Legal Update 2024

Learner Resource Book

JAN 2024

BCFSA

CLASSIFIED: PUBLIC

Contents

OVERVIEW

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Acknowledgments

BC Financial Services Authority would like to thank the following who contributed their time and expertise. Your assistance in the creation of this course has been invaluable.

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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.

15 Good Reputation, Suitability, and Fitness for Individual Licensees | BCFSA
16 Good Reputation, Suitability, and Fitness for Individual Licensees | BCFSA

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;
- 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.

17 INDIVIDUAL REGISTRATION APPLICATIONS SUITABILITY REVIEWS AND CRIMINAL RECORD CHECKS (bcfsa.ca)
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*

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.

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] For a full discussion on material latent defects, see the *Contracts* Module.

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]

23 2018 CanLII 122721 (BC REC)
24 Real Estate Rules, Section 30 (b)
25 *Ibid*, Section 59
26 Real Estate Rules, Section 59(3)
27 SBC 1998 c 31
28 2019 CanLII 67655 (BC REC)

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.

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.

29 SBC 2002 c 78
30 Tenancies (Residential) Information | BCFSA
31 B.C. Reg. 477/2003
32 SBC 1998 c 43

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.

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.

33 Real Estate Rules, Section 30(d)
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]

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 Real Estate Service 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

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.

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.

44 RSBC 1996 c 313, Section 6
45 K. P. Consent Order

Module Two: Fraud and Prevention

This module discusses real estate fraud, which includes title fraud and mortgage fraud. You will learn about the law regarding real estate fraud in the regulatory, civil, and criminal context. You will study the leading cases regarding real estate fraud, receive tips on how to spot both title fraud and mortgage fraud, how to prevent those frauds, and the consequences of participating, wittingly or unwittingly, in fraud.

LEARNING OBJECTIVES

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

1. Understand what title fraud and mortgage fraud are;
2. Identify indicators of title fraud and mortgage fraud;
3. Avoid becoming a victim of fraud, or participating in a fraud, and to assist in protecting your clients from fraud; and
4. Know the regulatory, criminal, and civil consequences of fraud in real estate matters.

02

FRAUD

Wherever there is money, there are fraudsters circling it like vultures. Fraud is pervasive in our society, and licensees[1] and registrants[2] can be victims despite all the measures which exist to prevent it. Fraudsters betray the basic social contract: we believe what people tell us. They prey on our emotions and our honourable and dishonourable intentions. The money, they tell us, is always easy and fast. For a title fraud or mortgage fraud to be successful it almost always requires the witting or unwitting participation of a professional: a lawyer, a notary, a licensee, or a registrant. Professionals, and their ability to follow the statutes, rules, and regulations which guide them, as well as their ability to be savvy about fraud, are important safeguards to this serious criminal activity.

According to the Canadian Anti-Fraud Centre, losses to fraud reached a historic level in 2022.[3] This included a number of title and mortgage frauds in Ontario. The numbers in British Columbia ("B.C.") for title fraud and mortgage fraud appear to be less, however, there are more reasons than ever to maintain our vigilance.

Title fraud happens when a fraudster holds themself out to be the legitimate owner of a property. The fraudster either applies for and receives a mortgage loan on that property or sells it outright. Once the transactions are completed, and the money is received by the fraudster, the fraudster usually vanishes into the wind along with all the funds. This can be done by forging documents, as will be seen in the two cases which follow. It can also be an elaborate ruse, where the fraudster holds themself out to be the actual owners of the property using fraudulent identification, or their duly appointed representative using a forged power of attorney.

Mortgage fraud is when a deliberate misrepresentation is made to obtain a mortgage loan. This can be as simple as lying on a form, or can involve more complicated crimes, such as doctoring documents such as official tax forms or creating entirely new false documents.

1 "Licensee" refers to any person who must be licensed under Section 3(1) of the *Real Estate Services Act* SBC 2004 c 40
2 "Registrant" refers to any person granted registration by the registrar under Section 4 of the *Mortgage Brokers Act* RSBC 1996 c 313
3 Fraud Prevention Month 2023: Fraud losses in Canada reach another historic level | Royal Canadian Mounted Police (rcmp-grc.gc.ca)

GILL V. BUCHOLTZ

Gill v. Bucholtz[4] addresses a classic case of title fraud, involving a forged transfer of title and subsequent mortgages. Mr. Gill owned a property, which the court called Lot 4. An unknown fraudster forged Gill's signature and transferred Lot 4 to Gurjeet Gill, no relation, who was working with the fraudster. She registered the title, and Gurjeet Gill by all appearances was the legitimate owner of the property. Gurjeet Gill then sought a mortgage loan from the unwitting Mr. Bucholtz who granted the loan to her and registered the mortgage on title. She also was able to secure another mortgage loan, and that mortgage was registered in second place on title.

The fraudster did not make any mortgage payments, which of course is how this case found its way to the Supreme Court of British Columbia. The mortgage lenders wanted their money, which was secured by mortgages registered against title. The court found that the lenders could not have known that Gurjeet Gill's title was fraudulent as it was properly registered. Mr. Gill, the legitimate owner of the property, had no knowledge that Lot 4 was transferred, and wanted his property back unencumbered. The court had to determine which of these innocent actors was to bear the financial burden of the crime.

What was at issue were the indefeasibility sections of the *Land Title Act* ("LTA").[5] The fundamental principle of the Torrens system is that once a title is registered it can be relied on. Section 23 of the LTA grants indefeasible title to the registered owner subject to some enumerated exceptions. The key one in this case is the fraud exception.[6] If a registered owner acquired the property by fraudulent means, they are not the legitimate owner of the property and do not hold indefeasible title to it. The title is returned to the original owner.

The effect of this exception means that, in this case Gurjeet Gill, having participated in the fraud, did not in fact have indefeasible title to Lot 4. The knock-on effect, the court determined, meant that any charge granted by the illegitimate owner was a void instrument, as it would have been at common law.[7] Section 26 of the LTA does not grant registered owners of charges with the same degree of indefeasibility as Section 23 does for title. Holders of charges are only "deemed" to be entitled to the charge. Section 26, combined with Section 25.1(1), which provides that a person who purports to acquire land or an estate or interest in land by registration of a void instrument, does not acquire any estate or interest in the land on registration of the instrument, meant that the two mortgagees did not have valid charges. This meant that Mr. Gill would have his property returned to him free of both mortgages. Mr. Bucholtz and the second mortgagee were left without a remedy. They bore the entirety of the financial loss and had no claim against the land title assurance fund as they would have lost at common law. In order to have a claim on the assurance fund, a claimant has to show that they would not have lost their interest at common law and the LTA prevented them from having a valid claim for their interest. However, they could potentially still have a claim through tort or contact law against the fraudster.

The court debated the wisdom of such an exception, and how in a "perfect" Torrens system any person lending money on the security of a mortgage granted by a registered owner would be able to rely on the title. However, the court determined that the legislative intent of the fraud exception was clear. Professionals must be vigilant against fraud, as the LTA may not provide for compensation for an innocent party in all circumstances.

4 2009 BCCA 137
5 RSBC 1996 c 250
6 RSBC 1995 c 250 Section 23(2)(i)
7 RSBC 1995 c 250 Section 25.1(1)

CREDIT FONCIER FRANCO CANADIAN V. BENNETT

The classic case on forged mortgages and still the leading authority in B.C. is *Credit Foncier Franco Canadian v. Bennett*.[8] The Court of Appeal of British Columbia considered a fraudulent mortgage. George and Irene Bennett were the registered owners of a property in Vancouver. Unbeknownst to them, Allen, an officer of Todd Investments Ltd. ("Todd"), forged a mortgage of $7,400 in favor of Todd and registered the mortgage against their property.

Allen then assigned (sold) the mortgage to a licensee and registrant that he knew, Allen Kilbee Stuart, for $5,500. Allen then "took off" with the money. Stuart bought the mortgage for the purposes of assigning it one more time. He assigned it for $6,600 to Credit Foncier Franco Canadian ("Credit Foncier"). The fraudulent transaction took place on January 13, 1961, and the final assignment to Credit Foncier was made just eleven days later, which was not enough time for the first payment to come due.

Upon completing the assignment, Credit Foncier wrote to the Bennetts to advise them about the assignment of their mortgage and asked them to acknowledge the debt. The Bennetts simply ignored the letters, as they had never sought or received any mortgage loan on their property. By May of the same year, not a single payment had been made on the mortgage, and Credit Foncier began an action against the Bennetts for judgment for the amount due and foreclosure of the property.

Both the fraudster (Allen), and the Attorney General (the administrator of the assurance fund), were sued. In the lower court, Credit Foncier abandoned the claim for personal judgement against the Bennetts, but continued to seek the foreclosure of the property. The order for foreclosure was granted along with an order that the Attorney General pay Credit Foncier out of the assurance fund. The Attorney General appealed.

The Attorney General argued that as the mortgage was a forgery, the mortgage was a nullity. Credit Foncier conceded that the mortgage had indeed begun as a forgery, but once it had been assigned to Stuart it was a valid registered mortgage, which they had purchased in good faith relying upon the register.

The Court of Appeal weighed a number of statutory provisions, which went to whether a registered instrument can be relied upon. The court ruled that just because a mortgage is registered does not make that a conclusive right, but one which is rebuttable. The decision turned on the difference in the wording between what are now Sections 26 and 23 of the LTA. Section 26 provides that a registered owner of a charge is "deemed" to be entitled to the estate, interest, or claim created. That "deeming" can be rebutted, i.e. in the case of a forged document. Indefeasible title, in Section 23, is defined as being "conclusive evidence" that the person named is the registered owner of the property.

In this case the original mortgage was clearly a forgery. The Court of Appeal ruled that this made it a nullity notwithstanding the registration, or the fact that the mortgage had passed through a third party. Further, the court found that as the Bennetts had never received any funds from the mortgage, they owed nothing. The court ordered the discharge of the mortgage, more than three years after the forgery occurred.

As in *Gill v. Bucholtz*, the final owner of the mortgage owned nothing, and was left with nothing, despite having relied upon the register. The fraud exception to transfers of property or assignments of mortgages requires that licensees and registrants exercise particular care and due diligence, and take additional steps to prevent fraud from occurring. For example, a prudent registrant, acting on behalf of a person taking an assignment of a mortgage, would check with the mortgagor as to the validity of the mortgage and the outstanding balance of the mortgage.

8 *Credit Foncier Franco-Candien v. Bennett*, [1963] BCJ No. 16 (QL)

MORTGAGE FRAUD

As noted earlier, mortgage fraud occurs when someone misrepresents information to obtain a mortgage loan. The final report of the Commission of Inquiry into Money Laundering in British Columbia determined that the vast majority of mortgage fraud in Canada relies on the assistance of professionals such as licensees, registrants, appraisers, and lawyers. It estimated that the total amount of money lost to mortgage fraud could be as high as $500 million.[9]

Most mortgage fraud happens by overstating the borrower's qualifications. This can include:

- Lying about or misrepresenting employment status;
- Misrepresenting the intended use of the property, i.e. stating the borrower intends to live in the property when they do not;
- Failing to disclose other mortgages or debts; and
- Using false or doctored documents to mislead a lender about the borrower's financial status, such as a T1 General with an inflated income.

A potential borrower can act independently in forging or doctoring documents. At some point, however, they will require the assistance of a professional, be it a licensee, a registrant, or a lawyer to ultimately obtain a mortgage loan.

It is important to be vigilant and ask questions of clients to ensure that the information they have provided you is accurate. Knowingly assisting a borrower that is using false information to obtain a mortgage loan is a crime with many consequences which will be addressed more fully later.

OKLAHOMA SWINDLE

Another type of real estate fraud is known as an Oklahoma Swindle. This fraud usually involves two parties conspiring to obtain a mortgage loan which is much more than a property's value. The first fraudster buys a property at market value, which is then sold to a second fraudster, usually in short order, at a considerably higher price. The second fraudster then seeks out a mortgage loan on the property in an amount based on the inflated value, usually with no intent to pay that mortgage. Once the mortgage loan is granted the fraudsters usually split the ill-gotten gains. When the property is foreclosed, there is not enough equity to cover the loss, and the lender is out the additional funds.

Fraudsters seek out licensees, lawyers, and registrants to assist in these frauds. In another regulatory setting, where a lawyer assisted in a number of these transactions, he was found guilty of professional misconduct.[10] The lawyer ran a very busy real estate practice where he would close 30 transactions a month. Over the course of two years the lawyer completed twelve suspicious transactions involving one untoward individual. Each of the transactions bore some of the hallmarks of an Oklahoma fraud. The transactions included the following suspicious activity:

- Substantial, unexplained increases in the prices of properties from the first to the second transaction;
- Excessive and/or additional deposits paid;
- The absence of a payee specified in the contract of purchase and sale respecting deposits which were purportedly paid;
- Deposits paid directly to sellers;
- Unexplained changes in closing dates;
- Unexplained reduction in the purchase price at the last minute;

9 Commission of Inquiry into Money Laundering in British Columbia (cullencommission.ca) at p. 79
10 2013 ONLSAP 0014 (CanLII)

- Closing funds paid to third parties who were not involved in the transaction; and
- The fraudster being involved in each of the transactions, and as a power of attorney on a number of them.

The Law Society of Upper Canada found that the lawyer committed professional misconduct by being at a minimum reckless or willfully blind regarding these fraudulent transactions. The lawyer argued that he was the gullible victim of a sophisticated fraudster, but was disciplined regardless. The fraudster was convicted of committing fraud and sentenced to four years in the penitentiary, a fine, and ordered to pay restitution.[11]

IDENTIFYING REAL ESTATE FRAUD

There has been a rash of title fraud cases in Ontario in recent years. Some of them were committed by the fraudster noted above. Between four and five criminal organizations fraudulently sold properties or sought mortgage loans on at least thirty homes in the greater Toronto area.[12] In some instances, the fraudster forged the homeowners' identities and then sold their homes to unwitting buyers. In other cases, they used the forged identification to grant mortgages on the property. While there currently appears to be less title fraud activity in British Columbia, there are at least three reported cases since 2019 where fraudsters attempted to sell properties they did not own.[13]

These can be elaborate crimes. The central figure in a title fraud often hides in the shadows. The crime begins by them looking for a property which is free from any mortgages, liens, or other charges. Ideally, the owner of the property lives outside of the area, or the country. The fraudster then forges identity documents and hires actors to pose as the sellers of the property, or poses as the seller. In other cases, the fraudster will forge a power of attorney, if they cannot find a suitable stand-in for the owner.

The actors will then reach out to an unwitting licensee and ask them to list the victim's home. They tell the licensee that they are prepared to list it for a reasonable price, even a bargain, but it must go quickly as they are facing some financial hardship. They will often insist on a quick closing date. Once the transaction is completed, the funds quickly disappear. It is only later when the legitimate owner (i.e. the victim) of the property learns of the sale, that the crime is discovered. As the cases above show, the process to unwind the resulting mess can take years, involving lengthy litigation.

The following signs of both title fraud and mortgage fraud do not necessarily mean that the transaction is fraudulent. However, the licensee or registrant should take further steps to ensure that the transaction is legitimate. The list is also not exhaustive.
The signs include:

- The property listed has no charges on it;
- The property is vacant land, or a rental property;
- The seller or proposed mortgagor is unfamiliar with the property;
- The seller or proposed mortgagor is using new documentation, which may have inconsistencies;
- The property was bought and sold a number of times in short order, each time for a higher value;
- The seller asks for the deposit to be paid to them directly;
- The seller or proposed mortgagor is operating under a power of attorney, and you never meet the actual owner of the property, except perhaps by phone;
- A power of attorney is for a person who lives outside the country;
- The seller wants to sell the property, have it close quickly, and puts undue pressure on you, threatening to take their business elsewhere;
- The seller offers a higher commission, or a bonus for selling or mortgaging the property quickly;

11 2014 ONCA 464 (CanLII)
12 How organized crime has mortgaged or sold at least 30 GTA homes without owners' knowledge | CBC News
13 At least 3 B.C. homes listed for sale without homeowners' knowledge amid surge in title fraud in Ontario | CBC News

- The name on the seller's or proposed mortgagor's identification is different from that on the property;
- They ask for the closing to take place during the end of the month, or right before a long weekend;
- There is a surplus of mortgage funds, which go to a third party, especially an offshore company;
- There is a third-party facilitator that is not involved in the purchase and sale, but seems to be directing everyone;
- The seller or proposed mortgagor misspells their own name, or does not readily answer to their name;
- The buyer does not require title insurance, a loan, or title insurance has been declined; and
- The photos between two pieces of identification do not match.

Again, this list is not exhaustive. When issues arise with a sale which give you cause for concern, it is important to ask questions, and seek out explanations. You should notify your managing broker immediately. When a sale seems so quick and easy, it is always good to question why it is that way. Fraudsters prey on people's greed and know that the promise of an easy commission can turn a licensee or registrant into an unwitting accomplice, or even one which is willfully blind.

CONSEQUENCES OF REAL ESTATE FRAUD

Aside from the civil and regulatory consequences of real estate fraud, it is above all a criminal offence with potential criminal consequences. Knowingly participating in a fraudulent real estate transaction can lead to a criminal charge. Fraud is a hybrid offence, meaning the Crown can proceed summarily or by way of indictment. If the Crown chooses to proceed by indictment, the maximum sentence allowable is 14 years.

In recent years, to ensure that courts impose penitentiary sentences for large scale frauds, the federal government amended the *Criminal Code* to include mandatory minimum sentences. Where the proceeds of a fraud exceed one million dollars, the minimum sentence a court can impose is two years imprisonment. As noted in the Oklahoma fraud case earlier, the Ontario Court of Appeal upheld a sentence of four years imprisonment.[14] The total proceeds of all of the eleven mortgages in that case was just under $500,000. Courts will often also order restitution of the proceeds of the fraud and can also impose fines.

With the value of properties, particularly in the lower mainland of British Columbia, being convicted of title or mortgage fraud can easily attract a penitentiary sentence.

Participating in such a transaction could also be found to be a breach of criminal anti-money laundering provisions. If a licensee or registrant in any way accepted funds which resulted from a fraud to which they were found to be willfully blind, they can be prosecuted for money laundering.[15]

Whether there is a corresponding criminal case or not, participating in fraudulent transactions will also attract the attention of BC Financial Services Authority ("BCFSA"). As the regulator of licensees and registrants, BCFSA administers discipline.

For licensees who knowingly participate in a fraudulent real estate transaction, those actions constitute several statutory breaches. Committing fraud, once proven, is conduct unbecoming under the *Real Estate Services Act* ("RESA").[16] Committing a fraud brings the real estate industry into disrepute, it undermines public confidence in the real estate industry, and is contrary to the best interests of the public. Further, it also would be considered misconduct, as it is deceptive dealing.[17]

14 2014 ONCA 464 (CanLII)
15 2018 ONCA 1034 (CanLII)
16 SBC 2004 c 42 Section 35
17 SBC 2004 c 42 Section 35(1)(c)

These are among the most serious breaches a licensee can commit and would attract the most serious consequences, up to and including the cancellation of the individual's licence. Allegations of knowingly participating in a fraud could also lead to an urgent order, which would result in immediate suspension of a licence, pending a full hearing. Disciplinary penalties of up to $250,000 could also be imposed, as well as an additional penalty equal to remuneration received by the licensee. Brokerages could face disciplinary penalties of up to $500,000.

Registrants who wittingly participate in a fraud would face similar consequences. Knowingly participating in a fraudulent transaction is conducting business in a manner that is otherwise prejudicial to the public.[18] It could also lead to the cancellation of a registration, and a penalty of up to $50,000.

Registrants and licensees who unwittingly participate in a fraudulent transaction could nonetheless still be subject to disciplinary proceedings. This will particularly be the case if they did not exercise adequate due diligence. Licensees could be found to have committed misconduct by demonstrating incompetence in the performance of their duties.[19] Further, they could be found to be in breach of the rules which require them to act honestly and with reasonable care and skill.[20]

Registrants who unwittingly participate in fraudulent transactions could still be found to be acting contrary to the public interest.

Finally, there are many civil consequences of being involved in a fraudulent transaction. Once discovered, real estate fraud will usually result in civil litigation which would include the registrants and licensees involved. In addition to the significant costs of civil litigation, it can take years to unwind some of these transactions.

There is of course reputational harm, and the stress which accompanies criminal, regulatory, and civil proceedings.

PREVENTING REAL ESTATE FRAUD

There are many tips that licensees and registrants can follow to prevent fraudulent transactions. It begins with knowing your client. This is one of the most important obligations of real estate professionals. The *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* ("PCMLTFA") imposes requirements on licensees, which also help prevent fraud.

Identifying your client should include getting government issued identification, and performing a search of the land owner transparency registry, and a search at the land title office. Forged documents are becoming more sophisticated and can easily fool anyone. Check the documents carefully and know what the security measures for that document are. For instance, the Insurance Corporation of British Columbia ("ICBC") publishes all the security features of a B.C. drivers licence on its website.[21] The features include:

- Raised laser etching of the licence holder's name;
- Microprinting on the face of the card;
- Fine line background and security spiraling to make photo substitutions difficult;
- A slightly overlapping signature to make photo substitution difficult;
- Colours that blend across the card;
- A 'ghost' image with the year of birth on the right-hand hand side that can be felt by touch; and
- There is no smiling permitted in a B.C. drivers' licence.

Canadian passports also have published security features.[22] Know the identification document that you are handling. You are not expected to be an expert in reviewing identification documents, but knowing the security features can help pick out identity theft, which is necessary for title fraud.

18 RSBC 1996 c 13 Section 8(1)(i)
19 SBC 2004 c 42 Section 35(1)(d)
20 Real Estate Services Rule Sections 33 and 34
21 Card security & privacy (icbc.com)
22 Features of the passport - Canada.ca

Beyond identifying your client, get to know them personally. Hold in-person meetings. Ask them about the property which they are selling, how they came into possession of it, and about the features of the property. Ask them how they found you.

Look for the warning signs listed above. Are there more than one? Are there several of them? What are the explanations the seller provides about the warning signs? If they are acting using a power of attorney, ask where the owner of the property lives. Ask if you can meet with the owner, ideally in person.

You can conduct an internet and social media search of the client. Do the people in the pictures match the faces of the people you have been dealing with? A simple internet search can sometimes show that the people you are dealing with are not the people they purport to be.

When acting as a registrant, also get to know your client. Ensure that all their documents match. Ask them about what they do for a living and see if their answers match their income documents. Ask them for a business card, or official work identification, then verify their employment with their employer, along with the information on their pay stub.

When acting for buyers, let them know about title insurance. Title insurance may reimburse them if they fall victim to title fraud.

Where many red flags appear, talk to your managing broker/designated individual immediately. They may recommend seeking legal advice. Where you have clearly identified a transaction as fraudulent, call the authorities and report it. Registrants have a duty to report to lenders if there is reason to believe a transaction may be fraudulent.

For tips to protect consumers from real estate fraud, please visit BCFSA's website.[23]

ASSURANCE FUND UNDER THE *LAND TITLE ACT*

If the worst happens, and title fraud occurs, the assurance fund under the LTA may compensate innocent victims of title fraud. It provides that anyone who is deprived of any estate or interest in land as a result of fraud may go to court to recover money from the assurance fund.[24] There are other preconditions to a claim. For example, the claimants must prove that the LTA prevents recovery of the estate or interest in the land, which could have been recovered at common law. However, it is not a simple process.

The person deprived of the title must first proceed in court for the recovery of damages against the person who committed the fraud, and then make the Minister of Finance a party to the proceedings. If the person responsible for the fraud is dead, or cannot be found in British Columbia, they can seek recovery directly from the Minister.

Only once the court makes a final decision, can the innocent victim be paid out of the assurance fund. These can be costly and time-consuming proceedings, which is why you may consider recommending title insurance to your clients.

CONCLUSION

Title fraud in British Columbia, up to now has been rare, thankfully. For other types of real estate and mortgage fraud, this is less so. Licensees and registrants play a critical role in helping prevent fraud. When fraud is involved, we may not be able to rely on the land title office records, such as the Certificate of Title. This means that licensees and registrants must take additional steps to help prevent fraud. They must know the signs of fraud, its significant consequences, and take steps to try to prevent it.

23 Consumer Tips to Protect Against Fraudulent Transactions | BCFSA
24 RSBC 1996 c 250 Section 296

Module Three: Due Diligence

This module is designed to provide an overview of some important due diligence topics in the real estate profession. Licensees[1] and registrants[2] will learn about the importance of due diligence, the legal and ethical obligations of real estate and mortgage professionals, and how to identify and mitigate risks associated with real estate transactions. The module will cover topics such as knowing your clients, knowing who to refer out to and accept referrals from, material latent defects, zoning, and land use restrictions.

LEARNING OBJECTIVES

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

1. Understand the legal and ethical obligations of licensees and registrants with respect to due diligence;
2. Identify and mitigate risks associated with real estate transactions and mortgage financings;
3. Describe best practices for confirming identification;
4. Understand the importance of knowing who to refer out to and accept referrals from;
5. Understand your disclosure obligations for material latent defects;
6. Identify common latent defects such as radon gas, poly-b piping, and underground oil storage tanks; and
7. Describe zoning and land restrictions, such as water rights or an Agricultural Land Reserve designation, and how to conduct proper searches and refer clients to professional advice if necessary.

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1 "Licensees" refers to any person who must be licensed under Section 3(1) of the *Real Estate Services Act*, SBC 2004 c 42.
2 "Registrant" refers to any person who is granted registration by the Registrar of Mortgage Brokers under Section 4 of the *Mortgage Brokers Act*, RSBC 1996 c 313.

WHAT IS DUE DILIGENCE?

Due diligence is the process of investigating and verifying information before entering a transaction or making a decision. For licensees and registrants, due diligence involves conducting research and gathering information on both your client and the subject property. In the case of licensees, you have a duty to your client to be aware of any information that may impact their decision to purchase a property such as its physical condition, existing zoning and building permits, title defects, and any other issue that may affect the value of the property or your client's decision. For registrants, you have a duty to be aware of any information that may affect your client's ability to obtain a mortgage loan, including details about the subject property as well as your client's own financial information.

Due diligence does not just refer to your obligations to your client. You have a statutory and common law duty to also know your client and, in situations where you are giving or receiving referrals, know the industry member you are referring to or from. These "Know Your Client" and referral rules are essential in protecting yourself, your client and the profession from fraud and money laundering and are discussed later in this module.

The duty to conduct proper due diligence is found in both statute (including related rules and regulations) and the common law. Failure to conduct proper due diligence may result in regulatory sanction as well as civil claims for breach of fiduciary duty and negligence.

Statute

Real Estate Services Act

For licensees, the statutory duty to conduct proper due diligence is found in the *Real Estate Services Act* ("RESA") and the Real Estate Services Rules ("Rules"). Specifically, Section 30 of the Rules requires a licensee to act in the best interests of their client[3] and to use reasonable efforts to discover relevant facts respecting any real estate that the client is considering acquiring.[4] Licensees should also note that the Rules require them to advise their client to seek independent professional advice on matters outside their expertise.[5] The Rules require a licensee to make all reasonable searches and inquiries regarding a property so they may act in the best interest of their client. Often, a licensee may not have the expertise to answer a question about the property at which time they should always advise their client to seek outside professional help (for example, a building inspector or lawyer).

Mortgage Brokers Act

Registrants are currently regulated under the *Mortgage Brokers Act* ("MBA").[6] BCFSA provides guidance to registrants on the due diligence required both generally and when brokering stated income mortgages.[7] The general guideline is summed up as follows:

> "Mortgage brokers need to recognize that lenders rely on the information they receive regarding potential borrowers. Mortgage brokers cannot say that it is not their responsibility to verify the information being given to them during the application process. Lenders indicate they assume that mortgage brokers have verified the information before forwarding it on…a mortgage broker has a duty to ensure the information being sent to a lender has been verified."

3 Rules Section 30(a)
4 Rules Section 30(h)
5 Rules Section 30(d)
6 *The Mortgage Services Act*, which replaces the *Mortgage Brokers Act*, was passed in November, 2022. It is currently not in force.
7 www.bcfsa.ca/media/1523/download, and www.bcfsa.ca/media/1517/download

When assisting a client in securing a mortgage, registrants are expected to make reasonable efforts to verify that the information in their client's mortgage applications is accurate. What constitutes "reasonable efforts" will change on a case by case basis, but you should be aware of and do further inquiries on any application that contains errors or omissions, or that contains suspicious information. The MBA allows the Registrar of Mortgage Brokers to sanction individuals if, in the opinion of the Registrar, they have conducted business in a manner that is otherwise prejudicial to the public interest, which would include not verifying information.

Common Law

Duty of Care

At common law, both licensees and registrants owe a duty of care to their client. A licensee has a duty to "disclose anything that affects the property's suitability for the principal's purpose, the legality of the current use of the property, zoning or development plans being made by others for the property or the area in which it is situated...and any potential problems which may arise with respect to the transaction."[8]

A breach of an established duty of care can result in you being found liable for any damages that result.

Royce Holdings Inc. v. Jupe ("Royce Holdings")[9] shows how the standard of care and due diligence required by law in a transaction can change as new facts arise. In that case, the defendant registrant proposed two mortgage investments to a client that were secured by a second mortgage. The investments were made at different times. The subject property was foreclosed on and sold for less than the amount of the first mortgage, resulting in the registrant's client losing their entire investment.

First, the Court had to determine what standard of care a registrant owes their client. It found that a registrant must exercise "reasonable care" in verifying information provided to them so that they are not "a mere conduit with no legal responsibility for the accuracy of such information."[10] Further, a registrant must exercise their knowledge and experience when considering whether an investment is reasonable in all the circumstances.

The Court then considered whether the standard of care was met when the registrant recommended both investments.

For the first investment, the evidence showed that the registrant did not obtain income confirmation from the borrower. However, the Court found that was reasonable in the circumstances as the registrant had collected a current appraisal of the property, a mortgage statement from the first mortgagee, and the credit history of the borrower which allowed him to reasonably believe that this was a safe investment for his client. The registrant met the standard of care in that instance.

However, by the time of the second investment circumstances had changed. Time had passed, and the borrower requested the second investment in order to pay out a high-rate third mortgage that had been added to the title after the first investment. This should have been a red flag to the registrant that there may have been issues with the borrower's financial situation that should be investigated. However, no further investigations were made. The registrant then told his client that the property's appraised value had increased since the first investment and as such a further loan was safe. He did this even though time had passed and no formal appraisal had taken place since the first investment was made. He was also aware that prices in the area had begun to drop in the time between the two investments. The registrant's failure to inquire about the borrower's financial situation and the current value of the property was found to be a breach of the standard of care and he was found liable to his client for the entirety of the second investment.

8 Malpass v. Morrison, 2004 CanLII 36076 (ON SC) at para. 20, citing *Laycock v. Lee* (1912), 1912 CanLII 318 (BC CA), 1 D.L.R. 91 (B.C.C.A.)
9 *Royce Holdings Inc. v Jupe*, 2018 BCSC 2025
10 Ibid, at para 105, citing *Transamerica Life Insurance Co. of Canada v. Hutton* (2000), 33 R.P.R. 1 (3d) (Ont. S.C.J.)

KNOW YOUR CLIENT

To best serve your client you need to know your client. Provincial and federal statutes require that you confirm your client's identity to protect against fraud and money laundering. It is also best practice to make reasonable inquiries into your clients' personal information to ensure you are giving appropriate advice and can make accurate statements to other parties in a transaction.

Know Your Client ("KYC") procedures are required of both licensees and registrants. KYC was difficult during the COVID-19 pandemic as it was often difficult to meet your client in person. This trend has continued, as people have become more used to working remotely. You will likely encounter potential clients that believe that everything can now be done via video conference or email. However, this poses significant risks as not properly identifying your client can leave you vulnerable to scams or aiding criminal activity.

In the licensee context, you must ensure that your client is who they say they are, but also that you are not misrepresenting any information about them to the other party in the real estate transaction. For registrants, knowing your client can assist you in identifying red flags in their mortgage applications. For example, if your client informs you they are retired but their mortgage application states they have a significant yearly income, further inquiry as to that income's source would be required.

Anti-Money Laundering

As a licensee or registrant, you must be aware of the reporting obligations under the federal *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* ("PCMLTFA")[11] and its associated regulations. The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) enforces the PCMLTFA. The PCMLTFA applies to anyone who acts as an agent for the buyers and sellers in respect of a purchase or sale of real property. It does not include activities related solely to property management.

The requirements under the PCMLTFA are the responsibility of the brokerage, except for reporting suspicious transactions which are the responsibility of both the licensee and the managing broker.[12] A suspicious transaction report must be submitted to FINTRAC if there are reasonable grounds to suspect that a financial transaction that occurs or is attempted relates to the commission or the attempted commission of a money laundering or terrorist financing offence.[13]

The PCMLTFA requires you to verify the identity of any client, whether a person or an entity, when you act as their agent in the purchase or sale of real estate or in many situations where you receive funds directly from them.

If there are any unrepresented parties in a real estate transaction it is necessary for all licensees involved in the transaction to take reasonable measures to verify the unrepresented parties' identities.

In order to verify someone's identity you must use one of five approved methods. They are:

1. **Government Photo ID**

a) The identification must be authentic, valid, and current. It must include the person's name, a photo of the person, and a unique identifying number.

b) The name and appearance of the person must match the ID. Best practice is that this be done in person.

c) You may use government-issued photo identification if your client is not physically present if you have a process in place to authenticate the ID document. The client will need to send you a copy of their ID and then you must use available technology, such as the services provided by the Land Title and Survey Authority ("LTSA") which are explained below, to authenticate that the document is valid and current. You can then participate in a live video chat session with the client to compare them to the photo ID. It is not enough to only view a person by video chat. You need a process to authenticate the document itself.

11 SC 2000, c 17
12 Note, registrants currently do not have the same reporting requirements under the PCMLTFA as licensees. However, recent draft amendments to the PCMLTFA Regulations will extend these reporting requirements to mortgage lending entities including lenders and registrants.
13 For more information on suspicious transaction reports and other reporting requirements see https://fintrac-canafe.canada.ca/re-ed/real-eng

2. Credit File Method

a) You may use a valid, current credit file to verify someone's identity if the information in the credit file matches the name, address, and date of birth of your client. The credit file must be from a Canadian credit bureau, have been in existence for at least three years, and contain information from more than one transaction.

3. Dual-Process Method

a) You can verify the identity of a person by doing any two of the following:

   i. Referring to information from a reliable source that includes the person's name and address;

   ii. Referring to information from a reliable source that includes the person's name and date of birth; and

   iii. Relying on information that shows the person has an account with a bank or credit union and confirming that information with the institution.

b) A reliable source should be a well-known entity such as governments, crown corporations, banks, or utility providers. You cannot use social media.

4. Affiliate or Member Method

a) You can verify the identity of a person by confirming that an affiliate[14] of yours has already verified their identity.

5. Reliance Method

a) You may rely on measures taken by another reporting entity or affiliated foreign entity. However, in the case of a foreign entity, you must be satisfied that the foreign entity has similar policies in place for verifying identity and that those policies are subject to supervision of an authority under legislation of that foreign state.

You may use an agent to verify someone's identity (for example, if a client is out of the country). To do so, you must have a written agreement or arrangement in place with the agent before you use them. You must obtain, as soon as possible, all the information that the agent used to verify the person's identity and be satisfied that the information relied on was valid and current and verified using a government photo ID, a credit file, or the dual-process method listed above.

You do not need to verify someone's identity that you have already verified.

To verify the identity of a corporation, you must refer to a certificate of incorporation, a record that has to be filed annually under provincial securities legislation, or any other official record that contains the corporation's name, address, and names of its directors.

In all cases, you must record the person or corporation's name, the date you verified their identity and the method and documentation used.

LTSA Identity Verification Service is available for a fee through myLTSA. It confirms the authenticity of domestic and some foreign identification documents and can be used in conjunction with the other steps noted above.

In summary, doing the due diligence to know your client is a key component in preventing fraud and money laundering in the real estate sector. As a licensee or registrant, you may have reporting requirements under PCMLTFA that require you to authenticate the ID of your clients. Proper procedures should be put in place that utilize the prescribed methods of identification.

14 Note, an "affiliate" must be an entity described under Section 5(a)-(g) of the PCMLTFA. The definition does not include other licensees or registrants.

KNOW YOUR REFERRAL

A prudent licensee or registrant should take reasonable steps to verify the licensing status of anyone to whom they refer clients. They should also take reasonable steps to ensure that anyone they accept referrals from is not acting contrary to RESA or the MBA. You can face sanction for facilitating unlicensed activity.

The practice of registered persons facilitating the activity of unregistered persons is commonly referred to as "fronting." Fronting has recently gained significant attention in the registrant context.

The Commission of Inquiry into Money Laundering in British Columbia, popularly known as the Cullen Commission, took special notice of loan applications put together by unregistered individuals and then passed on to lenders through registrants. These applications often include falsified documents that are used to mislead lenders and inflate an applicant's borrowing capacity. For example, in one matter,[15] a registered submortgage broker allowed an unregistered person to use her Filogix account to submit falsified mortgage applications under her name. The unregistered individual then used that account to improperly provide mortgage arranging services to various borrowers. The registrant never met with or took direct instructions from any of the borrowers.

Licensees have also been disciplined for promoting unregistered activity. For example,[16] a licensee formed a relationship with an unlicensed brokerage to which he paid a significant portion of his commissions in exchange for fronting transactions that had been prearranged and, in one case, prepared an offer for a client he never met.

Licensees should also be aware of referrals to persons performing property management when not licensed to do so. For example, a brokerage was disciplined for facilitating an unlicensed person's rental property management business. The brokerage had taken 58 referrals, without solicitation, from the unlicensed person in exchange for supporting that person's property management business. It was agreed that the volume of referrals should have been a red flag for the brokerage to look more closely at the unlicensed individual's business.[17]

KNOW THE PROPERTY

Licensees and registrants should prioritize proper due diligence when evaluating a specific property for a transaction or financing to provide accurate advice to their clients. This critical step identifies potential risks, legal issues, and financial considerations associated with the property which protects both the interests of their clients and their own professional reputation. One should be aware of potential defects in the property or restrictions on its use when advising a client on a transaction or financing.

Material Latent Defects

At common law, a latent defect in a property is a material defect that is not readily visible or discoverable during a reasonable inspection of the property. This means that the defect is not apparent to a buyer or their home inspector during the purchase process. Under the common law, a seller or licensee has an obligation to disclose known latent defects.

Examples of latent defects in a property could include issues with the foundation, electrical or plumbing systems (such as poly-b piping), or the presence of radon, mold or asbestos, or environmental contamination, among others. These defects involve a risk to health or habitability, can significantly impact the value of the property, and may require expensive repairs or remediation.

15 M.E. Consent Order
16 2016 CanLII 62167 (BC REC)
17 2019 CanLII 94530 (BC REC)

Further, licensees are required by the Rules to disclose any known material latent defects in a property to potential buyers.[18] The Rules have a broader definition than the common law of what constitutes a material latent defect:

59. DISCLOSURE OF MATERIAL LATENT DEFECTS

1. In this section, "**material latent defect**" means a material defect that cannot be discerned through a reasonable inspection of the property, including any of the following:

a) a defect that renders the real estate

i. dangerous or potentially dangerous to the occupants,

ii. unfit for habitation, or

iii. unfit for the purpose for which a party is acquiring it, if

(A) the party has made that purpose known to the licensee, or

(B) the licensee has otherwise become aware of that purpose;

b) a defect that would involve great expense to remedy;

c) 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;

d) a lack of appropriate municipal building and other permits respecting the real estate.

