Legal Update 2023

Learner Resource Book

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OVERVIEW

Disclaimer

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Module One: Deposits

Transactions do not always go according to plan. When parties are left with a failed transaction, the seller must consider the range of remedies available to them, including the powerful tool to retain the buyer's deposit. This module discusses the rights and responsibilities of a seller to validly retain a deposit when a transaction falls through, separate from any recission rights under the *PLA* and the *HBRP Regulation*. This module will also discuss some crucial considerations when determining the amount of the deposit, as well as important considerations surrounding the timing of the payment of deposits.

IMPORTANT NOTE:

Licensees need to understand the rescission provisions in the *PLA* and the *HBRP Regulation* and how they may apply to deposits. In particular, licensees need to understand the exceptions to section 30 of *RESA* (withdrawals from trust account) contained in the *HBRP Regulation*.

LEARNING OBJECTIVES

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

1. Understand the underlying rationale behind deposits;
2. Explain to a client the reasons for and risks associated with deposits;
3. Identify for a client the risks associated with the amount of a deposit;
4. Describe to a client the risks of paying a deposit late; and
5. Explain to a buyer why the often held misconception that "not paying a deposit allows a buyer to avoid contract obligations without consequences" is wrong.

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INTRODUCTION

When a buyer fails to complete a real estate transaction, one of the most powerful and significant remedies for a non-breaching seller is to retain the buyer's deposit. While deposits are not required for a valid contract for the sale of property the practice is that deposits are included in most contracts for purchase and sale. With the large sums of money involved in the sale of property it is understandable that a seller would be reluctant to have their property tied up pending completion without the buyer having provided any deposit to demonstrate good faith in the purchase.

Issues arise with deposits when transactions collapse and both buyer and seller claim a right to the deposit. While the law has been unclear as to the scope of a seller's right to keep the deposit when they have not actually suffered a monetary loss (i.e., when they have later sold the property for the same price or for more or decide not to sell at all), this issue has been clarified by the B.C. Court of Appeal. A non-breaching seller's right to retain the deposit is now almost entirely unrestrained where the standard contract of purchase and sale produced by British Columbia Real Estate Association ("BCREA") and the Canadian Bar AssociationBC Branch (the "standard form contract") is used in a real estate transaction.

In other words, sellers can retain the buyer's deposit even if they suffer zero monetary loss due to the failed transaction. For this reason, retention of the deposit is understandably considered one of the most powerful remedies available to a seller and a serious commitment for a buyer to consider when entering into a contract of purchase and sale.

Since the Court of Appeal's clarification of the law, a buyer is seldom granted the right to the return of their deposit where the buyer has breached the contract. Deposits are meant to secure and guarantee that the buyer will proceed with the transaction. If there was no risk of forfeiture or if it was relatively easy for a buyer to get their deposit returned to them, the motivating force and protection of a deposit would not exist. Again, note the exception under the *PLA* and the *HBRP Regulation* where a buyer is entitled to return of deposit, less a rescission fee, where a notice of rescission is given within the prescribed three days from the date of acceptance of the offer.

There have also been developments in the law in the area of non-payment of a deposit and late payment of a deposit which creates risk that buyers, sellers, and licensees need to be aware of.

THE OLD WAY: NO HARM, NO DEPOSIT FORFEITURE

To understand the current law, it is helpful to look at where we came from.

Purpose of Deposits

There is no legal requirement for a deposit to be paid in real estate transactions. Having said this, providing deposits is common practice and sellers expect deposits to show the buyer is serious. Deposits are meant to guarantee performance of the contract by the buyer. It is this fear of forfeiture which is supposed to motivate the buyer to perform their obligations in the contract. Without a risk of a loss of a deposit a buyer could tie up a property and then fail to complete, leaving the seller to pursue legal action which may or may not result in a recoverable judgment. The reasoning had been that the existence of a deposit gave the seller confidence that the buyer would complete as it would not want to lose the deposit. This was, at least, the traditional view of deposits in contracts.

Over time, the concept of absolute forfeiture of deposits to sellers was eroded by the courts and some judges began to require a seller to prove damages and only award the deposit where the damages were at least as much as the deposit. If damages were proven but were less than the deposit amount the seller would only be entitled to a portion of the deposit equal to the damages.

For example, if the buyer failed to complete the sale but the seller was able to sell the property without a loss or delay, some courts decided "no harm, no foul" and ordered the deposit to be returned to the buyer. Despite the seller being the innocent party, if they could not prove actual damages, they were prevented from retaining the deposit and they would recover nothing more than, maybe, nominal damages for breach of contract. See *Agosti v. Winter*,[1] where the buyer breached the contract and the court limited the seller to proven damages, which were less than the amount of the deposit.

However, other judges were following the more traditional view and held that contracts calling for deposits should be interpreted to require forfeiture of the deposit regardless of whether damages could be proven where the buyer breached the contract by failing to complete the sale.

The cases often turned on specific contract language but sometimes even similar language was open to alternative interpretation by the courts.

The standard form contract states, under the "Time" clause, the deposit is to be "absolutely forfeited on account of damages." In many cases the court required proof of damages before any deposit could be retained by a seller, as happened at the trial level in *Tang v. Zhang*.[2] This meant that deposits were a less effective form of ensuring compliance with contracts where there was a strong rising real estate market. If deposits were returned to a buyer when the seller suffered no monetary loss, the fundamental purpose of a deposit, to motivate a buyer to complete a sale, was lost.

These two lines of cases made it difficult to predict whether a seller could keep the deposit upon a transaction collapsing. It also made the effectiveness of deposits questionable.

1 2009 BCCA 490
2 2012 BCSC 214

The Debate is Settled

This debate was settled by the British Columbia Court of Appeal ("BCCA") in the case of *Tang v Zhang* ("*Tang*").[3] In this case, the buyer failed to complete the sale. The sellers took the position that the $100,000 deposit was forfeited. The seller was able to sell the property to a third party at a higher price, and therefore suffered no monetary loss. As such, the court had to consider whether the deposit could be claimed by the seller even though the seller did not suffer a loss, and in this case actually benefited from the buyer's breach. The trial judge said the seller could not recover the deposit in the circumstances.

The BCCA considered the language in the standard form contract and concluded that a non-breaching seller should be entitled to retain a deposit and did need not prove they suffered damages in order to claim the deposit. The Court reviewed the conflicting case law and overturned the trial court judgement, stating that the traditional approach to deposits was still the law.

The Court did say that a contract could contain language which identified payment as an advance or partial payment of a sale price instead of a deposit to avoid forfeiture. However, the Court also stressed that such language would need to be very clear in the contract. Reference in the standard form contract to forfeiture being "on account of damages" was not enough to deny the seller's right to the deposit regardless of the seller's actual damages.

In concluding that a deposit can be retained even where no damages were actually suffered, the BCCA reiterated the purpose of deposits: deposits are meant to guarantee performance of the contract by the buyer. Thus, regardless of whether the seller was or was not ultimately disadvantaged, the buyer still breached the contract and should not be able to recover the money back after their breach.

It is this fear of forfeiture that acts as the motive for the buyer to perform their obligations in the contract. Otherwise, the deposit effectively has no motivating force. If deposits could be returned to a buyer when the seller suffers no monetary loss, buyers would be able to breach the contract, without consequence, any time a seller was able to find a better (or equal) offer.

How Deposits and Damages Work Now

The *Tang* case now stands as both a warning to buyers and a comfort for sellers that the amount of a deposit is the minimum amount the buyer can be liable for if they fail to complete the purchase and sale transaction, subject to a deposit being characterized as a penalty which is discussed further below. It does not mean, however, that the seller keeps the deposit and then also recovers actual damages where such damages are the same or less than the deposit.

For example, where there is a $50,000 deposit and a sale collapses due to a buyer's breach of contract the seller is entitled to the deposit. If the seller sells the property for $50,000 less than the original contract price the seller does not recover both the deposit and the damages. Only $50,000 is recoverable. If, however, the property sells for $100,000 less than the original purchase price, and the seller sues the buyer, the seller will be entitled to the deposit plus $50,000 in damages. It should be noted that clear contract language, other than that in the standard form contract, can still operate to change the recoverable nature of a deposit.

It is very important that any language added to the standard form contract dealing with the deposit should be reviewed by a lawyer for your client as the impact could be to deny client recovery of the deposit. Be sure to review a contract carefully for any changes to the standard deposit language and recommend that your clients obtain legal advice where changes have been made. Further, if you are acting for a buyer who wants to change the language in the deposit clause of the standard contract, it is best to also recommend legal advice be obtained to ensure the impact of any changes is fully understood.

3 2013 BCCA 52

PLA and *HBRP Regulation*

The previous discussion deals with the right of a seller to keep a deposit after the expiry of the three business day rescission period set out in section 4 of the *HBRP Regulation*. Under section 6 of the *HBRP Regulation*, if a buyer rescinds a contract of purchase and sale under section 42 of the *PLA* the buyer must promptly pay to the seller an amount that is equal to 0.25 per cent of the purchase price (the "rescission fee") for the residential real property that is set out in the contract.

