to exercise the due degree of diligence).
56. The only possible distinguishing feature between the two contraventions, in the circumstances of this case, is the difference in focus on the client versus the standards. Close inspection of the elements of the matter needed to find a contravention shows that both contraventions really include both those foci and the difference is not one of substance.
57. I therefore find that the principle of double jeopardy expressed in *R v Kienapple* and *R v Prince* applies in this case and that I cannot find that Mr. Lee contravened both section 30(a) and 34 of the Rules.
58. BCFSA submits that I should find that Mr. Lee contravened section 30(a) and not section 34. Mr. Lee argues I should not find either contravention occurred. I agree with BCFSA. Section 30(a) is, in my view, the more specific contravention and more clearly expresses the failure that occurred here. Therefore, it better reflects the misconduct that occurred and addresses it more precisely.
59. I have addressed Mr. Lee's substantive defences to a finding that he contravened section 30(a) above.
60. I therefore find that Mr. Lee failed to act in his client's best interest contrary to section 30(a) of the Rules by failing to review the Counteroffer and deliver it to his client before the period for its

acceptance expired. I cancel the administrative penalty for the alleged contravention of section 34 of the Rules.

### Penalty Amount

61. Section 27(3) of the Rules sets the amount of an administrative penalty that can be issued for a Category C contravention, which includes section 30(a) of the Rules. The NOAP issued a \$5,000 administrative penalty for Mr. Lee's contravention. I note that I do not have the power to vary the administrative penalties; I can only cancel an administrative penalty or confirm it. If I cancel it, I could refer the matter to a discipline hearing.
62. Mr. Lee submits that he had no malicious or fraudulent intent and did not act to better his own self-interest. I accept that submission. Mr. Lee's conduct in this case was due to an error in assumption. The tenor of his text messages with his client after this event occurred, which continued for nearly a month after the error came to light, supports my finding that Mr. Lee had no ill intent. That communication was professional and courteous as Mr. Lee attempted to resolve the issue with the Client and remained so when the Client chose to cut ties. My finding is also supported by Mr. Lee's early admissions to BCFSA Investigations and his admissions in this review proceeding. I therefore find that the evidence before me does not establish that Mr. Lee had any dishonest intent; instead, I find that he acted in good faith and made an obvious and avoidable mistake.
63. Mr. Lee also submits that this matter did not involve a conflict of interest. I agree, but I find that to be of minimal relevance in this case.
64. Mr. Lee submits that he made no false representations or misrepresentations. I disagree with Mr. Lee on this point. Mr. Lee sent text messages that falsely represented to his client that the Client had a deal when the deal was not firm. Although that is not a fraudulent misrepresentation, on the evidence before me, it was a false one and one that Mr. Lee should not have made without confirming the necessary facts. Again, I note Mr. Lee's submissions that his error arose from the seller's agent's failure to communicate. That fact is explanatory and does reduce Mr. Lee's culpability to some extent, but it does not eliminate it. I am particularly cognizant in this regard of Mr. Lee's failure to review or forward the Counteroffer in the hours prior to its expiry. Mr. Lee had time to undertake the simple checks required to confirm a contract had been formed.
65. Mr. Lee also submits that an administrative penalty in this case would be unfair, excessive, and disproportionate. I disagree.
66. I agree with Mr. Lee that regulatory sanctions are not meant to be specifically punitive. They are instead intended to induce compliance, effect specific and general deterrence, and to protect the public: see *Thow v BC (Securities Commission)*, 2009 BCCA 46, para 38. I disagree that the only goal is to "guide and support" licensees. Educating licensees, both specifically and generally, and rehabilitating specific licensees are proper regulatory goals, but specific and general deterrence go beyond merely guiding and supporting licensees. This is reflected in the factors and principles underlying regulatory sanctions expressed in *Law Society of British Columbia v Ogilvie*, 1999 LSBC 17, and *Law Society of British Columbia v Dent*, 2016 LSBC 5, which are often cited in disciplinary proceedings. Those factors and principles look not only at the individual licensee but look at the impacts of their conduct, the circumstances surrounding the conduct, the impact on the industry generally, and the need for public confidence.
67. On the whole, Mr. Lee failed to discharge his duties to his client in a way that resulted in harm to his client. Although Mr. Lee's failure was precipitated by another licensee's terse communication and was not intentional, his failure to review the necessary documents and deliver them was the most proximate cause of the Client's loss of an opportunity. In the circumstances, I consider the administrative penalties issued in this case to be well within the range of appropriate sanctions. If the matter had been further investigated and the harm suffered by the Client established beyond

the loss of an opportunity, Mr. Lee could have faced a discipline hearing and the broader and larger range of sanctions available in that context.

68. I therefore find that the administrative penalty of \$5,000 issued for the contravention of section 30(a) of the Rules was appropriate.

### Conclusion

69. I find that Mr. Lee failed to act in his client's best interest contrary to section 30(a) of the Rules by failing to review the Counteroffer and deliver it to his client before the period for its acceptance expired.

70. I find that the \$5,000 administrative penalty issued for Mr. Lee's contravention of section 30(a) of the Rules was appropriate. I confirm that administrative penalty.

71. I cancel the administrative penalty for the alleged contravention of section 34 of the Rules on the basis that finding a contravention of that section in these circumstances offends the principle against double jeopardy expressed in *R v Kienapple* and *R v Prince*.

72. The \$5,000 administrative penalty for the contravention of section 30(a) of the Rules is now due and payable to BCFSa.

DATED at North Vancouver, BRITISH COLUMBIA, this 7<sup>th</sup> day of January, 2025.

"Original signed by Gareth Reeves"

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Gareth Reeves  
Hearing Officer