Licensees must be aware of the broader requirements under the Rules. The Rules include a range of problems from the serious and dangerous to those that do not represent any danger to the occupants or structure, but may impact how a party may use the property (for example, an unauthorized rental suite). As a licensee acting for a seller, it is best practice to inquire with your clients about potential material latent defects in the property. Failure to disclose a known material latent defect could result in legal action and financial consequences for the seller and licensee.

The disclosure of material latent defects must be written and separate from "any agreement giving effect to a trade in real estate." To assist licensees in complying with the Rules, British Columbia Real Estate Association ("BCREA") provides a "Seller's Disclosure of Material Latent Defects" form that may be completed.

The seller is required to disclose known latent defects in a Property Disclosure Statement ("PDS"). The definition under the PDS is less broad than that found under the Rules. More information about the PDS is found in the *Contracts* Module.

A licensee should inform their client of their legal obligation to disclose material latent defects and the potential liability that could follow from non-disclosure. If a client instructs you to withhold disclosure required under the Rules, then you must refuse to provide further trading services on behalf of that client.[19]

18 Rules, Section 59(2)
19 Rules, Section 59(3)

Radon

Radon is a naturally occurring, radioactive, odourless, and colourless gas that is generated in soil. Radon seeps up through the ground and may find its way into homes through cracks in the foundation or walls. Radon can be a problem in any home or building but is especially an issue in new homes that are energy efficient and sealed from the outside. This allows radon levels to build to unsafe levels within the home.

Known radon levels of 200 Bq/m^3 or more are material latent defects and must be disclosed.[20]

There is no legal requirement to test a home for radon. The prudent buyer, however, may require a radon test as a condition of purchase and also require a holdback of funds to mitigate the cost of remediation.

If a test has been done, the licensee for the buyer should request copies of the results.

Therefore, it is important for licensees to be aware of their due diligence requirements when it comes to radon, and to take appropriate action to mitigate the risks posed when acting on behalf of buyers or sellers of property.

Poly-B Pipes

Polybutylene ("poly-b") pipes are a type of plastic plumbing pipe that was commonly used in residential construction during the 1980s and 1990s. However, poly-b pipes have a history of failure due to their susceptibility to becoming brittle and cracking, leading to leaks and water damage in homes. A further concern is that poly-b piping does not change colour or appearance as it deteriorates, so it is difficult, if not impossible, to know how close it is to failure by eye inspection alone.

As a result of these concerns, poly-b piping was removed from the National Plumbing Code of Canada as a viable material in 2005.

If you are acting for a buyer considering purchasing a property that was built in the 1980s or 1990s, it is important to conduct due diligence to assess the condition of the plumbing system. Inquiries should be made of the seller's agent as to the type of piping used in the house. You should recommend that a licensed plumber or home inspector conduct a thorough inspection of the pipes and fittings to determine if any repairs or replacements are necessary.

Additionally, it is important to check if the property has a history of leaks or water damage related to the poly-b pipes. This information can often be obtained through a PDS or by contacting the previous owners.

Registrants should also conduct reasonable due diligence regarding mortgage requirements on properties built in the 1980s and 1990s. Poly-b piping can affect the value of the home and many insurance companies now require remediation as a condition of insurance.

Underground Oil Storage Tanks

Underground oil storage tanks continue to be an issue in British Columbia. The practice of burying oil tanks was prevalent throughout the province prior to 1957, when the practice began to decline. Underground storage tanks erode over time, releasing any oil they contain into the surrounding soil. The costs of locating an oil tank and remediating any damage caused can be significant. Storage tanks that have been "decommissioned" but not removed may still lead to environmental contamination and remain an issue.

In one instance, a licensee for the buyers took the appropriate step of advising her clients that older homes may have buried oil tanks that – if removal is required – would cost the buyers a significant amount. She advised that the Contract of Purchase and Sale include an addendum stating any tank be removed prior to the completion date and that the seller would pay for the cost of the removal of any tank. An oil tank was found by the buyers after they moved in. The addendum was found to be legally binding, and the sellers paid for the remediation and removal.[21]

20 Consumer Guide to Radon | BCFSA
21 2020 BCSC 19 (CanLII)

While such a term is not necessary, it is important as an agent for a buyer to inform the buyer of the potential of an underground oil tank in older properties. As an agent for the seller, inform the seller of the potential for liability if they know of an underground storage tank and do not disclose it. The PDS contains the question "Are you aware of any past or present underground oil storage tank(s) on the premises."

Zoning and Bylaws

Licensees and registrants are expected to be familiar with zoning and bylaw restrictions that are common in the market area in which they practice. For example, in many areas developers are buying properties to construct multi-unit homes, laneway houses, and coach houses which may or may not be permitted by the property's zoning. In other areas of the province, properties may be designated as Agricultural Land Reserve ("ALR").

The following are samples of zoning or bylaw considerations that may affect a property. It is not a complete list. Restrictions under the *Heritage Conservation Act*,[22] expropriations and right-of-way restrictions, air space rights, considerations in regard to Indigenous lands, and other issues may affect the property. It is incumbent on the licensee and registrant to make the appropriate searches to inform themselves and their client of any restrictions on the property.

Coach Houses and Laneway Houses

When conducting due diligence for laneway houses and coach houses, there are several important factors to consider.

The first step is to check if the property is zoned to allow for a laneway house or coach house. It is also important to review local bylaws and regulations governing the construction and use of these types of buildings. Then, a survey of the property can identify any issues related to setbacks, easements, or other restrictions that may impact the construction or use of a laneway house or coach house.

If a laneway or coach house already exists on the property it is important to ensure that any construction had the necessary permits and has passed all required inspections. This can usually be achieved by making the appropriate inquires with the local government. You should advise your client to hire a professional to inspect the condition of the addition to ensure that that there are no issues with the foundation, electrical, or plumbing systems.

Short Term Rentals

If your client is purchasing a property for a short-term rental, you must be aware of any bylaws put in place by the local government or the relevant strata corporation.

While recent changes in the law have removed the ability for strata corporations to ban rentals, strata corporations can still prohibit short-term accommodation, which is often informally termed 'short-term rentals,' and commercial use of a strata units. A licensee or registrant must request the strata bylaws and turn their mind to whether a short-term rental is permissible in a strata unit.

Some municipalities, such as Kelowna, Powell River, Victoria, and Vancouver, generally limit short-term rentals to primary residences only – with Vancouver also requiring short-term rentals to have a business licence number in order to advertise.[23] Licensees and registrants should be aware of local restrictions on short-term rentals when advising clients on possible investments.

22 RSBC 1996, c 187
23 Short-term rental business licence | City of Vancouver

Agricultural Land Reserve ("ALR")

ALR designation is a provincial land use zone that is intended to protect agricultural land for farming and related uses. The ALR was established in 1973 and covers over 4.7 million hectares of land in the province. The Agricultural Land Commission ("ALC") is the provincial government agency that oversees the ALR and is responsible for making decisions regarding land use within the ALR.

Properties within the ALR are subject to restrictions and regulations that are intended to preserve the land for agricultural use. Some key points to consider regarding ALR zoning in British Columbia include:

- The primary use allowed within the ALR is farming and related agricultural activities. Other uses may be allowed in limited circumstances, such as home occupations, bed and breakfasts, and certain non-farm uses that support agriculture.
- Properties within the ALR may be subject to restrictions on the amount and type of development that is allowed – including the size of a home built on the property. Development that is not related to farming or agriculture may be prohibited or limited.
- Subdivision of properties within the ALR is greatly restricted,[24] as it can lead to fragmentation of agricultural land and may make it more difficult for farmers to operate their businesses.

ALR maps can be found on the government of British Columbia's "ALR Maps" webpage and the ALR status of a parcel can be determined by using the ALR Property Map Finder.[25] In the vast majority of cases, a property's title will indicate whether the land may be affected by the *Agricultural Land Commission Act* ("ALCA").[26] Although the land title registers/records should be accurate, licensees should be aware that the ALC's records take precedence over certificates of title; therefore, in the rare instance where no notice appears on title but the ALC has land recorded as being within the ALR, that land is still subject to the ALCA.

A recent Supreme Court of British Columbia case is instructive on the due diligence obligations that may arise for a licensee when a property may fall under the ALR. In that case, the listing agent was aware that a buyer wished to buy the property for a development, but was also aware of a proposal to put that property into the ALR. He also knew of a potential for the buyer to opt out of the inclusion into the ALR but failed to tell them. The licensee was found to be negligent in his failure to provide full and complete information on the ALR matters and was liable for the lost profits and thrown away costs of the buyer in the amount of $1.5 million.[27] The decision was appealed. The result was damages were reduced by over $450,000. For a summary of the case see Legal Update 2023 On the Radar: Accurate Information Module.

24 *Agricultural Land Commission Act*, SBC 2002] c 36, Section 18.
25 https://governmentofbc.maps.arcgis.com/apps/webappviewer/index.html?id=87dee902dc5e443fbff8ca7b4311b407
26 SBC 2002, c 36
27 2021 BCSC 167

Water Rights

When conducting due diligence for properties in British Columbia, it is important to consider water rights as they can impact the use and development of the property.

If there is water on a property you should determine how it is used and whether it is from a well, stream, or other source. While licensees are not expected to be experts on water rights, they are expected to be alert to the implications of water sources on a property and to direct their client to the appropriate professional advice.

If an owner plans to use the water from a stream or aquifer as defined in the *Water Sustainability Act*,[28] they will require a licence and will be subject to fees unless they fall under an exemption. Inquiries should be made about whether the current owner of a property holds a water use license, what is permissible under that license and its associated cost.

If the property has a well, it is important to be aware of the restrictions and obligations under the *Ground Water Protection Regulation* ("GWP Regulation").[29] A licensee should advise buyers of the GWP Regulation and its implications when purchasing a property that contains a well, and should make inquiries as to whether the seller has complied with the GWP Regulation's requirements.

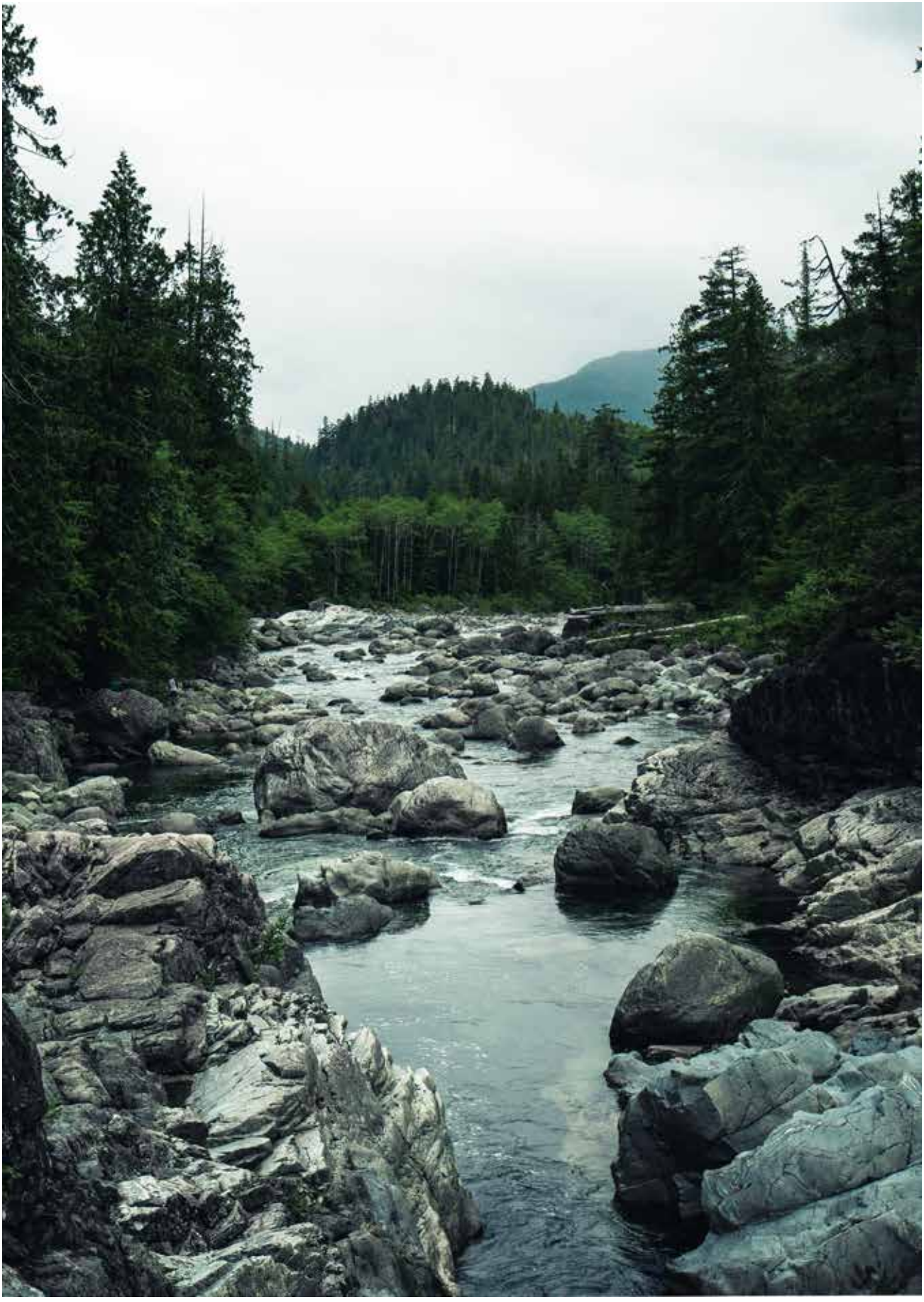
If a buyer wishes to use a water source on the property, a prudent licensee acting for a buyer should include subject clauses that deal with potability, quality, and supply. Sample clauses can be found on the BCFSA's Knowledge Base.[30] These clauses would be used in addition to the licensee confirming the existence of a water licence.

Further, a licensee should be aware that streams, rivers, and other bodies of water may fall under the jurisdiction of the *Riparian Areas Protection Act*[31] and its regulations, which are intended to protect fish habitat and promote a high standard of environmental stewardship. It is important to verify the extent of the riparian rights and any restrictions that may apply.

CONCLUSION

Licensees and registrants are required to exercise due diligence in the course of their business. This means knowing the necessary details about the people and properties you deal with in any transaction. You must ensure you know your client's identification and you should know the people to whom you make referrals or accept referrals from. In order to best serve your client in any real estate transaction you must make the effort to know the property involved and be aware of any potential defect, encumbrance, or any other factor that may affect your client's decision as to whether to purchase or lend in respect of it. You should take all reasonable steps in ensuring that the information you pass on to others is correct. Your due diligence obligations not only protect you from liability but improves your reputation and protects the integrity of your profession.

28 SBC 2014, c. 15
29 BC Reg 299/2004
30 Clauses | BCFSA
31 SBC 1997, c 21



Module Four: The Managing Broker – Management and Supervision

Managing brokers retain ultimate responsibility for the control and conduct of the business of the brokerage. The only way to effectively do this is through adequate management and supervision. Perhaps the most important aspect of management and supervision is ensuring that licensees of the brokerage follow the policies and procedures that are established by the brokerage. Managing brokers must also ensure that their licensees maintain competence through professional development and ensure that effective risk management policies are in place.

LEARNING OBJECTIVES

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

1. Understand the importance of having a governance and accountability structure in place in order for a managing broker to properly manage and supervise;
2. Understand the importance of proper delegation of authority by a managing broker;
3. Identify management and supervisory issues related to licensees and unlicensed employees in order to advise, assist, and guide those brokerage personnel and help to mitigate risk; and
4. Understand the importance of professional development.

04

INTRODUCTION

Under the *Real Estate Services Act* ("RESA"),[1] managing brokers act for their brokerage and are responsible for:

- The exercise of rights conferred on the brokerage;
- The performance of the duties imposed on the brokerage; and
- The control and conduct of the brokerage's real estate business, including supervision of all the licensees who are licensed in relation to the brokerage.

Section 28 of the Real Estate Services Rules ("Rules") places supervisory duties upon managing brokers. Managing brokers must be actively engaged in the management of their related brokerage, ensure that the business of the brokerage is carried out competently and in accordance with RESA, the regulations, and the Rules, and that there is an adequate level of supervision for all of the brokerage's personnel, whether they be licensees or unlicensed employees.

Perhaps the most important aspect of management and supervision is ensuring that licensees engaged by the brokerage follow the policies and procedures that are established by the brokerage. Managing brokers must ensure that the brokerage's policies and procedures are:

- Comprehensive;
- Effectively communicated to the brokerage's personnel;
- Followed consistently; and
- Regularly reviewed and adapted to meet the needs of the brokerage to comply with their evolving legal and regulatory obligations.

Under Section 28 of the Rules, further responsibilities of a managing broker include:

- Taking reasonable steps to deal with any matter in which the managing broker has knowledge of conduct that the managing broker considers may constitute professional misconduct or conduct unbecoming a licensee on the part of a related licensee, or may be improper or negligent conduct in the provision of real estate services on the part of a related licensee or an employee or other person associated with the brokerage;
- Ensuring the records and trust accounts of the brokerage are maintained in accordance with RESA, the regulations, and the Rules; and
- Ensuring proper management and control of documents and records.

To carry out these responsibilities, it is important for managing brokers to have a governance structure in place including policies and procedures that mitigate risk for the brokerage, managing broker, licensees, and unlicensed employees.

1 SBC 2004 c 40

GOVERNANCE AND ACCOUNTABILITY PLANS

Policies and Procedures

In a busy real estate marketplace, it is easy for managing brokers to become overly reactive in their management approach. In other words, their primary response to a given issue occurs after it has transpired, and they focus on putting out the "fires" as they arise. This mentality may exist because the managing broker's day-to-day operations have become so demanding and all-consuming that there simply does not seem to be enough time to think about the medium or long term.

Being overly reactive often involves relying heavily on one's intuition (i.e., following one's "gut"). While this approach can yield successful results, it ignores the universally accepted management method of "Think-Plan-Do." The "Doing" takes over, at the expense of the "Thinking" and "Planning."

In contrast to reactive management, proactive management focuses on anticipating and either eliminating or minimizing problems before they have had a chance to appear. It prioritizes critical "Thinking" and careful "Planning" so that one is better prepared to react, or "Do."

The development of policies and procedures is not only a critical task for fulfilling the duties imposed upon a managing broker by RESA and the Rules, but it also serves as a foundation for proactive management and business success.

Brokerage Policy Manual

The brokerage policy manual ("BPM") sets out the brokerage's key policies and procedures. Ensuring the brokerage's business is being carried out competently and lawfully starts with ensuring that the brokerage has appropriate policies and procedures in place. The BPM is a valuable component of new licensee and unlicensed employee orientation and training. It also acts as a resource for existing licensees and unlicensed employees in their day-to-day activities. BCFSA has stated that a key characteristic of a well-managed and adequately supervised office is ensuring that the brokerage's BPM has been read and acknowledged by all the brokerage's licensees and unlicensed employees.[2]

The Content of a Brokerage Policy Manual

There is no "one size fits all" template for creating a BPM. Factors that will shape the content of a specific BPM include, among other things:

- The types of real estate service(s) provided;
- The size of the brokerage;
- The area of the province the brokerage serves;
- The management structure of the brokerage; and
- The brokerage's business model and corporate culture.

A template will not be provided in this module. In fact, the act of creating, reviewing, and updating a BPM involves critical thought and reflection into the core components of the brokerage and its business model, which is itself a valuable management practice. However, a sample non-exhaustive list of essential elements of a BPM is included in Appendix A.

2 "Supervision," Knowledge Base | BCFSA

In some cases, brokerages have a legal requirement to develop written policies and procedures. Including these in the BPM, rather than having them as a standalone document, is ideal. Here are two examples:

- Section 5 of the *Personal Information Protection Act* ("PIPA")[3] requires that organizations develop and follow policies and practices that are necessary for the organization to meet the obligations of the organization under PIPA; and
- The *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* ("PCMLTFA")[4] requires brokerages to establish a compliance program for their brokerage, which provides a structure that ensures that the obligations under PCMLTFA are fulfilled.

A failure to develop such mandatory policies and procedures can carry significant penalties. For example, in a case dating back to 2021, the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC") imposed an administrative monetary penalty of $33,371 on a Vancouver brokerage for committing five violations of the regulations of the PCMLTFA, one of which was a failure to develop and apply written compliance policies and procedures that are kept up to date and, in the case of an entity, are approved by a senior officer.[5] Furthermore, on June 11, 2021, a brokerage was issued an administrative monetary penalty of $59,235 for similar violations of the regulations of the PCMLTFA. See also FINTRAC imposes an administrative monetary penalty, FINTRAC imposes an administrative monetary penalty, FINTRAC imposes an administrative monetary penalty.

A BPM should be:

- A source of quality information;
- Created as a component of a brokerage's risk management plan;
- Easily accessible by all personnel of the brokerage;
- A major component of new licensee/employee orientation and training;
- Consistently followed and applied; and
- Reviewed and updated on a regular basis.

DELEGATION OF MANAGING BROKER RESPONSIBILITY

The management and supervisory responsibilities set out above can be onerous.

As a managing broker, you may delegate your responsibilities under RESA, as long as you have not abdicated control or become so uninvolved as to have effectively abdicated or surrendered complete control. To determine whether there has been an abdication of control, BCFSA looks at the context of each situation, and asks the following questions:

- What work was delegated?
- What is the scope of authority that was delegated?
- To whom was the work delegated?

3 SBC 2003 c 63
4 SC 2000 c 17
5 www.fintrac-canafe.gc.ca/pen/pen-2021-03-22-eng.

There are three main situations in which delegation is typically considered:

1. The managing broker may wish to delegate some of their duties, on an ongoing basis, to assist in their management of the brokerage;
2. The managing broker may need to delegate some of their supervisory duties in certain "in-house" transactions (e.g., they act as the designated agent for a seller while another licensee at the brokerage acts as the designated agent for the buyer in that transaction); and
3. The managing broker may wish to delegate all of their duties during an absence, such as a vacation or medical leave.

Managing brokers can only delegate duties to someone who is engaged by the same brokerage, and the individual should be an experienced licensee, preferably an associate broker. Additionally, the delegate must be licensed to provide the services being delegated to them. This was not the case in 2017 CanLII 47682 (BC REC),[6] where a managing broker was disciplined because he delegated his managing broker responsibilities in rental property management to a licensee who was only licensed in trading services, despite the fact that another managing broker at his brokerage was licensed in both trading services and rental property management services.

Fundamental to delegation under RESA is that, regardless of the delegation, the managing broker retains ultimate responsibility for the control and conduct of the business of the brokerage. The act of delegating is not about avoiding or minimizing personal liability. This means that the managing broker should regularly review the work of the person to whom the work has been delegated. In other words, managing brokers must still exercise effective supervision over those who have been delegated responsibilities by the managing broker.

PRACTICE TIP – PUT IT IN WRITING

When delegating tasks to another licensee, either on an ongoing or a short-term basis, make sure that the agreed-upon responsibilities are clearly outlined in a written document, which specifies the name of the licensee who has accepted the responsibilities, the duties or tasks that were delegated, the date when the tasks were delegated, and the expected end date (if any) of the delegation.

Delegation During Absences

In the case of absences for up to one month where remaining connected to the office and being in active supervision of the brokerage is not possible, managing brokers should inform BCFSA's licensing department (licensing@bcfsa.ca), as far in advance as possible, of the start and end dates of their absence, and provide the name of the licensee who will be acting on their behalf.

For absences longer than one month, or in situations where the managing broker is unsure of the length of absence (e.g., a serious illness), BCFSA requires that the managing broker do one of the following:

1. Arrange for another managing broker to become licensed at the brokerage and assume their duties during the absence, or arrange for the licence of an associate broker at the brokerage to be upgraded; or
2. Advise BCFSA's licensing department in writing, as far in advance as possible, how they intend to maintain active control of the brokerage during their absence. BCFSA will review this plan and advise as to whether a replacement managing broker will be required.

6 2017 CanLII 47682 (BC REC)

For delegations during absences, it is important that all of the licensees of the brokerage are well aware of this fact. Managing brokers should inform all brokerage personnel of their impending absence, their expected return date, and whom is being delegated with the managing broker's responsibilities while they are absent.

It is important to keep in mind that not all absences are planned, such as in the event of death or becoming seriously ill overnight. What happens then? A prudent managing broker will always have succession planning in mind. For example, it may be wise to have at least one associate broker in the brokerage, so that if there is an absence, expected or not, the associate broker can immediately assume the duties of the managing broker. As part of management, professional development, and risk mitigation, a managing broker should seek to develop associate brokers within their brokerage. This is important so that further expertise is developed within the brokerage. It is also important for the ongoing development of the managing broker. Having a succession plan and having others who are able to step in for the managing broker, if required, is all part of the general responsibility of any manager: to motivate, guide, and inspire others within the brokerage to do their best work and to seek professional advancement.

Delegation for the Creation and Maintenance of Books and Records

Brokerages have numerous responsibilities to create and maintain certain books and records. This can be an especially daunting task for a managing broker who has not acquired comprehensive training in these areas. In such cases, managing brokers may delegate certain responsibilities over books and records to others within the brokerage (e.g., a brokerage book-keeper or an accountant) or to others outside of the brokerage (e.g., book-keeping and accounting firms). This delegation may be the most effective way to ensure that the managing broker is fulfilling the books and records requirements such as in Section 28 of the Rules, where the managing broker must ensure that trust accounts and records, as well as all other required documents and records, are maintained and managed.

Despite this delegation, the managing broker is not relieved from their regulatory duties. Delegation assists in fulfilling these duties, but it does not transfer the responsibilities onto someone else. Therefore, managing brokers must continue to be involved and engaged in the creation and maintenance of books and records processes. There are several ways to do this, however, and typical activities might include:

- Periodic review of books and records;
- Regular meetings with those involved in the creation and maintenance of books and records;
- Critical review of books and records, where questions are asked by the managing broker when an item or process is confusing or does not make sense; and
- Investing in and maintaining systems to support accurate record-keeping and reporting and maintaining or upgrading their knowledge relating to their duties for books and records (e.g., staying current with BCFSA communications, regularly reviewing BCFSA information on the topic, and seeking external education.)

PERSONNEL MANAGEMENT AND GUIDANCE

Along with the responsibility of creating a governance structure for the brokerage, managing brokers are responsible for licensee supervision. Managing brokers play an important role as a mentor, guide, and educator to the licensees and unlicensed employees at their brokerage, ensuring they are able to practice competently, in accordance with their regulated requirements, conflict free, and in a professional manner. As well, the licensees and unlicensed employees must keep up to date with the everchanging environment and economy.

Advising, Assisting, and Guiding Brokerage Personnel

Regardless of training or professional development undertaken by those within the brokerage, an important role managing brokers play is to act as a mentor, and be available to assist and advise brokerage personnel on issues that arise in their day-to-day activities.

Managing Broker Expertise and Education

Managing brokers should ensure that their expertise and education is at least as good as, if not better than, the licensees in their brokerage. Managing brokers should talk to their licensees about their experiences in various courses. Educational programs can also help to identify valuable professional development for a managing broker. Using a tool such as a spreadsheet of licensee professional development is a valuable tool to identify potential professional development opportunities for a managing broker. It will also help in the managing broker's role advising the licensees at their brokerage about educational opportunities when training gaps are identified, particularly if the managing broker does not have the specific expertise a licensee wishes to acquire.

An example of the pitfalls for managing brokers in giving incorrect guidance to their licensees can be found in 2019 CanLII 35325 (BC REC).[7] In this case, two licensees acted as limited dual agents in the sale of a property in 2016. The contract of purchase and sale contained a number of conditions precedent, with all but one to be removed March 4, 2016. These conditions were not removed by March 4. On March 5, the buyer purported to remove all conditions in the contract. The licensees, on their managing broker's advice, prepared an addendum to the contract of purchase and sale that provided for the parties to acknowledge and agree to a late subject removal date. The managing broker failed to realize that, once the date set for removal of conditions precedent has passed without removal, the contract terminates. As stated in BCFSA's Knowledge Base, "[a]n expired contract cannot be revived. Licensees should draft a new Contract of Purchase and Sale for the parties to sign or have them sign an extension addendum before the contract expires."[8] The sale ultimately completed, however, the managing broker was found to have failed to ensure the business of the brokerage was carried out competently and failed to exercise reasonable care and skill by providing the licensees involved in this transaction with incorrect advice with respect to the suitability of contract addendums. In the end, the managing broker was reprimanded and ordered to pay a disciplinary penalty of $2000 and enforcement expenses of $1500.

7 2019 CanLII 35325 (BC REC)
8 "Contract Clauses," Knowledge Base | BCFSA

Appropriate Licensing of Brokerage Personnel

Managing brokers must ensure that the brokerage, and all of its licensees, are appropriately licensed. When interviewing prospective licensees, managing brokers should discuss current employment the individual may have. On licence applications, BCFSA requires applicants to disclose current employment. Upon review BCFSA may discuss any apparent conflicts with the applicant prior to issuing the licence. However, employment opportunities that arise after licensing could cause conflicts of interest so it is important, as part of oversight responsibilities, for managing brokers to be aware of other activities in which the licensees at their brokerage may be engaged. For example, a prospective licensee employed as a maintenance worker may have a conflict of interest if the prospective licensee becomes a rental property or strata management licensee.

Providing Real Estate Services Outside of Licensed Categories

One aspect of appropriate licensing is ensuring that all of the licensees of the brokerage are only providing the services within the categories (i.e., trading services, rental property management services, and strata management services) in which they are licensed. Despite ongoing reminders and warnings from BCFSA about providing services outside of their licence category, a breach of Section 3 of RESA, numerous licensees are disciplined each year for this conduct.

In some cases, licensees have been found to have breached Section 3 of RESA when providing real estate services outside of their licence category for friends and family. They may not know or fully appreciate that such conduct is not permitted. An example case is 2019 CanLII 110045 (BC REC).[9] Here, a trading services licensee assisted a landlord, who was a personal friend and who did not live in Canada, with the management and rental of their property. The licensee was paid by the landlord in exchange for her assistance. The licensee performed activities such as providing tenancy agreements to the tenant, completing inspection reports for the property, and dealing with tenant complaints about the property. In numerous instances, documents and correspondence prepared by the licensee included her brokerage's contact information. The licensee was disciplined for providing rental property management services when not licensed to do so, and for providing those services separate and apart from her brokerage. She was ordered to pay a discipline penalty of $7,500 and enforcement expenses of $1,500, and to complete a remedial education course.

In another case, (2020 CanLII 103120 (BC REC)[10]), the licensee(s) involved appear to knowingly disregard the limitations of their licence category. A trading services licensee was asked by a former client, who was managing her own rental property, to help the client with an issue they were having with the strata corporation. The licensee emailed the strata manager, stating that he was the property manager, and included, as an attachment, a property management agreement between himself and the former client. That agreement was back-dated and included services to which the former client had not agreed. In fact, the licensee did not even send the management agreement to the former client. He claimed that the former client could not read English, and they had a telephone conversation where it was explained to the former client that the purpose of the agreement was to enable the licensee to deal with the strata manager. As a result, the licensee was suspended for 30 days, ordered to pay a discipline penalty of $18,000 and enforcement expenses of $1,500, and ordered to complete ethics and remedial education courses.

9 2019 CanLII 110045 (BC REC)
10 2020 CanLII 103120 (BC REC)

Beware of Conflicts of Interest

As a managing broker, providing guidance and advice to those within your brokerage can become difficult in certain conflict of interest situations.

In the trading services context, imagine a situation where different designated agents within your brokerage are representing two or more current clients of the brokerage with competing interests. This could arise in transactions where different designated agents within the brokerage are representing a seller and a buyer with respect to a single property. It could also arise where different designated agents within the brokerage represent two or more buyers interested in purchasing the same property, or where different designated agents within the brokerage represent two or more sellers offering their property for sale, where those properties might be in competition with one another. How should the managing broker respond if one of these designated agents asks for assistance in drafting appropriate contractual terms or in reviewing the contract of purchase and sale?

Under the provisions respecting designated agency in the Rules,[11] the brokerage is expected to treat the interests of all clients in an even handed, objective, and impartial manner. The managing broker must ensure that the brokerage remains neutral throughout these transactions. Giving advice to one designated agent puts their client's interests ahead of the other client's interests and is not permissible. In these situations, further information is provided on the following guidance for managing brokers:

- You may review contracts according to a standard brokerage due diligence checklist that licensees at the brokerage work from to ensure their contracts are free of common problems or issues, and ask questions of the licensees to clarify issues.
- You may advise your licensees where they might be able to find further information on a particular topic of concern (e.g., BCFSA's Knowledge Base, the brokerage's policy manual, and helpful articles or other reference material provided by the local real estate board or BCREA).
- You may provide information or advice on issues of mutual interest to both clients. To remain neutral between the parties, advice given to one party must be disclosed to the other party. For example, you may point out ambiguity or contradictions in a clause in a contract of purchase and sale relating to a holdback for builder's liens or upcoming special levies of a strata corporation, as a logical and precise holdback clause creates certainty for both parties.
- You may give general information and provide alternatives to address issues that have been brought to your attention. For example, you can explain to a designated agent, if they ask, the purpose of holdback clauses in a contract of purchase and sale, and the range of potential alternatives for such clauses, but you cannot give any specific advice on which clause to use. If asked by the licensee, you can review a clause such as a holdback clause to ensure it meets the desired intent of the drafting licensee.

Ultimately, the designated agents must represent, advocate for, and assist their respective clients in resolving any issues that arise during the negotiating process. If the issues are complex in nature, designated agents should consider advising their clients to seek legal advice.

Given the limitations on giving advice and assistance in these situations, it is important that you identify potential conflicts of interest as soon as possible. For example, if a licensee were to email you about a specific clause, you should first identify which transaction or file it relates to, and whether the interests of that client may conflict with the interests of another client of the brokerage.

11 Rules, Section 32

The difficulties with advice and assistance are made worse when you, as the managing broker, are one of the designated agents in a transaction involving competing clients of the brokerage. In this case, supervision becomes even more difficult because of the conflict of interest that arises in being required to act in your client's best interests while fulfilling your duties as a managing broker. Essentially, in these cases, you will not be able to fulfill your role as managing broker for the transaction or execute your supervisory role for the licensee who is the designated agent for the other party. As such, another member of the brokerage would have to assume your supervisory responsibilities in order to ensure the brokerage fulfills its responsibilities and to ensure that you and the other designated agent involved fulfil all responsibilities as designated agents for the respective clients. The most likely candidate for this temporary delegation of managing broker responsibilities would be another managing broker, or an experienced associate broker or representative, engaged by the same brokerage.

For an example of a conflict of interest in the rental property management and strata management context, see "How to Handle Conflicts of Interest" (September 2014 Special Report from Council).[12]

Professional Development

In the words of Brian Tracey, a Canadian motivational speaker, "if you're not constantly learning, you're actually falling behind." These words are strikingly true for those involved in the real estate services industry, where markets can move rapidly, clients expect immediate service, laws and regulations are constantly changing, and transactions are increasing in value and complexity.

Take for example, strata management licensees, who need to become knowledgeable about the *Strata Property Act*,[13] the *Personal Information Protection Act, the Limitation Act*,[14] the *Interpretation Act*,[15] the *Human Rights Code*,[16] and the *Residential Tenancy Act*,[17] in addition to RESA. They also need to keep up-to-date with case law that may affect their clients' governance of strata corporations. Trading services and rental property management licensees face their own challenges in this area, too.

So, how can licensees not only "keep up," but thrive in their professional practice? One way is through professional development, which can generally be thought of as programs, services, and activities that are designed to enable personal growth and enhance professional practice.

As a managing broker, part of your duty to actively supervise and manage the licensees within your brokerage is to facilitate and encourage their professional development. Take a moment to consider how you frame professional development at your brokerage. Is professional development merely BCFSA's mandatory continuing education program, that simply must be done ahead of licence renewal, or is it a chance to learn and refine one's professional capabilities to serve clients more effectively in a swiftly changing industry? Furthermore, is professional development simply meeting the minimum requirements to maintain one's licence, or is it something that is licensee-specific and focuses on developing the knowledge, skills, and abilities needed for one's practice?

THINK TO YOURSELF

Do you want the doctor, lawyer, or accountant who does the minimum amount of education and training to renew their licence, or would you prefer to have the one who continually tries to improve?

12 September 2014 Special Report from Council | BCFSA
13 SBC 1998 c 43
14 SBC 2012 c 13
15 RSBC 1996 c 238
16 RSBC 1996 c 210
17 SBC 2002 c 78

Approaching Professional Development as Lifelong Learning

To foster continuous development and improvement of the knowledge and skills needed for employment and personal fulfillment, professional development can be approached through the lens of lifelong learning, which is defined as the provision or use of both formal and informal learning opportunities throughout one's life.[18] To maintain a high level of professionalism, improvement of knowledge and skills is an ongoing commitment professionals make to their careers. In other words, education and training is not something that is only done to gain entrance into an industry, nor is it only a once per licence-cycle activity.

While a particular professional development activity (e.g., a course) may result in immediate knowledge and skills enhancement, it can also provide an opportunity for reflection and improvement that extends and continues well beyond the duration of the activity.

Example

Betty Broker recently learned that one of the representatives at her brokerage, Reggie, attended a full-day course on the sale of strata properties. Betty follows up with Reggie shortly thereafter. She asks Reggie to take a few moments to write down the following:

- A three to four sentence summary of the course;
- Whether he would recommend others at the brokerage to take the course;
- Three valuable things that he took away from the course; and
- One thing that he learned that he would like to implement into his practice to make him a better professional.

The first two items c be used by Betty to determine whether the course might be one to recommend to others within the brokerage (and whether she might want to take the course herself). The third item forces Reggie to reflect on his learning. Too often, people are overloaded with information and do not have a chance to process that information into something meaningful. Finally, the fourth item encourages Reggie to take accountability for his professional development and can be a part of a follow-up meeting, such as performance review, at a later date. While this may seem like a lot of work, such management practices can serve as valuable tools to identify talent within the brokerage (or spot problematic attitudes and practices before they worsen).

Setting the Tone for Professional Development Early

Managing brokers have the power to set the appropriate tone of the brokerage in the area of professional development. This can be done at the training and orientation phases for new brokerage personnel. However, it can also be done at the recruitment phase as a strategy to attract quality individuals to the brokerage. Further, think about professional development as a marketing tool and as a way to build trust from clients and potential clients.

CONCLUSION

Managing brokers play a very important role in the conduct of the business of their brokerage. Having a governance and accountability structure in place helps to ensure excellent management and supervision. Advising and guiding brokerage personnel helps to mitigate risk and to ensure professional development of licensees.

18 www.dictionary.com/browse/lifelong-learning.

Module Five: Selected Issues in Rental Property Management

This module provides an overview of the duties and responsibilities of which licensees need to be aware when managing residential rental properties. It explains the key terms of rental property management agreements and tenancy agreements of which licensees should know.

LEARNING OBJECTIVES

After completing this module, you will be able to:

1. Identify the key terms of rental property management agreements;
2. Describe the responsibilities of rental property managers under the *Residential Tenancy Act* ("RTA");[1]
3. Identify circumstances under which a Notice to End Tenancy may be issued; and
4. Explain the process for Residential Tenancy Branch ("RTB") dispute resolution, and the circumstances where dispute resolution may be sought by tenants and landlords.