Licensees need to understand that the *HBRP Regulation* only applies to residential property, as that term is defined in section 2 of the *HBRP Regulation*, subject to the exemptions set out in section 3.

If the deposit was received by or on behalf of the seller, then the rescission fee must be paid from the deposit. After the seller is paid the rescission fee, the remainder of the deposit must be paid promptly to the buyer. Those payments, on the face of it, would cause an issue under section 30 of *RESA* if the deposit were held by a brokerage. Therefore, section 6(3) of the *HBRP Regulation* sets out a further circumstance whereby money may be withdrawn from a brokerage trust account: the rescission fee to the seller and the balance of the deposit to the buyer in circumstances where the right of rescission is exercised under section 42 of the *PLA*.

How Much Should a Deposit Be?

Deposits should be a reasonable amount and not be so excessive as to be considered a penalty by the court. This is a difficult concept as obviously to some extent forfeiture of a deposit is supposed to penalize a buyer for a breach of contract. The courts, however, have discretion to find that forfeiture of an "excessive" deposit is unfair. The courts have used language such as "all out of proportion" to the damages suffered when assessing what is a penalty or excessive.

The case of *Wilkie v Jeong* ("*Wilkie*") emphasized that even where a payment is called a deposit under a contract of purchase and sale, a court will still consider whether a deposit payment constitutes a penalty and is therefore unenforceable. In other words, merely calling an amount a "deposit" does not insulate the payment from scrutiny.

The court in *Tang* also discussed this concept and noted that, generally speaking, a deposit representing 10 per cent of a purchase price is reasonable, with up to 20 per cent being reasonable in some circumstances.

In *Liu v Coal Harbour Properties Partnership*[5] the court warned that "deposit sums much in excess of 20 per cent of the purchase price of a property would invite particular scrutiny by the court."

Unfortunately, the courts have not explicitly determined what percentage is or is not excessive. The reason is that "excessive" is always going to be examined in the context of the particular facts of the case. What is excessive in one transaction might not be in another, depending on the circumstances (e.g., the strength of the market, the product type, the geographical location etc.). Accordingly, licensees should exercise caution. While courts have found deposits as high as 25 per cent to be acceptable, licensees should be wary of deposits exceeding 20 per cent and should advise a client to seek legal advice before agreeing to an unusually significant deposit amount.

4 2006 BCCA 385

Relief from Forfeiture

In addition to the amount of the deposit, courts will also consider the conduct of the seller in assessing whether a buyer can avoid forfeiture of the deposit where the buyer has breached the contract. The legal basis for avoiding loss of a deposit can be found in section 24 of the *Law and Equity Act*,[6] which specifically grants the court the power to relieve a party from forfeiture. Significant case law has developed regarding the basis for relief from forfeiture.

Wilkie discussed the legal test to allow a buyer to be relieved from having to forfeit the deposit. In this case, the buyer was a foreign national who entered into a contract to purchase a North Vancouver home, prior to the Property Transfer Tax "additional tax" known as the "Foreign Buyer Tax" coming into effect. The buyer paid a $180,000 deposit (less than 10 per cent of the purchase price). However, between entering into the contract and the completion date, the tax came into effect and resulted in a tax for the buyer of over $400,000. The buyer claimed she was unable to complete the purchase because of the extra financial obligation and the seller claimed damages and retention of the deposit. While the buyer argued the contract was frustrated by the new tax, she also attempted to seek return of her deposit, arguing that she ought to be relieved from forfeiture based on equitable principles such as unconscionability and the result being disproportionate to the wrongful conduct.

In its conclusion, the court stated not being able to complete the purchase because of financing challenges did not frustrate the contract.

The court went on to consider the issue of forfeiture, finding a buyer must not only prove that a deposit is out of proportion to the actual damage suffered by the seller, but must also establish that it is unconscionable for the seller to retain that deposit.

Notably in this case, the seller's loss had not crystallized, as the seller was unable to resell the home. This meant that it was not actually possible to determine whether the deposit was disproportionate to the loss.

On the question of whether it was unconscionable for the deposit to be forfeited, the court considered the seller's conduct. Specifically, the court found the seller's conduct was entirely proper, there was no evidence of the buyer suffering any disability or disadvantage, there was no inequality of bargaining power, and the repudiation was no fault of the seller. Further, the deposit amount was "reasonable and well within the normal range of residential real estate sales."

The outcome was different in the cases of *Malek v. Tanbakookar*[7] and *Norfolk v. Aikens*[8] where the courts found that the conduct of the sellers failed to bring an end to the contracts. That conduct meant the sellers ultimately breached the contracts themselves by not being ready, willing, and able to complete the sales, thereby depriving them of the right to keep the deposits in those cases.

As such, licensees should keep in mind not only whether the amount of the deposit seems excessive, but should also be aware that if a seller acts wrongfully or in bad faith in negotiations or takes steps during the term of the contract which keep the contract alive, it could put at risk the seller's claim to a deposit in the event of a buyer's breach of contract. Obviously, if a seller's conduct ultimately amounts to a breach of contract the right to remedies will be impacted.

6 RSBC 1996 c. 254
7 2012 BCSC 1742
8 1989 Can Lii 245 (BCCA)

What if the Buyer fails to pay the Deposit

The guarantee-like purpose of a deposit is further supported by the fact that a deposit is forfeited "in principle," even if the buyer never actually paid the deposit in the first place.

This is exactly what happened in the recent case of *Argo Ventures Inc. v Choi*[9]. The parties entered into a subject free contract that contemplated a $300,000 deposit due within 10 business days (sale price of $6.5 million). However, before the deposit payment date, the buyers suddenly decided they no longer wished to complete the transaction and repudiated the contract. The seller accepted the repudiation and commenced an action seeking judgment in the amount of the unpaid deposit. The buyers took the position that an unpaid deposit cannot be forfeited.

The court held that although the deposit could not technically be "forfeited" because it was never actually paid to the seller, the seller was still entitled to sue for the deposit amount.

Significantly, this case warns buyers that they cannot simply walk away from a transaction merely because they have yet to pay a deposit that has become due and owing. They will be considered to have paid "in principle" and will be liable for the deposit amount. Buyers who believe they can avoid their contractual obligations by merely failing to pay the deposit should be strongly warned against such conduct and referred to a lawyer for legal advice.

If a buyer seeks a longer than usual time to pay a deposit or has a deposit which increases over time, they should be warned that failing to pay the first or later deposits can expose them to litigation for the total amount of all deposits, paid and unpaid. This is even so where the property is later sold for a higher price than the original contract.

Note that, in the situation where a buyer is exercising their right of rescission under the *PLA* and the *HBRP Regulation*, they are still liable for payment of the rescission fee, even where a deposit has not been made.

Form of Deposit

The standard form contract calls for payment by way of various methods (bank draft, certified cheque, wire transfer, etc.) but that contract can be changed to stipulate a specific method of payment which must then be complied with. Parties to a contract have attempted to avoid contractual obligations by claiming that the payment form of the deposit was not in the form set out in the contract. While there has not been a court decision yet to determine the fundamental nature of the form of payment of the deposit, licensees should take note of any changes from the standard form contract for the method of payment of a deposit. Be sure to bring such changes to the attention of your clients to ensure compliance with the deposit clause.

Late Payments of Deposits: Simple Slip or Breach of Contract

1. Late payment constitutes repudiation of the contract of purchase and sale

While parties are always entitled to grant extensions of time, *1473587 Ontario Inc. et al. v. Jackson et al. ("Jackson")*[10] demonstrates that if parties enter into a contract of purchase and sale where a time is of the essence provision applies to all obligations, the non-breaching party is entitled to treat the late deposit payment as repudiation of the contract.

Why might a court be so strict about the lateness of a deposit payment if the deposit payment is ultimately paid to the seller? What if the payment is only a day or two delayed? What if the lateness was completely unintentional and the purchaser had every intention to complete the transaction on time?

It all comes down to the "time is of the essence" provision in contracts. In the standard form contract the "time is of the essence" language is found at clause 12. When time is of the essence with regards to all obligations and the buyer fails to pay at the specified time, late payment constitutes not merely disorganization or mistake, but a breach of an essential term of the contract. When an essential term of the contract is breached, the innocent party is entitled to terminate the contract and seek appropriate remedies for the breach (e.g., damages).

9 2020 BCCA 17
10 [2005] OJ No 710 (ONSC)7

In *Jackson*, the buyers inadvertently paid a deposit to purchase the seller's land seven days later than was contemplated under the contract. This late payment was not intentional or strategic, but a mere oversight and mistake.

The contract for purchase and sale included a "time is of the essence" provision that applied to all obligations under the contract. The buyers had notified the seller by telephone that the deposit cheque was on its way, to which the seller responded with a terse "OK." However, the sellers eventually took the position that the agreement with the buyer was at an end and they would not accept the payment.

The buyer argued that the deposit term may have been a fundamental term of the agreement but did not constitute a fundamental breach as the delay was remedied before the sellers suffered any prejudice or harm.

