Legal Update 2025

Learner Resource Book

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BCFSA

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Contents

OVERVIEW

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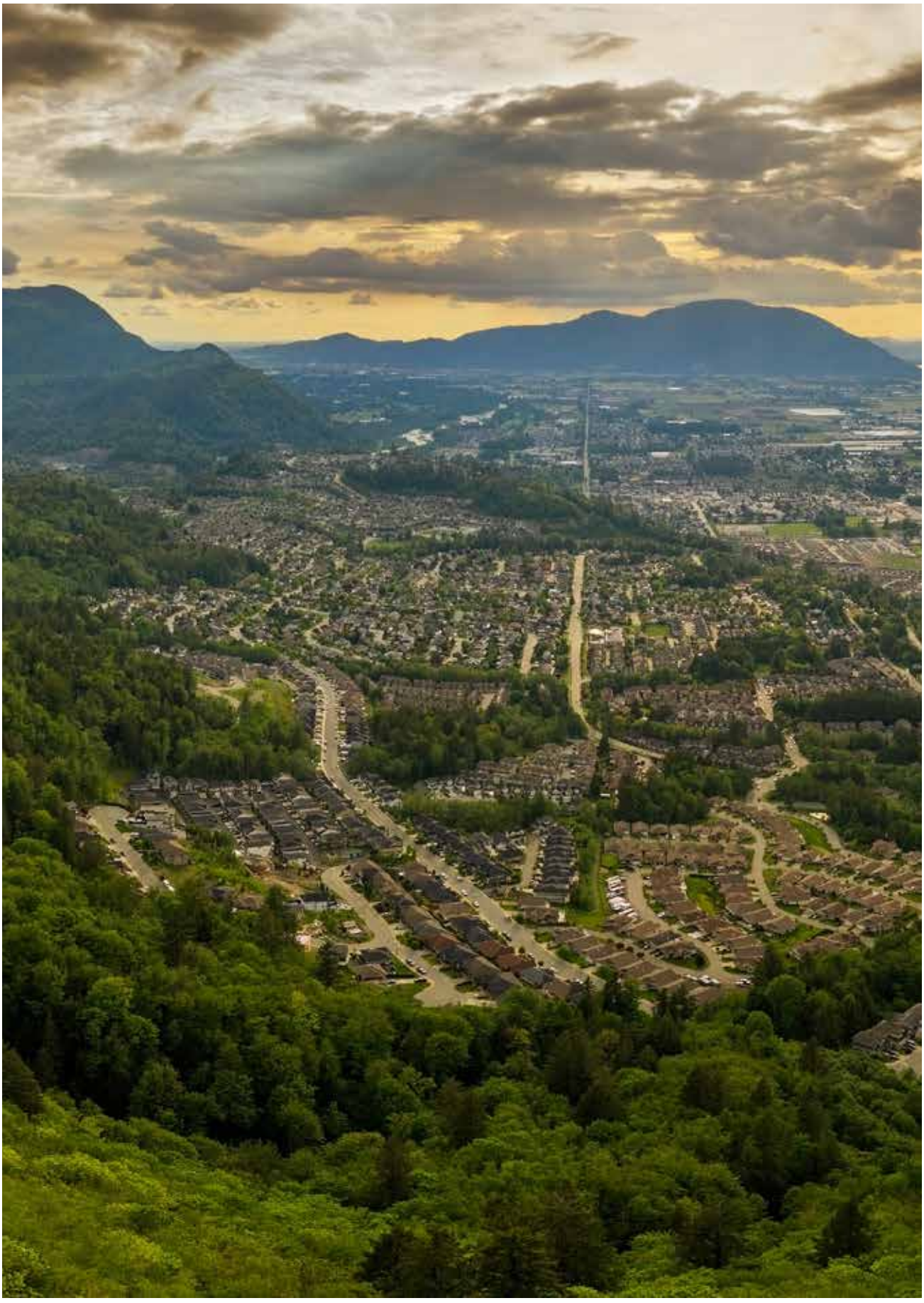
- Content Consultation Groups
- Legal Editor – Bruce Woolley
- Content Writers:
  - Mandeep Kalan, Personal Conduct
  - Laura Forseille, Agency – Back to Basics
  - Angela Woo and Leslie Woo, Disclosures
  - Bruce Woolley, Conflicts of Interest
  - Amy Peck, Contracts
  - Brendan Craig, Easements and Encroachments
  - Elaine McCormack and Emily Sheard, Recent Amendments to *Strata Property Act*
  - Elaine McCormack and Emily Sheard, Small Stratas and EVs
  - Shannon Mathers, Managing Brokers
  - Tim Lack, Mortgage Brokering in Challenging Situations
  - Phil Dougan and Silvano Todesco, Agency – Rental and Strata
  - Phil Dougan and Silvano Todesco, Disclosures and Notices – Rental and Strata
  - Phil Dougan and Silvano Todesco, Conflicts of Interest – Rental and Strata
- Course Instructors
- UBC Sauder School of Business, Real Estate Division



Module One: Personal Conduct

This module will explore some selected topics relating to personal conduct both during your work as a real estate or mortgage services professional and outside of your professional duties and in relation to your responsibilities under the *Real Estate Services Act* ("RESA")[1] and the *Mortgage Brokers Act* ("MBA").[2] Specifically, it will address how personal conduct, even outside of your work, can lead to disciplinary action by BC Financial Services Authority ("BCFSA") and can affect suitability for licensing or registration. It will also provide some best practices for effectively identifying and managing situations involving unlawful instructions from clients and areas that are outside of your expertise as a licensee[3] or registrant.[4] Lastly, it will provide guidance on your duties to BCFSA in the context of BCFSA inquiries and investigations.

LEARNING OBJECTIVES

By the end of this module, you will be able to:

1. Understand how your personal conduct, including outside of your work as a licensee or registrant, may lead to disciplinary action by BCFSA;
2. Understand how your personal conduct can affect your suitability for licensing/registration;
3. Identify and effectively manage situations where you receive unlawful instructions from your client;
4. Identify and effectively manage situations where you should refer your client for independent professional advice; and
5. Understand your duties to respond to and cooperate with BCFSA investigations.

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1 SBC 2004 c 40
2 RSBC 1996 c 313
3 "Licensee" refers to any person who must be licensed under Section 3(1) of RESA.
4 Registrant" refers to any person granted registration by the Registrar of Mortgage Brokers under Section 4 of the MBA.

INTRODUCTION

As a licensee or registrant, you will undoubtedly encounter challenging situations which will require you to carefully consider your next steps. Those situations may involve acting in a way that is clearly contrary to RESA or the MBA or acting in a manner that is unprofessional, but not necessarily contrary to specific provisions in RESA or the MBA. In these situations, licensees and registrants have a duty to act with honesty, integrity, and good faith in a manner that upholds the reputation of the respective industries they serve. Every member of both professions has a responsibility to conduct themselves in a manner that upholds the public's confidence in the industry and sometimes that may be as simple as "doing the right thing."

PERSONAL CONDUCT OUTSIDE OF WORK

It is well established that a member of a regulated profession's "off-duty" conduct can still be found as misconduct deserving of sanction by their respective regulator. Personal conduct that may harm the confidence and trust that the public places in members of those professions is considered a serious misconduct issue. For example, the Law Society of British Columbia's Code of Professional Conduct states that a lawyer's conduct should reflect favourably on the profession. Dishonourable conduct by a lawyer in either their private or professional life that reflects adversely on the integrity of the profession may be the subject of discipline proceedings.[5] BCFSA and other professional regulators across the country apply similar principles.

Under RESA, misconduct by licensees includes both professional misconduct and conduct unbecoming a licensee. Under Section 35(1) of RESA, professional misconduct is conduct that contravenes RESA, the Real Estate Services Rules ("Rules") or the Real Estate Services Regulation ("Regulation") and is related to the provision of real estate services. This section includes various categories of professional misconduct (see Section 35(1) for full list: *Real Estate Services Act* (gov.bc.ca)). Under Section 35(2) of RESA, licensees can also be disciplined for conduct unbecoming.

This includes conduct that:

- Is contrary to the best interests of the public;
- Undermines public confidence in the real estate industry; or
- Brings the real estate industry into disrepute.

The scope of what constitutes "conduct unbecoming" is very broad and captures conduct that occurs outside the provision of real estate services. Licensees are expected to act professionally and with integrity, as their behaviour on and off the clock can affect the public's confidence in the real estate industry as a whole. In some cases, a licensee's conduct can constitute both professional misconduct and conduct unbecoming, depending on the particulars of the conduct in question.

The following are three examples of conduct unbecoming in the real estate industry.

In Alberta, a licensee, while driving under the influence of alcohol, was involved in a motor vehicle accident, resulting in the death of the other driver. The licensee was not providing real estate services at the time and had been drinking at a bar prior to the accident. He was found to be in breach of the *Real Estate Act* of Alberta for conduct unbecoming and bringing the industry into disrepute.[6] The licensee's licence was cancelled and he was prohibited from applying for a new licence until the end of his incarceration period (from a criminal conviction related to the same conduct). The licensee was also ordered to pay enforcement costs in the amount of $2,500.

In British Columbia ("B.C."), a licensee was found to have committed conduct unbecoming when he submitted to a bank, two mortgage applications in his wife's name with falsified information regarding significant deposits at other banks which did not exist.[7] This was unrelated to his provision of real estate services for a client. The licensee, whose licence was inoperative at the time, consented to an order that he was not eligible to renew his licence for a period of 18 months, enforcement costs of $1,000, and remedial education.

5 LSBC Code of Professional Conduct, Section 2.2-1.
6 2015 CanLII 153610 (AB RECA)
7 2010 CanLII 26586 (BC REC)

A licensee who was mentoring a prospective licensee, a trainee, created a forged doctor's note to excuse the trainee's late submission of an assignment during the Applied Practice Course and was found to have committed conduct unbecoming.[8] The licensee consented to an order including a 120-day suspension, a discipline penalty of $5,000, a 12-month enhanced supervision period following the suspension, enforcement costs of $1,500, and remedial education.

Pursuant to Section 8(1)(i) of the MBA, the Registrar of Mortgage Brokers may make an order against a registrant, if in the opinion of the Registrar, the person has conducted or is conducting business in a manner that is otherwise prejudicial to the public.[9]

A registrant was found to have altered an official regulatory document issued by the Registrar, being an alert to the industry regarding serious findings against an individual who held himself out to be a registrant when he was not registered under the MBA. The registrant testified that he altered the names of various individuals in the alert and sent it to a client to dissuade the client from working with those lenders as he believed them untrustworthy. The Registrar found that the registrant's conduct potentially extended harm beyond just the parties involved and that the registrant had committed a serious offence to the reputation of the industry and the public's confidence both in the industry and the regulator.[10] The registrant's registration was suspended for 24 months, and investigative costs of $5,000 and hearing costs of $2,500 were ordered.

The Registrar, when assessing whether the conduct in question occurred while the person was conducting business, will take a purposive approach to interpreting this section of the MBA. The words "conducting business" should be interpreted in the context of the overall purpose and scheme of the MBA, which is protection of the public.[11]

In a similar case, a registrant was found to have breached Section 8(1)(i) of the MBA by altering an email sent to him by the staff of the Registrar and redistributing it to other registrants as if the email were a genuine communication from the regulator. The registrant was also found to have breached Section 8(1)(h) of the MBA by making false or misleading statements to the regulator.[12] The Registrar ordered that the registrant was not at liberty to apply for registration under the MBA for a period of two years (retroactively applied), and the payment of an administrative penalty of $5,000.

Personal conduct of a registrant may also amount to conduct that, in the opinion of the Registrar, makes that person disentitled to registration if the person were an applicant under the MBA.[13] This conduct is not limited to conduct that only occurs in the provision of mortgage services or while "conducting business," but can extend to personal conduct.

BCFSA obtained an interim suspension order against a registrant who had been convicted of possession of child pornography. The Registrar's order found that the registrant was unsuitable for registration under Section 4 of the MBA, and that his registration was objectionable because of the criminal conviction.[14] In this case, the registrant did submit that the criminal conviction was in no way connected to his work or the provision of mortgage services. In granting the suspension, the Registrar found that given the seriousness of the criminal offence and the conditions that were placed on the registrant by the criminal court, the registrant posed a risk of harm to the public and that this conduct is that which would undermine the public's confidence in the industry and the Registrar.

8 2018 CanLII 108051 (BC REC)
9 RSBC 1996 c 313 Section 8(1)(i)
10 2016 BCFST 5 (CanLII)
11 S.M.A Decision on Merits
12 S.M.A Decision on Penalty and Costs
13 RSBC 1996 c 313 Section 8(1)(e)
14 M.A.S Suspension Order

PERSONAL CONDUCT THAT MAY AFFECT SUITABILITY FOR LICENSING OR REGISTRATION

Personal conduct prior to and during your licensing under RESA or registration under the MBA may also affect your suitability for licensing or registration.

Real Estate Services Act

Section 10 of RESA requires an applicant for a new licence or licence renewal to satisfy the Superintendent of Real Estate that they are of good reputation, suitable to be licensed at the level and in the category in which they are applying, and fit to be a licensee.[15] An applicant's prior personal conduct, both in their personal lives and in their professional lives, can have a bearing on their suitability for licensing as assessed by the Superintendent.

The Superintendent requires a criminal record check for all new applicants or an applicant that has been unlicensed for more than 90 days. An applicant must disclose all current charges and convictions, regardless of date, and including absolute and conditional discharges. Criminal charges and convictions are considered on a case-by-case basis. BCFSA will investigate the circumstances underlying the conduct that gave rise to the criminal charges and/or convictions. In some cases, BCFSA may choose to wait until a pending criminal charge is resolved before deciding if the applicant is suitable for licensing. Although BCFSA takes all criminal charges and convictions seriously, particular scrutiny will be applied to charges or convictions whose nature suggest that issuing a licence could adversely affect the public interest, public confidence in the industry, or the reputation of the industry. Charges that involve dishonesty and lack of integrity (fraud, forgery, theft), abuse of positions of power or abuse of the vulnerable (extortion, crimes against children), or charges involving crimes against a person (assault) may preclude issuance of a licence. The Superintendent will also consider rehabilitation factors in this assessment.[16]

Applicants are also required to disclose if they have been bankrupt or discharged from bankruptcy. Given that licensees are entrusted to work with clients making decisions involving significant sums of money and may handle large sums of money, a lack of financial responsibility may demonstrate a lack of good reputation or suitability.

Applicants must also disclose whether they have been refused a licence or had a licence that was suspended or cancelled under other real estate, insurance, mortgage broker, or securities legislation in British Columbia or other jurisdictions. Also, any previous discipline by other professional bodies must be disclosed. These matters will be considered in assessing suitability.

Lastly, civil judgements made against the applicant must be disclosed as well as any pending legal proceedings against them. BCFSA may investigate the circumstances underlying the civil matter to determine if they raise any concerns regarding the applicant's suitability or good reputation.

Mortgage Brokers Act

Under the MBA, the Registrar assesses the applicant's suitability for registration or renewal of registration. Applicants must answer a series of questions and provide further information that the Registrar will consider in assessing the applicant's suitability for registration.

The applicant must provide a criminal record check and disclose whether they have been charged or convicted without pardon of any criminal offence under the law of any province, state, or country. The existence of the criminal record or outstanding criminal charges alone will not necessarily preclude the applicant from registration.[17] The Registrar will consider:

- The seriousness and number of offences;
- The nature of the offence or offences, and whether they relate to acts of dishonesty or deception, or demonstrate a risk of potential harm to the public;

15 Good Reputation, Suitability, and Fitness for Individual Licensees | BCFSA
16 Good Reputation, Suitability, and Fitness for Individual Licensees | BCFSA
17 INDIVIDUAL REGISTRATION APPLICATIONS SUITABILITY REVIEWS AND CRIMINAL RECORD CHECKS (bcfsa.ca)

- The length of time which has elapsed since the date of the offence or offences;
- Any efforts the applicant has made to rehabilitate themself; and
- The sentence imposed by a court, and whether the sentence has been completed successfully.

Applicants must also disclose whether they have been licensed, registered, or authorized under the *Financial Institutions Act*,[18] the MBA, RESA, the *Real Estate Act* of Alberta,[19] the *Securities Act*,[20] or other similar legislation in British Columbia and elsewhere. They must also disclose whether they have ever been refused a licence or been disciplined by a regulatory body in the past.

Applicants must also disclose any judgments against them within the last five years and pending legal proceedings against them, and whether they have been subject to any bankruptcy proceedings.

Failures to Disclose

Providing false or incomplete information on applications may affect the applicant's suitability for licensing or registration under both RESA and the MBA. In the context of renewal applications, it may also result in disciplinary proceedings against the registrant or licensee.

PERSONAL CONDUCT AT WORK

Inappropriate or Unprofessional Communications

Communications have drastically changed over the years from primarily phone calls and letters to a wide gamut of communication mediums – including emails, faxes, text messages, social media, and other messaging applications. Licensees and registrants are expected to keep all communications, whether with their own clients or not, professional and representative of the industries that they represent.

Inappropriate or offensive communications with clients, colleagues, other professionals, and even the public at large could result in investigations by BCFSA and disciplinary action.

The Real Estate Errors and Omissions Insurance Corporation ("REEOIC") warns that as communication styles and format have become less formal and more colloquial, licensees should be careful to not engage in unprofessional or inflammatory communications.[21] Communications can later become the foundation for disciplinary investigations or lawsuits. Licensees should be careful to ensure that all communications are handled in a professional manner. Specifically in text messages and emails with any parties, not just their own clients, licensees should avoid using expletives or inappropriate language or emoticons, insulting or making fun of clients, and highly aggressive language or tones.[22] This advice should be applied throughout all professional communications.

A licensee was found to have engaged in multiple instances of conduct unbecoming over a period of three years for conduct related to his work as a licensee as well as outside the provision of real estate services. The conduct included sending inappropriate and offensive communications of a sexual nature on different occasions to a female real estate professional at a different brokerage, his managing broker, and a female neighbour.[23] In addition, while providing real estate services, he acted in an inappropriate and unprofessional manner by making comments that could be perceived as offensive, racial, and sexual in nature, and by behaving in a manner that could be perceived as inappropriate, obnoxious, unwanted, harassing, and offensive.

18 RSBC 1996 c 141
19 RSA 2000 c R-5
20 RSBC 1996 c 418
21 From trash talk to trouble: the importance of professionalism (reeoic.com)
22 *ibid*
23 2018 CanLII 122721 (BC REC)

Acting in Accordance with Lawful Instructions

Both licensees and registrants have a responsibility to act in accordance with the lawful instructions of their clients and should be on alert for unlawful instructions.

Pursuant to Section 30(b) of the Rules, licensees have a duty to act in accordance with the lawful instructions of their clients.[24] If a client's instructions are contrary to the law, the licensee must explain why they are unable to fulfill the request and provide alternative solutions.

It is the licensee's responsibility to be on alert for any instructions that could result in breach of applicable legislation. Any instructions that require a breach of RESA, the Rules or Regulation, or other relevant legislation cannot be followed. In those circumstances, licensees should consult with their managing brokers and advise the client why they are unable to fulfill the request. Should the client persist with the request, it may be prudent to advise the client to obtain independent legal advice. Registrants should follow similar processes in the event of unlawful instructions in the context of providing mortgage services and consult with their designated individuals.

Some specific situations that licensees should be aware of include:

Material Latent Defects

A licensee who is providing trading services to a client who is disposing of real estate must disclose to all other parties in a trade any material latent defects in the real estate that is known to the licensee.[25] A licensee's obligation to disclose material latent defects pursuant to Section 59 of the Rules is more expansive than a seller's common law legal duty to disclose. It is important to discuss with your client what constitutes a material latent defect. If your client instructs you not to disclose a known material latent defect under Section 59 of the Rules, you must refuse to provide further trading services to or on behalf of the client.[26]

Selling a New home

Pursuant to the *Homeowner Protection Act* ("HPA"),[27] no person may build, sell, or even offer to sell a new home in British Columbia except in compliance with the HPA. This means that a licensee also cannot accept a listing of a new home unless the owner has complied with the requirements of the HPA. When dealing with a new home, licensees should take extra care to ensure that the requirements of the HPA have been met before agreeing to list the property. If the requirements have not been met, and the owner instructs the licensee to list and advertise the property as a new home, licensees should follow guidance in this module on best practices when faced with unlawful instructions.

A licensee failed to confirm that the seller of a new home had obtained a B.C. Housing - Owner Builder Disclosure Notice and that the property was covered by a policy of home warranty insurance prior to listing the property. The licensee consented to a finding of professional misconduct that he failed to ensure that his client had complied with the requirements of the HPA, failed to make appropriate inquiries of his client, and failed to advise his client to seek professional advice with respect to their obligations under the HPA. The licensee consented to a reprimand, a discipline penalty of $3,500, remedial education, and $1,500 in enforcement expenses.[28]

Rental Property Management

When providing rental property management services to your client, all of the same obligations and duties arise under RESA and the associated Rules and Regulation. In addition, licensees should take reasonable efforts to ensure that their clients are in compliance with the *Residential Tenancy Act* ("RTA").[29] The RTA stipulates that an agent representing the landlord is considered the landlord for the purposes of the RTA. Licensees are expected to provide competent advice to their clients respecting applicable legislation and advise them to seek independent professional advice on areas of legislation with which they may not be familiar.

24 Rules Section 30 (b)
25 *Ibid*, Section 59
26 Rules Section 59(3)
27 SBC 1998 c 31
28 2019 CanLII 67655 (BC REC)
29 SBC 2002 c 78

Instructions from your client that could result in your client acting contrary to provisions of the RTA may be unlawful. If your client's instructions are in contravention of the RTA, the licensee must explain why they are unable to fulfill the request and provide alternative solutions. If the client persists, they should be referred to independent professional advice or the licensee may need to cease acting for that client, with the consultation of their managing broker. Some common issues that may arise include:[30]

1. The Residential Tenancy Regulation ("RTR")[31] states that a tenancy agreement must be in writing and contain certain standard terms. If the client refuses to comply with those requirements, this may result in the termination of the tenancy and not be in the best interests of your client.
2. The RTA puts strict limits on the amount of security and pet damage deposits. A licensee should not knowingly contravene these requirements.
3. Condition Inspection Reports must be completed in accordance with the relevant RTA provisions. If not, this could result in your client losing the security deposit owed to them.
4. The circumstances in which a landlord can end a tenancy and the notice/process required are also stipulated in the RTA. Licensees, as agents for the landlord, must give notice in line with the RTA or risk putting their client as risk.
5. Landlords and their agents must follow strict rules for entering a tenanted property as stipulated in the RTA.
6. If the tenant defaults on rent, the licensee must provide relevant information to the client and seek lawful instructions to proceed.
7. Repairs and maintenance of tenanted properties are also covered under the RTA, including but not limited to providing the tenant with an emergency repair contact.

The Rules stipulate that you must act in the best interests of your client and with reasonable care and skill. Ensuring compliance with the RTA will decrease potential risk to your client and assist in fulfilling these duties.

Strata Management Services

Acting as a strata manager for a strata corporation also carries with it the same duties to clients under RESA and the Rules. In addition, strata managers are expected to be familiar with the provisions of the *Strata Property Act* ("SPA"),[32] the regulations made pursuant to the SPA, and the client's strata corporation's bylaws.

If your client's instructions are contrary to the SPA or the bylaws (or other applicable legislation), it is appropriate to advise your client why the instruction is not lawful and advise of other appropriate solutions and refer them to independent professional advice if required. Licensees should also discuss their concerns with their managing broker. Generally, your managing broker should be involved in any attempts to resolve the issue, as refusing to follow the instruction given by the strata council may result in a termination of the relationship between the brokerage and the strata corporation.

Matters Outside the Licensee or Registrant's Expertise

Acting in the best interests of your client also means identifying matters that are outside of your knowledge or expertise and referring your client to the appropriate professional. Section 30(d) of the Rules requires that licensees advise clients to seek independent professional advice on matters outside of the expertise of the licensee.[33] Registrants should also take care to ensure that they are properly identifying areas that are outside of their knowledge or expertise and referring their clients to the appropriate professionals as needed.

30 Tenancies (Residential) Information | BCFSA
31 B.C. Reg. 477/2003
32 SBC 1998 c 43
33 Rules Section 30(d)

Providing your client with advice that is not accurate or complete, in a subject matter about which you are not familiar, can put both you and your client at risk. Ensuring that your client receives the most accurate and informed advice protects their interests and also ensures that you are discharging your duty as their agent and fiduciary. If you provide poor or incorrect advice, you could be the subject of a discipline proceeding by BCFSA for having demonstrated incompetence or having failed to act with reasonable care and skill. You may also find yourself involved in a lawsuit. It is prudent to obtain in writing any third-party advice that your client may rely on or consider in their instructions to you.

Here are some tips on how to deal with matters outside of your expertise:[34]

1. Before agreeing to represent a client, ask yourself whether you have the requisite knowledge and experience to represent them. For example, do you have experience/skill in the specific type of property or mortgage product, the location/geographic area, the relevant market?
2. Do not give advice on matters with which you are unfamiliar. Refer your client to a professional that can assist.
3. Find an experienced licensee/registrant for your client. Referring your client to a professional better suited to their needs is acting in the best interest of your client and will foster trustworthy agency relationships.
4. Broaden your expertise by taking additional education or seeking mentorship/connection with other professionals that practice in that area.

Commercial versus Residential

Overall, in the provision of both real estate services and mortgage broker services, commercial transactions require a degree of experience and specialized knowledge that is distinct from that of residential sales and mortgages. For example, commercial tenancies are often significantly more complex than residential tenancies and are governed by the *Commercial Tenancy Act*.[35] Also, the purchase and sale of commercial properties can be more complex and require consideration of additional factors that are not relevant in residential sales. In the context of mortgage services, commercial mortgages are different than residential mortgages and may require expert knowledge or experience. Arranging syndicated mortgages and mortgages involving private lenders may also require some level of direct experience. Registrants should be careful to ensure that they are not advising in areas they are not experienced and knowledgeable in and should consult with their designated individuals when dealing with these topics and others that may require specialized knowledge or experience.

34 June 2015 Report from Council Newsletter | BCFSA
35 RSBC 1996 c 57

DUTIES TO THE REGULATOR

In addition to duties to clients, both licensees and registrants have duties to BCFSA specifically in the context of investigations pursuant to RESA and the MBA.

Real Estate Services Act

BCFSA can investigate any complaints involving a breach of RESA, the Rules, or Regulation. Under Section 37 of RESA, the Superintendent may, at any time during business hours, inspect and remove records that are located at a business premises of a licensee or former licensee, or an officer, director, controlling shareholder, or partner of a licensee or former licensee.[36] The Superintendent can also require those persons to answer inquiries related to the investigation, or produce records, information, or other things in their possession or control for examination.[37] Most importantly, a person referenced in Section 37 may not withhold, destroy, conceal, or refuse to provide any information or thing reasonably required for the purpose for the investigation.[38] If a licensee fails to cooperate with an investigation under Section 37 of RESA, it is considered professional misconduct.

Failing to cooperate with an investigation can include making a false or misleading statement to investigators. A licensee agreed to a finding of professional misconduct, for failing to cooperate with an investigation under Section 37 of RESA, when he provided false statements to investigators during an investigation into his conduct.[39]

In addition to RESA, Section 21 of the Rules includes a positive obligation on licensees to reply promptly and in writing (unless otherwise allowed) to any inquiry addressed to them by the Superintendent.[40] This duty is broad, and includes responses to disciplinary investigations, audit correspondence, inquiries from BCFSA licensing, and any other communication from BCFSA to licensees.

Failure to comply with these duties can result in disciplinary action by BCFSA. Section 21 of the Rules has also been designated as a contravention that is subject to an administrative penalty.[41] This contravention includes a base penalty amount and further daily penalties to encourage compliance in a timely manner.

BCFSA recently issued an administrative penalty against a managing broker and brokerage for failing to provide a prompt reply to inquiries from the Superintendent pursuant to Rule 21.[42] The managing broker was provided with an audit report from BCFSA and asked numerous times for a response and further documentation. After many reminders over several months, and a warning letter before the issuance of an administrative penalty, the managing broker partly complied, but did not provide a full response to the request. An administrative penalty was issued for the base penalty amount and a daily amount for an additional 21 days that the request remained outstanding. The managing broker and brokerage asked for a reconsideration of the matter from the Superintendent. The reconsideration was denied, and the penalty upheld.[43]

Mortgage Brokers Act

Under the MBA, the Registrar may conduct an investigation, inquire into, or examine matters arising from the MBA and its Regulation.[44] The powers of the Registrar under the MBA are broad. Section 6(3) of the MBA includes the power to summon and enforce the attendance of witnesses, compel them to produce records, property, assets, or things. The failure or refusal of a person to attend, answer questions or to produce records, property, assets, or things in their custody or possession are breaches of the MBA and may be the subject of discipline proceedings.

36 SBC 2004 c 42 Section 37(3)(a)
37 SBC 2004 c 42 Section 37 (3)(b)
38 SBC 2004 c 42 Section 37(4)
39 2019 CanLII 35331 (BC REC)
40 Rules Section 21
41 SBC 2004 c 42 Sections 56 and 57; Rules Sections 26 and 27
42 Y.S. Notice of Administrative Penalty
43 Y.S. Notice for Decisions Regarding Administrative Penalty Reconsideration Request
44 RSBC 1996 c 313 Section 6

Section 6(7) also gives the Registrar, or a person appointed by the Registrar, the ability to enter and examine, inspect, analyze, and remove records, property, or assets from the business premises of persons registered or required to be registered under the MBA for the purposes of an inspection, examination, or analysis. Pursuant to Section 6(7.5), if a person attempts to withhold, conceal, or refuse to give any information or produce any record, property, asset, or thing, this would also be considered a breach of the MBA and may be the subject of discipline proceedings

In a recent consent order under the MBA, a registrant agreed to a finding that he contravened Section 8(1)(f) [*breach of the Act, regulations or a condition of registration*] of the MBA by failing to comply with a summons issued by BCFSA staff, when he attended and then unilaterally terminated an interview with BCFSA staff.[45]

CONCLUSION

Licensees and registrants are expected not only to understand the standards expected of them pursuant to their governing legislation, rules, and regulations, but also the standards expected of them as professionals and representatives of their respective industries. Personal conduct, both during and outside of work, can become the subject of disciplinary action and may also affect suitability for licensing or registration if it could damage the public's confidence in the industry, bring the industry into disrepute or is prejudicial to the public interest. Both licensees and registrants should be on alert to effectively manage situations that may give rise to additional risk to them or their clients such as situations involving unlawful instructions from clients or areas that are outside of their expertise. Lastly, all professionals regulated by BCFSA are expected to cooperate and respond promptly to any and all inquiries from their regulator: failure to do so is a breach of RESA and the MBA.

45 K. P. Consent Order

Module Two: Agency – Back to Basics

Agency is a relationship where one person, the agent, has the authority to represent and act on behalf of another person, the principal. In the real estate context, a licensee acts as an agent on behalf of their client. The nature of agency relationships is frequently misunderstood by both licensees and clients, and this can lead to unintended consequences.

In this module, we will look at how a real estate transaction gives rise to an agency relationship, and what "being in an agency relationship" means. We will review important things to keep in mind when managing agency relationships. We will also examine the different types of agency relationships, including express and implied agency.

LEARNING OBJECTIVES

By the end of this module, you will be able to:

1. Identify and explain agency relationships and agents' obligations to the clients they represent;
2. Understand how agency relationships are created and terminated, and how to manage them;
3. Assess the types of agency representations and brokerage models and understand some best practices for each one; and
4. Describe the difference between express and implied agency, and the risks inherent in implied agency relationships.

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WHAT IS AGENCY?

Agency is a relationship between the agent and the principal. The agent works on behalf of and represents the principal. In the real estate context, this relationship is between the licensee (the agent) and the client (the principal). Once an agency relationship is created, the agent has a legal requirement to represent the interests of the principal.

When a real estate licensee is acting as an agent on behalf of their client (the principal), the licensee has certain legal duties to the principal. These duties exist at common law and are called fiduciary duties. Fiduciary duties apply in situations where a consumer places their confidence in another party and trusts that party to represent the consumer's best interests. In a trade in real estate the consumer who has engaged a licensee to act on their behalf places trust and confidence in the licensee. For that reason, fiduciary duties apply to real estate professionals.[1] Another example of a fiduciary relationship is lawyer-client.

The duties that British Columbia ("B.C.") real estate professionals owe their clients are also set out in Section 30 of the Real Estate Services Rules ("Rules").[2] These are:

- Acting in the best interests of the client;
- Acting in accordance with the lawful instructions of the client;
- Acting only within the scope of the authority given by the client;
- Advising the client to seek independent professional advice on matters outside of the expertise of the licensee;
- Maintaining the confidentiality of information respecting the client;
- Disclosing to the client all known information respecting the real estate services, and the real estate and the trade in real estate to which those services relate;
- Communicating all offers to the client in a timely, objective, and unbiased manner;
- Using reasonable efforts to discover relevant factors respecting any real estate that the client is considering acquiring; and
- Taking reasonable steps to avoid any conflict of interest, and if a conflict of interest does exist, promptly and fully disclosing it to the client in writing, and separately from a service agreement or any other agreement under which real estate services are provided and separately from any agreement giving effect to a trade in real estate.

In addition, Section 33 of the Rules requires a licensee to act honestly when providing real estate services, and Section 34 requires a licensee to act with reasonable care and skill when providing real estate services.

Express vs. Implied Agency

An agency relationship can be created in one of three ways:

- A client and a licensee can enter into a written agreement, which sets out the scope of work the licensee will perform for the client and the duties the licensee owes to the client;
- A client and a licensee can have an oral agreement where the licensee agrees to provide services to the client, but Section 43 of the Rules requires a written agreement in most circumstances; or
- An implied agency relationship is created when the licensee's conduct leads a person to believe that they are acting as the person's agent. Examples of such conduct are providing advice at an open house, providing speculation to potential sellers about what their home could be worth, and soliciting confidential information.

The first two situations above are called express agency relationships. They are preferable to implied agency relationships because both parties are intending to create the agency relationship. A written service agreement, required under Section 43 of the Rules in most circumstances, can set out clearly all of the obligations and expectations of the parties.

1 See Duties to Clients Guidelines | BCFSA
2 Real Estate Services Rules

If an implied agency relationship is created, even inadvertently, then the licensee now owes the client all of the duties as described in Section 30 of the Rules. In a recent discipline case,[3] a licensee told a prospective buyer about a condo investment opportunity while getting a haircut, advising that it would be profitable due to its pre-sale prices, market conditions, and the developer's reputation. The licensee told the buyer that he would represent her in the transaction, and the buyer made an offer on a unit. The licensee provided the disclosure documents, including an Agency Disclosure Form and a Working with a Realtor form (forms that were used at that time), which named someone else as the buyer's agent. However, the licensee who provided the disclosure forms to the buyer had already created an implied agency relationship with the buyer. The licensee had not provided a detailed explanation to the buyer of the terms of the contract of purchase and sale prior to the buyer signing. He was found to have performed professional misconduct by failing to act in her best interests. Even though the licensee had not intended to be the buyer's agent, he created an implied agency relationship by advising her as if he was. He was therefore expected to fulfill all of his agency duties to the buyer and was found to have committed professional misconduct when he failed to do so.

Another risk of creating an implied agency relationship is because it could result in dual agency, which is greatly restricted under the Rules. In a recent discipline case, the licensee was representing the seller of a property.[4] An unrepresented prospective buyer contacted the licensee and asked if the licensee could prepare an offer for the property (a "no agency" situation). They agreed to proceed with the licensee in a "customer" relationship (i.e. the licensee was not to be the buyer's agent). However, the licensee proceeded to advise the buyer about the offer price, the reasonableness of the asking price, and building a new house on the property. In doing so, the licensee was providing real estate services to the unrepresented party, creating an implied agency relationship. This put the licensee in dual agency, under the Rules (see more in the "Dual Agency" section below).

MANAGING THE AGENCY RELATIONSHIP

As discussed, an agency relationship can be created through a written service agreement between the licensee's brokerage and the client, through an oral agreement, or through an implied relationship. However, Section 43 of the Rules requires a written agreement in most circumstances. It is important that any new client understands how agency relationships work and what duties are owed to them by their agent prior to entering into an agency agreement. The Disclosure of Representation in Trading Services form, one of the first steps in managing the agency relationship in a real estate context, contains a description of the duties and responsibilities that a licensee owes their client.[5]

Confidentiality

The agent's legal duties to the principal will no longer be applicable once the relationship ends except the duty of confidentiality, which does not end.[6] Therefore, a conflict of interest can sometimes arise when a licensee begins to represent a new client who is a competing party in a transaction with the licensee's former client. This is because, pursuant to Section 30 of the Rules, the licensee continues to owe their former client the duty of confidentiality, but also owes the new client the duty to represent their best interests, the duty of confidentiality, and a duty to disclose to them all known information about the transaction.

If a licensee does not maintain the duty of confidentiality to their former client, they can be found to have committed professional misconduct. An example is set out in a recent disciplinary case,[7] in which the licensee had been the previous listing agent of a property which the licensee later mentioned in an email to a group of potential buyers. The email mentioned that the sellers were highly motivated to sell, and the purchase price could therefore be below appraisal. The licensee was found to have failed to maintain the confidentiality of the client's information in the course of communicating with prospective buyers after the brokerage's listing with the former client had expired.

3 2020 CanLII 12248 (BC REC)
4 2019 CanLII 37500 (BC REC)
5 Disclosure of Representation in Trading Services form
6 See BCFSA's Confidentiality Information
7 2010 CanLII 60402 (BC REC)

If this type of conflict of interest arises, the licensee should seek the advice of their managing broker. It may be appropriate to ask the current client to permit the licensee to modify their duties, to continue to maintain confidentiality for the old client. Section 31(2)(a) of the Rules allows a licensee's Section 30 duties to be modified through their written service agreement, and Section 31(2)(b) allows them to be modified through their Disclosure of Representation in Trading Services form.[8] Sometimes it will not be appropriate to proceed this way, and the new client should be advised to seek different representation. The licensee should discuss with their managing broker to decide their next steps.

No Agency

Sometimes a party will choose to have no representation in a real estate transaction – a no agency situation.

Licensees should be aware of the risks of being involved in a no agency transaction where the other party is unrepresented. Licensees can unintentionally and unknowingly create an agency relationship with the other party (as discussed earlier in this module). Licensees have also attempted to characterize a transaction as no agency when it was in essence a dual agency, which can amount to professional misconduct (see the "Dual Agency" section below). The unrepresented party will not have the benefit of a licensee's advice on, for instance, an appropriate price for the subject property, or appropriate terms and conditions to include in the purchase contract. These are just some examples of how a no agency transaction may involve increased risk for the licensee and the consumer.

In a no agency transaction, in addition to providing the unrepresented party with the Disclosure of Representation in Trading Services form, the licensee must also provide the unrepresented party with the Disclosure of Risks to Unrepresented Parties form, which is a form advising them of the risks of being unrepresented, and recommend that they get representation and/or legal advice.[9] This form explains to the unrepresented party that the licensee owes their client a duty of loyalty and that they will be working in the client's best interests in the transaction. It also advises that the licensee must tell their client any relevant information that the unrepresented party shares with them. It also sets out the limited services that the licensee is able to provide to the unrepresented party.

The requirement to disclose the risks of "no agency" is in Section 55 of the Rules, which requires that the licensee must disclose:

a) The risks to an unrepresented party of receiving assistance from the licensee due to the licensee's duties and responsibilities to the client of the licensee;

b) The limited assistance that the licensee may provide to the unrepresented party; and

c) A recommendation that the unrepresented party seek independent professional advice in respect of the trade in real estate.

8 Disclosure of Representation in Trading Services form FAQs | BCFSA
9 Guide to Disclosure of Risks to Unrepresented Parties form | BCFSA

In a no agency transaction, the licensee may still provide limited services to the unrepresented party in the transaction without creating an agency relationship, such as:

- Sharing general information and real estate statistics;
- Showing a property and providing factual information about the property;
- Providing the unrepresented party with standard real estate forms and contracts;
- Filling out a standard real estate contract; and
- Communicating the unrepresented party's messages and presenting offers to their own client.

The licensee may not:

- Give the unrepresented party advice about an appropriate price;
- Give the unrepresented party advice about any terms and conditions to include in a contract;
- Negotiate on behalf of the unrepresented party;
- Share any of their client's confidential information, such as their maximum/minimum price, or their reasons for their buying/selling/leasing; or
- Protect the unrepresented party's confidential information.[10]

Terminating the Agency Relationship

The agency relationship ends when the service agreement expires, the relevant transaction has been completed, or the relationship is terminated by agreement between the parties. If both parties cannot agree to end the relationship, the terms of the service agreement continue until the agreement expires. The licensee continues to owe a duty of confidentiality to the client after the relationship is terminated.

TYPES OF AGENCY RELATIONSHIPS

Designated Agency Model

In British Columbia, there are two types of agency models used by brokerages: designated agency and brokerage agency. Most trading services brokerages operate under designated agency, which is permitted under Section 32 of the Rules. In this model, when a client engages a brokerage for real estate services, the brokerage assigns the client one or more licensees to act as the sole agent(s) acting on behalf of the client. Two licensees at a designated agency brokerage could represent two opposing parties in a transaction without creating a conflict of interest or requiring a dual agency agreement, as long as each licensee has been designated as an agent for one or the other opposing party.

Under Section 32(1)(a) of the Rules, the assigned licensee, or team of licensees, is the only agent for the client at the brokerage, and the brokerage as a whole does not owe the client the agency duties described under Section 30 of the Rules. These duties are owed by the designated agent. Therefore, the client's information is kept confidential from the rest of the licensees of the brokerage. Managing brokers should ensure that policies and procedures are in place to ensure sensitive documents, phone calls, and other communications involving confidential information are not made available to the brokerage's other licensees.

Section 32(2) of the Rules requires designated agency brokerages to make it clear in their written service agreement that they operate under the designated agency model. If there is no written service agreement, disclosure is to be made in writing on the Disclosure of Representation in Trading Services form. Section 32(3) requires that, regardless of whether it is a service agreement or a written disclosure, this document must clearly indicate that none of the related licensees of the brokerage, other than the designated agent or agents, owe the Section 30 duties to the client.