05→

1 SBC 2002, c 78

RENTAL PROPERTY MANAGEMENT AGREEMENTS – KEY TERMS TO KNOW

The agency relationship between a property owner and their licensed rental property manager is defined by the management agreement ("Management Agreement") entered into by the brokerage and the property owner. As the "agent" for the property owner, the licensee will act on behalf of the owner and perform the owner's responsibilities in respect to the tenancy, in accordance with the terms of the underlying Management Agreement. Therefore, it is important to know the terms of the Management Agreement, and the specific duties that it requires/enables the licensee to perform.

Duties of the Licensee. A well-drafted Management Agreement should clearly set out the rental property manager's duties and responsibilities which are to be performed on behalf of the owner.

Because the licensee acts as the "agent" for the owner, the Management Agreement should describe the limits of a licensee's exposure to liability if losses are suffered because of, or connected to, their provision of services under the Management Agreement. Licensed rental property managers are required to act with reasonable care and skill, in the best interests of their clients, and in accordance with the RTA and *Real Estate Services Act* ("RESA").[2] Where this is not done, the licensee could find themselves in a position of legal or professional liability.

Rental property managers generally provide the following services to clients:

- Advertising and showing the rental unit to prospective tenants;
- Screening prospective tenants and helping the owner to find an appropriate tenant;
- Advising on and negotiating the rental rate for the rental unit;
- Collecting rent and security deposits (and returning those deposits to tenants as required); and
- Managing the rental unit on a day-to-day basis, including fulfilling the inspection and maintenance duties of the landlord, and managing the needs of the tenant(s) as they arise.

Never act outside of the scope of duties set out in the Management Agreement without the owner's express consent to do so. BC Financial Services Authority ("BCFSA") will commence disciplinary proceedings (which may result in the issuance of expensive fines) against licensees who act outside their scope of authority as set out in the Management Agreement and fail to obtain and follow their clients' written instructions.

Fees and Tenancy – Related Expenses. The owner's duties under the Management Agreement should also be clearly outlined – including the means of payment for management fees and tenancy-related expenses.

Term and Termination Provisions. The term of the Management Agreement is a key provision. Generally, a Management Agreement will be in effect for a one-year initial term, with automatic renewal terms to follow unless either party provides notice of termination on expiry of the term. There are commonly penalties for the owner terminating a Management Agreement during the initial term.

Pay close attention to the termination provisions, as they should include the ability for the brokerage to terminate the Management Agreement if the owner breaches the Management Agreement or the brokerage decides the relationship with the owner will not proceed and gives proper notice to the owner of such decision.

2 SBC 2004 c 40

RESIDENTIAL TENANCY AGREEMENTS – KEY TERMS TO KNOW

When signing a tenancy agreement on behalf of a client, licensees should be careful about how their name appears on the agreement. It is best practice to list the owner's name as landlord on the agreement. If the licensee's name is placed in the "landlord" field, they may be legally liable for anything that goes wrong under the tenancy. As a best practice, ensure that the terms of any tenancy agreement entered as agent for the owner, and any amendments to it, are made in writing, with the owner's written approval.

Standard Terms. The RTB has prepared a standard form called the Residential Tenancy Agreement (Form #RTB-1) which has been drafted to accurately reflect the requirements for tenancy agreements under the RTA. While certain terms can be negotiated, there are standard terms set out by the RTA which all tenancy agreements in British Columbia ("B.C.") must include. The standard terms set out certain statutory rights and responsibilities of landlords and tenants, and relate to:

- The term of the tenancy;
- Security and pet damage deposits;
- Condition inspections;
- Payment of rent;
- Rent increases;
- Repairs;
- Occupants and guests;
- Locks;
- Landlord's entry into the rental unit; and
- Ending the tenancy.

Term of the Tenancy. In British Columbia, tenancy agreements may be for an initial fixed term, during which the tenancy cannot be terminated by either landlord or tenant, except for in the following narrow circumstances:

- By written mutual agreement of the parties (pursuant to a signed Form #RTB-8: Mutual Agreement to End a Tenancy);
- There are special circumstances, such as:
  - The tenant is likely at risk from family violence; or
  - The tenant has been assessed as requiring long-term care or has been accepted into a long-term care facility; or
- The other party to the tenancy has breached a material term of the tenancy agreement.

While the RTA permits fixed-term tenancies, the RTA prohibits clauses in tenancy agreements which require the tenant to vacate the rental unit at the end of the initial fixed term (except in circumstances where a landlord or their close family member intends to occupy the rental unit at the end of the initial fixed term, as discussed further, later in the module). Except in circumstances as described in Section 13.1 of the *Residential Tenancy Regulation* ("RTR"),[3] all fixed-term tenancies, following the expiry of the initial term, continue on a month-to-month basis (unless the landlord and tenant otherwise agree to an additional longer fixed term). Section 13.1 of the RTR permits landlords to require a tenancy to terminate after the initial fixed term in the event if the landlord or a close family of the landlord intends, in good faith, to occupy the rental unit.

3 BC Reg 477/2003

Recent Changes to the *Residential Tenancy Act* and *Residential Tenancy Regulation*

In July 2022, Section 51.1 of the RTA was brought into force to require landlords to compensate a tenant (12 times the monthly rental amount) if they include a clause in a fixed term tenancy agreement requiring the tenant to vacate the rental unit at the end of the initial fixed term pursuant to Section 13.1 of the RTR but fail to use the rental unit for the stated purpose for a minimum six-month period.

If the tenant becomes aware that the landlord did not use the rental unit for that stated purpose for at least six months following the end of the fixed term, the landlord may be viewed by the RTB as having acted in "bad faith," which is grounds for the RTB to issue on the landlord an order requiring them to monetarily compensate the tenant with an amount equal to 12 months' rent.

Further, in November 2022, the RTB updated "Residential Tenancy Policy Guideline 27: Jurisdiction" to confirm that strata corporations can act as a "landlord" by the RTB's definition for the purposes of issuing, defending, and enforcing a notice to end tenancy. If a tenant's conduct leads the owner's strata corporation to take on the role of landlord for the purpose of ending a tenancy, licensees should encourage owners to seek legal advice from a lawyer experienced in strata and residential tenancy law to review the facts and provide advice.

In July and August 2024, the RTA and RTR were amended again to change certain requirements for notices to end tenancy. For more information, see "Ending a Tenancy under the *Residential Tenancy Act*."

Additional Terms. In addition to the standard terms, additional terms can be inserted into the tenancy agreement (in the agreement itself or by way of an addendum to the standard Form #RTB-1). These terms may include (but are by no means limited to) provisions relating to matters like:

- The types and number of pets permitted in the rental unit;
- The landlord's ability to increase the rental rate if additional occupants (outside of the named tenants) begin living in the rental unit;
- Rules around smoking in or around the rental unit; and
- Rules around recreational facilities, parking facilities, storage facilities, etc.

While the tenancy agreement is permitted to include terms beyond the standard terms set out in the RTA, additional terms must not be unclear and must not grossly favour one party over the other. In that case, the term may be found "unconscionable" and thus unenforceable. For more information on unconscionable terms, refer to Residential Tenancy Guideline 8: Unconscionable and Material Terms.

Further, amendments to a tenancy agreement should be in writing, signed by all parties to the tenancy agreement. Oral or implied agreements to amend the tenancy agreement may not be recognized as enforceable by the RTB, if the issue of an amendment is the subject of dispute between the landlord and the tenant.

Rent Increases. The RTA limits the amount by which a landlord is permitted to increase the rent for a rental unit. The RTB stipulates that, for 2024, the rent increase limit is 3.5 per cent - meaning that rent cannot be increased by more than 3.5 per cent this year. Next year, rent may be increased again, up to the maximum amount set out by the RTB. You should refer to the government's online rent increase calculator to determine exactly how much rent can legally be increased.

Material Breach of a Tenancy Agreement. The landlord should be aware of the material terms of the tenancy agreement, and ensure compliance with them at all times. If a landlord breaches a material term, the tenant may be entitled to terminate the tenancy without the landlord's consent. When a tenant thinks that the landlord has breached a material term, the tenant is not permitted to end the tenancy until after they have taken the following steps, which are set out in more detail in Residential Tenancy Guideline 8: Unconscionable and Material Terms:

- Serve a written notice to the landlord identifying the issue which, in the tenant's view, amounts to a breach of a material term of the tenancy agreement, including a reasonable deadline that the problem must be fixed by (following which, if the issue is not rectified, the tenant will end the tenancy); and
- If the landlord does not rectify the issue within a reasonable period of time after receiving the tenant's first written notice, the tenant may issue a further written notice to the landlord advising that the tenancy is being terminated. The tenant is also entitled to seek compensation from the landlord for any loss of use of the rental unit which was suffered as a result of the landlord's refusal to address the alleged material breach.

Where a tenant has breached a material term of the tenancy agreement, the landlord has a similar right to terminate the tenancy, by serving on the tenant a One Month Notice to End Tenancy for Cause. Section 47 of the RTA sets out the conditions in which a tenant will be liable to receive a One Month Notice to End Tenancy for Cause. They include, for example, repeated late payment of rent, significant interference with or unreasonable disturbance of another occupant or the landlord, extraordinary damage to the rental unit, or the failure to comply with a material term of the tenancy agreement (and failure to correct such breach within a reasonable time upon receiving notice from the landlord). Later in this module, there is further discussion about the conditions where a One Month Notice to End Tenancy for Cause may be justified, and the remedies available for landlords in such circumstances.

LANDLORD'S DUTIES UNDER THE *RESIDENTIAL TENANCY ACT*

When acting as agent for a landlord, licensees must ensure they comply with the landlord's duties as set out in the RTA. Rental property managers should be familiar with the rights and responsibilities of landlords and tenants under the RTA.

Move-in and Move-out Condition Inspection Report. At the outset of a tenancy, the landlord must complete a move-in condition inspection report. As noted in the BCFSA Knowledge Base, a rental property manager has the obligation to act in the best interest of their client, and as such, must ensure that condition inspection reports are completed in accordance with the RTA. Refer to Form #RTB-27: Condition Inspection Report, which includes clear instructions on how to complete the form and conduct the inspection. The move-in condition inspection report should provide an accurate and detailed description of the condition of the rental unit prior to the move-in – ideally, on the day the tenancy begins (or the day of "move-in"), while the rental unit is still empty. Form #RTB-27 includes a section where the landlord and tenant may record any repairs the landlord is required to complete (prior to move-in or during the tenancy, depending on the nature of the repairs).

The landlord's duty under the RTA is to ensure that the rental unit:

- Complies with the health, housing, and safety standards required by law in British Columbia; and
- Is suitable for occupation, factoring in the age, character, and location of the rental unit.

During the tenancy, the landlord is required to maintain the rental unit and residential premises as necessary to keep it in a condition that is suitable for occupation. The landlord also owes the tenant a right to "quiet enjoyment" of the rental unit, which, according to Section 28 of the RTA, includes (but is not limited to) the right to:

- Reasonable privacy;
- Freedom from unreasonable disturbance;
- Exclusive possession, subject to the landlord's right of entry under the RTA; and
- Use of common areas for reasonable and lawful purposes, free from significant interference.

For more information on the circumstances in which a landlord may be found to have breached a tenant's right to quiet enjoyment, refer to Residential Tenancy Policy Guideline 6: Entitlement to Quiet Enjoyment.

If the landlord requires access to the rental unit to inspect its condition, complete repairs or maintenance, or show the property to prospective buyers or tenants, they must first provide proper written notice to the tenant, at least 24 hours prior to the landlord entering the rental unit. The notice must provide the date, time (between 8:00 a.m. and 9:00 p.m.), and reasonable purpose for the landlord entering the property. Where such proper notice has been given, the tenant may not prevent the landlord (or landlord's agent) from accessing the rental unit.

At the end of the tenancy, the landlord must complete another inspection of the rental unit, again, filling out Form #RTB-27 as the walk-through is done. It is important that both a move-in and move-out condition inspection be completed (preferably in detail, and with accompanying photographs/video), so that, at the end of the tenancy, the inspection reports can be compared to determine if the rental unit was damaged during the tenancy. While normal wear-and-tear is permissible under the RTA, damage beyond that is the responsibility of the tenant, and can be held back from the damage deposit(s) (either with the tenants' written agreement, or by way of an order from the RTB).

Both the landlord and tenant should be present for the inspections of the rental unit at move-in and move-out. The landlord is required to offer the tenant at least two opportunities (between 8:00 a.m. and 9:00 p.m.) to complete the inspection. If the tenant fails to accept one of the offered inspection times, the landlord must then issue to the tenant a copy of RTB Form #RTB-22: Notice of Final Opportunity to Schedule a Condition Inspection. This will present the final opportunity for the tenant to attend the inspection, and if the tenant remains unavailable or unable to attend, the landlord is permitted to proceed without the tenant's participation. In that case, the tenant's right to see their security and pet damage deposit returned is extinguished.

The landlord must provide a copy of any completed inspection report to the tenant within seven days of completing the inspection. As a cautionary best practice, photographs or video should be taken during the inspection to supplement the written descriptions in the report.

When conducting move-in and move-out condition inspections on behalf of a client, it is critical to ensure that the procedures set out in the RTA are properly followed. If the tenant is not given the opportunity to participate in the inspection, or if the tenant is not provided a copy of the report within seven days of the inspection, the landlord loses the right to make a claim against the security deposit or pet damage deposit for any damage caused to the rental unit during the tenancy. Failing to complete detailed, well-evidenced, and properly conducted move-in and move-out inspections can lead to significant consequences, especially if there arises a dispute between the landlord and tenant over the cause of damage to the rental unit. It is best to practice diligence for inspections of rental units.

Collecting, Retaining, and Returning Deposits. At the start of the tenancy, the landlord may collect a security deposit of up to half the monthly rental amount and hold it until the end of the tenancy. If applicable, the landlord may also collect a pet damage deposit not exceeding half the monthly rental amount, either at the start of the tenancy or at a time during the tenancy when the tenant acquires a pet. After the tenancy ends, the tenant has one year to provide a forwarding address in writing to the landlord, following which, the landlord has 15 days to return the deposit(s) to the tenant – with interest on the deposit(s) at the rates specified in the RTR. For 2023, the interest payable on security and pet damage deposits was 1.95 per cent, and at time of publication 2024 rates were not available. It should be noted that between 2009 to 2022, the interest rate was set to zero per cent (due to low interest rates), so if a landlord is dealing with a tenancy that began prior to 2009, they should refer to the summary of historical interest rates provided by the RTB, to confirm if additional interest is owed to their tenant. The RTB website provides a useful calculator to determine the interest payable on a deposit.

If a licensee receives payment of a security deposit or pet damage deposit, the money received should be promptly delivered to the licensee's brokerage so that it can be deposited into the brokerage's trust account, held on behalf of the owner for the tenant in trust.

If, at the end of a tenancy, the landlord wishes to retain an amount from the security deposit or pet damage deposit, they may only do so if:

- The landlord and tenant agree, in writing, to the landlord retaining all or a portion of the deposit(s); or
- The landlord obtains an order from the RTB permitting them to retain all or a portion of the deposit(s), based on the damage (beyond reasonable wear and tear) evidenced by a comparison between the move-in inspection report and the move-out inspection report. In this case, the landlord must file their application to the RTB within 15 days of the end of the tenancy.

Maintenance and Repairs. The landlord is responsible to maintain a rental unit in a condition that is suitable for occupation given the nature and location of the rental unit. If, during the tenancy, a tenant discovers a need for repairs in the rental unit, they are entitled to make a written request to the landlord to complete certain repairs within a reasonable amount of time. If the landlord and tenant fail to agree on the need for the repairs, or the landlord refuses to complete the repairs, the tenant is entitled to make a claim at the RTB for an order requiring the landlord to complete the repairs. Additionally, in the following circumstances, the tenant may also be entitled to claim monetary compensation from the landlord:

- Where the value of the rental unit decreases due to the landlord's failure to repair or maintain it (for example, if the landlord refuses to repair or replace a broken appliance after the tenant has notified them in writing of the issue);
- Where the tenant has suffered a loss of quiet enjoyment of their rental unit; and
- Where the landlord fails to provide services or amenities that are set out as terms on the tenancy agreement (such as electricity, cable, laundry facilities, balconies, etc.).

As a rental property manager, you will likely be responsible to manage and oversee repairs to the rental unit. Review your Management Agreement to confirm what the rental property manager's duties are in terms of conducting repairs to the rental unit, including when the rental property manager is deemed to have the owner's approval to proceed with repairs versus when the rental property manager is required to confirm the owner's approval in writing.

Under the RTA, the landlord is responsible for repairs and maintenance required at the rental unit, as necessary to make the rental unit compliant with health, safety, and housing standards established by law, and reasonably suitable for occupation by a tenant given the nature and location of the rental unit. During the tenancy, the tenant is responsible to maintain reasonable health, cleanliness, and sanitary standards throughout the rental unit.

Further, the landlord must ensure that the rental unit is equipped with the utilities and fixtures promised to the tenant as part of the tenancy agreement. For example, if the tenancy agreement stipulates that the rental unit has a washer and dryer, then the tenant is entitled to expect the landlord keep the washer and dryer in good working order. If the washer and dryer need repair, the tenant is further entitled to request that the landlord complete the requested repair (or replacement, if necessary) to ensure that the rental unit is, within a reasonable amount of time, re-equipped with a working washer and dryer.

Of course, the landlord is not responsible for damage to the rental unit caused by the tenant, their pets, or persons permitted on the residential property by the tenant. Nor is the landlord responsible for the regular cleaning of the rental unit. That is the tenant's job. If the tenant causes damage to an appliance or fixture in the rental unit, it will be the tenant who is responsible to repair or replace the damaged item. If the landlord is required to complete repairs due to the tenant's failure to do so, then the landlord may charge the reasonable cost of repairs back to the tenant.

For further information on the landlord's and tenant's responsibilities to repair and maintain the rental unit and residential premises, refer to Residential Tenancy Policy Guideline 1: Landlord & Tenant – Responsibility for Residential Premises.

The Guideline provides that the landlord is responsible for:

- Providing the tenant with clean carpets and window coverings in a reasonable state of repair at the beginning of the tenancy;
- Repairs to appliances provided under the tenancy agreement (unless the damage was caused by the deliberate actions or neglect of the tenant);
- Painting the interior of the property at reasonable intervals;
- Installing and keeping smoke alarms in good working condition, including performing regular maintenance on smoke alarms (i.e., annual inspection, cleaning, testing, and battery replacement);
- Inspecting and servicing the furnace in accordance with manufacturer specifications, or where there are no such specifications, annually;
- Replacing furnace filters and cleaning heating ducts and ceiling vents as necessary;
- Cleaning and maintaining the fireplace chimney, dryer exhaust pipe and outside vent at appropriate intervals;
- Ensuring that all light bulbs and fuses are working when the tenant moves in;
- Replacing light bulbs and repairing light fixtures in hallways and common areas like laundry and recreational rooms in the residential premises (e.g. in apartment buildings); and
- Cleaning the outside of the windows at reasonable intervals.

Further, the Guideline provides that the tenant is responsible for:

- Maintaining the carpets and window coverings to a reasonable standard of cleanliness (including, if necessary, steam cleaning or shampooing at the end of the tenancy);
- Cleaning the inside and outside balcony doors, windows, and tracks during and at the end of the tenancy;
- Cleaning the stove top, elements, oven, refrigerator, and dishwasher;
- Washing scuff marks, fingerprints, and other such markings off the walls (unless the texture of the walls prohibits wiping);
- Repairing walls where there is an excessive number of nail holes, or large nails, screws or tape that have been used and left wall damage, or where there has been deliberate or negligent damage to the walls;
- Cleaning floor and wall vents as necessary;
- Cleaning the fireplace and any screen of a vent or fan at the end of the tenancy; and
- Replacing light bulbs and standard fuses in the rental unit during the tenancy (except where there is a problem with the stove or electrical system).

STRATA LOTS AS RENTAL PROPERTIES

There are additional considerations when a rental unit is a strata lot. The *Strata Property Act* ("SPA")[4] governs the operation of strata corporations in British Columbia. Owners and their tenants are required to follow the strata corporation's bylaws and rules, and breaches of these bylaws and rules may result in the strata corporation issuing a monetary fine against the owner or tenant who committed the breach.

A strata corporation's power to impose fines for bylaw or rule contraventions is set out in Section 130 of the SPA. Section 130(1) provides that a strata corporation may fine an owner if a bylaw or rule is contravened by the owner, a person who is visiting the owner or was admitted to the premises by the owner for social, business, or family reasons or any other reason, or an occupant if the strata lot is not rented by the owner to a tenant. Section 130(1) does not permit the strata corporation to fine the owner for a breach by the tenant. Section 130(2) provides that a strata corporation may fine a tenant if a bylaw or rule is contravened by the tenant, a person who is visiting the tenant or was admitted to the premises by the tenant for social, business or family reasons or any other reason, or an occupant, if the strata lot is not sublet by the tenant to a subtenant.

Section 131(1) of the SPA provides that, if the strata corporation fines a tenant or requires a tenant to pay the costs of remedying a contravention of the bylaws or rules, the strata corporation may collect the fine or costs from the tenant, the tenant's landlord and the owner, but may not collect an amount that, in total, is greater than the fine or costs. Section 131(2) provides that if the landlord or owner pays some or all of the fine or costs levied against the tenant, the tenant owes the landlord or owner the amount paid.

Where there is a significant or ongoing breach of a strata corporation's bylaws, there can be consequences both to the owner of the rental unit and the tenant occupying the rental unit which go beyond the imposition of fines, including potential legal action by the strata corporation to terminate the existing tenancy or even to force the sale of the strata lot.

Payment of monthly strata fees generally remains the responsibility of the owner of the strata lot – unless otherwise stipulated in the Management Agreement.

Form K Requirements

When renting a strata lot, the landlord must provide the tenant with a copy of the strata corporation's bylaws and rules, along with a Form K – Notice of Tenant's Responsibilities ("Form K"), for the tenant to sign and return to the landlord, pursuant to Section 146 of the SPA. Upon signing the Form K, the tenant agrees to comply with the bylaws and rules of the strata corporation. If the tenant (or the tenant's occupant or visitor) breaches the bylaws or rules of the strata corporation, the tenant is responsible and may be subject to penalties, including fines, denial of access to recreational facilities, and if the strata corporation incurs costs for remedying the contravention, payment of those costs.

Where a rental unit is part of a strata corporation, completing and returning a Form K should be a priority. Section 146 of the SPA requires that the signed Form K be returned to the strata corporation within two weeks of the start of any new tenancy in a strata lot.

Recent Changes to the *Strata Property Act*

In November 2022, the Government of British Columbia passed amendments to the SPA removing the ability of strata corporations to have rental restriction bylaws. Effectively, this means that any existing rental restrictions in strata bylaws across British Columbia are now unenforceable. Across the province, residential tenancies are permitted in all strata corporations, with the exception of short-term rentals, which can still be restricted or disallowed by a strata corporation's bylaws.

4 SBC 1998, c 43

However, under the revised SPA, a strata corporation remains permitted to restrict or prohibit owners from advertising and renting their strata lots as "short-term accommodation" (such as Airbnb or VRBO), by bylaw, because short-term accommodation is not considered a tenancy under the RTA, but rather is considered a license to occupy/use. Owners and tenants who breach these bylaws risk finding themselves subject to penalties by their strata corporations, including fines, and in extreme cases, legal action by the strata corporation to force the owner or tenant to cease licensing the occupation/use of their strata lot as short-term accommodation.

TENANCY DISPUTES AT THE RESIDENTIAL TENANCY BRANCH

Ending a Tenancy under the *Residential Tenancy Act*

There are numerous different circumstances in which a tenancy can lawfully be terminated under the RTA. The most efficient and effective way to terminate a tenancy is by the mutual written agreement of the landlord and tenant(s). However, where a mutual agreement is not achievable, the RTA provides circumstances in which the landlord or tenant may unilaterally end the tenancy (without the other party's consent).

Again, neither party can unilaterally terminate the tenancy agreement during the fixed term of a fixed-term tenancy (except by mutual agreement or in special circumstances as set out above). If a tenant or landlord is seeking to terminate a tenancy during a fixed term, it is recommended that the landlord engage legal counsel who can advise on the appropriate steps to take given the circumstances. If the tenant terminates the tenancy during the fixed term, the landlord may be entitled to compensation to make up for the lost rent for the remainder of the fixed term. The landlord has a duty to mitigate their losses by promptly taking steps to find and secure a replacement tenant.

During a month-to-month or periodic tenancy, the RTA permits the tenant to terminate the tenancy at any time by providing written notice to the landlord, at least one month before the effective date of the tenant's notice to end tenancy, and before the day that rent is due. For example, if rent is due on the first day of the month, and the tenant issues their notice to end tenancy to the landlord on December 15, the notice would not take effect until the last day of January and the tenant would be responsible to pay rent for the month of January. Once a tenant's notice to end tenancy has been issued, the tenant must move out of the rental unit by 1:00 p.m. on the day the notice takes effect. They cannot change their mind or withdraw their notice unless the landlord agrees in writing.

For landlords, there are numerous different circumstances wherein a landlord may seek to terminate a tenancy. The circumstances in which a landlord may do so are set out by the RTA. The RTB has prepared the following standard form Notices to End Tenancy, which landlords are required to use to effectively terminate a tenancy agreement:

- The 10-Day Notice to End Tenancy for Unpaid Rent or Utilities, which can be issued by a landlord when tenants have not paid their full rent or utilities owed by the due date.
- The One-Month Notice to End Tenancy, which can be issued by a landlord when the landlord has cause to end the tenancy, or if the rental unit was provided to the tenant as a condition of the tenant's employment, which has ended. The RTB website includes a handy summary of circumstances which would qualify as "cause" to end a tenancy, including (among other things), repeated late payment of rent, significant interference with or unreasonable disturbance of the landlord or other occupants, or permitting an unreasonable number of occupants to live in the rental unit.

- Recent amendments to the RTA and RTR have revised the notice and dispute periods for Notices to End Tenancy issued for use by the landlord, a purchaser of the rental property, or a close family member of the landlord or purchaser. For landlords who plan, in good faith, to use the rental unit (or permit a close family member to use it), a Four-Month Notice to End Tenancy, generated through the RTB's Landlord Use Web Portal must be served to the tenant, who will have 30 days to dispute the notice (pursuant to Sections 49(5) and (8) of the RTA). Where a purchaser of the rental property intends to occupy the rental unit (or have a close family member occupy it), a Three Month Notice to End Tenancy, which also needs to be generated through the RTB's Landlord Use Web Portal, must be served on the tenant, who will have 21 days to dispute the notice (pursuant to Sections 49(8) of the RTA and 42.3 and 42.4 of the RTR). A Three Month Notice to End Tenancy for purchaser's use may only be issued if all the conditions of the sale of the rental unit have been satisfied. In such a circumstance the tenant is entitled to dispute the Notice to End Tenancy, triggering the need for an RTB hearing and decision to determine the validity of the notice. If the date of hearing falls after the date of closing on the real estate transaction, the seller may face issues if they promised the buyer vacant possession of the property by a certain date, and no longer can fulfil that promise. If either a Three or Four Month Notice to End Tenancy is issued to a tenant, the landlord must provide the tenant compensation equal to one months' rent, and the landlord or purchaser must honestly and in good faith intend to use the rental unit for the purpose stated. If the landlord or purchaser does not use the rental unit for the purpose stated in the Notice to End Tenancy, the tenant is entitled to file an RTB dispute against the landlord or purchaser, requesting a monetary order for compensation of 12 months' rent, due to the landlord issuing the Notice to End Tenancy in "bad faith." For further information on ending a tenancy for occupancy by a landlord, purchaser, or close family member, see Residential Tenancy Policy Guideline 2A.
- The Four-Month Notice to End Tenancy, issued by a landlord if they intend to demolish or convert the rental unit to another use (including to provide accommodations for a live-in caretaker of the residential premises).
- If the landlord wishes to end the tenancy for the purpose of completing extensive renovations or repairs, they must apply to the RTB for an order permitting them to do so. The requirements for ending a tenancy for renovations or repairs are outlined here.

It is critical that landlords follow the RTA closely when taking steps to end a tenancy. The process can be onerous, and the rules are strictly enforced by the RTB. Still, even when the landlord has followed all of the proper procedures, tenants may refuse to vacate a rental unit, in which case, they become "overholding" tenants. In such circumstances, the tenant is responsible to pay rent for the entire duration that they occupy the rental unit. However, landlords must be cautious when accepting rent payment from an overholding tenant, as it can be deemed to continue the tenancy if the landlord fails to make it clear that this is not the case. Landlords should seek legal advice for any communications with their tenant when accepting overholding payments.

If the landlord cannot get the tenant's agreement to vacate the rental unit, the landlord may have to seek an order of possession from the RTB, legally requiring the tenant to vacate the rental unit by a certain date (usually within 48 hours of the order being issued.) For more information on what to do in the case of an overholding tenant, refer to the RTB website.

When serving any kind of formal notice during the tenancy (including, but not limited to, a Notice to End Tenancy), the landlord must ensure that all notices are issued in writing, with a copy kept on record by the landlord. There are specific legal requirements and deadlines applicable to different types of tenancy-related notices, including:

- The tenancy agreement (must be given to the tenant within 21 days of entering the agreement);
- Condition inspection reports (must be given to the tenant within seven days of the inspection);
- Notices of rent increases (must be given to the tenant three full months prior to any rent increase);
- Notices of terminating or restricting services relating to the tenancy (which must be given to the tenant 30 days prior to taking effect); and
- Landlord notices to enter the rental unit (which must be given to the tenant at least 24 hours prior to the landlord accessing the rental unit).

To ensure that all legal requirements for notices are met, it is best practice to review the RTB website for up-to-date details and to use the RTB's standard forms for each specific purpose.

The RTB Dispute Resolution Process

There are many reasons why a tenancy-related dispute may arise. In general, parties should try engaging in a reasonable discussion about any issues that arise during the tenancy, preferably in writing.

A tenant can apply to the RTB for dispute resolution if:

- They object to a notice to end tenancy issued to them by the landlord;
- They object to an increase in rent put in place by the landlord;
- They feel that their right to quiet enjoyment of the rental unit has been breached;
- They have requested necessary repairs to the rental unit and the landlord has refused to complete the repairs, or alternatively, the landlord has refused the tenant's written request for reimbursement of emergency repairs to the rental unit;
- The landlord has overcharged the tenant for a security deposit or pet damage deposit; or
- The landlord fails to return the security deposit and/or pet damage deposit, if any, within 15 days of receiving the tenant's forwarding address in writing.

A landlord can apply to the RTB for dispute resolution if:

- They wish to hold back a portion or all of the security deposit and pet damage deposit, if any, for damage beyond normal wear and tear;
- They seek reimbursement for repairs or maintenance which were the tenant's responsibility but completed by the landlord upon the tenant's refusal to do so; or
- They seek monetary compensation from the tenant for a breach of a material term of the tenancy agreement.

If dealing with a dispute at the RTB, licensees are recommended to seek legal advice or encourage their client to do so. A lawyer experienced in residential tenancy law can review the facts and provide advice.

Module Six: Strata Bylaws and Enforcement

Every strata corporation has bylaws. Having a good set of bylaws can make the management of the strata corporation easier. Because each strata corporation can amend the bylaws to suit their needs, each strata corporation may have different bylaws. Being aware of the differences and what may be missing is useful to make sure the strata corporation is operating in accordance with its bylaws. Bylaw enforcement is also one of the primary duties of the strata council. This module will describe the bylaw enforcement process from both the perspective of the complainant and the accused owner or tenant.

LEARNING OBJECTIVES

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

1. Manage the expectations of owners, tenants, and occupants complaining of contraventions of the strata corporation's bylaws;
2. Guide a strata council through the process of levying fines and charging back the costs of remedying a bylaw contravention;
3. Understand what amounts owing can and cannot be included in a Form G – Certificate of Lien (the "Lien");
4. Identify a few useful bylaws that may be missing from the strata corporation's bylaws; and
5. Understand why some strata corporation bylaws might be unenforceable.

06

BYLAWS

All strata corporations must have bylaws.[1] The bylaws provide for the control, management, maintenance, use, and enjoyment of the strata lots, common property, and common assets of the strata corporation and for the administration of the strata corporation.[2] The bylaws of the strata corporation are the Standard Bylaws included in the *Strata Property Act*[3]("SPA"), except to the extent that different bylaws are filed in the land title office. In short, they are the code of conduct the strata corporation can democratically impose upon their community. As such, each of the strata manager's clients may have different bylaws. It is important to have up to date bylaws at hand at all times to make sure that the strata corporation is managed in accordance with its bylaws. In addition to bylaws, some strata corporations also adopt rules to deal with the use, safety, and condition of common property.[4] In this module, we will not be discussing rules, except with respect to enforcement since the protocol is the same whether enforcing bylaws or rules.

ENHANCING THE STANDARD BYLAWS

The Standard Bylaws are generic bylaws meant to apply to all types of strata developments, such as duplexes, townhouse communities, bare land strata corporations, mixed use complexes, resort communities, and whether they are located in rural areas or cities. As a result, most strata corporations will amend them to suit their needs. There are some useful bylaws that a strata manager may want to suggest their client consider adding if they have not been included:

1. Quorum bylaw for general meetings – A quorum at a general meeting is eligible voters holding one-third of the strata corporation's votes, present in person or by proxy.[5] If quorum is not reached within a half hour of the time the meeting was supposed to start, the meeting is adjourned one week, same time and same place. That may not be convenient particularly where the strata corporation has had to book a meeting room outside of the strata corporation's premises. Strata corporations commonly amend their bylaws to adjourn the meeting to the same day, same place at a later time.

1 SBC 1998 c 34, Section 119(1)
2 SBC 1998 c 34, Section 119(2)
3 SBC 1998, c 43
4 SBC 1998 c 34, Section 125
5 SBC 1998 c 34, Section 48

2. Chargeback bylaw – The Standard Bylaws do not include a bylaw to chargeback the strata corporation's insurance deductible where the owner is responsible for loss or damage. A strata corporation can sue the owner responsible for the loss or damage for the deductible.[6] While there are cases where the Civil Resolution Tribunal ("CRT") has allowed the chargeback of a deductible in the absence of a bylaw, Section 158(2) will not apply to loss or damage below the deductible, uninsured losses, or investigation costs. As a result, it is important to have a chargeback bylaw that addresses all of those issues. Even where there is a chargeback bylaw, the strata manager may want to consider suggesting that it be reviewed by a lawyer, particularly if it does not reference the word "responsible" and uses the word "negligence" instead. Where the strata corporation sets a threshold different than the responsible threshold in Section 158(2) of the SPA, such as negligence, the strata corporation will have to prove negligence to chargeback an owner.[7] Because negligence is more difficult to prove than the responsibility standard set out in Section 158(2), where the bylaw references the word negligence, it is prudent to have it reviewed by a lawyer.
3. Bylaw limiting council eligibility – While the strata corporation does not have the power to limit who can stand for council, there is one exception. The strata corporation can adopt a bylaw that states that "no person may stand for council or continue to be on council" if the strata corporation is entitled to register a Lien against that person's strata lot.[8] This is very useful to encourage owners to pay their outstanding arrears. The court has confirmed that in order to be entitled to register a Lien, the strata corporation must have issued a demand letter in accordance with Section 112 of the SPA giving the owner 20 days to pay, and that the 20 day period has expired.[9]
4. Bylaw expanding council eligibility – Owners, individuals representing corporate owners, and tenants who, under Section 147 or 148 of the SPA, have been assigned a landlord's right to stand for council are eligible to be council members. Some strata corporations have trouble finding people willing to stand for council. In those situations, it may be useful to adopt a bylaw that allows other classes of people to stand for council.[10] Other classes that are commonly referred to in this type of bylaw are the spouse of the owner, adult children of the owner, or tenants.
5. Limitations on voter eligibility bylaw – Like standing for council, the strata corporation is not permitted to limit who is eligible to vote at a general meeting with one exception. A strata corporation is permitted to adopt a bylaw that prevents an owner from voting on all resolutions, except those requiring a unanimous vote or 80 per cent vote, if the strata corporation is entitled to register a Lien against that person's strata lot.[11] This is very useful to encourage owners to pay their outstanding arrears. Similarly, to be entitled to register a Lien, the strata corporation must have issued a demand letter in accordance with Section 112 of the SPA giving them 20 days to pay, and that the 20 day period has expired.

6 SBC 1998 c 34, Section 158(2)
7 *Strata Plan BCS 1589 v. Nacht*, 2019 BCSC 1785
8 SBC 1998 c 34, Section 28(3)
9 *Azura Management Inc. v. Strata Plan KAS 3359*, 2022 BCCRT 1255
10 SBC 1998 c 34, Section 28(2)
11 SBC 1998 c 34, Section 53(2)

UNENFORCEABLE BYLAWS

A strata corporation's bylaws are not enforceable to the extent that they contravene the SPA, its regulations, the *Human Rights Code*, or any other enactment or law.[12] In addition, bylaws are unenforceable if they destroy or modify an easement created under Section 69 of the SPA.[13] Section 121(1)(c) also provides that a bylaw is unenforceable to the extent it prohibits or restricts the right of any owner to freely sell, lease, mortgage, or otherwise dispose of the strata lot or an interest in the strata lot. To allow for the strata corporation to have rental restriction and age restriction bylaws as they were entitled to do before November 24, 2022, Section 121(2)(c) carved out an exception by stating that Section 121(1)(c) does not apply to those bylaws.

On November 24, 2022, Bill 44 came into force resulting in a number of amendments to the SPA, which are summarized below:

1. A strata corporation can no longer adopt bylaws that restrict rentals. To the extent that a strata corporation had a rental restriction bylaw, that bylaw became unenforceable on November 24, 2022.

2. A strata corporation can no longer adopt bylaws that restrict age other than age restrictions that require at least one or more persons who are residing in the strata lot to have reached 55 (or such older age the strata corporation chooses). To the extent that a strata corporation had an age restriction bylaw where the minimum age was under 55, that bylaw became unenforceable November 24, 2022.

Bill 44 went from first reading to Royal Assent in the span of a week. Strata corporations had to pivot quickly to understand the implications. Primarily, the amendments to the SPA meant that strata corporations could no longer enforce their rental restriction bylaws. Regardless of the bylaws, owners became entitled to rent their strata lots to tenants. Many who had rental restriction bylaws chose to amend their bylaws to remove the unenforceable rental restriction even though there was no need to do so. Others used it as an opportunity to adopt bylaws that ban short term accommodations, as those are not restrictions on rentals.

The situation with the changes to age restrictions is a bit more complicated. Strata corporations had a variety of age restrictions where the minimums varied. Common ones were minimum of age 19, 35, and 45, though they could have been any age. Those bylaws were likely unenforceable as of November 24, 2022, though there was some argument that the legislation, as written, did not accomplish that goal. Any doubt on the enforceability of pre-existing age restriction bylaws was removed by an amendment to Section 123.1 of the SPA, which received Royal Assent on May 11, 2023 and came into force retroactively on November 24, 2022. The new wording makes it clear that a strata corporation cannot restrict, and not just pass bylaws that restrict, the age of persons other than those restrictions permitted in the SPA.

12 SBC 1998 c 34, Section 121(1)(a)
13 SBC 1998 c 34, Section 121(1)(b)

Because of how quickly those bylaws became unenforceable, some strata corporations reacted by amending their current age restriction bylaw to the new allowable minimum age, namely 55. This strategy was adopted by many strata corporations that had age restriction bylaws because the SPA also provided for certain exemptions, including those persons who were currently living in the strata lot at the time the bylaw was passed. The idea was that all the current owners were exempt so they would be permitted to stay even if they were under 55, but that anyone new that moved into a strata lot would have to meet the age requirement under the new bylaw.