The court ultimately rejected the buyer's arguments and found that the parties expressed a clear intent in drafting the contract to have the time is of the essence agreement apply to all obligations. Therefore, the court concluded that when the buyer inadvertently failed to pay the deposit within the time specified, it breached an essential term of the contract, thus entitling the sellers to treat the contract as ended.

Based on this case, licensees should be extremely diligent about ensuring deposit payments are made exactly when due and owing under the contract. So long as a contract contains a broad time is of the essence provision (which all standard form contacts do), any late payment will not be treated as a mere slip, but could be a fatal mistake affecting the entire transaction.

Issues to keep in mind:

- How is the timing of the deposit set out in the contract? Is it within 24 hours of acceptance or 24 hours of subject removal? Contracts have been terminated where the parties all assumed the deposit was owed in the more common 24 hours after subject removal time when the contract actually called for payment 24 hours after acceptance of the offer and upon discovery the seller took the position the buyer had breached the contract. It is very important, as the licensee involved, to properly calculate and keep track of when the deposit is due and ensure your client is aware of the importance of the deposit being paid on time.
- Also carefully consider the calculation of the date. Where, for example a subject clause removal deadline is within a certain number of days from another event (e.g., acceptance of the contract, or removal of another subject clause) the proper calculation can be complicated and easily missed. You can be certain that a client will hold a licensee responsible for a missed deadline unless there is a clear record, ideally in writing, that the client was put on notice of the proper date for payment of the deposit.

2. If claiming termination due to late payment, a seller must act accordingly

After a seller claims the buyer's late payment of a deposit constitutes repudiation of the contract, the seller cannot continue to perform the contract in hopes or anticipation that payment may be forthcoming if they want to have a strong claim to the deposit. Rather, the seller must act in accordance with the intention that the contract has been repudiated.

PRACTICE TIP

It is very important that licensees immediately advise sellers to seek legal advice upon becoming aware a deposit is being paid late. Failure to seek such advice could jeopardize the sellers' legal position going forward.

Yuen v Gill[11] illustrates the importance of the seller standing by their intention to treat the contract as repudiated following late payment of a deposit. In this case, the buyer and seller were engaged in various discussions amending the contract of purchase and sale to include and exclude certain household appliances. The deposit was due to be paid within 72 hours of acceptance of the offer. Eventually, the seller tried to claim, despite not having advised the buyer of same, that the contract was terminated due to late payment of the deposit. However, because the agreement and amendments with respect to the appliances were ongoing, the central issue before the court was at what date the agreement was finalized and thus, when the time started for payment of the deposit. The buyer argued that these ongoing negotiations meant that their deposit payment was not late.

The court eventually determined that the timeline to pay the deposit remained open while the parties were still negotiating amendments and waiting for the seller to initial said amendments. As such, the date to pay the deposit was extended.

The court further noted conduct by the seller (i.e., trying to get the buyers to sign a disclosure statement, after the allegedly late deposit) was a fundamental problem to the seller advancing the view that the contract was repudiated by the buyer's late deposit payment.

3. Allowing for late payment of a deposit to fix clerical

Notwithstanding the rigid rules regarding payment of deposits, there may be flexibility permitting late payment of a deposit so that a buyer can fix clerical errors in payment, so long as the payment is presented to, and accepted by, the seller's agent on the correct date stipulated by the contract.

In the recent case of *Toor v Dhillon ("Toor")*,[12] the buyers were required to pay a deposit within 24 hours of acceptance of the contract. The deposit was to be delivered via certified cheque to "Omaxwell Realty" and the contract stipulated that if buyer failed to pay the deposit "as required by the contract," the seller could terminate this contract. On the stipulated date, the buyers presented the bank draft payable to the wrong name, "Omax Real Estate" rather than "Omaxwell," but the cheque was provided on the appropriate date and in the right amount. The dual agent (permitted at the time of this sale in 2015) advised the buyers not to worry and asked them to have the bank draft corrected the next day. The following day, the buyers delivered the redrafted deposit to the dual agent.

However, upon receipt of the payment, the sellers took the position that the payment was made one day late. The sellers claimed late payment of the deposit was a repudiation of the contract. The buyers on the other hand took the position that they had complied with the contract, or in the alternative, the dual agent had waived the date for deposit payment by one day.

The court's decision rested, in part, on the fact that the sellers were not entitled to rely on the time is of the essence provision due to their previous conduct (saying they would not complete and refusing access to a bank appraiser before the deposit was due – see earlier discussion of how a seller's conduct can result in the seller losing the right to the deposit).

As the sellers were not entitled to rely on the time is of the essence clause, the sole issue was whether the buyers' late payment was made "as required by the contract." The court concluded that by presenting the mistaken draft to the dual agent, in the correct amount, on the correct date, the buyers had complied with the contract – despite the one day delay to fix the clerical error – because the agent had accepted the first bank draft. Accordingly, the deposit was not late because it was accepted on the stipulated date, with permission given by the dual agent to fix the clerical error the following day.

11 2009 BCCA 238
12 2020 BCCA 137

PRACTICE TIP

Based on the reasoning in Toor, licensees acting for sellers should be aware of how their acceptance of an imperfectly drafted or late deposit may affect the seller's ability to later claim repudiation and a right to the deposit. Such acceptance should never be done without the express instructions of your client. Please refer to the Knowledge Base for further information.

Real Estate Development Marketing Act ("*REDMA*") vs Real Estate Services Act ("*RESA*") and Deposits

Pursuant to section 28 of *RESA* all deposits accepted by a brokerage in respect of a trade in real estate are held by the brokerage as a stakeholder unless it is with respect to a deposit received under provisions of the *Residential Tenancy Act*. This means that your brokerage is not holding the funds for the benefit of either the buyer or seller, but as a neutral third party. Note that the *PLA* rescission right and the *HBRP Regulation* do not apply to contracts of purchase and sale to which the rescission rights in section 21 of *REDMA* apply.

Unlike resale transactions where deposits are usually held by a brokerage as stakeholder per *RESA*, any deposit relating to a new development unit (e.g., a presale unit) purchase is held according to the provisions in *REDMA*. This applies to developers holding deposits with their lawyers or notaries and instances where a brokerage has been tasked with holding the funds.

Under *REDMA*, all deposits received from buyers must be held in trust by a notary, lawyer, or real estate brokerage. When a brokerage holds the funds, they must do so as a trustee.

There are different provisions from RESA for when the funds can be released. While a trustee holds the funds for both the developer and buyer (as would a stakeholder), a trustee can withdraw the funds:

- If the money was paid into trust in error;
- With the written consent of the buyer and developer;
- In accordance with *REDMA*'s allowance for the developer to use the funds under specific circumstances;
- In accordance with a buyer's rights of rescission;
- In accordance with *RESA*'s section on unclaimed funds;
- In accordance with *RESA*'s section on paying funds into court;
- In accordance with a court order; and
- In accordance with the Regulations under *REDMA*.

The trustee must release the deposit funds to the developer if the developer certifies in writing:

- That the buyer's right of rescission has ended;
- That the subdivision plan, strata plan or other plan has been deposited in the appropriate land title office (if required); and
- The approvals required for the lawful occupation of the development unit have been obtained, and;
    - As applicable:

        - The interest has been registered in the appropriate land title office and an instrument evidencing the registration has been delivered to the buyer if all or part of the buyer's interest in the development unit is registrable in a land title office; or

        - An instrument evidencing the interest of the buyer has been delivered to the buyer if all or part of the buyer's interest in the development unit is not registrable in a land title office.

Or, the developer certifies in writing:

- The buyer has failed to pay a subsequent deposit or the balance of the purchase price when required by the purchase agreement under which the deposit held by the trustee was paid;
- The developer elects to cancel the purchase agreement because the buyer failed to pay a subsequent deposit or the balance of the purchase price when required under the terms of the purchase agreement, so the amount of the deposit is forfeited to the developer; and
- The developer has elected to cancel the purchase agreement.

PRACTICE TIP

If a deposit is related to a trade involving a development unit which is subject to the requirements of *REDMA*, you should determine that the party holding that deposit, whether it be your brokerage or someone else, is aware that it is being held under the provisions of *REDMA*, not *RESA*. This should be included in the contract of purchase and sale and you should advise your client to seek legal advice to ensure there is no misunderstanding about either how the deposit is to be held, or the terms upon which it may be released.

COMMON PROBLEMS FOR LICENSEES DEALING WITH DEPOSITS

Failing to report late deposits

The most common complaint and discipline penalties arising from deposits, is due to the mishandling of late deposits. Licensees have been repeatedly disciplined for failing to report properly upon a deposit being received late.

Representatives must promptly provide contracts of purchase and sale to their managing broker (Real Estate Services Rules Section 29(1)). It is not appropriate to wait until subjects are removed or deposits are due to hand in contracts. As managing brokers have specific responsibilities (discussed below) regarding deposits, it is important they are in possession of contracts to allow for proper supervision and compliance with the Real Estate Services Rules. Licensees must immediately report to their managing broker if a deposit is not paid on time (Real Estate Service Rules Section 29(2)(b)).