10 Disclosure of Risks to Unrepresented Parties form

Section 32(4)(a) of the Rules requires designated agency brokerages to supervise the designated agents to ensure they are fulfilling all of their agent obligations under Section 30 of the Rules, despite the fact that the brokerage itself does not owe those duties to clients. Section 32(4)(b) prohibits the brokerage from disclosing confidential information about a client unless authorized by the client or required by law. Section 32(4)(c) requires the brokerage to treat the interests of all clients in an even-handed, objective, and impartial manner.

Brokerage Agency Model

Some trading services brokerages in B.C. operate under brokerage agency. In this model, when a client enters into a service agreement with the brokerage, the client's agency relationship is with the brokerage and all of its licensees, and not just the licensee that is working with the client. Therefore, all licensees at the brokerage are in an agency relationship with the client. It is assumed that all licensees at the brokerage have access to the client's confidential information, and the brokerage owes the duties of agency to the client that we discussed in the "What is Agency?" section.

In brokerage agency, a conflict of interest arises when:

- A licensee at the brokerage proposes to represent a buyer and another licensee at the brokerage proposes to represent a seller in the same transaction;
- A licensee at the brokerage proposes to represent both the buyer and the seller in the same transaction; and
- One or more licensees at the same brokerage propose to represent competing buyers in a transaction.

For trading services, these examples would constitute dual agency, which is greatly restricted under the Rules. In these situations, the licensee(s) must disclose the conflict of interest to their client(s). Section 65(1) of the Rules requires that the brokerage either not represent any client in that trade, or that the brokerage only represents one of the clients in respect of that trade. If the brokerage intends to proceed with continuing to represent one client in that trade, then Section 65(3) requires a written agreement from both the remaining client, and the client that the brokerage intends to no longer represent, prior to any ongoing provision of agency to either party.[11]

Dual Agency

Dual agency occurs when a licensee (agent) represents two clients (principals) with differing interests in a real estate transaction. Examples of parties with differing interests could be two buyers seeking to buy the same property, or a buyer and seller in the same transaction.

Sections 63 and 64 of the Rules greatly restrict dual agency.

Section 64 of the Rules provides that a brokerage may engage in dual agency in respect of a trade in real estate only if:

- The real estate is in a remote location that is under-served by licensees; and
- It is impracticable for the parties to be provided trading services by different licensees.[12]

Before the licensee provides any trading services that would constitute dual agency, the licensee must do two things. First, the licensee must make a disclosure to each party, in a form approved by the Superintendent of Real Estate.[13] That form, called the Disclosure of Risks Associated with Dual Agency, must include a statement of the brokerage, signed by the managing broker, setting out why dual agency is permitted in the circumstances. The form must also set out the duties and responsibilities of the licensee to the clients in the dual agency relationship, as well as the risks associated with a dual agency relationship. Second, the licensee must enter into a written agreement of dual agency with each party, after making the disclosure in the form. The brokerage must provide the disclosure to the Superintendent of Real Estate, promptly after entering into the written agreement. Every brokerage should have policies and procedures to address the use of the Section 64 exemption.

When in a dual agency relationship, a licensee must deal with both clients impartially - not prioritizing one client's

11 Resolving Conflicts of Interest Between Clients: Understanding Your Options
12 A very useful flow chart can be found here download (bcfsa.ca)
13 Disclosure of Risks Associated with Dual Agency form

interests over the other in the transaction. Some of the usual duties of an agent are modified in a dual agency situation, often referred to as a "limited dual agency":

- They cannot provide the client with any advice on what purchase price the client should offer or accept, or what terms they should include in the contract to protect their interest;
- They cannot make full disclosure to the client of all material facts in their knowledge if that would breach their duty to protect their other client's confidential information; and
- They cannot share information with the client such as the other client's motivation or preferred terms, nor share their information with their other client.[14]

Teams

Teams are groups of licensees working together. The concept of teams can be used in designated agency, as each team in a brokerage can separate their duties from other licensees in the brokerage.

Section 42.2 of the Rules requires a group of two or more licensees to register with the Superintendent of Real Estate as a team if the licensees in the group do any of the following:

- Represent themselves to the public as a single entity (such as in advertising);
- Are regularly engaged as designated agents of the same client; and
- Regularly work together in a manner that is consistent with the licensees being implied agents of the same party.

Section 42.4 of the Rules requires:

- A licensee can only be a member of one team at any time and a member can only provide trading services through their team;
- A licensee can only provide trading services through a real estate team if they are member of the team;
- All members of a team must be related to the same brokerage. This brokerage must designate all team members, under Section 32 of the Rules, as designated agents of the brokerage; and
- A team must ensure that the team's name is clearly indicated in the course of providing trading services.[15]

A licensee must not represent themselves as being part of a team if they are not, as in a recent disciplinary case.[16]

When a client works with a member of a team on a real estate transaction, the entire team is deemed the client's designated agent. Each team member must also be designated as a team member on all disclosures required by BCFSA and on service agreements, with the full names of all team members indicated. The team's agency relationship with the client lasts until the conclusion of the real estate transaction. If a licensee leaves the team, even during a transaction, they should consider the potential conflicts of interest in future transactions involving members of their former team. The team and its members continue to have a duty of confidentiality towards the client after the transaction is concluded. A team's disclosures and service agreements need to be updated if a team member joins or leaves the team.

14 See BCFSA's Use of Dual Agency Exemption
15 Teams Information | BCFSA
16 2021 BCSRE 1 (CanLII)

It is important that the licensees explain to their clients that they will be working with a team, and what that means for them, including that:

- Every member of a team represents each of the team's clients and has access to the client's confidential information;
- Each member of the team owes the legal obligations of an agent to that client, and no members of the team are allowed to be an agent for any other parties in the relevant transaction; and
- Because of the collective agency of a team, there cannot be two team members acting for the buyer and seller in a real estate transaction, or two competing buyers, as this would be dual agency. Teams who find themselves in this scenario must comply with the requirements of Section 65 of the Rules.

CONCLUSION

Licensees are expected to understand the nature of agency relationships, because these relationships affect their duties and obligations. Licensees need to be able to explain these relationships to their clients and potential clients. Licensees must understand their agency obligations under the Rules. They should understand how agency relationships begin and end, and how they can be created through their own conduct rather than intentionally. They should understand the different types of agency relationships. Licensees should understand that clarifying the agency relationship with the client is the best way to avoid a conflict of interest, and to ensure that the client's interests are being protected in all cases.

Module Three: Disclosures

The focus of this module is disclosures that are to be made in trading services transactions under the *Real Estate Services Act* ("RESA")[1] and disclosures to be made by registrants[2] registered under the *Mortgage Brokers Act* ("MBA")[3] and to be made under the *Business Practices and Consumer Protection Act* ("BPCPA").[4]

The first part of the module, dealing with trading services, will be a walk-through of a sale and purchase of a property: disclosures made before an agency relationship is entered into, during the course of the transaction, and at the conclusion of the transaction. We will focus on the disclosures that are mandatory and set out by the Real Estate Services Rules ("Rules") and the Real Estate Services Regulation ("Regulation"). We will also discuss the obligation of licensees[5] to use reasonable efforts to discover relevant facts and disclose to clients all known material information respecting the real estate.

We will then review the disclosure requirements for registrants pursuant to the MBA and BPCPA. The purpose of these disclosure requirements will be highlighted so registrants understand the importance of their disclosure requirements and how it assists their clients.

LEARNING OBJECTIVES

By the end of this module, you will be able to:

1. Identify and explain the disclosures required by the Rules and the Regulation during each stage of a transaction;
2. Help your clients understand the disclosures that they are required to make, and are entitled to receive, in a purchase or sale of a property;
3. Recognize and understand the importance of keeping records of disclosures; and
4. Understand the statutory disclosure obligations of registrants.

03

1 SBC 2004 c 42
2 In this module, we have used the term "registrant" to include mortgage brokers and submortgage brokers. The context may suggest one or the other.
3 RSBC 1996 c 313
4 SBC 2004 c 2
5 In this module, we have used the term "licensee" to mean a brokerage, managing broker, associate broker, and representative, as the context may require.

WHAT IS A DISCLOSURE?

It is fundamental for licensees to act with fairness and transparency with clients to build and maintain trust with the licensee and the profession, and for licensees to comply with their common law and statutory obligations. One of the key duties that a licensee owes to clients is that of full disclosure. The Rules and the Regulation have mandated certain disclosures that contain key information that a licensee must provide to their clients or unrepresented parties in relation to a trade in real estate. In many cases, but not all, the Rules require that specific BC Financial Services Authority ("BCFSA") approved disclosure forms be used. In most cases, disclosure must be made in writing. Disclosure in writing is recommended even in the rare circumstances where it is not mandated. Failure to adhere to the Rules and the Regulation may lead to discipline action by BCFSA. Licensees should also be aware of licensees' and sellers' obligations under common law to disclose certain information in respect of a property during the course of a transaction. Failure to provide disclosures required under common law may result in civil liability for licensees and for their clients.

The purpose of these disclosures is to ensure that real estate consumers, whether it be for commercial purposes or personal, have the information they need to make informed decisions relating to one of the largest purchases that they will likely ever make. It is important for licensees to keep in mind the purpose of these disclosures in their day-to-day dealings with clients and unrepresented parties.

It is equally important for registrants under the MBA to be open and transparent to borrowers and lenders. The disclosures required under the MBA and BPCPA assist parties to a transaction make fully informed decisions with all the necessary information given to them.

MEETING YOUR CLIENT OR UNREPRESENTED PARTY

Before providing any trading services to or on behalf of any party to a trade in real estate, licensees are required to disclose whether the licensee will represent them as a client, pursuant to Section 54 of the Rules. This disclosure must be made on BCFSA's Disclosure of Representation in Trading Services form.

The definition of "trading services" in RESA is quite broad. Trading services includes but is not limited to "making representations about the real estate," "showing the real estate," and "advising on the appropriate price for the real estate."[6]

Licensees must be careful what information they provide and/or request when speaking to a prospective party to a trade in real estate so that a client relationship is not formed prior to making the required disclosure. For example, when speaking to an individual on the telephone, if the individual begins providing information about their motivations to purchase a commercial property, the licensee should stop the conversation and provide the Disclosure of Representation in Trading Services form to the individual before continuing any further. The failure to disclose the nature of the representation that the licensee would provide to a party to a trade in real estate prior to providing real estate trading services is the top issue found by the BCFSA Audit and Assurance team when auditing brokerages.[7]

The Disclosure of Representation in Trading Services form also contains a disclosure that buyers have the right to cancel a contract to purchase some types of residential real property in British Columbia.

There are exceptions to when a licensee is required to give a Disclosure of Representation in Trading Services form. Under Section 54(3) of the Rules, a licensee is not required to provide the Disclosure of Representation in Trading Services form if the licensee is only hosting an advertised open house or providing factual responses to general questions from the party, unless the licensee solicits or receives information from a party about the party's motivation, financial qualifications, or needs in respect of the real estate.

6 SBC 2004 c 42
7 Audits of Real Estate Brokerages: Top 10 Findings

If a licensee makes a disclosure under Section 54 of the Rules (Disclosure of Representation in Trading Services) to an unrepresented party in respect of a trade in real estate while representing a client to that trade in real estate, then Section 55 of the Rules becomes applicable. Section 55 requires licensees to disclose the risks to an unrepresented party in the approved BCFSA form whenever a Disclosure of Representation in Trading Services form is given to an unrepresented party. Merely providing the required form is not sufficient. The licensee must ensure that the unrepresented party fully understands:

- The risks related to being an unrepresented party;
- That the licensee will only be providing limited assistance and what that limited assistance entails; and
- That the licensee recommends they seek independent professional advice.

This is to prevent any misunderstanding that an agency relationship exists between the licensee and the unrepresented party. Licensees should also be careful not to provide any trading services (e.g. giving advice) to the unrepresented party as that would put the licensee at risk of creating an implied agency relationship with that party.

At an Open House

When hosting an open house, licensees should be cautious when speaking to unrepresented parties. Licensees are permitted to answer general questions about the property. However, if an unrepresented party begins telling the licensee (even if it was not solicited) information about their motivations for purchasing real estate, their budget, or what they are looking for in respect of their purchase, then a Disclosure of Representation of Trading Services form must be given before continuing the conversation. If the licensee will not be representing them as a client, BCFSA's Disclosure of Risks to Unrepresented Parties form must also be given. Licensees may wish to consider having hard copies of the Disclosure of Representation of Trading Services and Disclosures of Risks to Unrepresented Parties forms with them at an open house, so the forms are readily available. Licensees should also be up front at an open house by proactively disclosing that the licensee represents the seller, and that they are obliged to share any confidential information to the seller provided by any parties who are not their clients.

Case Study

A licensee was one of the owners of a property where the licensee also acted as the designated agent.[8] The buyers saw the MLS listing and contacted the licensee directly. The buyers then viewed the property while accompanied by the licensee and discussed the terms of an offer to purchase with the licensee before signing a contract of purchase and sale. The buyers thought the licensee was acting as their agent in the transaction. On the date the buyers signed the contract of purchase and sale, the licensee gave the buyers a Disclosure of Representation in Trading Services form which indicated a second licensee was purporting to provide agency to the buyers (but did not actually provide agency in a meaningful way), a Disclosure of Interest in Trade form, and a Disclosure of Remuneration: Trading Services form which did not indicate the amount the second licensee would receive in commission. At no time did the licensee provide the Disclosure of Risks to Unrepresented Parties. The licensee was found to have engaged in professional misconduct by failing to:

- Promptly provide the Disclosure of Interest in Trade form (then Sections 5-9, now Section 53);
- Provide the buyers with a meaningful opportunity to obtain representation from the second licensee and/or ensure the buyers understood the risks to proceeding as an unrepresented party (then Section 5-10.1, now Section 55); and
- Accurately complete the Disclosure of Representation of Trading Services and Disclosure of Remuneration: Trading Services forms (then Sections 5-10 and 5-11, now Sections 54 and 56).

The licensee was suspended for two months, required to pay a discipline penalty of $40,000 and enforcement expenses in the amount of $24, 850, and successfully complete the REIC2600 Ethics in Business Practice course provided by the Real Estate Institute of Canada.

The licensee did not provide a Disclosure of Interest in Trade form to the buyers nor did the licensee make it clear that the licensee was not acting on the buyers' behalf. The Disclosure of Representation in Trading Services form should have been made prior to taking the buyers to view the property and discussing the terms of the offer to purchase the property. Further, the licensee should have also then given the Disclosure of Risks to Unrepresented Parties form to the buyers and explained to the buyers the risks of proceeding without the aid of a licensee. This would have clarified the licensee's role with the buyers.

This scenario highlights the importance of not only making the required disclosures at the appropriate time, but to also ensure that the disclosure is understood. Further, it is important for licensees to take care to act in a manner that is consistent with their intentions if they are not creating an agency relationship, so an implied agency relationship is not inadvertently created.

DISCLOSURES ABOUT THE PROPERTY

1. When Acting for the Seller

Sellers and licensees acting for sellers are required to make certain disclosures about the property being sold.

a. Disclosures by Seller – Latent Defects

A latent defect is a defect that is not discoverable upon reasonable inspection by observation and reasonable inquiry. A licensee acting for a seller should inform the seller of the seller's common law duty to disclose a known latent defect that renders the property dangerous or uninhabitable.[9] Failure to disclose such a defect will expose the seller to potential liability. Licensees representing seller clients also have an obligation under the Rules to disclose to all parties to a trade other than the seller "material latent defects" known to the licensee. The definition of "material latent defect" in the Rules is much broader than the common law definition that applies to sellers. The licensee's obligation to disclose under the Rules is separate from a seller's common law obligation to disclose latent defects. Licensees' obligations to disclose material latent defects are discussed in "Disclosures by Licensee – Material Latent Defects."

8 2022 BCSRE 22 (CanLII)
9 2006 BCSC 333 (CanLII) at paras. 122 and 128; affirmed 2007 BCCA 313 (CanLII)

Sellers may be asked for additional information not related to latent defects, for example, in a Property Disclosure Statement ("PDS") developed by the British Columbia Real Estate Association ("BCREA"), which includes questions that may reveal latent defects and questions that will not. Sellers may also be asked about a potential stigma, an event that has occurred on the property that does not impact the physical condition of the property but may cause some consumers to avoid it, such as a death on the property. Sellers are not required under common law to disclose information about a property unless it pertains to a latent defect. Licensees should advise their seller clients to either answer these questions honestly or decline to answer. Providing inaccurate or misleading answers could expose the seller to liability and is inconsistent with a licensee's duty to act honestly.

In a 2021 decision of the Court of Appeal of British Columbia[10] affirming a 2019 decision of the Supreme Court of British Columbia,[11] the sellers were found liable for fraudulent misrepresentation when they indicated on the PDS that they were not aware that the property had been used as a "marijuana grow operation." On the PDS that the sellers received when they purchased the property one year prior, the previous owners had disclosed that the property had been used as a marijuana grow operation. Based on this evidence, the court found that the only "reasonable and logical inference" was that when the sellers listed the property for sale, they knew that it had been used for this purpose. The sellers were liable only for nominal damages because the marijuana grow operation had not been shown to be the cause of the mould discovered on the property after the transaction closed. The licensee acted as dual agent in the transaction in 2005. At that time, the Rules did not greatly restrict dual agency. The licensee was found not to have had knowledge of the marijuana grow operation because the sellers never told the licensee that the property had been used for this purpose, there was no evidence that the licensee had seen the PDS from the previous owners, and there was nothing that the licensee observed about the property that would have indicated that the property had been used for this purpose. Consider that this case may have been decided differently against the licensee if the licensee had known that the property was previously used for a marijuana grow operation.

b. Disclosures by Licensee – Material Latent Defects

Under Section 59 of the Rules, licensees representing seller clients have an obligation, separate from a seller's common law obligation, to disclose "material latent defects" known to the licensee. A material latent defect under the Rules means a material defect that cannot be discerned through a reasonable inspection of the property, including the following:

- A defect that renders the real estate
    - Dangerous or potentially dangerous to the occupants;
    - Unfit for habitation; or
    - Unfit for the purpose for which a party is acquiring it, if the party has made that purpose known to the licensee, or the licensee has otherwise become aware of that purpose;
- A defect that would involve great expense to remedy;
- A circumstance that affects the real estate in respect of which a local government or other local authority has given a notice to the client or the licensee, indicating that the circumstance must or should be remedied; and
- A lack of appropriate municipal building and other permits respecting the real estate.

Written disclosure of the material latent defect must be provided to all other parties to the transaction promptly and before any contract for the purchase and sale of real estate is entered into, unless the seller has already provided written disclosure to those parties, for example on a PDS. The disclosure must be separate from a service agreement or any agreement giving effect to a trade in real estate.

10 2021 BCCA 412 (CanLII)
11 2019 BCSC 955 (CanLII)

A licensee's obligation to disclose under the Rules is broader than a seller's obligation to disclose under common law. A seller's obligation only extends to defects that are dangerous or potentially dangerous to the occupants or that make the real estate unfit for habitation. Therefore, a licensee may be required to disclose known material latent defects that a seller would not be required to disclose themselves. In such a case, the licensee should seek their seller client's permission to disclose those defects. If a seller client instructs a licensee to withhold disclosure of a material latent defect known to the licensee, the licensee must refuse to provide further trading services to that client in respect of that transaction.

c. Did You Know? Potential Material Latent Defects

Cannabis Growth: While growth of cannabis generally does not in and of itself constitute a material latent defect that must be disclosed, if a licensee is aware of defects on the property resulting from growth of cannabis that meet the definition of material latent defect in the Rules, this must be disclosed to potential buyers. Defects may include mould and mildew resulting from poor ventilation or unpermitted electrical work for the hydroponic system in which the plants are grown. Illegal cannabis growth may be more likely to result in material latent defects. Therefore, licensees that are aware of illegal cannabis growth on the property should have a heightened awareness of such defects. The PDS forms include a question on illegal cannabis growth.

Archaeological Sites: Archaeological sites are protected under provisions of the *Heritage Conservation Act* ("HCA")[12] and alterations require a permit. If a licensee is aware of archaeological restrictions that render a property unfit for the purpose for which the potential buyer is acquiring it (for example, subdividing or developing the property), this is a material latent defect that must be disclosed to the potential buyer.

Licensees should be aware that archaeological sites are not commonly noted on title. The HCA protects archaeological sites on private and public land, regardless of disturbance, even when the sites have not been registered or designated with the province. Inquiries regarding known or potential archaeological sites may be made with the local municipality or regional district, or directly to the Archaeology Branch through a free information requestor, or at a possible cost with a professional archaeologist.

The PDS forms include a question on archaeological restrictions affecting a property. Please note that separate from the HCA, and provincial law, some municipalities pass bylaws for municipal heritage designations.

Radon: Radon is an invisible, odorless gas that can be harmful to health when present in enclosed spaces. Health Canada recommends that remedial measures be undertaken on a property when the average annual radon concentration exceeds 200 Bq/m³ in the normal occupancy area.[13] If a licensee learns that a property has been tested for radon and that radon levels exceed 200 Bq/m3, this constitutes a material latent defect that must be disclosed to potential buyers. To facilitate this, the seller may make the disclosure on a PDS which includes questions on radon.

Once a property has been remediated, the previous radon level is no longer considered a material latent defect and therefore does not have to be voluntarily disclosed. However, radon levels may not always stay below 200 Bq/m³ following remediation. Health Canada recommends that retesting be conducted every few years, or if a major home renovation takes place. For more information on radon testing, go to Take Action on Radon. For BCFSA's practice guidelines relating to radon, go to Radon Precautions Guidelines.

12 RSBC 1996 c 187
13 Health Canada - Guide for Radon Measurements in Residential Dwellings (Homes)

2. When Acting for the Buyer

Licensees acting for buyers have a duty to use reasonable efforts to discover relevant facts respecting any property that the client is considering purchasing (Rules, Section 30(h)) and to disclose those facts to the buyer (Rules, Section 30(f)). Licensees should have discussions with their buyer clients about their needs to determine what types of inquiries should be made on the property.

3. When Acting for the Seller or the Buyer

Whether acting for the seller or the buyer, licensees have a duty to disclose to the client "all known material information respecting the real estate services, and the real estate and the trade in real estate to which those services relate" (Rules, Section 30(f)). This Rule is consistent with common law principles of agency, which require that an agent must disclose to their principal all information that would be likely to influence the conduct of their principal.[14] The disclosure may be in any form and is not required to be in writing; however, written disclosure is recommended.

In a 2019 decision of the Financial Services Tribunal (the "Tribunal"),[15] the Tribunal affirmed a decision of the Real Estate Council of British Columbia (predecessor to BCFSA) ("RECBC") that a licensee contravened then Section 3-3(f) (now Section 30(f)) and then Section 3-4 (now Section 34) [duty to act with reasonable care and skill] of the Rules. The licensee failed to disclose to their buyer client that a property that the buyer had expressed an interest in (the "Desired Property") had become available (due to a sale that failed to complete) before the contract for the buyer's purchase of another property had become unconditional, despite knowing of the buyer's preference for the Desired Property. The licensee was ordered to pay a discipline penalty of $5,000.00, be subject to enhanced supervision for a minimum of 12 months, complete remedial education courses, and pay $25,142.76 in enforcement expenses. The penalty in this case was decided under the legacy penalty regime and no longer reflects the current penalty standards.

PREPARING AND PRESENTING AN OFFER

1. Licensees' Disclosure of Interest in Trade and Disclosure of Remuneration

Before a contract of purchase and sale for real estate is entered into, licensees must disclose their interest, if any, in a proposed transaction. In addition, they must disclose the remuneration that they and their brokerage can expect to receive in connection with the real estate services provided.

a. Disclosure of Interest in Trade

Under Section 53 of the Rules, a licensee must provide a Disclosure of Interest in Trade form to the other party to the transaction when a licensee is acquiring or disposing of the real estate directly or indirectly, or when an associate of the licensee is acquiring or disposing of real estate directly or indirectly and the licensee is providing real estate services to the associate, subject to certain exceptions.

An "associate" in relation to a licensee who is an individual, as defined in Section 51 of the Rules, includes:

- A spouse or family partner of the licensee;
- A trust or estate in which the licensee, or a spouse or family partner of the licensee, has a substantial beneficial interest or for which the licensee, spouse, or family partner serves as trustee; and
- A corporation, partnership, association, syndicate, or unincorporated organization in respect of which the licensee, or a spouse or family partner of the licensee, holds not less than five per cent of its capital or is entitled to receive not less than five per cent of its profits.

Please refer to Section 51 of the Rules for the full definition of "associate" and to Section 53(2) for exceptions to the requirement to provide disclosure. The use of this form is mandatory.

14 1987 CanLII 2872 (BC CA) at para. 20
15 2019 BCFST 10 (CanLII)

The disclosure must be made promptly and before a contract of purchase and sale is entered into on BCFSA's Disclosure of Interest in Trade (Buying or Selling) form or BCFSA's Disclosure of Interest in Trade (Leasing or Renting) form, depending on the nature of the transaction. Licensees should refer to the forms for a description of the information required to be disclosed.

In a 2022 decision of the Tribunal,[16] the Tribunal affirmed RECBC's finding that a licensee failed to make proper disclosure of an interest in trade to the owners in the purchase of three properties.[17] The first property was being acquired by a corporation of which the licensee's spouse was a director. The licensee listed their spouse as an "associate" on the Disclosure of Interest in Trade form, but failed to disclose the actual corporate buyer as an associate or the nature of the licensee's relationship with the corporate buyer. On the purchase of the second property, the licensee failed to complete and provide a Disclosure of Interest in Trade form indicating the licensee and their spouse were acquiring the property. The third property was being acquired by the licensee and their spouse. The licensee provided a Disclosure of Interest in Trade form indicating that the licensee was acquiring the property but did not mention the spouse on the form. The owners in these transactions may or may not have had actual knowledge of the licensee's interest in these transactions. The licensee was also found to have contravened several other provisions of RESA and the Rules, and was subject to significant penalties.

16 2022 BCFST 5 (CanLII)
17 2021 CanLII 92520 (BC REC)

b. Disclosure of Remuneration

Under Section 56 of the Rules, when a licensee, acting for either a buyer or seller, receives or anticipates receiving remuneration, other than remuneration paid by their client, as a result of

- Providing real estate services to or on behalf of a client; or
- Recommending to the client a home inspector, mortgage broker, notary public, lawyer, or savings institution, or any other person providing products or services related to real estate (i.e. referral fees), the licensee is required to promptly disclose to the client all remuneration paid or payable to the licensee's related brokerage.

The disclosure must include the source of remuneration, the amount of remuneration, and any other relevant facts. Disclosure is not required to be made to unrepresented parties. Remuneration includes money as well as other forms of remuneration, such as a commission, fees, gains, or rewards (such as loyalty points, gift cards, or merchandise), whether received, directly or indirectly.

The disclosure may be made on BCFSA's Disclosure of Remuneration: Trading Services form but the use of this form is not mandatory. The disclosure may be made in any other record, except an agreement giving effect to a trade in real estate such as a contract of purchase and sale.

c. Disclosure to Sellers of Expected Remuneration

Under Section 57 of the Rules, if a licensee representing a seller presents an offer to acquire real estate to the seller, the licensee must disclose to the seller the following information on BCFSA's Disclosure to Sellers of Expected Remuneration (Payment) form:

- The remuneration to be paid by the seller to the listing brokerage;
- The remuneration to be paid by the listing brokerage to the cooperating brokerage, if applicable;
- The remuneration to be retained by the listing brokerage; and
- Any remuneration a licensee receives or anticipates receiving that is required to be reported on BCFSA's Disclosure of Remuneration form, as explained in the section above.

Disclosure must be made to the seller when the offer is presented and before they enter into a contract with a potential buyer. The use of this form is mandatory.

Where the offer is followed by one or more counteroffers, the disclosure must be updated and provided with each counteroffer presented by the buyer.

2. Contract-Related Disclosures

Licensees who may act for buyers or sellers are required to disclose certain information about the contract of purchase and sale. Licensees should fully explain the terms of the contract of purchase and sale to their clients so they understand their obligations. Licensees should also explain any required disclosures to clients so that they understand what is being disclosed.

a. Disclosure of Right of Rescission

As a result of changes to the *Property Law Act*[18] that came into effect in January 2023, a buyer of residential property may now rescind a contract of purchase and sale by serving written notice of rescission on the seller within three business days after the date that the acceptance of the offer was signed.

Related amendments were made to the Rules such that, under Section 57.1 of the Rules, licensees must now disclose detailed information about the home buyer rescission period to their clients. A licensee representing a buyer must provide disclosure to their buyer client when the licensee prepares an offer to acquire residential property for the buyer. A licensee representing a seller must provide disclosure to their seller client when the licensee presents the offer to the seller. Disclosure is not required to be made to unrepresented parties.

18 RSBC 1996 c 377 Section 42

The rescission period applies to most types of residential properties, but there are some exceptions, such as residential property that is located on leased land and a leasehold interest in residential property. The rescission period also does not apply to any purchase and sale of property to which Section 21 [Rights of rescission] of the *Real Estate Development and Marketing Act*[19] applies.

The disclosure must be made either on the standard form of Contract of Purchase and Sale (Residential) jointly developed by the BCREA and the Canadian Bar Association or on BCFSA's Disclosure: Right of Rescission form. The disclosure must include specific information, such as the period during which the right of rescission may be exercised and the calculation of the dollar amount that the buyer must pay to the seller for exercising the right of rescission. If there are multiple offers and counteroffers made on a property during the negotiation process, licensees may be required to provide an updated disclosure if the purchase price is amended.

b. Notice Regarding Assignment Terms

Under Section 8.2 of the Regulation, a licensee who prepares a proposed contract for the purchase and sale of real estate (other than a proposed contract for the sale of a development unit by a developer) must include the following terms in the proposed contract, unless instructed otherwise by the party to which they are providing trading services:

- The contract must not be assigned without the written consent of the seller; and
- The seller is entitled to any profit resulting from an assignment of the contract by the buyer or any subsequent assignee.

If the proposed contract of purchase and sale does not include these terms, licensees representing the seller and licensees representing the buyer have an obligation to inform the seller by providing notice on BCFSA's Notice to Seller Regarding Assignment Terms form. The BCREA's standard form Contract of Purchase and Sale (Residential) includes the above-noted terms on assignment. Therefore, notice would be required only if one or both of those terms are removed from the standard form contract, or if another form of contract (not prepared by the licensee) that does not include those terms is used.

ONGOING DISCLOSURE REQUIREMENTS

During a transaction, licensees must keep in mind that the disclosures required by the Rules are ongoing throughout the entire process. Licensees must be mindful of circumstances that may change which either triggers the need to make a disclosure or update a disclosure that was previously made. There are some disclosures that may need to be made again or updated. In particular, the Disclosure of Remuneration, Disclosure to Seller of Expected Remuneration, and Disclosure of Right to Rescission in a multiple offer and counteroffer scenario would require an updated disclosure form with each offer or counteroffer. It is the licensee's obligation to recognize when a disclosure must be made and when a disclosure needs to be updated or changed.

Conflicts of Interest

A conflict of interest could arise at any time during a licensee's agency relationship with a client. The focus of this module is a licensee's disclosure obligations when it comes to a conflict of interest. Further discussion on conflicts of interest can be found in the *Conflicts of Interest* module.

19 SBC 2004 c 41

In circumstances where a conflict of interest cannot be reasonably avoided, despite the licensee's best efforts to do so, licensees have an obligation under Section 30(j) of the Rules to disclose the conflict in writing. Some conflicts of interest must be disclosed in an approved form, such as a Disclosure of Interest in Trade form, which was discussed above. Where a conflict arises with no prescribed form, the disclosure must still be in writing. This could be in an email or in print. As stated on BCFSA's Knowledge Base, this disclosure should include at least the following:

- The name of the licensee making the disclosure;
- The name of the recipient of the disclosure;
- A full and clear description of the nature of the conflict;
- The date on which the disclosure was made; and
- An acknowledgement of receipt from the recipient.

The written disclosure will assist the client in being able to fully understand the nature of the conflict, ask questions, and to seek independent professional advice with respect to the conflict. This written record will also assist in safeguarding against misunderstandings of the conflict of interest.

If the nature of the conflict of interest changes or a different conflict of interest arises, then the disclosure must be updated as needed, and must also be done in writing. Remember, if you are not sure whether to disclose, you should talk to your managing broker. You should always disclose at your earliest opportunity.

Case Study

In a 2018 RECBC case,[20] a licensee was the agent for a buyer who was an associate (as defined by the Rules) of the licensee in the purchase of property. The licensee made the proper Disclosure of Interest in Trade to the seller. Before closing, the buyer assigned the contract of purchase and sale for the property to the licensee. The licensee did not disclose to the sellers that they would be acquiring the property after the buyer assigned their interest in the contract to the licensee. He also did not act with reasonable care and skill by adding the assignment contract to the brokerage's file without providing the disclosure of interest in trade to the seller and failed to keep their managing broker informed about the real estate services being provided. The licensee was ordered to pay a discipline penalty of $5,000, complete the Real Estate Trading Services Remedial Education Course provided by Sauder School of Business, review the Rules with their managing broker, and complete a certificate that the review was completed, and to pay enforcement expenses of $1,500. It is of note that this matter was decided under the legacy penalty regime.

This case highlights how during the course of the transaction, the situation changed such that a Disclosure of Interest in Trade form became required after the contract of purchase and sale was entered into but before completion. Licensees should remain vigilant to the evolving transaction and ensure that they provide the required disclosures at the appropriate time.

20 2018 CanLII 126920 (BC REC)

AFTER THE CONTRACT – RECORD KEEPING

The importance of disclosures has been stressed throughout this module. However, it is equally important to ensure that those disclosures are properly documented. When completing the disclosures that require the use of mandatory forms, care should be taken by licensees to accurately complete the forms. The BCFSA audit team routinely reviews transaction files when conducting brokerage audits. Missing dates and signatures on disclosure forms are just two of the deficiencies that are often found during those audits. Failure to properly document the required disclosures may lead to disciplinary measures.

Section 92 of the Rules requires brokerages to retain records for at least seven years after their creation. Brokerages should have policies in place to ensure that compliance with the Rules and the Regulation is documented within the file. Further, in the performance of their supervision duties, managing brokers should be mindful of the mandatory disclosures with an eye for accurately completed disclosure forms, as well as confirming that the appropriate disclosures were made by their licensees to the appropriate parties to the transaction.

Registrants should also be mindful of proper record keeping and ensure that all required disclosures (discussed below) are documented in their files. Section 6(a) of the MBA Regulations requires registrants to "keep such books and records as necessary for the proper recording of [their] business transactions and financial affairs." Pursuant to Information Bulletin MB 12-001, the Registrar requires that registrants keep all records relating to each mortgage transaction or potential mortgage transaction for a period of seven years.[21]

MORTGAGE BROKER DISCLOSURES

There are important statutory requirements when it comes to the disclosures that registrants are required to provide to borrower and/or lenders. These statutory requirements come from the MBA and the BPCPA. Registrants should provide complete transparency to borrowers and lenders involved in the transaction which will allow consumers to make informed decisions and make their own assessment of the factors which may be influencing the registrant acting in the transaction.

MBA

Sections 17.3 and 17.4 of the MBA require registrants to provide disclosure to borrowers and lenders of any direct or indirect interest the registrant (or any "associate" or "related party" of the registrant) may acquire in the transaction. For the purposes of this disclosure, "associates" includes submortgage brokers employed by the mortgage broker and "related party" includes a party that influences another. The full definitions of "associate" and "related party" can be found at Section 13 of the MBA Regulations.[22] Accordingly, the obligation to provide this conflict of interest disclosure is equal amongst the mortgage broker (i.e. the firm/company) and the submortgage broker (i.e. the individual).

The prescribed form for this disclosure is BCFSA's Form 10 – Conflict of Interest Disclosure Statement. A conflict of interest exists when there is a risk that the registrant may be influenced in the transaction by the interests of another party, including the registrant themselves. The purpose of Form 10 ensures that the parties to the transaction are aware of the registrant's competing interests and can make informed decisions with respect to their transaction. To that end, Form 10 must be provided to the borrower as early as possible before they sign the mortgage agreement, or any other agreement that commits the borrower to the mortgage. Form 10 must be provided to the lender on or before the advance of funds to the borrower if the funds are not being held in trust, or before the release of funds from trust.

21 MB 12-001 RECORD KEEPING REQUIREMENTS FOR MORTGAGE BROKERS (bcfsa.ca)
22 Mortgage Brokers Act Regulations (gov.bc.ca)

Section 17.1 of the MBA states that a registrant must provide a written disclosure statement to the other person where a registrant:

- Arranges a mortgage in which another person is to be the mortgagee;
- Arranges a sale of a mortgagee's interest in a mortgage to another person; or
- Sells the registrant's own interest as mortgagee under a mortgage to another person.

The prescribed form for this disclosure is BCFSA's Form 9 – Investor/Lender Information Statement. Registrants may use any of the three versions of Form 9 that can be found on the BCFSA website. Form 9 must be provided to the lender/investor before any advance is made or, if the funds are paid into trust, before the funds are released from trust. Further, the registrant must update Form 9 upon mortgage renewal. The purpose of Form 9 allows lenders/investors to receive key information about the transaction and be able to determine whether the investment is suitable for their purposes. There are some exceptions to the requirement of Form 9. Registrants are not required to provide this disclosure to "sophisticated persons," which is defined at Section 15(1) of the MBA Regulations. Further information can be found in Information Bulletin MB 11-005.[23]

BPCPA

Under Part 5 of the BPCPA, registrants and lenders are required to provide a disclosure statement, also known as the cost of credit disclosure, to individuals who borrow money for primarily personal, family or household purposes. This disclosure must be provided regardless of whether the registrant or lender is charging additional fees. When a lender is not carrying on business lending money, the registrant is responsible for providing the disclosure statement to the borrower.

The disclosure statement must be given to borrowers two days prior to the borrower incurring any obligation to the lender, or the date on which the borrower makes a payment to the lender in connection with the mortgage. This two-day period may be waived by the borrower.

While there is no specific form prescribed by Part 5 of the BPCPA, Sections 84 to 92 of the BPCPA outline the requirements that must be included in the written disclosure statement. The purpose of the disclosure statement allows a borrower to easily compare the true cost of borrowing across the various loans offered to them and ensures that the borrowers fully understand their mortgage transaction.

Case Study

In this recent case from 2023, BCFSA conducted a compliance audit of a registrant to ensure general compliance with the MBA.[24] From that compliance audit, several deficiencies were identified including:

- Failing to accurately and fully complete the required Form 10;
- Failing to accurately and fully complete the Cost of Credit Disclosure; and
- Failing to accurately and fully complete the Form 9 and retain a copy in the mortgage file.

A warning letter was issued to the registrant. During a subsequent investigation, the registrant was found to have failed to adequately complete the Form 10 in three separate mortgage applications. Specifically, the Form 10s did not include the commissions they received from the lenders and the legal descriptions of the property. The registrant was ordered to pay an administrative penalty of $20,000, as well as investigation costs.

This case highlights the importance of properly and adequately completing the required disclosure forms and the importance of good record keeping as well. Copies of the Form 9 and 10 should be kept in the file by the registrant for at least seven years (Section 17.5 of the MBA). It is prudent for registrants to also retain proof of delivery and/or receipt of the disclosures.

23 Mortgage Broker (MB) Bulletin - 11-005 LENDER DISCLOSURE STATEMENT
24 2023 BCRMB 1 (CanLII)

CONCLUSION

Disclosures made in trading services transactions and mortgage transactions play an important role in consumer protection by providing information to interested parties about their relationships with licensees and registrants, the real estate services and mortgage services being provided, and their (potential) real estate and mortgage transactions.

Licensees must ensure that appropriate disclosures are made at the appropriate stages of their relationship with a client or unrepresented party, and at the appropriate stages of a transaction. Licensees should not only provide, but explain disclosures to clients so that they understand what is being disclosed and are able to provide informed instructions to the licensee. All of BCFSA's disclosure forms for licensees can be found on BCFSA's Knowledge Base. BCFSA's disclosure forms are available in several languages, including Chinese, French, Persian, and Punjabi. Once disclosure has been provided, licensees must remember to update the disclosure if, during the course of providing real estate services, there is any substantive change to the information previously disclosed (Rules, Section 52(3)), and to retain a record of disclosures required to be provided in writing (Rules, Section 92).

Similarly, registrants should be mindful of their disclosure obligations under both the MBA and the BPCPA. Registrants should not only provide, but explain, disclosures to clients so that they understand what is being disclosed and are able to provide informed instructions to the registrant. All of BCFSA's disclosure forms for registrants can be found on BCFSA's website.

Module Four: Conflict of Interest

This module reviews the concept of a conflict of interest from the perspective of real estate trading services and mortgage brokerage services. A conflict of interest can often arise in a real estate transaction. As a licensee[1] under the *Real Estate Services Act* ("RESA")[2] and the Real Estate Services Rules ("Rules") you owe special duties to your client. One of those duties is to act in the client's best interests. As a registrant[3] under the *Mortgage Brokers Act* ("MBA")[4] you have duties regarding disclosure of direct and indirect interests that could give rise to conflicts of interest.

You may be in a conflict of interest if, for example, your interests conflict with those of the client. Or it may be that you are trying to act in the best interests of more than one party in the transaction. After we review "what is a conflict of interest?" we will examine why identifying your client is important. Next, we will review how you can avoid conflicts of interest. Then we examine how to identify and deal with conflicts of interest, and applicable legislation, rules, forms, and guidance. Finally, we will examine some specific issues relevant to conflicts. A separate module discusses conflicts of interest for licensees who are rental property managers or strata managers.

LEARNING OBJECTIVES

By the end of this module, you will be able to:

1. Explain "what is a conflict of interest";
2. Identify steps and strategies to avoid conflicts of interest;
3. Identify steps a licensee or registrant should take if a conflict of interest arises;
4. Identify and understand applicable legislation, rules, forms, and guidance; and
5. Provide examples of conflicts of interest for licensees and registrants and explain why those give rise to conflicts of interest.