In addition, a caregiver who resides in the strata lot for the purpose of providing care to another person who resides in the strata lot and is depending on caregivers for continuing assistance or direction because of disability, illness, or frailty is exempt from the age restriction bylaw.[14] The government also provided for potential other classes of persons to be exempt by amending the regulations to the SPA. To that end, on May 1, 2023, by Order in Council, the British Columbia ("B.C.") government amended the regulations. Effective immediately, Section 7.01 of the regulations now exempts the child or spouse of a person living in the strata lot in compliance with the age restriction bylaw.

Ultimately, the recent amendments to the strata corporation's power to restrict the age of persons living in a strata lot and ban or limit rentals had significant impact on strata corporations that had such bylaws. The amendments are not well understood and strata corporations are trying to find ways to deal with these changes by creating new bylaws.

Another example of an unenforceable bylaw that strata corporations try to adopt is one that allocates payments received from owners first to fines, chargebacks, and other charges before strata fees and special levies. The court has held that the effect of this bylaw is to preclude owners from contesting or refusing to pay fines while continuing to pay strata fees. This is contrary to the intent and plain wording of the SPA. The court has found such a bylaw invalid and unenforceable.[15] Though not obviously unenforceable in that the SPA does not specifically prohibit such a bylaw, trying to rely on such a bylaw could have significant repercussions. A strata manager should consider advising their client to obtain legal advice to avoid making amendments to their bylaws that are unnecessary, unenforceable or do not accomplish their goals.

BYLAW (AND RULE) ENFORCEMENT

One of the more significant duties of a strata council is to enforce the bylaws.[16] Strata managers are often the first line in relation to bylaw enforcement. Most full service strata management agreements include assistance with bylaw enforcement as a delegated task. The starting point for all bylaw or rule enforcement is a complaint that someone has breached the bylaws or rules.

14 SBC 1998 c 34, Section 123.2(b)
15 *Strata Plan v. Podwinski*, 2016 BCSC 2253 at para 21 to 25
16 SBC 1998, c 43, Section 26

MYTHS ABOUT COMPLAINTS

Section 135(1)(d) of the SPA requires that the strata corporation have "received a complaint about the contravention." It does not specify who is entitled to make the complaint or in what format the complaint must be made. Despite the lack of details, there are a number of myths about how complaints are received.

A common misconception is that complaints must be in writing. While there may be good reasons to want to receive a complaint in writing, the SPA does not require a written complaint. As a result, the strata corporation cannot ignore its duty to enforce the bylaws simply because the complaint was not written. Imagine an owner talking to the licensee or leaving a voicemail to complain about a bylaw contravention. Consider ways a licensee should handle that complaint to ensure that the strata council does enforce the bylaws.

A second myth is that the complaint must be made by an owner. Again, the SPA does not limit who can make the complaint. As a result, that complaint can be made by an owner, a tenant, or occupant. The complaint can also be made by a council member if they are an owner, tenant, or occupant. For example, if a council member notices an owner's vehicle parked in a visitor parking stall in contravention of the bylaws, the council member can make the complaint. They may do so by raising that complaint at a council meeting. Alternatively, they may send the licensee an email indicating that the bylaw breach be discussed at the next council meeting.

A third misconception is that the complaint cannot be made anonymously. The SPA does not require that the complainant identify themself. So while it may have been received anonymously, the strata council still has a duty to enforce the bylaws if they are breached. Of course, if the complainant did not include enough details about the alleged breach of the bylaws, it may not be possible to take the next steps to enforce the bylaws. If the complaint was made anonymously, it may not be possible to get further details. Consider ways further details might be obtained in order to act on the complaint.

COMPLAINANTS AND PRIVACY

When an owner, tenant, or occupant complains about a breach of a bylaw, they may be disclosing personal information. Under the *Personal Information Protection Act*[17] ("PIPA"), personal information is defined, in part, as "information about an identifiable individual." If the complaint is made by email, it may include the complainant's email address, unit number, address, or name. Depending on the nature of the complaint, it may identify the location of the complainant. For example, the complaint may be that "the resident above me was playing loud heavy metal music for about a half hour starting 3 a.m. last Saturday." The complainant can be identified from the complaint. PIPA requires that the strata corporation obtain the consent of the complainant before disclosing their personal information, including their identity.[18] As a result, their identity should not be disclosed in minutes of council meetings or if asked by the accused owner. That said, there is an exemption from consent where the disclosure is required by law.[19] The SPA requires the strata corporation to disclose correspondence sent to the strata corporation, the strata manager, or the council, if a request is made by an owner.[20] As a result, the owner accused of contravening a bylaw can request the email setting out the complaint and the strata corporation must provide it. PIPA does not require the strata corporation to remove personal information from complaint letters that it is required to disclose under Section 36(1)(a) of the SPA.[21] While the strata council cannot identify the complainant in the minutes or upon request to the accused owner, the accused owner can obtain that information by requesting a copy of the complaint letter. For that reason, receiving a complaint orally may be useful particularly where there is concern about retaliation by the accused owner.

17 SBC 2003, c 63, Section 1
18 PIPA, Section 6(1)(c)
19 PIPA, Section 18(1)(o)
20 SBC 1998 c 34 Section 36(1)(a)
21 *Little Qualicum River Village Strata Corporation (Strata Plan VIS 4673) (Re)*, 2019 BCIPC 03, at para 18; *Mason v. The Owners, Strata Plan BCS 4338*, 2017 BCCRT 47 at para 41

MAINTAINING PROFESSIONALISM

One of most difficult scenarios arises when the contravention is of a "nuisance" type bylaw and is repeated or continuing. Complaints about smoke or noise interfering with the complainant's use and enjoyment of their strata lot are a huge source of frustration. Owners might have decided not to make complaints initially because they do not want to cause trouble or deal with the accused owner directly. By the time they make their first complaint to the strata corporation, they may have tolerated the situation for months or even years. As a result, their expectations are high and they want it to stop immediately. Bylaw enforcement takes time, so it can appear that the strata corporation is doing "nothing."

In addition, the focus of communication when enforcing the bylaws is with the accused. Depending on how bylaw complaints are dealt with in minutes of council meetings and how frequent those meetings are, it may not be clear what, if anything, the council is doing with the bylaw complaint. This is a recipe for frustrating the complainant. Consider how you might deal with the complainant to manage their expectations.

Do not let their frustrations impact your professionalism. Frustrated complainants can send rude correspondence suggesting that nothing is being done. As a licensee, it is important to try to de-escalate the situation and maintain your professionalism. Avoid sending an immediate response. Read your draft response when you have had time to calm down. Assume any response will be heard or written by a judge or tribunal member of the CRT. Talk to your managing broker. The complainant's frustration may be avoided if regular updates are provided about how the complaint is being handled. Recommend to your client that the complainant be provided with monthly updates or some other regular frequency that may be appropriate.

Emotions also tend to run high when bylaw enforcement meets the *Human Rights Tribunal* ("HRT"). The situation is more critical to the complainant because a medical condition or disability can be made worse as a result of the perceived failure to enforce the bylaws. Nowhere is this more apparent than when the complainant has a respiratory condition and the accused is a smoker. These are difficult situations to navigate. Because of the complainant's medical condition, the strata corporation not only has the duty to enforce the bylaws, but also the duty to accommodate the complainant. Often that accommodation is ensuring the bylaws are enforced. However, it means not only enforcing persistently but also communicating with the complainant. In *Leary v. Strata Plan VR 1001*,[22] the HRT held that the duty to accommodate required the strata corporation to do all of the following:

- Address requests for accommodation promptly, and take them seriously. A strata council should consider how it will process accommodation requests on a timely basis, including between council meetings. For example, the strata council should ensure that someone is responsible for receiving such requests and promptly beginning the accommodation process
- Gather enough information to understand the nature and extent of the need for accommodation. The strata council is entitled to request medical information that is related to the request for accommodation. It is not entitled to any more information than is strictly necessary for this purpose. If the strata council requests further medical reports, it should be at the strata's expense.
- Restrict access to a person's medical information to only those individuals who are involved in the accommodation process and who need to understand the underlying medical condition. The strata council should keep medical information confidential from the general membership of the strata corporation.

22 2016 BCHRT 139 at para 69

- Obtain expert opinions or advice where needed. For second-hand smoke, a "sniff test" undertaken by another strata member will rarely be sufficient to evaluate the extent of a problem with smoke in a suite. The strata council may have to retain air quality experts. The strata council should pay for any tests or expert reports.
- Take the lead role in investigating possible solutions. Co-operate with the person seeking accommodation to constructively explore those solutions.
- Rigorously assess whether the strata council can implement an appropriate accommodation solution. In doing so, the strata council may have to consider the financial cost and competing needs of other strata members with disabilities. In some circumstances, a solution may not be possible without the strata corporation suffering an undue hardship. In that case, the strata council should document the hardship and test its conclusion to ensure there is no other possible solution.
- Recognize that the strata corporation cannot, through its membership, contract out of the *Human Rights Code*. This means that a strata corporation cannot rely on a vote of its membership to deny an accommodation.
- Ensure that the strata council representatives working on the accommodation are able to approach the issue with an attitude of respect. Members of a strata council whose behavior risks undermining genuine efforts at co-operation and conciliation may need to be removed from the process.

The HRT acknowledged that this accommodation process can be challenging making it difficult for everyone to remain respectful and ensure cooperation. However, it is particularly in these sorts of situations that a licensee must maintain their professionalism and help prevent these scenarios from escalating into high conflict situations.

BYLAW ENFORCEMENT AND CONFLICTS OF INTEREST

Sometimes, it is a council member that is making the complaint about a bylaw contravention. In that situation, the council member is not just making the complaint but will also be determining whether the bylaw was contravened and what bylaw enforcement measures will be applied. That may result in a conflict of interest. Where the complaint does not really impact the council member directly, there is likely no issue. On the other hand, a council member may be complaining about their neighbour's loud parties or someone using their assigned parking stall. In those cases, the council member making the complaint would be in a conflict of interest if they also participated in the enforcement decisions. Because of the conflict, the council member should not participate in the discussions or decisions made about enforcement.[23] It would be prudent for the council member to leave the room. Similarly, if the complaint is about a council member breaching the bylaws, a conflict of interest arises. As a result, the council member must not participate in a decision made under Section 135 about the complaint[24] unless all owners are on the council.

ENFORCEMENT PROTOCOL

The strata council's duty to enforce the bylaws[25] is not a simple one. Licensees are often tasked with implementing the administrative work of enforcing bylaws. While it seems relatively easy, it is tedious and time consuming, particularly where the person contravening the bylaws is doing so repeatedly. Even the most seasoned strata manager can end up making mistakes. The protocol for the enforcement of bylaws also applies to the enforcement of rules. Section 129 of the SPA gives a strata corporation three options to enforce a bylaw or rule:

- Imposing a fine;
- Remedying a bylaw contravention; or
- Denying access to a recreational facility but only if the bylaw or rule contravened relates to the recreational facility.

23 SBC 1998 c 34, Section 32
24 SBC 1998 c 34, Section 136
25 SBC 1998, c 43, Section 26

Imagine a strata council instructing you to disable an occupant's fob because they have not paid their strata fees. Consider how you would respond and explain why that is not possible given the options noted above.

Before any one of the three enforcement options can be implemented, the accused person is given a chance to defend themselves. That process must comply with Section 135 of the SPA. Compliance with Section 135 requires the following steps:

1. The strata council receives a complaint of a bylaw or rule contravention;
2. The strata council provides notice of the complaint in writing to the owner or tenant. The notice must include particulars of the complaint and give the owner or tenant an opportunity to respond, including a hearing if requested. If it relates to a contravention of a bylaw by the tenant, a copy of the notice must be provided to the owner;
3. After the deadline for the owner or tenant to respond passes, the strata council decides by majority vote at a strata council meeting, after considering the response, if any, whether the bylaw has been contravened and, if so, what enforcement option will be implemented, such as a fine, chargeback, or denying access to a recreational facility. The decision should be recorded in the minutes of the strata council meeting;
4. As soon as feasible, the strata council must give notice in writing to the owner or tenant of its decision about the bylaw or rule contravention allegation and the enforcement option implemented, if any, such as a fine or chargeback or denying access to a recreational facility. If the tenant has been found to have contravened the bylaw or rule, the fine or chargeback is levied against the tenant, and a copy of the notice of the fine is provided to the owner; and
5. If the strata council decides to levy a fine or chargeback the costs of remedying a bylaw or rule contravention, it is only at this stage that the fine can be applied to the owner's account.

Often, the strata corporation relies on the strata manager to ensure compliance with Section 135. The case law makes it clear that strict compliance is required if the strata corporation has any chance at collecting those fines or chargebacks in court or a tribunal. The Court of Appeal of British Columbia in *Terry v. The Owners, Strata Plan NW 309*[26] said that Section 135 is not complex and its requirements are straightforward. Again, in *Strata Plan NW 307 v. Desaulniers*,[27] the Court of Appeal repeated this point and noted that "there is no leeway" on the issue of notice. As a result, it is critical for a strata manager to understand these steps and to undertake them correctly. Making an error can result in the fines being cancelled by a court or tribunal. In addition, the Real Estate Services Rules require that a strata manager act with reasonable care and skill (Section 34).

An area of difficulty is continuing contraventions. Section 135 of the SPA provides that once a strata corporation has complied with Section 135, it may impose further fines for a continuing contravention without having to comply with Section 135 again. The question is what is a continuing contravention? In *Strata Plan VR 2000 v. Grabarczyk*,[28] Ms. Grabarczyk was fined $22,928.69 for breaching the noise bylaw. While the noise she made was persistent and frequent, the court concluded that it was not a continuing contravention because it stopped and started again. These were repeated contraventions. The court cancelled the fines for continuing contraventions, such that the total fines were reduced to $2,500.

26 2016 BCCA 449
27 2019 BCCA 343
28 2006 BCSC 1960, affirmed 2007 BCCA 290

COMMON MYTHS AND ERRORS IN ENFORCEMENT

One common misconception is that "late fines" for overdue strata fees or special levies can be applied to the owner's account without first complying with Section 135. In *Terry v. The Owners, Strata Plan NW 309*,[29] the strata corporation had a lengthy history of communicating with Ms. Terry and her mother over many issues including her outstanding strata fees and special levies. However, as is common, most of the letters simply notified Ms. Terry that fines had been imposed after they were applied to her account. The Court of Appeal noted that the letters did not particularize the alleged contravention except stating that a particular month's strata fees remained outstanding. However, this was incorrect. Ms. Terry's arrears arose from her failure to pay the increase in strata fees. None of the letters noted the bylaw being allegedly contravened, gave the owner fair notice that the strata corporation was contemplating future fines or that she had an opportunity to respond prior to those future fines being levied. As a result, all the fines levied by the strata corporation were set aside.

Another misconception is that the strata corporation can fine the owner for the contravention of a bylaw or rule by the owner's tenant. The strata council often wants to deal directly with the owner and leave it to the owner to deal with the tenant. While Section 130(1) allows the strata corporation to fine an owner for the bylaw or rule contraventions of the owner, their visitors, or their occupants, it does not include tenants in that list. Instead, Section 130(2) states that where the bylaw or rule is contravened by the tenant, the tenant's visitors or the tenant's occupants, the strata corporation's power to fine is limited to the tenant (Section130(2)). Section 135 also makes it clear that where the tenant has contravened the bylaw or rule, the tenant is to be given notice of the complaint together with the particulars, and an opportunity to respond including a hearing, if requested. While the strata council must also provide notice of the complaint and the decision to the landlord and owner, the strata council must also deal directly with the tenant.

One of the common reasons for not wanting to levy the fine against a tenant is the difficulty in collecting. This should not be a problem because Section 131 makes the owner responsible for paying any of the fines that the tenant did not pay. In *Lin v. Strata Plan EPS 3602*,[30] the strata corporation imposed a number of fines against the owner for breaches by the tenants. The strata corporation sent notices of the complaints and decisions to the owner. Nothing was sent to the tenant because the strata corporation noted that it "does not deal with tenants." The CRT held that the fines were invalid because the strata corporation had not complied with Section 135 by not giving the tenant notice of the complaint and an opportunity to respond.

Levying the fine and then not providing an opportunity to respond is also a common error. In *Fariborz v. Strata Plan EPS 1945*,[31] the strata corporation sent a letter to the owner advising that it had imposed $400 in fines, but also acknowledged that a hearing was scheduled the following day. The minutes of the strata council meeting confirmed strata council's decision to levy a fine of $200 for feeding birds and $200 for renting the strata lot as a short term licence even though it also noted that a hearing was scheduled a week later. The CRT concluded that this proved that the strata council was not prepared to consider the owner's evidence and arguments at the hearing before deciding whether to impose fines. The CRT cancelled the fines.

29 2016 BCCA 449
30 2020 BCCRT 52
31 2022 BCCRT 268

CORRECTING PROCEDURAL ERRORS

Following through the entire procedure under Section 135 of the SPA from start to finish is necessary to ensure strict compliance. In *Strata Plan NW 2207 v. Ohrlein*,[32] the strata corporation's letter demanded that the owner clean their patio/balcony and stairs immediately in accordance with the bylaws. The letter also noted that an unspecified amount of fines had been imposed and that a fine of $50 every seven days would be imposed. An almost identical letter was sent three weeks later noting that the fines would be charged every seven days starting in two weeks. The CRT found that Section 135 had not been followed. Even though it turned out that the fines were not actually charged to the account until several weeks after the letters were sent, the initial letter stated that the fines were levied. The second letter was not helpful because it did not provide an opportunity to respond to the complaint. In addition, there were no clear particulars set out. Finally, the CRT also found that the strata corporation did not provide notice of the decision to fine. Given all of the missteps in complying with Section 135, the CRT cancelled all of the fines.

When a procedural mistake is made, it is possible to correct the error. In *Cheung v. The Owners, Strata Plan VR 1902*,[33] the Supreme Court confirmed the procedure for curing a procedural error. The strata corporation must reverse the fines, and essentially re-start the procedural requirements of Section 135 from the time the error was made. For example, if the fines were imposed without considering the owner's response, then the fines are reversed. Then at the next strata council meeting, the strata council considers the owner's response and decides whether the bylaw was contravened, and if so, whether to impose a fine. However, if the error is not providing the particulars of the complaint, then the strata corporation can reverse the fines, provide the particulars, give the owner an opportunity to respond, and continue the Section 135 procedure from that point forward.

While the process for compliance with Section 135 is straightforward, it is tedious and time consuming. Because strata managers are often tasked with preparing the notices of complaint, care should be taken to avoid errors and ensure they are acting with reasonable care and skill.

COLLECTION OF FINES AND THE COSTS OF REMEDYING A BYLAW CONTRAVENTION

In more difficult bylaw enforcement situations, the owner may ignore the fines or the costs of remedying the bylaw contravention that were charged back. When that happens, the strata corporation may need to consider starting a dispute in the CRT to collect those fines and chargebacks and to obtain an order that the owner stop contravening the bylaws. The strata council has the authority to make the decision, by majority vote, to start the CRT dispute. Assuming the strata corporation can prove the owner contravened the bylaws and that the fines or chargebacks were levied in accordance with Section 135 of the SPA, the CRT is likely to grant an award in the amount of the total fines and/or chargebacks. If the owner does not pay the award, the strata corporation can file the CRT order in Small Claims Court if the total owing is $35,000 or less. It the award is more than $35,000, the strata corporation can file the CRT order in Supreme Court. The order is enforceable for 10 years.

Why pursue a CRT order? Although the Supreme Court has stated that the current *Limitation Act*, which came into force June 1, 2013, does not apply to fines,[34] obtaining an order indicates how seriously the strata corporation is taking the repeated or continuing contraventions. In addition, the court-filed CRT order allows the strata corporation to register it against the strata lot and any other real property owned by the owner. Then, if the owner wants to sell or register any financial charges, they will have to pay the total owing under the CRT order. The chargeback for the costs of remedying the bylaw contravention are subject to the two-year limitation period under the *Limitation Act*.[35]

32 2022 BCCRT 191
33 2004 BCSC 1750
34 *The Owners, Strata Plan KAS 3549 v. 0738039 B.C. Ltd.*, 2015 BCSC 2273
35 SBC 2012, c 13

As such, it is important to start the CRT proceedings before the limitation period expires. Similarly, if the CRT makes an order awarding the chargeback, the CRT order can be filed in the applicable court and then registered on the title to the strata lot and any other real property owned by the owner.

What you cannot do to collect fines and the costs of remedying a bylaw contravention is register a Lien. The Lien can only be used to collect those amounts set out in Section 116(1) of the SPA, which are:

a) Strata fees;

b) Special levy;

c) Reimbursement of the cost of work referred to in Section 85 (work orders from public or local authorities); or

d) Strata lot's share of a judgment against the strata corporation.

Filing a Lien that includes unpaid fines or the costs of remedying a bylaw contravention will render the Lien void and unenforceable.[36]

Another possible way to collect unpaid fines and the costs of remedying a bylaw contravention is for the strata corporation to demand payment when an owner requests a Form F – Certificate of Payment (the "Form F"). A Form F is required every time a strata lot is transferred to a new owner. There are certain exceptions, such as when the new owner acquires through a foreclosure or the estate of the former owner. As a result, it is possible for there to be a new owner without a Form F having been requested. The fines and costs of remedying a bylaw contravention would not be payable by the new owner. The strata corporation would have to collect from the former owner. In addition, the strata corporation needs to be mindful of the two-year limitation period as it does apply to the chargeback for the costs of remedying a bylaw contravention.

Further, while a Form F can be used to try to collect unpaid strata fees, special levies, work order costs, a strata lot's share of a judgment against the strata corporation, fines, and the costs of remedying a bylaw contravention, it cannot include claims of damages that have not been decided by a court, arbitrator, or the CRT or any other amounts that are owing.[37]

Some strata corporations have adopted or want to adopt a bylaw that provides that any payments received from the owner will be applied first to fines, chargebacks, and other charges that cannot be included in a Lien. The court has held that the effect of this bylaw is to preclude owners from contesting or refusing to pay fines while continuing to pay strata fees. This is contrary to the intent and plain wording of the SPA. The court has found such a bylaw invalid and unenforceable.[38] Further, if the strata manager is collecting the strata fees on behalf of the strata corporation through preauthorized debit, the use of the collected funds for anything other than the purpose stated in the preauthorized debit agreement is likely a breach of that agreement.[39]

CONCLUSION

The bylaws of the strata corporation are a key document the strata manager needs to understand in order to assist the strata council in managing the strata corporation. One of the key duties of the strata council is to enforce the bylaws. As a result, strata managers should be very familiar with bylaw enforcement from managing the complainants to administrating the enforcement process so they can assist their clients and prevent costly mistakes.

36 *Strata Plan VR 386 v. Luttrell*, 2009 BCSC 1680 at para 41
37 RSBC 1998 c 34, Section 115(4)
38 *Strata Plan v. Podwinski*, 2016 BCSC 2253 at para 21 to 25
39 *Canada Payments Act*, RSC 1985, c 21

Module Seven: Contracts

Contracts are the foundation of real estate practice. They outline the expectations and obligations between you and your clients and between your clients and the other side of a property transaction. Powerful tools, contracts can be a source of great protection or a source of great distress, depending on how well they are drafted.

In this module, we will start at the beginning and look at the contract between client and agent, and the client identification obligations that arise in that context. We will also discuss reviewing contract terms with clients, and why it is important to do so thoroughly every time an offer is made or received. The property disclosure statement ("PDS") may or may not form part of the contract between buyer and seller, but its legal effect warrants discussion either way. Finally, we will discuss the features and pitfalls of back-up offers, as well as a few contractual terms of note that may be added to a contract of purchase and sale.

LEARNING OBJECTIVES

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

1. Understand why it is best practice to properly identify clients early;
2. Explain why e-signature software may be problematic in fulfilling a licensee's duty to their client;
3. List some circumstances where a PDS should be modified;
4. Draft an enforceable back-up offer; and
5. Recognize adverse clauses.

07 →

THE FIRST CONTRACT – CLIENT IDENTIFICATION IMPLICATIONS

When discussing real estate contracts, the focus is often on contracts of purchase and sale. However, the first contract a licensee will likely deal with when working with clients is the contract under which the client agrees to engage a real estate brokerage to assist them, and under which the licensee of that brokerage agrees to act as the client's agent. These contracts normally take the form of a buyer's agency agreement or a listing agreement. While there are other ways in which the law imposes obligations on licensees, these types of contracts turn many of those obligations into contractual promises, which can mean that different consequences arise in the event of their breach.

Brokerages may provide a standard form buyer's agency agreement and listing agreement, but the terms of these agreements are negotiable with clients. Like any contract, the terms can be anything that the parties mutually agree to, with a few exceptions. That said, the standard forms co-drafted by the British Columbia Real Estate Association ("BCREA") and the Canadian Bar Association, British Columbia Branch ("CBABC") should only be changed with caution and with input from the managing broker, and possibly a lawyer.

An issue that can arise when embarking on a new client relationship that has frequently been in the news lately is confirming the client's identity. Though not directly connected to the contractual terms of the client relationship, there are many issues, contractual and otherwise, that arise if a licensee is dealing with someone who is not who they purport to be. This issue arises more often with sellers than with buyers, but licensees should be aware of client identification issues in all circumstances. It also arises most frequently in the case of a client who lives out of town or out of the country.

Of course, client identification has been a Financial Transactions and Reports Analysis Centre ("FINTRAC") and a P*roceeds of Crime (Money Laundering) and Terrorist Financing Act* ("PCMLTFA") requirement for many years. However, recent instances of attempted and actual fraudulent sales of real estate have reminded the industry why it is so important to confirm who you, as a licensee, are dealing with.[1] FINTRAC obligations are non-negotiable, and non-compliance can create professional and regulatory consequences. Recent disciplinary cases and civil lawsuits have highlighted the fact that client identification can have a serious impact on contracts of purchase and sale as well.

Often licensees wait until a transaction is near to closing to verify a client's identity, given that the anti-money laundering ("AML") obligation under FINTRAC arises when a "transaction" takes place. However, it is good practice to take on this task earlier in the working relationship with the client, such as at the time of a listing agreement or buyer's agency agreement.[2] This provides an earlier opportunity to discover any red flags in the client's identification and has the added benefit of confirming your clients' legal names. If a client is legitimate, it should not be a problem to collect and verify the required identification documents at the time or shortly after the relationship begins. If the client is hesitant to do so, that may itself be a red flag that there are identification issues at play.

1 See BC Financial Services Authority's ("BCFSA's") Real Estate Bulletin January 26, 2023 for more on fraud in real estate transactions.
2 See BCFSA's Knowledge Base guidance on checking the Land Owner Transparency Registry prior to the listing meeting with a prospective seller client here.

Though every case will depend on its own facts, there are some additional red flags to consider as it relates to client identification:

- Difficult or impossible to arrange to speak to the client on the phone or by video;
- Unclear or poorly copied identification photographs; and
- Verified identity documents coming from the client directly and not from the professional, such as a lawyer or notary public, who is required to verify the identity of a client not located in Canada.

The failure to properly identify a client can result not only in civil liability through a lawsuit brought by an injured party, but it may also result in disciplinary action. Sections 33 and 34 of the Real Estate Services Rules impose broad duties on licensees to act honestly and with a reasonable degree of care and skill. BCFSA, and its predecessor the Real Estate Council of British Columbia, has found that failure to properly identify clients is a breach of these rules, and can attract serious penalties, including licence suspension.[3]

The full scope of client identification processes and requirements is beyond the scope of this module. See BCFSA's Knowledge Base for some helpful guidance on why, how, and when to identify clients.[4]

PAY ATTENTION TO THE FINE PRINT – REVIEWING CONTRACT TERMS WITH CLIENTS

The BCREA, together with the CBABC, drafts and keeps current standard form contracts of purchase and sale for use by licensees. This simplifies the property purchase process for licensees and clients alike and makes it much more efficient. Despite the standard forms, a licensee is still required to turn their mind to whether all of the standard-form terms should be used in every specific case. Though it is tempting to skim over the standard form parts of a contract of purchase and sale because they are so familiar, doing so can be problematic for a number of reasons.

First, it is critical for a licensee to consider whether any of the terms included in the standard form contracts need to be removed or altered. Not all terms will be applicable, or, more importantly, in a client's interest. Therefore, a licensee needs to direct their attention to each term every time an offer is made or accepted to ensure that their client's interests are being properly represented and protected. For example, the standard form contracts of purchase and sale include a prohibition on assignment without the seller's consent and provide that any profit earned on the assignment goes to the seller. If acting for the buyer, a licensee should consider their client's assignment plans to determine whether this clause should be changed to be more advantageous to the buyer.[5]

3 *E.g.*, this BCFSA decision/this BCFSA decision.
4 BCFSA Anti-Money Laundering Guidelines
5 With respect to assignments in particular, a notice needs to be provided to the seller if the standard form assignment provisions are altered, among other considerations. See the BCFSA contract assignment information page for more information.

Second, a licensee must review all terms of an offer with their clients every time one is made or received to properly discharge their duty of representation to the client. It is sometimes tempting to assume that a client will be familiar enough with the standard form contracts of purchase and sale to skip this step, but that is rarely, if ever, the case. Further, while the use of e-signature software has made real estate transactions infinitely more efficient and convenient, the use of those tools cannot replace the advice that a client is expecting and is entitled to receive from their licensee. It is critical that licensees go over every offer every time with their clients, since those offers can become legally binding contracts that may be difficult or impossible to change after the fact. The review may also expose specific client requirements or characteristics that are material to the transaction in question but have otherwise not been mentioned or understood.

A 2022 court decision[6] highlighted the perils of a licensee failing to ensure that the clients had read and understood all parts of a contract of purchase and sale. In that case, the buyers had recently moved to Kelowna, British Columbia ("B.C.") from the United Kingdom for work, a fact of which their licensee was aware. The buyers made a prior offer on a property, which included a true representation that the buyers were not Canadian citizens or permanent residents. When that deal did not go through, the buyers made an offer on another property in the area. The licensee misunderstood the clients' residency status at the time of the second offer and changed the clients' Canadian residency declaration to "yes" on the contract of purchase and sale without confirming that change with them. While the licensee told his clients to review the offer carefully, he did not go through the offer with them nor draw his clients' attention to that change specifically.

The buyers sued the licensee and their conveyancing lawyer in negligence and breach of contract, to recover the 20 per cent additional tax imposed by the *Property Transfer Tax Act*[7] and commonly known as the "Foreign Buyers Tax," that they were required to pay when their true residency status became known. This amounted to almost $175,000. The court found the licensee 75 per cent responsible for the buyers' loss, a penalty that could likely have been avoided if the licensee had reviewed the terms of the offer with their client.

It is worth noting that there are other good reasons for a licensee to review contracts with their clients in person besides protecting themselves from legal or regulatory liability. In a business built on relationships, it is always a good idea to use an opportunity to spend time with clients and solidify the relationship of trust and confidence they have in you, as their licensee. This will assist you in the context of that transaction and ideally future transactions by those same clients and their networks.

PROPERTY DISCLOSURE STATEMENTS – A CONTRACT WITHIN A CONTRACT (MAYBE)

The PDS is worth addressing because it often gets incorporated into a contract of purchase and sale. Once incorporated, it becomes part of the contract between the buyer and the seller. If there are mistakes or inaccuracies in the PDS, these may become breaches of contract that can have negative consequences for the seller, and sometimes for the listing or designated seller's agent as well.[8]

To the extent that they choose to complete a PDS, sellers are required to fill it out as accurately as they can based on personal knowledge and the information available to them at the time.

6 2022 BCSC 183
7 RSBC 1996 c 378
8 See this BCFSA discipline decision, where the licensee was ordered to pay a penalty and enforcement expenses for, among other things, failing to correct their seller client's PDS answer that they knew to be incorrect. See also this BCFSA discipline decision where another licensee failed to advise their clients to amend a PDS to disclowse a defect of which the licensee was, or should have been, aware.

One interesting contractual question is the legal implications of a PDS being incorporated into a contract of purchase and sale. Section 18 of the residential standard form contract of purchase and sale states that representations made in the PDS survive completion of a sale and can continue to be relied on by the buyer if the PDS is incorporated into the contract. Section 18 does not, however, convert the statements in the PDS into positive promises by the sellers that the answers to PDS questions are, in fact, true.[9] They are designed to put the buyer on notice of any concerns that may not be easily discoverable. However, incorporating a PDS into the contract does not impose a duty on sellers to take active steps to confirm that their answers are true unless they have ignored red flags that any reasonable seller would have noticed.

The impact of incorporating a PDS into the contract of purchase and sale is important for buyers' agents to know in particular because incorporating the PDS may provide buyers with additional protection. It is also open to the parties to include in the contract of purchase and sale a separate warranty, or promise, on the part of the sellers that a particular item in the PDS is true. This will mean that if that warranty turns out not to be true then the seller may be in breach of contract even if they did not know nor should have known the true state of the property. Therefore, licensees acting for sellers should be very careful about including or allowing warranties in a contract unless the sellers have actual knowledge that the item they are warranting is completely accurate.

Another interesting issue with PDS documents arises due to their standard-form nature. As is the case with the standard-form contract of purchase and sale, the answers on a PDS are not always a good fit for every property and the questions may not be easily answered in a way that is accurate or not misleading. This may occur when there are several buildings located on a property, or a property is listed for some time and a material fact about the property changes or is identified during the listing period.

There are several ways that a licensee can deal with these atypical situations. If there are several buildings or significant elements to a property, a licensee can suggest that the seller fill out more than one PDS, making clear which statement applies to which part of the property. Also, there is an "additional comments" section in the PDS where a seller can provide additional information to qualify or further explain any answer in the PDS that may need additional detail. Finally, if some element of the property changes over time, or new information is learned or discovered by the sellers or the licensees, it is good practice to have the sellers complete a new PDS incorporating that new information.

The courts have limited a listing agent's obligations regarding the PDS to asking the sellers to complete the PDS truthfully and to the best of their knowledge, and raising questions if the licensee has any basis on which to doubt the accuracy of the sellers' answers. They do not need to observe or actively assist the sellers in filling out the PDS. However, if the licensee is or becomes aware of something in the PDS that is not accurate, they may be held liable to an unsuspecting buyer unless they take steps to ensure that the buyers receive adequate disclosure of the issue in question. The easiest way to prove that disclosure was made is with an accurate PDS provided to the buyer or their agent.

9 2016 BCCA 189

BACK-UP OFFERS

Back-up offers have been used for some time to protect sellers in case a prior conditional sale of their property does not become firm. They are of particular interest now that the home buyer rescission period is in force in B.C., because it creates an opportunity for buyers to walk away from a deal if they meet the rescission criteria and results in uncertainty for sellers, even in the face of an unconditional contract of purchase and sale. Being a runner up to an already existing contract of purchase and sale means that back-up offers hold an interesting legal status.

At its core, a back-up offer is a specific type of conditional contract of purchase and sale, where the contract exists but its terms do not have to be performed until the conditions specified in the contract are waived or met. The main condition in the back-up offer context is normally the seller being unconditionally released for one reason or another from a prior contract of purchase and sale. Given this somewhat unusual form of contract, some specific considerations for both buyers and sellers should be kept in mind.

A seller, particularly one who wants or needs to sell quickly, can use a back-up offer to their advantage if a second buyer is willing to submit one. This provides some additional assurance that a deal will get done even if the seller's first contract falls through. A licensee with a seller in this position may also want to consider including a right for the seller to force the buyer under the first contract to remove conditions within some shorter period of time if the seller receives another offer they would like to accept.[10]

Back-up offers must be drafted with care, however, and must follow the general rules applicable to contract drafting that require that subject terms be sufficiently clear and objective to be enforceable. Subject clauses that are entirely discretionary or impossible to determine whether they are fulfilled will render a contract unenforceable. In a recent Supreme Court of British Columbia summary trial,[11] the sellers accepted a back-up offer from buyers that included the following terms:

> Subject to the Buyer, at the Buyer's expense, receiving and approving, on or before July 15, 2021, professional advice that there are no limitations unsatisfactory to the Buyer on the use or development of the Property resulting from the *Riparian Areas Protection Act*, its regulations, or any similar legislation. This condition is for the sole benefit of the Buyer.
>
> Subject to the Buyer on or before July 15, 2021, approving the feasibility of building a residence on the property in a commercially reasonable manner as contemplated by the Buyer, in its sole discretion. This condition is for the sole benefit of the buyer [sic].

The court held that there were so many subjective elements to the two subject clauses that it was impossible to infer any objective terms without fundamentally changing the nature of the agreement between the parties. As such, the back-up offer was not enforceable by the back-up buyers. The court made this finding despite an allegation that the sellers had negotiated an extension to the closing of the original offer in breach of the back-up offer's specific terms. Despite the extension protection having been added into the back-up offer, the poorly drafted subject clauses made the back-up offer, including that protection, unenforceable as a whole. The sellers sued their licensee in this proceeding but because the court found that the sellers were not liable to the buyers, there were no damages to pass on to the licensee.

10 BCFSA seller invoking time clause
11 2022 BCSC 1011

In another recent case,[12] a buyer intended to make a back-up offer on commercial property in Penticton, B.C. Though the offer was described by all persons involved as a "back-up offer" and was signed by the seller, it did not include any express language that would make it an enforceable back-up offer. The buyer under the purported back-up offer sued the seller for specific performance and filed a certificate of pending litigation ("CPL") on title to the property, which prevented the seller from transferring the property to the original buyer as agreed. The seller then sued their listing agent, claiming that if it was liable to the purported back-up buyer then that was due to the licensee's failure to properly protect the seller's interests.

The seller's application to remove the CPL registered on title failed. The court discussed the listing agent's evidence who said they understood that the offer had been intended as a back-up. However, the details of the purported back-up offer included nothing to distinguish it from a stand-alone offer, which the licensee admitted was "unfortunate." Despite the seller proving that they would suffer hardship and inconvenience as a result of the CPL, the court held that it was not plain and obvious that the purported back-up buyer's claim for specific performance would fail. This put the seller in the unenviable position of having to defend a claim by the purported back-up buyer and being unable to transfer clear title to the original buyer as a result of the CPL.

Shortly after the CPL decision was released, the original buyer sued the seller and the purported back-up buyer in a second legal action related to these transactions. The seller, in turn, again sued their listing agent. This left the licensee with two legal actions to defend resulting from the same poorly-drafted back-up offer, which the licensee had not even drafted themselves. Interestingly, the purported back-up buyer did not sue their licensee who had drafted the ineffective back-up offer but there likely would have been cause for them to do so had they chosen to.

This case is a reminder to licensees working for the buyer and licensees working for the seller to carefully draft or review the terms of a back-up offer to ensure that it is, in fact, a back-up offer. The fact that the parties and licensees involved may have understood it was intended to be a back-up offer is irrelevant if the words of the offer do not support that understanding.

Licensees acting for buyers in a back-up position should make clear to their clients that the seller's existing offer may or may not become firm, meaning that they are likely going to have to wait for a period of time before a seller can confirm whether or not the back-up offer has taken priority. This can be a stressful period, and may be impacted by the seller's ability to amend the prior contract of purchase and sale (see footnote 12). However, if the buyer is content to wait, then it can be a good option to potentially acquire a property of particular interest despite not having been the first offer the seller accepted.