Managing brokers must give notice in writing to all parties to the trade if a deposit is not received, is received late or a deposit cheque is returned dishonoured (Real Estate Services Rules Section 28(5) and (6)). A managing broker will not be relieved of this requirement even where the managing broker did not know the deposit was due. It is the responsibility of managing brokers to ensure that representatives provide the brokerage with contracts so that deposit due dates can be recorded and tracked. As can be seen in the discipline cases Uganec (Re)[13] and Cavin (Re)[14], lack of knowledge regarding the status of deposits will be considered professional misconduct.

With the knowledge gained in this session licensees should better understand the significance of a late deposit and the need to report a late deposit in order to best protect the interest of clients.

Better yet, licensees will hopefully impress upon their buyer clients the importance of providing a deposit on time and in the proper form.

13 2013 CanLII 51536 (BC REC)
14 2009 CanLII 23833 (BC REC)

Failing to submit deposits to the brokerage upon receipt

Section 27(1) of RESA requires:

A licensee engaged by a brokerage must promptly pay or deliver to the brokerage

(a) all money held or received from, for or on behalf of a principal in relation to real estate services...

Licensees have been disciplined for holding deposits rather than providing them to the brokerage. Clients may ask for a deposit to be held while, for example, a buyer is deciding whether to remove subject clauses, but this is not appropriate. Licensees should explain to the buyer client **before** taking a deposit that once received the licensee must provide the deposit to the brokerage for it to be deposited into the brokerage trust account. Similarly, upon receipt of a deposit it is not appropriate to give the deposit back to the client. The proper conduct is to provide the deposit to the brokerage as soon as is practicable; meaning the same day or, if received late in the day, the following morning.

Payment of a deposit to the seller or third party without written agreement

A deposit may be paid to someone other than the brokerage, such as directly to a seller, where the contract stipulates this. Payment of deposits to anyone other than a brokerage carries risk and clients should be warned that *RESA* does not operate to control such deposits. Depending on the contract language even deposits held in trust by a third party may not be held by the third party as a stakeholder and will not have *RESA* stakeholder protection. Clients should be told to seek legal advice before agreeing to deposits being paid to anyone other than a brokerage and this recommendation should be recorded in the contract.

> *Clause: The Seller [or Buyer] acknowledges that the Seller [or Buyer] has been advised to obtain legal advice before signing this Contract, regarding the provisions in this Contract for holding the Deposit.*

Section 27(4) of *RESA* states that where the monies are to be paid to someone other than the brokerage there should be a separate agreement setting out the terms of the payment of the funds (subject to section 27(4.01) discussed below). Brokerages should have a form for payment of a deposit other than to the brokerage which warns of the risk of such payments (which will not have the protection provided by *RESA* where the brokerage holds the deposit in trust as a stakeholder). Additionally, consideration should be given to a subject clause to allow the parties to have a lawyer approve such deposit arrangements:

> *Clause: Subject to the Buyer's [or Seller's] lawyer approving, on or before (date), the provisions set out in this Contract for holding the Deposit. This condition is for the sole benefit of the Buyer [or Seller].*

This clause and other clauses dealing with deposits can be found in the Clauses section of the Knowledge Base.

Section 27 (4.01) permits a licensee to deliver a deposit, other than cash, directly to a third party or seller without a separate agreement if the deposit is in a form made payable to the third party or seller. While this is permitted, use of the brokerage form for payment of deposits other than to brokerages is still prudent as it provides a documented warning to the client of the risks involved in this decision.

Assisting clients by paying deposits and being reimbursed or accepting wire transfers into personal accounts

Licensees have been disciplined for providing personal cheques for deposits where the client has agreed to reimburse the licensee. In a similar vein, a licensee was disciplined for allowing a client to wire transfer funds into her personal account for a deposit. At no time should a licensee use any form of personal funds or accounts for the transmission of any money in a real estate transaction. Even though the licensees believe they are assisting clients with no malicious intent there is little tolerance for this kind of assistance which steps outside the proper boundaries between a licensee and client. See: *Wen (Re)*[15].

Releasing deposits to parties without written instructions

All deposits accepted by a brokerage in respect of a trade in real estate are held by the brokerage as a stakeholder unless it is with respect to a deposit received under provisions under the *Residential Tenancy Act* or held as a trustee under the provisions of *REDMA*. This means that your brokerage is not holding the funds for the benefit of either the buyer or seller, but as a neutral third party.

Should a transaction not complete, all parties to the trade must sign an agreement indicating to whom the deposit is to be paid. A written agreement is required whether or not the contract of purchase and sale outlines what happens if one party breaches the contract. Failing to obtain a written agreement will result in discipline. See: *Abbasi (Re)*[16].

If a dispute arises between the parties with respect to the deposit, and no agreement to release the funds is signed, the funds may ultimately get deposited into court on application by the brokerage.

Note that under section 42 of the *PLA* and the *HBRP Regulation* section 6(2) where the rescission right is exercised, no written agreement is required.

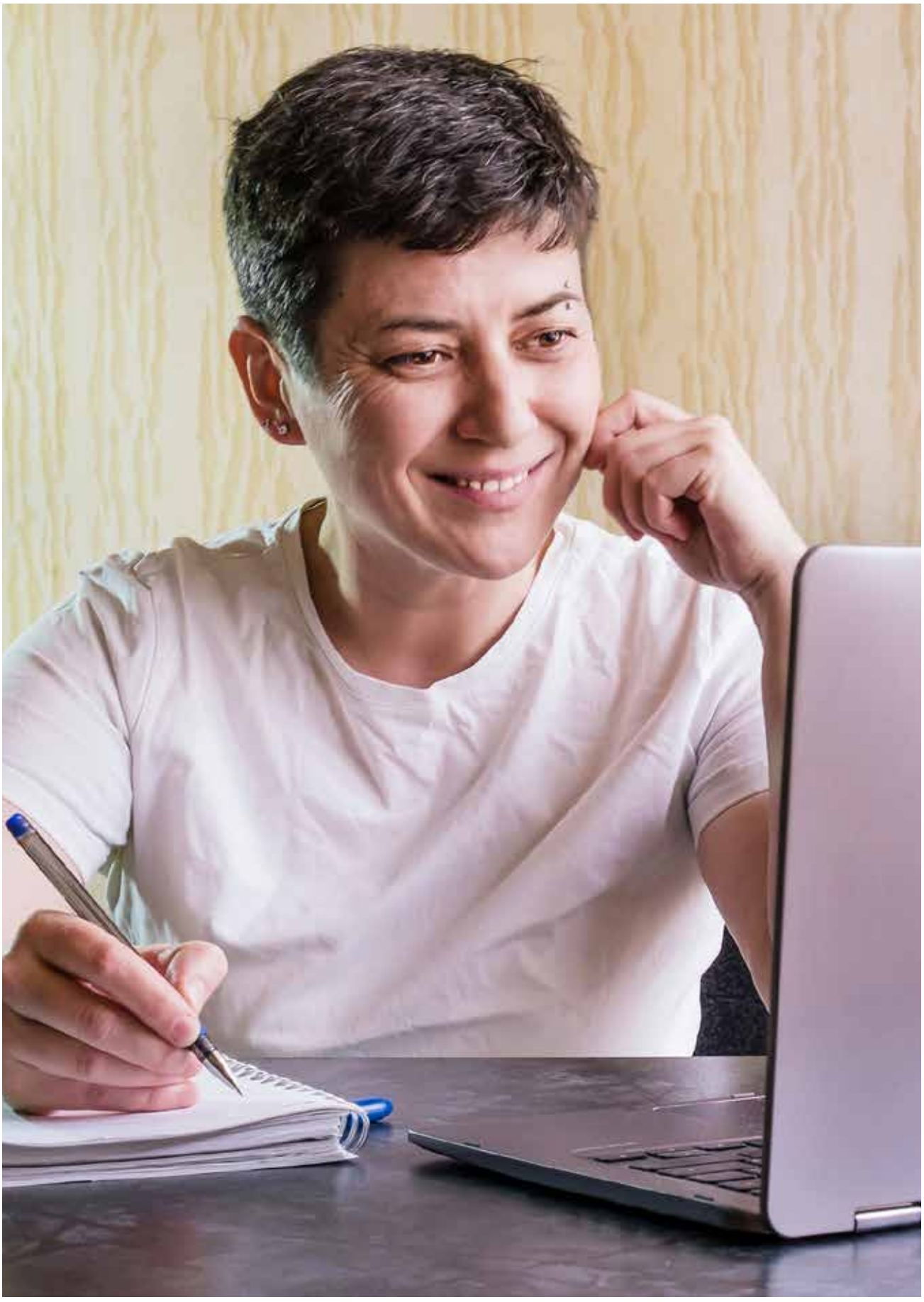
Practical Realities

When a buyer breaches a contract of purchase and sale by paying a late deposit or committing other breaches of the deposit clause, the non-breaching seller is, of course, always entitled to accept the breach as a repudiation of the contract and treat the contract at an end. The seller can then decide to return the deposit to the buyer if the seller is feeling charitable and does not want the likely fight over the deposit. In such cases, the licensee should always recommend clients seek legal advice.