04→

1 In this module, we have used the term "licensee" to mean a brokerage, managing broker, associate broker, and representative, as the context may require.
2 SBC 2004 c 42
3 In this module we have used the term "registrant" to include mortgage brokers and sub-mortgage brokers. The context may suggest one or the other.
4 RSBC 1996 c 313

WHAT IS A CONFLICT OF INTEREST?

A conflict of interest may be misunderstood, so let's be clear. A conflict of interest is not the same as a conflict. You may have an argument with your spouse or boss. You may disagree with the car salesperson as to the value of your trade-in. Those are conflicts or disputes. Your spouse, boss, or the car salesperson does not owe you any duty at law to act in your best interests. Disagreements are part of everyday life.

However, if you carry on certain professional activities, the law may set out special duties for you. If you are a licensee, then the law provides that you owe certain duties to your client. Those are called fiduciary duties. One of those duties is to act in the best interests of your client. That should stop you from acting in your own best interests. If you did propose to act in your best interests, that would be a conflict of interest. If you are a registrant, then Section 8 of the MBA provides that you may be subject to discipline if you conduct business in a manner that is prejudicial to the public interest. That could include a conflict of interest.

A conflict of interest arises when there is a substantial risk that a licensee's ability to act in the best interests of their client may conflict with the licensee's own interests or with their duties owed to another client, former client, or third party. RESA is clear about conflicts of interest for licensees. The first action to take is to avoid the conflict of interest. Section 30(i) of the Rules provides that a brokerage and its related licensees must take reasonable steps to avoid any conflict of interest. We will discuss methods to avoid conflicts later in this module.

For registrants, many activities are unlikely to give rise to fiduciary relationships. Mortgage arranging is the most likely to create fiduciary obligations. If a registrant conducting the mortgage arranging activities takes on the role of trusted advisor to the borrower, a registrant may owe fiduciary duties to the borrower and be the subject of a conflict of interest.

Whether you are a licensee or a registrant, it is important that you keep in mind the goal of consumer protection.

WHO IS YOUR CLIENT?

Licensees

A licensee must act in the best interests of the client. It is therefore important to determine "who is the client?" In a trading services world, if a seller has entered into a service agreement with your brokerage and the brokerage has named you as the designated agent, then it is clear that your client is the seller. The buyer is not your client. If a buyer has entered into a buyer agency agreement with your brokerage and the brokerage has named you as the designated agent, then it is clear that your client is the buyer.[5] What happens if the seller is your client, but you treat the buyer as if the buyer is your client? That may give rise to an implied agency relationship with the buyer, discussed in the *Agency* module, and resulting conflicts of interest.[6]

Even simple scenarios can cause issues. What if, as a licensee, you are representing sellers who are divorcing. Would it be a good idea for both spouses, who appear to be always arguing, to be your clients? What if the seller is your client but the potential buyers have been former clients many times in the past and they tell you that they are relying on you? What if you are part of a team? You may need the guidance of your managing broker to resolve these important issues. If you do not understand or properly identify "Who is my Client" it will be difficult to understand the steps to take to avoid a conflict.

Registrants

As a registrant not acting as a private lender, there are normally two parties – the lender and the borrower – in addition to you as registrant. In most circumstances, especially in private lending, the lender is not the client. The term "client" (as opposed to customer) normally indicates a fiduciary relationship. The borrower is not normally the client and therefore, there is no fiduciary relationship with the borrower. As well, in private lending there may be only one other party: the borrower.

5 There are other ways a buyer may become a client, for example through an acknowledgement on a Disclosure of Representation in Trading Services form.
6 This situation may also give rise to dual agency, discussed in the *Agency* module.

Certain categories of relationships are automatically presumed to be fiduciary relationships, such as lawyer-client. The mortgage broker relationship is not an established category of fiduciary relationship. It is still possible for that relationship to be fiduciary and could therefore give rise to a conflict of interest, if:

- A person (A) has undertaken to act in the best interests of another person (B);
- B is vulnerable to A's actions, i.e. A has some power or control over B; and
- A can act in a way that affects B's legal interests.

If these circumstances exist, a registrant may be found to be in a fiduciary relationship. In *S v S*[7] a widow (Lender) contacted a registrant because she had $25,000 to invest. The registrant invested poorly and did not make adequate disclosures to the Lender, including the fact that a borrower was going to be using part of the loan to repay a debt to the registrant. The court ordered the registrant to repay the Lender's investment with interest for the breach of the fiduciary duty to the Lender. In a 2016 decision[8] of the Financial Services Tribunal ("FST"), an appeal under the MBA, a registrant was found to be in a fiduciary relationship with a borrower who placed trust in him. The registrant was also found to be in a conflict of interest as the borrower was seeking financing to discharge a mortgage the registrant had registered against the borrower's property which was subject to a foreclosure proceeding in which the registrant was acting as the listing agent.

However, in *R v N*[9] a registrant obtained a loan commitment for a developer. The developer refused to pay the agreed fee. The developer argued, unsuccessfully, that the relationship was fiduciary. The court found, however there was little trust, confidence, and reliance placed by the developer in the registrant and therefore no fiduciary relationship. You should discuss any conflicts issues with your designated individual including any concerns that you may be in a fiduciary relationship.

DUTY TO AVOID CONFLICTS OF INTEREST

A major theme of this module is avoiding conflicts of interest. It is important to always keep in mind your duty under the Rules to avoid conflicts of interest. Managing them can be difficult. By the time you are managing a conflict much of the damage may be done in your relationship with a client. The best practice is to avoid them whenever possible. Here are some tips on avoiding conflicts of interest.

- **Be proactive in anticipating and avoiding conflicts.** You can be proactive, for example, by identifying situations that normally give rise to a conflict and asking yourself whether they apply.
- **Communicate with your clients.** Communicate early – do not let the problem "fester." Be direct and open in your communications. Ask the client if they understand.
- **Be alert to changes in a client's strategy.** New information may come to light that alerts you to a potential conflict being on the horizon.

The Conflict of Interest (Trading Services) Guidelines ("Trading Services Conflicts Guidelines") set out a number of conflicts of interest that you can anticipate and avoid. Some of them include:

- Buying your seller client's property;
- Representing yourself in the sale of your own property to a client; and
- Loaning money to clients, thereby introducing your own financial interest into a potential transaction.

For a full discussion, for licensees see the Trading Services Conflict Guidelines in the Knowledge Base. As well, remember to talk to your managing broker for further advice. As a registrant, see the Mortgage Broker Conflicts of Interest Disclosure Guidelines ("Mortgage Broker Conflicts Guidelines") and talk to your designated individual for further advice.

7 1982 CanLII 675 (BCSC)
8 2016 BCFST 5
9 2018 ONSC 259 (aff'd 2018 ONCA 534)

Licensees

The fiduciary duties of licensees, which include the duty to act in the best interests of the client, exist at common law. In other words, the duties exist outside of any statute. However, RESA and the Rules also contain many duties for licensees. For example, Section 30 of the Rules requires a brokerage and its licensees to "act in the best interests of the client." A conflict of interest arises where there is a substantial risk that a licensee's ability to act in the client's best interest may conflict with the licensee's own interests, or with their duties owed to another client, former client, or third party.

Section 30 of the Rules also requires licensees to take reasonable steps to avoid any conflict of interest and to disclose in writing any conflict. Please note these are two separate duties. A licensee must first take steps to avoid the conflict of interest. The second step is the licensee must disclose the conflict of interest in writing in accordance with the Rules. That does not necessarily mean you can continue to act, as your actions may clearly not be in the best interests of the client. However, a licensee should understand that the most important step under Rule 30 regarding conflicts of interest is to avoid them. Do not create a situation where a conflict of interest may arise. Do not be wilfully blind to the potential for a conflict of interest to arise. If you are in a situation where a conflict of interest has arisen, your disclosure should involve, in addition to the written disclosure, a full and complete discussion with the client during which, among other matters, you ask your client for instructions on how you might proceed.

Registrants – Disclosure

As discussed, there is normally not a fiduciary relationship associated with a registrant. Section 8 of the MBA does set out some broad requirements for conduct of a registrant. For example, the registrar may suspend or cancel a registration if the registrant is in breach of the MBA or its regulations, or if the registrant has conducted or is conducting business in a manner that is otherwise prejudicial to the public interest.

The focus of the MBA in relation to conflicts of interest is on disclosure of potential conflicts of interest. Section 17.3 of the MBA requires that registrants provide disclosure to borrowers in the prescribed Conflict of Interest Disclosure Statement ("Form 10"), which is found in the MBA Regulations. Section 17.4 requires the same type of disclosure be provided to lenders. The registrant must comply with the strict disclosure requirements set out in the Form 10 (the specific timing requirements are set out later in this module). The purpose of the Form 10 is to ensure that all parties working with the registrant are aware of any competing interests that may affect that registrant's advice or service to them. It should be emphasized that the registrant does not have to assess whether or not a conflict of interest actually exists. Each party can make their own assessment of the factors which may influence the registrant acting in the transaction. However, a registrant should discuss completion of the Form 10 with the designated individual if the registrant has questions about proper completion of the Form 10.

Please refer to the Mortgage Broker Conflicts Guidelines for further information.

IDENTIFYING THE CONFLICT OF INTEREST

Licensees

A conflict of interest is a threat to a licensee's ability to act in their client's best interests. A conflict of interest can arise in many different situations. Some conflicts of interest are easy to spot. For example, if a licensee acts for both a seller and a buyer, that is a clear conflict of interest. Each of the buyer and seller has different goals in a trading services transaction. Or a licensee may act for two buyers who want to purchase the same property, which is a clear conflict of interest, as both of their interests cannot be satisfied by the licensee. These two situations, which are clearly conflicts of interest for a licensee, are dealt with by Sections 63 and 64 of the Rules, which greatly restrict what is called "dual agency."

Some conflicts of interest may not be so obvious. A licensee's interest in a property, whether personal or financial, may give rise to a conflict between the licensee and the client. For example, what if a licensee loans money to a buyer client so the buyer can make a deposit on a property? The conflict here, which may not be immediately seen, is the licensee's hope that the transaction will complete so that remuneration is earned. Depending on the facts, there may be other conflicts of interest in the loan situation. As well, a licensee's personal relationship with a third party may also give rise to a conflict of interest, even if the licensee has not provided any real estate services to that third party. For example, what if a licensee is acting for a seller but the buyer is a close friend or even a family member of the licensee?

Sometimes a client believes there is a conflict when none exists. Those are referred to as perceived conflicts. A perceived conflict of interest can "sour" the relationship with the client. It may also damage your reputation or create an atmosphere of distrust. Communicate with the client. Disclose personal or professional relationships even if they do not give rise to a conflict. There is no downside to full and complete disclosure.

For further guidance on conflicts of interest, see Trading Services Conflict Guidelines on BC Financial Services Authority's ("BCFSA") Knowledge Base.

Registrants – Direct and Indirect Interests

The MBA requires disclosure by a registrant to borrowers and lenders of any direct or indirect interest the registrant or an "associate" or "related party" of the registrant may acquire in the transaction. Because the definition of "associate" for the purposes of Sections 17.3 and 17.4 includes sub-mortgage brokers employed by the mortgage broker, the disclosure applies equally to brokerage firms and individual sub-mortgage brokers.

A "direct interest" is one in which the interest is immediately known and flows directly from the transaction. It includes both monetary and non-monetary benefits. An "indirect interest" is one in which the interest is not triggered immediately or obviously but may be contingent on other factors. Examples include expected trailer fees payable if the borrower renews the mortgage with the lender or potential volume bonuses.

In a 2023 decision,[10] a registrant was disciplined for numerous breaches of the MBA, including failing to disclose to the lender the registrant's personal familial relationship with the borrower. In a 2012 decision,[11] a registrant was disciplined for numerous breaches of the MBA. Those breaches included failing to disclose to a lender that his client was refinancing his property in part to pay out a promissory note issued by a company of which the registrant was a director. The registrant also failed to disclose to lenders possible conflicts of interest where the vendor and borrower's employer were controlled by the same person and where the borrower and the borrower's employer who verified income were related.

The registrar has issued Mortgage Broker Conflict Guidelines. The registrar expects registrants to provide disclosure in a manner that is consistent with the following principles:

- **Clear and understandable –** interests should be described in simple language, free of unnecessary technical and industry terminology;
- **Comprehensive, complete, and accurate –** sufficient qualitative and quantitative information should be provided to fully describe interests; and
- **Meaningful to users –** users should have a full understanding of the interests and be able to make informed decisions and otherwise act on the information.

10 2023 BCRMB 13
11 KAC May 4, 2012

HOW TO DEAL WITH THE CONFLICT OF INTEREST

Licensees

A licensee is required, under the Rules, to take reasonable steps to avoid any conflicts of interest. If a conflict of interest arises, Section 30 of the Rules requires a brokerage and its related licensees to promptly and fully disclose the conflict to the client, in writing, separately from a service agreement or any other agreement under which real estate services are provided and separate from any agreement giving effect to a trade in real estate. Keep in mind that if circumstances in the transaction change, you may have to make further, updated disclosures. Your brokerage should also have policies and guidelines concerning conflicts of interest to help you work your way through the situation. If you suspect you have a conflict of interest, consult the brokerage policies and guidelines, and talk to your managing broker. If it is not possible to completely avoid the conflict, you should discuss the situation with your client and present options for how to resolve the conflict. In some situations, you may need to stop acting act for them. Keep in mind the requirements of the Rules. It is important to understand that a client may perceive a conflict of interest before you do. Therefore, if a client, or other person, raises the question of a possible conflict of interest, treat it seriously, even if the conflict of interest has not crossed your mind. It is also important to know that there does not have to be any financial gain or loss on any one's part for a conflict of interest to exist.

As a licensee, you will encounter conflicts of interest as some cannot be avoided. For example, it is in your best interests that transactions complete, as you will then typically be entitled to remuneration. However, the seller, for example, may not be happy with certain terms of the contract. How do you counsel the seller client? What if you are advising your seller client on two offers, one presented by a buyer's agent and one presented by an unrepresented buyer? Since your brokerage will not be splitting the remuneration with another brokerage, there may be a temptation to encourage the seller to accept the offer made by the unrepresented buyer as you will earn more remuneration. This is not only a conflict of interest but may be a breach of fiduciary duty. Please note the disclosure obligations relating to remuneration (Disclosure to Seller of Expected Remuneration (Payment)).

Financial relations with clients, such as loans to clients, should be avoided. You should always be sensitive to the issue of confidentiality. For example, if a former client, for whom you have acted in multiple transactions, is an unrepresented party in a transaction where you are acting for the other party, you should consider whether you can truly act solely in the best interests of the current client. You should also consider the risks of implied agency. See *Agency* module.

Designated agency, where the brokerage designates one or more of its licensees to be the designated agent of the client, helps to avoid many conflicts. In brokerage agency, if a licensee of a brokerage acts for a client, the licensee is doing so on the legal basis that the client is engaging the entire brokerage. So, under brokerage agency, if a licensee of the brokerage were acting for the seller, no other licensee of that brokerage could act for the buyer – that would be a conflict of interest. Under designated agency, the licensee acting for the seller owes all agency duties to the seller, but the brokerage and its other licensees do not.[12] Therefore, a licensee of a brokerage could act for a seller, and another licensee of that same brokerage could act for a buyer without that being a conflict of interest, absent any other facts. It would not be prudent for a licensee to act for a seller, and another licensee of that brokerage act for the buyer, where the buyer had been in a designated agency relationship with the licensee for the seller on many occasions.

12 The brokerage does have the duty of confidentiality.

Licensees should discuss potential conflicts of interest with their managing broker. In some circumstances, the managing broker may recommend that the client obtain legal advice. Managing brokers have been disciplined for failing to take reasonable steps to avoid a conflict of interest where they were fully aware of their representatives engaging in real estate services that gave rise to conflicts of interest. The managing brokers did not take steps to stop those activities and also did not have in place policies that addressed conflicts of interest that arose.[13]

Commercial real estate transactions differ in many respects from residential ones. Parties are often more sophisticated and have professional advisors such as lawyers and accountants to assist them during a transaction. Further, business interests can differ from individual interests. However, licensees are not relieved of their fiduciary duties merely because their clients are sophisticated business entities with legal representation. The sophistication of a licensee's clients might make them more aware of conflicts of interest.

Registrants

As a registrant, you may encounter situations involving a potential conflict of interest. Just because you have provided the Form 10 does not mean you do not have to take any further steps. A registrant should be particularly careful about conflicts of interest if they have entered into a fiduciary or agency relationship with another person. Registrants should also be cautious if their actions could amount to conduct that contravenes other sections of the MBA. What if a registrant is helping a borrower to refinance the borrower's mortgage and receives confidential information from the borrower that the borrower is going through a divorce and is desperate to refinance? The mortgage broker may decide to lend some or all of the funds themselves, and may do so at a high rate of interest. That may be conduct prejudicial to the public interest, for which the registrant may be disciplined. There is also the possibility of civil proceedings.

CONFLICTS OF INTEREST AND DISCLOSURE ISSUES

Before we look at some specific issues, here are a few practical considerations for licensees and registrants. To avoid any perceived conflict of interest, anticipate situations that might place you into a perceived conflict. Be transparent with your clients and colleagues, within the bounds of confidentiality. Be proactive - stay aware of situations where a conflict of interest may arise. Communicate early and often with clients about potential conflicts, take steps to avoid them, and promptly provide clear written disclosure when conflicts arise.

1. Timing for the Form 10

Form 10 is concerned with conflicts of interest – when there is a risk that the registrant's advice may be influenced by the interests of another party, including the registrant themself. For example, a commission payment from a lender creates risk that the mortgage broker will recommend that particular lender to maximize their own commission, rather than because the lender offers the best mortgage product for that particular borrower. The purpose of the Form 10 is to ensure that all parties working with the registrant are aware of any competing interest that may affect that registrant's advice or service to them. Therefore, it is crucial that the Form 10 be provided to the borrower as early as possible before they sign the mortgage agreement or a related agreement that commits them to the mortgage. Form 10 disclosure must be provided to a lender before release of the funds from trust or the advance of funds to the borrower if the loan proceeds are not being held in trust. Copies of all Form 10s must be kept on file for at least seven years.

13 2009 CanLII 46825 (BCREC)

2. Teams

A "real estate team" means a group of two or more trading services licensees that is registered as a real estate team. All members of a real estate team are collectively designated agents of a client. They must also be designated as such on disclosures required by BCFSA and on service agreements with the full names of all team members indicated.[14] This means every member of a team represents each of the team's clients. Because each member of a team may work closely with their team members and share or have access to confidential client information, they must collectively represent the same client(s).

This collective agency means that each licensee on the team owes the agency and fiduciary duties to each of the team's clients. That is why you cannot have one team member acting for the seller and one for the buyer in the same transaction. Members of the same team cannot represent competing buyers in the same transaction. If these situations arise, to comply with Sections 63 and 65 of the Rules, the team will need to:

- Refer each client to licensees outside of their team; or
- If both clients agree, continue to act for one client and refer the other client to another licensee.

The only possible exception to this would be if the restricted dual agency exemption under Section 64 of the Rules applied to that specific situation. In such a case, all members of the team would become dual agents of the clients. You can read more on the Real Estate Knowledge Base in the Trading Services Conflict Guidelines.

There is no legal concept of a "team" under the MBA or its regulations.

3. Family Members

The Trading Services Conflict Guidelines state that "representing another party in a transaction involving your spouse, family partner, or other "associate" is a conflict of interest you should avoid.

In a 2017 case,[15] the licensee, while acting as the exclusive listing agent for an assignment of a contract of purchase and sale ("CPS") decided the property would be suitable for the licensee's daughter and prepared an offer. The licensee did not disclose to the client that the offer or assignee was her daughter until a few days later, on the same day the offer was accepted. The licensee was found to have failed to take reasonable steps to avoid a conflict of interest by writing the assignment of the CPS on behalf of the daughter and to have failed to promptly and fully disclose the conflict of interest.

The Mortgage Broker Conflict Guidelines discuss Form 10 requirements and regulatory expectations. Section 13 of the MBA Regulations contains a definition of "associate" which includes "a relative, including a spouse of a mortgage broker" and a definition of "related party" which includes "parties that influence the mortgage broker." The guidelines provide that "direct interests" include where "a mortgage broker or family member is the lender or has ownership interests in the lender or is part of a syndicate lender, and a family member or business partner of the mortgage broker is the borrower."

14 Real Estate Teams | FAQS
15 2017 CanLII 92500 (BC REC)

4. Loans to Clients

The Trading Services Conflicts Guidelines state that you are strongly discouraged from actively courting and engaging in any type of conflict of interest, including but not limited to a number of listed examples. One of the examples in those guidelines is "loaning money to clients, thereby introducing your own financial interests into a potential transaction." In a 2019 discipline matter[16] a licensee offered to loan his clients the shortfall in funds to make an offer on Property A in excess of their budget. The licensee did not advise the clients that the loan may constitute a conflict of interest. The client's offer was not accepted. The client then made an offer and received a counter offer on Property B, still relying on the licensee's previous loan offer. The client accepted the counter offer but the licensee reneged on the loan offer. The licensee was found to have created a conflict of interest by offering to lend money. The licensee could not impartially carry out the licensee's duty to advise his clients about the benefits and risks of the loan terms, or the absence of loan terms. A loan would also provide the licensee with remuneration through loan interest and increase his commission should the clients purchase a more expensive property than their original budget allowed.

In a recent 2023 decision[17] where a licensee made a $50,000 loan toward a $90,000 deposit the hearing officer adopted BCFSA's submission that:

> "When a licensee makes a loan to a client, a conflict of interest arises because the licensee introduces their own interest into the transaction and cannot maintain their loyalty of fulfilment of agency duties owed to a client. For example, in a situation where a licensee loans funds towards the deposit or the purchase price of a property, a risk of the licensee being adverse in interest to their own client can arise should the transaction not complete for any reason."

CONCLUSION

Conflicts of interests should be identified and avoided at the earliest opportunity. Managing a conflict of interest is not the preferred option. However, unavoidable conflicts of interest and potential conflicts of interest, if dealt with as early as possible and properly disclosed, can be managed. Left unattended or not fully disclosed, they can lead to disciplinary action, civil lawsuits and can damage the reputation of a licensee or a registrant. All brokerages and mortgage brokers should have policies in place to deal with conflicts of interest.

16 2020 Canlii 36927 (BCREC)
17 2023 BCSRE 18

Module Five: Contracts

Contracts are the foundation of a real estate practice. However, contracts require much more reflection than simply filling out the standard forms. In this module, you will learn about situations where the identification of who can negotiate and enter into contracts may not be straightforward. You will study some contractual issues to consider related to tenant-occupied properties and municipal relocation policies. A refresher on the home buyer rescission period is included. We discuss of contract termination: both contracts of purchase and sale and contracts between agent/brokerage and client. Finally, we discuss title clauses and highlight certain title encumbrance issues that licensees and their clients should be aware of.

LEARNING OBJECTIVES

After completing this module, you will be able to:

1. Understand the importance of taking instructions from the appropriate client(s);
2. Identify the tenant relocation notice periods and procedures under the *Residential Tenancy Act*;[1]
3. Describe how to effectively terminate a contract that includes a termination clause; and
4. Explain why a licensee must carefully review encumbrances registered on title to a property.

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IDENTIFYING THE CLIENT

"Who is the client in a real estate transaction?" seems like it should not be a difficult question to answer. However, given the complexities of property ownership and the different circumstances in which properties are bought and sold, there may be some uncertainty surrounding who is, in fact, the client. Therefore, a licensee should always turn their mind to that question.

1. Why is Client Identity Important?

The importance of confirming who is the client is likely obvious on its face. All of the specific areas it impacts may be slightly less obvious. Client identity is critical to a number of issues when dealing with real estate contracts.

a. Financial Transactions and Reports Analysis Centre ("FINTRAC") Reporting

FINTRAC rules require clients to be identified to comply with the anti-money laundering policies that have been in place in British Columbia ("B.C.") and across Canada for some time. In order to determine what person or entity needs to be identified and how, a licensee must determine the specific identity of the buyer or seller client, as the case may be.

b. Multiple Sellers/Buyers/Lessors/Lessees or Corporate Clients

When there are multiple clients or corporate clients, a licensee must be careful to obtain instructions from the correct individual(s). This is made more difficult where there are language barriers, or some individuals involved are located in the jurisdiction and some are not. While ease of communication and convenience may suggest that communicating with one or two of a group is sufficient, future problems may arise unless the licensee and the clients are all clear about who can speak for whom.

In particular, a licensee should be clear on the identity of the client group (for example, in a land assembly or multiple investors) and which person or persons are authorized by the group to provide instructions. If the group or the corporation with a number of directors and/or owners is content to have one person or a smaller group speak for it, the licensee should have the client group appoint their representative(s) in writing and be clear about what instructions that representative group can and cannot provide without consulting with the entire group.[2] There may be specific corporate steps or forms required to properly appoint a representative so a licensee should canvass that with their clients and direct them to seek legal advice and legal assistance as necessary. Written instructions of this nature allow a licensee to rely on them if the licensee is later challenged about why they followed the instructions of a certain person or group.

c. Divorcing Couples

One of the unfortunate circumstances where a property is sometimes sold is in the context of a divorce or end of a common law relationship. Absent an agreement or court order, if both spouses are on title to the property, both are entitled to give instructions to a licensee and to agree on the ultimate sale terms. However, it is fairly common for there to be court orders or settlement agreements that change who can give instructions and potentially impose limits on what a title holder can do with property. Therefore, if a listing agent is aware that a property is being sold as a result of a relationship breakdown, it is best practice to confirm with the clients whether a court order or settlement agreement is in place. If so, the licensee should obtain a copy to determine who is entitled to provide instructions and sign transaction documents with respect to the property. Interpreting the impact of a settlement agreement or court order on a licensee's obligations will likely require legal advice so a licensee should immediately involve their managing broker in these circumstances. The transaction may be further complicated if each party has a different licensee acting for them.[3]

2 Authority to provide instructions is different than signing authority. Signing authority is discussed, in part, in the Powers of attorney section below but a full discussion is outside the scope of this module.
3 See this BCFSA consent order for a regulatory decision discussing of a number of minefields for licensees in the context of a divorce.

d. Powers of Attorney

A specific type of appointment of a representative is a power of attorney. While it is possible to informally appoint a representative to provide instructions or communicate with a licensee for a broader group, that type of informal appointment cannot give the representative signing authority for any other person. Regardless of who provided instructions, all persons on, or to be put on, title must sign the appropriate contract and title documents.

An attorney appointed under a power of attorney, on the other hand, is authorized to stand in the place of the person appointing the attorney for all purposes described in the power of attorney document itself. This means the attorney can engage a licensee, negotiate the terms of a transaction, and sign the contract and property transfer documents on behalf of the person who appointed them. Some powers of attorney have limitations on what the attorney can do. Therefore, a licensee should review the power of attorney. If any questions arise, the licensee should seek the advice of the managing broker.

Given the significant legal consequences of appointing an attorney under a power of attorney, in British Columbia they must be signed in front of a lawyer or notary, who will ensure that the person appointing the attorney is doing so freely and is clear on what type of power(s) they are allowing the attorney to assume. If the power of attorney is made outside of British Columbia, extreme caution is warranted and appropriate legal advice is almost certainly necessary to ensure the form and content is effective.

Anytime someone other than the title holder or person whose name is intended to be included as buyer on a contract of purchase and sale is contacting a licensee, the licensee should ask whether that person is acting under a power of attorney or some other authority. When a licensee is engaged by a person who is acting as the attorney for another, they should make sure to get a complete copy of the notarized power of attorney document and discuss the appointment with their managing broker if powers of attorney are unfamiliar to them. The brokerage may need to seek legal advice on the power of attorney document, its validity, and its scope. It should also be checked by a lawyer in advance to make sure that it is a form that is registrable in the land title office. If it is not, it may hold up the transfer of title on closing.

Once the power of attorney is validated, the licensee may rely on the attorney for instructions as well as to provide whatever signatures are required on contract documents. A recent related group of discipline cases highlight potential issues when a power of attorney document is not adequately validated.[4] A relatively new licensee was contacted by way of cold call by a fake seller to list property under a fraudulent power of attorney document. While the licensee was originally going to act as the listing agent, the fake attorney refused to sign an exclusive listing agreement and ultimately the licensee simply assisted with the transaction. Some negotiations ensued, and the buyer accepted a counteroffer from the fake attorney before the licensee obtained a complete copy of the power of attorney document. The buyer was represented by another agent at the same brokerage.

4 2023 BCFSA 43; 2023 BCSRE 47; 2023 BCSRE 35

The copy of the power of attorney that was eventually provided was not fully executed on the date the contract of purchase and sale was made, and described the various individuals involved as having different occupations than had been previously communicated. Despite issues having been raised by the conveyancing department and at least one managing broker, the transaction proceeded and the property was ultimately transferred out of the name of the legitimate owner. The licensees were advised to seek legal advice prior to the transaction closing, but they did not do so.

The licensee contacted by the fake attorney was found to have committed professional misconduct under Section 35(1)(a) of the *Real Estate Services Act* ("RESA")[5] and ordered to pay a $100,000 discipline penalty and $7,000 in BC Financial Services Authority ("BCFSA") expenses, to undergo remedial real estate training at their expense, and supervision conditions were imposed on their licence for six months. One aggravating factor was the licensee having failed to adequately address the suspicious features and inconsistencies in the power of attorney during the transaction. That resulted in a finding that the licensee had wrongfully provided trading services to a person they knew or reasonably ought to have known was not duly authorized to deal with the property, and failed to take reasonable measures to alert anyone of the suspicious circumstances. This was so, despite the seller at all times acting as unrepresented.

The buyer's agent was ordered to pay a $50,000 fine, $5,000 in expenses, to complete remedial training, and was subject to enhanced supervision for at least one year. The brokerage was ordered to pay a $25,000 fine, $5,000 in costs, and to institute a comprehensive series of training courses for its agents related to identification of suspicious transactions. The true owners commenced a civil lawsuit, naming the agents and brokerage, among others. That civil lawsuit was resolved out of court on terms that are not public, but it represents another consequence of the failure to verify the power of attorney.

This group of decisions was made in a somewhat unusual circumstance since none of the licensees were acting on behalf of the seller, which was the party who allegedly organized the power of attorney. However, given that there was no licensee acting for the seller, the validation of the power of attorney could only have happened through those agents actually involved in the transaction.

e. Court-Ordered Sales

There are certain circumstances where the owner of real estate loses control over the ability to retain title to and otherwise deal with their property. The most common circumstances where this arises is where there is a mortgage default and the lender is able to take steps to foreclose on the property, or where there is a legal judgment against a property that is registered against title and the judgment holder takes steps to sell the property to satisfy the judgment.

In a mortgage default situation, the owner has some time after default to try to pay back the debt, either by selling the property on their own or obtaining financing in some other way. However, if a period of time elapses and the debt remains unpaid, there are mechanisms where the mortgage lender can apply to court for conduct of sale, which, if granted, puts the lender in charge of the sales process rather than the registered owner(s).

In cases where the property is being sold pursuant to a court order, a lawsuit will have been started and there will be a certificate of pending litigation ("CPL") registered on title. This is one flag on title that will alert licensees to the possibility that a court proceeding or order may impact what the registered owner(s) can do with the property. There are a number of reasons that a CPL may be registered on title to a property, which are beyond the scope of this module, but in the context of a court-ordered sale is one of them.

5 SBC 2004 c 42

Where a property is being sold under a court-ordered sale, the court order will specify who is authorized to provide instructions and sign documents on behalf of the property owner(s) to transfer and otherwise make decisions about the real estate in issue. Similar to a power of attorney situation, those appointees are the persons who are the listing agent's clients rather than the property owner.

Court-ordered sales are another type of transaction where it is important to involve the managing broker, since they are not common and have some significant intricacies and potential complications. It may, in fact, be wise to refer the transaction and/or client to a licensee who has experience dealing with court-ordered sales on a more regular basis. This is especially so if the court order affects the rights of some owners of a jointly-owned property and not others.

f. Parties to be Bound by a Contract

The parties' names that are put on any contract for sale or lease are the parties who will be bound by the terms of the given agreement, with some limited exceptions that are outside the scope of the discussion in this module. This may be the same or different from the person or persons providing instructions. It is important to be clear if you are speaking with a group which specific group members intend to be a party to the contract in issue, and who is simply involved in providing advice and input.

It may also be prudent for a group to use a corporation as the party to a contract rather than naming a list of individuals. While a licensee obviously cannot give clients any legal or accounting advice about the pros and cons of a corporate buyer or lessee, the licensee needs to get clear instructions, ideally in writing, on whether or not to make offers in the name of a company or in the name of one or more individuals.

The title search will disclose the legal owner(s) so there is less opportunity for confusion about the proper parties to a contract when acting on behalf of a party who owns the property. That said, it is important for any contract document to be in the name of the intended owner. If the intended owner is misnamed that potentially threatens the enforceability of the contract. The verification of an intended owner must be carefully done, particularly if a licensee is dealing with a less sophisticated business person that may have or use a corporation to do business but who may not recall details or specifics.

2. Client Mental Capacity

Another related reason to be very clear on who is the client arises where there may be issues with a client's mental capacity and ability to understand the transaction. The general principle is that in order to enter into an enforceable contract, a person must have the mental capacity to do so. The goal of this principle is to ensure that a person is capable of understanding the contract terms and appreciating that they are committing to certain legally binding obligations. This is one of the reasons that adults are generally not able to enforce contractual obligations made by people under the age of 19. This protects minors from committing to contract terms in favour of adults that they may not be able to fully grasp.

Proving that someone truly has insufficient mental capacity, rather than other kinds of mental health or medical issues, is very difficult. These distinctions are not always easy to determine, and questions about mental capacity can create a minefield of legal, privacy, and human rights issues. However, though difficult, they may need to be answered to properly protect a person's interest in buying or selling property.

If a licensee has any concerns about a client's capacity, they should reach out to their managing broker. Whether or not someone has mental capacity to provide instructions or enter into contracts is a legal and medical determination and cannot be definitively made by any licensee. However, a managing broker can assist in finding the right resources to consider that determination if concerns are raised.

IMPACT OF CONTRACT TERMS ON TENANT-OCCUPIED PROPERTIES

A buyer purchasing a tenant-occupied property generally cannot evict the tenant. There are some exceptions to that principle but they are limited, and exercising those exceptions has to be done specifically as prescribed by law.

1. B.C. *Residential Tenancy Act* ("RTA") Protections

It is important to note that some of RTA tenancy protections are poised to change due to recently enacted amendments. The obligations discussed below were accurate as at the time this module was published. However, licensees dealing with tenanted properties should make sure to keep current about the changing rules, particularly given that some changes have already been authorized and are simply not yet in force.

a. RTA Termination of Tenancy Rules

Section 49(5) of the RTA states that a selling landlord may end the tenancy if (a) the agreement to sell is made in good faith, (b) all the conditions on which the sale depends have been satisfied, and (c) the purchaser has asked in writing that the landlord give notice to the tenant that the buyer, or the buyer's parent, spouse or child or the parent or child of the buyer's spouse, intends, in good faith, to occupy the unit. There is no way to legally terminate the tenancy on the basis of a sale of the rental unit if the buyer is going to rent to someone other than the list of close family members noted above. This is also not possible in a building with five or more rental units where the landlord is the owner of the units.

Section 49(2) of the RTA currently says that the effective end date of the tenancy has to be at least three months from the date notice is received by the tenants unless otherwise prescribed by the regulations. Notices must be generated and issued through the Residential Tenancy Branch Landlord Use Web Portal that was established as part of these legislative changes and is available online. The only different notice period prescribed in the regulations as of the date of publication is a three-month notice period for terminations under Section 49(5) where a purchaser has requested an authorized termination of the tenancy. Any notice also has to be effective the day before the day of the month, or other period, that rent is payable. It also does not apply to shorten the length of a fixed-term tenancy; the termination date cannot be earlier than the date specified as the end of the tenancy in the fixed-term lease.

A tenancy can also be terminated on four months' notice for major renovations or repairs, or conversion of the unit into strata, non-profit or cooperative housing, non-residential use, or into a caretaker's unit (Sections 49(2) and (6) of the RTA).

A buyer and seller cannot contract out of the protections that the RTA provides to tenants.

As a result of these tenancy complications, when assisting a client to buy a tenant-occupied property, a licensee should ask the buyer what their intentions are with respect to occupying, renovating, or developing the property. If the tenancy can lawfully be terminated in accordance with the RTA, a licensee should make sure that the appropriate requests are made of the landlord in writing to terminate the tenancy in time for closing, and that the closing and possession dates in the contract of purchase and sale give enough time after subject removal to give proper length of notice to the tenants. The notice will not be effective unless the termination date is set for the end of the rental payment period plus the prescribed notice period, as a minimum, and the landlord has used the forms and process of the Residential Tenancy Branch Landlord Use Web Portal.

The sample contract clauses contained in the BCFSA Knowledge Base address some of the tenancy termination issues discussed above. In particular, the following is a clause that can be included in a contract of purchase and sale of a tenanted property that directs the seller to provide termination notice, as agreed:

> If the Seller has received from the Buyer a request to give a notice to end tenancy in accordance with Section 49 of the *Residential Tenancy Act*, the Seller will promptly give a notice to end the tenancy in accordance with the provisions of the *Residential Tenancy Act* to any tenants of the Property.

b. Compensation to Tenants

Over and above the notice requirements to terminate a tenancy, tenants are also legally entitled to receive compensation. Section 51 of the RTA requires that the tenant be provided with one month's rent as compensation for any lawful termination.[6] If a tenancy is to be terminated on sale, the contract of purchase and sale should make clear who is responsible to pay that compensation so that there is no confusion.

Section 51(2) of the RTA also provides that a tenant may be entitled to receive 12 times the monthly rent in compensation if (a) steps have not been taken to have the person for whom the tenancy was ended move in, or (b) if the unit is not used for the stated purpose for at least twelve months, beginning at a reasonable time after the effective date of the notice ending the tenancy, unless there are extenuating circumstances or a different period of not less than six months is prescribed in the regulations. The contract of purchase and sale should also address responsibility for those potential damages, since the tenant can claim them against the buyer or the seller.

Responsibility for these various potential tenant costs and the ability to collect them after closing are relatively complex and the drafting to allocate the risk and to confirm the parties' intentions should be done by a lawyer.

6 The RTA amendments not yet in force will set compensation amounts and once set, the amount payable will be the greater of one month's rent or the prescribed amount, or 12 times the monthly rent or the prescribed amount, as applicable.

c. Rights of First Refusal

Section 51.2 of the RTA also creates a right of first refusal for tenants who are ordered to vacate for renovation and repair under Section 49.2. Where the rental unit is in a residential property with five or more units, the displaced tenant is entitled to enter a new tenancy agreement respecting the rental unit upon completion of renovation or repairs if, before the tenant vacates the unit, they give the landlord notice of their intention to do so. Licensees dealing with properties that are or are soon to be under renovation or repair should be aware of these tenant rights and whether or not they have been exercised so that they can inform their clients accordingly.

2. Additional Protections – Municipal Requirements

The RTA provides provincial-government imposed protections to residential renters in B.C. However, many municipalities have instituted additional protections for tenants under their jurisdiction.

For example, in the City of Vancouver, rezoning and development applications from February 15, 2016 forward, need to comply with the Tenant Relocation and Protection Policy.[7] That policy provides for minimum compensation amounts payable to tenants who must relocate as a result of a new development that is based on the length of tenancy. It also provides minimum compensation for moving costs and obliges development applicants to assist with locating alternative accommodation options for displaced tenants, on request. Finally, where the redevelopment is for market housing, similar to what is provided for under the RTA, displaced tenants are to be offered a right of first refusal over rental units on completion of the project at a 20 per cent discount off starting market rents.

Further, particular projects, such as the Broadway Plan[8] that extends skytrain services east west along Vancouver's Broadway corridor, may have additional tenant protections built into the municipal approvals granted to the developers of specific larger projects, over and above the generally applicable policy.

Many other municipalities around the province have instituted tenant relocation policies,[9] each of which have their own particular eligibility requirements, application process, and compensation scheme. Licensees should familiarize themselves with the policies in place in the areas in which they practice, and ensure they keep up to date with any changes. This is also an example of why a licensee practicing outside regions they are familiar with may be problematic and may, in fact, be a breach of their obligations under Section 30 of RESA.

The responsibility for complying with these compensation and other obligations should lie with the buyer/developer. However, licensees should consider whether some language that makes division of responsibilities related to tenants clear when dealing with contracts of purchase and sale of tenant-occupied properties that are, or may be, on a future development site.

7 Vancouver Tenant Relocation and Protection Policy
8 The Broadway Plan
9 A brief representative, but non-exhaustive list of municipalities with tenant relocation policies are: District of North Vancouver, Metro Vancouver, Port Moody, Victoria, Kitimat, among many others.

HOME BUYER RESCISSION PERIOD

On January 1, 2023, the B.C. *Property Law Act* ("PLA")[10] was amended to establish the home buyer's rescission period ("HBRP"): a purchaser's right to rescind, within a three business-day period, a contract of purchase and sale for residential real property.[11] "Rescission" at common law is a technical legal term which means all parties to a contract are to be put back into the place they were in prior to the contract having been made. In other words, it makes it as if the contract never existed. The PLA creates a form of statutory rescission, which erases most of the contract's obligations, though the rescinding buyer does have to pay the prescribed fee. In practical terms, this means the seller is free to enter into another contract with another buyer and the buyer gets their deposit back, minus a prescribed fee, which must be disclosed on the contract of purchase and sale.

If a purchaser chooses to invoke their right of rescission within the rescission period, the purchaser must pay to the seller 0.25 per cent of the purchase price as compensation. If the buyer exercising their rescission rights paid a deposit under the contract of purchase and sale, the rescission fee is payable to the seller out of the deposit and the remainder of the deposit must be "promptly" released to the buyer. Stakeholders are entitled to pay out monies held in trust in accordance with Section 6 of the PLA regulations related to the HBRP[12] without further agreement or direction from the parties.