The BCFSA Knowledge Base, Clauses section, has some suggested language for back-up offers that licensees should review if clients are interested in this option.[13]

12 2021 BCSC 1802

13 BCFSA back up offer clause. Licensees should note that the suggested BCFSA terminology includes an option to include an obligation on the part of the seller not to amend the prior contract of purchase and sale. The addition of this obligation is for the back-up buyer's benefit. It may increase the chances that a back-up buyer's offer will become the contract of purchase and sale because it prevents the seller and their existing buyer from changing the contract to, for example, extend the subject removal period, or otherwise change the terms to make it more likely that the initial deal will become firm.

COMPLETION DATE EXTENSIONS

It is normally a requirement that contract terms be certain so that all parties are clear about their respective rights and responsibilities from the outset. However, so long as it is drafted carefully, there is an opportunity to allow for certain terms to be changed after the contract is made in specific circumstances.

One such example is in the case of pre-sale contracts between a developer and a buyer. While the developer often provides an anticipated completion date at the time the contract of purchase and sale is made, it is recognized that there may be factors outside the developer's control that require that completion date to be moved, sometimes earlier but more likely later.

A recent Supreme Court case[14] addressed a buyer's entitlement to cancel a contract of purchase and sale for a strata unit where the developer had not set a completion date. The contract set the completion date as 14 days after the developer provided notice that the applicable strata plan had been registered and the city had issued a provisional occupancy permit. The contract further provided that if the developer did not set a specific completion date by the "Cancellation Date," initially defined as January 31, 2022, the buyer could cancel the contract and receive a refund of their deposit. Finally, the contract allowed the developer to unilaterally extend the Cancellation Date no more than twice for a period of six months each. The developer exercised that unilateral extension right the day the contract was made, by extending the Cancellation Date to July 31, 2022, and again on August 19, 2022 (after the first Cancellation Date had passed), extending the Cancellation Date to January 31, 2023.

The court held that the developer was entitled to extend the Cancellation Date as it had done, and the buyer was not entitled to cancel the purchase contract. The court rejected the buyer's argument that the developer could not extend the Cancellation Date for a second time after the first extension date (July 31, 2022) had passed. The court found that the contract would have had to be clear and specific about such a restriction in order to impose it on the developer. The relevant provision imposed two restrictions on the developer – the number of extensions allowed and the length of time of each extension – but not on the timing of exercising the extensions. Other provisions of the contract set specific dates by which the developer must exercise different rights under the contract, which the court said helped it interpret the specific clause in issue.

While it is sometimes assumed that the courts are more sympathetic to purchasers and stricter on developers, this case shows that where a contract's terms support it, the developer's interpretation sometimes takes precedence.

NOTABLE CONTRACT TERMS

While the standard form contracts of purchase and sale are an excellent starting point, almost every contract needs to be amended in order to properly reflect the parties' intentions and expectations. The following are some particular terms or categories of terms that licensees should be aware of so that they are able to properly use and interpret them for their clients, as appropriate.

Adverse clauses

When a licensee receives an offer or counteroffer from another party, that offer should be reviewed in detail, and in particular, to determine which clauses have been added or amended in a way that may not benefit the licensee's client. An offer, and therefore a contract, may include a term that not only benefits the other side of a transaction more than the licensee's client, but may in fact compromise the client's interest in some way. These are called "adverse clauses."

14 2022 BCSC 2063

When that is the case, it is critical that a licensee explain the effect of such a term so that the client can make an informed choice as to whether they want to accept it. For a variety of reasons, a client may choose to accept a term despite it being contrary to their interests in order to obtain another concession that is more important or to simply come to an agreement. However, they must do so on an informed basis, and it is the licensee's job to provide that information or to refer them to a legal or other professional if they are unsure or, for whatever reason, are unable to advise the client adequately in the circumstances.

Adverse clauses may or may not be specifically described as adverse to one party or another in the contract. This is one reason why a licensee must review each added term carefully and assess each term to determine whether they are helpful, harmful, or neutral to their client and advise their client accordingly.

Particular types of adverse clauses to look out for are:

- Responsibility to pay certain taxes or retain holdbacks to pay certain taxes;
- Changes to the standard form assignment provisions, including whether any notice of assignment is required and who is entitled to benefit from any profit earned on the assignment;
- Warranties sought or provided about the state of the property or any items located on the property at closing; and
- Responsibility to ensure that any licenses or ongoing permits applicable to the property are transferred to the buyer on closing.

This list is far from exhaustive, and licensees should take care to assess each clause individually to determine its impact on their client in the specific context of the contract in question.

Time of completion versus deposit of completion documents at the land title office

A recent Supreme Court of case[15] has highlighted a potential disconnect between the language of the standard form contracts of purchase and sale and current practice on closing of real estate transactions that is worthy of mention.

The parties of this case used a residential standard form contract of purchase and sale under which the sellers agreed to sell a property located in Abbotsford, B.C. to the buyer for $4,800,000. Section 11 of the standard form provides that the documents required to give effect to the contract "will be delivered in registrable form where necessary and will be lodged for registration in the appropriate Land Title Office by 4:00 p.m. on the Completion Date," ultimately defined in the contract as October 4, 2021. On the completion date, the buyer's lawyer filed a Form A transfer form in the land title office at 5:09 p.m., after he received confirmation that the buyer's lender had deposited the additional amount required to pay the purchase price in his trust account. It was admitted that the buyer did not have access to the funds required to complete until approximately 5:00 p.m. on the completion date, at which point the buyer's lawyer said that they would keep their office open so that the cheque could be picked up that evening. The lawyer did, however, request that the cheque not be deposited until the following day. Title was transferred to the buyer by the land title office on October 6, 2021.

The sellers claimed that the buyer had repudiated the contract of purchase and sale for having failed to pay the purchase price by 4:00 p.m. on the completion date and wanted title to the property transferred back to them. They tried to rely on the time is of the essence clause (Section 12 of the standard form contract). The buyer claimed that it was at all times willing and able to complete the sale and pointed out that there was a completion date in the contract but no specific completion time by which the buyer needed to tender funds.

15 2022 BCSC 1373

The court held that the buyer's interpretation was correct. Referring to Section 12 (requiring that the balance of any outstanding purchase price be paid "on or before the Completion Date") and Section 13 (the financing clause, allowing a buyer who is obtaining new mortgage financing, to hold back payment of the purchase price until title transfer documents have been registered in the land title office) of the standard form contract, the court said that the buyer had complied with the substance of its obligations, namely having obtained the funds to complete through financing and otherwise on or before the Completion Date. The court confirmed that, absent some clause to the contrary, on or before the Completion Date means on or before 11:59 p.m. It also held that the fact that the lawyer had requested the cheque not be deposited until the following day was not a breach of the obligation to pay because Section 10 of the standard form contract sets out a lawyer's trust cheque as being proper payment. The court made this finding in part because the code of conduct applicable to lawyers treats a lawyer's trust cheque as an undertaking that the cheque can be negotiated. The court specifically noted that if there was any confusion about whether a lawyer's trust cheque was an accepted and guaranteed form of payment, the real estate conveyancing system could not function and that was not a floodgate the court was willing to open.

The takeaway from this decision is for licensees to recognize that so long as the purchase funds are delivered by a form of payment contemplated in the contract of purchase and sale on or before 11:59 p.m. on the completion date, there is no time restriction on the payment of funds unless the parties have specifically imposed one by amending the standard form contract.

CONCLUSION

For many of your clients, real estate represents the largest investment they will ever make. Therefore, taking care to make sure that the contracts dealing with that real estate are clear, correct, and comply with the clients' current wishes is a critical component of your job as a licensee. This module should assist you in identifying some specific contract issues to be aware of that will serve your clients, and you, well.

Module Eight: Taxes

Taxation of real property is extremely complex. Buyers, sellers, and owners often turn to real estate professionals, including licensees, for advice. Through this module, licensees should understand the basics of real estate taxation to identify issues and refer clients to the appropriate professional when necessary.

This module is broken into two sections. The first section discusses the transactional taxes – i.e. taxes triggered when buying, selling, or otherwise transferring interests in real property. The second section discusses the annual taxes property owners may owe – especially relating to vacancy taxes. To conclude, the module briefly discusses the various anti-avoidance rules in tax law and the transparency registers in British Columbia ("B.C.") and how they impact taxes.

LEARNING OBJECTIVES

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

1. Identify the basic transactional taxes that apply to buying, selling, or otherwise transferring interests in real property;
2. Identify common audit targets and mistakes relating to taxes on real estate transactions;
3. Understand the annual ownership taxes associated with real property; and
4. Understand at a high level the complex tax reporting regimes and some ownership transparency rules in B.C.

08

TAXES ON REAL ESTATE TRANSACTIONS

Most real estate transactions are subject to taxes. The most common are goods and services tax ("GST") and property transfer tax ("PTT").

In recent years, governments at all levels are adding new taxes on real estate transactions to reduce speculation and inflated residential real estate prices. Measures such as the additional property transfer tax, also known as the foreign buyers' tax ("FBT"), and "anti-flipping rules" are government attempts to address the lack of affordable housing.

Goods and Services Tax

GST is a federal tax on the purchase of goods and services. The current GST rate is five per cent of the purchase price. By default, GST applies to all real estate transactions, including sales, leases, and assignment contracts. However, the purchase of real estate, also referred to as real property, is often exempt from GST in cases of "used" residential housing. GST is often an after-thought in the sale or purchase of a home. But forgetting to account for GST could easily create a $75,000 tax liability on a $1.5 million real estate transaction.

Overview of GST

GST is imposed under Part IX of the *Excise Tax Act* ("ETA").[1] It is designed to apply to every transaction unless there is an exemption. Thus, licensees should assume that any transfer of real property, or interest in real property, is subject to GST unless specifically exempt.

"Real property" includes any interest in real property. For example, co-ownership of houses, leasehold interests, a licence to use real property, and interests in condominiums acquired at a pre-sale are all real property for GST purposes.

Schedule V of the ETA provides a list of exempt supplies. The most commonly used exemptions include:

- Residential real estate sold by a person that is not a "builder," as defined (this is commonly referred to as the "used" housing exemption);
- Ground leases; and
- Sales of non-commercial or vacant land by individuals and personal trusts.

This section on GST elaborates on the "used housing" exemption and the "vacant land" exemption later in this module.

Who Pays and Who Collects

In GST-applicable transactions, the buyer or recipient usually has the obligation to pay GST. However, usually the person reporting and sending the GST to the Canada Revenue Agency ("CRA") is the seller. Licensees should remember that even though the obligation to pay the GST is usually on the buyer, the CRA can pursue a seller for failing to charge GST and force the seller to pay. Therefore, correctly identifying whether a sale or transfer of real property is subject to GST is just as important for the seller as it is for the buyer.

When dealing with non-residential property, sellers generally can leave the GST reporting and remittance to CRA to the buyer if the buyer is registered for GST and provides the seller with the buyer's GST registration number. There are certain template forms that licensees, notaries, and non-tax lawyers often use that refer to this as an "exemption" for the seller. Licensees (especially those acting for buyers) should remember that in this situation, strictly speaking, no exemption applies. Rather, the seller is simply relieved from collecting GST from the buyer because the buyer takes on the responsibility for reporting and paying the tax directly to the CRA. The vast majority of time, if the seller is relieved from collecting the GST, they will also not be held liable if the buyer fails to pay GST. It is only in very unique circumstances where a seller could potentially be liable for a buyer's failure to pay GST where the seller has relieved themselves of the obligation to collect.

1 RSC 1985, c E-15

When dealing with residential property, the seller can still leave the GST reporting and remittance obligation to the buyer unless the buyer is an individual. If the buyer is an individual, even if they are registered for GST and provide the seller with a GST registration number, the seller must still collect GST from the buyer if the transaction is taxable.

Sellers are also not liable to collect and remit GST where they are a non-resident of Canada for tax purposes. Rather, it is up to a buyer to report and remit any applicable GST to the CRA.

What is Residential Property?

Identifying what constitutes "residential property" is crucial for GST purposes. Not only does the type of property affect who reports and remits the tax to the CRA, some exemptions only apply to residential property.

There are several definitions relating to residential property in the ETA. These definitions are complex and are beyond the scope of what licensees need to know. What licensees should remember, however, is that just because a property looks residential, it does not mean that the property is treated as such for GST purposes. Residential property excludes properties like hotels, motels, and short-term rental properties. A single detached home or condominium used as a short-term rental may be a commercial-use property.

The Used Housing Exemption and Rules for Builders

As noted earlier, all sales of real property are taxable by default. One of the most commonly relied upon exemptions is colloquially referred to as the "used housing" exemption. This nickname is a misnomer. Used housing can still be subject to GST. Instead, the rule is that the supply of a home is exempt from GST where the seller is not a builder (as defined in the ETA).

Though the definition of builder is very long, at a high level a builder is someone who:

- Holds an interest in real property while it is being constructed or substantially renovated; or
- Holds full or part ownership in a newly constructed or substantially renovated home before it is first occupied.

It does not include an individual who is not acting in the course of business or in an adventure in the nature of trade – e.g. an individual who intends to use the property personally or in other non-commercial ways.

There are additional rules for strata complexes that will not be discussed here as they are too complex.

Licensees should understand that a newly built property can be exempt from GST. In theory, someone who sells a new home that they had planned to live in but sold due to a change in personal circumstance would not be a builder and would not be required to charge GST on the sale of the home.

However, where a licensee is assisting a client who asserts that no GST applies to the sale of their new home, the licensee should alert the client that sales of new properties are frequently selected for audit by the CRA. The licensee should recommend that the client obtain legal advice before entering into a binding contract of purchase and sale.

The licensee should also be aware of and alert the client that a seller of a new home could have income tax consequences on top of GST. Notably, sales of personal use homes are either entirely exempt from income tax or are subject to a more favourable amount of income tax. However, where a new home is sold there is a risk that the CRA could view the sale as part of a business and adjust the seller's income so that the net proceeds are entirely taxable for income tax purposes.

Finally, licensees should be aware that on a new or substantially renovated residential property, GST does not necessarily apply at the time of sale. If the seller is a builder and if the new property was occupied after construction or renovation completion by the seller, a family member, or even a tenant, then GST technically applies on the fair market value of the property at the time the first individual moved into the new property. Therefore, where a seller has had someone living in their property and the seller is a builder, the seller may already have a GST liability and should seek advice on how to manage this tax liability.

Vacant Land Exemption

Another exemption commonly relied upon is the one for "vacant land." Technically, the exemption applies to more than just vacant land. However, the exemption is most often relied upon where the land is vacant.

The seller must meet certain requirements before claiming this exemption. Again, the rules are complex but at a high level the:

- Seller must be an individual, a personal trust, or an estate;
- Property cannot have been used in a business;
- Seller must not have subdivided the property;
- Property cannot be residential property; and
- Seller must not be a person in the business of buying and selling real property (this excludes the business of acting as a licensee).

Licensees should advise clients to obtain legal advice with respect to claiming any exemptions.

Assignment Sales

Previously, assignment of pre-sale contracts for stratas or new houses were treated similarly to sales of new homes. Whether the assignment was subject to GST depended on whether the seller was an individual who intended the property for a non-commercial use.

Starting in 2022, the GST rules were amended so that all assignments are taxable. It no longer matters whether the assignor is an individual who intended to use the property personally; no exemption applies. Often, the assignor will have paid a deposit to the developer. Assignees will therefore need to reimburse the assignor for those deposits paid. The CRA has long taken the position that reimbursements of deposits from assignee to assignor are subject to GST. The new rules stipulate that if these reimbursement amounts are clearly identified in the assignment contract, the reimbursement amounts will not be subject to GST.

Licensees should advise clients to obtain legal advice with respect to the drafting of the tax clauses and assignment contracts.

Common Audit Targets

The CRA frequently audits real estate transactions with respect to GST. Below are two of the most common audit targets.

- House flips: CRA may suspect that a person should have charged GST on the sale of residential property because the person sold the property too soon after it was built.
- Fair market value fights over new housing: As discussed above, in some instances GST can be due when someone moves into a newly built or substantially renovated property (instead of at the time of sale). There is no "sale price" upon which to calculate the GST. Therefore, the value used to calculate GST is the "fair market value" of the property at the time the first individual moves in. Different valuators can come up with different fair market values. The CRA may not agree with the value that the owner chooses to use. Often, the CRA valuates the property to have a much higher fair market value, thereby increasing the GST owing.

Property Transfer Tax

PTT is a tax that is generally payable on the registration of certain interests in real property registered at the land title office ("LTO") payable by the buyer/transferee. Such a transfer is also known as a taxable transaction in the *Property Transfer Tax Act* ("PTTA").[2] Taxable transactions include much more than just sales of real property. The Province's website contains a high level summary of the types of taxable transactions. Any time any kind of interest in real property will be registered with the LTO, a licensee should alert the client to consider whether there are PTT consequences.

Rate

The amount of PTT payable is calculated by taking the fair market value of the transfer (which can be, though is not always, the purchase price) and applying the appropriate rate. The rate of PTT follows the following formula:

- One per cent on the first $200,000;
- Two per cent on the fair market value greater than $200,000 and up to $2 million;
- Three per cent on the fair market value greater than $2 million; and
- If a property is residential, a further two per cent tax on the fair market value amount above $3 million.

For example, on a $4 million residential home, the PTT payable is $118,000: $2,000 on the first $200,000; $36,000 on the next $1.8 million; $60,000 on the remaining $2 million; and an extra $20,000 on the $1 million above the $3 million mark.

Licensees should not advise clients on how to avoid or reduce the amount of PTT payable. Doing so may lead to disciplinary actions. In a consent order published on December 9, 2020, the licensee, among other improper conduct, failed to act honestly and with reasonable care when she advised a buyer that they could exempt themselves of PTT if they paid $42,000 directly to the seller (instead of through the home sale) so that the purchase price would remain below the PTT threshold. The licensee also did not advise the seller and/or buyer to seek independent legal advice with respect to this PTT arrangement. The discipline committee suspended the licensee for 60 days, issued a $7,500 penalty and $1,500 in enforcement expenses, and required the licensee to complete an ethics course.[3]

If a client is interested in learning more about the PTT, the licensee should refer the client to a tax professional.

Fair Market Value

As noted already, PTT is calculated based upon the fair market value of the transaction registered at the LTO. Fair market value generally refers to the amount that would have been paid had the property been sold in an open market. In practice, this usually means the final price in the contract of purchase and sale. However, uncertainty over fair market value can occur in various scenarios including the following:

- Completion date is long after the date the contract of purchase and sale is signed; and
- Sales that are not listed on the open market (e.g. closed market transactions and private sales).

In these situations, the licensee should alert the client to consider seeking professional advice with respect to valuating the property.

2 RSBC 1996 c 378
3 2020 CanLii 95982 (BC REC) W.E.G., Representative, RE/MAX Camosun, Victoria | BCFSA

Filing Obligation and Commonly Used Exemptions

The buyer or transferee must file a PTT return when they register their interest in the property. Buyers who qualify for an exemption must still file a PTT return. Buyers who do not qualify for an exemption also have to pay the tax at this time.

There are several exemptions, partial exemptions, rebates, and refunds available for PTT, including:

- First time homebuyer exemption and refund;
- Exemptions for purpose built housing;
- Transfers between family members for certain kinds of property; and
- Subdivisions and consolidations.

Licensees should advise clients to seek professional advice on whether certain exemptions, rebates, or refunds are available. Licensees should also alert clients that refunds entail paying the tax first before filing for a refund, and to advise clients to discuss with a tax professional to better understand any refund or rebate application process.

Common Audit Targets

Licensees should be aware that the Province of British Columbia commonly audits transfers in three situations:

- Improper exemption claims;
- Disagreement on reported fair market value of property; and
- Avoidance transactions (this is discussed separately later in this module).

Accordingly, licensees should never advise clients on how to claim exemptions, pay less PTT, or how to avoid PTT.

Foreign Buyers Tax

In addition to the regular PTT, the PTTA imposes an additional tax, commonly known as the foreign buyer tax ("FBT"), on transfers of residential property to foreign buyers in certain areas of B.C. The FBT is one of the Province's attempts to address inflated home prices in B.C.

As of February 21, 2018, the FBT rate is 20 per cent of the fair market value of a foreign transferee's interest in the purchased property. Like the regular PTT, FBT is payable upon property registration at the LTO.

When Does the Tax Apply?

FBT applies where three conditions are met.

1. The property being transferred is residential property – which generally means class 1 property for BC Assessment purposes.
2. The property is situated in one of the prescribed areas in B.C.
3. The transferee is a foreign entity, meaning:

a) A foreign national – an individual who is not a Canadian citizen or permanent resident;

b) A foreign corporation – generally meaning a corporation that is not incorporated in Canada or is controlled by a foreign national or another corporation not incorporated in Canada; or

c) A taxable trustee – an entity who is a foreign national or foreign corporation, or is holding interest in the property for one or more foreign nationals or foreign corporations.

The definitions of foreign corporation and taxable trustee are complex. Licensees should refer the client to a tax professional whenever there is any possibility of FBT applying because there is some foreign entity involved in the transaction.

Common Mistakes

Due to the extremely high rate of FBT, licensees must be exceptionally careful when assisting clients who are non-Canadian. Some of the most common mistakes that are made in relation to the FBT are as follows:

- Not recognizing that property is residential: A buyer can intend to build a commercial complex on the purchased land, or the property can appear to be used for commercial purposes at the time of purchase. But if the property is class 1 property for BC Assessment purposes, FBT will apply regardless of the property's use or intended use.
- Relying on Social Insurance Number ("SIN") as proof of immigration status: There is an incorrect belief that a SIN number is enough to prove that a transferee is not a foreign national. This is not true. Passports and permanent residency cards are the appropriate documents to check and rely upon.
- Using tax residency instead of immigration status: The definition of foreign national is based on immigration status, not tax residency. A transferee that is a Canadian tax resident but not a Canadian citizen or permanent resident is still subject to the FBT.

Prohibition on the Purchase of Residential Property by Non-Canadians

Though this module focuses on taxes, licensees should be aware that the federal government has prohibited non-Canadians from purchasing residential Canadian real estate as of January 1, 2023.[4] The ban is planned to last until 2025. This is yet another reason why licensees must be exceptionally careful when assisting clients who could potentially be considered as being non-Canadian or foreign clients. The licensee should advise the client to obtain legal advice.

Income Tax Anti-Flipping Rules

A full discussion of when real property is subject to income tax is beyond the scope of this module. But one rule that licensees should understand is the new anti-flipping rule,[5] which applies to residential properties sales as of January 1, 2023.

A flipped property refers to a housing unit owned by the seller for less than 365 days prior to the sale. Under the new anti-flipping rules, a "flipped property" sold at a gain is deemed to give rise to business income. This means the net proceeds of sale are fully included in the seller's income for the relevant tax year. The seller does not benefit from capital gains treatment on the sale, where only 50 per cent of the net proceeds are included in the seller's income from the year. This also means sellers cannot claim the principal residence exemption on properties subject to this anti-flipping rule.

The anti-flipping rule is subject to some exemptions such as sales due to death of the owner or related persons, or a breakdown of a marriage.

As with all taxes, under no circumstance should licensees be advising clients on the income tax implications of disposing of interests in real property.

4 Prohibition on the Purchase of Residential Property by Non-Canadians Act – Frequently asked questions | CMHC (cmhc-schl.gc.ca)
5 See the Canada.ca website for more information: Residential Property Flipping Rule - Canada.ca

ANNUAL TAXES ON REAL ESTATE

In recent years, several tax measures have been implemented with the goal of combating real estate speculation and "underused housing." All levels of government have introduced tax measures to address home affordability. These taxes apply only to residential property and are "annual taxes" in the sense that owners may be liable to pay the tax each year unless an exemption applies. There are three such taxes.

1. The City of Vancouver vacancy tax, also known as the empty homes tax ("EHT");
2. The B.C. speculation and vacancy tax ("SVT"); and
3. The federal underused housing tax ("UHT").

Though similar in concept, the rules on application for each tax are very different.

City of Vancouver Empty Homes Tax

EHT was introduced by the City of Vancouver via the *Vacancy Tax By-Law No. 16774*. As of 2023, it imposes a five per cent levy on a residential property's assessed value (as determined by BC Assessment) where a home in Vancouver is unoccupied for six months of the year, unless exempt. For 2021 and 2022, the tax rate was three per cent.

Summary of Scope of EHT

EHT only applies to residential property in the City of Vancouver. Properties occupied as a principal residence or tenanted under long-term tenancies for at least six months of the year are not subject to EHT. Short-term rentals do not count as "occupancy" for EHT purposes. Occupancy for non-residential purposes (e.g. usage as office space) likewise do not count as occupancy.

Filing Requirements

All residential property owners in the City of Vancouver receive a declaration form from the City in December of each year. This form must be completed and returned to the City by a certain date the following year. Otherwise, the property owner could face fines up to $10,000 in addition to applicable vacancy taxes. False declarations also trigger this fine.

Common Exemptions

There are a handful of exemptions available for the EHT, including exemptions for death of the registered owner, for properties under construction/major renovation, and for instances where the last occupants are residing in a hospital or care facility. All of these exemptions come with specific and detailed requirements. Licensees should also refer clients to a tax professional if asked about an exemption.

British Columbia Speculation and Vacancy Tax

The Province introduced SVT in 2018. SVT is similar to EHT. It is an annual tax payable by a registered owner of a residential property, and the tax is payable unless the owner is exempt. A property occupied for at least 180 days of the year generally exempt an owner – whether the owner themselves reside there or a tenant. Other exemptions are explained below. SVT is implemented and governed by the *Speculation and Vacancy Tax Act*.[6]

Summary of Scope

The rate of SVT applicable depends on an owner's residency and immigration status. At a high level:

- Canadian citizens and permanent residents who are tax residents, and whose spouses are also tax residents, are subject to a tax rate of one-half of a percent;
- Everyone else is subject to a two percent tax rate; and
- Owners who do not file an SVT declaration when required are automatically subject to the two percent tax rate.

The exact rules on determining tax rate are complex. The above notes are provided as a general reference guide.

6 SBC 2018 c 46

SVT is calculated on the assessed value of the property on July 1 of the relevant year (per BC Assessment). The tax is then levied on December 31 and due the following July 1. Where there are multiple owners, each owner bears the tax for their respective interest in the property.

SVT does not target all homes in British Columbia. It only applies to certain regions, as set out on the Province's website.

Filing Requirements

An annual declaration letter is mailed to owners of residential property each January with respect to the prior year. The declaration letter lists all the owner's properties in the taxable regions in that prior year. If a property has multiple owners who own the property together, multiple declarations must be filed. These declarations must be filed online or by phone by March 31 and payment of SVT is due in July, if applicable.

Common Exemptions

There are several SVT exemptions. Two types of exemptions most commonly relied upon are for principal residences and rentals. There are several types of principal residence exemptions and rental exemptions, and each exemption comes with different requirements. Many of the exemptions are only available to certain types of owners. For example, non-resident owners generally are more restricted on who they can rent to. Licensees should not assume that just because property is occupied, it is exempt from SVT.

Other exemptions from SVT are similar to the EHT exemptions such as death, illness, or a major home renovation or redevelopment.

Underused Housing Tax

UHT is a new federal tax similar in concept to EHT and SVT. It came into force January 1, 2022, through the *Underused Housing Tax Act*.[7]

Summary of Scope

The UHT is one percent of 1) where an election is made, the fair market value of a property or 2) the greater of the assessed value or last sale price. The tax is levied on anyone who owns a residential property (subject to applicable exemptions or exclusions) on December 31 of the relevant year.

Filing Requirements

Excluded owners (as defined in the law) do not have filing obligations. They are excluded from the tax. Excluded owner includes:

- Canadian citizens and permanent residents (except to the extent their interest in the property is part of a partnership or trust);
- A corporation incorporated in Canada or a Canadian province with shares listed on a Canadian stock exchange;
- Trustees of mutual fund trusts, real estate investment trusts, and specified investment flow-through trusts;
- Registered charities; and
- Cooperative housing corporations, hospital authorities, municipalities, public colleges, school authorities, or universities.

Owners who are not excluded owners are subject to the UHT unless an exemption applies. They must file a UHT return for each residential property owned in Canada. They must file the return on or before April 30th of the following year and pay any tax owed at this time too. Failing to file the return when required will result in penalties.

7 SC 2022, c 5, Section 10

Common Exemptions

Like the EHT and SVT, there are exemptions from UHT for primary residences and tenanted properties. In all cases, the occupancy must be for at least 180 days per year and the occupancy must be for continuous periods of at least one month. As with all tax statutes, whether these exemptions are available depend upon the owner and the owner's relation to the occupant, amongst other factors. Licensees should not assume an exemption applies just because the property is occupied.

There are numerous other exemptions, such as where a property is newly constructed or where an owner has passed away in the relevant year.

DUE DILIGENCE CHECKS

All tax authorities have expansive tax collection and enforcement powers, some broader than others. For instance, the Minister of National Revenue may freeze bank accounts and register liens on properties to collect federal taxes. Likewise, since the EHT is a levy on the property, not the owner, a buyer could purchase a property and inherit the seller's outstanding EHT liabilities. The City of Vancouver may register liens to enforce the EHT. Though SVT liability does not run with the land (meaning the tax liability technically sticks to the owner, not the property), the Province can still register liens on the property.

While the client's conveyancing lawyer or notary public may conduct due diligence checks at closing, a licensee should consider advising the client to obtain professional advice if one of these taxes appears to be a concern.

ANTI-AVOIDANCE RULES

Anti-avoidance rules are in several taxing statutes of Canada and B.C. These provisions prevent persons from creating transactions or schemes solely to receive a tax benefit, such as avoiding, reducing, or deferring tax or increasing a refund or rebate amount.

These rules specifically target transactions that are inconsistent with the "spirit or intent" of the respective act. One can find these provisions in the *Property Transfer Tax Act*, *Underused Housing Tax Act*, *Excise Tax Act*, *Speculation and Vacancy Tax Act*, and *Income Tax Act*.[8] At the moment, the City of Vancouver's vacancy bylaws do not have anti-avoidance rules.

8 RSC, 1985, c 1 (5th Supp)

TRANSPARENCY REGISTERS

In recent years, the Province has established some registries to create transparency around ownership of corporations and real property with the purpose of gathering information to, amongst other things, combat money laundering and other illicit activities. Some of them focus on real estate ownership.

Land Owner Transparency Registry

One of these registries is the Land Owner Transparency Registry ("LOTR"). It contains information about individuals who have an indirect interest in land owned through trusts, corporations, or partnerships. Ownership information is posted on a searchable, public database unless an extraneous circumstance requires that the information not be posted (usually due to safety concerns). Generally, a new transparency report must be filed whenever ownership changes, or when entities indirectly holding an interest in the property change.

The LOTR is governed by the *Land Owner Transparency Act*,[9] which is an extremely complicated piece of legislation. When confronted with a LOTR issue, the licensee should advise the client to seek legal assistance. This remains true with many legal issues that real estate professionals come across. Licensees have been disciplined in the past for not referring clients to independent legal advice when the facts of the situation suggested that they should have done so.

Property Transfer Tax Information Collection Regulations

Before the LOTR was introduced, B.C. had already enacted regulations to collect information about owners. Since September 17, 2018, certain corporations and trusts that acquire property must disclose additional information on their PTT returns. The information includes the identity of any individual with "significant interest" in properties held through a corporation or trust.

Tax Implications of Registries

These registries generally disclose information about the interest holders in real property, such as tax residency status and citizenship. The registries can be used to generate audit leads for tax authorities. For example, suppose an individual claims a principal residence exemption for SVT but declares themself to be a non-resident of Canada in one of the registries – this is a clear red flag that indicates to a provincial auditor that the person may have incorrectly claimed the exemption.

CONCLUSION

This module's main takeaway is that tax is a complex subject. Licensees should be aware of and be able to identify tax issues that clients may have relating to real estate. But when such issues arise, licensees should avoid providing tax advice and refer clients to the appropriate professional instead.

9 SBC 2019 c 23

Module Nine: Commercial Transactions and Contract Issues

This module discusses select issues regarding commercial real property transactions and contracts of purchase and sale for commercial real property transactions.

LEARNING OBJECTIVES

After completing this module, you will be able to:

1. Distinguish between registered, legal, and beneficial ownership of real property;
2. Understand how to use a non-binding letter of intent as a negotiation tool;
3. Distinguish between different types of commercial real estate transactions and understand special considerations applicable to each type, including appropriate contract forms; and
4. Identify some risks and issues that often arise in commercial real estate transactions.

09

INTRODUCTION

This module discusses select topics and issues that may arise for licensees involved in commercial real estate transactions, namely: legal and beneficial ownership; letters of intent; commercial real property transactions versus corporate and business transactions; small versus large commercial real estate transactions; representations and warranties in purchase agreements; environmental considerations; purchase price, adjustments, and disbursements; and the use of checklists. Commercial licensees should be well versed in each of these areas in order to appropriately manage their professional obligations and advise their clients.

LEGAL AND BENEFICIAL OWNERSHIP

In British Columbia ("B.C."), it is common for commercial real estate to be held in a trust arrangement. In very basic terms, a trust is a legal relationship that is established when one person (including a legal entity such as a company) holds an asset for the benefit of another person. In doing so, overall ownership of the asset is split into two distinct forms of ownership: legal and beneficial. The person who holds legal title to the asset is referred to as a "trustee" or "legal owner" and the person who is entitled to the beneficial interest in the asset is referred to as a "beneficiary" or "beneficial owner." In the case of real property, the legal owner or trustee will also be the registered owner shown on the certificate of title for the property. The beneficial owner will not show as a registered owner on title.

Bare Trusts

In the commercial real estate context, real property is often held in a "bare trust." The term "bare trust" refers to a trust in which the trustee has no authority to act except at the direction of the beneficial owner. A trustee that holds real property pursuant to a bare trust may be referred to as a "bare trustee." Without the express direction and consent of the beneficial owner, the bare trustee cannot enter into any agreements respecting the property (e.g. purchase agreements, mortgages, leases, or service contracts) or transfer or otherwise deal with the property. This is in contrast to other types of trust, such as family trusts used for estate and tax planning purposes, where the trustee typically has certain powers to manage and deal with the assets that it holds for the trust.

There are various reasons why commercial real property might be held in a bare trust. Some of the most common reasons are as follows:

- Ownership of commercial real estate is often structured using limited partnerships. However, partnerships do not have legal capacity to hold a registered interest in real estate. Accordingly, the partnership's real property must be held either by one or more of its partners (such as the general partner that is responsible for the management of the limited partnership) or by a bare trustee on behalf of the partnership.
- When a registered interest in real property is transferred, this typically results in property transfer tax being assessed on the fair market value of the transferred property interest. If the property is held by a bare trustee, the sale of the property may be structured as a transfer of the shares of the corporate bare trustee rather than a transfer of registered title to the property (i.e. after closing, the bare trustee will remain the registered owner, but will hold the property in trust for the new buyer, who will also likely be the new owner of the shares of the corporate bare trustee). Under the current law, a sale of the share of the bare trustee would not incur property transfer tax. Note that members of the Provincial government have indicated that these types of transactions may become subject to property transfer tax in the future. Licensees acting for buyers in these transactions should advise their clients to obtain legal advice.
- Similar to the above, using a bare trustee to hold title may allow more flexibility to reorganize the ownership structure without incurring property transfer tax under the current law. This would occur, for example, in changes of investors or transferring the asset between related or affiliated companies for tax or accounting reasons.
- Using a bare trustee may help to keep the true ownership of the property confidential, though this may be less effective given the implementation of the *Land Owner Transparency Act* ("LOTA").[1]

1 SBC 2019, c 23

Determining if a Property is Held in Trust

Licensees should be aware that neither a title search nor a search of the Land Owner Transparency Register ("LOTR") will necessarily confirm whether a property is held in trust. Often, the seller's document disclosures and representations and warranties under the purchase agreement are the only way to determine whether the property is held in trust.

If the trust is registered on title, the registered owner information on title will show the words "IN TRUST" and a reference to the registration number of the legal document that establishes the trust (sometimes referred to as a settlement or declaration of trust). That said, it is relatively uncommon for the trust to be registered on title, particularly in the case of a bare trust, as registration of a trust may trigger property transfer tax obligations that may otherwise not be payable.

It is not appropriate to rely on a search of the LOTR as a means of determining the beneficial owner of a property for a number of reasons, including the following:

- While an LOTR search may identify certain individuals with an indirect interest in the property, these individuals are not necessarily beneficial owners of the property in the true legal sense.
- Unlike the land title registry, the LOTR is not a definitive registry of interests in land. It relies on self-reporting by owners, which may be incomplete, incorrect, or omitted altogether. Additionally, the administrator is required to obscure certain information from the public, such as information about minors or incapacitated persons.
- The interest holders disclosed in LOTR can only be individuals, whereas the beneficial owner of real property is often a company or other legal entity. A search of LOTR does not disclose information about any corporate or other intermediaries between the registered owner and any interest holders and does not explain the nature of an interest holder's interest in the property.

In light of the above, licensees acting for buyers should ensure that the purchase agreement contains representations and warranties of the seller confirming the ownership structure of the property.

Implications of a Trust for the Purchase Agreement and Transaction

If the real property being sold is held in a trust, the beneficial owner should typically be the seller under the purchase agreement. There are a number of reasons for this, including the following:

- All of the value is in the beneficial interest and the beneficial owner should receive the net sale proceeds. The legal interest held by the trustee has only nominal value (e.g. $1.00);
- The beneficial owner may hold assets that are included in the transaction, such as personal property, leases and service agreements, and warranties, permits, and licences applicable to the property, and as such would be required to execute any transfer documentation with respect to those assets;
- The beneficial owner may be in possession of property documents that should be included in the seller's due diligence deliveries and disclosed to the buyer; and
- The beneficial owner should be bound to the representations and warranties of the seller under the purchase agreement.

The purchase agreement may also name both the registered owner and the beneficial owner as sellers. Regardless, the contract should be reviewed in its entirety by legal counsel to ensure that the seller's obligations are allocated appropriately between the legal and beneficial owners and that the closing procedures are appropriate for the transaction. Different closing documents may be required where property is held in trust, such as an unregistered transfer of the beneficial interest which may accompany a Form A Transfer in respect of the legal interest.

LETTERS OF INTENT

Drafting an offer to purchase or a purchase and sale agreement for commercial real property can be a complex, time-consuming, and expensive process. There is no one-size-fits-all purchase agreement form for commercial real estate transactions in British Columbia. While the British Columbia Real Estate Association ("BCREA")/Canadian Bar Association B.C. Branch ("CBABC") standard form of Contract of Purchase and Sale for Commercial Real Estate may be a useful starting point for simple commercial real estate transactions, custom templates are more often used for larger or more complex transactions.

A letter of intent is a useful tool to help a buyer and seller of commercial real estate agree in principle on the key business terms of the transaction before proceeding to the contract drafting stage. The letter of intent can serve as a summary of the parties' general understanding of key deal points, without all the extra detail and legal terms typically included in a formal purchase agreement. The letter of intent also often sets out the basic process that the parties will follow to negotiate the formal purchase agreement, including timelines to prepare the first draft and negotiate the final agreement. The settled letter of intent then serves as a roadmap for drafting the formal purchase agreement.

The following are some of the key terms that are often included in a letter of intent:

- A description of the parties, the property (including any non-real property assets included in the transaction), the purchase price and the deposit structure;
- A general summary of any conditions precedent in favour of the buyer and the seller, and the time periods applicable to these conditions;
- The completion date or how the completion date will be determined;
- A description of the process for drafting and negotiating the formal purchase agreement, including timelines and who will be responsible for preparing the first draft;
- A description of the buyer's access and inspection rights;
- A general summary of the due diligence deliveries to be provided by the seller;
- Details of the buyer's assignment rights, if any, together with a statement that any profit arising from an assignment will be to the benefit of the seller, if applicable; and
- A general summary of any other deal terms that are critical to either party's decision to proceed with the transaction.