Section 30(2) of *RESA* requires, prior to paying out a deposit the brokerage obtain a written agreement which both buyer and seller must sign providing instructions on release of the deposit. Again, it is very important that prior to having this agreement signed you advise, in writing, that your clients obtain legal advice. This is especially so if the form used by your brokerage includes a release of claims along with the instructions for return of the deposit funds. A seller may feel confident about the ability to quickly sell the property but if the market changes, as does happen quickly, the seller may suffer significant unexpected losses. You can expect that in such a circumstance the seller will not be happy about having waived rights to a claim to recover such losses and may potentially try to blame their agent for this decision. Having paperwork to show that the client was told to obtain legal advice prior to signing any release forms is vital to successfully defending these kinds of claims.

CONCLUSION

With developments in the law strengthening the seller's right to the deposit, licensees can expect sellers to be less prepared to just move on in the face of breach of the contract by a buyer, even in a strong and rising market. It should be expected that sellers will more frequently be claiming a right to deposits even where they are quickly able to resell their property. Licensees should not be involved in making any recommendations with respect to whether a seller makes a claim to a deposit or waives their rights. This is an area which the client should be seeking legal advice as there are many factors which can impact a claim for a deposit and early legal advice is vital to the preservation of such claims.



Module Two: Contracts

Contracts are living, breathing documents by design, and are most effective when they are tailored to a specific situation. The standard form contracts of purchase and sale co-created and maintained by the British Columbia Real Estate Association are very useful starting points, but they are starting points only and need to be reviewed and modified as appropriate for every specific deal. This module will describe some best practices for drafting and reviewing contracts with clients, as well as some drafting risks to be aware of, with respect to subject clauses in particular. Finally, it will discuss the effect of expired contracts and address renegotiations once a contract is made.

IMPORTANT NOTE:

Licensees need to understand the rescission provisions in the *PLA* and the *HBRP Regulation* and how they may apply to the contracts discussed in this module. These recission rights are separate from the legal rights of buyers who use contract condition clauses.

LEARNING OBJECTIVES

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

1. Understand the legal impact of contract clauses that are vague or overly subjective;
2. Identify precise and objective subject clauses;
3. Understand the importance of considering and reviewing with clients the contract of purchase and sale terms in every transaction; and
4. Describe the consequences of letting a subject removal period lapse.

02

STANDARD FORM CONTRACTS – WHEN NOTHING IS TRULY STANDARD

The British Columbia Real Estate Association together with the Canadian Bar Association, BC Branch 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. The most commonly used forms are the residential and commercial standard form contracts. The residential and commercial form contracts contain a lot of overlap; however, each form is focused on information more likely to be applicable to the specific type of transaction. The commercial form also builds in more space to include deal-specific terms, since there is, generally speaking, more variety in the terms of a transaction for commercial property than there is in contracts for residential property.

However, the standard forms are a baseline to build from and are rarely the end product. No deal is truly "standard." Properties and parties are all unique and their contracts must reflect the specific agreement and understanding between the parties. Clients are relying on licensees to create enforceable contracts and draft appropriate terms that reflect the deal at the time it is made.

Unintended Consequences of Standard Terms

In some cases, there are terms in the standard forms that may have unintended consequences that one or more of the parties did not consider, or worse, wanted to avoid. For example, section 9 of the residential contract and section 22 of the commercial contract both state that title will be transferred from seller to buyer free and clear of all encumbrances except for a specified list of encumbrances including restrictions contained in the original crown grant or rights of way and covenants in favour of utilities and public authorities. If the parties intend to attempt to remove any of the encumbrances that are included in the standard form language, or there are other encumbrances that will stay on title after closing, then the contract needs to be changed to make that clear.

Added Terms

Another example where the standard form contracts need to be reevaluated is where the parties want to include a specific term (normally included in section 3 of the residential form and sections 20A, 22, 23, 24 and/or 41 of the commercial form, or in an addendum attached to the contract) but that term is inconsistent with a term that is already included in the standard form. A common example is assignment terms. The standard form contracts include a prohibition on assignment of a contract of purchase and sale without the seller's consent, and also provides that the seller is entitled to any profit on the assignment (section 20A of the residential form and section 40A of the commercial form). While either or both of those terms can be changed if the parties agree, it is not recommended to include "new" assignment terms in the contract without removing or appropriately modifying the standard form terms. Leaving the standard terms as-is makes the contract internally inconsistent, which may ultimately make the contract or the specific terms being added unenforceable, among other unintended results.

Therefore, it is critical that licensees consider and review with their clients the standard form terms and discuss their impact with clients in every engagement. Clients may not realize that they want to change the standard terms until they learn what they are. Even experienced buyers and sellers can gloss over contract terms without fully reading and digesting them. Collecting signatures by way of DocuSign or other electronic document signature software, which in many ways has improved the convenience of real estate practice for all parties, exacerbates the issue, and almost encourages clients to skip ahead to the dotted line without reading what they are signing. It is part of a licensee's obligation to slow down that process and ensure that the clients take the time to read the contract to make sure that all of the terms are accurate and properly reflect their wishes.

Residency and Tax Implications

The recent case of *Shave v. Century 21 Assurance Realty Ltd.*,[1] has 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 plaintiff buyers had recently moved to British Columbia from the United Kingdom for work, a fact their licensee was aware of. The licensee was assisting the plaintiffs as designated buyers' agent to find property in the Kelowna area. The plaintiffs made an offer on a property which indicated on the contract of purchase and sale that the buyers were not Canadian citizens or permanent residents, which was true. The plaintiffs did not obtain financing in time, so the deal did not proceed, and they continued their search.

The plaintiffs then travelled to the United States in order to finalize their Canadian work visas. The licensee misunderstood the implications of that trip and believed that the clients had obtained their Canadian permanent residency in that time. Therefore, when the clients made their next offer on a property, the licensee changed the Canadian residency declaration to "yes" on the contract of purchase and sale without confirming 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 plaintiffs' evidence was that they did not review that term when they signed off on the offer. The plaintiffs ultimately purchased the property but after the transaction completed, the Province required that the plaintiffs pay the Property Transfer Tax plus the 20 per cent additional tax, commonly known as the "Foreign Buyers Tax," which amounted to almost $175,000.

1 2022 BCSC 183

The court found the licensee 75 per cent responsible for the buyers' loss (the court found the conveyancing lawyer 20 per cent responsible and the plaintiffs five per cent responsible). This was despite the clause in the designated agency agreement directing the clients to confirm their residency status and any tax implications with their own lawyer or accountant. The licensee knew that the plaintiffs had recently arrived in Canada but did not say anything to them about the possibility of the Foreign Buyers Tax being applicable. The court found the licensee had a duty to advise them of the existence of the tax as one of the facts that may impact the buyers' decision to purchase. This duty is part of an agent's fiduciary obligations and is also set out in the Real Estate Services Rules. The Disclosure of Representation in Trading Services form confirms a licensee's obligation to disclose everything the licensee knows that might influence a client's decision. While the licensee in this case did not need to advise on whether the tax would in fact be payable, the licensee needed to raise the issue so the clients could seek appropriate advice. If the licensee had reviewed the contract carefully with the clients, they would have discovered the mistake and either consciously accepted the risk or decided not to buy at that time.

The case also stands as a warning against a licensee changing something in the contract of purchase and sale without specifically confirming their instructions from the clients. The clients will obviously have more accurate information about their residency status and other personal information, and where the clients are unclear on their status, a licensee should recommend they get legal advice to confirm, rather than make assumptions.

THE PROPERTY DISCLOSURE STATEMENT – ANOTHER FIELD OF REVIEW

A Property Disclosure Statement ("PDS") is another standard-form document that is often used (but less often read in detail) in real estate transactions. The PDS is worth addressing here 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.

Ultimately, the sellers are the ones who should have the most accurate information about the items covered in the PDS. However, they may need assistance from their licensee in interpreting the questions asked. Representations made about the property's condition, including in the PDS, is also one of the limited areas where a listing agent can be found to owe a duty of accuracy to a buyer, even though the buyer is not their client. However, if a licensee knows or should know that a seller's representation in the PDS is not accurate, they may be found at least partly liable for the consequences of that inaccuracy (see, for example, *Jakubke v. Sussex Group at al.*[2]; *Johnstone v. Dame*[3]). Therefore, properly completing the PDS is important for both sellers and their licensees.

The courts have limited a listing agent's obligations 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. Their review of a PDS after it is completed can be limited to making sure all questions are answered and that the form is signed (see *Beacock v. Moreno*[4]). A licensee may attract added liability if they fill out the PDS themselves, so that is a task best left to the sellers (see *Johnstone v. Dame, supra*).