To protect the integrity of the buyers' protection period, the right of rescission cannot be waived by the parties, which means a contract of purchase and sale cannot specify that the HBRP will not apply. The HBRP applies to all defined "residential real property" in B.C. other than leasehold properties, leasehold interests, properties sold at auction, or court-ordered sales. Residential real property includes single-family homes, duplexes, townhouses, strata properties, cooperative ownership, and manufactured homes affixed to land.

The policy behind the HBRP was to allow buyers to use this "cooling-off" period to complete due diligence activities that will assist them in making an informed decision about a purchase, given that the state of the real estate market at various times in certain communities is such that those activities are difficult or impossible to do prior to submitting an offer. Due diligence activities can include confirming financing and insurability, reviewing relevant documents regarding the property, and undertaking inspections.

The HBRP has a real impact on home buyers, but also on sellers and real estate licensees on both sides of a transaction. Sellers will need to understand the risk of buyers walking away. Real estate licensees will need to be aware of the related risks, from both the buyer's and seller's perspective, in order to properly advise their clients and to be in a position to comply with their disclosure obligations under 57.1 of the RESA Rules. RESA was amended at the same time as the PLA to make clear that failure to comply with the HBRP may amount to professional misconduct on the part of a real estate licensee, resulting in potential discipline consequences.

10 RSBC 1996 c 377
11 Note the HBRP does not apply to contracts to which the Real Estate Development Marketing Act (SBC 2004 c 41) applies. That statute imposes its own rescission regime and timelines, discussion of which is outside the scope of this module.
12 Home Buyer Rescission Period Regulation

TERMINATING THE CLIENT RELATIONSHIP

Contracts of purchase and sale and leases are the contracts that get the majority of attention when discussing real estate contracts. However, the relationship between brokerage and client is also a contractual one. These contracts, or service agreements, set out the scope of work, commission payable, and the time period of the engagement, among other parameters of the working relationship. They are generally agency agreements so will also impose fiduciary obligations on the brokerage and designated agent named in the agreement, subject to a contrary intention set out in the agreement.[13] That said, the contractual relationship between brokerage and client is often much less complicated than contracts of purchase and sale, and is normally not something the parties turn their minds to with any regularity. The exception to that is when one of the parties wants to terminate the service agreement.

1. Termination Steps

Once a party decides to terminate the service agreement, to do so effectively and in a way that is not going to create a claim by the other party for damages, that party needs to follow the termination procedure the service agreement specifies. That normally requires providing written notice to the other party in a particular form, to a particular person or address, within a certain specified notice period. If the service agreement simply specifies written notice without specifying the form of delivery, email notice is fine. Unless the service agreement says otherwise, it is best practice to deliver written termination notice in a form such as email or courier, which generates a delivery receipt and can be used as proof of notice of termination at a later date, if required.

It is unlikely but not impossible that the service agreement in question does not have a specific termination clause. In that case, a party will only be able to terminate the service agreement if the other party significantly breaches the contract. If you are party to a real estate service agreement without a termination clause, you will require legal advice about your termination options.

2. Consequences of Termination

Once a party decides to terminate the service agreement, they must carefully follow the termination steps set out in the agreement to do so effectively. Failure to do so risks a damages claim from the other party and/or an argument that the service agreement is not, in fact, terminated.

With respect to termination of a listing contract in particular, each brokerage will have their own form but there is often a provision in the listing contract that entitles the brokerage to a commission for a certain time period after termination. This term is intended to discourage clients from taking advantage of a licensee's assistance to find a buyer and then terminating the listing to avoid paying commission.

It should be noted that it is always open to the parties to a contract to negotiate different termination steps or consequences if they jointly agree that a different outcome makes more sense. For example, in some cases a licensee or brokerage may not hold their former client to a post-termination commission obligation, for various business or relationship reasons. The issue with negotiating a different outcome at that time is that is by the time parties are discussing termination of a contract, it is likely that some sort of problem has arisen, which may make it difficult for the parties to negotiate calmly or agree on different terms.

13 For example, the BCREA standard Multiple Listing Agreement used for designated agency provides that an agency relationship exists only with the Designated Agent.

TERMINATING THE CONTRACT OF PURCHASE AND SALE

This module does not explore in detail the circumstances where a party may be entitled to terminate a contract of purchase and sale. However, if a contract of purchase and sale is lawfully terminated by the parties, there are some loose ends that may need tying up.

Often, the contract itself specifies what circumstances may lead to its termination. The following sections of the standard form contracts of purchase and sale drafted by the British Columbia Real Estate Association and the Canadian Bar Association BC Branch ("Standard Residential CPS" and "Standard Commercial CPS") speak to circumstances where the contract might terminate:

- Section 2 (Standard Residential CPS) and Section 15 (Standard Commercial CPS) says that where a buyer fails to pay the deposit as agreed, the seller may terminate the contract;
- Section 3 (Standard Residential CPS) and Section 16 (Standard Commercial CPS) says where a condition precedent is not waived or declared fulfilled by the party benefitting from that condition, the contract is terminated; or
- Section 12 (Standard Residential CPS) and Section 28 (Standard Commercial CPS) says unless the buyer pays the amounts owing and enters into such formal agreements to pay any balance of the purchase price on or before the completion date, the seller may terminate the contract.

One of the more significant issues is what happens to the deposit that is being held in a stakeholder trust account on termination. In a lawful or legal termination, as opposed to a purported termination that the terminating party does not have a right to, unless the deposit has become non-refundable according to the contract's terms, the seller must pay the deposit back to the buyer. A deposit being paid directly to the seller does not make it a non-refundable deposit. Any deposit being held by a stakeholder brokerage cannot be released without the written direction of all of the parties to the relevant contract, unless one of the specific circumstances outlined in RESA Section 30(1) (a) through (f) apply or as specified in certain RESA or PLA regulations (see Section 30(2) of RESA).

If the contract has terminated because of a wrongful act on the part of the buyer, the seller may be entitled to retain the deposit and to pursue the buyer for other damages. For example, if the seller enters into a new contract of purchase and sale for the property after termination at a lower price than the original buyer was willing to pay, the seller may claim against the original buyer the difference between the original buyer's contract price and the eventual sale price unless there is an agreement to the contrary or a right to terminate. If a buyer is going to avoid liability for additional damages, it is wise to negotiate a release of possible claims with the seller that accompanies the termination to make that clear.

Where clients want to terminate a contract of purchase and sale, licensees should immediately recommend they get legal advice to assist them in doing so. A lawyer can help negotiate termination rights as well as draft the appropriate contract language to implement what the parties have agreed, including any releases. Releases are common but are technical legal documents that a lawyer is best-placed to draft.

TITLE CLAUSES

Section 9 of the Standard Residential CPS and Section 22 of the Standard Commercial CPS deal with the exceptions to the seller's obligation to pass along title free and clear of encumbrances on the sale of property. The main encumbrances on title the buyer normally wants removed are mortgages and other financing charges. However, there may be other charges on title in favour of government, public utilities, or neighbouring properties that will stay registered and thus bind the buyer.

The Standard Commercial CPS specifically contemplates including additional permitted encumbrances, or other charges on title that the buyer does not require be removed. These may relate to charges required to operate the business located on the property, other encumbrances that will not impede operations or detract from the property's value, or ones that cannot practically be eliminated, such as for utilities or repair and maintenance access for infrastructure.

The other thing to keep in mind when thinking about the title clause is that not all encumbrances are to be avoided. A buyer may be looking at a property that benefits from an access easement over a neighbouring property, a right of way allowing certain other types of access for utilities or other things, or that includes a long-term tenant lease. If an encumbrance is not on title, then it likely will not pass to the buyer when title to the property passes unless a separate agreement doing so is negotiated. Therefore, while title searches should be carefully reviewed to be clear about what encumbrances will stay, they should also be reviewed to make sure that any expected encumbrances are included. If a desired encumbrance does not show up on title, it should be discussed with the seller to find a solution.

The Title section in the BCFSA Knowledge Base is an excellent resource to start with when considering CPS clauses to deal with which encumbrances can and should remain or be removed from title. See also the *Easements and Encroachments* module for a discussion on this topic.

CONCLUSION

As this module highlights, dealing with real estate contracts requires a high level of attention to detail. The law surrounding interpretation of contracts has long emphasized that every word in a contract should be given meaning, which means all the words written and reviewed should be done so carefully. It often simply requires a moment of reflection, or advice from a managing broker or a lawyer, to identify issues that require further follow up or explanation. Complicated ownership structures and rights to deal with property, tenant-occupied properties, cases of contract termination, the home buyer rescission period context, and title encumbrances are all cases where some extra attention by the licensee will avoid significant problems in the long run.

Module Six: Easements and Encroachments

This module discusses easements (including statutory rights of way) and encroachments and some of the ways that they may impact real property transactions and financing, as well as the value, use, and ownership of real property.

LEARNING OBJECTIVES

By the end of this module, you will be able to:

1. Identify the key differences between easements, statutory rights of way, and encroachments;
2. Understand some of the purposes for which easements are used and how they can have a positive or negative impact on the use and value of real property;
3. Understand how encroachments arise and are identified, and some of the legal remedies available to deal with them; and
4. Be aware of the provisions of the British Columbia Real Estate Association / Canadian Bar Association BC Branch ("BCREA / CBABC") standard form contract of purchase and sale when dealing with easements and encroachments.

06

EASEMENTS

What is an Easement?

In general terms, an easement is usually a legal right to enter onto and use real property for a specific purpose. Easements may also prevent or restrict certain uses of land. An easement is considered an interest in land. As such, it can be registered on title to the affected properties.[1] However, it is not an ownership interest that entitles a person to possession of land, like fee simple ownership or a tenancy under a lease. Generally, easements must be between two parcels of land, but the affected properties do not necessarily need to be owned by different persons (see Section 18(5) of the *Property Law Act*[2]).

The most basic form of easement is a right to travel through one legal parcel to access another parcel. This is sometimes referred to as a "right of way." However, easements can allow many other uses of the affected lands. For example, easements might include rights to park vehicles, share a driveway, or swing the boom of a construction crane through the air space of the affected lands.

Easements can also allow for utilities such as water, electricity, gas, and telecommunications on private lands, though typically these easements take the form of statutory rights of way, a special type of easement discussed later in this module.

One of the key features of all easements, other than statutory rights of way, is that they bind one parcel of land for the benefit of another parcel. The legal term for the parcel that is bound by the easement is the "servient tenement," though it can also be referred to as the "burdened lands" or a variation of that term. The parcel that benefits from the easement is referred to as the "dominant tenement," but can also be described as the "benefitting lands" or a variation of that term. While the owner of the benefitting lands may be entitled to exercise the easement rights, the easement rights are tied to the lands and not the individual. Upon the transfer of benefiting lands to a new owner, the new owner becomes entitled to exercise those rights and the old owner can no longer do so. Similarly, on the transfer of the burdened lands, the new owner's ownership interest is automatically subject to the easement rights.

1 A registered easement will appear on a title search of the servient tenement under the heading "charges, liens and interests" and on a title search of the dominant tenement under the heading "legal notations."
2 RSBC 1996 c 377

While there are several legal requirements for a valid easement, the legal concepts involved are often complex and it is not necessary for licensees to be familiar with them. Accordingly, they are outside of the scope of this module. Licensees should always recommend that their clients obtain legal advice in order to determine the nature, effect, and enforceability of easements.

Easements by Express Grant

The most common type of easement that licensees will encounter is easements created by express grant. This is an easement arising from a written agreement between the owners of the benefitting and burdened lands. These easements are typically registered on both parcels in the land title office ("LTO"), to ensure that they are binding upon and benefit subsequent owners of the affected lands. Registration is not required for a valid easement; however, an unregistered easement will only bind the original parties and not subsequent owners.[3]

Easements Implied by Statute

In some cases, easements are implied or created by legislation rather than by agreement between property owners. Easements implied by statute may not need to be registered on title in order to be effective and binding on the owner and any subsequent owner.

One example that will be particularly relevant to licensees dealing with strata property is implied easements under Section 69 of the *Strata Property Act* ("SPA").[4] This section provides, among other things, that there exists an easement in favour of each strata lot in the strata plan and the owner of each strata lot for:

- The strata lot's vertical and sideways support by the common property and by every other strata lot capable of providing support;
- The passage or provision of certain utilities and other services, through or by means of any pipes, wires, and other facilities existing in the common property or another strata lot; and
- Except in the case of bare land strata plans, shelter of the strata lot by every part of a building that is common property, or another strata lot that is capable of providing shelter.

Similar easements are implied under the SPA in favour of the common property and the owners of the common property in the strata plan. These easements include a right of entry to inspect, maintain, repair, and replace the shelter, support, services, and facilities.

These implied easements may be enforced by the strata corporation on its own behalf or on behalf of one or more owners to the same extent as if the strata corporation were the owner of the benefiting lands. In this way, enforcement costs can be shared amongst all the owners.

Equitable Easements

In some circumstances, the courts can apply equitable principles to find that an easement exists in the absence of a written agreement or statutory right. For example, if the owner of Lot A promises that the owner of Lot B can use a road on Lot A to access Lot B, but later revokes that promise, the Lot B owner may be able to call on the equitable doctrine of proprietary estoppel to enforce that promise. To be successful, the Lot B owner would need to establish that:

- They had relied on that promise;
- Such reliance was reasonable in the circumstances; and
- They suffered a detriment as a result of that reliance, such that it would be unfair or unjust to allow the Lot A owner to break its promise.

If those criteria are met, the court may grant an equitable easement over Lot A allowing the promised access to Lot B.[5]

3 Subject to the exception for fraud under Section 29 of the *Land Title Act* (RSBC 1996 c 250).
4 SBC 1998 c 43
5 2022 BCSC 1499 (CanLII)

Licensees dealing with strata property should note that proprietary estoppel may not apply in the strata context. When a strata lot owner tried to obtain an equitable easement to access a stairway by way of a deck that was allocated as limited common property to another strata lot, the court determined that proprietary estoppel conflicted with the SPA, which requires a three-quarter vote of the owners to dispose of common property by way of easement.[6]

Easements Implied by Common Law

In rare circumstances, the common law may imply an easement that has not been agreed to in writing, registered on title, or mandated by legislation, called an "implied easement." One example of an implied easement is an "easement of necessity," which can arise where a parcel is landlocked, meaning that there are no legal means to access the property by land or, in some cases, waterways. It is important to note, waterfront properties are not necessarily considered landlocked and the inconvenience of requiring a boat for access does not automatically give rise to an implied easement.[7] An easement of necessity is more likely where there is no land access and the adjacent waters are not navigable or navigation is prohibited by law.

Licensees from other jurisdictions in Canada might be familiar with the concept of prescribed easements. In general terms, this is an easement created by a continued trespass on another person's lands. In British Columbia, Section 24 of the *Land Title Act* ("LTA")[8] abolishes all existing methods of acquiring a right in or over land by prescription. This means that in British Columbia, continued trespass will not lead to a legal right to traverse the lands.

Easements and Leasehold Premises

Easements can affect, burden, and benefit leasehold premises in a number of ways. Firstly, a leasehold interest will be subject to any prior easement rights registered against title to the leased lands. This means that the easement rights can be exercised on the leased premises. Because of this, a landlord should be careful to include a term in the lease confirming that prior easements are permitted encumbrances on the leasehold premises. Additionally, the landlord will usually want to reserve the right to grant further easements, provided that they do not materially interfere with the tenant's use. Tenants should always review the prior easements and encumbrances to ensure that they do not interfere with the tenant's intended use. Trading services licensees acting on leasing transactions should advise their clients to obtain legal advice with respect to these issues. Lawyers can assist with the necessary title review and to draft appropriate lease provisions to deal with prior and subsequent easements and other encumbrances.

Secondly, leasehold premises can benefit from an easement over other lands. For example, a tenant might lease all or part of a building, but have easement rights over other parts of the landlord's property that are not included in the leased premises. This often arises on multi-tenant properties, such as shopping centres and strip malls, where tenants may have easements allowing them to access and use driveways, drive-thrus, parking areas, patios, and garbage and recycling enclosures. These easements are said to be "appurtenant to" the leasehold premises. This means that they are attached to and benefit the leasehold premises. Upon expiry or termination of the benefitting lease, the easement will also cease automatically.

Thirdly, a tenant can grant an easement over its leasehold interest for the benefit of other lands or leasehold premises, subject to a prohibition in the lease against doing so. As with an easement benefitting leasehold premises, an easement over the leasehold premises will cease upon the expiry or termination of the benefitting lease.

6 2022 BCCA 337 (CanLII)
7 2018 BCSC 1465 (CanLII)
8 RSBC 1996 c 250

Easements vs. Licences

Easements are sometimes confused with licences. Similar to an easement, a licence is a non-possessory right that allows a person to use another person's lands for a defined purpose. Unlike an easement, a licence is a contractual right only and not an interest in land. As such, a licence cannot be registered in the LTO. The licence does not run with the lands (i.e. it does not automatically bind or benefit subsequent owners of the benefitting or burdened lands). Licences are often used to grant temporary or short-term usage rights or where there are no benefitting lands (which are not required for a valid licence). For example, a landowner might grant a licence to another person to use part of the owner's lands temporarily as a staging area for a nearby construction project in exchange for a monthly licence fee.

STATUTORY RIGHTS OF WAY

A statutory right of way ("SRW") is a special type of easement granted under Section 218 of the LTA. The primary distinguishing feature of an SRW is that it does not have a dominant tenement or benefitting lands. Instead, an SRW is granted in favour of a legal entity or other person. Only certain persons are entitled to hold an SRW, namely:

- The Crown or a Crown corporation or agency;
- A municipality, a regional district, the South Coast British Columbia Transportation Authority, a local trust committee under the *Islands Trust Act*,[9] or a local improvement district; or
- A water users' community, a public utility, a pulp or timber, mining, railway, or smelting corporation, or a pipeline permit holder as defined under the *Energy Resource Activities Act*.[10]

Other persons not listed above can apply to the Surveyor General of British Columbia (as the delegate of the minister responsible for the LTA) to be designated as a person entitled to hold an SRW. The Surveyor General has discretion to make this designation on terms and conditions that the Surveyor General thinks proper.

In order to be valid, an SRW must be for a purpose necessary for the operation and maintenance of the holder's undertaking (i.e. the holder's business, project, etc.). For example, an SRW in favour of a utility company must be necessary to allow it to maintain its utility infrastructure, serve its customers, or fulfil some other business purpose.

SRWs are very common in the context of utilities, transportation infrastructure, and the resource sector. They are also frequently granted to municipalities as conditions of rezoning and development authorizations. For example, an SRW in favour of a municipality may allow for public access to a plaza that is part of a multi-family development on private lands. Licensees should be aware that, like easements, SRWs may restrict a landowner's rights to use the SRW area, including by prohibiting the construction of any structures or other improvements in that area. This may negatively impact a buyer, owner, or tenant of the affected lands, depending on their intended use of those lands.

TERMS IN EASEMENT AGREEMENTS

The terms of easement agreements can vary greatly depending on the purpose of the easement. The law does not mandate any particular form for a valid easement; however, there are certain terms that are essential to create an enforceable easement (e.g. the burdened lands must be described). The following are some of the common terms found in easement agreements:

- **Grant:** Language granting the easement over the burdened lands is an essential term of any easement agreement.
- **Servient Tenement / Burdened Lands:** The lands that are burdened by the easement must be clearly identified by their legal descriptions (if covering one or more whole parcels) or by a survey plan deposited in the LTO (if covering only part of a parcel).
- **Dominant Tenement / Benefitting Lands:** The lands that benefit from the easement must also be clearly identified in the same manner as above. However, in the case of an SRW, the benefitting lands will be substituted with a benefitting person (including a legal entity).

9 RSBC 1996 c 239
10 SBC 2008 c 36

- **Purpose:** The purposes for which the easement area may be accessed and used should be clearly specified (e.g. for access to the benefitting lands, for parking, or to construct and maintain utilities infrastructure or other improvements).
- **Who, How, and When:** The agreement will often specify who is entitled to exercise the easement rights on behalf of the owner (e.g. the owner of the benefitting lands and their agents, contractors, employees, tenants, etc.). The permitted means of access may also be specified (e.g. by foot, by bicycle, or with or without vehicles and equipment), as well as when the access may occur (e.g. at all times or during specific times).
- **Use Restrictions:** Uses of the burdened lands that might interfere with the easement rights are often prohibited. For example, the owner of the burdened lands may be restricted from excavating or constructing improvements within the easement area, or blasting in the vicinity of the easement area.

Positive Covenants

Easement agreements often contain positive covenants. A positive covenant requires a party to do something. A negative covenant is an agreement not to do something. Some examples of positive covenants that are often seen in easement agreements include requirements of a party to maintain liability insurance, repair damage caused to the lands, or share maintenance costs. However, the courts have held that positive covenants in easements do not run with the lands, notwithstanding registration on title. As a result, positive covenants are binding on the initial parties to the easement agreement but not on subsequent owners of the burdened or benefitting lands. This inconvenient legal principle can have a serious negative impact on easement arrangements, as certain positive obligations such as cost sharing may be very important aspects of the access arrangement.

This issue often arises in complex developments that include multiple parcels or air space parcels. These developments are often set up with easements and cost sharing obligations to facilitate the use and maintenance of common facilities in one parcel by owners of other parcels. In a case where a strata corporation benefitted from an easement to use a parking facility in exchange for paying a share of maintenance costs, the strata corporation was able to argue that the positive covenant requiring it to pay its share of maintenance costs was unenforceable. The agreement was entered into by the developer that owned the benefitting lands before the strata corporation was created. The strata corporation, as a subsequent owner, was not bound by the positive covenant to pay costs because it was not a party to the original agreement and the obligation did not run with the lands.[11]

To try to work around this issue, easement agreements will sometimes provide that upon the sale (or other transfer) of the burdened or benefitting lands, the seller will obtain an assumption agreement from the buyer. For example, if Lot A benefits from an easement over Lot B, and the owner of Lot A sells its lands, the new owner of Lot A would enter into an assumption agreement in favour of the Lot B owner agreeing to assume and be bound by all of the Lot A owner's positive covenants in the easement agreement. This creates a direct contractual agreement between the new Lot A owner and the Lot B owner, so that the positive covenants in the easement agreement can be enforceable even though they do not run with the lands.

11 See: 2019 BCCA 144 (CanLII) However, courts may accept other legal arguments to find that a strata corporation is bound to cost-sharing obligations that the strata corporation has not expressly assumed. For example, the courts might imply a binding contract on the basis of the strata corporation's historical conduct. See: 2020 SCC 29 (CanLII).

Where licensees are helping clients to buy or sell properties that are subject to or benefit from easements they should recommend that their clients obtain legal advice regarding any easements on title, including to determine whether there are positive covenants that may not be enforceable and whether assumption agreements are required. Legal counsel can also advise on the limitations of assumption agreements. Buyers will usually obtain this advice as part of their overall title review, either before entering the contract or before waiving a title review condition. Sellers should obtain this advice as part of their sale preparations, to determine whether there are any requirements on transfer such as obtaining an assumption agreement from the buyer. The seller may need to add specific contract terms to deal with any such obligations (e.g. the buyer will not be required to provide an assumption agreement unless this is expressly set out in the contract of purchase and sale).

ENCROACHMENTS

What is an Encroachment?

What happens when a land owner accidentally builds a fence on a neighbour's property, or builds a deck or a swimming pool that crosses over the property line into the neighbour's yard? These scenarios represent a type of trespass called an "encroachment," and the offending fence, deck, or pool would be said to encroach on the neighbour's lands. Some encroachments arise from genuine mistakes over the location of the boundary line, while others arise as a result of carelessness or the intentional wrongful acts of a landowner. Encroachments can occur on any type of property, but are most likely where improvements or additions have been constructed without permits or surveys.

One of the risks in real estate transactions is that a buyer can purchase a property that is affected by an encroachment and not know about the encroachment. That could be because an improvement on the buyer's lands encroaches on a neighbouring property, or a neighbour's improvement encroaches on the buyer's lands. Either of these scenarios can result in unexpected and unwanted consequences, some of which are discussed later in this module.

A structure or other improvement does not always have to cross a property line for an encroachment to exist. Improvements within the boundaries of a parcel can also encroach on easements, or statutory rights of way on the same parcel. These rights often contain restrictions that prevent the owner of the lands from building within a certain area or in a manner that might interfere with the exercise of the rights.

Another kind of encroachment arises when an improvement encroaches on an area of a property where improvements are prohibited by laws. For example, municipal zoning bylaws typically contain setback requirements, specifying the minimum distance between a building and the property line. Improvements that are too close to the property line will encroach on the setback. Additionally, provincial legislation may dictate where improvements can be located on a property. For example, under the Riparian Areas Protection Regulation,[12] development is prohibited within 30 metres of a stream (or more, if the stream is located in a ravine). Any improvements or landscaping within the prohibited area would encroach on the riparian protection area.

12 BC Reg 178/2019

Identifying Encroachments – Survey Certificates

Since property lines are invisible, encroachments cannot be identified or confirmed by visual inspection or a home inspection. Survey plans in the LTO are rarely helpful in determining whether an encroachment exists. These plans typically do not show the location of improvements, may not show the location of easements and other rights affecting the property, and are not authoritative for determining the exact boundaries of a property. The only reliable way to identify encroachments (or the absence thereof) is to obtain a recent survey certificate of the property from a BC Land Surveyor. A survey certificate will typically show the property boundaries, the location of improvements on the lands (including encroachments), and the areas of any registered easements and statutory rights of way.

Trading services licensees acting for buyers should, as part of the due diligence process, request copies of any survey certificates in the seller's possession. However, often a seller will not have a survey certificate or, if they do, it may not be current. It can be dangerous to rely on a survey certificate that is not recent, as it may be inaccurate as a result of subsequent changes to the property. For example, in the time since the certificate was issued, additional improvements may have been constructed, existing improvements may have shifted or been modified, and easements and statutory rights of way may have been granted. It is even possible that property boundaries may have changed; for example, by subdivision or expropriation or, in the case of waterfront properties, by accretion (addition to property by the deposit of soil or sediment causing the water line to recede) or erosion (loss of property by soil falling into the water).

Legal Remedies

Before running to the courts, land owners affected by an encroachment should attempt a negotiated solution. Encroachments might be addressed in any the following ways: entering into an encroachment agreement (either a licence or an easement) that permits the encroachment; removing or relocating the encroaching improvement; or, adjusting the boundary lines of the properties to accommodate the encroachment (subject to approval of the applicable municipality or other approving authority). Often the encroaching owner will need to pay compensation to the other owner to secure encroachment rights or a boundary line adjustment. If these avenues fail, any dispute can be resolved through the courts.

Under Section 36 of the *Property Law Act*, the courts have the power to:

- Impose an easement on the encroached lands and determine the period of the easement and the compensation payable for it;
- Transfer title to the encroached land to the encroaching owner, for compensation determined by the courts; or
- Order the owner to remove the encroachment or the fence so that it no longer encroaches on or encloses any part of the adjoining land.

Case law is full of examples of the courts exercising the above powers to settle disputes between property owners, including the following:

- A buyer bought a property with an outdoor swimming pool that encroached on a neighbour's land. The neighbour sought a court order to have the buyer remove the pool. The Supreme Court of British Columbia found that the pool's encroachment was a significant impairment to the use of the neighbour's land and ordered that the buyer remove the pool.[13]

13 2013 BCSC 940 (CanLII)

- A neighbour built a patio that encroached on a neighbour's land without obtaining a survey certificate. The neighbour sought a court order to have the patio removed, but the owner argued for an easement or ownership of the encroached lands. The Supreme Court of British Columbia considered the detriment to the owner in removing the patio and to the neighbour if the patio remained. Although the owner was in the wrong, the court found that removing the patio would be expensive and the encroachment was not a significant impairment on the neighbour's enjoyment of the property, especially since the neighbour's house was located far away from the patio. The owner was ordered to compensate the neighbour for the appraised value of the encroached land ($22,000) plus legal fees incurred.[14]

Protecting Against Encroachments: Title Insurance

Title insurance is an insurance product designed to protect property owners against certain title issues, such as title fraud. Title insurance policies may include an endorsement that protects against some of the consequences of encroachments, such as removal costs or court ordered compensation. As an added benefit, the insurer would usually be required to defend the encroachment claim in the courts. Title insurance is available from a number of licensed insurers in Canada for a one-time premium. Usually it is purchased at the time the property is acquired, but policies are also available for existing property owners. Licensees acting for buyers should recommend that their clients speak to an insurance broker or lawyer for advice about title insurance and the coverage included in any particular policy.

TITLE SEARCHES

Title review is an important step to determining what easements affect a property. Registered easements and statutory rights of way will appear on a title search of the burdened lands under the heading "Charges, Liens and Interests." The registration will state the type of interest, the registration number and the date and time of registration and, in the case of an SRW, the registered owner. The full terms of the easement agreement can be obtained from the LTO by ordering the charge document filed under the same registration number as is shown in the title search. If the burdened lands are more than one legal parcel, the registration will contain the remark "Inter Alia." If the burdened lands are not a full legal parcel, the registration will also reference a plan number. This plan can also be ordered from the LTO and will show the surveyed location of the easement or SRW area. That said, in the case of older charges, the LTO records are occasionally missing, damaged, or incomplete, making it difficult or impossible to determine the area with certainty.

When a property benefits from a registered easement, the title search will contain a legal notation that includes the registration number and a description of the burdened lands. For example, a legal notation on the benefitting lands might read: "Hereto is annexed Easement CA1234567 over Lot 1 Plan EPP12345."

There is quite a bit of variation in how benefitting lands are described, but these notations should always start with the phrase "hereto is annexed Easement [...]."

Encroachments will not appear on a title search or a registered survey plan, unless the encroachment is the subject of a registered easement. As noted above, the only way to formally identify an encroachment is to obtain a survey certificate prepared by a qualified BC Land Surveyor.

14 2012 BCSC 1520 (CanLII)

Unregistered easements will also not appear on a title search. These unregistered interests are not binding on subsequent owners of the affected lands, even if the subsequent owners have notice of the interest (see LTA, Sections 20 and 29). If a subsequent owner wants the benefit of an unregistered easement, the subsequent owner will have to enter into a contractual agreement with the owner of the burdened lands or, better yet, obtain a registered interest.

Discipline for Licensee Failure to Provide Title Searches or Identify Easements

Licensees acting for buyers should always provide a title search to their client and flag any easements, and statutory rights of way. Failure to do so may amount to professional misconduct. For example, in one case a licensee failed to provide the buyer with a title search and failed to disclose that there was a significant easement over the property. For this and other misconduct, the licensee was suspended for one year and ordered to pay a discipline penalty and enforcement expenses.[15] In another case, a licensee was asked by the buyer if the property had any easements. The licensee responded that the title was "very clean," but did not advise that there was a restrictive covenant[16] (i.e. a restriction on certain uses of the land) registered on title limiting the height of any structure on the property to 21 feet. For this and other misconduct, the licensee was ordered to pay a discipline penalty and enforcement expenses.[17]

Trading services licensees can avoid claims of professional misconduct by always obtaining and reviewing title searches and recommending that their clients obtain legal advice with respect to any registered or unregistered easements, statutory rights of way, and other encumbrances before waiving their title review condition or entering into an unconditional contract.

IMPACT OF EASEMENTS AND ENCROACHMENTS ON PROPERTY VALUE

Easements can affect the property value of both the benefitting and the burdened lands, both positively and negatively depending on the nature of the easement. In some cases, easements may provide a substantial benefit to the benefitting lands that may increase its value or salability. For example, the easement might provide convenient access, rights that increase the development potential and allowable density (e.g. parking rights on adjacent land to meet a zoning requirement for a larger building to be constructed on the benefitting lands), or otherwise facilitate development (e.g. a crane-swing easement over adjacent lands).

In other cases, easements might allow for perceived nuisances to occur on the burdened lands and restrict the use or development potential of the burdened lands in a way that decreases the property value. For example, a utilities line running through the middle of a parcel might drastically reduce the allowable size of any building on the lands from what would otherwise be permitted under the applicable zoning or prevent development altogether. That said, restrictions in easements will not always reduce property values, as they might come with corresponding benefits. For example, a well-placed utilities easement might be essential to the value of a property because it allows for critical services to the property, such as water, sewer, electricity, or gas.

Known encroachments may negatively affect property value, especially if the encroachment is substantial and/or involves an important structure on the property, such as a residence, garage, or swimming pool. A seller can try to mitigate the impact of the encroachments by securing an encroachment agreement or easement that allows for the encroachment prior to listing the property. Legal counsel can advise on these issues and assist with preparing and negotiating the applicable agreement.

15 2015 CanLII 62639 (BC REC)
16 A restrictive covenant is a charge that would be registered on title expressly prohibits the owner of the burdened lands from making certain uses of the lands (for example, a restrictive covenant could prohibit building in a certain area or constructing a certain type of improvement). Like an easement a restrictive covenant must have both a dominant and a servient tenement.
17 2019 CanLII 37500 (BC REC)

FINANCING PROPERTIES WITH EASEMENTS AND ENCROACHMENTS

Before advancing funds under mortgage financing, a lender will want assurances that there are no easements or encroachments affecting the mortgaged lands in a way that could have a material adverse impact on the lender's security, including the value of the underlying lands. As part of their due diligence, the lender will typically have their lawyer review any easements and statutory rights of way on title and provide a legal opinion confirming that the registrations will not have a material adverse impact on the lender's security interest. In a residential conveyance, this process is usually straight-forward and often invisible to the buyer, whose lawyer is typically acting for both the buyer and the mortgage lender. In the commercial and development contexts, the lender will have their own lawyer and the due diligence review process can be much more involved.

Encroachments can have a serious impact on the value of the mortgaged lands. As discussed above, a court could order that a valuable improvement be removed or that the property boundaries be adjusted to accommodate the encroachment. Accordingly, lenders will typically ask for a survey certificate and a lawyer's opinion that there are no encroachments. If the certificate is not current, the lender may also require a statutory declaration from the owner stating that there have been no changes to the lands or improvements since the date of the certificate.

Where an acceptable survey certificate is not available, lenders will usually require a title insurance policy with appropriate endorsements to protect them against the risk of encroachments. This represents an additional cost to the borrower. Increasingly, lenders are requiring title insurance regardless of whether or not a survey certificate is available, in order to benefit from all the protections that title insurance provides. Note that a lender's title insurance policy is different from the owner's title insurance discussed earlier in this module. Lender's and owner's title insurance policies can usually be obtained together for a discounted premium.

It is important for buyers to provide full disclosure of any encroachments to both the lender and the title insurer, as withholding or misrepresenting the facts may represent a breach under the mortgage, invalidate the insurance policy, or amount to fraud. Problems with easements and encroachments do not necessarily render a property un-financeable, and title insurance endorsements are often available to cover even known encroachments. It may be more difficult to find a lender or insurer willing to accept the risks, but, regardless, honest and full disclosure is crucial.

STANDARD FORM CONTRACT OF PURCHASE AND SALE

When selling a property that is affected by an easement, it is important to make sure that the easement is identified as a permitted encumbrance in the contract of purchase and sale ("CPS"). A permitted encumbrance is an encumbrance that the seller does not have to remove from title on or before completion of the sale. If an encumbrance is not permitted and the seller fails to remove it, the buyer may be entitled to legal remedies against the seller. In some cases, the available remedies can include terminating the CPS and/or a claim for damages.

The standard form CPS for residential transactions only deals with easements in a very limited way and does not deal with encroachments at all. The only easements that are by default permitted encumbrances in that contract are "registered or pending restrictive covenants and rights-of-way in favour of utilities and public authorities." If any easements that do not fit into that narrow exception are registered on title, the licensee acting for the seller should ensure that they are expressly identified in the CPS. Licensees should be familiar with the sample clauses in the BC Financial Services Authority Knowledge Base dealing with title and encumbrances.

If the seller is aware of any encroachments, the seller should disclose the encroachment to the buyer before the buyer signs the CPS. A good place to do this is in the BCREA Property Disclosure Statement ("PDS"), which asks the seller: "Are you aware of any encroachments, unregistered easements or unregistered rights-of-way?" The PDS is not mandatory, but is often used in residential transactions and can be incorporated into the CPS at the option of the parties. Licensees acting for sellers should advise their clients to obtain legal advice with respect to the extent of disclosure required in respect of encroachments. Licensees should also be aware that they cannot be complicit in concealing material latent defects from buyers.

It is good practice for licensees to always include a title review and condition precedent to a CPS. If a licensee is instructed to prepare a condition-free offer, the licensee should explain the risks to their client and assist their client to conduct title due diligence and obtain any required legal advice prior to signing the offer. Making a condition-free offer without an understanding of any easements and other encumbrances on title can expose the buyer to significant risks that their intended use or development of the property may be negatively impacted.

CONCLUSION

After reviewing the content of this module, licensees should have a general understanding of the difference between easements and encroachments and how they can affect real property ownership and transactions. Additionally, licensees should have an understanding of steps needed to identify easements and encroachments and to properly address them, including recommending that their clients obtain survey certificates and legal advice in certain circumstances. Licensees should also be aware that, in the absence of contrary instructions, it is part of a licensee's duty when acting for a prospective buyer or tenant to review title with their client to help them identify encumbrances, including easements, that may require further legal review.

Module Seven: Recent Amendments to the *Strata Property Act*

Several important amendments were made to the *Strata Property Act* ("SPA")[1] from January 2022 to June 2024. The objective of this module is to explain the main concepts of those amendments and to consider their implications on strata corporations. Those implications will affect how you, as a real estate licensee, provide advice to your clients. For a more general summary of the amendments to SPA discussed in this module, please refer to the Government of B.C.'s website.

LEARNING OBJECTIVES

By the end of this module, you will be able to:

1. Describe recent and important amendments to SPA;
2. Distinguish between strata rental bylaws and short-term rental bylaws;
3. Discuss features of strata age bylaws; and
4. Identify SPA requirements for holding a general meeting by electronic or hybrid means.

07 →

1 SBC 1998 c 43

ELECTRIC VEHICLE ("EV") CHARGING INFRASTRUCTURE

Recent changes to SPA and the Strata Property Regulation ("SPR")[2] make the installation of EV charging infrastructure in strata complexes easier to approve and fund. Also, most strata corporations now have a statutory obligation to obtain an electrical planning report. The deadline to obtain the report varies based on the age of the complex and its location in British Columbia ("B.C.").

There are now specific provisions in SPA and the SPR explaining what needs to be contained in a request by an owner to make alterations to common property related to EV charging infrastructure. There is also a standardized process for a strata corporation to respond to the request.

Information Certificate ("Form B") requirements related to electrical planning reports will be dealt with under the Information Certificate ("Form B") section of this module.

For a detailed examination of the changes to SPA and the SPR regarding EV charging, please refer to our 2025 module entitled *Small Stratas and EVs*.

RENTAL BYLAWS

On November 24, 2022, an amendment to SPA made all strata rental bylaws unenforceable in B.C.

The general rules in Section 121 of SPA apply, including that a bylaw is not enforceable to the extent that it "... prohibits or restricts the right of an owner of a strata lot to freely sell, lease, mortgage or otherwise dispose of the strata lot or an interest in the strata lot."

Historically, the ability of a strata corporation under SPA to limit or prohibit the rental of residential strata lots was an exception to the general rule above. Drafting rental bylaws and enforcing them was complicated, as there were delaying provisions to apply, as well as exemptions.

As a result, the elimination of rental bylaws has simplified one aspect of bylaw enforcement for strata corporations and strata managers. Another aspect of bylaw enforcement for councils and strata managers to consider is the strata corporation's authority to issue a notice to end a tenancy for "[a] repeated or continuing contravention of a reasonable and significant bylaw or rule by a tenant of a residential strata lot that seriously interferes with another person's use and enjoyment of a strata lot, the common property or the common assets ... ."[3] If a strata council is considering pursuing this course of action, a strata manager should advise the strata council to seek legal advice.

Strata councils should take steps to ensure that the owners vote on amending and replacing any bylaw that has been filed with the land title office ("LTO"), but is no longer enforceable. Failing to repeal unenforceable bylaws can confuse owners, tenants, prospective purchasers, licensees, and council members regarding the council's intentions to enforce the bylaw.

PRACTICE TIP FOR STRATA MANAGERS:

Recommend to the strata council to repeal any rental bylaws that were previously filed with the LTO for the strata corporation. Strata managers should also recommend for the strata council to obtain legal advice on how to properly do this, for example with respect to the language of the 3/4 vote resolution that the owners will be voting on at a general meeting to repeal the bylaw. As well, strata managers should recommend informing owners and tenants of any amendments to the bylaws as soon as feasible after they are approved.[4]

2 BC Reg 43/2000
3 SBC 1998 c 43 Section 138(1) and Residential Tenancy Branch Policy Guideline No. 27 at pages 13-14
4 *Ibid*, Section 128(4), Real Estate Services Rules Section 30(d)

Strata managers who were managing strata complexes with rental bylaws in the past, particularly those with rental prohibition bylaws, may not have developed robust procedures for communicating with tenants and dealing with their personal information. Now is the time to consider what personal information the strata manager and the strata council reasonably require about each tenant and to consider amendments to the strata corporation's bylaws and privacy policy that allow for the collection, use, disclosure, retention, and destruction of this information.

The obligations on a landlord of a residential strata lot to provide the strata corporation with a Notice of Tenant's Responsibilities remains unchanged.[5] Prior to renting all or part of a residential strata lot, the landlord must give to the prospective tenant both the strata corporation's current bylaws and rules, and a Notice of Tenant's Responsibilities, which is Form K in the SPR. The landlord is also responsible to provide the strata corporation with a signed copy of the Form K within two weeks of renting the strata lot.

For trading services licensees, your client may ask you what happens if a strata corporation has not repealed a bylaw that limits or prohibits the rental of a residential strata lot. Although those bylaws are unenforceable, there are councils who may not be aware of the change in legislation, or may attempt to enforce them anyway. Your client may even become involved in a Civil Resolution Tribunal matter regarding the same. Just because the rental bylaws are unenforceable does not guarantee that your clients are immune from councils attempting to enforce the bylaws against them, and your clients should be advised of the same. Also, rental bylaws should not be confused with short-term rental bylaws, which are still enforceable in B.C. We discuss the distinction between the two in the section below.