Ensuring the Letter of Intent is Non-Binding

The summary of business terms in a letter of intent should be non-binding, meaning that they are not a contract and do not impose legal obligations on the buyer or seller. Licensees should be aware that simply calling the document a "letter of intent" or "non-binding letter of intent" is not sufficient to make it non-binding. Special legal language is required to accomplish this. Courts will look at the substance of the document and may find that it constitutes a binding contract if it does not contain appropriate legal language to confirm that it is non-binding.[2]

The danger here is that if the letter of intent is in fact a binding contract, and the parties ultimately fail to agree on the terms of a formal purchase agreement that is supposed to follow the letter of intent, then either the buyer or the seller could require the other party to complete the transaction on the basis of the terms set out in the letter of intent without the benefit of the more detailed provisions that would typically be included in the final purchase agreement. Given this, licensees should always advise their clients to obtain legal advice before signing a letter of intent; in particular to ensure that any terms that the parties intend to be non-binding are in fact non-binding.

As additional protection, it is also useful to provide that the letter of intent will automatically terminate if the parties have not entered into a formal purchase agreement by a certain date.

2 See 2018 BCSC 1821 (CanLII) and 2022 BCSC 1416 (CanLII)

Intentionally Binding Terms in a Letter of Intent

Notwithstanding that letters of intent are typically intended to be non-binding, there are some terms commonly found in a letter of intent that the buyer and seller might intend to be legally binding, such as:

- **Confidentiality provisions,** which may provide that the parties will not disclose the terms of the letter of intent (subject to standard exceptions) or make any public announcements about the proposed transaction.
- **Exclusivity and non-solicitation provisions,** which may provide that the seller will not engage in discussions or enter into any other agreements regarding the sale of the property with third parties for a defined period of time (for example, while the letter of intent is in effect).
- **Terms respecting the negotiation process,** such as the obligation of the buyer to have its legal counsel prepare a draft purchase agreement within a certain time period, and the parties' obligation to negotiate the terms of the formal purchase agreement in good faith for a defined period of time.

The letter of intent should clearly state that these terms are legally binding on the parties, notwithstanding that the rest of the letter of intent is not. Licensees should advise their clients to obtain legal advice to ensure the terms the parties intend to be binding are binding, and vice versa.

COMMERCIAL REAL PROPERTY TRANSACTIONS VS. CORPORATE AND BUSINESS TRANSACTIONS

Some commercial real estate transactions involve the purchase and sale of only real property and related assets, while others also involve the purchase and sale of business assets and/or corporate shares. Licensees should be able to distinguish between these different types of transactions, in part to help determine what form of contract is appropriate in the circumstances. Additionally, licensees should understand that they are not licensed or professionally qualified to provide advice regarding business assets or shares. Whether acting for a buyer or a seller, licensees should ensure that legal counsel is involved from the outset in any transaction involving business assets or shares.

Transactions Involving Only Real Property and Related Assets

A commercial real estate transaction may involve the purchase and sale of the following:

- Real property that is zoned and used for a commercial use; and
- Real property that is zoned and used for residential purposes, but is acquired for a commercial purpose, such as an assembly of residential properties for development purposes or the purchase of a residential apartment building as an income property.

In either case, the types of transactions described above might include other assets that are integral to the property, such as tools and equipment used in the maintenance and operation of the property and the benefit of existing leases and service contracts.

Under the *Real Estate Services Act* ("RESA"),[3] licensees are licensed to provide trading services in respect of these types of transactions. In particular, licensees can provide professional advice regarding the property and any leases. Licensees should nevertheless recommend that their clients obtain legal advice regarding any legal issues relating to the transaction or the assets.

3 SBC 2019 c 23

In most of the scenarios described earlier in this section, the BCREA/CBABC standard form Contract of Purchase and Sale for Commercial Real Estate may be used as a starting point (but note that for an assembly of residential lots, the BCREA/CBABC standard form residential Contract of Purchase and Sale may be more appropriate as a starting point, since this is in essence not a commercial acquisition but a purchase of two or more individual residential lots). However, licensees should be aware that this contract form contains only basic terms and typically requires extensive customization in the form of schedules or additional terms. For more complicated or high-value transactions, a brokerage's or a lawyer's form of purchase agreement for commercial property may be a better starting point.

Transactions Involving Business Assets or Shares

Other transactions may be centred around or involve the types of real estate described above, but also have elements of corporate and/or business transactions. For example, further distinctions may be drawn between purchase and sale transactions involving the following types of property:

- Real property forming part of the assets of an active business, together with other tangible and/or intangible personal property used in the business (e.g. equipment, inventory, customer lists, branding, and other intellectual property);
- Shares in a company that holds real property as a bare trustee; and
- Shares in a company that holds real property (and potentially other assets) in the course of operating an active business.

Share transactions are popular because they may result in tax advantages to the seller and, under the current law, the buyer does not need to pay property transfer tax when acquiring ownership of a company that holds real property. Licensees should advise their clients to obtain advice from legal and tax advisors in respect of the potential tax implications of any such transaction, including with respect to any potential change of tax laws prior to completion.

It is not uncommon for the real property holdings of a business to be its most valuable asset, so it can be tempting to treat a corporate or business acquisition with a real property component as a real estate transaction. However, doing so may result in serious liabilities for the parties to the transaction and disciplinary action for the licensees involved. Licensees are not professionally qualified or licensed to provide advice regarding business assets or shares and should ensure that both the buyer and the seller are represented by legal counsel right from the outset of any transaction with these elements. However, licensees may provide professional advice with respect to any real property or leases forming part of these transactions, but must ensure that they are limiting their advice to these matters and are not providing advice with respect to the shares or business assets.

The first of the three types of transactions listed above involves the sale of real property together with business assets, without any transfer of shares. The BCREA/CBABC standard form Contract of Purchase and Sale for Business Assets may be an appropriate starting point for a transaction of this nature. For complex or high-value transactions, a lawyer's form of asset purchase agreement may be a better starting point.

The second and third of the three types of transactions listed above involve a share purchase. In these cases, the buyer is acquiring ownership of the company that owns the real property and assets, rather than directly purchasing the assets themselves. There is no BCREA/CBABC standard form contract for transactions involving a share purchase, as licensees should not be involved in documenting these transactions. These contracts should only be prepared by legal counsel. Licensees may provide professional advice with respect to any real property or leases forming part of these share transactions, but should ensure that both the buyer and the seller are represented by legal counsel right from the outset.

SMALL VS. LARGE COMMERCIAL REAL PROPERTY TRANSACTIONS

While the distinction between "small" and "large" transactions is arbitrary and will vary between different markets, in this section a "large" transaction refers to a transaction that has a higher dollar value or level of complexity than the average transaction typically undertaken by a licensee or their brokerage. Large transactions are often good for business, as they may come with more prestige and financial reward. However, licensees should remember that large transactions also come with greater risks and potential liabilities for the licensees involved, as well as their clients and their brokerages.

Small and large transactions share much in the way of process, though larger transactions will often have longer time periods, more detailed purchase agreements, more due diligence requirements, and potentially more complex issues for the parties to address leading up to completion. As a result, more involvement from consultants and professional advisors may be needed, and licensees should advise their clients to establish their team of advisors early in the process. In particular, licensees should advise their clients to involve legal counsel throughout any negotiation and drafting of the letter of intent (if applicable) and the purchase agreement.

Professionals learn by taking on new challenges outside of their comfort zones; however, before pushing those boundaries, licensees should ensure that they have a professional support network in place, including practice advisors, mentors, senior brokers, and managing brokers. Wherever possible, licensees should work alongside senior brokers to gain experience with large transactions before taking a leading role themselves.

Licensees should always speak with their managing brokers before taking on deals that are larger than their usual transactions or that are larger than the typical transactions run through their brokerage. Licensees should ask their managing broker(s) about the insurance coverage in place to cover them and their brokerage in the case of errors, omissions, or professional negligence, and should ensure that the policy limits are adequate in the circumstances.

REPRESENTATIONS AND WARRANTIES IN PURCHASE AGREEMENTS

In general terms, representations and warranties are statements of fact made by one contract party to another. They can be oral or in writing and might be made during the course of negotiating a deal or included as terms in a contract. For example, the seller may make representations and warranties to the buyer about the condition of the property or the absence of various circumstances that might negatively affect the property or the transaction.

If a representation or warranty turns out to be false, the benefiting party may be entitled to legal remedies against the party that made the false statement. While representations and warranties may provide some protection to buyers against undisclosed liabilities, they are not a substitute for thorough due diligence on the part of the buyer. The process for claiming legal remedies against the seller may be expensive and time-consuming, and there is never any guarantee that the seller will have any funds available to satisfy a legal judgement in favour of the buyer.

Contracts will contain different representations and warranties depending on the type of transaction, the nature of the property and other assets included in the sale, the specific concerns of the parties, and the current market, among other things. Licensees should advise their clients to seek legal advice to determine which representations and warranties are appropriate in the circumstances.

Considerations for Buyers vs. Sellers

Buyers will typically want extensive representations and warranties about the seller, the property, and any other assets that are included in the transaction. Sellers will usually want to limit the representations and warranties, either by deleting some of them altogether or by qualifying them (e.g. "to the best of the seller's knowledge"). Sellers should also ensure that the purchase agreement contains an "entire agreement" clause stating that the seller is only giving the representations and warranties that are included in the purchase agreement (rather than representations and warranties that might have been made during the course of negotiations leading up to the purchase agreement, including in any letter of intent).

Unless expressly provided for in the purchase agreement, representations and warranties may expire on completion of the transaction, leaving the buyer without recourse for a breach. To prevent this, the purchase agreement should state that the representations and warranties "survive" and do not "merge" on completion. Sellers may want to limit the survival period to a specific time-period (e.g. one year) after completion, after which the buyer will no longer be entitled to recourse for the seller's breach.

Sellers may also want to specifically limit the amount of any claims arising from a breach of representations and warranties. Sellers may consider including a cap on the maximum damages that the buyer would be entitled to for a seller breach. Additionally, the purchase agreement may provide that the buyer's aggregate claims must exceed a certain dollar amount before the buyer can bring a claim against the seller. This prevents nuisance claims for small amounts of money arising from minor breaches.

When acting for buyers, licensees should advise their clients to obtain legal advice to ensure that the purchase agreement contains representations and warranties that are appropriate to the specific transaction, address any specific concerns of the buyer, and survive for an appropriate period. Buyers should also understand any limitations on their ability to recover damages from the seller.

When acting for sellers, licenses should advise their clients not to make any representations or warranties that they know (or should know) are false or that they are unsure about. In some cases, the law may impose an obligation on the seller to investigate whether or not the statement is in fact true, even when the seller is only making a representation or warranty "to the best of its knowledge." Additionally, an "entire agreement" clause might not protect a seller that intentionally makes false representations to induce a buyer to enter into a contract.

Licensees should advise the seller to obtain legal advice about the representations and warranties that they are giving, including to ensure they are appropriate for the transaction and to understand the effect of any limitations or qualifications that the seller wants to apply and what obligations the seller may have to confirm the accuracy of the representations and warranties.

Consequences of Breach

If a seller makes a false representation or warranty, the buyer may be entitled to legal remedies. The nature and extent of these remedies may depend on whether the seller acted intentionally, the subject matter of the breached representation or warranty, the loss suffered by the buyer, and the specific terms of the purchase agreement. Usually, the buyer's remedy will be a claim for damages from the seller. As referenced earlier, it may not always be practical or even possible for the buyer to recover damages.

In some cases, the buyer may be entitled not to proceed with the transaction, but the circumstances in which this remedy is available are limited and may be difficult to establish. If the buyer wants the right to elect not to proceed with the purchase in the event of a breach of the seller's representations and warranties, then the buyer should ensure that the contract specifically provides for this, by way of a closing condition or termination right. Licensees should advise their clients to obtain legal advice about the rights and remedies available to them in the event of a seller's breach of its representations and warranties.

ENVIRONMENTAL CONSIDERATIONS

British Columbia's contaminated sites regime is primarily governed by the *Environmental Management Act* ("EMA")[4] and Contaminated Sites Regulation ("CSR").[5] Under the EMA, owners and occupants of a contaminated site may be required to remediate the property or they may be jointly and severally liable with past owners and occupants for the costs of remediation. Even directors and officers of a company that owns a contaminated site may be liable in some circumstances. The owners' or occupants' liability under the EMA does not end when they sell the property.

While environmental contamination may be more common at industrial sites or commercial sites used for activities involving contaminants, hazardous substances can exist on any type of property. Among other causes, contaminants may migrate underground from nearby contaminated sites. Under the EMA, even an innocent owner may be required to pay the costs of remediation up front, before trying to seek reimbursement from the actual polluter.

In light of this, prospective buyers should always satisfy themselves as to the environmental condition of the property before committing to purchasing the property. If the seller has a recent environmental report prepared by a qualified consultant, the buyer may be able to obtain a reliance letter from the consultant. A reliance letter allows the buyer to rely on the environmental report as though it had been prepared for them. In the absence of current environmental reports and reliance letters, licensees should advise their clients to consider engaging their own environmental consultant to prepare an environmental site assessment during the buyer's due diligence period.

Sellers should also be concerned about selling a contaminated site. Following the sale, the seller continues to be liable for remediation costs under the EMA, but loses any control over the remediation process and costs incurred. As a result, many sellers of a known contaminated site will want to remediate the contamination prior to the sale or require the buyer to remediate the site post-closing. In some cases, it will be more efficient for the buyer to perform the remediation, such as where the buyer wishes to redevelop the site and intends to remove soil as part of the redevelopment. The seller may wish to obtain some security from the buyer to ensure that it complies with its remediation obligations, such as a letter of credit or cash in escrow to cover the remediation costs if the buyer fails to remediate.

Disclosure Obligations

Under the EMA, a seller of commercial real property is required to provide a "site disclosure statement" (formerly a "site profile") to the prospective buyer if the seller knows, or reasonably should know, that the site has been used for a commercial or industrial use listed in Schedule 2 of the CSR. The site disclosure statement must include specific details of the industrial or commercial uses. Sellers should complete the site disclosure statement to the best of their ability or knowledge and must deliver it to the buyer at least 30 days before the transfer of the property or prior to entering into the purchase agreement, if it is entered less than 30 days before the completion date. That said, the buyer can waive their entitlement to a site disclosure statement, provided that they do so in writing. These waivers are often included in purchase agreements for commercial real estate.

4 SBC 2003, c 53
5 BC Reg 375/96

Even if the seller is not required to provide a site disclosure statement, the seller should not conceal known environmental issues from the buyer. Courts have made exceptions to the general rule of *caveat emptor* (or "buyer beware") where sellers have concealed the presence of contamination at the property.[6] Generally, *caveat emptor* provides that the seller is not responsible to the buyer for the condition of the property in the absence of a contractual or statutory obligation to the contrary. However, courts have allowed a purchaser's rescission of a purchase contract due to a seller's failure to disclose major defects. In other cases, purchasers have successfully made claims against sellers for knowing about latent defects and failing to disclose them. Sellers who actively conceal an environmental issue with the property while also representing that the issue does not exist may be liable for fraud. Accordingly, licensees should encourage sellers to fully disclose any known environmental issues to buyers and must never be complicit in concealing environmental liabilities from prospective buyers.

Representations, Warranties, Indemnities, and Releases

Purchase agreements for commercial real estate often contain representations, warranties, indemnities, and releases in respect of environmental contamination. The content of these terms will depend on how the buyer and the seller decide to allocate risk for environmental issues amongst themselves.

On the one hand, the buyer will typically want representations and warranties from the seller that the property is in compliance with all applicable environmental laws and that there are no hazardous substances or other environmental issues at the property. The buyer may also request an indemnity from the seller against any third-party claims in connection with environmental issues at the property (for example, claims by subsequent owners). On the other hand, the seller may want to sell the property "as is, where is" without any representations or warranties about the environmental condition of the property. The seller may also request a release of any claims the buyer may have against the seller for the environmental condition of the property, together with an indemnity from the buyer against any third-party claims in connection with environmental issues at the property. Following negotiations, the parties may land somewhere in between these two extremes.

It is important to remember that these contracts only affect the parties' obligations to each other and do not change the parties' liability for environmental issues under the EMA. Additionally, indemnities are only as good as the party giving them, and may be of no value if the indemnifying party ceases to exist or has no funds to fulfill its obligations.

6 *See CRF Holdings Ltd v Fundy Chemical International Ltd*, (1981) 33 BCLR 291

PURCHASE PRICE, ADJUSTMENTS, AND DISBURSEMENTS

The purchase price is an essential term of a purchase agreement and must be clear in order for the contract to be enforceable. This is not likely to be an issue in most purchase agreements, but may be a concern if the purchase price is not a specific amount but an amount to be determined at a later date. In that case, the method for determining the purchase price must be clearly set out in the purchase agreement.

It is also good practice to specify whether the purchase price includes or does not include applicable taxes. Applicable taxes usually include goods and services tax ("GST"), but may also include provincial sales tax ("PST") where some of the purchase price relates to assets other than real property. While there is a presumption at law that the buyer will pay GST if the contract does not indicate otherwise, it is better to ensure that this is clearly spelled out in the contract.

Licensees should not provide advice or opinions as to whether or not specific taxes apply but should advise their clients to seek tax advice from a lawyer or professional tax advisor. However, courts have found that licensees have a duty to advise their clients about the existence of taxes that may be applicable. For example, the courts have found that a licensee acting for a foreign buyer has a "clear and obvious duty" to advise their client about the existence of the foreign buyer tax.[7]

Allocation of the Purchase Price

In a commercial real estate transaction, the buyer and seller should determine how the purchase price is to be allocated among the lands, buildings, and other assets included in the purchase price. This allocation can affect the tax treatment of the transaction and the buyer's subsequent accounting in respect of the property and assets. The allocation should be specified in the purchase agreement if it is agreed to before the parties sign. Often, the allocation is not known or cannot be agreed upon before the purchase agreement is signed. In this case, the contract should provide that the parties will use commercially reasonable efforts to agree on the allocation before the completion date, but that failure to agree will not affect the transaction. If the parties cannot agree, they should each be free to make their own allocations, subject to review by the Canada Revenue Agency.

Closing Funds and Net Sale Proceeds

As in a residential transaction, the purchase price in a commercial transaction is usually subject to closing adjustments, so the amount payable by the buyer to the seller on completion may be higher or lower than the purchase price under the purchase agreement.

Licensees acting for buyers should ensure that their clients are aware that the actual amount of funds required from the buyer on closing may be significantly higher than the purchase price under the contract. For example, funds required for closing may be increased by closing adjustments in favour of the seller, GST and/or PST payable to the seller, property transfer tax payable to the Ministry of Finance, legal fees payable to the buyer's lawyer and commissions payable to the buyer's licensees (if not paid by the seller).

7 See 2022 BCSC 183 (CanLII)

Where the buyer is relying on financing to fund part of the purchase price, the buyer should be aware that the lender may withhold significant amounts from the advance of loan proceeds to the buyer. Accordingly, the buyer may receive far less than the total amount of the loan commitment, which in turn increases the amount of the buyer's own funds that will be required for closing. For example, a lender may withhold commitment fees and other lender fees, mortgage broker fees, legal fees, disbursements such as insurance review fees, future property tax payments, and some or all of the interest payable during the term of the loan (usually called an "interest reserve"). Buyers should carefully review the commitment letter or loan agreement, as well as the lender's order to pay, to determine how much of the loan advance will actually be available to the buyer.

Licensees acting for sellers should ensure that their clients are aware that the actual amount of net sale proceeds received on closing may be significantly less than the purchase price under the contract. In addition to closing adjustments debited from the seller, the seller may have to pay legal fees, commissions, and other amounts on closing. The seller should ensure that sufficient proceeds will be available to pay out all financial encumbrances on title that are not being assumed by the buyer. Otherwise, the seller will need to make additional funds available to satisfy these liabilities on completion. Non-resident sellers should be aware that the buyer will be required to hold back 25 per cent or more of the purchase price until a clearance certificate is obtained from the Canada Revenue Agency.

USE OF CHECKLISTS

Commercial real estate transactions are complex and there are many things that a licensee needs to remember in order to properly represent a client. Checklists are a useful tool to help licensees organize their transactions. Brokerages often have template checklists to use as a starting point. Checklists can serve a number of purposes, including to provide a list of steps and actions that a licensee should fulfill, as well as to confirm advice given by the licensee and clients' instructions. It can be useful to have a written record of these matters so that licensees can ensure they are discharging their duties and also protecting themselves in the event of legal claims by their clients. However, checklists are not intended as a substitute for professional judgment nor as a mandatory guideline for appropriate practice. Each transaction comes with its own issues, some of which may not be captured in a checklist, so licensees should always think critically about the requirements of a given transaction and how to meet their professional obligations in the circumstances.

Module Ten: Due Diligence on Commercial Transactions

This module discusses the different areas of due diligence that typically form part of a commercial real property acquisition. This module does not deal with due diligence specific to a purchase of shares in a company that is the registered owner of real property.

LEARNING OBJECTIVES

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

1. Identify key components of the due diligence process, including title review, public off-title due diligence searches, property document review (including leases and service contracts), and physical investigations;
2. Understand some of the key concerns that buyers and their consultants should be on the lookout for when conducting due diligence;
3. Identify some important contract terms that help facilitate the due diligence process; and
4. Understand the licensee's role to facilitate the due diligence process.

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INTRODUCTION

At common law, the principle of *caveat emptor* (or "buyer beware") applies to real estate transactions. This means that in the absence of specific contractual, legislative, or other legal protections in favour of a buyer of real estate, the seller is not liable to the buyer for the condition of the property.[1] Additionally, a buyer may be assuming responsibility for liabilities associated with the property, such as liability for environmental contamination, upon becoming an owner. As a result, due diligence is an important part of any commercial real estate acquisition.

While representations, warranties, and indemnities given by a seller under a purchase agreement may go some way to protect a buyer against property liabilities, it is important to remember that the legal claim process can be expensive and time-consuming and there is no guarantee that a buyer will be able to recover its damages from the seller. Many commercial properties in British Columbia are held by special purpose entities ("SPE") incorporated for the sole purpose of holding title to the property. It is also uncommon in British Columbia for an SPE's obligations under a purchase agreement to be supported by a parent company guarantee or a personal indemnity from the principals of the seller. As a result, once the SPE's property is transferred to a buyer and the SPE has distributed the proceeds of sale to its shareholder(s), the SPE may have no assets left to satisfy a judgement in favour of the buyer. This emphasizes the need for buyers to conduct thorough pre-transaction due diligence wherever possible.

Licensees should have a strong understanding of the due diligence process in order to prepare their clients for this process and guide them through it. Licensees should be able to inform their clients as to the types of due diligence typically undertaken by buyers of commercial real estate and be prepared to advise their clients to obtain due diligence assistance from appropriate consultants. Commercial transactions can move quickly and the time for due diligence is often short, so it is important for licensees to be organized and ready to help their clients through this process in advance of condition waiver dates.

DUE DILIGENCE SEARCHES AND INVESTIGATIONS

In general terms, the purpose of the due diligence process is for the buyer to determine whether any circumstances exist that may negatively affect the value or use of the property or result in potential liabilities to the buyer, as well as to determine whether the acquisition of the property and use of the property for the buyer's intended purposes is feasible. This process may entail many different areas of review and involve professionals and other consultants from a variety of disciplines.

Specific due diligence requirements for commercial real estate will vary from transaction to transaction, but will usually include some or all of the following:

- Legal review of the title to the property, including all registered charges, liens and interests (also sometimes referred to as "encumbrances"), legal notations, and associated plans;
- Legal review of public off-title due diligence searches obtained from governmental and statutory authorities in respect of the property, any assets included in the transaction, and the seller;
- Review of documents and information disclosed by the seller in respect of the property;
- Investigation of the physical condition of the lands and any improvements, which may include building inspections and geotechnical and environmental studies, among other things; and
- Investigation of the feasibility of the transaction, including the buyer's ability to obtain financing and insurance and to use the property for the buyer's intended purpose (e.g. ensuring that the zoning allows the intended use and that any required permits can be obtained).

1 Note that *caveat emptor* does not apply where a seller has knowledge of a material latent defect (as defined at common law) and fails to disclose the defect to the buyer in writing before the buyer enters into the purchase agreement.

The level of due diligence required by a particular buyer will often depend on the buyer's risk tolerance, cost sensitivity, and comfort level with, or pre-existing knowledge of, the property. Some buyers will prefer to conduct thorough due diligence while others will be comfortable to proceed on the basis of limited investigations. Regardless, licensees representing buyers of commercial real estate should ensure that their clients have a general understanding of the types of due diligence investigations customarily undertaken in commercial real estate transactions and that completing a transaction without adequate due diligence may result in unexpected expenses and liabilities. Licensees should advise their clients to consult with legal counsel and other consultants to help their clients make educated decisions about the due diligence requirements for a given transaction.

Timelines for Due Diligence

Some due diligence searches and investigations can take weeks, if not months, to obtain or complete. Accordingly, it is important for buyers to ensure that they are allowed adequate time under the purchase agreement to complete their due diligence. As a general rule, a due diligence period of 60 to 90 days is often sufficient for a buyer to complete their due diligence. However, this depends on the circumstances and a shorter or longer due diligence period may be appropriate in some cases. For example, where environmental testing is required, a due diligence period of 90 days or more is likely appropriate. Ideally, the buyer's due diligence period should not commence until after the seller has waived or declared satisfied any conditions precedent in favour of the seller. Due diligence investigations can be costly, and the expense may be wasted if the seller ultimately decides not to proceed with the transaction.

When representing a buyer, a licensee should ensure that their client is aware of the potential consequences of proceeding with a short due diligence period. Licensees should also recommend that their clients ask any consultants involved in the due diligence process how much time is needed to complete their due diligence reports, to help the buyer determine how long of a due diligence period is needed in the circumstances.

Consultants

Prudent buyers will want to ensure that documents and other information about the property and included assets, as well as the results of due diligence searches and investigations, are reviewed by qualified professionals. Accordingly, proper due diligence may include a variety of professionals, such as: real estate licensees; accountants; tax advisors; mortgage brokers; bankers; appraisers; valuators; insurance brokers; architects; civil, mechanical, environmental, and geotechnical engineers and consultants; construction and development consultants; land surveyors; building inspectors; and lawyers. Real estate licensees should advise their clients to consult the appropriate professionals during the due diligence process, including to determine what due diligence is appropriate for a specific transaction. While licensees may see many different scenarios and gain experience in various areas of due diligence, licensees should not give advice that falls outside of their professional qualifications as this may result in liability and disciplinary action. Under Section 30(d) of the Real Estate Services Rules, licensees have a duty to advise their clients to seek independent professional advice on matters outside of the expertise of the licensee.

TITLE REVIEW

Title review is a critical component of due diligence for any real property purchase. Licensees should always review the title to confirm that the purchase agreement correctly identifies the registered owner and legal description of the property. Buyers should engage legal counsel to review and report on all legal notations, charges, liens, and interests registered on title, together with any associated plans, so that the buyer has a full understanding of the benefits attached to the title as well as any restrictions affecting the title (and, in the case of strata property, the common property of the strata corporation). Legal counsel can also advise on any statutory exceptions to title under Section 23 of the *Land Title Act*.[2]

As part of their sale preparations, sellers should also conduct a title review to ensure that any title registrations that will remain on title after completion are properly described as permitted encumbrances in the purchase agreement. Sellers should also be aware of any financial charges on title, such as mortgages, assignments of rents, and statutory liens (e.g. builders liens, tax liens, etc.), which the seller will be required to pay out and remove from title as part of the closing process. Additionally, some encumbrances may impose obligations on the seller in connection with a transfer of the property.

Survey Plan or Strata Plan

Buyers and their legal counsel should review the survey plan or plans of the property deposited in the land title office ("LTO") to ensure that the property location, area, and dimensions are as expected and that there is legal access to the property from public roads. If the property is a strata lot, then the boundaries and area of the property will be as shown on the strata plan registered in the LTO. The strata plan will also show any common property of the strata corporation and whether any of the common property is designated for the exclusive use of one or more of the strata lots in the strata plan.

Legal Notations

Legal notations are identified under the heading "Legal Notations" on a title search of the property. Legal notations provide notice of certain benefits or restrictions that may affect the property. Among other things, legal notations may provide notice that:

- The property benefits from an easement or restrictive covenant against another parcel of land;
- The property is subject to certain statutory requirements, such as building height restrictions under the *Aeronautics Act*;[3]
- The property is subject to certain statutory protections, such as restrictions on the registration of builders liens under the *Builders Lien Act*[4] if the unpaid services were performed at the request of a party other than the property owner (e.g. a tenant or other occupant of the property);
- There are municipal permits or bylaw variances affecting the property;
- There is a municipal housing agreement affecting the property, which may restrict its use to rental purposes (including below-market rental purposes); or
- There may be a registration in the Personal Property Registry under the *Personal Property Security Act*[5] that affects the property.

Unlike registered title encumbrances, registered legal notations may not contain full details of the benefit or restriction affecting the property. Additional documents may need to be obtained from the LTO, other registries, or municipal or other government offices in order to fully understand the impact to the property. Licensees should advise their clients to obtain legal advice regarding the effect of any legal notations on title.

2 For example: exceptions and reservations contained in the original grant or in any other grant or disposition from the Crown; the right of a person to show that all or a portion of the land is, by wrong description of boundaries or parcels, improperly included in the title; and, the right of a person deprived of land to show fraud, including forgery, in which the registered owner has participated in any degree.
3 RSC 1985, c A-2
4 RSBC 1996, c 41
5 RSBC 1996, c 359

Charges, Liens, and Interests

Registered title encumbrances are identified under the heading "Charges, Liens and Interests" on a title search of the property. Title due diligence should include a review of these encumbrances, as well as any encumbrances registered against other properties for the benefit of the property that is the subject of the proposed transaction. If the title notes that any registrations are pending (i.e. in the process of being registered), these should also be reviewed as they will affect the title once they reach final registration.

Title encumbrances should be reviewed by legal counsel to confirm which encumbrances are permitted encumbrances under the purchase agreement, as well as to determine the following:

- **Are there are any restrictions that might affect the buyer's use of the property?** For example, restrictive covenants may prohibit the use of the property for certain purposes, or prohibit the construction of improvements in certain areas of the property.
- **Do third parties have any rights to use or occupy any parts of the property?** For example, easements and statutory rights of way may permit third parties to use the entire property or a defined area for specific purposes, and leases and subleases may allow third parties to occupy all or part of the lands as tenants or subtenants. Note that leases and subleases are not always registered on title, so it is important that the buyer obtain copies of all leasing documents from the seller (discussed later).
- **Are there any positive obligations on the owner to do anything?** For example, covenants registered under Section 219 of the *Land Title Act*[6] may require the registered owner to build and maintain certain improvements, remediate contamination, maintain certain insurance policies, or perform other obligations. These covenants are often in favour of municipalities or other government bodies.
- **Do any third parties have any rights to acquire an interest in the property?** For example, an option to purchase or right of first refusal to purchase may entitle a third party to purchase the property, and an option to lease or right of first refusal to lease may entitle a third party to lease all or part of the property.
- **Are there any encumbrances that may restrict the transfer of the property?** For example, if a property is subject to a right of first refusal of a third party to purchase the property, a transfer of the property must be accompanied by a release or waiver of the right of first refusal. Otherwise, the LTO will not allow the property to be transferred.
- **Are there any financial encumbrances that will be discharged by the seller or assumed by the buyer?** Financial encumbrances, such as liens, mortgages, and assignments of rents, are usually required to be discharged by the seller on completion. However, if any financial charges are permitted encumbrances and will be assumed by the buyer, these should be identified and reviewed so that the buyer understands the financial obligations they will be assuming.

There are many types of title encumbrances and a wide range of terms. Accordingly, the above considerations are not necessarily exhaustive, as particular title registrations may raise unique issues that require a buyer's consideration. Such issues should be flagged by the buyer's legal counsel.

From the seller's point of view, it is important to note that some encumbrances[7] will provide that, in connection with any transfer of the property, the seller must obtain a contractual agreement from the new owner to be bound by the terms and conditions set out in the encumbrance. If this is the case, the seller should ensure that an assignment and assumption of permitted encumbrances, or such other form of document as may be required under the terms of the applicable encumbrance, is included in the closing document requirements under the purchase agreement.

6 RSBC 1996, c 250
7 For example, an easement that contains positive covenants.

PUBLIC OFF-TITLE DUE DILIGENCE SEARCHES

The public off-title due diligence process usually entails searches of the records and registries of various public bodies, such as federal and provincial government ministries and departments, municipalities, regional districts, authorities, administrative bodies, tribunals, and others. The purpose of off-title due diligence searches is typically to try to determine whether there are any outstanding liabilities associated with the property that might result in liens against the property or that might affect its value, as well as to determine whether there are any outstanding work orders affecting the property or any known non-compliance with municipal bylaws or statutory requirements. Additionally, searches against the seller may reveal issues that could prevent the seller from fulfilling its obligations under the contract (e.g. bankruptcy proceedings in respect of the seller or ongoing litigation in respect of the property).

There is a vast array of public due diligence searches available, not all of which will be necessary in all circumstances. Licensees should advise their clients to consult with legal counsel to determine which searches are appropriate in the circumstances. This will depend on a number of factors, including:

- The type of commercial property and the nature of the improvements, if any, on the property;
- The current and historical use of the property, including what types of businesses operate at the property, if any;
- The jurisdiction (e.g. municipality or regional district) in which the property is located; and
- The buyer's intended use of the property.

Some common off-title due diligence searches for a commercial real property acquisition include:

- **Corporate Registries:** to confirm that the parties to the transaction exist and are in good standing.
- **Personal Property Registry:** to determine whether any of the personal property (e.g. equipment and inventory) included in the transaction is collateral for any debt obligations of the seller.
- **Office of the Superintendent of Bankruptcy:** to determine whether any seller parties are subject to insolvency proceedings, which may affect their ability to transfer the property.
- **Workers' Compensation Board:** to determine whether any occupational health and safety violations are outstanding.
- **Property Tax:** to determine whether any property taxes or metered utilities are outstanding and to confirm the amount of the current levy.
- **BC Assessment Authority:** to determine the current assessed value and various other information about the property.
- **Contaminated Site Registry:** to determine whether the property has a record as a contaminated site. Note that the absence of a registration in the contaminated site registry does not mean that a property is not contaminated. Buyers should always consult with an environmental consultant to determine the environmental condition of the property.
- **Archaeology Branch:** to determine whether the property has been identified as a heritage or archaeological site by the Province.
- **B.C. and Federal Court Registries:** to determine if there is any litigation affecting the seller that might affect the seller's ability to transfer the property or disclose potential issues that might affect the value of the property.
- **B.C. Court Bailiffs:** to determine whether there are any outstanding writs of execution that might prevent the seller from transferring any personal property included in the transaction.

- **Municipal Zoning, Land Use, and Bylaw Compliance:** to obtain information about the current zoning of the property, whether the property is affected by an official community plan, the status of any permits issued in respect of the property, and whether there is any known non-compliance with municipal bylaws, among other things. The buyer should also review the zoning bylaw applicable to the property, to ensure that its intended use or development of the property is permitted under the existing zoning.
- **Fire Department:** to determine when the property was last inspected and whether there is any outstanding non-compliance with fire safety requirements.
- **Technical Safety BC:** to determine whether there are any permits issued, work orders outstanding or notices of violation with respect to electrical and gas systems, elevating devices (e.g. elevators) and boiler and pressure vessels at the property.
- **Health Department / Health Authority:** to determine whether there is any outstanding non-compliance with health requirements by a business that is subject to health inspections (for example, where there is a restaurant operating at the premises).

Some due diligence searches can only be obtained with the seller's written consent. The purchase agreement should require the seller to promptly provide a signed consent to authorize due diligence searches against the property, the seller and, if applicable, the title nominee / registered owner. Licensees can assist by facilitating timely signing of the due diligence consent and delivery of the same to the buyer's legal counsel.

PROPERTY DOCUMENTS

A purchase agreement for commercial real estate will typically require the seller to deliver or make available to the buyer a variety of documents and information about the property. The seller's due diligence deliveries will often include some or all of the following documents and information pertaining to the property and its operation and maintenance:

- Past and current financial statements and operating budgets;
- Tax notices and filings;
- Third party reports, including environmental reports, geotechnical reports, and any other reports about the condition of the property or improvements;
- Survey plans, architectural drawings, and as-built plans of improvements;
- Copies of the title and any registered and unregistered agreements affecting the property;
- A current rent roll and copies of all leases, subleases, offers to lease, licences, and other agreements allowing third parties to occupy or use any part of the property;
- Service contracts for the maintenance and operation of the property;
- A list of any personal property (sometimes referred to as "chattels") included in the transaction, including any equipment and/or inventory included in the transaction;
- Details of the seller's intellectual property rights, if any;
- Details of the seller's property and liability insurance;
- Copies of permits and warranties;
- Notices from and correspondence with municipal and other governmental and statutory authorities; and
- If the property is a strata lot, copies of the strata plan, bylaws, minutes of strata meetings (for the past several years), and copies of any parking and storage area leases or assignments.

A seller of commercial real estate is generally not required to provide any documentation with respect to the property unless specifically required under the contract. Accordingly, buyers should ensure that the purchase agreement requires full disclosure by the seller. A seller will usually want to limit these requirements to only documents within the seller's possession or control (e.g. documents in the possession of the seller's property manager). If the seller agrees to provide a certain document and fails to do so, they will be in breach of the purchase agreement.

There are certain instances where a seller of real property in a commercial context may be required under legislation to make disclosures to a buyer. For example:

- The seller may be required to provide a site disclosure statement (formerly called a "site profile") under Section 40(6) the *Environmental Management Act*.[8] There are certain exemptions to this requirement, including where the property is used primarily for residential purposes or the buyer has waived its entitlement to a site disclosure statement in writing. Purchase agreements for commercial real property often contain such a waiver.
- If the property falls under the definition of "development property" under the *Real Estate Development and Marketing Act*[9] and no applicable exemption to the disclosure statement requirement is available, then the seller cannot market the property without filing a disclosure statement and cannot enter into a purchase agreement without providing a copy of the disclosure statement to the prospective buyer. For example, if the property is a stratified apartment building with five or more strata lots, then the disclosure statement requirement is triggered even if the seller is not the original developer and the building is not a new build.

Licensees should advise their clients to consult with legal counsel to determine whether any statutory disclosure requirements are applicable in the context of a given transaction.

Listing agents can add value by helping their clients to understand what document deliveries are typically required for the type of transaction, and assisting their clients to assemble the documentation and make it available to prospective buyers (for example, by setting up a virtual data room). Additionally, it is helpful for listing agents to have a template form of non-disclosure agreement prepared by a lawyer and available for prospective buyers to sign. While commercial purchase agreements often contain confidentiality provisions, some document disclosure often happens before the purchase agreement is negotiated. A stand-alone non-disclosure agreement helps protect the seller's confidential information in these cases.

Licensees should also be aware that if the seller's disclosures include any personal information (e.g. with respect to employees, tenants, or otherwise), the disclosures must be made in compliance with applicable privacy legislation. Licensees should advise their clients to seek assistance from legal counsel prior to disclosing any third party personal information to a prospective buyer.