2 1993CanLII1277 (BCSC)
3 [1995] BCJ No 2637 (SC)
4 2019 BCSC 955, affirmed 2021 BCCA 412

CERTAINTY OF CONTRACT TERMS

An enforceable contract requires these three main items:

- Certainty of the parties to the agreement;
- Certainty of the fundamental terms of the agreement; and;
- Consideration, or some value being exchanged between the parties.

In terms of a real estate contract, the fundamental terms of the agreement, in addition to the parties to the contract, are normally:

- The identity of the property being bought and sold; and
- The purchase price.

If any of these items are not clear, then the contract is simply unenforceable. That could allow a party to walk away from the contract without consequence if they change their mind. Therefore, licensees need to be conscious about including clear language in the contract on all terms, but particularly as it relates to the parties, property identification and price.

Certainty of Price

Certainty of price may be in question when the parties want to negotiate a price adjustment clause from the outset. The parties can always try to negotiate a different purchase price after the contract is made, such as where defects are uncovered in a building inspection. However, the parties are not obliged to agree on a different price once the initial contract price is agreed to. Therefore, if the defect is uncovered before appropriate subjects are removed then the buyer can normally walk away from the deal by simply not removing the subject. If the defect is uncovered after subjects are removed but before completion, in most cases the buyer will have to pay the original price unless the seller agrees to renegotiate.

Price Adjustment Clauses

To avoid a situation where the buyer must choose between accepting a property with defects at full price and walking away, price adjustment clauses are sometimes used. However, because they deal with the fundamental term of price, they need to be used very carefully. In *Khela v. Clarke*,[5] the parties had specified a price in the contract but had also included a price adjustment clause that provided the "final purchase price" would be based on the "developable area" of the property. The contract did not define what "developable" meant. The court found that there was no ordinary meaning of "developable" that could assist in the interpretation. The absence of a definition of "developable" rendered the contract void due to uncertainty of price. The price could not be calculated without knowing specifically what that term meant.

The buyers had argued that the price adjustment clause should be severed, or simply deleted, from the contract, leaving the original purchase price and the rest of the contract intact. The law allows a term to be removed from a contract in certain circumstances where including that term would make a contract unenforceable. However, to be able to sever or delete a term, it has to be a term that the contract can exist without. You cannot sever a term as critical as price since without that term, as discussed, no contract exists in the first place.

Contract Interpretation by the Court

A dispute over a contract by definition means the parties are interpreting the same contract terms in different ways. The court's job is to analyze the words of the contract on its face to determine the intention of the parties from the words that they used, regardless of their arguments made after-the-fact. The plain meaning of the words used in the contract is what is relevant. Oral statements made by the parties at the time the contract is made are generally not used in the interpretation.

As a result, the words used in a contract are critical. The more clearly a contract is drafted, the more likely the parties' original intention can be determined from its plain language. Conversely, if a contract is not clearly drafted, the parties risk a court finding that the words mean something other than what one or more of them expected, or that they have no contract at all.

5 2021 BCSC 503, affirmed 2022 BCCA 71

CONTRACT CERTAINTY AND CONDITIONS PRECEDENT/SUBJECT CLAUSES

While creating clear contract terms is always important, it is particularly important to be clear when drafting conditions precedent, also known as subject clauses. Parties to a contract of purchase and sale normally understand that a contract is made but further obligations under the contract do not need to be performed until all of the conditions precedent, or subjects, have been removed.

As such, clients may get an unpleasant surprise when it turns out that either:

1. They thought they could rely on a subject clause to back out of the deal, and they are unable to do so without consequences; or

2. They thought a subject clause was clear enough to require the other party to complete the transaction in the circumstances, but the other party is able to walk away.

Both mishaps are possible if the subject clauses are not drafted with care.

Davidson v. Merrick

The recent case of *Davidson v. Merrick*[6] provides an excellent explanation of the types of subject clauses typically used in real estate and some of the problems that may ensue.

That case involved a property transaction in the Shuswap Lake area. The buyers were looking for a cabin and liked the property the sellers had listed. The buyers made an initial offer, which was countered by the sellers and the sellers' licensee added the following subject clause in the counter-offer:

This offer is subject to the seller entering into an unconditional agreement to purchase a suitable waterfront or semi-waterfront home on or before August 14, 2020. This subject is for the sole benefit of the seller.

The buyers were concerned about the subjective nature of the clause and felt like it was vague. However, their licensee assured them that there were a number of available properties for sale and suggested the sellers would have no trouble finding one to purchase. Relying on that advice, the buyers accepted the counter-offer as-is.

The sellers had a home in Kelowna and the Shuswap Lake cabin and wanted to combine their two properties into something in the West Kelowna area. However, as their search continued, they did not find anything that suited them. The sellers offered to extend the subject removal period by a month to give them more time, but the buyers did not agree and the subject removal period ultimately expired without the sellers removing the subject clause at issue.

The buyers sued the sellers claiming that the sellers had an obligation to make best efforts to remove the subject clause at issue and had failed to do so, but the court did not agree.

In its analysis, the court discussed the three types of subject clauses that appear in contracts of purchase and sale:

1. Clear, precise and objective clauses, for example:

Subject to John Smith being elected as mayor of Kelowna in the municipal election on October 15, 2022.[7]

2. Entirely subjective clauses, for example:

Subject to the buyer approving the colour of the tile work in the property's bathrooms.

3. A mix of subjective and objective elements, for example:

Subject to the buyer obtaining a satisfactory building inspection report on or before May 5, 2022.

Each type of clause has different legal implications and imposes different obligations on the parties.

Clear, precise, and objective clauses are the easiest to interpret and determine whether or not they have been performed. It is a simple "yes" or "no" as to whether the objective event has occurred. If an objective subject clause is removed, the contract is firm and the parties all have an obligation to act in good faith to complete.

6 2021 BCSC 1847
7 *Ibid*, para. 23

Entirely subjective clauses are the ones that create problems because what is "suitable" or "large enough" or "an appropriate layout" is in the eye of the beholder. Esthetics and location are particularly troublesome subjective ideas. What will satisfy one person may not satisfy another, which makes the court's job of determining what all the parties agreed to impossible. Where interpreting a subject clause with certainty is impossible, that "contract" becomes a standing offer, which either party can walk away from before that subject is removed without consequence. There is no requirement that the parties act in good faith to remove that subject. They can be completely arbitrary about it if they choose.

Where a clause is partly subjective and partly objective, prior court decisions have decided that the parties need to take all reasonable steps to cause the subject in question to be removed. What is "reasonable" may be up for debate in any given situation. However, parties usually need to make some effort. Otherwise they may be in breach of the contract for failing to remove a partly objective, partly subjective subject such that the other party can hold them to the bargain.

One very common example of a partly objective, partly subjective clause is "subject to obtaining satisfactory/suitable financing." In that context specifically, the courts have sometimes held that the buyer needs to use "best efforts" to obtain financing (see *Griffin v. Martens*[8]). In other cases, only an "honest" effort is required (see *Gordon Nelson Inc. v. Cameron*[9]). What is "satisfactory" or "suitable" normally means satisfactory to a person acting reasonably but taking their subjective circumstances into account. In other words, the buyer cannot act arbitrarily or in a way that does not make commercial sense, but at the same time their specific personal circumstances will be relevant and will inform what is considered reasonable. The type of effort required to find something suitable or satisfactory is a matter of looking at the specific words of the contract.

The takeaway from the *Davidson* case is for a licensee to be clear about the client's wishes, and if those wishes are subjective, to be clear with the client about the risks of including overly subjective subject clauses in a contract of purchase and sale.

Sutter Hill Management Corporation v. Mpire Capital Corporation

Another recent case provides some guidance and a warning regarding subject clauses that are not drafted clearly, as well as an agent's role and responsibility in the process. In *Sutter Hill Management Corporation v. Mpire Capital Corporation*,[10] the court was interpreting a contract for a commercial care home property in Abbotsford, B.C. One of the subject clauses required the buyer to use "commercially reasonable best efforts" to obtain Fraser Health Authority ("FHA") licence transfer approvals "as soon as possible." The buyer started talks with FHA in April 2016, but for a variety of reasons, those discussions stretched into the fall of 2017. On November 8, 2017, FHA forwarded three agreements for the buyer's review and comment, which needed to be executed as part of the approval process. On November 20, 2017, the buyer's Toronto lawyer said he lacked the expertise to comment on the agreements and recommended the buyer have a different local lawyer review them. The buyer retained a B.C. law firm shortly after, but that firm did not immediately review the documents. On November 27, the seller delivered a notice of default claiming the buyer had not used best efforts to obtain FHA's approval and required the buyer to cure its default by December 12. However, the buyer had still not returned the agreements to FHA by December 14, 2017, which resulted in the lawsuit.