SHORT-TERM RENTAL BYLAWS

To address the housing shortage in B.C., the Province enacted the *Short-Term Rental Accommodations Act* ("STRAA")[6] in October of 2023. This was the beginning of several sweeping changes concerning short-term rentals in B.C. Further changes came into effect on May 1, 2024. We will discuss those changes below. As a starting point, it is important to note that the changes under STRAA apply to many different types of properties in various communities in the province, not just to strata lots.

First, what does the Government of B.C. consider a "short-term rental" to be? STRAA has defined a "short-term rental accommodation service" to be "the service of accommodation in the property of a property host, in exchange for a fee, that is provided to members of the public for a period of time of less than 90 consecutive days or another prescribed period, if any, but does not include a prescribed accommodation service."[7]

Effective May 1, 2024, short-term rentals will generally be limited to a property host's principal residence, plus either a secondary suite or an accessory dwelling unit (the "principal resident requirement"). STRAA defines the terms in the preceding sentence as follows in the order they appear:[8]

- **Property host:** a person who is legally entitled to possession of a property where short-term rental accommodation services are provided, and who has responsibility for arranging for the short-term rental offer.
- **Principal residence:** the residence in which an individual resides for a longer period of time in a calendar year than any other place.
- **Secondary suite:** an accessory dwelling unit that is located in and forms part of a primary dwelling unit.
- **Accessory dwelling unit:** a building, or part of a building, that is a self-contained residential accommodation unit, has cooking, sleeping, and bathroom facilities, and is secondary to a primary dwelling unit located on the same property.

5 SBC 1998 c 43 Section 146
6 SBC 2023 c 32
7 *Ibid*, Section 1
8 *Ibid*

STRAA will apply to certain B.C. communities, including those with a population of over 10,000 and some smaller communities. There are several exemptions to this legislation, for example, strata corporation guest suites.

STRAA acts as a baseline restriction on short-term rentals in B.C. Strata corporations and municipalities have the flexibility to impose more restrictions on short-term rentals through bylaws. A distinction, however, must be made between rental bylaws in the strata context, and what has been termed "short-term rental bylaws" in STRAA. Unlike strata bylaws that restrict or prohibit long-term rentals, which are now unenforceable in B.C., strata corporations can pass and enforce short-term rental bylaws.

1. Short-Term Rental – Licence

From a strict legal perspective, a short-term rental is legally classified as a licence. A licence is distinct from a tenancy.[9] A tenant, by entering into a tenancy agreement, receives an interest in land and has a right to quiet enjoyment and exclusive possession of the rental property. Tenancies are also subject to the *Residential Tenancy Act* ("RTA").[10] A licence gives a person permission to use property, but that permission may be revoked at any time. There is no interest in land attached to the licence.[11] As such, a person with a licence to use a property does not have the same rights with respect to the property that a tenant has.

To avoid confusion with other rentals subject to RTA, when referring to "short-term rentals" in a strata context, a more accurate phrase to use is "accommodations pursuant to a licence." For the purposes of this module, we continue to use the phrase "short-term rental" because that is the phrase used in the legislation.

2. Prohibiting Short-Term Rentals

SPA and the SPR recognize the power of a strata corporation to prohibit short-term rentals through the bylaws. The maximum fine amount that a strata corporation can set out in its bylaws is "...in the case of a bylaw that prohibits or limits use of all or part of a residential strata lot for remuneration as vacation, travel, or temporary accommodation, $1 000 for each contravention of the bylaw."[12] A fine can be imposed for a bylaw described above on a daily basis for a continuing contravention, as opposed to other bylaws when the fine can be imposed every seven days for a continuing contravention.[13]

If a strata council is interested in proposing a short-term rental bylaw to the owners, the following relevant factors should be considered, including but not limited to:

- Was the complex designed with the short-term rental of strata lots in mind?
- Does the strata corporation have a guest suite, and if so, how will an exception be made for the guest suite in the bylaw?
- What has the experience of councils and residents been with short-term rental situations?
- What are the applicable provincial laws and local government bylaws in effect for short-term rentals and should the strata bylaws be drafted using similar concepts?
- What is the maximum fine that should be set out in the bylaws and what about continuing contraventions?

9 2023 BCCRT 844 (CanLII)[*Eustace*]; 2017 BCSC 1039 (CanLII) affirmed 2019 BCCA 64 (CanLII)[*Highstreet*]
10 SBC 2002 c 78
11 *Highstreet*
12 BC Reg 43/2000 Section 7.1(1)
13 *Ibid*, Section 7.1(2)

There are local government bylaws that govern short-term rentals. For instance, a business licence is required to offer a residence for short-term rental in a number of municipalities in B.C., including Vancouver, Surrey, Burnaby, and Richmond.[14] Some municipalities may also have additional requirements with respect to short-term rentals. For example, in Burnaby, there are also requirements for the short-term rental operator to provide information to the strata corporation if the property is a strata lot, including the name and telephone contact information of the short-term rental operator and a responsible person.[15] The short-term rental operator or responsible person must also be able to respond to complaints to the City of Burnaby within two hours of being requested to do so by the City.[16] As another example, in Richmond, a short-term rental operator cannot provide "boarding and lodging to more than 2 guests at any one time."[17] Further, if the property is a strata lot, the short-term rental operator must obtain the strata council's permission,[18] and when applying for a business licence, must provide a letter from the strata council that proves the use of the property as a short-term rental is allowed under the strata corporation's bylaws.[19]

If a strata council wishes to refuse to provide permission to a resident for a short-term rental, the strata manager should recommend that the council seek legal advice, particularly if the strata corporation does not have a bylaw prohibiting short-term rentals. The Civil Resolution Tribunal agreed in one instance that it was not significantly unfair for a strata council, faced with a request by an owner for strata approval for a city business licence for short-term rentals, not to provide the approval.[20] Instead, the strata council held a general meeting of the owners. The democratic decision of the owners was to pass a bylaw prohibiting short-term rentals. The Civil Resolution Tribunal found that it was not significantly unfair for this relatively new strata corporation to have sought the democratic decision of the owners and to withhold the approval letter.[21]

14 City of Vancouver By-law No. 12079 (A By-law to Amend License By-law No. 4450 Regarding Short Term Rental Accommodation Section 25.1; City of Surrey Business Licence By-law, 1999, No. 13680 Section 60.1; Burnaby Business Licence Bylaw 2017, Amendment Bylaw No. 3, 2020, Schedule "G" (Bylaw 14272) ("Burnaby Business Licence Bylaw") Section 2.1; City of Richmond Business Regulation Bylaw No. 7538 Section 23.1
15 Burnaby Business Licence Bylaw, Section 4.1
16 *Ibid*, Section 4.5
17 City of Richmond *Business Regulation* Bylaw No. 7538 Section 23.2.4
18 *Ibid*, Section 23.2.3
19 City of Richmond Business Licence Bylaw No. 7360 Section 2.5.1(c)
20 *Eustace*
21 *Ibid*

3. Strata Corporation Guest Suites

Some strata corporations own a strata lot in the complex, which is classified as a common asset. A common asset is "personal property held by or on behalf of a strata corporation, and land held in the name of or on behalf of a strata corporation, that is not shown on the strata plan, or shown as a strata lot on the strata plan."[22]

Strata corporations in B.C. that own a strata lot in the complex and use it as a guest suite should seek legal advice regarding whether doing so is consistent with local government bylaws, including holding a business licence and zoning bylaws. It may also be appropriate to seek accounting advice. Strata corporations with guest suites located in certain areas, such as the City of Vancouver may also wish to consider whether the strata lot may be subject to the Vacancy Tax By-law.[23]

4. Management Services and Strata-Titled Hotels or Motels

Some strata corporations operate like hotels or motels. In those situations, it is likely that there is a rental pool or rental management agreement in place, whereby a licensee may be providing both strata management services and rental property management services. It is important for licensees providing such services to note that under STRAA and its regulation, the Short-Term Rental Accommodations Regulation ("STRAR"), the principal residence requirement does not apply to certain properties that are considered to be strata-titled hotels or motels.[24] The STRAR defines a strata-titled hotel or motel as "a property in which accommodation is provided in a manner similar to that of a hotel or motel and, in respect of which property, a strata plan is filed under the [SPA], and different owners own different strata lots."[25] Licensees should refer to the specific exemption provisions in Section 3.1 of the STRAR to determine whether the property they manage is exempt from the principal residence requirement. The licensee may wish to advise the strata council to seek legal advice to assist with interpreting those provisions.

The STRAR's definition of "strata-titled hotel or motel" also leaves an interesting issue of whether strata corporations where there is one owner who owns all of the strata lots (such as an owner developer or a corporate owner), who provides accommodation in a manner similar to that of a hotel or motel, meets the definition. Licensees in this situation may wish to seek legal advice to assist with interpreting the provision and its application.

AGE BYLAWS

SPA has been amended to restrict the application of age bylaws in B.C. The amendments came into effect on November 24, 2022 and May 5, 2023.

The only age bylaw that is now permissible is one that requires one or more persons residing in a strata lot to have reached a specified age that is not less than 55 years.[26] Individuals who have met the specified age are referred to in the SPR as a "specified resident." In addition, an individual who resided in the strata lot immediately before the age bylaw was passed and continues to reside there after the bylaw is passed is also a "specified resident" and is exempt from the age bylaw.[27]

Caregivers who reside in a strata lot to provide care to a person who also resides in the strata lot and is dependent on the caregiver for continuing assistance or direction because of disability, illness, or frailty, can continue to live in a strata lot despite being younger than the age limit specified in the bylaw.[28]

In addition, a child who receives care from a specified resident is exempt from the bylaw. Further, a person who is over the age of 19 years can return to live with their former caregiver and is exempt from the bylaw.[29] For instance, an individual returning home to live with their parents will be exempt from the age bylaw.

22 SBC 1998 c 43 Section 1
23 Vacancy Tax By-law No. 11674. The Vacancy Tax is also referred to as the Empty Homes Tax.
24 SBC 2023 c 32 Section 14, BC Reg 85/2024 Section 3.1
25 BC Reg 85/2024 Section 1
26 SBC 1998 c 43 Section 123.1
27 SBC 1998 c 43 Section 123.2, BC Reg 43/2000 Section 7.01
28 SBC 1998 c 43 Section 123.2
29 *Ibid*, BC Reg 43/2000 Section 7.01

The SPR also provides an exemption to the age bylaw for a younger spouse. Using the technical language used in the SPR, a spouse of a specified resident who has not reached the age specified in the bylaw can live in the strata lot.[30]

As mentioned under the rental bylaw section, strata councils should take steps to ensure that the owners vote on amending the bylaws by repealing any bylaw that is not enforceable. This now includes age bylaws that do not meet the new requirements. If unenforceable bylaws are not repealed, it can confuse owners, tenants, prospective purchasers, licensees, and council members regarding the strata corporation's intentions and expectations regarding the enforcement of such a bylaw.

Unenforceable age bylaws include bylaws that specify that an individual must have attained an age lower than 55 years. For instance, age bylaws commonly specified that individuals occupying a strata lot must be 19 years of age and over. There are other age bylaws that will also be found to be unenforceable by the Supreme Court of British Columbia or the Civil Resolution Tribunal. Certain age bylaws attempt to limit the age of individuals that can purchase a strata lot. It is the age of residents that can be specified, not the age of an owner. In addition, age bylaws that provide that the complex is a retirement community or that the strata lots are reserved for the use of seniors without specifying an age are likely too vague to be enforceable.

A bylaw review by a lawyer may be prudent for an age bylaw that was not drafted by a lawyer after the recent amendments came into force. Many of the age bylaws drafted before the recent amendments do not accommodate caregivers, children, and adults returning home.

FUNDING OF CONTINGENCY RESERVE FUND

Various amendments to the SPR came into effect on November 1, 2023, which increased the obligation on an owner-developer to initially fund the contingency reserve fund and for the owners in the strata corporation to continue to do the same.

When the owner developer conveys a strata lot to a purchaser for the first time, the owner developer must establish a contingency reserve fund. If the first conveyance to a purchaser happens no later than one year after the deposit of the strata plan, the amount that must be deposited into the contingency reserve fund must be at least 10 per cent of the estimated operating expenses as set out in the interim budget.[31]

If the owner developer conveys the first strata lot to a purchaser later than one year after the deposit of the strata plan, the minimum contribution must be the lesser of:

- 10 per cent of the estimated annual operating expenses as set out in the interim budget, then multiplied by the number of years or partial years since the deposit of the strata plan; and
- 50 per cent of the estimated annual operating expenses as set out in the interim budget.

Other provisions of Section 12 of SPA still apply, including that an owner developer must not use money in the contingency reserve fund to pay for strata expenses and that the contingency reserve fund belongs to the strata corporation.

Prior to a strata plan being deposited in the LTO, if an owner developer has retained a strata management brokerage with respect to preparing an interim budget or providing other services, the Real Estate Services Rules apply regarding having a written service agreement.[32] Once the strata plan is deposited in the LTO, which creates the strata corporation,[33] a new service agreement should be entered into in the name of the strata corporation.

30 *Ibid*
31 SBC 1998 c 43 Section 12; BC Reg 43/2000 Section 3.01
32 Real Estate Services Rules Section 43
33 SBC 1998 c 43 Section 2

The amount that must be contributed to the contingency reserve fund must be determined by the strata corporation in accordance with the requirements of the provision below:[34]

> 6.1 (1)For the purposes of section 93 of the Act, the amount of the annual contribution to the contingency reserve fund for a fiscal year, other than the fiscal year following the first annual general meeting, must be determined after consideration of the most recent depreciation report, if any, obtained under section 94 of the Act.
>
> (2)The amount of the annual contribution must be at least 10% of the total amount budgeted for the contribution to the operating fund for the current fiscal year.

The contribution to the contingency reserve fund must be at least 10 per cent of the total amount budgeted for the contribution to the operating fund for the fiscal year. The amount must be determined after consideration of the most recent depreciation report, if any.

Further, effective July 1, 2024, for strata corporations established on or after July 1, 2027, the SPR requires owner developers to pay an additional certain amount of money into the contingency reserve fund in order to obtain the strata corporation's first depreciation report.[35] The lesser of the following must be paid into the strata corporation's contingency reserve fund no later than the date of the strata corporation's first annual general meeting:[36]

> a) $5 000, plus an additional $200 multiplied by the number of strata lots in the strata corporation;
>
> b) $30 000.

DEPRECIATION REPORTS

Further to the above-noted changes regarding the requirement for owner developers to contribute a certain amount of money towards the contingency reserve fund for depreciation reports, more changes made to SPA and the SPR became effective July 1, 2024 concerning depreciation reports.

Most notably, the delaying provision, whereby strata corporations with five or more strata lots could waive the requirement under SPA and the SPR to obtain a depreciation report, has been removed from the SPA. Those strata corporations must obtain a new depreciation report at least once every five years.[37] The exemption for strata corporations with fewer than five strata lots was also removed from the SPA and moved to the SPR. This was likely done because it is easier for the legislature to amend the SPR rather than the SPA.

Provisions were also added to the SPR to require strata corporations established before July 1, 2024, that have not obtained a depreciation report since December 31, 2020, to do so within a certain period of time depending on where the strata corporation is located.[38] For strata corporations located wholly or partially in the following areas, a depreciation report must be obtained before July 1, 2026:[39]

- the Capital Regional District, other than an island within the Capital Regional District that is accessible by only air or boat;
- the Fraser Valley Regional District; and
- the Metro Vancouver Regional District, other than an island that is only accessible by air or boat.

For strata corporations established before July 1, 2024, that have not obtained a depreciation report since December 31, 2020, that are located wholly outside of those areas, a depreciation report must be obtained before July 1, 2027.[40]

34 BC Reg 43/2000 Section 6.1
35 BC Reg 43/2000 Section 6.23
36 *Ibid*
37 *Ibid*, Section 6.21(2)
38 *Ibid*, Section 6.21(3)
39 *Ibid*, Sections 6.21(1) and (3)(a)
40 *Ibid*, Sections 6.21(1) and 3(b)

For strata corporations established on or after July 1, 2024 but before July 1, 2027, the strata corporation's first depreciation report must be obtained no later than two years after the date of the strata corporation's first annual general meeting.[41] Finally, for strata corporations established on or after July 1, 2027, the strata corporation's first depreciation report must be obtained no later than 18 months after the date of the strata corporation's first annual general meeting.[42]

The definition of "qualified person" has been clarified in the SPR, and requirements for the qualified person to have specific educational requirements and one of several professional designations if the depreciation report is obtained on or after July 1, 2025 have been added.[43]

Finally, minor changes have been made to the SPR regarding what depreciation reports must include. An executive summary is now required.[44]

While it is always important to refer to the SPR, it is even more important now for strata managers to refer to the SPR with respect to depreciation reports.

INFORMATION CERTIFICATE ("FORM B")

An Information Certificate, also known as a Form B, is a document in a prescribed form contained in the SPR that must be provided by the strata corporation to an owner, purchaser, or other person authorized by the owner within one week of the request being made.[45]

Effective April 1, 2023, strata corporations must now attach a "summary of the strata corporation's insurance coverage" to an Information Certificate.[46]

Effective December 6, 2023, strata corporations must now attach any electrical planning reports under Section 94.1 of SPA.

Typically, strata management contracts require the brokerage to respond to Form B requests. Provisions of SPA concerning Form B's have been amended multiple times throughout the years, each time requiring the strata corporation, or the strata manager on its behalf, to answer more questions or attach further documents to the Form B. It is critical to ensure that the version of the Form B used in your brokerage is the most up-to-date one.

Brokerages providing partial management to strata corporations need to be especially careful in preparing a Form B. For instance, if the brokerage is not informed about a change of insurance, the strata manager may inadvertently attach an outdated copy of the insurance summary to the Form B. Also, to protect the strata corporation and the brokerage, it is important to obtain the information about insurance from the strata corporation's insurer or insurance agent, as this will render the information about insurance not binding on the strata corporation.[47] Otherwise, the information disclosed as required by SPA in an Information Certificate is "binding on the strata corporation in its dealings with a person who relied on the certificate and acted reasonably in doing so."[48]

PRACTICE TIP FOR TRADING SERVICES LICENSEES:

Speak with your clients concerning providing adequate time for Form B requests to avoid being charged rush fees.

A more detailed discussion of Form B matters is set out in the module entitled *Small Stratas and EVs*.

41 *Ibid*, Sections 6.21(4)
42 *Ibid*, Sections 6.21(5)
43 *Ibid*, Section 6.2(0.1)
44 *Ibid*, Section 6.2(1)(g)
45 SBC 1998 c 43 Section 59(1)
46 *Ibid*, Section 59(3)(I.2)
47 *Ibid*, Section 59(5.1)
48 *Ibid*, Section 59(5)

ELECTRONIC PARTICIPATION IN GENERAL MEETINGS

At strata general meetings, whether annual or special, owners meet to discuss and vote on strata business. Prior to the COVID-19 pandemic, a strata corporation could, if it had a bylaw permitting it to do so, provide for attendance at general meetings by telephone or "any other method."[49]

The COVID-19 pandemic created an urgent need for strata corporations to be able to provide for attendance at general meetings by electronic means. Between restrictions to the size of gatherings and many other factors, holding in-person annual and special general meetings over the past three years was difficult and sometimes impossible.

To address this, the Government of B.C. implemented various temporary measures over the course of 2020 through 2022 that permitted strata corporations to provide for attendance at general meetings by electronic means without a bylaw.

Pursuant to amendments made to SPA, strata corporations now have the option to hold general meetings in person only, solely by electronic means, or by a combination of the two, without needing to pass a bylaw.[50] However, it may still be useful for strata corporations to pass bylaws concerning general meetings held by electronic means, for example, with respect to voting procedures, proxy forms, and verifying identities of proxies. Those bylaws should be reviewed by a lawyer who is experienced in the area of strata law to ensure compliance with SPA and the SPR.

The amendments made to SPA at the end of November 2022 regarding general meetings concerned requirements to provide for attendance by electronic means including notice requirements, communication among attendees, and identification of eligible voters, as well as voting cards and voting by secret ballot.[51]

If the strata corporation provides for attendance by electronic means, the strata council and/or the strata manager should consider how it will facilitate those meetings. Strata councils may lean on their strata manager for a number of tasks to help run a general meeting by electronic or hybrid means, including:

- Ensuring that the program, platform, or application used enables all persons attending the meeting to communicate with each other;
- Facilitating registration;
- Identifying eligible voters and certifying proxies and corporate representatives; and
- Voting procedures.

Strata managers should consider whether they have the knowledge, and whether they or their brokerage have the means, to be able to facilitate such meetings. Specifying whether a strata manager will attend and facilitate a general meeting held by electronic or hybrid means may be set out in a strata management agreement.

Instructions for attending the meeting by electronic means must be included in the notice of general meeting.[52] If some attendees are unwilling or unable to attend the meeting by the program, platform, or application chosen by council, it would be prudent to provide for the option to attend by telephone. Attending by telephone comes with its own set of unique considerations. For example, council may choose to use a videoconferencing platform to hold a general meeting by electronic means. The videoconferencing platform may have a call-in feature whereby participants may join the videoconference by telephone. The council wishes to conduct a vote using the chosen platform's written chat function, but the telephone participants cannot use that function. Can the council conduct the vote using the written chat function, if the telephone participants cannot view the responses submitted by other participants, nor vote by the same method?

49 SBC 1998 c 43 Section 49(1) before re-enacted by 2022-41-11 (effective November 24, 2022)
50 SBC 1998 c 43 Section 49
51 *Ibid*, Sections 49(2) and (3)
52 *Ibid*, Section 45(3)(c)

Registration can be difficult enough at in-person general meetings. Strata councils should consider, prior to the meeting, how to conduct registration for individuals that attend general meetings by electronic means. For example, will all attendees have to wait in a waiting room until they are identified, then admitted to the meeting? Alternatively, will registration occur once everyone has connected to the meeting? Especially when there are a large number of strata lots and the person facilitating registration does not know the attendees well, registration can take a long time, and it is important to have a system in place to make the registration process efficient. Strata councils may also wish for their strata managers to perform this function.

Identifying eligible voters and certifying proxies and corporate representatives may also be more challenging if those individuals attend by electronic means. The strata council should consider whether photo identification is going to be requested or required.

The recent amendments to SPA create an interesting situation for hybrid general meetings, as the Schedule of Standard Bylaws to SPA permits eligible voters attending in person to vote by secret ballot and have voter cards issued to them, but electronic attendees would not have the same rights under the Schedule of Standard Bylaws to the SPA. Strata councils may consider proposing a resolution to amend the strata corporation's bylaws to allow for this. Strata councils should also consider how to respond to attendees when a secret ballot is requested for a vote in the case of hybrid general meetings or meetings held solely by electronic means.

Aside from the secret-ballot votes, councils must consider the logistics of how eligible voters can cast their votes and how the appropriate person(s) can count the votes cast.

Prior to the meeting, councils may wish to set out voting procedures in the notice of meeting and/or the strata corporation's bylaws so the eligible voters know what to expect.

CONCLUSION

As a real estate licensee in B.C., keeping up to date on related legislation is essential. The legislation is being amended at an increased pace to deal with various issues, including lack of housing. BCFSA finds that SPA and the SPR are being frequently amended and many of those amendments affect the everyday tasks of strata managers, and the advice given to clients of those who work in trading services and rental property management. Licensees providing strata management services to strata corporations should ensure that all bylaw amendments are promptly filed with the LTO. Trading services licensees should be diligent about requesting the most up to date bylaws for clients interested in purchasing a strata lot and not relying on unfiled consolidated copies of bylaws that are not the filed bylaws of the strata corporation and may be out of date.

Module Eight: Small Stratas and EVs

The Strata Property Act ("SPA")[1] is legislation unique to British Columbia. It is generally a "one-size-fits-all" statute, however, there are some provisions that only concern small stratas. SPA is frequently amended to reflect societal changes and technological advancements.

The objective of this module is to focus on two select topics regarding strata corporations and the application of SPA. First, we focus on strata corporations with few strata lots, their proper governance, and licensees' potential role when representing strata corporations with few strata lots. Next, we address the current and upcoming requirements of SPA and the Strata Property Regulation ("SPR")[2] to deal with electric vehicle ("EV") charging infrastructure in strata communities.

The phrase "few strata lots" may be confusing. It is confusing because neither SPA nor the SPR define the phrase "few strata lots," or a similar concept. In this module, we use the phrase "few strata lots" to draw attention to the fact that SPA and the SPR contain special provisions that apply to strata corporations that have few strata lots or few owners. For instance, SPA contains some special provisions for strata corporations with "fewer than 4 strata lots or fewer than 4 owners," "fewer than 5 strata lots," and "at least 10 strata lots." In particular, because "few strata lots" is not a defined term in SPA or the SPR, you must be very careful when looking at different provisions in this legislation.

1 SBC 1998 c 43
2 BC Reg 43/2000

LEARNING OBJECTIVES

By the end of this module, you will be able to:

1. Recognize that there are provisions of SPA and the SPR that do or do not apply to strata corporations with few strata lots;

2. Consider how your professional obligations apply as a licensee when you are dealing with strata corporations with few strata lots;

3. Identify the voting thresholds for the owners at a general meeting to approve certain decisions related to EV charging infrastructure and to funding an electrical planning report; and

4. Understand the requirement for strata corporations to obtain an electrical planning report, including the applicable time limits, and which strata corporations are exempted from the requirement.

08 →

APPLICATION OF SPA TO STRATA CORPORATIONS WITH FEW STRATA LOTS

In this section, we consider the application of SPA and the SPR to strata corporations with "few strata lots." As mentioned above, neither SPA nor the SPR define the phrase "few strata lots" or a similar concept. This could be for a number of reasons, including different writing styles of drafters at the legislature or the movement towards use of more plain language in statutes.

Licensees sometimes refer to strata corporations with few strata lots as "non-conforming strata corporations." What is a non-conforming strata corporation? Do strata corporations that have few strata lots have the right to opt out of the requirements of SPA and the SPR?

All strata corporations in British Columbia must comply with SPA and the SPR, regardless of the number of strata lots in the complex. Strata communities with two strata lots (duplexes), towers with two hundred strata lots in them, and strata corporations with a number of strata lots anywhere in between, are all subject to SPA and the SPR. There are, however, a number of provisions in SPA and the SPR that only concern strata corporations with few strata lots. Those provisions do not give strata corporations with few strata lots the right not to comply with SPA and the SPR. A "non-conforming strata corporation" is a strata corporation that does not comply with SPA or the SPR. The failure of a strata corporation to comply with SPA and the SPR, including failing to hold an annual general meeting, pass a budget, and form a proper strata council, are violations of SPA and the SPR. Those violations may have legal consequences for the owners of the strata corporation, as well as any licensees and brokerages involved.

All strata corporations must prepare and approve a budget, whether it has few strata lots or not. If strata corporations with few strata lots fail to prepare and approve a budget, and instead "pass a hat around" to pay for expenses on an ad hoc basis, they will likely not be prepared or have sufficient funds available when there is an emergency repair required, such as a roof leak. Strata councils that request money from owners on an ad hoc basis, and not in accordance with the methods set out in the SPA, may not be able to use a legal process to collect on those payments from owners because the strata council has not followed the process under SPA for approving a budget or imposing a special levy. Another complication is when strata owners agree to allow different owners to repair and maintain "their portion" of the exterior of a building, when in reality, the building exterior is common property that the strata corporation is responsible for repairing and maintaining.[3] When some but not all owners repair and maintain the portion of the exterior of the building that is adjacent to their strata lot, a strata corporation could eventually end up in a dispute when not all owners agree to do so. Individuals may disagree on the level of repair required, or an owner may eventually argue that SPA should be complied with.

Under the Real Estate Services Rules ("Rules"), licensees have a duty to act in accordance with the lawful instructions of their client.[4] Accordingly, strata managers must act in accordance with the lawful instructions of the strata council. Strata managers may be put in awkward situations when strata councils in strata corporations with few strata lots do not want to comply with the requirements of SPA and the SPR (like the above example). The strata council members may ask the strata manager to let its non-compliance slide. In those situations, strata managers may wish to speak with their managing brokers to determine whether the strata manager and the brokerage should continue to act for the strata corporation, if they are unable to receive lawful instructions.

3 SBC 1998 c 43 Sections 3 and 72; Schedule of Standard Bylaws to SPA ("Standard Bylaws") Section 8
4 Rules Section 30(b)

1. Strata Management Service Agreements

Generally, strata management service agreements are often drafted on the basis that full strata management services will be provided. When a brokerage provides full strata management services to a strata corporation, the strata manager has the opportunity to become especially knowledgeable about the strata corporation. The strata manager will likely have been involved in obtaining strata insurance, preparing the budget, attending both general meetings of the strata corporation and strata council meetings, arranging for service providers, and reviewing agreements for the same.

In performing the above-noted tasks, the brokerage will have access to the records of the strata corporation. The strata corporation may request the brokerage to retain all or most of the records of the strata corporation at its office. As a result, the brokerage generally has the information necessary to prepare forms that are required to be produced by the strata corporation under SPA and SPR upon request, such as an Information Certificate ("Form B") and a Certificate of Payment ("Form F").

Sometimes, strata corporations may choose to limit the number of services provided by a brokerage through a strata management service agreement. For example, a strata corporation may wish to only have a brokerage provide financial accounting or prepare SPA required forms, such as the ones listed above. For brokerages providing partial strata management services to strata corporations, it is appropriate to make special efforts to ensure that the strata management service agreement matches the services that the strata corporation is paying for, and that the services have been bundled together in a logical manner. This is especially important for strata corporations with few strata lots, which often retain a brokerage to provide partial rather than full strata management services.

Further, providing accurate information on a Form B is difficult when partial strata management services are provided and the strata manager does not retain the records of the strata corporation, nor attend the general meetings of the strata corporation and strata council meetings.

In either case, the Rules require a strata management service agreement to set out "a description of the records that are to be kept by the brokerage on behalf of the strata corporation, including an indication of which, if any, of the records required under section 35 … of the [SPA] the brokerage will retain on behalf of the strata corporation."[5] With respect to strata corporations with few strata lots, specific provisions should be set out in the strata management service agreement to provide that the strata corporation is responsible to provide the brokerage with the documents required to fulfill the functions that the brokerage has agreed to provide.

In addition to being mindful to define the services that are being offered and making sure that the brokerage has the knowledge to provide those services, licensees managing strata corporations with few strata lots should be aware that there are some differences in SPA and the SPR regarding the governance of strata corporations with fewer strata lots. Many of these differences are for strata corporations with fewer than five strata lots or phases of a strata plan with fewer than five strata lots. We discuss these differences below in greater detail.

In the above-noted situations, standard procedures regarding general meetings of the strata corporation, strata council meetings, depreciation reports, electrical planning reports, and fundamental changes to the strata corporation require special attention. Below, we consider some of the provisions of SPA and the SPR that are different for strata corporations with fewer than five strata lots, or another number of strata lots, or a number of owners specified in the legislation.

5 *Ibid*, Section 43(6)(f)

2. Council

As a strata manager, you may have a standard practice regarding giving advice to strata councils about how to function. For instance, the advice may concern council meeting procedures including determining quorum and how tie votes are addressed at a council meeting, as well as what happens when there is a complaint made against a council member or when a conflict of interest arises with a council member. When it comes to strata corporations with few strata lots, the standard practice may need to be modified because SPA and the Schedule of Standard Bylaws (the "Standard Bylaws") thereto contain exceptions for those strata corporations. We first consider the basis for strata council membership pursuant to SPA, then consider the application of exceptions contained in SPA and the Standard Bylaws to demonstrate why your standard practice may need to be modified when providing strata management services to strata corporations with few strata lots.

The starting point for considering membership on strata councils pursuant to SPA is as follows:[6]

> **29** (1) The number of persons on council is determined by the bylaws.
>
> (2) If a strata lot is owned by more than one person, only one owner of the strata lot may be a council member at any one time with respect to that lot, unless all the owners are on the council.
>
> (3) If a strata lot is owned by a corporation, only one representative of the corporation may be a council member at any one time with respect to that lot.
>
> (4) If all the owners are on the council, each strata lot has one vote at council meetings.

The above must be considered together with the Standard Bylaws, which sets out an exception for strata corporations with fewer than four strata lots or if the strata corporation has fewer than four owners. In the case of those strata corporations, all owners are on council.[7]

Not only are the Standard Bylaws regarding council membership different for certain strata corporations based on the number of strata lots in the complex, but the provisions regarding certain strata council meeting procedures also vary. Under the Standard Bylaws, the quorum at a strata council meeting varies depending on the number of council members there are.[8] Normally, under the Standard Bylaws, tie votes at strata council meetings can be broken by the president of the strata council. This, however, does not apply if there are only two strata lots in the strata plan.[9] In addition, if there is a complaint about a strata council member contravening a bylaw or rule, the strata council member must not participate in a decision about the complaint made pursuant to SPA. However, if all owners are on strata council, that strata council member may participate.[10]

Whether a strata council member is under a conflict of interest requires special consideration in the context of a strata corporation with few strata lots.[11] For instance, if every owner is on strata council, every hearing before a strata council requested by an owner will involve the interests of at least one owner who is serving on the council, and maybe more. To illustrate, an owner who is serving on the strata council in a triplex may request under the strata corporation's bylaws to install a hot tub on the limited common property they have exclusive use of. The owners of the other two adjoining strata lots, who also serve on strata council, may be concerned about the noise that may emanate from the hot tub motor. In these instances, it would be prudent for a licensee attending the strata council meeting to recommend to the strata council that legal advice should be sought on how to proceed.

6 SBC 1998 c 43 Section 29
7 Standard Bylaws Section 9
8 *Ibid*, Section 16
9 *Ibid*, Section 18
10 SBC 1998 c 43 Section 136
11 *Ibid*, Sections 31 to 33

3. General Meetings

General meetings of a strata corporation are another area that strata managers need to be careful about if they are managing a strata corporation with few strata lots, or even performing a limited task such as chairing the general meeting. Make sure that your brokerage complies with the provisions of the Rules regarding written service agreements.[12] It may seem like a lot of paperwork to have a written service agreement for a short-term arrangement, such as chairing a meeting, yet you are still providing strata management services to the client.

At the beginning of a general meeting, it is necessary to determine whether quorum has been reached. Unless a bylaw provides otherwise, quorum is generally established when eligible voters holding 1/3 of the strata corporation's votes are present in person or by proxy. In the case of a strata corporation with fewer than four owners, unless there is a bylaw providing otherwise, quorum is obtained when eligible voters holding 2/3 of the strata corporation's votes are present in person or by proxy.[13]

Normally, under the Standard Bylaws, tie votes at general meetings can be broken by the president of the strata council. This, however, does not apply if there are only two strata lots in the strata plan.[14] In some cases, that could lead to a stalemate regarding repairs and other important topics. Those strata corporations may need to consider pursuing a legal process such as at the Civil Resolution Tribunal or arbitration to address a variety of issues the strata corporation may face.

Strata corporations with fewer strata lots are more likely to be able to obtain a unanimous vote for various purposes under SPA, because there are fewer signatures to obtain. In the case of a failed unanimous vote, SPA contains a powerful remedy that allows a strata corporation to make an application to the Supreme Court of British Columbia to seek an order for the unanimous vote to proceed as if the dissenting voter or voters had no votes. However, the provision does not apply to strata corporations with under 10 strata lots, so those strata corporations will not be able to seek that remedy.[15] In those circumstances, strata managers should speak with their managing broker and recommend to the strata council to obtain legal advice.

For strata corporations with phases, SPA and the SPR govern the requirement to hold an annual general meeting after a phase other than the first phase of a phased strata plan is deposited with the land title office.[16] When holding an annual general meeting after a subsequent phase of a phased strata plan is deposited with the land title office, two additional members of the strata council must be elected from the owners in the new phase to hold office of the strata council until the next annual general meeting of the strata corporation.[17] If the new phase consists of only one strata lot, or the strata lots of that phase are owned by only one or two owners, that owner or those owners are deemed to be elected to strata council if they consent.[18]

4. Electrical Planning Report

If there are fewer than five strata lots in a complex, or fewer than five strata lots in a phase for a phased strata corporation, the provisions regarding electrical planning reports vary from those provisions that apply to strata corporations with more strata lots.[19] This will be discussed in greater detail later in this module.

12 Rules Section 43
13 SBC 1998 c 43 Section 48
14 Standard Bylaws Sections 27(5) and (6)
15 SBC 1998 c 43 Section 52
16 *Ibid*, Section 230
17 BC Reg 43/2000 Section 13.5(1)
18 SBC 1998 c 43 Section 230; BC Reg 43/2000 Sections 13.4 and 13.5
19 BC Reg 43/2000 Sections 5.8 and 5.9

5. Depreciation Report

It is generally mandatory for strata corporations in British Columbia to obtain a depreciation report, but there is an exemption in SPA and the SPR for some strata corporations.[20] The exemption is for strata corporations with fewer than five strata lots, which do not need to obtain a depreciation report for so long as there remains fewer than five strata lots in the strata plan.[21]

Strata managers who provide strata management services to strata corporations with few strata lots should consider how this exemption will affect repair and maintenance in the strata corporation. Strata managers should have a discussion with the strata council concerning a repair and maintenance plan, and whether the strata council would like to obtain a depreciation report even in the absence of a requirement to obtain one by a certain date. If repair and maintenance is not performed in the strata complex, this could create major structural issues and could cost the strata corporation a lot of money to deal with in a short period of time.

6. Administrators

Strata corporations with few strata lots often do not comply with SPA and the SPR. Strata corporations that fail to comply with basic governance obligations under SPA are subject to having an administrator appointed under Section 174 of the SPA. As a result, administrators are appointed more regularly for strata corporations with few strata lots than those with a higher number of strata lots.

The basic test to have an administrator appointed is set out in a 2001 Supreme Court of British Columbia case:[22]

- "whether there has been established a demonstrated inability to manage the strata corporation;
- whether there has been demonstrated substantial misconduct or mismanagement or both in relation to affairs of the strata corporation;
- whether the appointment of an administrator is necessary to bring order to the affairs of the strata corporation;
- where there is a struggle within the strata corporation among competing groups such as to impede or prevent proper governance of the strata corporation; and
- where only the appointment of an administrator has any reasonable prospect of bringing to order the affairs of the strata corporation."

Often, senior strata managers are appointed by the Supreme Court of British Columbia to act as administrators for strata corporations pursuant to Section 174 of the SPA. In a Report from Council, the Real Estate Council of British Columbia advised that licensees acting as court-appointed administrators must ensure the following:[23]

- "their related brokerage is appointed as the administrator. If the courts or the parties wish to have a specific individual licensee also involved, this could be identified in the court order or other service and/or consent agreement that may be entered into;
- funds held on behalf of the strata corporation are held in a brokerage trust account(s);
- all remuneration paid for the licensee's services is paid through the brokerage;
- the brokerage maintains books and records as required by RESA [*Real Estate Services Act*] and the [Rules]."

20 BC 1998 c 43 Section 94
21 BC Reg 43/2000 Section 6.2(8)
22 2001 BCSC 493 (CanLII) at para 11
23 Real Estate Council of British Columbia, October 2014 Report from Council Newsletter (2014, November 27)

7. Winding Up

The procedural requirements to wind up a strata corporation, with or without a liquidator, and the need for court approval, differ for strata corporations that have under five strata lots.[24] Licensees may be involved in the winding up process in various capacities, such as with respect to strata management or selling the property to a developer. The licensee should ensure that they have the appropriate licence(s) to carry out the services they are involved in. This may require holding both a strata management licence and a trading services licence. The licensee should also ensure that they are acting within their expertise and be aware that a process that they may have seen followed in the past may vary for a strata corporation with under five strata lots. Licensees have a duty under the Rules to advise clients to seek independent professional advice on matters outside of their expertise.[25]

EV CHARGING INFRASTRUCTURE

Recent changes to SPA support the installation of EV charging infrastructure on common property in strata communities, including limited common property. Those changes to SPA anticipate that EV charging infrastructure may be installed by the strata corporation, or at the request of an owner. For strata corporations, EV charging infrastructure and the management of electricity and related matters, including reports, are no longer treated like most other expenses or alterations in a strata complex. There are special provisions in SPA and the SPR regarding approving the funding of infrastructure, the management of electricity, and obtaining related reports. There are also special provisions in SPA and the SPR regarding requests of owners for parking stalls with access to EV charging, and how strata corporations must consider and respond to those requests.

1. Voting Thresholds

On May 11, 2023, amendments to Sections 71, 82, and 96 of SPA came into force. Those amendments allow for the owners of a strata corporation attending a general meeting to make certain decisions related to EV charging infrastructure, or the management of electricity used by EV charging infrastructure, by a majority vote as opposed to a 3/4 vote.

Section 71 of SPA generally requires any significant change in the use or appearance of common property or land that is a common asset to first be approved by a 3/4 vote of the owners at a general meeting. The longstanding exception to this requirement is when there are "...reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage..." ("Emergency Expenditure").[26] There is now another exception to the requirement for a 3/4 vote. A significant change in use or appearance "...in the case of a change that is related to the installation of EV charging infrastructure or the management of electricity used by EV charging infrastructure..." can be approved by the owners at a general meeting by majority vote.[27]

Section 82 of SPA provides general provisions regarding strata corporations acquiring and disposing of personal property. Under that provision, a strata corporation can:

- acquire personal property for the strata corporation's use, as well as for the purpose of making an alteration to common property to install EV charging infrastructure for an owner pursuant to Part 5, Division 6 of SPA;[28] and
- sell, lease mortgage or otherwise dispose of personal property.[29]

24 SBC 1998 c 43 Sections 274(c), 278.1, and 279
25 Rules Section 30(d)
26 SBC 1998 c 43 Section 71(a)
27 *Ibid*, Section 71(b)(i)
28 *Ibid*, Section 82(1)
29 *Ibid*, Section 82(2)

Unless the strata corporation's bylaws provide otherwise, any acquisition or disposal of personal property of a market value of more than $1,000.00 requires prior approval by a 3/4 vote of the owners at a general meeting. There is an exception made for certain investment instruments set out in Section 95(2) of SPA. Section 82 of SPA was amended in 2023 so that personal property acquired or disposed of for a purpose related to the installation, operation, maintenance and repair of EV charging infrastructure, or the management of electricity used by EV charging infrastructure, must be approved by the owners at a general meeting by a majority vote, rather than a 3/4 vote as required for personal property acquired or disposed of for any other purpose.[30]

Related amendments to Section 96 of the SPA provide that the decision to fund certain expenditures in relation to EV charging infrastructure from the contingency reserve fund can be made by a majority vote of the owners. Generally, expenditures from the contingency reserve fund require prior approval from the owners by a 3/4 vote at a general meeting. There are exceptions to this general rule, as there are a few categories of expenditures from the contingency reserve fund that only require a majority vote approval by the owners at a general meeting.