8 SBC 2003, c 53
9 SBC 2004, c 41

Leases

For tenanted properties, review of leases and tenant information is a key component of the due diligence process. Rental revenues from leases may determine, in part, the property value and the buyer's ability to obtain acquisition financing. Existing tenant obligations may also impact the buyer's intended use of the property. Poor leasing documentation and oral leases may create risks and uncertainties for a buyer.

A prudent buyer of a tenanted property will supplement its own review of any leases with a review by legal counsel. Additionally, licensees may be able to provide advice regarding the business terms of the existing leases and whether they meet or deviate from current market norms. Aside from identifying key business terms, the following are some of the key issues that should be considered in a lease review:

- **Essential Terms:** Are all of the essential terms of the lease, namely the lease parties, rent, premises and term, clearly identified in or determinable on the basis of the lease terms? If any are not, the lease may be unenforceable.
- **Illegal Subdivision:** Does the lease constitute an illegal subdivision under Section 73 of the *Land Title Act*? This may be the case if the leased premises include a portion of the lands outside of the building, such as a patio area, parking area, or a drive-thru. A lease of an entire parcel, a building or part of a building is not off-side, and granting rights to external areas by easement or licence is also acceptable. If the lease is off-side of Section 73, it is not registrable and may be unenforceable in some circumstances.
- **Landlord Financial Obligations:** Are there any outstanding financial obligations of the landlord to the tenant, including tenant inducements such as rent-free periods, improvement allowances or landlord work requirements?
- **Transfer Requirements:** Does the lease impose any requirements on the landlord in connection with a transfer of the lands? For example, is the new landlord required to enter into an agreement directly with the tenant?
- **Assignment Provisions:** Does the lease permit the tenant to assign its interest in the lease or sublet the premises? Is a change of control of the tenant permitted? Ideally, landlord consent should be required so that the landlord can exercise some control over who occupies the space and can try to ensure that the assignee or subtenant has the financial resources to pay rent, among other things.
- **Use Restrictions:** Does the lease place appropriate restrictions on the tenant's permitted use of the premises? In the absence of use restrictions, it may be difficult to prevent high-risk or nuisance-causing activities.
- **Estoppel Certificates:** Is the tenant required to provide an estoppel certificate on request? Estoppel certificates serve to confirm certain facts about the lease and the leasing arrangement. For example, the estoppel certificate might confirm that there are no outstanding tenant inducements. This prevents the tenant from later claiming that it is owed a tenant inducement. Tenant estoppel certificates may be a buyer or lender requirement in connection with a commercial property acquisition.
- **Extraordinary Tenant Rights:** Is the tenant entitled to any extraordinary rights? For example, is there an option or right of first refusal to lease additional premises, an option or right of first refusal to purchase the property, an early termination right, or a restrictive covenant that prohibits the landlord from leasing other nearby premises to certain types of businesses or for certain uses?
- **Integrity Issues / Unusual Provisions:** Are there any other issues that might affect the integrity of the lease or the landlord / tenant relationship? Are there any unusual provisions that might be cause for concern?

The purchase agreement should require the seller to provide the buyer with complete copies of all leases, subleases, and other documents entitling any party to occupy the premises, including any amendments and related notices (e.g. notices exercising renewal options). While some leases and subleases may be registered on title to the property, in many cases they are not registered and will only be available from the seller.

For a tenanted property, and especially a multi-tenanted property, the seller's due diligence deliveries should also include a current rent roll that summarizes key information about the tenancies at the property, including: address of premises (e.g. unit number), tenant name, current monthly rent, current additional rent, security deposit amount on hand, expiry date of current term, and details of renewal or extension rights. A rent roll is particularly important where some or all of the tenancies are oral (i.e. there is no written lease in place). Ideally, an updated rent roll should be provided in the month leading up to closing, as the information in the rent roll will assist the parties to prepare and review the statement of adjustments.

Where leases form part of the purchased assets, the purchase agreement should usually restrict the seller's ability to enter into new leases or amend or terminate existing leases without the buyer's consent. Any such changes could impact the viability of the acquisition for the buyer or impede its ability to obtain financing. The purchase agreement should also usually require the seller to use commercially reasonable efforts to obtain tenant estoppel certificates, to the extent these are required by the buyer or its lenders. As noted above, estoppel certificates are important tools to help confirm key details about the lease (e.g. rent amount, deposits, the absence of landlord default, or outstanding tenant inducements) and to prevent tenant claims against the buyer for unfulfilled obligations of the prior landlord.

Service Contracts

As mentioned above, the seller's due diligence deliveries may include copies of service contracts. Service contracts are typically understood to be contracts to which the seller is a party with respect to the operation or maintenance of the property. That said, the purchase agreement will likely provide a definition of "service contracts" and what is included. Some examples of potential service contracts are: property management agreements; maintenance agreements for elevators, HVAC, or other mechanical equipment; landscaping; garbage removal; janitorial; and, security services.

In a commercial real estate transaction, the buyer may be purchasing not only the real property, but also the benefit of some or all of the service contracts. Whether or not this applies in a given transaction will depend on the specifics of the purchase agreement. Typically, the buyer will be required to advise the seller by a certain date, such as the buyer's due diligence condition date, which service contracts the buyer wishes to assume. The seller should be required, under the purchase agreement, to terminate any service contracts not assumed by the buyer, prior to the completion date.

Service contracts are more likely to exist and to form part of the transaction for operationally complex properties. For example, for shopping centres, office buildings, and other multi-tenant premises, the landlord will often enter into service agreements with respect to the operation and maintenance of the building and common areas and facilities, and will charge back some or all of the costs associated with such services to the tenants. In other cases, the owner of a commercial property will not be party to any service contracts, either because none are required in connection with the management and operation of the property, or because one or more tenants is responsible to directly contract for any required services. For example, where a single tenant leases the whole of the property, it is not uncommon for the tenant to be responsible for its own service contracts in respect of the premises. A review of the applicable lease terms can usually confirm whether or not this is the case.

When reviewing service contracts, a buyer will typically want to consider:

- The nature of the services provided and whether the buyer needs or wants the ongoing benefits of such services after purchasing the property;
- The rights, obligations, and liabilities of the owner, including the cost of the services;
- Whether the service contract is assignable and whether the consent of the service provider or any third party is required for an assignment of the service contract; and
- The term and termination rights under the contract.

Assignment and Assumption Agreement

If leases or service contracts form part of the purchased assets, the closing documents for the transaction should include an assignment and assumption of the rights and obligations under the leases and service contracts. It is good practice to ensure that these documents are specifically listed as closing deliverables under the purchase agreement. It is also good practice to ensure that the assignment and assumption agreements contain an indemnity by the seller in favour of the buyer against any liabilities arising under the leases or service contracts before the completion date, and a corresponding indemnity by the buyer in favour of the seller against any liabilities arising under the leases or service contracts from and after the completion date.

PHYSICAL INVESTIGATIONS AND TESTING

A buyer's due diligence with respect to the physical condition of the property will usually, at minimum, involve a visual inspection of the property and any improvements on the site. The buyer may also wish to engage qualified professionals to conduct inspections and testing of the property, including to verify or update third party property condition reports received from the seller as part of the due diligence deliveries. For example, a buyer may wish to obtain some or all of the following:

- Building condition and inspection reports, which may alert the buyer to potentially expensive repair and maintenance obligations resulting from: the age of the building or defects in its construction; or non-compliance with building and fire codes;
- Hazardous materials reports, which may reveal the presence of hazardous building materials such as those containing asbestos;
- Surveys of the property and improvements, to confirm the property boundaries, the location of easement and rights of way, and the absence of building encroachments;
- Geotechnical reports, which may expose issues such as soil instability that may render it difficult, expensive, or even impossible to build on the site; and
- Environmental reports, such as:
    - A Phase I Environmental Site Assessment, which reviews existing environmental data about the property and identifies potential risks; or
    - A Phase II Environmental Site Assessment, which involves testing the property at strategic locations to try to determine whether any environmental contaminants are present on or migrating to or from the property, and the potential cost of remediating the same.

Since environmental liabilities can follow any owner or occupant of a property even after they cease to be an owner or occupant, many buyers will require up-to-date environmental reports. Additionally, lenders often require environmental reports as a condition of granting acquisition financing.

The investigations listed above may require not only inspections of the property, such as visual inspections or thermal imaging, but may also require more invasive or destructive activities such as drilling and sampling for laboratory analysis. In negotiating the purchase agreement, the buyer should therefore ensure that it secures sufficient access rights to permit these activities. Sellers, on the other hand, should be careful to protect themselves from liability, damage to the property, and unwanted activities being carried out at the property. Sellers of tenanted properties also need to ensure that the buyer's access and investigations do not contravene any tenant rights under their leases or otherwise. Some commonly negotiated limits on a buyer's access and inspection rights include:

- The buyer must indemnify the seller against any damage to the property or other loss resulting from the buyer's access;
- The buyer cannot conduct destructive or physical testing without the seller's prior consent;
- The buyer must give the seller advance notice prior to accessing the property;
- Access must be during the seller's normal business hours;
- Access is subject to the rights of tenants under any leases of the property;
- The buyer must obtain appropriate insurance coverage;
- The buyer must comply with the seller's site safety and security protocols;
- The seller may have a representative present during the buyer's access; and
- The buyer cannot speak with the seller's employees, tenants or other occupants of the property (e.g. where the proposed transaction is confidential).

CONCLUSION

After reviewing the content of this module, licensees should have a general understanding of some key areas of due diligence that often form part of commercial real estate transactions. While due diligence investigations will typically be carried out by the buyer and the buyer's consultants, licensees can add value by being knowledgeable about, preparing their clients for, and facilitating the due diligence process. Under Section 30(d) of the Real Estate Services Rules, licensees are required to advise their clients to seek independent professional advice on matters outside of the expertise of the licensee. Accordingly, licensees should keep due diligence requirements in mind at all stages of a commercial transaction and encourage their clients to seek timely advice from qualified professionals so that their clients can better understand the risks and liabilities that might arise in connection with their transactions.

Module Eleven: Climate Change and Natural Catastrophes

This module is based on a 2023 discussion paper issued by the BC Financial Services Authority ("BCFSA") entitled *Natural Catastrophes and Climate-Related Risks: Managing Uncertainty and Building Resilience in the B.C. Financial Services Sector*[1] ("discussion paper"). It outlines BCFSA's proposed approach towards natural catastrophes and climate-related risks ("NCCR"). BCFSA initiated a discussion with British Columbia's ("B.C.") financial services sector participants and those that depend on these organizations and individuals for services, and feedback was received at the end of November 2023.

NCCR poses risks to both the financial services sector and to consumers of that sector. In this module, we focus on two providers of services in the sector. The first are people and organizations licensed under the *Real Estate Services Act* ("RESA"). In this module, we refer to them collectively as "licensees." The second are people and organizations registered under the *Mortgage Brokers Act* ("MBA"). In this module, we refer to them collectively as "registrants." For ease of reference, we refer to licensees and registrants together as "service providers."

This module discusses how NCCR issues affect service providers. It also discusses how those issues will affect consumers. For purposes of this module, the term "consumer" is used to broadly refer to individuals using or thinking of using the services of a licensee or registrant.

1 Natural Catastrophes and Climate-Related Risks: Managing Uncertainty and Building Resilience in the B.C. Financial Services Sector

It is important for service providers to consider how to mitigate NCCR and how to put safeguards in place. This will help to guide service providers to identify and manage NCCR. This will be important for brokerages and service providers to consider and to implement in the competent provision of services to consumers.

This module will not make you a NCCR expert. It is intended as an introduction so that there is an increased awareness among service providers of the various issues and the risks involved. The questions at the end of this module do not require expert or prior knowledge. The classroom activities will further explore the topic and provide an open forum for discussion. As well, the classroom discussion will provide some more specific and relevant examples that will be of interest to service providers.

LEARNING OBJECTIVES

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

1. Consider how climate change and natural catastrophes may impact your business operations and governance and the possible steps that may be taken to mitigate NCCR;
2. Consider current and long-term NCCR and their impact on consumers and the products they purchase; and
3. Understand the importance of effectively disclosing possible NCCR and its effects on consumers and the products they purchase.

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NATURAL CATASTROPHES AND CLIMATE CHANGE

This module outlines how NCCR impacts and may pose a material risk to service providers and to consumers in B.C. The risks and impacts to service providers are driven by B.C.'s significant exposure to natural hazards, including flooding, heat waves, wildfires, wind, winter storms, and earthquakes. The level of risk is expected to increase with the growing frequency and severity of natural catastrophes resulting from climate change. Service providers will not only have to adapt to these changes but will increasingly be relied upon as a source of information, advice, products, and services that empower consumers to be better able to protect themselves and their assets. Although earthquakes are not a result of climate change, earthquakes have the potential to cause damages and disruption at a scale much larger than any climate-related natural catastrophes.

At the same time, meeting climate targets that have been set by the provincial and federal governments will lead to significant structural changes for the Canadian and global economies. This transition to a lower-emissions economy will be more challenging in countries like Canada that have large carbon-intensive sectors that could have a large impact on consumers for matters such as retrofits, building costs, and heating costs.

MITIGATING THE IMPACTS OF CLIMATE CHANGE

Given this assessment, BCFSA's position is that BCFSA should act to ensure its regulated entities and individuals exercise prudent risk management, and that they help ensure consumers are protected and continue to be treated fairly. BCFSA is aware that some service providers have implemented measures to mitigate the impacts of NCCR on their business and the consumers they serve. BCFSA encourages those service providers providing real estate and mortgage services to consider NCCR holistically, which means considering the impacts of NCCR on both their business and the consumers they serve, rather than considering each of these in isolation. BCFSA specifically considers the real estate market, given its outsized impact on B.C.'s economy and its importance to service providers and to consumers.

The module will discuss the complexity and uncertainty in identifying and measuring these impacts, in addition to the challenges communicating NCCR to consumers.

In the discussion paper BCFSA's proposed approach to climate change consists of two pillars. In advance of any specific direction from BCFSA, service providers may want to consider these pillars when addressing the risks of climate change:

1. Business Sustainability: Ensuring licensees and registrants identify, measure, and manage NCCR, commensurate with the level of risk to both their business and to consumers. This could include, for example:

- Strengthening brokerage governance requirements to ensure service providers are resilient to NCCR and that they can continue to provide products and services to their customers and clients through potential disruptions;

2. NCCR Disclosures to Clients: Ensure that when working with consumers, licensees and registrants give consumers sufficient information to understand the products and services they are being offered and/or have received. This could include, for example:

- Providing property-specific NCCR Disclosures: disclosures in relation to real estate for the purpose of improving consumers' awareness of the risks to them and their assets (e.g., homes and businesses) and ensuring they have the information they need to make informed decisions.

While the issues posed by NCCR require a "whole of society" approach, when working with consumers service providers can address the effects of climate change, mitigate risk, and build resilience. Service providers can provide valuable assistance to consumers by helping to ensure consumers have the information and advice required to make informed decisions about the property they may be buying or financing. What are the risks and how can the risk exposure be mitigated?

For example, as a strata manager, or a rental property manager, this may include directing the client to get appropriate advice from an insurance professional on how the property owners can protect their assets in the event of NCCR events.

AWARENESS OF CLIMATE CHANGE

As a service provider, it is important for you to understand how NCCR are material and why a comprehensive approach to mitigating climate risk for your business and for consumers is needed.

NCCR can directly affect consumers, particularly their most significant assets – their homes and businesses. Therefore, licensees and registrants have an important role to play, helping to ensure consumers are protected, and continue to be treated fairly. Once again, this includes ensuring consumers have the relevant information required to make informed decisions.

At its core, the approach to mitigating NCCR issues will require licensees and registrants to review how their business and the consumers they serve could be impacted by NCCR. This emphasizes the need for licensees and registrants to identify, measure, and manage material NCCR in a way that is proportionate to the risk posed to their business and to consumers. It also emphasizes the need for licensees to treat consumers fairly and to help ensure they have access to information, advice, and financial products and services that help protect them against NCCR.

RISK IDENTIFICATION

BCFSA has identified NCCR as a material and potentially systemic risk. As a risk-based regulator, BCFSA's focus is on ensuring that regulated individuals and entities exercise prudent risk management and help ensure consumers are protected and continue to be treated fairly.

Rather than representing a new type of risk to the financial services sector, NCCR may amplify conventional prudential risks, including credit, market, operational, reputational, liquidity, strategic, and insurance risks. This is consistent with the approach taken by the Task Force on Climate-Related Financial Disclosures. There is a similar approach with respect to market conduct risks. Although categories for market conduct risks are less developed internationally and nationally, NCCR amplify the importance that all consumers, including consumers of real estate and mortgage services, be treated fairly, primarily through increased transparency, and ensuring appropriate disclosures are made when selling, or considering product suitability and availability.

Physical Risk

B.C. is highly exposed to natural hazards including flooding, heat waves, wildfires, wind, winter storms, and earthquakes. It has experienced several natural catastrophes in recent years that have resulted in loss of human life, significant damage to physical assets, and disrupted economic activities.

Through their business operations, service providers may be directly or indirectly impacted by natural catastrophes. Property and casualty insurers are likely to see increased claims following a NCCR. Real estate consumers are exposed to the same events and have traditionally relied on financial services providers to help explain their exposure and assist in protecting them by providing information/resources to help mitigate risk.

With the increasing frequency and severity of natural catastrophes as a result of climate change, the level of risk is expected to increase.[2] The financial services sector, including licensees and registrants, will not only have to adapt to these changes, but will increasingly be relied upon as a source of information, advice, products, and services that help empower consumers to be better able to protect themselves and their assets.

The natural catastrophes of 2021 have demonstrated the impact that a changing climate can have on B.C. According to a November 2022 study from the Canadian Centre for Policy Alternatives that was commissioned by VanCity Credit Union, the 2021 June heat wave, summer wildfires, and the November floods resulted in between $10.6 billion - $17.1 billion in total economic losses.

Heat Wave: The heat wave that hit B.C. in June and July of 2021 is believed to have contributed to hundreds of sudden deaths. According to the BC Coroners Service, there were 619 heat-related deaths in the province during the week of the heat wave. The likelihood of such an event occurring was very low prior to 2021. This event was unprecedented in B.C.'s recorded history in terms of temperature and duration. According to the Insurance Bureau of Canada, the insured losses from the heat wave are estimated to be around $450 million. Total economic losses are expected to be much higher.

Wildfires: The wildfires that followed the June heat wave burned over 1.2 million hectares (3 million acres) of land and forced thousands of people to evacuate their homes. The likelihood of wildfires occurring in B.C. is high due to the province's dry climate and forested areas. The 2021 wildfires are among the largest and most destructive in B.C.'s history. Insured losses are estimated to be around $1.2 billion, including the June 30, 2021 wildfire that destroyed the town of Lytton ($102 million in insured losses) as well as the White Rock Lake wildfire on August 2, 2021 ($77 million in insured losses).

Floods: In November 2021, floods caused major damage to infrastructure and homes in B.C., and many communities were left without power and clean water. The insured losses from the floods are estimated to be around $675 million according to estimates from Catastrophe Indices and Quantification Inc. ("CatIQ"), with the total economic losses estimated to exceed $3 billion. The likelihood of flooding occurring in B.C. varies depending on the region, but it is generally considered to be moderate to high. The 2021 floods are among the most significant in B.C.'s history, particularly in terms of damage to infrastructure and disruption of communities.

2 Retrieved from IBC 2021 Fact Sheet: Whereas the average annual insured losses from natural catastrophes totaled $446 million between 1983 to 2009, the annual average increased to $2.0 billion in insured losses between 2010 to 2020 (author's calculations in 2020 dollars based on reported losses plus loss adjustment expenses; note, figures for 2019 and 2020 are preliminary estimates that include only the two largest events in the year and annual totals)

Overall, the 2021 natural catastrophes were unusual and historic in terms of their severity and impact. They serve as a reminder of the growing risks and challenges associated with climate change.

Service providers should review the certificate of title for the property being purchased or financed as there may be a restrictive covenant on title relating to flooding. The restrictive covenant may contain terms such as:

- The owner (the covenantor) acknowledges that the lands are within a designated flood plain;
- The owner accepts the risk of damage by flood water; and
- The owner will not make any claim against the covenantee (e.g. the City of Vancouver) for damages due to flooding.

Service providers should review "Items Affecting a Property" in the Knowledge Base. The issue of flood plains is discussed. Service providers may wish to review the topic of Floodplain Mapping on the B.C. Government website.

Earthquakes: Although earthquakes are not a result of climate change, some earthquakes could potentially cause damages and disruption at a scale much larger than any climate-related natural catastrophes.

Some earthquakes also pose a significant threat to the safety of B.C.'s financial sector and to B.C. residents. Several recent studies have estimated damages from a major earthquake approaching or exceeding $100 billion, which would far exceed the damages from any previous natural catastrophe in Canadian history.

An earthquake of this magnitude could result in significant damage to property and human life and poses a systemic risk to the financial system. It could trigger the default of multiple property and casualty insurance companies, potentially increase credit risk to lenders and lead to multiple failures. Consumers and businesses may have difficulty accessing funds and credit from lenders. It is estimated that economic growth would be significantly reduced following such an earthquake.

REAL ESTATE AS A FOCUS AREA

In addition to BCFSA's unique jurisdiction, given B.C.'s risk profile and the structural importance of real estate to the B.C. economy, impacts in this area could be particularly significant. The following are significant potential impacts BCFSA has identified:

- Property values could decrease (or increase) depending on exposure to natural hazards;
- The number of properties considered high(er) risk may increase due to changing climate conditions;
- Ongoing development in hazard prone areas is expected to put more homes in harm's way, which could further increase the number of consumers exposed to natural hazards (i.e., more homes in high-risk areas);
- Construction and reconstruction costs will likely increase over time;
- Insurance and reinsurance costs could increase (abruptly) to correspond to the increasing frequency, intensity, and severity of natural catastrophes;
- Insurers could restrict homeowners' insurance coverage in high-risk areas; and
- Lenders could restrict or place conditions on mortgages for higher risk properties.

Transition Risk

Transition risks are risks associated with transitioning to a lower carbon economy, such as current or future government policies to reduce emissions, technological advancements, and changes in investor or consumer sentiment. Transition risks could also affect the safety and soundness of real estate and mortgage finance in B.C. The B.C. and Canadian governments' legislative commitments to achieve net-zero greenhouse gas ("GHGs") emissions by 2050 and the transition to a lower-emissions economy could impact financial institutions with material exposures to carbon-intensive assets as well as building design and construction requirements. Misjudging of transition risks could expose financial institutions to sudden and large losses, with potential implications for financial viability.[3] Meeting climate targets will lead to significant structural changes for the Canadian and global economies, and this transition will be more challenging in countries like Canada that have large carbon-intensive sectors.

Information Gaps

High quality and accessible quantitative and qualitative information is required for BCFSA, service providers, and consumers to identify and measure NCCR.

BCFSA has identified five key data challenges to information related to NCCR. Regardless of these challenges service providers should still seek out the best available information.

1. **Availability:** Obtaining data on climate risks is challenging.

a) Data on physical hazards such as floods is often outdated and unavailable at sufficient granularity. For example, there is no currently consistent flood mapping available for all of B.C. as flood risk management is mostly done at the community level and hence flood maps are local;

b) Estimates of damages to buildings based on natural catastrophes are not publicly available;

c) Multi-hazard approaches need to be developed as buildings are often exposed to multiple hazards, such as floods, wildfires, and earthquakes; and

d) Emissions data needed to assess transition risk is difficult to obtain, particularly for small and medium-sized enterprises.

2. **Certainty:** There is a high degree of uncertainty regarding the timing and severity of natural catastrophes and the impact of changes at the global level on the local level. Additionally, both climate and earthquake risk models often rely on historical data to infer future risks. Historic events might not be a good predictor for future events.

3. **Standardization:** Lack of standardization of data creates challenges for comparing reporting of risk exposures of different financial services providers.

4. **Accessibility:** Service providers and government agencies could take additional steps to share data and information.

5. **Complexity:** Services providers need to translate NCCR data into information that the average person can understand. Insufficient understanding of NCCR data can lead consumers to be inadequately prepared for natural catastrophes, potentially resulting in financial and social impacts.

3 A recent pilot project led by the Bank of Canada and Office of the Superintendent of Financial Institutions on climate scenario analysis explored how different economic sectors are impacted by the transition to a low-carbon economy and the linkages to credit and market risk for financial institutions.

SUMMARY OF CLIMATE CHANGE AND RISK MITIGATION

In this changing environment, licensees and registrants will need to adapt products and services to address changing risks or to meet shifting consumer demand. The decisions to address NCCR, including changes to product and service offerings, will affect consumers. Making information available and understandable can empower consumers to make informed decisions regarding their exposure to NCCR.

Resilience in the face of NCCR

In becoming aware of how climate change can affect service providers, and the services they provide to consumers, you, as a licensee or registrant, have the opportunity to increase resilience in the face of NCCR.

Resilience refers to the capacity to withstand or to recover quickly from difficulties. For service providers this means:

- Ensuring the operational resilience (i.e., the ability to deliver critical operations through a temporary disruption) of your business and the ability to respond swiftly and efficiently to a natural catastrophe;
- Ensuring that as a business, you understand the impact of NCCR on your strategy and business model, and can respond to plausible but severe climate scenarios; and
- Consumer resilience is enhanced by ensuring consumers have access to information, advice, and services that can help them make good financial decisions and provide protection during a real estate transaction. This approach focuses on you as a service provider, prioritizing the fair treatment and best interests of consumers and how various NCCR issues can affect the property of interest, the transaction and any financing they may require.

In doing so, service providers may consider the two pillared approach previously presented in this module supporting the strategic imperatives of safety and soundness of brokerages and consumer protection.

The first pillar focuses on licensees and registrants identifying and managing NCCR, with the actions you take being commensurate with the risk posed to your customers. The second pillar highlights the responsibility all licensees have in ensuring consumers have sufficient understanding of the products and services they are receiving. This includes understanding how NCCR can impact the appropriateness of the offered products and services in meeting consumers' interests and needs.

Brokerage Governance

The first pillar recognizes that all service providers will be affected by NCCR. Service providers may address their business risk, in the short to medium term, by strengthening governance requirements, ensuring robust policies and procedures are maintained (see *The Managing Broker – Management and Supervision* module) so that they are prepared for potential disruptions to their operations because of NCCR and other material risks. BCFSA intends to engage with and support brokerages on these matters and will look for ways to leverage this work in the context of registrants.

Informing Clients and Consumers about NCCR

The second pillar emphasizes that licensees and registrants should provide information to consumers to enable them to make informed decisions with a focus on NCCR disclosures. Strata managers and rental property managers can play an important role directing their clients to an appropriate professional for the provision of relevant information to their clients.

Property-Specific NCCR Disclosures

Financial services providers (not limited to real estate licensees and mortgage brokers) are being called on to disclose to real estate consumers the potential impact from NCCR to their financial wellbeing and their property. Consumers may not be aware of the risk or ways they can work to mitigate impacts from these risks on their property.

The Canadian Climate Institute has found that Canadians are unknowingly buying and building homes and other infrastructure in areas at high risk of flooding, wildfires, and other climate change impacts.[4] Moreover, the products and services available to real estate consumers that can mitigate their financial risks are often complex, which may make it difficult for consumers to understand what they are being offered as well as what they have already purchased. This may result in consumers being inadequately protected from financial losses resulting from a climate-related natural catastrophe or an earthquake.

Service providers should consider appropriate use of "subject to" clauses to protect consumers potential financial losses. For example, the BCFSA Knowledge Base "Clauses" section has a clause providing that the purchase is "subject to the Buyer obtaining approval from a licensed insurer for property (including fire) and liability insurance for the Property on terms and rates satisfactory to the Buyer." It should be noted that even if appropriate coverage is available, the premium or deductible may not be affordable to a buyer.

BCFSA currently chairs the Canadian Council of Insurance Regulators' ("CCIR") working group on Climate Change, Natural Catastrophes, and Consumer Awareness. We led the development of CCIR's Position Paper on ways that insurers and insurance products can better protect Canadians' personal property against the risks posed by natural catastrophes and a changing climate.

Real estate consumers should have the information and advice they need to better understand the likelihood and extent to which a natural catastrophe like a flood, wildfire, or earthquake could impact the property they are buying and/or own. Service providers can provide expert knowledge on the products they provide and the services they offer as well as access to information about a consumer's risk profile, both of which may not be readily available and/or understandable to consumers. When working with a consumer, licensees should be aware of the importance of appropriate due diligence of the property related to NCCR and use of relevant clauses in a contract of purchase and sale.

While there is nothing specific relating to NCCR in the current Property Disclosure Statement ("PDS"), certain disclosures such as "Are you aware of any damage due to wind, fire or water" may point to a previous natural catastrophe. The PDS also provides that "the Buyer is urged to carefully inspect the Premises and if desired, to have the Premises inspected by a licensed inspection service of the Buyer's choice."

Access to NCCR data and information which can be facilitated through disclosures can assist consumers in making informed decisions when purchasing or leasing property, making investments in on-going property improvements, obtaining financing, or purchasing or renewing property insurance that provides adequate protection against NCCR. In addition, property-specific disclosures could include information about its carbon emissions and energy-efficiency and level of retrofit against flooding and earthquake. The PDS contains a disclosure relating to a current "EnerGuide for Houses" rating number.

4 Infrastructure-English-FINAL-jan17-2022.pdf (climatechoices.ca)

Registrants

BCFSA believes that it is prudent that all registrants should consider how physical risk could impact themselves and their customers over time. While the principles of identifying and measuring physical risks still apply to registrants, the actions that registrants are expected to take to manage risk should be commensurate with the risk. Registrants should take appropriate measures to ensure they can manage disruptions in their operations due to climate and/or seismic events. It is proposed that registrants could be called upon to disclose to customers a property's exposure to NCCR.

- What challenges do you foresee with registrants (including lenders) having to provide advice or disclosures based on property-specific NCCR disclosures?

Licensees

BCFSA believes that it is prudent that all licensees should consider how physical risk could impact themselves and their customers over time. While the principles of identifying and measuring physical risks still apply to licensees, the actions that real estate service providers are expected to take to manage risk should be commensurate with the risk, as their operations could be affected abruptly or over time due to climate and/or seismic events.

It is proposed that licensees would be called upon to disclose to customers a property's exposure to NCCR. They will also be expected to be knowledgeable about NCCR and financial services products that can help a customer better protect themselves.

- What challenges do you foresee with requiring licensees to disclose property NCCR risk, or the disclosures themselves?

CONCLUSION

Taking responsibility for climate change is everyone's responsibility. Across the globe we see real life examples of how NCCR can impact the individual and whole communities, destroying their homes and businesses. Licensees and registrants are in a unique position to help their customers mitigate the risk of climate change when obtaining financing, purchasing a property and, as applicable, the ongoing management of the property. Being aware of climate related issues and understanding your role in providing appropriate disclosures about the possible impacts of climate change on a property can go a long way to protecting consumers from serious impacts. As well, consumers can be protected from serious impacts by you having knowledge of a variety of products and services available depending on a particular climate impact or potential impacts and you giving appropriate advice. Beyond this module, much information is being developed on NCCR. BCFSA encourages you to use the resources provided as part of this module to further your own understanding about climate change and risks that affect both the broader community and the local community in which you live, work, and serve consumers.

Module Twelve: Indigenous Lands

This module introduces the issue of land management as reconciliation with Indigenous peoples. Licensees are increasingly likely to encounter transactions involving Indigenous Lands. This module will provide an overview of the different land management systems that licensees may come across when assisting with transactions relating to Indigenous Lands, whether those transactions involve trading services, rental property management, strata management, or mortgage broker services. This module describes the various land registries for Indian reserves, Modern Treaty First Nation lands, and other self-governing First Nation lands. It also highlights key considerations for licensees when assisting with transactions relating to Indigenous Lands.

The terms "Indigenous" and “Aboriginal” are often used interchangeably as collective names for the original peoples of North America and their descendants. Section 35 of the *Constitution Act, 1982* recognizes three groups of Indigenous peoples: Indians (more commonly referred to as First Nations), Inuit, and Métis.

From time immemorial, Indigenous peoples have lived on the lands that now form British Columbia. Indigenous communities assert that they hold title to their traditional lands, and the Supreme Court of Canada (“SCC”) has recognized the existence of “Aboriginal title.” In *Tsilhqot’in Nation v British Columbia*,[1] the SCC declared that the Tsilhqot’in had proven Aboriginal title to part of their traditional territory. That is a landmark decision: it is the first time a Canadian court has issued a declaration of Aboriginal title.

However, this module only addresses the following lands, which are subject to specific forms of Indigenous governance and where licensees need be aware of unique rules that apply to real estate transactions:

1. “Indian reserves” within the meaning of the *Indian Act*;
2. “First Nation land” meaning an Indian reserve where the Indian band has adopted a land code under the *First Nations Land Management Act*;
3. Land held in fee simple by a Modern Treaty Nation; and
4. Land subject to a self-government agreement.

1 2014 SCC 44

This module refers to those four types of lands as “Indigenous Lands.” Further, in this module, the terms “Indian” and “Indian band” have the meaning given to them in the *Indian Act*. The term “First Nation” refers to an Indian band that has adopted a land code under the *First Nations Land Management Act*. This use of terms is for convenience purposes only; to easily refer to and distinguish among those four types of land.

LEARNING OBJECTIVES

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

1. Identify if a transaction involves Indigenous Lands;
2. Understand the key differences, and the implications of those differences for a licensee, among the B.C. land title system and various Indigenous Lands registry systems;
3. Identify key contractual provisions to be explained, added to, or modified, in the British Columbia Real Estate Association (“BCREA”) and Canadian Bar Association BC Branch (“CBABC”) standard contracts of purchase and sale of a leasehold interest in First Nation reserve lands (and associated assignment of lease); and
4. Understand the registration processes and timelines, and their implications, when transferring or encumbering interests on Indigenous Lands.

Transactions involving Indigenous Lands can be complex. Issues may arise that a licensee would not encounter in other transactions. Licensees should not take on these transactions unless they have the appropriate expertise or have ready access to that expertise. Licensees should seek the advice of their managing broker or designated individual who may be able to provide support. The managing broker or designated individual may recommend that the transaction be referred to another licensee at that brokerage who is knowledgeable about these transactions and who can handle the transaction. The referring, inexperienced licensee could work in the background with the other licensee to gain experience. The managing broker or designated individual may refer the matter to another brokerage if they decide their brokerage does not have the expertise. If the licensee acts without the proper level of expertise, that could be an expensive and unfortunate choice for the licensee and the client.

LAND MANAGEMENT AS RECONCILIATION

"Reconciliation" is a term used so often by government it runs the risk of becoming a meaningless buzzword. What is reconciliation? The notion entered legal discourse in 1997 when then Chief Justice Lamer wrote in *Delgamuukw* (quoting from *Van der Peet*) that a basic purpose of Section 35(1) of the *Constitution Act, 1982* is "...the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown [because] ... Let us face it, we are all here to stay." Perhaps Chief Dr. Robert Joseph, OC, OBC, states it best: "Let us find a way to belong to this time and place together. Our future, and the well-being of all our children rests with the kind of relationships we build today."

The colonial legacy of dispossession, discrimination, and violence perpetrated against Canada's Indigenous peoples is too well documented to be denied. The land on which Canadians work and play, the institutions that provide public order, peace and safety, and the economy within which members of society earn a livelihood, all exist because of that legacy. Many people would rather ignore this history, claiming they had no part of it, yet the impacts of that legacy continue every day. If one were to develop a plan to destroy a people, it would include dispossessing those people from their lands and resources, confining them to the smallest, most unproductive areas; suppressing their language, spiritual beliefs, and social practices; denying them basic civil and social rights and privileges, along with their very dignity; and removing their children from their homes, intent in indoctrinating them in the ways of the dominant culture. As Sir John A. Macdonald, our first Prime Minister, once said, "I want to get rid of the Indian problem. ... Our objective is to continue until there is not an Indian that has not been absorbed into the body politic, and there is no Indian question, and no Indian Department..." Canadians are only beginning to understand the depth of the horror of Canada's Indian Residential School system, with its legacy of neglect, abuse, and thousands of unexplained deaths – of children. This is the toolkit of cultural genocide – this was Canada's playbook, the foundation of today's society, the ugly side of Canada's history many would prefer to ignore.

But it is increasngly difficult to ignore that legacy. Canada's Indigenous peoples make up only 4.5 per cent of the population, yet they represent 75 per cent of all arrests, 31 per cent of the prison population, 33 per cent of children in foster care, and 25 per cent of the urban population living in poverty. An Indigenous individual is twice as likely to be the victim of violent crime than a non-Indigenous individual. These are not historical statistics: this legacy has not gone away as we became more aware. Between 2009 and 2018 the overall prison population in Canada rose by only one per cent, yet the Indigenous population in prison rose by 42 per cent. Why? There is something seriously wrong with how Indigenous people are treated in Canadian society. This must change; we must strive for reconciliation.

We cannot undo the past, but we can take steps today to mitigate the harm caused by the past, ensuring Canada's Indigenous peoples have the resources to create their rightful place within the social, cultural, economic, political, and Constitutional fabric of this country. Part of reconciliation means unwinding the legacy of cultural genocide, creating the space within our society today for Indigenous peoples to recover and thrive. This includes:

- Restoring Indigenous peoples' lands and resources;
- Embracing Indigenous customs and traditions as the very foundation of Canadian culture; and
- Providing resources and tools to restore and nurture Indigenous family well-being.

All to allow Indigenous peoples to regain dignity and life-meaning – in short, self-determination for Indigenous peoples is the heart of reconciliation.

Indigenous peoples' self-determination of traditional lands is a key part of reconciliation. Under the colonial inspired *Indian Act*, the federal government manages "lands reserved for Indians," referred to as "reserves." In more recent times, Indigenous communities have been recognized under federal legislation with the power to enact their own laws, called "Land Codes," as a means by which the local Indigenous community may assume management of their reserves. Other Indigenous communities negotiate self-government agreements to manage their reserves or, as the highest expression of self-determination, some have negotiated "Final Agreements" (also called "Modern Treaties"), where their lands are no longer reserves under the *Indian Act* but are fee simple "Treaty Lands" under the Modern Treaty.

As self-determination becomes more prevalent, a licensee may encounter land transactions on the various types of Indigenous Lands. Understanding the difference among the types of Indigenous Lands is of critical importance not only to avoid costly mistakes, but also to further a licensee's own journey of reconciliation through knowledge of, and respect for, the growing role Indigenous communities play in society and economic development. The purpose of this module is to provide licensees an overview of real estate transactions on Indigenous Lands. These transactions may include, for example:

- A residential or commercial trading services transaction on a reserve or on Treaty Land;
- Rental property management for some Treaty Lands;
- Strata management for some Treaty Lands; or
- Mortgage broker services in relation to reserve or Treaty Land.

On March 30, 2022, B.C. released the *Declaration on the Rights of Indigenous Peoples Act* Action Plan. The Plan outlines actions B.C. will undertake in consultation and cooperation with Indigenous peoples over the next five years. A key goal of the Plan is to ensure Indigenous peoples exercise and have full enjoyment of their rights to self-determination and self-government, including developing, maintaining, and implementing their own institutions, laws, governing bodies, and political, economic, and social structures. With the growing role of Indigenous peoples in land management and economic development, licensees are likely to encounter the topics considered in this module more and more frequently in the coming years.

INDIGENOUS REGISTRIES

The following table summarizes the various Indigenous Lands registries that are discussed in this module. There are many different Indigenous communities in B.C. The majority are Indian bands, and some of those bands have adopted a Land Code under the *First Nations Land Management Act*. Only a few Indigenous communities have signed a Modern Treaty.