It is not clear from the decision who drafted the contract. However, "commercially reasonable" is a term that has a relatively accepted meaning, as does "best efforts." The confusion arose from the combination of the two phrases ("commercially reasonable best efforts"). The court found, interpreting the subject clause as a whole, that "the parties intended that the purchaser [buyer] would do everything it reasonably could to obtain the necessary approvals as soon as possible, excepting only such steps as would be commercially unreasonable." The court also held that the buyer had not made "best efforts" since its lawyers delayed reviewing the FHA agreements for a total of five weeks when time was increasingly of the essence. The buyer lost the right to purchase the property and its $300,000 deposit, as well as wasted significant time and expense in the more than 20 month due diligence process.

8 1988 CanLII 2852 (BCCA)
9 2018 BCCA 304
10 2022 BCCA 13

The takeaways from the Sutter Hill case are:

- Use the standard contract terms if they fit the client's needs. However, the client's needs are paramount, and if there is no "standard" term that applies in the situation then you, or their lawyer, will have to craft a new one. If there is a term that is generally used in the industry that captures the client's intentions, chances are good that using that term will have a predictable result. Discuss terminology and drafting issues with your managing broker if you have questions. BC Financial Services Authority ("BCFSA") also maintains a large database of recommended contract language in its Knowledge Database, which is another excellent resource (see BCFSA Knowledge Base - Clauses).
- Recognize that your actions as a client's agent may have implications for the clients' rights and liabilities. In this case, the agent in question was a lawyer and not a real estate professional. However, the lawyer's delay in reviewing documents was attributed to the client because the lawyer was acting as the client's agent. As such, the client was found to have not fulfilled its obligations quickly enough in the circumstances. In those cases, the client will turn around and point the finger at their agent if something goes awry.

CERTAINTY SUMMARY

The law in the area of certainty of contract terms can seem frustratingly dense, and in some cases inconsistent. While the general principle that contract terms must be certain seems straightforward, in practice it can get confusing. Where a large deposit or a unique property is at stake, or there are specific concerns about how to turn a client's wishes into an enforceable clause, the licensee should recommend that the client consult a lawyer to ensure that the contract drafting considers all the intricacies required.

Particular attention is required in the context of subject clauses. As discussed, where an essential term of a real estate contract is uncertain, there is no contract. In the case of subject clauses, the contract exists but the obligations are generally not enforceable until that subject is removed, making the effect very similar. In other words, even if the subject clause does not relate to a critical term, because of the nature and effect of subject clauses they, too, can render a contract unenforceable if they are uncertain.

Interestingly, in the *Davidson* case, the fact that the sellers' licensee had drafted an unclear subject clause worked in the sellers' favour, allowing them to walk away from the transaction when they did not find a suitable replacement property. However, it highlights licensees' obligations not only to draft clear contract terms but to recognize when terms presented by other licensees are not drafted clearly. The buyers' licensee was not named as a defendant in the action, but the judge commented at the end of the decision to say that he should have been sued as well. The licensee's assurances that the buyers need not worry about the sellers' ability to find a replacement property were hollow because he had no idea what the sellers wanted. They were not his clients and he had no basis on which to make the assurances to his clients it appears that he made.

RENEGOTIATION OF A CONTRACT

Sometimes, after entering into a binding contract of purchase and sale, parties to a contract decide that the contract no longer suits the circumstances. If both parties agree on how the new circumstances should be dealt with then there is normally no issue. Parties to a contract can mutually agree to any change to the original bargain. Recording those changes is usually done in an amendment to the original contract.

Amendments are a distinct category of contract changes. Some of the same concepts above apply, such as making sure that the amendment is internally consistent with the rest of the original contract. Where an amendment is completely replacing a prior term, it is best practice to state in the amendment that the prior term is being deleted in its entirety and is of no further force and effect, and that the amendment is intended to replace that deleted term.

Until an amendment is finalized and agreed by both parties, the existing, unamended terms will be in force. If the amendment is never finalized, then the original terms of the contract of purchase and sale will govern and be binding. However, there is concern in some cases that proposing an amendment may put the party making the proposal in breach of contract, or provide an opportunity for the other side to say that the contract has been prematurely ended.

It is very unlikely that a court would find that merely proposing an amendment to a contract results in a breach unless there are other facts suggesting a party will not complete the contract. However, there is an industry practice to include in an offer to amend the contract a statement that is similar to the following:

> The attached Proposed Amendment is being provided on a without prejudice basis to the existing Contract and without the intent of repudiation in any way. Until and unless the Proposed Amendment is executed by both the Buyer and Seller, it does not impact or amend the terms of the Contract.

This practice is not wrong, in that it does not compromise the client's rights to include this statement. However, it is likely not required. It would have to be fairly peculiar circumstances for a proposed amendment to be taken as a "repudiation" of the contract, which means a statement by the party proposing the amendment to the contract that they do not intend to be bound by or complete the original contract if the amendment is not accepted. Unless the party proposing the amendment has taken other steps that indicate they will not complete, simply proposing an amendment is very unlikely to create any issues with the enforceability of the contract. That said, as noted, the practice is not detrimental. If there is any concern that the proposed amendment may be interpreted as repudiation, or there is any indication that the other party may be looking for ways out of the contract themselves, a statement confirming the amending party's intention can be included.

"REVIVAL" OF A CONTRACT

A "dead" contract is a terminated contract. Once a contract has terminated, it cannot be revived. The parties can agree to enter into a new contract and can agree to that contract being identical to the prior contract including the original offer, acceptance, and relevant dates. However, the new contract requires both parties to agree on all terms again. No one party can "revive" the deal on their own.

Due dates are an important part of the obligations under the contract. Both the residential standard form (section 12) and the commercial standard form (section 28) confirm that time is of the essence. That means that a party to the contract can insist that the other party strictly comply with the timelines and due dates set out in the contract. Otherwise, the contract can likely be terminated by the innocent party without liability.

If subjects are not removed by the agreed date the contract expires and cannot be revived by an amendment or addendum at that point. Because dates are critical, licensees should keep track of all due dates in a contract and remind their clients when they are approaching, for example dates for subject removal. It is much simpler to amend the contract to extend deadlines as necessary than it is to try to enter a new contract once those dates have passed. In the former situation, the parties only have to agree on the new dates. If the parties are going to enter into a new contract, all of the terms of the contract are up for debate.

CONCLUSION

Contracts can be very flexible and powerful tools. However, what makes them so useful can also make them difficult to deal with. Licensees should get very familiar with the standard form contracts of purchase and sale so they can properly explain them to their clients and best use and modify them to the client's advantage without running into unintended consequences.

Module Three: Personal Circumstances

This module discusses issues that relate to the personal circumstances of clients and consumers. You will learn about issues that may arise when clients and consumers are undergoing separation and divorce. You will also learn about the concept of beneficial ownership and its application to real estate transactions. This module also discusses powers of attorney, as well as other types of personal planning arrangements which may be used by persons planning for cognitive impairment. Finally, this module discusses situations in which a client has died during the course of a licensee's engagement.

LEARNING OBJECTIVES

After completing this module, you will be able to:

1. Identify issues that may arise in a real estate transaction when assisting consumers who are separating or divorcing;
2. Understand the concept of beneficial ownership in real estate transactions;
3. Describe best practices when dealing with powers of attorney;
4. Identify when cognitive impairment may exist in real estate transactions and describe best practices for those situations; and
5. Identify considerations that apply when a client dies during the course of a licensee's engagement.

03

SEPARATION AND DIVORCE

Separation and divorce are common. Separating spouses usually have competing desires and goals with respect to real estate. Despite this, separating spouses are often registered as co-owners of real estate, such as the family home. Even if only one spouse is registered on title, the *Family Law Act ("FLA")* of British Columbia provides each spouse with an ownership interest in the other spouse's property upon separation[1]. Therefore, unless a court order or separation agreement says otherwise, both separating spouses are entitled to participate in any decisions regarding each other's property, including real estate.

The conflicts of interest that can develop between spouses in separation and divorce require licensees to exercise care when carrying out their duties to their clients. These duties include fiduciary duties such as the duty of loyalty, the duty of full disclosure, and the duty of confidentiality.

Conflicts of Interest for Trading Services Licensees

Let's look at how the duties of trading services licensees can be impacted in a separation and divorce scenario:

SCENARIO 1:

Samir is a listing agent pursuant to a listing agreement between his brokerage and the sellers, Adri and Juan. He is helping Adri and Juan, two separating spouses, to sell their family home. One day, Adri phones Samir and tells him she no longer wants to sell because she thinks Juan has started dating someone. Adri tells Samir to cancel the listing immediately and that she plans to buy out Juan and keep the house. Adri tells Samir not to tell Juan about their conversation. Samir is confused after this, so he phones Juan and tells him everything Adri said. Juan tells Samir not to worry, he will calm down Adri. Juan tells Samir to reduce the listing price to generate more interest, which Samir does. The next day, Adri phones Samir, furious. She tells Samir that she has filed a complaint against him with BCFSA.

1 Under the *FLA*, the definition of "spouse" for property division purposes includes unmarried persons who have lived together in a marriage-like relationship for two or more years, as well as two persons who are legally married. Thus, unmarried spouses have the same property division rights as married spouses.