Expenditures from the contingency reserve fund in relation to the following are now one of these exceptions and only require majority vote approval of the owners:

- The installation of EV charging infrastructure;
- The management of electricity used by the EV charging infrastructure; or
- Necessary for obtaining an electrical planning report under Section 94.1 of SPA or any other report about the EV charging infrastructure or the management of the electricity for infrastructure.

A strata manager may wish to review Section 98 of SPA to understand instances when funds can be expended by council from the contingency reserve fund without the approval of the owners. These instances include Emergency Expenditures. Keep in mind that expenditures by way of a special levy for EV charging infrastructure or the management of the electricity for the infrastructure, or an electrical planning report, must be approved by 3/4 vote pursuant to Section 108 of SPA.

2. Obtaining Electrical Planning Reports

On December 6, 2023, further amendments to SPA came into effect that relate to EV charging infrastructure and related electrical work. Those amendments impose requirements on strata corporations to obtain electrical planning reports on certain timelines and there are exceptions to those requirements. SPA now provides for a mandatory process for owners to follow who are requesting to make alterations to common property related to an EV parking stall and a process for the strata corporation to address those requests. The application of the concept of short-term exclusive use arrangements to parking stalls involving EV charging is now set out in SPA and the SPR.

The SPR sets out a lengthy list of what content an electrical planning report must include, including the current capacity of the strata corporation's electrical system and an estimate of the electrical capacity needed for any future demands on the electrical system.[31]

SPA and the SPR have also been amended to require most strata corporations to obtain an electrical planning report, on certain deadlines depending on whether the strata corporation is defined as an "existing strata corporation" or a "new strata corporation" under the SPR, as well as the location of the strata plan. There are, however, exemptions for "existing strata corporations" and "new strata corporations" with fewer than five strata lots which we discuss further below.[32]

30 *Ibid*, Section 82(3.1)
31 BC Reg 43/2000 Section 5.11
32 *Ibid*, Section 5.8

It may not be the case that the electrical planning report comes before EV charging infrastructure is installed in a strata corporation. The statutory deadline could occur after the infrastructure has been installed. In addition, some strata corporations already have EV charging infrastructure.

For strata corporations without phases, a strata corporation that existed on December 31, 2023, is defined in the SPR as an "existing strata corporation." An existing strata corporation must obtain an electrical planning report on or before December 31, 2026, if the strata plan is wholly or partly in a specified area, and by December 31, 2028, if the land in the strata plan is located wholly outside of a specified area.[33] The term "specified area" for the purpose of this requirement means any of the following:[34]

- The Capital Regional District, other than an island within the Capital Regional District that is accessible only by air or boat;
- The Fraser Valley Regional District;
- The Metro Vancouver Regional District, other than an island that is accessible only by air or boat.

Strata corporations without phases are defined as a "new strata corporation," if the strata plan was deposited after December 31, 2023. New strata corporations must obtain an electrical planning report on or before the date that is five years after the date of the deposit of the strata plan. New strata corporations with fewer than five strata lots are exempt from the requirement.[35]

There are deadlines and exemptions to obtain electrical reports for strata corporations with phased strata plans that follow similar timeline considerations of whether the phase is in a specified area. For instance, if a phase of a strata plan that was deposited as of December 31, 2023, has more than five strata lots and is wholly or partly in a specified area, the report must be obtained by December 31, 2026.[36] For subsequent phases for the same strata plan deposited after December 31, 2026, the strata corporation will have five years to obtain an electrical report. If the number of strata lots in each phase is fewer than five, the strata corporation has five years to obtain an electrical planning report after deposit of the final phase.

Section 5.8 of the SPR makes specific exemptions for "existing strata corporations" and "new strata corporations" with respect to obtaining electrical planning reports. For "existing strata corporations," those strata corporations do not need to obtain an electrical planning report if, on December 31, 2023, the strata plan has fewer than five strata lots.[37] For "new strata corporations," those strata corporations do not need to obtain an electrical planning report if, on the date of deposit of the strata plan, the strata plan has fewer than five strata lots.[38]

Electrical planning reports must be obtained from a "qualified person."[39] The SPR addresses who is a "qualified person" to prepare an electrical planning report,[40] as well as the necessary content of the report.[41]

33 *Ibid*
34 *Ibid*, Section 5.7
35 *Ibid*, Section 5.8
36 *Ibid*, Section 5.9
37 *Ibid*, Section 5.8(3)
38 *Ibid*, Section 5.8(5)
39 SBC 1998 c 43 Section 94.1; BC Reg 43/2000 Section 5.10
40 BC Reg 43/2000, Section 5.10
41 *Ibid*, Sections 5.11 and 5.12

3. Request by an Owner

Amendments to SPA and the SPR have been made regarding requests of owners for parking stalls with access to EV charging, and how strata corporations must consider and respond to those requests. As a strata manager, you may be the person who receives these requests from owners to pass on to the strata council for their consideration. On the other hand, the requests may go straight to the strata council. Either way, the lines of communication should be determined between the strata manager and the strata council, and then the owners should be informed so they know who to make their requests to. One way to do this is to set out who the strata council would like the owners to make the requests to in the minutes of a strata council meeting, so all of the owners receive notice.

Section 90.1 of SPA governs an owner's request for proposed alterations to "...common property, or to land that is a common asset that are necessary for the purposes of installing EV charging infrastructure for use at a parking stall." An owner's request under Section 90.1 of the SPA must be made in accordance with the timelines provided under the SPR.[42] The information required to be included in the request is as follows:[43]

- The owner's contact information and strata lot number;
- A description of the proposed EV charging infrastructure;
- The proposed location of the EV charging infrastructure;
- The number or location of the parking stall at which the EV charging infrastructure would be used;
- The name and contact information of a contractor who is qualified to make the proposed alterations for which approval is sought;
- A description, prepared by the contractor, of the work required to make the proposed alterations; and
- An estimate, prepared by the contractor, of
    - The cost of making the proposed alterations; and
    - The time needed to make the proposed alterations.

The strata corporation must decide whether to approve the owner's request within three months.[44] The strata corporation must not unreasonably withhold permission for the EV charging infrastructure.

Prior to approving a request, there may be other decisions that must be made by the owners rather than by the strata council. Generally, the powers and duties of the strata corporation must be exercised and performed by a strata council, unless SPA, the SPR, or the bylaws provide otherwise.[45] In the case of EV charging infrastructure, electricity and reports, the strata council will generally be deciding whether to approve requests and on what basis. The owners, however, will also be making decisions at general meetings concerning EV charging infrastructure that involve financial matters and significant changes in use or appearance of common property or land that is a common asset.

Generally, strata corporations cannot make significant changes in the use or appearance of common property or land that is a common asset without a 3/4 vote of the owners.[46] SPA has been amended to lower the voting threshold for significant changes in use or appearance of common property or land that is a common asset related to the EV charging infrastructure or the management of electricity used by EV charging infrastructure to a majority vote of the owners.

Further, the owners may need to approve either an expenditure from the contingency reserve fund or a special levy at a general meeting to finance the alteration.

42 *Ibid*, Section 5.4
43 *Ibid*, Section 5.3
44 SBC 1998 c 43 Section 90.2; BC Reg 43/2000 Section 5.6
45 SBC 1998 c 43 Section 4
46 *Ibid*, Section 71

Strata managers should be aware of the decisions that may require approval by the owners rather than by the strata council (such as those decisions discussed above) and anticipate them when the strata corporation receives a request made under Section 90.1 of SPA. The strata council may request for the strata manager's assistance in preparing and including resolutions in notices of general meetings for the owners to vote on with respect to financing and significant changes in use or appearance of common property or land that is a common asset for such alterations. Strata managers should consider whether to advise the strata council to obtain legal advice with respect to the resolutions, and/or the alteration request. Strata managers must ensure there is sufficient time to obtain legal advice within the timeframe required for the strata corporation to make a decision, especially if a general meeting is required to make decisions prior to approving the alteration request.

The strata corporation may approve the request if the following criteria are met:[47]

- The proposed EV charging infrastructure is in a prescribed class of EV charging infrastructure;
- If the parking stall is common property or located on land that is a common asset, at the time the request is made, the owner has a right, permission or privilege to use the parking stall to the exclusion of other owners; and
- Any prescribed criteria.

In considering the request, the strata corporation can consider the following matters:[48]

- The compatibility of the proposed EV charging infrastructure with
    - Existing EV charging infrastructure in the strata corporation;
    - Other EV charging infrastructure that may be installed by the strata corporation or another owner; and
    - Any system the strata corporation uses, or plans to use, to manage electricity used by EV charging infrastructure;
- The capacity of, and current and anticipated demands on, the strata corporation's electrical system; and
- Any prescribed matters.

The strata corporation can require the owner to agree to reasonable conditions of an approval. The conditions set out go beyond what is normally provided in an alterations agreement or indemnity agreement signed by an owner in exchange for being allowed to alter common property. The allowable conditions that a strata corporation may require of an owner include the following:[49]

- Obtain the strata corporation's approval of EV charging infrastructure, contractors, materials or other matters related to the alteration;
- Modify or replace the proposed EV charging infrastructure if the strata corporation installs other EV charging infrastructure for the benefit of the owners; or
- If more than one owner makes the request, accept joint and several liability for expenses associated with making the alteration or for other costs.

In determining who should pay for the installation of EV charging infrastructure, strata managers should advise councils that builders liens may be placed on all strata lots in the strata complex if work is performed to common property and the contractor, and others related to the contractor, are not paid.

Brokerages should advise councils that standard form alteration agreements they may use for other matters are likely not suitable to use for EV charging station infrastructure agreements and that they should seek legal advice on this matter.

47 *Ibid*, Section 90.2(2)
48 *Ibid*, Section 90.2(3)
49 *Ibid*, Section 90.2(5)

Section 90.3 of the SPA provides for what happens when an owner's request is approved. It provides the strata corporation with flexibility to make the alteration itself or allow the owner to make the alteration. Either way, the strata corporation may make the owner responsible for the costs associated with making the alteration. If the strata corporation is making the alteration, the owner, unless otherwise agreed, must prepay the cost to cover the expenses associated with making the alteration. If the amount prepaid is insufficient, the owner must pay the difference. If the amount prepaid exceeds the amount required, the excess amount must be returned to the owner. The installation of the EV charging infrastructure made at an owner's request does not affect the owner's rights or permissions to a parking stall. To reduce the possibility of owners claiming significant unfairness against the strata corporation, it would be prudent for strata managers to ensure that the strata council clarifies use of the parking stall with the owner prior to the owner agreeing to pay for expenses related to EV charging stations.

4. Exclusive Use and EV Parking Stalls

Permission to exclusively use a common property parking stall where an EV charging infrastructure installation has resulted from an owner's request may be given by the strata corporation to an owner for a period of not more than five years.[50] This is an exception to the general authority that a strata corporation may give an owner or tenant permission to exclusively use, or a special privilege in relation to, common assets or common property that is not designated as limited common property for a period of not more than one year.[51]

5. User Fees

User fees pursuant to Section 110 of the SPA can be imposed pursuant to Section 6.9 of the SPR. User fees can be approved by bylaw or by rule. Rules must be passed by the council at a council meeting and ratified by the owners at a general meeting prior to being effective if they are for user fees.

CONCLUSION

SPA and the SPR contain many nuances that are unique to strata corporations. As a real estate licensee in British Columbia, understanding that these nuances exist is important, and understanding how to deal with them if you are helping clients manage strata property, is even more important. This module focused on two of those topics: strata corporations with few strata lots and EV charging infrastructure in strata communities.

With respect to strata corporations with few strata lots, this module focused on several areas of SPA and the SPR where your approach to assisting clients to manage strata corporations may need to change because there are certain differences in the legislation for strata corporations with few strata lots.

With respect to EVs, this module focused on many of the recent changes to SPA and the SPR with respect to EV charging infrastructure and the impact of the new requirements on strata corporations, including electrical planning reports.

50 SBC 1998 c 43 Sections 76(1) and 76(2)(b)(ii), BC Reg 43/2000 Section 5.101
51 SBC 1998 c 43 Sections 76(1) and 76(2)(b)(i)

ELECTRIC VEHICLE
RESERVED

Module Nine: Managing Brokers

Managing brokers retain ultimate responsibility for the control and conduct of the business of the brokerage. To fulfill the broad range of responsibilities and obligations, many managing brokers have delegated some of their duties to individuals within the brokerage as well as outsourcing tasks and services to third parties. This module will provide some practice tips for effectively delegating and managing third party service providers.

Clear brokerage policies and procedures are fundamental to successfully fulfilling the managing broker responsibilities for active supervision and records. This module will provide supervision strategies to help a managing broker stay informed and get records from related licensees. This module will also explain the benefits of effectively handling client complaints at the brokerage and provide information to help build the policies and process.

A brokerage's policies and procedures can also help prevent you and your brokerage from becoming a victim of a social engineering scam. This module will provide risk management best practices to help prevent you from being used in an electronic funds transfer fraud. This module will also provide you with practice tips related to trust accounting, including prevention of trust shortages, and dealing with interest on trust accounts.

LEARNING OBJECTIVES

By the end of this module, you will be able to:

1. Understand your obligations to maintain proper books and records, including how to properly use third-party service providers for bookkeeping;
2. Apply some basic risk management principles to brokerage operations, including handling consumer complaints;
3. Identify red flags for electronic fund transfers ("EFTs") and implement way to mitigate EFT risk; and
4. Understand and properly handle interest on trust accounts and avoid trust shortages.

09

RESPONSIBILITIES OF A MANAGING BROKER

Important responsibilities of a managing broker are set out in Section 6(2) of the *Real Estate Services Act* ("RESA")[1] and Section 28 of the Real Estate Services Rules ("Rules"). These include:

- The exercise of the rights conferred on the brokerage by its licence;
- The performance of the duties imposed on the brokerage by its licence;
- The control and conduct of the brokerage's real estate business, including supervision of the associate brokers and representatives who are licensed in relation to the brokerage;
- Being actively engaged in the management of the brokerage;
- Ensuring that the business of the brokerage is carried out competently;
- Ensuring that there is adequate supervision for related associate brokers and representatives and for employees and others who perform duties on behalf of the brokerage (i.e., third-party service providers);
- Ensuring that the records of the brokerage are maintained in accordance with RESA, the Real Estate Services Regulation ("Regulation")[2] and the Rules;
- Ensuring the proper management and control of documents and other records related to licensing and regulatory requirements; and
- Ensuring that the trust accounts of the brokerage are maintained in accordance with RESA, the Regulation and the Rules.[3]

RESA and the Rules set out several duties and obligations of brokerages, such as maintaining records. A managing broker is responsible to ensure these duties and obligations are met.[4] As a result, when reading Rules that say "brokerage," it can generally be interpreted as the managing broker being responsible. A managing broker can get help in fulfilling these duties. Who a managing broker engages for help will depend on the duty and any associated licensing requirements. Help can come from other licensees at the brokerage, staff, and third-party service providers.

PRACTICE TIP

If you are a managing broker, but not the brokerage owner, consider how your contract with the brokerage will support you to fulfill your regulatory responsibilities. Ask yourself what resources you need to properly fulfill those responsibilities and then ask the brokerage owner to provide them. Remember that a brokerage cannot function or even exist without a managing broker.

THE MEANING OF "LICENSEE"

A brokerage, managing broker, associate broker, and a representative are "licensees." They are all licensed under RESA. Understanding the meaning of "licensee" is necessary to interpret provisions of RESA and the Rules. It will help you to identify who is responsible for what tasks and activities.

1 SBC 2004 c 42
2 BC Reg 506/2004
3 For full duties and responsibilities, review RESA, the Regulation, and the Rules. The guidelines on BCFSA's Real Estate Knowledge Base also contain "Managing Broker Considerations" to assist in identifying and fulfilling the duties.
4 Brokerage obligations are the responsibility of managing brokers because of Section 6(2) of RESA. For example, Section 6(2)(b) states that a managing broker is responsible for the performance of duties imposed on the brokerage by its licence.

BROKERAGE BOOKS AND RECORDS

RESA has many requirements to create, maintain, and, in some circumstances, file with the Superintendent, books and records in relation to the brokerage. Under Section 28 of the Rules, a managing broker must ensure the records of the brokerage are maintained in accordance with RESA, the Regulation, and the Rules and ensure proper management and control of the documents and records. Important regulatory requirements for books and records are in Section 75, Section 75.1 and Part 8 [*Brokerage Records*] of the Rules.[5] Under Section 75 of the Rules, a brokerage must file with BC Financial Services Authority ("BCFSA") various financial information and activity reports within 120 days after each fiscal year end of the brokerage.[6] Part 8 of the Rules details most of the records that must be prepared and/or retained by the brokerage including financial, trust accounts, general records, receipts, and payment of referral fees. It also sets out specific requirements for the timing of creating and updating records, making them available to BCFSA, retention, etc. BCFSA frequently relies on Section 21 of the Rules to request books and records from brokerages as part of an audit or investigation.

The most common contraventions regarding books and records resulting in BCFSA enforcement are breaches of Section 21 (responding to BCFSA)[7] and Section 75 of the Rules (annual filings). A prudent managing broker will ensure that the brokerage has adequate policies and procedures in place to maintain and retain required records in a way that helps the brokerage to submit records and reports to BCFSA in a timely fashion. A brokerage should arrange its affairs to meet its regular reporting requirements (e.g., annual filings). Books and records should also be maintained in a way that allows the brokerage to respond to other requests (e.g., BCFSA data calls, audits, investigations into a related licensee, or transfer of records to a former client following the termination or assignment of a service agreement), including periodic filings under Section 75.1 of the Rules.[8] BCFSA allows brokerages to determine how best to create and maintain books and records and many brokerages successfully employ software to assist them.

BCFSA relies on the annual filings under Section 75 to engage in risk-based analysis of brokerages, identify and quickly resolve trust shortages, and any other concerns BCFSA may have with a brokerage's financial health. Failure to comply with Section 75 creates a risk of harm to consumers.

Discipline Case – Section 75 Annual Filings

BCFSA has seen several recent cases of insufficient brokerage books and records and late annual filings.

A 2024 consent order[9] dealt with a brokerage with a fiscal year end of August 31, meaning its Section 75 annual filings were due December 31. In June 2022, BCFSA issued an administrative penalty because the Section 75 filing for 2021 was late, in contravention of Section 75 of the Rules. In October 2022, the brokerage's bookkeeper resigned. In January 2023, the 2022 Section 75 filings were overdue. In May 2023, the brokerage advised BCFSA that there were errors in the general ledger from the former bookkeeper and the external accountant would not complete the Financial Statements or Accountant's Report until these issues were resolved. BCFSA advised the brokerage to have their external accountant complete the 2022 Section 75 filings and note any issues as exceptions. In October 2023, the brokerage retained a new external accounting firm to complete the 2022 Section 75 filings. The consent order gave the brokerage approximately one month from the date of the order to provide BCFSA with the 2022 Section 75 filings. If the brokerage failed, the managing broker and the brokerage itself would face licence cancellation.[10]

5 Records requirements in Part 8 [*Brokerage Records*] of the Rules includes financial, trust, pooled trust, and general records, among others.
6 The specifics of the annual filing requirements under Section 75 are captured in a Regulatory Statement: RESA 23-004 - Brokerage Reporting Requirements.
7 Section 21 of the Rules requires a licensee (which includes a brokerage or managing broker) to respond promptly to any inquiry addressed to the licensee by BCFSA.
8 Section 75.1 of the Rules came into force in February 2024. The Section expressly authorizes BCFSA to require brokerages to make periodic filings which may not be annual (e.g., daily, monthly, or quarterly). Through multiple channels, including the Regulatory Roadmap, BCFSA has signaled to industry its intention to collect real estate transaction data from trading services brokerages.
9 I.M.I Consent Order, 2024 BCSRE 8
10 Additional cases can be found by searching for "Section 75" on BCFSA's Real Estate Decisions webpage, including 2023 BCSRE 15 and 2023 BCSRE 30.

There are several lessons that can be learned from discipline cases related to Section 75:

- Conducting proper bank reconciliations throughout the year can catch and resolve bookkeeping errors early and prevent annual filing delays;
- Managing brokers should have some understanding of how to use the brokerage's books and records software or have other business continuity plans in place to ensure the brokerage can continue to meet books and records requirements in the event of a change in staff or other potentially disruptive event;
- Undergoing a BCFSA audit does not relieve the brokerage from filing its Section 75 annual filings on time; and
- Managing brokers are responsible for books and records even where tasks are delegated internally or externally.

THIRD-PARTY SERVICE PROVIDERS

Managing brokers often delegate certain responsibilities over books and records to others within the brokerage or outside of the brokerage (e.g., outsourcing to a bookkeeping firm). Whether delegating supervisory duties to an experienced related licensee to cover a vacation or responsibilities for specific activities to a third party, a managing broker should retain some control and involvement.[11] The managing broker retains ultimate responsibility for all activities outsourced to a third party and is expected to document, monitor, and manage outsourcing.

When engaging a third party to do brokerage bookkeeping, the managing broker should ensure that all service providers are sufficiently familiar with RESA's requirements about their services as well as applicable privacy laws. BCFSA's relationship is with a brokerage and not the brokerage's third-party service provider. A brokerage is required to fulfil requests from BCFSA related to records required by the Rules, such as financial records, that may be created and held by a service provider. This is part of the managing broker responsibilities under Section 28 of the Rules to ensure control of documents and other records related to regulatory requirements.[12]

PRACTICE TIPS WHEN HIRING THIRD-PARTY SERVICE PROVIDERS INCLUDE:

- Vet third-party service providers to ensure they have the capacity, knowledge, and experience to fulfil expectations;
- Establish written contracts for all material functions done by third-party service providers;
- Maintain a centralized list of all outsourcing arrangements; and
- Document and regularly review brokerage policies and procedures for the supervision of third-party service providers (e.g., every two to three years or more often if issues arise).

PRACTICE TIPS RELATED TO THE ONGOING USE OF THIRD-PARTY SERVICE PROVIDERS:

- Monitor service provider performance and regularly review outsourcing contracts;
- Conduct periodic reviews of the provider's work to see that the provider is meeting expectations and complying with contract terms as well as RESA and the Rules;
- Notify BCFSA within a reasonable time of any events that are likely to have a significant negative impact on compliance; and
- Ensure business continuity in the event of a short-term service interruption or if service provider is unable to fulfill expectations.

11 Additional information about managing broker responsibilities, including delegation for 30 days or less and for over 30 days can be found on BCFSA's website.
12 Also see Section 74 that requires a brokerage to allow BCFSA to review the brokerage's accounts, financial records and any other records relating to its dealings as a licensee. Another example is Section 91 that enables BCFSA to require a brokerage to print financial and other records which are stored electronically.

Whether using a third-party service provider on a one-off basis or for ongoing services, ensure that any task delegated to the service provider does not require a licence under RESA. For example, the definition of "rental property management services" includes collection of rents and security deposits. As a result, a brokerage cannot contract these functions to a third-party (unless they meet a licensing exemption).

GETTING DOCUMENTATION FROM RELATED LICENSEES

Section 29(1) of the Rules requires representatives and associate brokers to provide their managing broker with copies of a variety of records (e.g., service agreements, disclosures). The timeline of this requirement is "promptly," meaning without delay. The exact number of hours or days depends on the circumstances. In most circumstances, given technology, representatives and associate brokers should be able to provide their managing broker with the required records within one or two business days.

PRACTICE TIP

Put your brokerage expectations in writing, in both the brokerage's policies and procedures manual and periodic reminders circulated to all related licensees and relevant staff.

Discipline cases – Representatives' Failure to Provide Documents to their Managing Brokers

There are many discipline cases involving a contravention of an associate broker or representative's duty to promptly provide records to their managing broker under Section 29 of the Rules (previously Section 3-2(1)). These decisions can be found by searching BCFSA's Real Estate Decisions webpage. None of the cases provide a concise definition of what "promptly" means, as it is impossible to capture all circumstances. A prudent managing broker will encourage and support related licensees to provide required records within one or two business days.

PRACTICE TIP

Consider whether implementing one or more of the following strategies at your brokerage would assist you to supervise related licensees and get timely documentation from representatives and associate brokers.

Supervisory assistance strategies:

- Require an attestation that representatives and associate brokers have reviewed the brokerage policy manual in the past one or two years.
- Require an Annual Information Return that representatives and associate brokers give to the brokerage. An industry panelist at a Financial Services Regulatory Authority of Ontario session on creating a positive conduct culture used information returns with questions such as: are you in good standing with the Canada Revenue Agency, have you done any outside deals in the past year, have you received direct remuneration from anyone for your services, do you hold any licences for other professions that may conflict with your real estate services duties (e.g., mortgage broker, insurance)?
- Hold interviews with representatives and associate brokers a few weeks before licence renewal (or more frequent interviews if helpful) to ask questions similar to those in the "information return" described in the above bullet.
- Organize an annual compliance meeting (or more frequent meetings if needed) to update representatives and associate brokers on compliance related changes at the brokerage, including updates to brokerage protocols, processes, and policies. Between meetings, communicate important updates to all brokerage personnel by other means (e.g., by email).

General brokerage documentation strategies:

- Restrict payouts if records are incomplete.
- Codify tools in brokerage policies and contracts with related licensees to require and encourage providing documents and records promptly to the brokerage (e.g., within two business days after signed by required parties and/or acceptance date), and strictly enforce any deadlines for document submission.
- Add selected strategies to new licensee orientation and contracts between the brokerage and related licensees. Consider whether potential related licensees who disagree with your selected strategies are a good fit for your brokerage or may make supervision and compliance challenging. The reaction of a related licensee or applicant to such brokerage policies may help you spot problematic attitudes and practices.

RISK MANAGEMENT

There are many threats, both internal and external, to the compliant operations of a brokerage. Several threats can be mitigated through business continuity planning, information management systems, and processes that safeguard trust monies. Other risk management strategies include regular training on anti-money laundering and fraud, and promoting a culture of compliance at the brokerage. To protect clients from business disruptions, both operational and financial, a prudent brokerage and managing broker should plan for:

- The managing broker's succession (including temporary absences due to accidents, health issues, or other events that may affect the manager broker's ability to manage the brokerage);
- Natural catastrophes (e.g., wildfires, flooding, earthquakes);
- Cybersecurity threats; and
- Other risks to business continuity.

Brokerages should have practices in place to assist in preventing cyberattacks and social engineering fraud, and to mitigate their impact. Despite a brokerage's best efforts to maintain cybersecurity, their clients' email may become hacked, opening the door for a fraudster to pose as a client. Managing cyber risk has become an integral part of a brokerage's policies and procedures

Electronic Fund Transfers and Fraud

Electronic fund transfer ("EFT") fraud scams continue to plague many professions with trust accounts, including lawyers and notaries. They can be devastating and may exceed insurance coverage or not be covered at all, depending on the actions of licensees.[13] Any brokerage is a target, whether big or small, no matter where in the province. Social engineering fraud often involves a fraudster pretending to be a client or someone authorized to give instructions on a client's behalf. Social engineering fraud can target staff, who typically receive less training, education, and warnings about fraud.

The two examples below are adapted from real cases. These cases show how vulnerable email is to being used as a tool for fraud.

Example 1: Fraud Targets Rental Property Management

Betty Broker was a managing broker at a brokerage offering rental property management services. Betty was unaware that her email account was hacked by a fraudster named Fred. Fred was monitoring all incoming and outgoing emails. Several months ago, Fred set up a bank account under a numbered company in Ontario. Fred was setting up for the long con. Now, Fred flagged Betty's emails that referenced money, funds, transfers, and similar key words. Fred detected an email exchange between Betty Broker and Chamkaur Client. Chamkaur was a landlord and Betty Broker the rental property manager. Chamkaur instructed Betty Broker to get some paint and drywall fixed in a rental unit and replace a refrigerator and to pay for the work and appliance out of the rental proceeds held in trust by the brokerage. Watching this email exchange closely, Fred Fraudster created an email account that looked just like Chamkaur's but with one character change. Fred sent an email to Betty posing as Chamkaur revising the instructions – "Chamkaur" was going to pay for the work directly and Betty could forward the funds to "Chamkaur's" bank account. The email from "Chamkaur" gave the bank account details. Betty Broker had the funds sent to the bank account specified in the email. The funds went to Fred's numbered company bank account in Ontario. Neither Betty nor Chamkaur noticed the money was missing until the painters and appliance store sent overdue notices.

13 See the Real Estate Errors and Omission Insurance Corporation March 2024 *Risk Report* for details of the 2024 Indemnity Plan, including social engineering fraud sub-limit.

Steps Betty should have taken to manage the risk and protect herself and her client include:

- Established and followed protocols for transferring money out of the brokerage's trust account, and train staff on those protocols.
- Stayed vigilant in relation to email processes and required instructions and changes to be given in person or verified by telephone (using a number previously provided and independently verified, and not a number given to Betty in the email).
- Examined links carefully before clicking on them to avoid Fred's malware being planted in Betty's computer.

Now Betty will be reporting the social engineering fraud to the Real Estate Errors and Omissions Insurance Corporation ("REEOIC"), consulting her insurance broker about cyber insurance, reviewing her obligations to report trust shortages to BCFSA, and consulting her computer support consultants about cyber safety

Example 2: Fraud Targets Instructions to Staff

The buyer, Bala, and the seller in a real estate transaction agree to collapse the deal and for the deposit to be released back to Bala Buyer. Boris Broker got an email with instructions from Bala Buyer to return the deposit directly by electronic transfer to a bank account. Boris had recently read an REEOIC article on fraud prevention. He emailed his assistant to verify the instructions by calling Bala. Unfortunately, Fred Fraudster had gained access to Boris' and his assistant's email accounts. Fred posed as Boris's assistant and replied to Boris that Bala had confirmed the instructions and bank account number by phone. Boris made the transfer. Fred now has Bala's deposit funds. Boris should have verified Bala's instructions himself in person or by telephone.

Red flags of potential fraud:[14]

- A change in instructions by email, even when accompanied by a voicemail confirming instructions (however, some fraudsters hack client email accounts to provide initial fraudulent payment instructions);
- A sense of urgency or rush;
- A new email address or changes in tone and style of communication; and
- A third party using a Power of Attorney.

Brokerage-level practices to avoid being used to aid in fraud include:

- Implement a brokerage wide protocol and ensure everyone in the brokerage is aware of the protocol;
- Educate related licensees and staff about fraud, scams, and the importance of verifying client identification and instructions, especially if the instructions come by email;
- Empower related licensees and staff to resist any request to bypass payment protocols due to urgent circumstances;
- Educate yourself, related licensees, and staff on safe computer practices;
- Inform your clients and other relevant parties that your brokerage verifies emailed payment instruction details only by phone or in person; and
- Maintain a record of your verification on every file.[15]

14 More red flags that may indicate fraud can be found in a June 2023 E&O article on *Battling funds and title transfer scams*.
15 Brokerage protocols can adapt the Lawyer's Indemnity Fund Funds Transfer Instruction Verification Checklist.

Specific practices before transferring funds by any means:

- Verify the authenticity of emailed instructions through direct phone or in-person contact. Ensure instructions, bank account details, and recipient information are all correct;
- Use a trusted phone number, such as from the original file or from a reliable directory. Do not rely on the party calling you to confirm instructions. Do not use the contact information in the instructing email. While in-person contact may be a hassle, we now live in a world where a fraudster can use Artificial Intelligence ("AI") to realistically mimic a person's voice to stage a phone call. This is part of the reason why using original contact information is important;
- If you decide to require your client to pick up a cheque, ensure that the person who comes to your office is your client and not someone else; and
- If you courier a cheque to a client, use the address the client originally provided to you.

If you think you have been a victim of a transfer of funds fraud:

- Immediately notify your bank and request a clawback of the funds;
- Immediately contact your insurer (REEOIC, if related to the provision of real estate services, and any excess or cyber insurer that covers social engineering fraud);
- Contact your IT department or service provider to ensure the fraudster is not lurking in your system;
- Notify the client or other party as they may have suffered the security breach that allowed the fraudulent email to be sent; and
- File a report with the police, the Canadian Anti-fraud Centre, and report the incident to BCFSA, and if necessary, any privacy reporting required under the *Personal Information Protection Act* ("PIPA").[16]

Related Licensee Leaving the Brokerage

Earlier in this module, you learned some tips to stay informed of related licensees' activities. Applying supervisory and documentation strategies can help mitigate risks when a related licensee leaves the brokerage. Risks can include incomplete records, undocumented client funds, and reduced service to clients.

Contracts between a brokerage and related licensees should cover what happens when the relationship ends. What happens may vary based on the reason for the relationship ending (e.g., mutual agreement, misconduct). Brokerage policies and procedures related to requirements to promptly provide a managing broker with records,[17] should, if followed, help the managing broker to identify necessary steps and records for a smooth transition and to establish an audit trail.[18]

A few things to look out for:

- Listing agreements terminated or transitioned to a new designated agent. When transitioning to a new related licensee, conduct a quick check to avoid conflicts of interest.[19]
- Rental property and/or strata management service agreements terminated and/or transitioned to a new agent and facilitate introductions to the client. Where agreements have been terminated, ensure that the brokerage meets its obligations to provide records to former clients within the timelines established by Section 87 (rental) or Section 88 (strata) of the Rules.
- Ensure transaction records are complete, including any assignments and disclosures (e.g., representation, licensee interest in property, conflicts of interest, referral fees, and remuneration discounts, etc.).
- Ensure brokerage branded materials (advertising, memberships, and marketing materials) are turned in, updated and/or cancelled.
- Brokerage physical office and virtual systems access terminated.

16 SBC 2003 c 63
17 See related licensee duties under Section 29(1) and (2) of the Rules.
18 A 2021 discipline hearing decision found a representative committed several contraventions related to changing brokerages (2021 CanLII 86355 (BC REC)).
19 Section 30(i) of the Rules requires a brokerage and its related licensees to take reasonable steps to avoid any conflicts of interest.

Using an Annual Information Return, as described in the section of this module on "Getting Documentation from Related Licensees," can provide a head start on identifying information and documents that may be missing.

Consumer Complaints

Any business providing services to the public should expect to get complaints. When you receive complaints, it is important to have a process in place to deal with them promptly and fairly. Benefits to the brokerage of having an effective complaint handling system include:

- Quickly and efficiently resolves concerns raised by dissatisfied consumers;
- Provides information that can lead the brokerage to improve its service delivery, including identifying and resolving risks before they become a concern for BCFSA; and
- Strengthens consumer trust in the brokerage, and the real estate industry overall.

Complaints can come from a variety of sources, including related licensees and unlicensed staff. The duty to report concerning conduct is a cornerstone of protecting the public by helping ensure that minor non-compliance is addressed quickly and that those not following the rules are properly dealt with, either by the brokerage or BCFSA. Make sure your related licensees and staff know the importance of reporting concerns about, or that will impact, their reputation, the brokerage's reputation, and that of the industry.

Handling Consumer Complaints within a Brokerage

A prudent brokerage will have procedures and processes for internally handling complaints from consumers. The process should:

- Designate an individual to be responsible for handling complaints;
- Respond to complaints in a fair, transparent, and timely manner;
- Ensure record keeping of the complaint, including the appropriate action taken;
- Use resolved (anonymized) complaints as example scenarios for continued training of other brokerage personnel; and
- Set out the frequency and types of complaints that are required to be reported to brokerage ownership (e.g., partners, directors, board).

A brokerage should also have a clear process to encourage and help its related licensees to promptly notify the managing broker of suspected misconduct.[20] This will help the brokerage to quickly identify and address risks. Upon learning of the concern, the managing broker must take reasonable steps to deal with the matter.[21] These steps may include attempting to resolve the matter through an internal complaint handling process, amending the terms of the relationship between the brokerage and the related licensee or brokerage employee (e.g., increased supervision), or terminating the relationship. For some serious cases of alleged misconduct by a related licensee (e.g., fraud, dishonesty), the only reasonable step a managing broker can take is to refer the matter to BCFSA for investigation and potential discipline.

20 Helping related licensees to fulfill their obligation under Section 29(5) of the Rules.
21 Rules Section 28

TRUST ACCOUNT SHORTAGES AND INTEREST

Trust Account Basics

"Trust funds" are monies that belongs to a person other than a brokerage which are in the control of a brokerage. Important requirements about trust accounts are in Part 3 [*Trust Accounts and other Financial Matter*] of RESA and Part 7 [*Brokerage Accounts and Financial Requirements*] of the Rules. Under Section 26 of RESA, all brokerages must maintain one or more interest-bearing trust accounts in British Columbia, under Section 27 of RESA, the trust funds in a trust account must be in relation to real estate services, and under Section 72 of the Rules at least one managing broker must be a signing authority on each brokerage trust account. The accounts must be designated as trust accounts with the financial institution and in all brokerage records (e.g., deposit slips, cheques, bank statements). Only trust funds can be deposited into a brokerage trust account.

A pooled trust account is a trust account which holds funds on behalf of more than one client and/or trade in real estate.[22] A pooled trust account may be used to deposit money received from or on behalf of various clients in relation to trading, rental property management, and strata management services and money received on account of remuneration for real estate services. Section 81 of the Rules contains specific records requirements for pooled trust accounts, including the creation and maintenance of separate trust ledgers and monthly reconciliations. Sections 77 and 78 of the Rules have additional requirements and restrictions for strata management trust accounts. For example, Section 77(2) requires a brokerage who holds or receives money on behalf of a strata corporation to maintain specific separate trust accounts for operating funds, contingency reserve fund money and special levy money. Each of these accounts must be designated in the name of the strata corporation. Section 77(7) of the Rules requires at least two signatories on a contingency reserve fund trust account and special levy trust account. Section 77(7) also lists who may act as a signatory.

Trust Shortages

The main provision about trust account shortages is Section 73 of the Rules.[23] Trust shortages are a serious concern as brokerages are safeguarding consumer funds. Before making a withdrawal from a trust account, signatories on the account should review account records to ensure there are adequate funds. Brokerages must not withdraw funds from a trust account if the withdrawal creates a negative balance in the trust account record or trust ledger/sub-ledger. Funds must also not be withdrawn if the trust account record or trust ledger/sub-ledger to which the payment relates is already at a negative balance.

If a negative balance is identified, it must be resolved immediately.[24]

The brokerage, typically through a managing broker, must notify BCFSA in two situations:

1. Immediately if a managing broker considers that the negative balance may result in a consumer having a claim for compensable loss; or
2. Within ten days after the negative balance arose unless the negative balance was eliminated.[25]

PRACTICE TIPS

- **Review your brokerage systems and procedures to ensure there are proper controls and regular monitoring in place to always protect trust monies; and**
- **If you have affiliated brokerages, instruct bookkeeping staff to take extra care that payments are being made from the right brokerage. Ensure that you are remunerating related licensees from the correct account.**

22 Rules Section 1
23 B.P.L., 2022 BCSRE 16 is a consent order BCFSA entered with a brokerage for breaches of Sections 73(1), (2) and (3) of the Rules, related to a shortage in the brokerage's pooled rental trust account.
24 Rules Section 73(2)
25 Rules Section 73(3)

Interest

Section 29 of RESA governs interest on trust accounts. All brokerages that hold trust accounts at financial institutions where interest accrues on the balance of a pooled trust account must hold that interest for the Real Estate Foundation ("Foundation") and must ensure the financial institution pays the interest to the Foundation.

Interest is not payable to the Foundation on deposits held under the *Residential Tenancy Act*.[26] In this situation, the interest is to be paid to a tenant.

PRACTICE TIPS

- Maintain a separate pooled trust account for security and pet deposits only. By maintaining them separately from other trust funds you can ensure that (a) any interest earned on these funds are not subject to Section 29 of RESA, and therefore not remitted to the Foundation, and (b) the interest earned on these deposits on behalf of the landlord client can be used to pay any interest required to be paid to the tenant, upon termination of the tenancy agreement, in accordance with the interest rate set annually by the Residential Tenancy Branch, with any residual interest being paid back to the landlord.
- Keep your brokerage policies and practices simple when it comes to client requests for their real estate transaction deposit to earn interest. In times of low interest rates and short deposit duration, the benefit to the client may be minimal, if any. Allow flexibility in brokerage policies and practice for a client to speak to the managing broker about earning interest, especially where a buyer is making a large deposit and/or the deposit will be held for a long time.

CONCLUSION

Brokerage policies and procedures, combined with strategies to educate related licensees and staff on policies as well as enforcement, can go a long way to helping a brokerage stay compliant. Having and adhering to policies and procedures helps to meet regulatory requirements and can mitigate risks.

26 SBC 2002 c 78

Module Ten: Mortgage Brokering in Challenging Situations

Registrants[1] will undoubtedly encounter challenging situations when brokering in an active market. But a challenging situation, difficult client, hurried circumstances, or a casual "hands off" lender does not mean that a registrant can deviate from their responsibility to verify, disclose, and otherwise comply with the *Mortgage Brokers Act* ("MBA" or "Act").[2] As registrants assist borrowers with a mortgage, they are likely assisting with that borrower's largest ever financial transaction. Referring to and following the MBA will serve as a useful and structured guide for registrants, and not just as the mandated legislation governing their industry.

The pressures of real situations may hinder the registrant's ability to employ best practices, exhibit proper conduct and follow strict compliance with the Act. That need not be the case for registrants who follow the Act, utilize BC Financial Services Authority ("BCFSA") resources and guidelines, confer with their designated individual ("DI"), and take it upon themselves to stay updated on the law as it relates to mortgage transactions. This module will examine a host of situations that are not everyday transactions but are not uncommon.