The Indigenous Lands listed in the chart below cannot be transferred in fee simple to persons who are not members of the relevant First Nation; licensees will therefore generally deal only with leasehold interests. The exception is a small proportion of Nisga'a lands, as discussed further below, which can be transferred in fee simple to anyone, Nisga'a or non-Nisga'a.

Indian Act Bands		
Type of land	**Register**	**Effect of registration**
Indian Act reserves	Indian Lands Registry System ("ILRS") • Reserve Land Register; and • Surrendered and Designated Lands Register.	Unlike the B.C. Land Title Office ("LTO") where order of registration establishes the priority of instruments, the ILRS does not guarantee any priority of instruments (except for assignments of lease)
First Nation lands (Land Code)	First Nations Land Registry System.	Priority based on registration.
Treaty and Self-Governing First Nations		
Type of land	**Register**	**Effect of registration**
Westbank First Nation	Indian Lands Registry • Westbank Lands Register (part of the Self-Governing First Nations Land Register).	Priority based on registration.
Sechelt Indian Band	B.C. LTO • Provincial land title system. OR Indian Lands Registry • Reserve Land Register (lands allotted to individual band members).	B.C. LTO • Priority based on registration. OR Indian Lands Registry • No priority based on registration.
Nisga'a Nation	Nisga'a Land Title Office • Nisga'a Land Title Register.	Priority based on registration.
Tsawwassen First Nation	B.C. LTO • Provincial land title system.	Priority based on registration.
Tla-amin Nation	B.C. LTO • Provincial land title system. OR Tla'amin Lands and Interests File Registry • Tla'amin Lands and Interests File Register.	B.C. LTO • Priority based on registration.. Tla'amin Lands and Interests File Registry • Priority based on type of interest, with date of registration as secondary "tie-breaker."

INDIAN RESERVES

Indian Lands Registry System

Indian Act Framework

Under the *Indian Act*, an Indian reserve is held by the Crown for the use and benefit of an Indian band. This structure is roughly comparable to land held under a trust, where legal title is held by the trustee and beneficial title is held by the beneficiary pursuant the terms of the trust.

The *Indian Act* provides for possession and use of Indian reserves by band members. The band council may grant a band member exclusive possession of a parcel of reserve land. The member can then sell or bequeath (leave by a will) to other members of that band. This allotment, as well as any transfer of the allotment to another band member, is subject to the approval of the Minister of Indigenous Services (the "Minister"). The Minister will issue a "Certificate of Possession" as evidence of the band member's right to exclusive possession.[2] If the Minister withholds approval, the Minister may still authorize and issue a "Certificate of Occupation" to the member allowing them to occupy the parcel temporarily.[3]

For non-band members, the *Indian Act* imposes strict restrictions on occupation and use of reserve land. Any agreement or instrument (other than a Ministerial permit) that purports to allow a non-member to occupy or use a reserve is void.[4] Reserve lands may only be sold or conveyed after the Indian band has surrendered those lands to the federal Crown.[5] A surrender is not valid unless a majority of the band members have voted in favour of it. This could occur where, for example, the band has decided to sell a portion of reserve land to a non-member individual or corporation. Reserve lands also cannot be leased nor an interest in them granted until they have been designated by the Indian band for that purpose.[6] Surrenders and designations may be conditional, and the Crown is bound by those conditions.

Subject to the terms of the surrender, designation or lease, a tenant of designated land may mortgage or assign the leasehold interest. However, Ministerial approval is required for assignments of all leases[7] and reserve lands are not subject to seizure under legal process such as bankruptcy or default on a mortgage.[8] Note that various on-reserve housing loan programs do exist, which allow a band member to mortgage reserve lands they have been allotted. These programs typically require the Indian band to guarantee the loan if the member defaults.

Nature of Regisry

The Indian Land Registry System ("ILRS") is used to record interests in and documents related to interests in reserve lands administered under the *Indian Act*. It comprises two registers:

- The Reserve Land Register records instruments respecting lands allotted to individual band members, as well as other transactions relating to those individual land holdings; and
- The Surrendered and Designated Lands Register records particulars in connection with any transaction affecting lands wholly possessed by a band and absolutely surrendered or designated under the *Indian Act*.

The ILRS is a centralized system with one office located in Ottawa where official records are kept, and regional sites where duplicates of the records affecting that region are kept. Once recorded, transactions cannot be deleted and remain on record even if after discharge or expiry.

2 *Indian Act*, RSC 1985, c I-5 [*Indian Act*], Section 20(2)
3 *Ibid*, Section 20(6)
4 *Ibid*, Sections 28(1) and (2); the Minister may issue a permit authorizing any person for a period not exceeding one year, or with the consent of the band council for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.
5 *Ibid*, Section 37(1)
6 *Ibid*, Section 37(2)
7 *Ibid*, Section 54
8 *Ibid*, Section 29

Licensees are able to search and view ILRS records on the Indigenous Services Canada ("ISC") website, once they set up a username and password.[9] Users can conduct searches under the tabs labelled "instruments" (legal documents dealing with transactions relating to interests in Indian land), "evidence of title" (documentary proof of a member's right to use and occupy reserve lands), or "land" (specific parcels of reserve lands, of which there are four types: easement; sub-surface; sub-PIN; and surface). As well, users can select the "reports" tab for detailed reports on bands and reserves, specific parcels of reserve lands, registered instruments, or a general report that lists all instruments registered against a reserve.

Further information on searching the ILRS can be obtained by clicking on the "help" button within the ILRS, which brings the user to an online guide. As well, the Indian Lands Registration Manual (the "Manual")[10] describes the procedures for preparing, submitting, and registering documents in the ILRS. It also provides descriptions of the common instruments that are registered in the ILRS.

It is important to know that registration in the ILRS is not required in order for reserves interests to transfer, and there is no legal priority for registered allotments over unregistered ones. As a result, the ILRS does not guarantee title or conclusively answer the question of who holds rights in any specific parcel. It is simply an information registry, that is, a repository of documentation that does not ensure validity or effectiveness of registered documents or that all documents affecting an interest in land have been registered.

To further complicate the issue, for some reserves the process set out in the *Indian Act* for allotments may be ignored altogether and the Indian band may be granting property rights to members through internal processes (sometimes referred to as "custom allotments"). These band members may have property interests but the ILRS would have no record of them.

Licensees should therefore search the ILRS to ascertain registration of interests involving reserve lands but must remember that the ILRS does not guarantee title or priority and that other valid land interests may exist even though they are not registered. This information may have to be obtained directly from the band council. If the licensee has questions about ILRS search results, the licensee should talk to their managing broker or designated individual.

The one exception is that a registered assignment of a lease is valid against a conflicting assignment that is unregistered or subsequently registered.[11] This provides some protection for individuals who register assignments of leasehold interests in the ILRS, but no similar provision is made for any other registered document. Licensees dealing with an assignment of lease for reserve lands should ensure registration of that assignment and identify any previously registered assignments that may affect the same land.

9 Indigenous Services Canada, online: <https://services.aadnc-aandc.gc.ca/ilrs_public/>.
10 Indigenous Services Canada, online: <https://www.sac-isc.gc.ca/eng/1100100034806/1611945250586>.
11 *Indian Act, supra* note 2, Section 55(4).

FIRST NATIONS LAND REGISTRY SYSTEM ("FNLRS")

First Nations Land Management Act Framework

The *First Nations Land Management Act* ("FNLMA")[12] allows Indian bands (as defined in the *Indian Act*) to opt out of some land tenure provisions of the Indian Act and enact their own "land management code." Title to these lands continues to be held by the Crown on behalf of the First Nation but, once the First Nation's land code is in force, the land becomes "First Nation land" rather than a reserve.[13]

The broad powers held by First Nations under the FNLMA give them more direct control over their reserve lands. In particular, a First Nation may exercise the powers, rights, and privileges of an owner in relation to their land, including the ability to grant interests and licences in relation to their land without the Minister's consent, unlike under the *Indian Act*.[14] Further, a First Nation government may, in accordance with its land code, enact laws respecting interests and licences in relation to the First Nation land, as well as the development, management, use, and possession of the First Nation land.[15]

The details and rules of a land code will be unique to the particular First Nation. However, the FNLMA requires that every land code address certain subject matters, including rules and procedures for the use and occupancy of First Nation land, including use and occupancy under licences and leases, as well as the granting of interests or rights by the First Nation in the First Nation land.[16]

Note that, as with under the *Indian Act*, sale of First Nation land is restricted. First Nation land may not be sold except where it is exchanged for other land in accordance with the Framework Agreement on First Nation Land Management between the federal Crown and First Nations. All exchanges are subject to approval of the Minister and the First Nation's members.[17] A licensee would not be involved in a such a transaction.

Nature of the Registry

Where a First Nation has adopted a land code under the FNLMA, interests in that First Nation's land are recorded in the First Nation Land Registry System ("FNLRS") rather than the ILRS. The FNLRS is accessible on the same ISC website as the ILRS and searches are conducted in a similar fashion. Users simply change the registry option, within the search criteria, from ILRS to FNLRS.

The *First Nations Land Registry Regulations* ("FNLR Regulations") provide that interests registered in the FNLRS have priority over one another according to the date and time of registration, and registered interests have priority over unregistered interests.[18] Like the ILRS, however, the FNLRS acts primarily as a repository of documentation and does not guarantee title or the validity of registered documents. It does not conclusively answer the question of who holds what rights in any specific parcel.

Further, a First Nation under the FNLMA will have adopted its own land code containing additional procedures, requirements and fees for registering interests in the First Nation's lands. For example, a First Nation may have adopted a two-step process in which the party seeking to register a transaction (e.g., a lease or assignment of lease) first applies to the First Nation using the First Nation's own application form, and the First Nation then applies to the FNLRS on the applicant's behalf.

Licensees dealing with First Nations lands under the FNLMA should therefore familiarize themselves with that Nation's land code as it relates to the requirements for transferring interests in those lands as it will affect the drafting of the contract of purchase and sale. Licensees are strongly encouraged to involve a lawyer in that process.

12 SC 1999, c 24
13 *Ibid*, Sections 5 and 5.1
14 *Ibid*, Section 18(1)
15 *Ibid*, Section 20(1)
16 *Ibid*, Section 6(1)
17 *Ibid*, Sections 26-27
18 SOR/2007-231, Sections 28-30

First Nations Commercial and Industrial Development Act

The *First Nations Commercial and Industrial Development Act (*"FNCIDA"*)* is optional legislation enabling a First Nation to ask Canada to develop regulations to apply to a project on a specific piece of reserve land. FNCIDA works by essentially reproducing the provincial rules and regulations that apply to similar large-scale commercial or industrial projects off reserve and applying them to the on-reserve project. FNCIDA does not yet apply to any lands in B.C. and its detailed application in each case will depend on the specific regulations. While it will allow the registration of on-reserve commercial real estate developments in a system that replicates the B.C. land title system, it is unlikely that FNCIDA will allow non-Indigenous owners to hold fee simple to reserve lands so transactions will continue to be based on leases.

Squamish Nation lands are administered as reserves through the ILRS. However, the Squamish Nation has submitted a proposal for a large-scale condominium development on Capilano Indian Reserve 5, which would be subject to FNCIDA. If this proposal proceeds, the land would be subject to provincial rules and regulations and registration in a system that replicates the B.C. land title system. Licensees dealing with Squamish Nation lands should therefore confirm the status of the lands before starting work on a transaction.

MODERN TREATY FIRST NATIONS LANDS

Treaty Framework

A "Final Agreement," also known as a "land claims agreement" or a "Treaty," is a comprehensive agreement negotiated among an Indigenous Community, the Government of Canada, and the Government of British Columbia. These agreements are substantially different than those negotiated historically by various colonial governments, and later by the Government of Canada, with Indigenous peoples between 1701 and 1921. At the time of writing, Modern Treaties have been negotiated and brought into force by federal and provincial legislation with Nisga'a Nation (north of Terrace), Tsawwassen First Nation (adjacent to Delta in Metro Vancouver), the Maa-nulth First Nations (on the West Coast of Vancouver Island), and Tla'amin Nation (near Powell River).

These Modern Treaties cover a broad range of topics, such as governance (lawmaking), lands (ownership and use), resources (subsurface, water, forests, fish, wildlife, migratory birds), fiscal relations, taxation, culture, environmental protection, parks, citizenship, and enforcement. They also set out the Treaty Lands of the applicable Indigenous people. The *Indian Act* no longer applies to those Indigenous people or their Treaty Lands, so they are no longer a "band," their government may no longer be led by a "chief" or have a "council," and their Treaty Lands are no longer "reserves." In all of the Modern Treaties in B.C., the Treaty Lands are owned in fee simple by that Indigenous community, or a member of that community. If a licensee is assisting with a transaction on Treaty Lands, the licensee should familiarize themselves with the proper terminology for that Indigenous community to ensure informed and respectful assistance in that transaction.

Nisga'a Nation

The Nisga'a Nation uses its own version of the Torrens system for recording land transactions. All Nisga'a Lands are recorded in the Nisga'a Land Title Office, not the B.C. LTO. The basis of the Nisga'a land title system is set out in applicable Nisga'a laws. Therefore, to undertake transactions on Nisga'a Lands, licensees must use and be familiar with the Nisga'a Land Title Office and relevant Nisga'a laws, such as the *Nisga'a Land Title Act* and *Nisga'a Landholding Transition Act*.

Nisga'a Lands were vested in fee simple in the Nisga'a Lisims Government in 2000. They can be divided into three types, as defined in the Treaty:

- Nisga'a Village Lands;
- Nisga'a Private Lands; and
- Nisga'a Public Lands.

The Nisga'a Lisims Government may designate Nisga'a Lands as Nisga'a Village Lands or Nisga'a Private Lands. Any Nisga'a Lands not designated remain Nisga'a Public Lands. Currently, there are 100 hectares of Nisga'a Lands zoned for residential use, primarily situated on Nisga'a Village Lands. Each of the four Nisga'a Villages has the authority to zone lands for residential use. Only zoned residential lands are eligible for transfers in fee simple to non-members and each parcel may be no greater than 0.2 hectares in area.

It is worth noting that the 100 hectares of zoned residential land only account for .05 per cent (five one-hundredths of one percent) of total Nisga'a Lands. It does not represent a mass privatization of lands.

The Nisga'a Nation became the first Indigenous group in Canada to develop a fee simple Torrens registration system.

Tsawwassen First Nation

All Tsawwassen First Nation's lands are administered under the B.C. *Land Title Act* and *Tsawwassen Land Act* and are registered in the B.C. LTO.

Tsawwassen has fee simple title in Tsawwassen Lands which comprise 662 hectares of former reserve and Crown lands. These lands vested in Tsawwassen in 2009 when the Tsawwassen Final Agreement came into effect. Under that agreement, former locatees (i.e. band members in possession of lands that had been transferred to that member in accordance with the *Indian Act*) acquired a Tsawwassen Fee Simple Interest in their lands and retained all former rights.

The agreement empowered Tsawwassen to dispose of any Tsawwassen Lands without federal or provincial consent, however Tsawwassen passed the *Land Act* in 2009 which prohibits the transfer of Tsawwassen Lands in fee simple to anyone who is not a Tsawwassen citizen or entity. Dispositions to non-citizens will therefore only be by way of a lease or an assignment of a lease. The Tsawwassen Government is empowered to convert Tsawwassen Public Lands to Tsawwassen Fee Simple Interests upon application by Tsawwassen citizens.

Maa-nulth First Nations

The Maa-nulth First Nations are comprised of the Huu-ay-aht First Nations, Ka:'yu:'k't'h'/Che:k'tles7et'h' First Nations, Toquaht Nation, Uchucklesaht Tribe, and the Yuułu?ił?ath Government (also known as the Ucluelet First Nation). Each Maa-nulth First Nation owns its Treaty Lands in fee simple.

Some Maa-nulth Treaty Lands are recorded in the B.C. LTO. As of the time of writing, those lands are restricted, meaning only a Maa-nulth citizen can be registered as owner and ownership cannot be transferred without a certificate from the applicable government stating the intended transferee is an eligible recipient.

The remaining Maa-nulth Treaty Lands are registered in each Maa-nulth First Nation's own land registry. Licensees are in practice unlikely to encounter interests recorded in those registries.

Tla'amin Nation

The Tla'amin Nation is authorized to use the B.C. LTO or to establish its own registry and has adopted a hybrid system. Tla'amin Lands are registered in either the B.C. LTO or the Tla'amin Lands and Interests File Registry.

For lands registered in the Tla'amin Lands and Interests File Registry:

- Except as against the person making it, an agreement or instrument does not operate to pass an interest or licence (other than a lease or rental agreement not exceeding a year), unless it is registered;
- An instrument takes effect when registered; and
- A registered interest is not affected by notice of an unregistered interest (other than a lease not exceeding one year).

Priority of registered interests depends on the type of interest and who holds it, with the date of registration acting as a secondary "tie-breaker" between two otherwise equal interests.

It is most likely that licensees will deal with Tla'amin Nation lands situated in the Klahanie and Southview subdivisions. Lands in these subdivisions are leased to both members and non-members. Those leases, and any assignments of those leases, are registered in the B.C. LTO.

OTHER SELF-GOVERNING FIRST NATIONS LANDS

Sechelt Indian Band

Title to its former reserve lands has been transferred to the Sechelt Indian Band in fee simple and no further Certificates of Possession are issued. The band is authorized, but not required, to use the B.C. LTO for registration of dealings with its land. Where Sechelt has decided to lease land to non-members, the band has placed the parcels in question in the B.C. LTO to give purchasers a greater assurance as to the status of the leasehold title that they purchase. Titles that are not registered in the B.C. LTO are registered in the ILRS under the *Indian Act*.

Westbank First Nation

Title to all Westbank Lands continues to be held in the name of Canada, but the Westbank First Nation has all the rights, powers, responsibilities, and privileges of an owner of those lands. Westbank Lands are administered under laws made by *Westbank First Nation* and the *Westbank First Nation Land Registry Regulations* (Canada). Transactions dealing with Westbank Lands are registered in the Westbank Lands Register. An interest in Westbank Lands is not enforceable unless it is registered. Only members can hold an allotment of Westbank Lands; non-members may acquire leaseholds, easements, permits, and licences.

The Westbank Lands Register is a sub registry under the Self-Governing First Nations Land Registry held in Ottawa, accessible through the Indian Lands Registry website. Registration determines the priorities of interests:

- A registered interest is entitled to priority over an unregistered interest;
- Registered interests have priority according to the time and date of registration; and
- A registered mortgage has priority over a subsequently registered interest.

Transactions on Indigenous Lands

Transactions involving Indigenous Lands can be diverse, complex, and raise unique issues. While this section intends to provide an overview of key considerations, documents, and processes, licensees should approach such transactions carefully. Seek support from your managing broker or designated individual, a licensee with experience in this area, or a lawyer as appropriate.

Some key considerations for a licensee include:

- Does the seller or buyer understand what interest in land they are selling or buying?
- Will there be a third-party approval process for the purchase?
- What is the registration process?
- What are the expected timelines?
- What financing options may be available?
- What form of contract should be used?

KEY CONSIDERATIONS FOR LICENSEES

Indian Act reserve lands

Licensees must remember that for reserves administered under the *Indian Act*, there is a system of allotments to band members, as well as a system of surrenders and designations for use or occupation of reserve lands by non-band members. These processes require band and Ministerial approval but are often not followed by the band. Given that uncertainty, and the fact the ILRS is a repository of documentation that does not guarantee title, investigation beyond the ILRS may be required to determine the legal status of any given parcel of reserve land. Licensees should be referring to their managing broker or designated individual and, if necessary, to lawyers to investigate the ILRS, as well as to advise on a transaction more generally, whenever that transaction involves Indian reserve lands.

The parties to a transaction involving *Indian Act* reserve lands should search the ILRS. Two different forms of reports can be generated from the ILRS: those relating to the reserve as a whole, including surrenders and designations (Reserve General Abstract); and those listing instruments relating to individual lots or parcels of reserve land (Parcel Abstract). Due to concerns regarding the federal *Privacy Act*, scans of registered instruments and supporting documents cannot be accessed through the ILRS website. Parties wishing to access these documents will need to submit a request to Indigenous Services Canada ("ISC"), who will then contact the relevant Indian band for permission. Licensees may wish to directly advise the Indian band that a request has or will be submitted to ISC, so that the band is aware that ISC will be contacting them and can prepare a response.

FNLMA First Nation Lands

Where an Indian band has adopted a land code under the FNLMA, licensees will have to familiarize themselves with the land code and procedures of the First Nation they are dealing with, as they may relate to use, occupancy, and the granting of interests in the First Nation land.

Given that the FNLRS adopts a system of priority, parties seeking to register instruments in the FNLRS should adopt practices similar to those for registering an instrument in the B.C. LTO, i.e., conducting a preregistration search, then submitting the registration package, then conducting a post-registration search. Although lawyers will generally carry out a registration, licensees should be familiar with performing searches within the FNLRS.

Note that the FNLRS Registrar must provide, upon request, a certificate indicating all interests registered and other documents recorded on the abstract of a specified parcel.[19] In addition to the information provided on the printout that can be obtained through the FNLRS website, this certificate bears the registrar's signature and certifies the parcel abstract report as of a given date. Similarly, a party may request a certified copy of a registered instrument.[20] The Registrar will not release the copy automatically, due to concerns about the federal *Privacy Act*, but will contact the relevant First Nation for authorization. As with the parcel abstract report, the certified copy of the instrument and supporting documents should bear the Registrar's certificate.

Treaty and Self-Governing First Nation Lands

Before assisting with a transaction involving Treaty or Self-Governing First Nation lands, licensees must understand the relevant legislation or Treaty, as this will determine any restrictions on transactions involving those lands and the appropriate terms of the contract. While we flag below some key areas to consider, licensees should consult with their managing broker, or as appropriate with a lawyer, as early as possible.

Searching the right registry

Where a transaction involves lands of a Treaty or Self-Governing First Nation registered in a registry other than the B.C. LTO or ILRS, all transactions and searches must be done through that First Nation's registry. For example, all transactions and searches on Nisga'a Lands must be done through the Nisga'a Land Title Office. Nisga'a Land will not show up in a search of the B.C. LTO.

While several Treaty and Self-Governing First Nations have their own registers, these are largely used for interests that can only be held by citizens of the First Nation, with the B.C. LTO used for interests that may be held by a non-citizen. As such, it is unlikely that a licensee will encounter transactions involving most of the Treaty and Self-Governing First Nation registers, with the possible exception of the Westbank Lands Register and the Nisga'a Land Title Register.

Leasehold interests only

In most cases, title to Treaty or Self-Governing First Nation lands can be held only by citizens of that First Nation: non-citizens will only be able to purchase a leasehold interest. This restriction can arise as a matter of law (for example, only a Tla'amin Citizen can hold Tla'amin Citizen Land Title as a matter of Tla'amin law). It can also arise by practice (the Sechelt constitution allows sale of lands to non-members, but a sale requires approval of 75 per cent of the members and, in practice, non-members are granted leases).

Some Nisga'a lands are an exception to this rule. Since the fall of 2012, Nisga'a law has permitted Nisga'a citizens to obtain the fee simple title to residential lots within Nisga'a Villages that are not greater than 0.2 hectares and are not subject to a registered mortgage. A Nisga'a citizen who obtains the fee simple title is then able to mortgage or transfer that fee simple title, without restriction. This permits the Nisga'a citizen to transfer their lot to any other person, Nisga'a or non-Nisga'a. The lands that are currently zoned for residential use (and therefore eligible for fee simple ownership) comprise approximately 100 ha, or 0.05 per cent of the entirety of Nisga'a Lands.

19 *Ibid*, Section 7
20 *Ibid*, Section 6

Third-party approval

Transactions relating to Treaty or Self-Governing First Nation lands may require third-party approval. For example:

- The grant of a lease or other interest in Sechelt lands requires the approval of the Sechelt Council, and approval by 50 per cent of the members on a vote if the interest is for a term exceeding 99 years or the land has not been previously improved.
- Tla'amin laws can prescribe a maximum period for a lease granted by a citizen and require a permit issued by the Tla'amin Director of Lands and Resources for leases over a certain duration. Leases entered into by the Tla'amin Nation, a Tla'amin Corporation, or a Tla'amin Public institution are subject to a maximum of 99 years for a residential lease and 60 years (up to 99 years with Executive Council approval) for a non-residential lease.
- A leasehold in Westbank Community Lands (lands in which no allotment to a Member has been made) requires a Council Resolution for a term of 15 years or less, Special Membership Meeting for a term of 15 to 49 years, and referendum for a term longer than 49 years.
- Residential leases of Tsawwassen Fee Simple Interests may be granted for a period of up to 99 years. Non-residential leases of Tsawwassen Fee Simple Interests may be granted for a period of up to 49 years, or a longer period of not more than 99 years with the approval of Executive Council.

Where approval of a third-party, e.g., the First Nation government or First Nation members, is required, this must be obtained before the closing and transfer of possession occurs.

Maximum term

Leases may be subject to a maximum term or require third-party approvals for terms over a certain length. See examples in the Leasehold section above. Licensees should consult with a lawyer to ensure the terms of the lease comply with the relevant legal requirements.

Zoning

The lands of Treaty and Self-Governing First Nations may be subject to zoning or other restrictions under the laws of the First Nation. A lawyer is likely to be required to advise on the applicable restrictions.

FORMS AND DOCUMENTS

Indian Act reserve lands

Any instrument that grants or claims a right or interest in reserve lands administered under the *Indian Act* (including surrendered and designated lands), or that transfers, encumbers, or affects those lands, may be registered in the ILRS.[21]

Several documents must be submitted when a party wishes to apply to register an instrument in the ILRS including: an application for registration, the instrument itself, an affidavit of execution, a survey or legal land description, and other supporting documents. Further information on each of these documents, including examples and templates, is found in chapters three to six of the Manual.

Although lawyers will generally deal with registrations in the ILRS, licensees must be aware of and able to work with the following three standard forms developed by the BCREA and CBABC:

- Contract of purchase and sale of a leasehold interest in First Nations reserve lands (third party approval required);
- Contract of purchase and sale of a leasehold interest in First Nations reserve lands (third party approval not required); and
- Assignment of lease.

21 Manual, *supra* note 10, Section 2-1.

These standard forms are specific to reserve lands that are administered by ISC and subject to the ILRS, and therefore licensees must be cautious and refer to a lawyer when asked to use these standard forms in relation to lands other than First Nations reserve lands.

Licensees should understand the following key differences between the standard contract of purchase and sale (for sales of residential properties in fee simple), and the standard contract of purchase and sale of a leasehold interest in First Nations reserve lands (the "Standard Lease Purchase Contract"):

- **Third Party Approval** (clause 3) – the contract may or may not be subject to third party approval (including from the First Nation government or ISC). If a third-party approval is required, it must be obtained prior to the trust completion date (see "Trust Completion" below). The parties have 60 days to obtain the third-party approval, which period will automatically extend for a further 90 days unless the parties agree otherwise.
- **Terms and Conditions** (clause 4) – the contract is subject to the buyer being satisfied with the terms and conditions of the lease documents listed in Schedule A, which will typically include the head lease, sublease, and assignments (if any).
- **Trust Completion** (clause 5) – the day when all documents are delivered in trust for submission to the ILRS, which occurs on the later of (i) the date specified by the parties or (ii) seven days after the last of any required third-party approvals has been obtained. On this day, the buyer must deposit the equity portion of the purchase price to their lawyer in trust, and the seller must deliver to the buyer's lawyer in trust an executed assignment of lease and any other required documents. The buyer's lawyer then submits the documents to the ILRS for registration.
- **Final Completion** (clause 7) – final completion of the purchase and sale is conditional on the successful registration of the assignment of lease in the ILRS.
- **Possession** (clause 8) – the parties may agree that the buyer takes possession either (i) on the final completion date; or (ii) on the trust completion date, if the buyer has arranged for title and home insurance, as well as financing, to be in place by this date.

Note that the Standard Lease Purchase Contract is for residential properties. Additional provisions may be needed for other purchases such as a business or commercial lease, and legal advice should be obtained in those situations.

The standard form assignment of lease adds an additional term to the completion process set out above, as it states that "if the registration of this Assignment of Lease in the appropriate lands registry has not occurred on or before [90th day following the Trust Completion Date], this Assignment of Lease shall be null and void." Although the terms of this assignment of lease are otherwise typical, licensees should familiarize themselves with those terms.

More generally, when working with any assignment of lease, licensees should review and understand the terms of the lease and any prior assignments. In particular, the licensee should know whether the lease is fully pre-paid or rent is payable, the amount of rent payable, whether the rent is due monthly or annually, and whether the rent may be raised or is subject to an escalation clause.

FNLMA First Nation Lands

For First Nation lands under the FNLMA, the FNLR Regulations set out certain application requirements.[22] An application for registration must contain certain required information, including: names of all parties to a document, the name of the First Nation - reserve and lot number, the land description, directions respecting priority, and a list of supporting documents. The documents must be originals unless specified in section 15 of the FNLR Regulations, and the land description must meet the requirements of sections 17-19 of the FNLR Regulations.

22 FNLR Regulations, *supra note* 19, Section 10(2).

The First Nation's land code may also set out additional procedures, requirements, and fees for registering interests in the First Nation's lands, including a requirement that the initial application be made to the First Nation rather than the FNLRS. The requisite forms and documents will be unique to that First Nation.

Licensees must be cautious and refer to a lawyer when asked to use the Standard Lease Purchase Contract in relation to FNLMA First Nation lands, as it may conflict with that Nation's land code.

Treaty and Self-GoverningFirst Nation Lands

The Standard Lease Purchase Contract was not designed to be used for transactions involving Treaty or Self-Governing First Nation lands, as these transactions can raise a broad range of unique issues. The Standard Lease Purchase Contract will need to be carefully reviewed in light of the specific transaction and applicable rules, and may need to be significantly adjusted. The licensee may wish to refer to a lawyer to assist with drafting of the contract of purchase and sale, reviewing the terms of the lease, and to ensure all legal requirements for the transaction are identified and completed.

In some cases, for example the significant residential and commercial developments on Tsawwassen lands, the developer will have created a specific form of contract and licensees should use that form rather than the Standard Lease Purchase Contract.

References to "reserves"

The lands of Treaty and Self-Governing First Nations are not reserves, and changes will be required to the Standard Lease Purchase Contract (if used) to reflect the status of the lands as Treaty or Self-Governing First Nation lands.

Third-party approval

If using the Standard Lease Purchase Contract (rather than a tailored form created by the developer), use the "third-party approval required" version, as this includes Clause 3, which provides that the parties have 60 days to obtain the third-party approvals. Identify who will pay for obtaining such consents by checking the appropriate box in Clause 3.

REGISTRATION PROCESS

Indian Act reserve lands

For reserve lands administered under the *Indian Act*, ILRS applications for registration are submitted to the applicable ISC regional office. The application may be submitted by the person transferring, receiving or claiming the interest (the applicant); the applicant's lawyer or agent; an employee of ISC; or a First Nation land officer.[23]

As noted above, the Standard Lease Purchase Contract contains two completion dates: the trust completion date, when documents are submitted to the ILRS for registration and the final completion date, when the parties receive confirmation of successful registration.

The inclusion of two completion dates reduces risk for the buyer. If there were one completion date, as with the standard contract used for fee simple residential properties, there is a chance the registration would be rejected and then a third party could successfully register an assignment of lease in the meantime. The seller would be holding the buyer's purchase money, but the *Indian Act* would give priority to the assignment of lease registered by the third party in the interim. This is because the *Indian Act* does not grant the same protection that is afforded to parties operating in the B.C. LTO, which deems documents to have been registered on the application date even if a document is rejected and subsequently resubmitted due to a defect.

23 Manual, *supra* note 10, Section 2.2.

FNLMA First Nation Lands

For First Nation lands, the FNLR Regulations contains registration procedures. Any person may apply for the registration of a document in person, by mail, or electronically.[24] The FNLRS will mail the applicant and First Nation an acknowledgement of receipt and a tracking number.

Electronic submissions are completed through the FNLRS website. The FNLRS will email the applicant and First Nation an acknowledgement of receipt and a tracking number.

Treaty and Self-Governing First Nation Lands

The process for registering a transaction in respect of lands registered in a Treaty or Self-Governing First Nation's register will depend on the terms of the relevant Treaty or self-government agreement and the laws of the First Nation, as well as the rules of the relevant registry. Licensees should consult with a lawyer and the relevant registry for details, as this will determine critical parts of the contract, including the timing for payment of purchase price and completion date.

For example, the Nisga'a Land Title Register provides for priority from the date that a transfer is filed for registration and allows an application to be withdrawn on terms, which would allow it to be corrected without losing priority if there were an error. A contract dealing with lands registered in the Nisga'a Land Title Register could therefore provide for one fixed date for full payment of the purchase price and transfer of title, as provided for under the standard form purchase and sale contract. This will also be the case for Treaty or Self-Governing First Nation lands that are registered in the provincial land registry e.g., any Tsawwassen lands.

On the other hand, if a document submitted for registration in the Westbank Land Registry does not meet requirements, the Registrar must return the application and any priority will be lost – contracts dealing with Westbank Lands should therefore include two completion dates as per the Standard Lease Purchase Contract. The parties should also ensure they have appropriate insurance in place. This will also be the case for Treaty or Self-Governing First Nation lands that are registered in the ILRS.

CONCLUSION

Licensees are increasingly likely to encounter transactions involving Indigenous Lands. It is therefore important to be able to identify if a transaction involves Indigenous Lands and to understand the key differences among the various types of Indigenous Lands. Each type of Indigenous Land has unique forms of rights to use or possession, processes for and implications of recording those interests, and considerations when transferring or encumbering those interests.

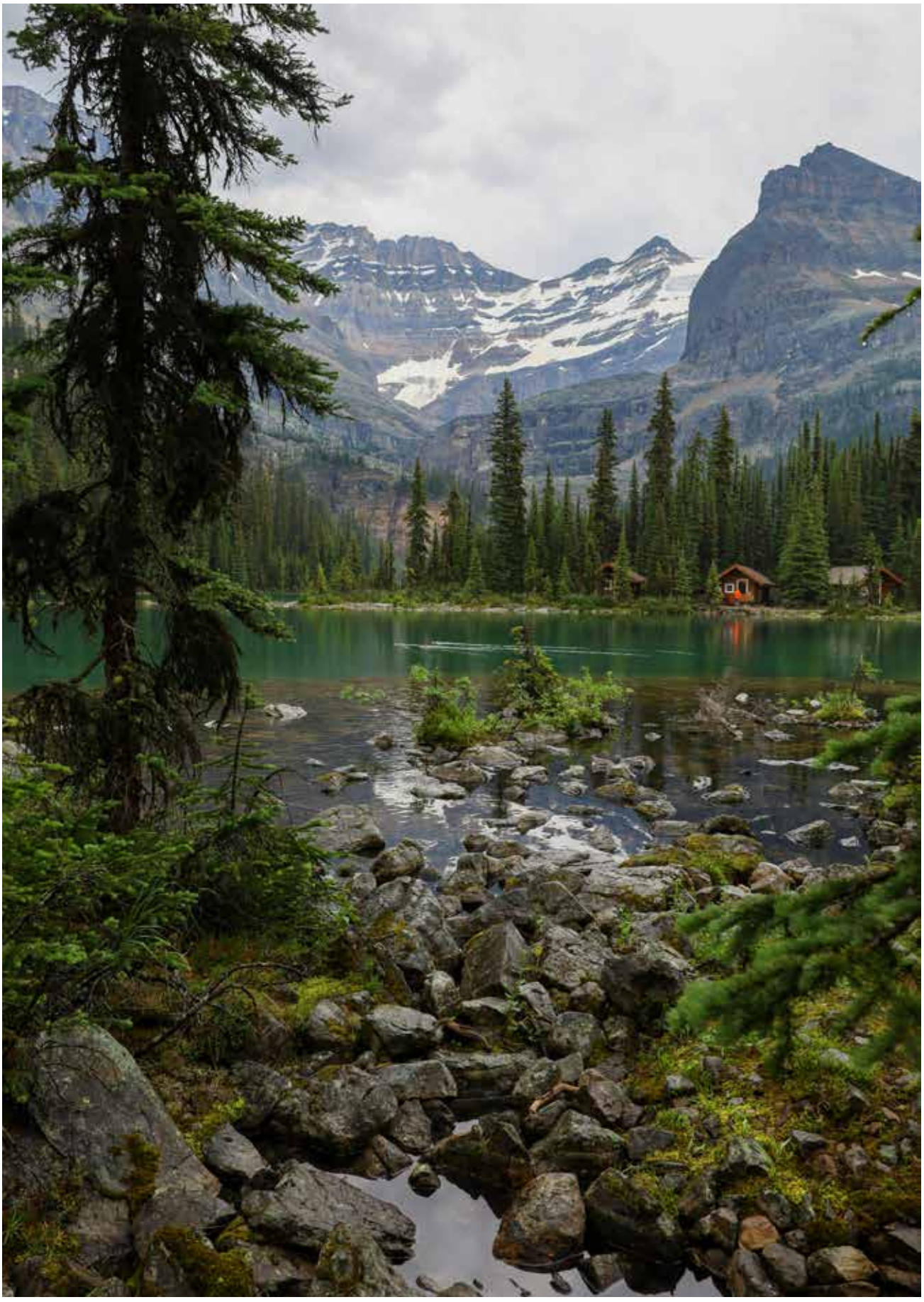
Understanding Indigenous Lands is critical to not only avoid mistakes, but also to further a licensee's own journey of reconciliation through knowledge of, and respect for, the growing role of Indigenous communities in society and economic development. Indigenous peoples' self-determination of traditional lands is a key part of reconciliation – a way to mitigate past harm and ensure Indigenous peoples have the resources to create their rightful place within the social, cultural, economic, political, and Constitutional fabric of Canada.

24 FNLR Regulations, *supra* note 19, Section 10(1).

Appendix A: Sample List of Brokerage Policy Manual Topics[1]

- **General:** the overall purpose of the BPM, establishment of certain defined terms, etc.
- **Brokerage Information:** the history of the brokerage, vision/mission/strategy, core values, services offered, etc.
- **New Licensee/Employee Orientation:** required training, key things to know, the importance of adhering to one's professional responsibilities as a licensee under RESA, key regulatory resources (such as BCFSA's Knowledge Base), etc.
- **General Licensee Conduct:** expectations on dress codes, time within the office, attendance to meetings, and availability by email; a code of conduct (respect, collegiality, freedom from harassment or discrimination, etc.); handling absences from work (e.g., medical, vacation, etc.); managing unlicensed assistants; personally trading in real estate; teams
- **Technology:** key hardware and software requirements (e.g., data encryption, hard drive backups, anti-virus software)
- **Advertising and Marketing:** use of the brokerage name, signage requirements, social media use, etc.
- **Privacy and Confidentiality:** handling hard-copy and electronic files appropriately
- **Dispute Resolution:** how to deal with disputes within the brokerage, with clients, with licensees at other brokerages, and with third parties
- **Record Keeping:** required records and documents, policies for transmission to the brokerage, etc.
- **Handling Money:** trust accounting, handling deposits, regulatory requirements, types of payments, etc.
- **Compensation/Remuneration:** commission splits, handling referral fees, bonuses, source deductions, etc.
- **Service-Specific Requirements:** handling listings, MLS usage, key disclosures, lockboxes, open houses, co-listings, managing conflicts of interest, etc.
- **Skills/Professional Development:** licensee expectations.

1 This is a non-exhaustive list and is being included as a starting point in creating or reviewing one's brokerage policy manual.



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