When a sports coach is questioned before a big game, they invariably answer that their team needs to stick to the basics, do what they do best, and finish off their plays. The same is true for brokering in difficult scenarios, special situations, and unique circumstances. The BCFSA resources and guidelines, the Act and regulations, other industry resources, and your DI are the fundamentals for a registrant, just like an athlete has their basic game plan for their big game.

1 In this module we have used the term "registrant" to include mortgage brokers and submortgage brokers. The context may suggest one or the other.
2 RSBC 1996 c 313

LEARNING OBJECTIVES

By the end of this module, you will be able to:

1. Understand the duties of a registrant and what types of registrant conduct would be deemed as prejudicial to the public interest contrary to the Act;

2. Identify certain unique, but not wholly uncommon, challenging lending/borrowing situations that will require registrants to assess the circumstances and how they can (or cannot) best assist;

3. Discuss the duties, obligations, and legislated conduct of a registrant as they apply to the difficult files and situations; and

4. Understand how to apply best practices and mandated duties to those unique circumstances to best serve the customer/client while maintaining strict compliance with the Act and expected conduct.

10

DUTIES OF A REGISTRANT

Section 8(1)(i) of the Act makes it clear that registrants must not conduct business in a manner that is prejudicial to the public interest. This section is the "go to" provision governing registrant conduct. More specifically, the Registrar of Mortgage Brokers (the "Registrar") and the Financial Services Tribunal ("FST") have interpreted what activities would fall under this section of the Act in a broad manner, keeping in mind the need to protect the public, lenders, borrowers, public and private mortgage insurance companies, the mortgage broker industry, and numerous other interested stakeholders.

Some registrant activities that have drawn the attention of the Registrar and application of this provision of the Act include:

- Failing to conduct reasonable due diligence on information provided to lenders;
- Failing to disclose fully all information relating to the borrower, such as:
    - Other concurrent mortgage applications;
    - Current and future uses of the property being mortgaged; and
    - Information relating to the actual indebtedness of the borrower;
- Facilitating the un-registered mortgage broker activities of others (such as staff or employees of the registrant); and
- Altering official regulatory communications and circulating it to other individuals.

A 2018 decision of the FST[3] discusses at length the considerations of the Registrar in determining what constitutes business conduct which is prejudicial to the public interest.

The Registrar is not limited by past decisions and there is no requirement that the conduct which is found to be prejudicial be listed in a published document.

In a 2017 decision,[4] the Registrar found that a registrant acted contrary to Section 8(1)(i) of the Act by seeking financing from lenders using a contract of purchase of sale that he knew or ought to have known was not genuine, submitting an appraisal to lenders knowing that it had been rescinded, submitting misleading mortgage applications to lenders, and facilitating unregistered mortgage broker activities. This was appealed[5] by an individual also named in the original decision who had conducted business as a submortgage broker in British Columbia ("B.C.") without being registered to do so. The appeal was dismissed in full. A registrant ought to have known that such conduct was improper and that other parties in this transaction could or would have been prejudiced by this conduct.

In a 2023 consent order,[6] a registrant was disciplined under Section 8(1)(i) of the Act for submitting to lenders income and employment information which the registrant knew or ought to have known were not genuine and the information not accurate, and for failing to take any steps to verify the accuracy of employment and income information submitted to lenders.

In a 2022 consent order,[7] a registrant acted contrary to Section 8(1)(i) of the Act by altering documents. The registrant was penalized under Section 8(1.2) of the Act, for including altered Canada Revenue Agency documents, income tax returns, and letters of employment or paystubs and for providing misleading income information through those altered documents. The registrant was also penalized for permitting another individual, not registered as a mortgage broker, to take information from borrowers, access her Filogix credentials, and paying that individual remuneration in excess of $1,000.00 during any one year for arranging mortgages.

3 2018 BCFST 7 (CanLII)
4 D.P.R, S.C.S Inc., A.S Decision on Merits
5 2019 BCFST 1 (CanLII)
6 2023 BCRMB 10 (CanLII)
7 2022 BCRMB 5 (CanLII)

In a 2023 decision on penalty and costs,[8] the Registrar found that, among other failures, a registrant arranged a private mortgage for a borrower without disclosing to the private lender that the registrant co-owned a separate property with the same borrower. Further, in a separate mortgage transaction, the registrant failed to disclose to the lender that the borrowers were members of the registrant's family.

In a 2020 decision,[9] the Registrar found that a registrant falsely identified themself as associated officially with FICOM (the regulating agency for registrants at that time), altered a communication from the regulator, and then circulated the same to another registrant claiming that they were under investigation.

The above decisions and orders point out seemingly obvious wrongdoing, and yet such conduct was carried out by registrants. The obvious takeaway is that conduct that falsifies documents, misleads other parties, or facilitates unlicenced broker activity will be pursued by the Registrar. Further, the general language set out in Section 8(1)(i) of the Act is used to capture all kinds of misdeeds and wrongdoing. Please keep this sweeping language in mind as we examine difficult situations and what a prudent registrant should be doing, disclosing, or not doing in such situations.

THE FORECLOSURE PROCESS

The foreclosure process in B.C. does not involve just the lender and borrower. The process is commenced by the lender to assert certain rights and remedies as against the borrower in default. However, the registrant may also be involved in a foreclosure by assisting the prospective buyer of a property in foreclosure. Such assistance is marked by a few characteristics that are not necessarily present in a typical purchase. The parties need to be mindful that the timeframes are often accelerated, the property may not be as accessible for inspection, and the state of the property on closing may not be predictable. The registrant, in their fundamental and underlying duty to disclose, needs to be aware of the foreclosure process and these characteristics when helping the prospective buyer.

The seller in a foreclosure is not necessarily the registered owner, who is typically the borrower in arrears. Rather, it is likely to be the lender who has commenced the foreclosure process, or a subsequent lender (i.e. a second mortgagee) who has applied to the courts to have the right to sell the property. This right to sell the property is referred to as "conduct of sale" and may be granted to the lender who has applied for it, which may be the first or second mortgagee. As such, many of the standard representations, warranties, and covenants that are included in the Standard Residential Contract of Purchase and Sale ("Standard Residential CPS")[10] are typically amended to be excluded by this seller. These amendments are needed to address:

- The requirement for court approval in order for the purchase and sale transaction to proceed;
- The fact that the seller is not making any representations as to the condition of the property (the property is being sold "as is, where is"); and
- The possibility that the purchase may ultimately not proceed if the borrower (or even some other subsequent charge holder) redeems the mortgage of the foreclosing lender or on account of some other court order.

Offers are typically requested by the seller to be subject-free, which again, may add to the risk for the buyer.

Also, access for the typical due diligence and inspections may be hampered by uncooperative owners or occupants. The registrant will need to advise the buyer that the lender's inspectors may not have easy access to the property. In addition to this, it is very likely that no Property Disclosure Statement will be provided, even when the buyer's lender requires this document for review.

8 G.D.P. Decision on Penalty and Costs
9 S.M.A Decision on Merits
10 This CPS is provided by the British Columbia Real Estate Association and the Canadian Bar Association British Columbia Branch

All this can make the buying process much more tenuous and stressful for the buyer. The registrant needs to be mindful of these deviations from the standard purchase procedure. Also, the lenders for a prospective buyer may not be pleased to see that a Property Disclosure Statement does not form part of the Standard Residential CPS and that the property as viewed and/or inspected prior to completion may not reflect the condition of the property upon completion. Some lenders and their foreclosure lawyers can recount their past files where a property was "trashed" prior to the sale completing. Further, the delivery of vacant possession is usually excluded from a covenant of the seller even though a further court order can be used to deal with the tenant or owner who refuses to vacate

While some buyers may be savvy in the nuances of the purchase through the foreclosure process, other buyers will be looking for extra assistance and guidance. The registrant may need to advise the buyer to seek legal advice. A registrant needs to provide full disclosure to a lender. That would likely include the amended form of Standard Residential CPS and the Order Approving Sale provided through the foreclosure action. Note that time frames are sometimes accelerated in a sale done by way of foreclosure as the seller (lender) wants to get out of the loan, sell the property, and be repaid in short order.

Another potential issue in a foreclosure purchase is that the sale is dictated by the court and the orders made in the court action. Where a lender demands that the title be held a certain way (with the inclusion of certain parties) and this requirement deviates from the Order Approving Sale, a further court application may be necessary to provide for this change. Therefore, the registrant needs to be aware of what the lender will likely want to see in the ownership structure when the prospective borrower/buyer submits their purchase offer for court approval.

The buyer in a foreclosure sale may be thinking they are getting a "bargain" without turning their mind to the other barriers that they may encounter in this type of purchase. The registrant should seek assistance from their DI or other experienced professional in providing the necessary guidance and information to the buyer and the requisite disclosure to the prospective lender

Finally, the requirement of virtually all lenders to have insurance in place prior to/or concurrently with funding is another aspect of the mortgage transaction complicated by the purchase through the foreclosure process. The borrower ought to be advised to seek clarity and the necessary assurances as early as possible from their chosen insurer/insurance broker to avoid insurance becoming a stumbling block to the purchase and mortgage funding.

The key for a registrant in assisting a borrower in a foreclosure purchase is to know of and inform the buyer/borrower of the issues in this type of property purchase. The registrant would also want to disclose to the lender early in the transaction that the purchase is by way of court order and that typical due diligence may be altered.

FAMILY AND FAMILY LAW ISSUES

Families are complex. Those complexities need to be examined in a mortgage transaction. While the spousal relationship between borrowers is most relevant, the registrant must also turn their mind to other family members who may become part of the loan transaction, and the complications that can arise.

The Family Law Act ("FLA")[11] provides at Section 81:

1. spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and

2. on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

11 SBC 2011 c 25

Note that in the FLA, "family property" means all real property and personal property, even if only one spouse is the registered owner on title. This section is also subject to some exceptions.

The big take away here is that a spouse who is not otherwise a signatory to a mortgage may be responsible to the other spouse for one-half of the outstanding obligation under the mortgage. It should be noted that this responsibility/obligation is, just between such spouses. Where a spouse is not a signatory to a mortgage, this responsibility may not affect the creditor seeking rights and remedies as against the signatory to the mortgage. That lender will likely only be able to seek payment from the borrower(s) it contracted with (the signatory to the mortgage). The FLA is complicated and a registrant, after consulting with their DI, may need to seek legal advice.

Note that as between the *Family Law Act* and *Land Title Act*,[12] the registered mortgagee should be able to assert a priority over the unregistered interest of the other spouse. This priority could be challenged by the spouse who is not registered on title where the lender knew a separation has occurred, and accordingly, the enquiries and due diligence of the registrant and the information and disclosure provided to the lender by the registrant must withstand any scrutiny of the challenging unregistered spouse. This information or awareness is fundamental in asserting the mortgagee's priority over the spouse who is not on title but asserting that one-half interest upon a separation. A registrant never wants to be accused of withholding this type of information.

When there is concern as to what knowledge may be attributed to a lender, the lender's lawyer typically obtains a consent/release/priority from the spouse/ex-spouse who is not on title. This document is usually further supported by a certificate of independent legal advice. The prudent and diligent registrant will be mindful of these situations and prepare the borrower(s) for the extra steps and documentation that will likely be demanded by the lender. It is fair comment that the spousal relationship of a borrower is not always readily apparent. But the consequences of not addressing this can create hardship (or loss) to a lender. The prudent registrant does not want to have played a part in this burden on the recovering lender.

The mortgage transaction, the parties, and the intended use of the funds may become complicated when other family are involved in the mortgage loan transaction. While every person on title should be a mortgagor under the mortgage, if they are not a mortgagor, the lender will likely not be encumbering/charging the whole property. While mortgaging only a fraction of a property is permitted by the land title office, this unique lending situation is usually only handled by private lenders.

Also, lenders may want other parties beyond the registered owners to be liable for the repayment and other obligations set out in the mortgage loan terms. These persons are known as covenantors or guarantors. While these terms are often used interchangeably, there is an important legal distinction between the two. The difference between the terms is in itself its own separate topic. The registrant is well served to know that a covenantor is effectively a primary debtor with the borrower. This means that the lender can and will pursue the borrower and any covenantor right from the beginning of their pursuit of their remedies. A guarantor is a residual debtor and a lender is expected to exhaust recourse as against the borrower before pursuing further remedies as against the guarantor. Accordingly, lenders typically want these other debtors to be covenantors as opposed to mere guarantors. As a mortgage professional, the registrant would be best advised to understand these terms and to only use the appropriate term that tracks the lender's instructions. It is important to note here that unsophisticated private lenders might also use the terms interchangeably and may not be aware of the difference.

12 RSBC 1996 c 250

The concept of beneficial ownership also applies to the mortgage transaction involving family members as some members may not be mortgagors/borrowers in the mortgage but are the beneficial (true) owners (in whole or in part). Lenders will expect that all parties asserting any type of ownership interest in the lands be parties to the mortgage loan transaction and documentation. The diligent registrant should be careful to make proper enquiries to determine if such a beneficial ownership exists and pass this information to the lender as early as possible. Finding out late in the mortgage transaction that a beneficial owner exists can lead to hurried added documentation, or worse, a lender who elects to decline to fund the loan. No registrant wants to be part of a collapsing loan when due enquiry and full disclosure could have kept the loan transaction proceeding.

It is worth repeating that families are complicated. That wisdom is not any less applicable in a mortgage transaction. The prudent registrant needs to take a full look at the borrower's situation and account for any spousal issues and the involvement of any other family members. Lenders can be flexible in such situations, but they need to be made aware of the situations surrounding the borrower. The registrant has a role to play in helping the borrower obtain the loan, and making the parties aware of their roles and obligations. The registrant also assists the lender in limiting their exposure from undisclosed risks. Accordingly, the registrant should make proper enquiries and disclose relevant information to the lender. Referring back to the duties of the registrant, most of the cited cases above seemingly pointed to deliberate misdeeds, but with the complexity of spousal and family relationships, mistakes can also be unintended but still be prejudicial to the lenders or other family members. As noted in an above case,[13] a registrant was found to have acted contrary to Section 8(1) for their failure to take sufficient or any steps to conduct due diligence on information provided to them by a referral source. This failure, which was prejudicial to the public interest, was subject to regulatory action.

ESTATE LAW AND MORTGAGES

A deceased person cannot grant a mortgage and borrow funds. That seems obvious, but when a person dies, the deceased's personal representative (executor or administrator) has, with some exceptions, all the same authority as the deceased person. Therefore, an estate can borrow funds under certain conditions. Many forms of wills specifically grant the executor the powers to borrow funds and to grant mortgages on the estate property. But even without such specific permissive language in the will, an executor may mortgage land to pay debts, providing the will does not prohibit such an action. This is also the case where the deceased died without a will (an "intestacy"). In this case, the personal representative is called an administrator who is granted the same rights to borrow money or to grant a mortgage as security under the *Wills, Estates and Succession Act*.[14]

Can mortgage loans be made and registered prior to probate (Probate being the court document granting the personal representative the authority to administer the estate)? The short answer is no, because the mortgaged property, prior to the grant of probate, remains in the name of the deceased and the land title office requires the mortgagor to be the registered owner (who has died). The land title office will accept a transfer of the title to the property to the personal representative in accordance with the grant of probate. Once that grant has been made, and the title has been transferred to the personal representative, the personal representative may grant a mortgage as described above. While the registrant may rely on the personal representative rightly carrying out their duties as personal representative, it would be prudent to enquire as to the reason for borrowing and mortgaging the estate property prior to distribution. No registrant wants to recklessly be part of any wrongdoing on the part of a rogue personal representative.

13 2022 BCRMB 5 (CanLII)
14 SBC 2009 c 13

Loans to and mortgages granted by estates are often the realm of sophisticated or private lenders. Nevertheless, registrants can expect to be asked if an estate (probated or not) can borrow and the registrant should be able to respond accordingly. If the registrant is unsure of the correct response, they should discuss the request with their DI.

The probate process can be complicated and take time. This can also affect a registrant's clients who are buying a property from an estate where probate has yet to be granted. Losing a "held" lower rate (i.e. through a pre-approval or a port) because title cannot be transferred and accordingly, cannot be mortgaged, needs to be on the radar for the registrant and their clients in this situation.

THE COLLAPSING DEAL

Occasionally, and hopefully through no fault of the registrant, a transaction will go "off the rails." The borrower and the registrant are left to find an alternate lender in very short order. Provided the collapse is not part of some wrongful conduct on the part of the borrower, the registrant can demonstrate their value by finding alternative lending without enormous extra fees and costs to the borrower. As the lending criteria and underwriting processes should not be that different among most institutional lenders, and perhaps more importantly to the registrant, the disclosure requirements would be unchanged, the risk that the new institutional lender will also decline the loan is a real possibility. Accordingly, many equity-based private lenders are busy at month end fielding calls from buyers needing to complete on a purchase but lacking the big institutional lender to assist.

There is a perception that once a 'firm and binding' purchase contract is in place, a buyer/borrower must not make any new requests on the seller. This perception needs to be addressed as requests (note: these requests ought to be drafted and presented by the buyer/borrower's lawyer), courtesies, and extensions are sometimes absolutely necessary. A properly worded and bona fide request to extend a completion date, provided that this request does not stipulate that the buyer will not perform the contract unless the request is agreed to, does not automatically amount to a repudiation by the buyer/borrower thereby allowing a seller to accept this as a repudiation and avoid the sale.[15] Repudiation on the part of the buyer needs to be clear.[16] According to our B.C. Courts, the buyer (or their agent or lawyer) must clearly state that they do not intend to complete the purchase or sale, at which point the contract is repudiated and the contract is ended.[17] This can be as simple as an email stating that the seller will not be proceeding with the transaction or that the buyer cannot close on the completion date as scheduled.[18] However, negotiations on how the transaction will be closed and proposals on changing terms of the contract that make clear that the existing contract will still be performed will not be a repudiation.[19] The registrant needs to be mindful about date changes as interest rates may change for the borrower.

As a result, a borrower might consider having their lawyer draft a request to extend the completion if such extension otherwise fits the borrower's circumstances. A prudent registrant will recommend that such a request is best made by the borrower's lawyer to avoid the request being deemed to be a repudiation on the part the borrower/buyer.

15 2007 BCCA 623 (CanLII)
16 2014 BCCA 425 (CanLII)
17 2022 BCSC 1373 (CanLII)
18 2015 BCCA 18 (CanLII)
19 2007 BCCA 436 (CanLII)

Large institutional lenders and title insurers are sophisticated in their due diligence and their underwriting. However, they can be, on occasion, reluctant to share full details on why a loan is declined. Accordingly, if a mortgage is declined at the 11th hour, the registrant is well served in reviewing their file for inconsistencies and other red flags. Barring such obvious anomalies to the registrant, the registrant may be asked to assist with finding an alternative lender. Accordingly, a registrant should make themselves familiar with non-institutional lenders who can "jump in" at the last minute and complete on the loan. Note that a prudent registrant would disclose to the new lender what had transpired to date with the borrower. The next section of this module will help registrants identify risks and areas for discussion with borrowers when dealing with non-institutional lenders to ensure they can make an informed decision.

Please note that efforts to extend the closing to source alternative lenders need to be done in the context noted above with respect to issues involving repudiation. Legal advice should be sought.

PRIVATE LENDING

Whether it is the collapsing deal, or abundantly obvious from the outset, sourcing private mortgages for borrowers (and lenders) serves a segment of borrowers that cannot avail themselves of conventional lenders. The risk tolerance, quick turnaround and flexibility of private lenders fill a role in the marketplace. However, the active registrant availing themselves of lenders from the private lending sector is encouraged to give attention to how such files differ.

The starting point is the borrower who is only able to access a mortgage loan by way of a private lender. The financial history, general bookkeeping, and employment history of the borrower may dictate private lending as the sole avenue of funds for such a borrower. However, such limited borrowing options may create a desperate borrower and the vigilant registrant must be mindful of any duress, undue influence, or coercion that is the real motivation behind the loan transaction.

Such situations may also give rise to predatory lending practices by certain private lenders. A registrant must make a careful assessment of the rates, terms, and fees associated with such loans to guard against such predatory lending.

On July 22, 2023, the Government of Canada released the *Budget Implementation Act*, 2023, No. 1.[20] Among other things, the *Budget Implementation Act* amended Section 347 of the *Criminal Code*,[21] changing the criminal interest rate across Canada effective January 1, 2025. The criminal interest rate is the interest rate on a loan which a lender cannot exceed before becoming an offence under Section 347 of the *Criminal Code* and is prohibited. Under the previous Section 347 the criminal interest rate was any rate that exceeded 60 per cent Effective Annual Rate or approximately 48 per cent Annual Percentage Rate. Under the new *Budget Implementation Act*, the criminal rate has been lowered to any rate that exceeds 35 per cent Annual Percentage Rate. Criminal Interest Rate Regulations set out three exemptions from the new criminal interest rate. These exemptions apply to certain, but not all, Commercial Loans, Pawnbroking Loans, and Payday Loans.

The provincial *Business Practices and Consumer Protection Act* ("BPCPA")[22] speaks to the issues of unconscionability, undue pressure, harshness, capacity, and excessive costs associated with a transaction. This B.C. legislation and the protections it provides has been applied to private mortgages. See a 2023 Court of Appeal of British Columbia case[23] where a private mortgage was attacked on grounds of unconscionability. It should be noted, however, that the BPCPA does not apply to commercial transactions, as discussed in a 2015 Supreme Court of British Columbia case.[24]

20 SC 2023 c 26
21 RSC 1986 c 46
22 SBC 2004 c 2
23 2023 BCCA 425 (CanLII)
24 2015 BCSC 773 (CanLII)

But there would be no private mortgages without private lenders and registrants ought to be mindful of this group and the characteristics that many display. While many non-institutional lenders will have some structured underwriting processes in place, registrants must be aware of the many unsophisticated lenders whose lending criteria is almost solely driven by the loan-to-value ("LTV") ratios calculated by the total loans as a percentage of the property value. These lenders will base their lending decisions on this LTV ratio and otherwise look to their legal counsel to secure their position. Other than this lawyer, the registrant may be the only other professional providing information to the private lender. The registrant must be wary where the private lender is using such limited information, due diligence, and processes in making their decisions. Also, certain conduct by a private lender will cause them to fall within the definition of a mortgage broker under the MBA which then necessitates registration with BCFSA by the lender. The prudent registrant will ask sufficient questions and do necessary searches to see if the lender is compliant with registration requirements. Where it is obvious that the lender is not compliant, the registrant may elect to find another lender rather than allow this mortgage loan transaction to proceed where there is obvious non-compliance by the lender with the MBA.

Where the private mortgage is a second mortgage, other important issues emerge. Such mortgages are invariably a breach of the terms of the prior (first) mortgage. This breach is not always of sufficient concern to the borrower to avoid requesting a second mortgage and the borrower should be directed by the registrant to seek legal advice on how such a breach could impact the borrower. Be mindful that a borrower seeking a private second mortgage may have already proven to be a higher-risk customer of the first mortgage lender and the placing of a secondary charge could trigger remedies by the first mortgagee. A registrant does not want the borrower pointing fingers that such action by the first mortgagee had not been contemplated or explained.

From a private lenders point of view, they are not privy (party) to the relationship between the first mortgagee and the borrower and may have an indifference as to what the first mortgagee may elect to do when they become aware of the second mortgage. However, the amount of the first mortgage balance is a fundamental part of the LTV lending criteria of every second mortgage. The lender will want to avail themselves of the protections provided in Section 28 of the *Property Law Act* ("PLA")[25] that allows a second mortgagee to assert a priority over subsequent (further) advances made by a first mortgagee after they have been given express, written, and direct notice of the registration of the second mortgage. While a PLA notice typically falls on the responsibility of the second mortgagee's lawyer, a registrant should be aware how important the notice is and how the notice might be received by the first mortgagee. Again, the second mortgagee may have an indifference as to the consequences of the first being made aware of the second mortgagee, but most second mortgagees are well aware of the importance of "capping" the first mortgage by way of such PLA notices. Please note that registrants are often of the opinion that if they were the registrants on the first mortgage, the potential conflict and action that may emerge with the placement of a second mortgage demands that they have no involvement with respect to the second mortgage. This is prudent conduct having regard to the action a first mortgagee may take upon notice of the second mortgage.

25 RSBC 1996 c 377

In summary, private mortgage loans are a financial product that serves certain parties and certain circumstances. However, the variance in fees, rates, and terms can be substantial compared to the tight spread in bank and credit union rates. Accordingly, providing disclosure, transparency, and information and maintaining a cautious awareness are critical measures for the prudent registrant in a private mortgage transaction. Finally, the registrant should always be directing the private borrower and lender to each seek separate legal advice in respect of the loan transaction. While such advice may ultimately "tank the deal," that advice is critical to avoiding issues after funding.

CONCLUSION

The role of the registrant is really to provide information to let borrowers and lenders make informed decisions. That information needs to be complete and accurate. Cases where information was false, fabricated, or misleading has resulted in the Registrar seeking penalties as against such registrant activity. In difficult or extraordinary situations, that information provided by the registrant may be more important. The prudent registrant needs to be aware of the borrower's situation, ask the pertinent questions, and disclose all this to the lender.

Module Eleven: Agency – Rental and Strata

Strata managers and rental property managers licensed under the *Real Estate Services Act* ("RESA"),[1] deal with the administrative, legal, financial, and practical elements of managing a strata corporation or a rental property. RESA provides for responsibilities for those property managers[2] so that they meet appropriate standards and properly protect consumers.

The owner of the managed property might be a single person, a family or a family wholly owned company, a strata corporation, or many individuals and families.

Therefore, understanding your role of property manager means you must understand who your client is and what good management, on behalf of that client, will involve. This module reviews the complexity of agency law and fiduciary duties by looking first at the legal construct of the agency relationship. What is an agent? What are the key elements of the relationship? Then we will look at the other party in agency, the client: Who are they? How are client relationships defined and governed?

Once we have a sense of an agent and their legal relationship to the client, we will review pitfalls if the agent does not fulfill their duties. Finally, we will review some good practices for property managers.

LEARNING OBJECTIVES

After completing this module, you will be able to:

1. Understand the law of agency, including the concept of a "fiduciary," so you can fulfill your duties;
2. Understand how RESA and the Real Estate Services Rules ("Rules") apply to your duties;
3. Identify who your client is and your legal obligations to your client and other parties; and
4. Identify some agency issues that may arise for a property manager.

11 →

1 SBC 2004 c 42
2 We use the term "property manager" in this module to refer to both rental property managers and strata managers.

AGENCY

Definition

The legal definition of agency has been described as "the fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions."[3] Therefore, licensees must always be aware as to how their actions, words, or deeds may involve the legal rights and duties of their clients. An agent may bind their principal, even if the agent does not intend to create a duty for the principal (subject to limitations to bind the client in the service agreement). Once the agency relationship is created the agent has a legal duty to represent the interests of the principal.

Creation of Agency Relationships

An agency relationship can be created in one of three ways:

1. A client and licensee can enter into a written agreement that sets out the scope of work the licensee will provide for the client and the duties the licensee owes to the client. For property managers that would be the service agreement. The parties to the service agreement would be the brokerage as licensee and the client, being the strata corporation or the owner of the property to be managed. The property manager is licensed to the brokerage and carries out the responsibilities of the brokerage under the service agreement.

2. A client and a licensee may have an oral agreement where the licensee agrees to provide services to the client. However, Section 43 of the Rules requires a written agreement in most circumstances, unless waived by the client.

3. An implied agency may be created. That is when the licensee's conduct leads a person to believe they are acting as the person's agent. For example, a tenant may think a licensee is acting on their behalf when in fact the landlord is the client.

The first two situations are called express agency relationships. Both parties intend to create the relationship, while implied agency may be created without intent. For express agency relationships, a written service agreement is always preferable to an oral agreement.

Please see BC Financial Service Authority's ("BCFSA") Knowledge Base for further details on how and when agency is created.[4]

Duties of the Licensee – Real Estate Services Rules ("Rules")

Section 30 of the Rules sets out the duties a licensee owes to the client. Many of these duties are duties any agent would owe to their principal.

> **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;
>
> (b)act in accordance with the lawful instructions of the client;
>
> (c)act only within the scope of the authority given by the client;
>
> (d)advise the client to seek independent professional advice on matters outside of the expertise of the licensee;
>
> (e)maintain the confidentiality of information respecting the client;
>
> f)without limiting the requirements of Division 2 [*Disclosures*] of Part 5 [*Relationships with Principals and Parties*], disclose to the client all known material information respecting the real estate services, and the real estate and the trade in real estate to which those services relate;

3 Black's Law Dictionary, 8th ed. 2004, St. Pauls Minn. USA
4 Agency Information | BCFSA

(g)communicate all offers to the client in a timely, objective and unbiased manner;

(h)use reasonable efforts to discover relevant facts respecting any real estate that the client is considering acquiring;

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

(j)without limiting the requirements of Division 2 [*Disclosures*] of Part 5 [*Relationships with Principals and Parties*], if a conflict of interest does exist, promptly and fully disclose the conflict to the client

(i)in writing, and

(ii)separately from a service agreement or any other agreement under which real estate services are provided and separately from any agreement giving effect to a trade in real estate.[5]

As well, Section 33 of the Rules requires a licensee to act honestly when providing real estate services. Section 34 requires a licensee to act with reasonable care and skill when providing real estate services.

With respect to providing property management services, the service agreement will provide for the authority of the agent. There may be limitations on the power to bind the principal. Limitations on expenditures are common in service agreements. The authority set out in a service agreement is often referred to as express authority. Second, with that express or actual authority the agent will also have implied authority – acts necessary to carry out the express authority. Third, the law of agency gives the agent customary authority – authority governed by the "customs of the trade." For example, hosting an open house for rent may be viewed as customary or even implied authority.

There is also a rule dealing with the authority to bind a corporation called the "indoor management" rule. This rule does not give the agent "extra" authority. However, it does protect the agent in that the rule provides that those who deal with a corporation in good faith and without any knowledge of irregularities are entitled to assume that the individual held out as having the authority in fact has that authority. If your principal is a corporation and they have authorized you to sign on their behalf, the corporation cannot later deny the authority to "get out of the deal."

Property managers should be careful when signing contracts. It is not good practice to sign in the name of the brokerage. The contract should be in the name of the landlord or strata corporation. If authorized, the property manager can sign their name as an authorized signatory of the landlord or strata corporation. If there is a contractual problem, for example an alleged breach by the principal, the agent and the principal may both be sued. Depending on the facts, the property manager may then have a claim under any indemnity granted by the principal to the agent or may have to sue the principal for any loss the agent suffers.

It is not a good idea for a rental manager to sign any document required under the *Residential Tenancy Act* ("RTA").[6] That is because the definition of "landlord" under the RTA includes an "agent." See the material later in this module under the headings "Landlord-Tenant Concerns" and "The Cost of the Misinformed." If you have any questions about signing any documents involved in strata management or rental management, seek the advice of your managing broker.

What does all that mean for an "agent"? As long as a third party dealing with you has no reasonable grounds to question your authority, whatever you say binds your principal (your client). The principal will be liable for any promises or representations you make as agent.

5 Rules Section 30
6 SBC 2002 c 78

Property Managers – Fiduciary Duties

A fiduciary duty is a legal duty where one person (the "fiduciary") must act in the best interests of another (the "beneficiary"). Trust lies at the heart of the fiduciary relationship. The beneficiary trusts that the fiduciary will act in good faith. It requires the fiduciary to act with absolute loyalty toward the beneficiary in managing the beneficiary's affairs. For a more complete discussion of fiduciary duties, see the *Conflicts of Interest* module.

A fiduciary must act in "good faith" and "within the scope of the relationship." Think of good faith as absolute honesty, and then ask, what is the scope of my relationship with my client? This is where matters of express authority are key. If your service agreement sets out in defined terms what you are responsible for, and perhaps, what you are not responsible for, then the scope of your relationship is clear. If the scope of your relationship is not clear, then your duties as fiduciary will not be clear. If the duties are not clear, a court will find in favour of the beneficiary.

Courts have wrestled with how fiduciaries are different from other legal actors, such as those privy to a contract, and have noted:

> ...In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently, the law seeks a balance between enforcing obligations by awarding compensation when those obligations are breached and preserving optimum freedom for those involved in the relationship in question. The essence of a fiduciary relationship, by contrast, is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other. [emphasis added in part][7]

Therefore, clients of property managers and their brokerages have an objective expectation that they are placing their interests in the hands of another, on the understanding that the property manager and their brokerage will be acting in good faith and in the client's best interests. This includes avoiding conflict of interests before any arise.

Brokerage Agency

In the "brokerage" model of agency, when a client enters into a service agreement with the brokerage, the client's agency relationship is with the brokerage and all of its licensees, not just the licensee who performs the property management services. This is quite different from designated agency, common for trading services, where the brokerage designates a licensee for the client. In designated agency, other licensees of that brokerage may work for persons whose interests may be adverse to the client. For example, a licensee may act as a designated agent for a buyer interested in a property for which another designated agent at the same brokerage is acting for the seller. This is not the case in brokerage agency. For example, in brokerage agency all licensees have the duty of confidentiality to the brokerage's client. See BCFSA Knowledge Base for more details.

Brokerages are always the direct agent of the principal in that the principal contracts with the brokerage rather than a specific property manager. This means the property manager must be very clear as to the direct authority they have to act. Any unauthorized actions by a property manager will first, by operation of agency law, be for the brokerage to answer for. However, if the property manager has acted outside clear authority requirements, the brokerage may have a right to claim against the errant property manager.

In other words, principals, brokerages, and managers of brokerages must be very careful to communicate directions and expectations. This means the property manager should be clear on the specific terms in the services agreement in place with the client as this is the governing document of the relationship. If the basis of an expectation, or proposed action of the property manager (whether the brokerage, or an individual manager) is not clear or is not actually written down, then the property manager should get clarification in writing. A misunderstanding regarding a proposed course of action can quickly be transformed from an action presumed to be in the best interests of the principal to a conflict of interest and possible lawsuit.

Always be clear about your authority to act.

7 1992 CanLII 65 (SCC), [1992] 2 SCR 226 D.L.R. (4th) 449 (cited to S.C.R.). quoted in 2008 BCCA 91 (CanLII) at para. 32

WHO IS YOUR CLIENT?

If you are going to be an effective property manager, you need to know who your client is, what they want, and what is in their best interest. These are the key elements of your fiduciary duty.

To review the complexity of the agent-client relationship, visit BCFSA's Knowledge Base and the potential agency concerns arising from each type of licensee.[8] See also the *Conflicts of Interest* module for a discussion of "who is your client."

The correct identity of the client may arise from a number of sources. The most important of these sources is the service agreement.

Service Agreements

Service agreements are the contracts under the Rules that formalize the agency relationship with the client identified in the agreement. Section 43 of the Rules sets out the statutory requirements for service agreements. There are many details required that must be set out in writing in the agreement. Consider for example:

Section 43...the service agreement must also include the following:[9]

...

(d) the scope of the authority of the brokerage, or a related licensee, when acting on behalf of the strata corporation, including any authority to

(i) sign cheques or make disbursements on behalf of the strata corporation,

(ii) enter into contracts on behalf of the strata corporation, and

(iii) invest money held by the brokerage on behalf of the strata corporation;

These types of responsibilities highlight the "high-trust" fiduciary role of the licensee. Most strata corporations have tens of thousands of dollars passing through their accounts on a monthly basis, and many strata corporations have millions of dollars in an annual budget. It does not take much imagination to consider how misunderstandings over cheques written, contracts signed, or investments made, could create tremendous financial and legal pressure.

8 Agency Guidelines | BCFSA
9 Rules Section 43

There are specific requirements in Section 43 relating to rental property and strata management services.[10]

The service agreement will lay out many roles and responsibilities, but not all of the concerns of the agent and principal are in that agreement. This discussion, and the concerns raised, apply to rental property management service agreements as well as strata managers.

AVOIDING CONFLICTS OF INTEREST

Licensees in brokerages providing rental or strata management services are not designated agents. The brokerage and all of its licensees are the agent of the landlord or strata corporation. As discussed earlier, that is known as brokerage agency. An example of where a conflict of interest can arise for rental brokerages, is when the brokerage is named on a contract, lease, or notice. The Residential Tenancy Branch ("RTB") will not look behind the party named on the document. This is because Section 1 of the RTA says a "landlord" includes the owner's agent or another person who, on behalf of the landlord, permits occupation of the rental unit under a tenancy agreement. Therefore, a brokerage can be held financially liable for a 12-month rent penalty because the Notice to End Tenancy, given through the RTB web portal, was issued in the name of the brokerage, but the actual landlord did not use the property as set out in that notice. Now the interests of the brokerage, to be indemnified by the actual landlord, are in conflict with those who may not want to pay the penalty.

Two scenarios that will arise for strata managers are as follows. For side-by-side strata corporations that perhaps share a common amenity building or use land that is covered by an easement or covenant, or sectioned buildings, there may be a conflict of interest. If the brokerage acts for both of the side-by-side strata corporations, conflicts may arise. Sometimes, if a new client is taken on that raises the potential for, but does not create, an actual conflict, the clients can be arranged as primary and secondary.[11] Then, if a conflict does arise, the secondary client understands they will need to seek a new property manager. The service agreement sets out the primary and the secondary clients, and all parties understand that the primary client will receive on-going management assistance and the secondary client will need to move to a new brokerage. Similarly, many strata corporations are 'sectioned.' That is the single strata corporation is separated into usually at least three parts: the residential section, the commercial section, and the strata corporation.[12] In this scenario, often the same brokerage manages all three parts. However, the case books are full of lawsuits between sections of a strata corporation. Unless carefully managed, with all the clients' consent, it is most likely that some or all of the clients might need to be released from the service contract.

Both of these scenarios are practical examples of when a fiduciary duty outweighs the hopes of the brokerage to earn income. If the scenario creates conflicts or potential conflicts between clients, then the brokerage must not act further. In any event, the brokerage should identify possible conflicts early so they can be avoided.

10 Rules Section 43(5) and 43(6)
11 September 2014 Special Report from Council | BCFSA.
12 SBC 2002 c 78 Sections 190 – 198

STRATA CONCERNS

If your "client" is a strata corporation, the Court has said, unless all the owners make a different direction to you, the 'client' is council. Not a council member - all of council. If council delegates authority for the president to deal directly with you on a particular topic, that may be fine, but be very wary of straying too far from any express direction from all of council. This issue was addressed by the Court of Appeal of British Columbia in a recent case.[13]

However, the main focus of the case was the constitutional right that is solicitor-client privilege. The court said such a privilege is paramount over the incidental reference to legal opinions in Section 35(2)(h) of SPA. Under Section 36 of SPA, on request, a strata corporation must provide copies of Section 35 documents which would seem to include legal opinions. The Court stated:

> [41] The term "legal opinions" is not defined in the SPA but it can fairly be inferred that use of the term was intended to capture documents and/or communications containing legal advice. However, applying *University of Calgary* at para. 44 (see para. 34(b) above), the term "legal opinions" does not adequately identify the broader substantive interests protected by solicitor-client privilege. Therefore, the statutory language used by the SPA is not sufficiently "clear, explicit and unequivocal" to evince legislative intent to set aside solicitor-client privilege.

So, do not hand out legal opinions just because an owner wants to see what the lawyer for the council has said about a legal issue. Rather, start with the presumption that all legal opinions are privileged and confidential. Discuss the issue with your client, and it is probably wise to seek legal advice on these disclosures.

Privilege is not 'lost' because Section 35 mentions legal opinions. It is too important a concept in Canadian law to be set aside by the words of Section 35, as the court saw the reference to legal opinions as incidental, not a direct restriction on privilege.

While Section 35 requires a strata corporation to retain copies of any legal opinion obtained by it and Section 36 requires the records in Section 35 to be made available to an owner, the doctrine of privilege appears to override the owner's request.

LANDLORD – TENANT CONCERNS

If your client is a landlord, then you must work very hard to distinguish yourself from the landlord proper. Not only does agency law assume the words and actions of the agent are the words and actions of the landlord, but the RTA, in Section 1, makes agents legal 'landlords' for the purposes of the RTA:

"**landlord**", in relation to a rental unit, includes any of the following:

> (a) the owner of the rental unit, the owner's agent or another person who, on behalf of the landlord,
>
> (i) permits occupation of the rental unit under a tenancy agreement, or
>
> (ii) exercises powers and performs duties under this Act, the tenancy agreement or a service agreement;...[14]

In practice, this can mean the RTB does not distinguish between landlord and agent, and agents may become inadvertently liable for the obligations of the landlord. This is a serious concern if the obligation is a financial one.

If you are entering into contracts or signing notices on behalf of the landlord, the RTB may make an order against the person privy to the contract, or who signed the notice. Therefore, for example, a tenancy agreement with the brokerage as "landlord," or a Notice to End Tenancy, in the name of the individual agent / manager, may result in orders against the brokerage or manager, despite their agency role.

As such, it is important that contracts, agreement, and all other documentation be in the landlord's name, not in the name of the agent (as is often the case) so that all third parties (especially the RTB) recognize who the actual landlord is (as opposed to their agent) and avoid any potential legal liability.

13 See BCSC 2054 (CanLII) re solicitor-client privilege of a strata corporation. The Court expressly says an individual owner is not the client: BCCA 89 (CanLII).
14 SBC 2002 c 78 Section 1

WARNINGS AND TIPS

The Cost of the Misinformed

Brokerage liable for $150,000 Judgment: A rental brokerage followed lawful instructions of a landlord client and issued a Two Month Notice to End Tenancy for Landlord's Use (at the time of the case the notice period was two months). The tenants moved out just down the street. The tenancy that had been ended was for an expensive 'executive home' and the monthly rent was in excess of $10,000 per month. The landlord owner did not move into the house, as was described in the Two Month Notice, and in fact sold his interest. The tenants, still living in the same neighbourhood quickly realized the situation, and sued in the RTB for the penalty funds available if a Two Month Notice is not strictly complied with. They won. The penalty is a payment of 12 months rent. As the brokerage was named on the tenancy agreement, and on the Two Month Notice, the $150,000 judgment was made against the brokerage. As the owner had sold his interest and not purchased other real property in British Columbia, the opportunity for the brokerage to claim indemnification from the owner, and actually get paid for the judgement amount is unclear, and the brokerage may not be able to collect the funds. They will have to pay the judgment directly.

Lack of Good Faith

Licensees are required to know their duties to their clients. This duty to know extends to a duty to act legally, and to guide clients properly. A licensee who does not know their responsibilities in law may find themselves and their clients in circumstances that will create serious legal problems for them.

If you do not know what you are doing, and you as licensee err, or worse, draw your client into that error, then the court may decide your actions are "acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith."[15] Conduct found to be in bad faith may invalidate any insurance coverage for a licensee.

PRACTICE TIPS

1. Keep up to date with the Rules;
2. Use the BCFSA website as a resource for clarifying your responsibilities as agent;
3. Manage relationships and expectations;
4. Limit brokerage or manager exposure to liability under contracts or notices made for the benefit of the principal;
5. Contact your managing broker and insurer right away if a mistake is made, or you are worried one might have been made; and
6. Deal with principal and third-party expectations clearly and directly so relationships do not descend into conflict.

BCFSA Resources

BCFSA is an excellent resource for you; and is not 'just a regulator.' The practice standards advisors are skilled, and the content on the BCFSA website is helpful. The Knowledge Base on the BCFSA website has the answers to likely thousands of questions you may have.

Expectations

As agents are legally synonymous with their principals, you must be clear as to the boundaries between those roles. Put all of your day-to-day responsibilities into your service agreement. This is express authority, in that your instruction and authority to act is 'express' in the contract.

Responsibilities

Avoid an 'implied' basis for action. If need be, by consent, add to the terms of the contract, the actions you actually undertake, or that the client wants you to complete, so that the functions you actually perform as agent are described in your contract. The more detail in the contract, the less likely you are to be accused of functioning outside your authority. Clients often want to include all of the direction they give a licensee within the scope of the basic services; however, be very clear about what is included in the scope of the contract, and what is 'extra' and will be charged separately.

15 2004 SCC 61 (CanLII), [2004] 3 SCR 304

Not Responsible

Just because it comes up often in lawsuits involving agents, be very clear as to what you are not responsible for, especially financial obligations. See the "Cost of the Misinformed" discussed earlier.

It is Not your Contract

Contracts and notices should be made in the name of the principal not in the name of the brokerage or manager.

Make sure the indemnity clauses in your service contract are very clear as to what duties and financial obligations the principal must be responsible for if they arise: legal fees, court orders, damages, compensation to third parties, expert reports etc. All of these types of expenses should normally be the principals to pay.

Limiting Liability with Service Contracts

The service contract is also a good tool to manage expectations. Limit the number of emails and responses that your monthly fee covers, and put that limit in the contract. In the same way limit: hours in meetings, visits to the property, dealing with extraordinary paperwork like tax issues, litigation, or insurance claims.

What if you Made an Error?

If there is a concern, in that you are worried you have misled a third party (gone beyond your express authority perhaps) or have created an obligation for your principal that in retrospect was not what they would have wanted, or went beyond instruction, then move quickly.

Tell your managing broker, your insurer, and then, once you know what you want to say, so you can say it clearly, talk to your principal. If you are concerned your principal may sue, consult legal counsel before speaking to your principal.

Communications

If something unexpected happens, unless it is an emergency, seek direct written instruction from your principal so you are not liable for any allegations of wrong doing.

Keep your principal informed, even if you do not hear from them. If you regularly provide updates and feedback, this shows a high degree of responsibility on your part and your understanding of your role as agent.

CONCLUSION

- Understand the law of agency;

Agency law creates a fiduciary duty for an agent to act in the best interests of the principal. Clear communication, express direction and authority, and regular reporting from an agent to their principal, are required.

- Identify who your client is and your legal obligations to your client and other parties;

Who the client is determines where an agent's authority comes from. Do not act on direction from persons not authorized to direct you. Who your client is determines what is "in their best interest" as this may be quite different from one client to another.

- Describe the rules relating to agency and your obligations as a property manager;

Keep up to date with regulatory expectations. Use BCFSA resources. Follow lawful instructions. Be clear about what you have authority to do, and what you do not have authority to do. Get written instructions, if your authority or direction is not clear. Do not put yourself in a position to be liable for the principal's responsibilities; keep your role and duties separate from your client's role. Move quickly to resolve problems arising from your agency role. Get help when needed.

Module Twelve: Disclosures and Notices – Rental and Strata

Disclosure has become a familiar term for licensees over the last few years as BC Financial Services Authority ("BCFSA") introduced mandatory disclosure forms for licensees involved in real estate transactions. However, in rental property and strata management services, there are some BCFSA mandatory forms but also non BCFSA disclosures and notices, some mandatory and some discretionary. It is important for licensees to be aware of and to understand the significance of these disclosures and notices. From a "Disclosure for Residential Tenancies" form to a "Payments and Benefits Disclosure for Strata Corporations" form to a "Form B – Information Certificate" in strata to a "Form K – Notice of Tenant's Responsibilities" for tenants renting in a strata lot, licensees must know what disclosure or notice must be made, to whom, when, and the legal implications of that disclosure or notice.

Disclosures and notices are important tools for licensees acting as property managers[1] and are designed not only to assist a licensee in their roles but also protect the public. Disclosure by way of forms ensures that all parties are properly informed and full disclosure assists parties in making informed decisions.

LEARNING OBJECTIVES

By the end of this module, you will be able to:

1. Understand your disclosure obligations under relevant legislation;
2. Understand why disclosure is important;
3. Identify the appropriate forms required to make proper disclosure and the information required to be submitted with the forms;
4. Identify which disclosures are mandatory, which are not and what non-mandatory disclosures can be helpful to manage relationships; and
5. Understand reasonable due diligence in particular circumstances.

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1 We use the term "property manager" in this module to refer to both rental property managers and strata managers.

DISCLOSURE FORMS

In recent years the disclosure forms required by BCFSA have been a focus of the industry.[2]

Property managers should be aware of when, for example, the following non-exhaustive list of BCFSA disclosures may be necessary in property management:

1. Disclosure for Residential Tenancies;
2. Payments and Benefits Disclosure for Rental Property Owner;
3. Payments and Benefits Disclosure for Strata Corporations; and
4. Agreement Regarding Conflict of Interest Between Clients.

These BCFSA forms are crucial in order for a property manager to comply with the *Real Estate Services Act* ("RESA")[3] and the Real Estate Services Rules ("Rules"). These are also crucial elements of consumer protection.

In addition to the BCFSA forms, a review of the more than 50 Residential Tenancy Branch ("RTB") forms and the more than 20 separate forms provided in the Strata Property Regulations ("SPR")[4] will make clear to a licensee why familiarity with the Residential Tenancy Branch and *Strata Property Act* ("SPA")[5] requirements is indispensable. Knowing which form is required, the details of the form that need to be properly completed, and the process of filing or serving each document is all key if a licensee is to successfully engage with the RTB.

Disclosure forms required by BCFSA are not as numerous but are specific and complex enough that a licensee must be cognizant of which disclosure documents are expected and when they are expected to be completed. Filling in these forms at the right time of a transaction or relationship and with sufficient accuracy are key for consumer protection and allow consumers to make informed decisions.

When a licensee is personally involved in a real estate matter, the potential for conflict of interest to arise is heightened. The personally involved property manager, must be extra vigilant to properly disclose their involvement.

While some of the previously noted forms are relatively new, and part of a property manager's day-to-day routine, there are many other forms and disclosures that may arise in a property manager's work that property managers may not be aware of the need and use of these forms.

By approximate count, between the SPA, the *Residential Tenancy Act* ("RTA")[6] and the RTB forms combined, there are well over 100 forms that may be necessary for proper disclosure to be made by a strata manager or rental property manager on behalf of their client. Keep in mind these forms are in addition to the BCFSA forms.

STRATA DISCLOSURE – POTENTIAL SOURCES

Strata managers have certain mandatory disclosure obligations set out in RESA and the Rules. However, there are no mandatory forms for strata managers under RESA or the Rules. The "Payments and Benefits Disclosure for Strata Corporations" form in the Knowledge Base can be used to comply with Sections 56 or 58 of the Rules. The strata manager providing services to a strata corporation has a duty to disclose to the strata corporation any direct or indirect:

- Payments the strata manager or the strata management company receives or anticipates receiving that come from sources other than that strata corporation; and/or
- Benefits such as financial gains, that the strata manager or strata management company (or an associate) receives or anticipates receiving as a result of making an expenditure on behalf of the strata corporation,

The form may be viewed at: Payments and Benefits Disclosure for Strata Corporations.

2 Agency and Disclosure Forms | BCFSA
3 SBC 2004 c 42
4 BC Reg 43/2000
5 SBC 1998 c 43
6 BC 2002 c 78

Under Section 30(j) of the Rules, a licensee must disclose a conflict of interest in writing, separate from any service agreement. A brokerage should have a form, separate from the service agreement, to deal with conflicts. There is a mandatory form in the Knowledge Base only to be used to meet the requirement of Section 65 of the Rules for using in trading services situations: the "Agreement Regarding Conflict of Interest Between Clients" form. It should not be used by strata managers to address any written disclosures under Section 30(j) of the Rules.

The SPA has more than 20 statutory forms.[7] But there are so many other documents in the 'life' of a strata corporation: minutes, notices, disclosure documents, depreciation reports, strata plans, easements, covenants, and leases, to name just a few. Managers of strata corporations should make themselves aware of all the documents that may become significant at different times. For example, having a good working knowledge of the strata plan is essential. The plan shows the boundaries between common property and strata lots as well as where any limited common property ("LCP") areas are located. Whether it is for bylaw enforcement, repair responsibilities, or priorities of land use, strata managers should know the strata plan well. It is a foundational document for all strata law matters.

Interestingly, mandatory disclosures do not always follow a logical path. For example, bylaws must be maintained as records of the strata corporation,[8] the owners are all bound by the bylaws, but those bylaws are not mandatorily required to be disclosed to owners.[9] Conversely, a tenant entering into a lease of a strata lot must be provided with the bylaws and the rules of the strata corporation.[10] The landlord and tenant must complete the Form K and provide that to the strata corporation.

Conversely, pursuant to standard bylaw 4, an owner must disclose their name and address to the strata corporation, but a tenant's name, other than on the Form K, need only be disclosed to a strata corporation upon its request.

RENTAL DISCLOSURE – POTENTIAL SOURCES

Rental property managers also have disclosure obligations set out in RESA and the Rules. There are a few mandatory forms for those disclosures for rental property managers under RESA and the Rules. There are also some suggested forms on the Knowledge Base that are very useful for rental property managers.

All licensees providing trading services in relation to the leasing or rental of a rental property must provide mandatory disclosures. Because rental property managers engage at times in "trading services" as it pertains to the rental of real estate, appropriate BCFSA mandatory disclosures to both their client and the other party to the transaction must be made.

In residential rental situations, the rental property manager and the trading services licensee must provide their landlord client with the mandatory "Disclosure of Representation in Trading Services" form. For residential rental property, rental property managers commonly use the form entitled "Disclosure for Residential Tenancies," when making the required disclosure to an unrepresented tenant. The form is used when the rental property manager is representing the owner of a residential rental property. It sets out what the rental property manager can and cannot do for the prospective tenant. The form ensures compliance with Sections 54 and 55 of the Rules.

Trading services licensees are permitted under their licence to assist residential tenants in finding a property to rent. They would therefore use the mandatory "Disclosure of Representation in Trading Services" form when making the disclosure to their tenant client. In addition, if the landlord is unrepresented, the trading services licensees would provide to the unrepresented landlord the "Disclosure of Representation of Trading Services" form and the "Disclosure of Risks to Unrepresented Parties" form.

7 BC Reg 43/2000, Part 18
8 SBC 1998 c 43 Section 35
9 SBC 1998 c 43 Section119-120, and see an "owner must" in standard bylaws 1-2, 4-6
10 SBC 1998 c 43 Section 146

In commercial rental situations, sometimes the tenant is represented by a trading services licensee and sometimes not represented. Regardless of whether a commercial tenant is represented by a licensee, rental property managers representing landlords in commercial transactions need to provide their landlord client and the prospective tenant with the "Disclosure of Representation in Trading Services" form. This form ensures compliance with Section 54 of the Rules. If the prospective tenant is not represented, the rental property manager acting for the landlord must also provide the prospective tenant with the "Disclosure of Risks to Unrepresented Parties" form, which ensures compliance with Section 55 of the Rules.

In addition to these mandatory disclosure forms, rental property managers also use the BCFSA "Payments and Benefits Disclosure for Rental Property Owner" form to ensure compliance with Sections 56 and 58 of the Rules. While disclosure of the information is mandatory, the use of this form is not. Rental property managers and their managing brokers should consider, if they use different forms, whether those forms are sufficient compliance with the Rules.

Under Section 30 of the Rules, a licensee must disclose a conflict of interest in writing, separate from any service agreement. BCFSA provides a form in the Knowledge Base to be used in conflicts that may arise in trading services: "Agreement Regarding Conflicts of Interest Between Clients." That form would not be used for other rental property management activities. Attached to that form is a form of agreement as to how the clients and the licensee propose to resolve the conflict. Proper use of the form and the agreement ensures compliance with Section 65 of the Rules.

The RTB lists over 50 forms for residential tenancy.[11] As well, similar to the standard bylaws for stratas, the RTA Regulation Schedule sets out the standard terms for residential tenancy agreements in British Columbia. The big distinction between strata bylaws and standard terms of the tenancy agreement is that the bylaws are all optional.[12] Strata corporations can create almost any bylaws they like (subject to the SPA), whether included in the standard bylaws or not. Landlords and their agents, however, cannot change the standard terms of the residential tenancy agreement. Some additional provisions may be added, if they do not conflict with the standard terms, but none of the standard terms can be removed or avoided. Indeed, the requirements as to the form and content of a residential tenancy agreement are quite specific and mandatory.[13] Rental property managers should be aware that when the strata and rental worlds collide, disclosure of the strata corporation bylaws to the new tenant also becomes mandatory.[14]

COMMERCIAL DISCLOSURE

Commercial tenancies in strata corporations raise similar issues although, of course, the RTA and the RTB are not considerations for commercial leasing. The lease in a commercial setting is key. By their nature, the terms and conditions of these leases are a lot longer, and more complicated, than residential tenancies. Brokerages dealing with commercial leases in strata corporations should be especially aware of the documentation that may affect those circumstances; especially the strata plan, the bylaws, zoning requirements or restrictions, and any restrictions on title such as covenants.

11 See Tenancy forms - Province of British Columbia (gov.bc.ca)
12 SBC 1998 c 43 Sections 119-125
13 SBC 2002 c 78 Section 13; BC Reg 477/2003 Section 13, schedule
14 SBC 1998 c 43 Section 146, and Form K, Regulations

FORMS EXAMPLE – FORM B – INFORMATION CERTIFICATE

One of the most often required documents created by a strata corporation is a Form B.

The Form B is a disclosure tool that informs a potential buyer of a strata lot of certain information including, but not limited to:[15]

- Strata fees payable;
- Pending amendments to the bylaws;
- Work notices;
- Ongoing legal action; and
- Parking stall and storage allocation.

The purpose of a Form B is to fully inform potential buyers of the current status of the strata lot and the strata corporation. It is a mandatory form and must not be amended. It is an important tool for consumer protection. This form in turn also assists a strata manager as any issues are disclosed before purchase of a strata lot and avoids disputes between sellers and buyers arising from undisclosed issues. The strata manager on behalf of the strata corporation, normally completes the Form B. In doing so the strata manager must use reasonable care and skill in compliance with the Rules. The strata manager must need to be aware of amendments to the SPA that may amend the prescribed form. This form arises pursuant to Section 59 of SPA:

Information Certificate

59 (1) Within one week of a request by an owner, a purchaser or a person authorized by an owner or purchaser, the strata corporation must give to the person making the request an Information Certificate in the prescribed form.

(2) The certificate must contain the information required by subsection (3), as of the date of the certificate.

Then follows a long list of required information and attachments that must be provided, usually to a potential purchaser. Any of the required disclosures on this form can be cause for concern; but often the following concerns arise:

- Any amount owing to the strata corporation by the owner of the strata lot described above (other than an amount paid into court, or to the strata corporation in trust under Section 114 of the SPA).
- Is the strata corporation party to any court proceeding, arbitration, or tribunal proceeding, and/or are there any judgments or orders against the strata corporation?

15 Strata Property Regulation (gov.bc.ca) Form B

The Form B provides as follows:

Are there any parking stall(s) allocated to the strata lot?

☐ no ☐ yes

(i) *If no, complete the following by checking the correct box.*

☐ No parking stall is available

☐ No parking stall is allocated to the strata lot but parking stall(s) within common property might be available

(ii) *If yes, complete the following by checking the correct box(es) and indicating the parking stall(s) to which the checked box(es) apply.*

☐ Parking stall(s) number(s) ..... is/are part of the strata lot

☐ Parking stall(s) number(s) ..... is/are separate strata lot(s) or part(s) of a strata lot ..... [*strata lot number(s), if known, for each parking stall that is a separate strata lot or part of a separate strata lot*]

☐ Parking stall(s) number(s) ..... is/are limited common property

☐ Parking stall(s) number(s) ..... is/are common property

(iii) *For each parking stall allocated to the strata lot that is common property, check the correct box and complete the required information.*

☐ Parking stall(s) number(s) ..... is/are allocated with strata council approval*

☐ Parking stall(s) number(s) ..... is/are allocated with strata council approval and rented at $ ..... per month*

☐ Parking stall(s) number(s) ..... may have been allocated by owner developer assignment

Why is there so much space attributed to parking? Parking within a strata corporation can be set out in many ways, which include:

- Common property with no parking assignments – this is 'first come, first served.'
- Common property with assignments by the developer – assignments not on the strata plan, nor in bylaws or other disclosed information, so can create a lot of problems if two owners claim the same assigned parking stall – especially if it is 20 years after the developer signed the original contracts of purchase and sale.
- Common property with a developer lease – this is pre-incorporation leasing of the parking areas of what becomes the strata corporation. A developer, in effect, leases the parking to itself, then 'sells' sub-leases to purchasers of the strata lots. Those owners can then 'assign' their sub-leases to subsequent owners of the strata lot.
- Common property designated as LCP to each owner / strata lot – this is the most straightforward of parking arrangement as the LCP designations are directly on the strata plan, which is available from the land title office and cannot be changed without a vote of the owners.[16]

Not knowing how parking is assigned has caused a great deal of litigation in the past. If records are not kept, this gap can create a lot of work for council, the strata manager, and legal counsel to figure out who gets to park where. With parking stalls 'selling' for tens of thousands of dollars, this is a very important detail to be sure of before signing a Form B.

16 SBC 1998 c 43 Sections 73-75

WORK ORDERS

Please review all of the disclosure requirements of a Form B very carefully. One other item we will highlight because the consequences of this matter can be very serious is:

- Have any notices or work orders been received by the strata corporation that remain outstanding for the strata lot, the common property, or the common assets?

The reason this is important arises from Sections 83-85 of SPA. Section 83 requires strata corporations to comply with municipal orders. Section 84 requires owners to comply with municipal orders. Section 85 provides that a municipal order given to an owner who refuses to comply, the strata corporation may do the work required on the strata lot in the municipal order.

These sections talk about orders to do repairs, perhaps because there is an identified *Building Code* breach, or a safety issue. If such an order is made against an owner, and they do not comply with that order, the strata corporation may step in and do that work.[17] If that is how the matter unfolds, what is often missed is how the strata corporation is compensated for the costs incurred. Section 116 of SPA allows the strata corporation to lien the non-compliant owner's strata lot, in the same manner as if the owner were in arrears for strata fees, and if necessary, sell the unit to pay the amounts owing.

This can be a very important detail to be aware of, to ensure and enforce the safety and integrity of the building both physically and legally.

Practice Note

The Form B has been amended to refer to Section 59(3) of SPA which requires disclosure of any electrical planning reports under Section 94. If there is a report, it must be attached to the Form B.

LANDLORD'S USE – RTA

Use of the "Section 49 Notice to End Tenancy for Landlord's Use of Property" ("Section 49 Notice") has become highly litigated. Simply put, it may be one of only a few ways tenancies can be legally ended by a landlord. An eviction, however, may make a tenant homeless. The stakes are high. As such, the Provincial Government introduced a 12-month rent penalty for any landlord issuing such a notice, and then not complying strictly with the intention of that notice. Thus, if the rent on a rental unit in which such a notice is issued is $2,500 / month, and the landlord does not comply with the notice, the penalty for such non-compliance would likely be $30,000. Even if the rent is much higher ($5,000 / month for example), the fact that the penalty would exceed the Provincial Court monetary jurisdiction limit, ($35,000) that applies to the RTB as well, would not stop the penalty ($60,000) from applying to the errant landlord.

A tenant cannot be evicted without the proper use of this form. If the purpose of the form is not strictly followed, it will be a very expensive error for the landlord. If the error arises because of the negligence of a property manager, the landlord may seek reimbursement from the brokerage! For a cautionary tale see the *Agency* module under "The Cost of the Misinformed."

The distinction between the above, Section 49, and a Regulation Section 13.1 fixed term tenancy must be noted. A Section 49 Notice is issued during a tenancy, when the landlord is seeking to 'change' the tenancy, by ending it. A fixed term tenancy per Section 13.1 is a term of the contract that the tenancy will end on a specific date, for the landlord's use. Termination of a fixed term tenancy cannot occur earlier than the date specified as the end of the tenancy (Section 49 (2)(c)). The procedures and expectations are quite different for each of these options, so licensees must be very careful not to confuse the use of each. The terms are almost identical, but the legal construct a Section 49

17 SBC 1998 c 43 Section 85 (1), (3), (4)

Notice creates versus a contractual term ending a tenancy on a specific date is quite different. Please note that the four month notice period for landlord's use of property (Section 49 (2), (3), and (4)) has been amended by regulation to provide for a three month notice in the case where the landlord has sold the property to a buyer (Section 49 (5)).

LEGAL THEORY – DISCLOSURE

Why is disclosure important? Does not *caveat emptor* ("buyer beware") mean whoever is buying, leasing a rental property, or taking action in a strata corporation, has the responsibility to make themselves aware of the legal consequences of their actions?

A case arising in a sale situation gives some helpful information and background into what the law expects, but also is a cautionary tale that perhaps to disclose is better than to not disclose: ignorance of disclosure responsibilities is not bliss.

In a 2019 Supreme Court of British Columbia case,[18] a house was sold to the plaintiff, that turned out to have been previously a 'grow-op.' The plaintiff sued the licensees and sellers involved in the case.

These types of claims arise in circumstance where disclosure is expected, or required, and a plaintiff thinks they have been otherwise misled by the lack of disclosure.

The Court set out explanations of:

Negligent Misrepresentation

This is a breached duty of care arising in a particular legal relationship through a careless misrepresentation that causes a loss for the plaintiff.

Fraudulent Misrepresentation

This is a breached duty of care arising in a particular legal relationship through a misrepresentation that a defendant knows is false, that causes a loss for the plaintiff.

Caveat Emptor

Buyer beware! A buyer, or contract party, takes on the risk of entering into a contract unless there is evidence of: a breach of contract, an active concealment (i.e., fraud), non-innocent misrepresentation (intentionally misleading), or if an implied warranty of habitability in the case of newly-constructed homes can be determined.

Patent Defects

A patent defect is an obvious problem that can be identified without careful searching or without need of special or technical knowledge.

Latent Defects

A latent defect is a defect not discoverable through a reasonable inspection or through reasonable inquiries and the latent defect renders the property dangerous or unfit for habitation.[19]

What these legal tests show is, regardless of whether a duty to disclose actually arises, the potential for legal disputes is significant. If property managers are acting in the best interests of their principals, then this ought to direct them toward disclosure and away from a *caveat emptor* mentality. A property manager should always be thinking preventive. Avoiding a lawsuit is better than having a lawsuit and still being held "not liable" by the Court. The cost and time investment for a court case far outweigh any benefit obtained from a non-disclosure.

A property manager should disclose all potentially relevant documents and allow the other party to determine their materiality for their own purposes. "We did not know about this" should not be a complaint from an opposing party, because a property manager or managing broker has not provided all that could be reasonably presented.

18 2019 BCSC 955 (CanLII)

19 Rule 59 (2) A licensee who is providing trading services to a client who is disposing of real estate must disclose to all other parties to the trade, promptly and before any agreement for the acquisition or disposition of the real estate is entered into, any material latent defect (as defined in that Rule) in the real estate that is known to the licensee.; see too 2016 CanLII 60722 (BC REC)

SPA DISCLOSURES

The SPA famously has a long list of potentially disclosable documents under Section 35 (some of these disclosures have been limited by the Courts). The types of disclosures listed in Section 35 include, but are not limited to: names, addresses, minutes, mortgagees, books of accounts, documents required by regulation, SPA, the Regulations, the Bylaws, resolutions of many types, the strata plan, the rules, contracts, decisions of legal procedures, correspondence, budgets, financial reports, income tax returns, bank statements, depreciation reports, owner-developer original documents including warranties and guarantees, professional reports, and EV electrical planning reports.

Most of these documents are expected to be disclosed to owners or tenants assigned the rights of the owner, within a week or two of the request, depending on the nature of the documents.[20] However, some document disclosure takes time, so brokerages should act quickly. If the time limits are too tight, rarely is there any material prejudice to an owner, or other qualified requestor, to wait a little longer.

Note too, that Section 35 is considered a 'complete code,' in that if the document requested is not directly on the Section 35 list, it is not disclosable. The Court, in a 2007 Supreme Court of British Columbia case,[21] compared Section 35 with the *Rules of Court* that require disclosure of all relevant and material documents to any particular dispute, and noted they are not the same.

So, if a document is not explicitly listed, it is not required to be disclosed.[22]

Recently too, the Court of Appeal of British Columbia has said all legal opinions obtained by the strata council are not disclosable, and are covered by solicitor-client privilege.[23] See the *Agency* module for a discussion.

PRACTICE TIPS

- Keep up to date with changes to the Rules;
- Review the BCFSA website regularly to avoid running afoul of the Rules;
- Attend seminars and educational conventions to retain an 'always learning' attitude;
- Identify which disclosures are not mandatory but helpful;
- Assume disclosure is generally a good idea. However, remember your client: you must act in their best interests. This does not mean you can use your client's best interest not to disclose mandatory information, but some disclosures (for example, disclosure of sensitive confidential information or matters covered by solicitor client privilege) may harm your client's position without actually providing a benefit to the other party;
- Keep up to date on current relevant case law by using databases regularly for cases pertinent to your area of license: RTB website, Civil Resolution Tribunal website, www.CanLII.org. Remember other tribunals may have cases that deal with disclosure, privacy, or other related rights like employment (i.e. Human Rights Tribunal, Office of the Information and Privacy Commissioner, Employment Standards Tribunal, or the Financial Services Tribunal);
- Be aware of and use best practices;
- Discuss any concerns with your managing broker;

20 SBC 1998 c 43 Section 36 (1.1 – 4)
21 2007 BCSC 1610 (CanLII)
22 See too in 2007 BCSC 1610 (CanLII) that not every bill needs to be disclosed if financial statements are sought (15), and emails between council members regarding strata business (22) is not correspondence with the strata corporation and so are not disclosable
23 2024 BCCA 89 (CanLII)

PRACTICE TIPS

- Do not disclose privileged information or confidential information without the consent of those who hold the privileged or right to confidentiality. Consider if the *Personal Information Protection Act*[24] may apply. Remember the *Personal Information Protection Act* is concerned with "personal information." That means information about an identifiable individual and includes employee personal information but does not include:

  (a) contact information; or

  (b) work product information.

- Consider, in advertising of rental units, are the descriptions of the unit correct? Especially, if the rental unit is in a strata corporation, does the rental unit really have legal right to two parking spaces? Is the balcony part of the rental unit? Is there an unrestricted right to storage? Is smoking or pets actually permitted?

CONCLUSION

RESA and the Rules, the SPA and RTA, as well as common law, have many potential disclosure requirements. Many are mandatory. Many are not, but consider disclosure as preventative medicine to avoid future lawsuits.

- Identify and use the appropriate forms required to make proper disclosure and the information required to be submitted with the forms;
- Identify which disclosures are mandatory, which are not and what non-mandatory disclosures can be helpful to manage relationships; and
- Understand reasonable due diligence in particular circumstances.

24 SBC 2003 c 63

Module Thirteen: Conflicts Of Interest – Rental and Strata

In this module, we will explore the concept of conflicts of interest. The Real Estate Service Rules ("Rules") address conflicts of interest. Conflicts of interest can be complicated. Aside from actual conflicts, there may be situations where potential conflicts could arise and should be addressed. Perhaps even more difficult, are perceived conflicts where the client suspects a form of conflict although none may exist. This can lead to problems with a licensee's relationship with their client and may give rise to complaints made against the licensee.

In this module, we will review the different types of conflicts of interest and applicable legislation and rules. We give guidance on how to avoid issues arising from actual and potential conflicts. We will also explore perceived conflicts and how they can be just as damaging as actual or potential conflicts.

In this module we use the term "property manager" to refer to both rental property and strata managers.

LEARNING OBJECTIVES

By the end of this module, you will be able to:

1. Understand what a conflict of interest is;
2. Understand what it means to act in the best interest of your client;
3. Describe how and when conflicts may arise and strategies to avoid them; and
4. Identify actual conflicts versus potential conflicts versus perceived conflicts and be able to manage your client's expectations for actual, potential, or perceived conflicts.

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WHAT IS A CONFLICT OF INTEREST?

A conflict of interest may be misunderstood, so let's be clear: a conflict of interest is not the same as a conflict. You may have an argument with your spouse or boss. You may disagree with the car salesperson as to the value of your trade-in. Those are conflicts or disputes. Your spouse, boss, or the car salesperson does not owe you any duty at law to act in your best interests. Disagreements are part of everyday life.

However, if you carry on certain professional activities the law may set out special duties for you. If you are a licensee, then the law provides that you owe certain duties to your client. Perhaps the highest of those duties is to act in the best interests of your client. That duty is also known as a fiduciary duty. A fiduciary acts in the best interest of their client first. The client's interests come before all other considerations. If any other priorities take precedent over your client's interest, there may be a conflict arising. Being a fiduciary should stop you from acting in your own best interests. If you did propose to act in your best interest, that would be a conflict of interest.

A conflict of interest also arises when there is a substantial risk that a licensee's ability to act in the best interests of their client may conflict with duties owed to another client, former client, or third party. The *Real Estate Services Act* ("RESA")[1] is clear about conflicts of interest for licensees. The first action to take is to avoid the conflict of interest – not manage the conflict that arises later.

A conflict of interest may arise in any situation in which a licensee's duty to work in the best interest of their client competes with a personal interest or an interest of another party. Section 30 of the Rules deals with conflicts of interest in subsections (i) & (j):

Duties to clients

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;

(j)without limiting the requirements of Division 2 [*Disclosures*] of Part 5 [*Relationships with Principals and Parties*], if a conflict of interest does exist, promptly and fully disclose the conflict to the client

(i)in writing, and

(ii)separately from a service agreement or any other agreement under which real estate services are provided and separately from any agreement giving effect to a trade in real estate.[2]

A failure to abide by these sections can result in disciplinary action.

DUTY TO AVOID CONFLICTS OF INTEREST

It is important to keep in mind the obligation to take reasonable steps to avoid any conflict of interest. A conflict can potentially jeopardize the advice and services a licensee is providing. Conflicts of interest can also have impacts on the licensee's reputation, their brokerages reputation, and the reputation of the industry as a whole.

Consider the following scenarios:

- If a rental property manager recommends a cleaning company to their client but also has an ownership stake in that company, that is a conflict of interest. In other words, the rental property manager's personal interest in having a profitable company conflicts with their obligation at law to work in the best interests of the client.
- A strata manager for a strata corporation is also a rental property manager for one or more of the strata lots within the strata corporation. In this scenario, the licensee's obligation to work in their client's best interests may be in conflict if the best interests of the strata corporation and that of the landlord differ.

1 SBC 2004 c 42
2 Rules Section 30

Consider the following real-life examples:

- Case 1 – An actual conflict occurred when a strata council decided to terminate the services of a brokerage. The strata manager acted outside the strata council's instructions and interfered with the attempt to terminate the contract. The strata manager assisted some strata owners to submit a petition to demand the strata corporation call a Special General Meeting ("SGM"), prepared the notice for the SGM, and attended the SGM without the clients authorization or consent.[3]
- Case 2 – An issue arose when a licensee failed to disclose a conflict of interest when they held proxies on behalf of a rental management client while the brokerage to which the licensee was licensed was providing strata management services and the strata management service agreement identified that the strata corporation was the primary client.[4]
- Case 3 – The licensee acted as strata manager for a strata corporation but was in a position of conflict because he was also employed by a company that owned strata lots within that strata corporation and negotiated leases on behalf of the owners, and also served on council.[5]

Penalties for failing to avoid a conflict of interest can include significant fines. In a 2024 disciplinary matter, a licensee was fined two administrative penalties of $5,000 each. The penalties were imposed for failing to avoid conflicts of interest by the licensee hiring their licensed assistant to provide cleaning services and their common-law spouse to provide repair and maintenance services for the licensee's clients.[6]

To assist you in avoiding conflicts of interest, see the Practice Tips at the end of this module. See also the BCFSA Knowledge Base (Conflict of Interest rental property and strata management).

There are also times where a potential or perceived conflict may arise.

A potential conflict of interest arises where the licensee may have a competing interest that, although no conflict of interest has yet arisen, could arise. Consider the following scenarios as they relate to potential conflicts:

- A property management firm is providing concurrent representation to the strata corporation and to the owner of rental property within the strata corporation;
- A licensee manages multiple sections in a sectioned strata corporation building; or
- A licensee provides both management services and trading services and is asked to sell a strata lot in the strata corporation the licensee or their brokerage manages.

In the examples above, what are the potential conflicts? What happens when two parties have opposing interests and are both represented by the same licensee? What happens if litigation starts between parties? How is the potential for conflict resolved before it becomes a problem? The most important step (and the first step) is to try to avoid the conflict in the first place. These potential conflicts can be obvious and dealt with by full disclosure and planning ahead. For example, a licensee could address the issues in a service agreement that deals with any Section 30 (Rules) duties that might be modified.

A perceived conflict of interest is one where no actual conflict exists. However, for a variety of reasons, a licensee's client may perceive a conflict. An example of this is where a licensee goes to an industry event sponsored by a contractor that works for the strata corporation. The client may assume that there is some sort of benefit for the licensee which is why they recommended the contractor. Perceived conflicts can give rise to complaints made against licensees even though the complaint may be without merit.

3 2014 CanLII 80381 (BC REC)
4 2017 CanLII 92512 (BC REC)
5 2010 CanLII 14119 (BC REC)
6 2024 BCSRE 23

ACTING IN THE BEST INTEREST OF YOUR CLIENT

Section 30(a) of the Rules provides that a licensee must act in the best interest of the client. That is in addition to the duties in Sections 30(i) and 30(j) discussed earlier that directly relate to conflicts of interest.

As stated above, a conflict of interest arises when there is a real conflict, or a seeming incompatibility between one's private interests and one's public or fiduciary duties.[7] This does not seem difficult to identify, but the nuances of these concerns are endless.

Acting in your client's best interests also means following the lawful instructions given to you by your client as well as avoiding a conflict between the brokerage's interest and the best interest of your client. Consider the multiple issues raised when managing strata corporations with sections.[8]

Some brokerages and property managers think that to "act in the best interests of your client," means potentially to your own detriment. They wonder, then how do I ever make money as a licensee?

Acting in the best interest of your client means you cannot put your interests ahead of your client's interests. You are allowed to make money for the work you do. The services provided by strata and rental property management licensees are valuable to consumers, as demonstrated by the demand for services, and worthy of remuneration.

WHO IS THE CLIENT?

As a licensee, you should clearly identify who exactly is your client. This is easy when the client is Mr. Smith. But what if it is Mr. and Mrs. Smith? Or 12345678 BC. Ltd.? Or a strata corporation, or a trustee? What about someone who claims to have a power of attorney? In rental situations, who is the landlord? Is it a person or corporation? This can be confusing.

As a strata manager, who is your client? It is not the individual strata lot owners, but the strata corporation acting through its elected strata council. The strata corporation is a separate and distinct legal entity. This may be confusing when strata lot owners insist that because they pay strata fees, they are the client and they can give instructions. This is not correct.

The Courts have recently confirmed that for the purposes of solicitor-client privilege, the strata council is the proper conduit to deal with the strata corporation's business[9] (see discussion in *Agency* module). Therefore, for a brokerage, and for individual managers of strata corporations it is also reasonable to assume the 'council' is the client. This means all of council is the client. The instructions may come from a single council member only as a result of a vote: there can be no unilateral decision made by a council member. Sometimes, this may be complicated by votes of owners under Section 27 of the *Strata Property Act* ("SPA"):[10]

Control of council

27 (1)The strata corporation may direct or restrict the council in its exercise of powers and performance of duties by a resolution passed by a majority vote at an annual or special general meeting.

(2) The strata corporation may not direct or restrict the council under subsection (1) if the direction or restriction

(a) is contrary to this Act, the regulations or the bylaws, or

(b) interferes with the council's discretion to determine, based on the facts of a particular case,

(i) whether a person has contravened a bylaw or rule,

(ii) whether a person should be fined, and the amount of the fine,

(iii) whether a person should be denied access to a recreational facility, or

7 *Black's Law Dictionary*, 8th ed. 2004, St. Paul's Minn. USA
8 2013 CanLII 70428 (BC REC)
9 2024 BCCA 89
10 SBC 1998 c 43

(iv) whether a person should be required under section 133 (2) to pay the reasonable costs of remedying a contravention of the bylaws or rules.

(v) [Repealed 2022-41-8.]

[emphasis added]

Owners seeking to control council through Section 27 is not a regular occurrence, but it is a potential choice under SPA. Strata managers and brokerages should be aware of this and be able to determine the accuracy and legality of any direction given under such provisions. The owners cannot direct the council to do anything illegal. As such, strata managers must be aware that some direction from owners can be problematic. In those situations, it should recommend that the council seek legal advice.

Brokerages and rental property managers representing landlords similarly must be wary of instructions from corporate entities and family companies. Just because one member of a family or company is telling you one thing, that does not mean it is 'company policy.' Be sure to get direction from the whole board of directors or satisfy yourself of the veracity of a letter of delegation.

FIDUCIARY DUTY

The law of agency includes a fiduciary relationship (see the "Agency" part of this module). A fiduciary duty is a legal duty where one person (the "fiduciary") has to act in the best interests of another (the "beneficiary"). Trust lies at the heart of the fiduciary relationship. The beneficiary trusts that the fiduciary will act in good faith. Fiduciary relationships are everywhere: lawyers have a fiduciary duty to their clients; doctors to their patients; parents to their children; even spiritual advisors can be fiduciaries.

The doctrine relating to fiduciary duty arises out of trust principles. It requires the fiduciary to act with absolute loyalty toward the beneficiary in managing the beneficiary's affairs.

In general terms, a fiduciary relationship comprises the following characteristics:

- 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; and
- The beneficiary is peculiarly vulnerable to, or at the mercy of, the fiduciary holding the discretion or power.[11]

A fiduciary duty imposes the highest duty in law on the party holding the duty - the fiduciary - to act altruistically for the sole benefit of the beneficiary, to the fiduciary's own detriment if necessary. This does not mean a licensee can have no interest at all in the client's interests; licensees are allowed to make money doing their job. A licensee just cannot let getting paid be more important than the client's interests. The traditional categories of relationship in which a fiduciary duty exists are licensee to principal, lawyer to client, trustee to beneficiary, partner to partner, and director to corporation. In all of these situations, a fiduciary duty exists because the fiduciary has assumed a position, and taken on a responsibility, in which the beneficiary's interest is dependent upon the fiduciary's actions.[12]

As a licensee, you are a fiduciary and as such, you are the one with the task of working in the client's best interests, acting honestly (see Section 33 of the Rules), in good faith, and within the scope of the authority given by your client. This means, amongst other things:

- Undivided loyalty to clients;
- Protecting client's confidentiality;
- Full disclosure to client; and, of course
- Avoiding conflicts of interest.

Therefore, clients of property managers and managing brokerages have an objective expectation that they are placing their interests in the hands of another, on the understanding that the licensee will be acting in good faith and in the client's best interests. This includes avoiding conflicts of interest before any arise.

11 2011 SCC 24 (CanLII), [2011] 2 SCR 261
12 1997 CanLII 12377 (ONSC)

PRACTICE TIPS

- Managing client relationships to avoid conflicts;
  a) Anticipate potential conflicts and take steps to avoid them. Identify situations that normally give rise to a conflict;
  b) Disclose, disclose, disclose – tell your client if there is a potential issue before something arises;
  c) Continue to keep your client updated as the situation evolves – disclosure is an ongoing obligation, communicate often and early; and
  d) Remember: this is a small industry and people talk so assume there are no secrets in rental property or strata management.
- Recognizing types of conflict;
  a) Actual conflicts may be obvious but not always; and
  b) Speak to your managing broker for direction if you are not sure or reach out to BCFSA. Remember to review and follow governing rules and legislation.
- Handling perceived conflicts before they become a problem;
  a) Communicate with your client and disclose any personal or professional relationships, even if they do not give rise to a conflict;
  b) Once a client suspects a conflict, whether founded in fact or not, that relationship is often difficult to repair and may give rise to future problems; and
  c) Communicate with your managing broker so they can assist you in avoiding conflicts and develop best practices to maintain good relationship with the client.
- What to do when a conflict arises – have a plan!
  a) Be proactive not reactive;
  b) Speak to your managing broker; and
  c) Contact BCFSA to get direction.[13]

13 Practice Standards Advisors | BCFSA

BC Financial Services Authority

600-750 West Pender Street
Vancouver, BC V6C 2T8

604 660 3555
Toll free 866 206 3030
info@bcfsa.ca

bcfsa.ca