Samir's brokerage entered into the listing agreement with both Adri and Juan. Therefore, as the designated agent, Samir owes fiduciary duties to both of them. This creates problems. If Samir followed Adri's instructions to withhold information from Juan, he would have been in breach of his duty of loyalty and full disclosure to Juan. In doing what he did, Samir failed to follow Adri's instructions, failed to maintain Adri's confidentiality, reduced the listing price without Adri's approval, and preferred the interests of Juan over Adri. Apart from disciplinary action by BCFSA, Samir could be sued in civil court by Adri for breaching his duties to her. In this situation, after receiving Adri's instructions, a prudent option for Samir would have been to immediately advise both parties that a conflict of interest had arisen, that he could no longer act for either party, and that both parties needed to seek legal advice. Samir should also have spoken to his managing broker immediately after having spoken to Adri.

Listing Licensees

How can a listing licensee navigate the challenging terrain of separation and divorce? By informing separating spouses of potential conflicts of interest at the outset of the relationship and allowing them to make an informed decision about the type of representation that they require. Listing licensees who may be engaged in a transaction involving separation or divorce should take the following steps when approached by one or both spouses:

Step 1: Ask whether the person has a legal advisor

It is common for separating and divorcing spouses to have legal advisors who can assist them with the process. If a person has the benefit of legal advice, ask what the lawyer may have advised regarding representation in the sale. In some circumstances, it may be prudent for the licensee to obtain the client's consent to discuss agency representation directly with the client's legal advisor.

Step 2: Explain agency obligations and potential conflicts of interest

It is important to ensure that the consumer understands the potential conflicts of interest that can develop when a licensee owes fiduciary duties to two separating or divorcing spouses. Follow these steps in your initial conversation with the consumer(s) about representation:

- Explain the fiduciary and other duties owed by a trading services licensee to their client. Explain that in a typical listing agreement, the licensee owes these duties to both co-owners.[2]
- Explain that, in separation and divorce situations, conflicts of interest may arise that may interfere with the licensee's ability to fulfill their fiduciary and other duties.

Step 3: Explain Agency Options

Once the consumer has an understanding of agency obligations and the conflicts of interest that can arise in separation and divorce scenarios, present and explain the three basic agency options available to the parties:

1. Both spouses can be represented by one designated agent. This option may be appropriate when the separating spouses are strongly aligned, and unlikely to develop competing interests. In this situation, the listing agreement should set out which spouse will provide instructions to the licensee, to avoid potential misunderstandings in the future. If both spouses will be providing instructions jointly, then that too should be set out in the listing agreement.

2. The spouses may be represented by different designated agents from the same brokerage. In this option, spouses can modify the fiduciary duties owed by each licensee, so that each licensee only owes fiduciary duties to one party.[3] A risk with this form of representation is that managing broker support to the designated agents may be limited, as the managing broker must be impartial between the two clients of the brokerage. Further, the brokerage must ensure that confidential information about each spouse is carefully protected.

2 Licensees must also remember to provide any required disclosure forms under the Real Estate Services Rules.
3 For guidance regarding the appropriate steps to take in order to modify a licensee's fiduciary duties, see BCFSA's Knowledge Base guidance at www.bcfsa.ca/industry-resources/real-estate-professional-resources/knowledge-base/guidelines/duties-clients-guidelines#how-to-modify-duties-owed

3. The spouses may be represented by different designated agents from different brokerages. This option provides the greatest degree of separation in the representation of each spouse. There may be standard forms used by brokerages to facilitate these types of arrangements, such as the "Co-Listing Form – Separate Representation" form created by the British Columbia Real Estate Association ("BCREA") and the Canadian Bar Association, BC Branch (the "CBABC").

Licensees must recommend to separating parties that they seek legal advice prior to selecting one of these three options. Further, always consider what is in the parties' best interests. For example, parties who appear to be combative are likely not good candidates for joint representation, under option one.

It is also important to consider the rights and interests of both spouses in separation and divorce scenarios. This is especially important where one spouse appears interested in taking steps in relation to real estate without the other spouse's knowledge or participation. In *Soltani (Re),*[4] a licensee helped a client assign their interest in a presale contract. The client was divorcing and wanted to keep the assignment a secret from their spouse. The licensee was found to have committed professional misconduct by helping the divorcing client dispose of the presale without reasonable inquiry into their spouse's interest in the presale and, without recommending to the client to seek legal advice about the consequences of selling the presale in the course of a divorce. The licensee was also disciplined for not keeping his managing broker informed of the real estate services he was providing. The licensee was ordered to pay a discipline penalty of $6,000 and enforcement expenses of $1,500, and to successfully complete remedial education.[5] This highlights the importance of licensees seeking guidance from their managing broker and brokerage policy manual when dealing with separation or divorce scenarios.

As a managing broker/designated individual. Consider reviewing your brokerage policy manual to ensure that it provides appropriate guidance to licensees in separation and divorce scenarios. A prudent brokerage policy may be to always recommend separating spouses to obtain separate representation from separate brokerages, as this provides the best protection to brokerage clients.

Step 4: Conduct due diligence and prepare the service agreement

As part of your due diligence, remember to determine whether any relevant court orders or agreements exist before entering the listing contract. For example, the court order may have conditions about how the property is listed. Failure to obtain and follow relevant court orders may be considered professional misconduct. For example, in *Stewart (Re)*,[6] a licensee was engaged by Client C. Client C was the sole registered owner of the property, though a court order granted Client C and their spouse (the "Spouse") joint conduct of sale. During negotiations, prospective buyers presented a counter-offer lowering the sale price. The licensee did not confirm whether the Spouse approved the counter-offer. Rather, the licensee took instructions from Client C to accept the counter-offer, mistakenly believing that Client C discussed the counter-offer with the Spouse. The licensee was disciplined for not ensuring that the Spouse was involved in determining the sale price. The licensee was ordered to pay a discipline penalty of $2,500 and enforcement expenses of $1,500.

Once the parties have made an informed decision about the type of representation they want, seek guidance from your managing broker on drafting the service agreement.[7] Clients should be recommended to seek legal advice on the terms of the service agreement before they sign it.

4 2019 CanLII 37498 (BC REC)
5 Note, prior to September 30, 2016 section 43(2) of the Real Estate Services Act ("RESA") provided for a maximum penalty of $10,000 for a licensee other than a brokerage or former brokerage. Effective that date, RESA was amended to provide for a maximum penalty of $250,000 for a licensee other than a brokerage or former brokerage.
6 2020 CanLII 36928 (BC REC)
7 BCFSA provides useful guidance for preparing service agreements in its Knowledge Base at www.bcfsa.ca/industry-resources/real-estate-professional-resources/knowledge-base/guidelines/service-agreements-guidelines

Acting for a Buyer

Buyer's agents owe their clients a fiduciary duty to act in their best interests. This includes a duty to provide the buyer with any information that may assist the buyer in negotiations relating to a property. For example, if a licensee discovers that a property is being sold as part of a separation or divorce, this may mean that the spouses are more motivated to sell than normal. A licensee may discover this through off-hand comments made by the listing licensee, or by reviewing the title search and noticing a certificate of pending litigation relating to divorce proceedings on title. A buyer's agent must communicate that information to their client as it may assist the buyer in negotiating a favourable deal.

Mortgage Brokers

Mortgage brokers are often contacted by separating spouses to help them understand what kind of replacement property they will be able to afford post-separation. Sometimes, mortgage brokers will receive predictions from the spouse or their lawyer about the post-separation financial circumstances of the spouse, including the likely level of support payments and the value of any assets that may be retained in the divorce. When working with such assumptions, mortgage brokers must qualify any advice they provide as being based upon those assumptions. Mortgage brokers must also be mindful of their duty of confidentiality when they receive information from a separating spouse or their lawyer and should not disclose a spouse's confidential information to any third parties without the spouse's consent.

Additionally, mortgage brokers may be engaged by two separating spouses to help them with various separation-related transactions. Mortgage brokers should consider any potential conflicts of interest that may arise in such situations, alert the spouses to potential conflicts, and recommend legal advice.

CONSIDER THE FOLLOWING SCENARIO:

Separating spouses, Parm and Kris, contact Harj, a submortgage broker. Parm is planning to buy Kris out of the former family home and must refinance the current mortgage to raise the payout funds. Kris needs the payout to buy a replacement home, though he has not yet located one. Harj, on behalf of his brokerage, agrees to help the separating spouses with the refinancing. In addition to helping with the refinancing, Kris asks Harj to arrange a new mortgage for his replacement home, when the time comes. Harj agrees to help Kris with his new mortgage, again on behalf of his brokerage. A few days later, Kris finds and enters a contract to buy his dream home. However, Kris must close on the purchase within three months. Kris calls Harj and tells him to complete the refinancing of the former family home mortgage as soon as possible because Kris needs his payout right away. Kris says that if there is a delay in the payout, Kris may not be able to close on the replacement home and may be in breach of the purchase contract. Kris also tells Harj not to mention the replacement home to Parm, because the replacement home is much bigger than the former family home and Kris does not think Parm will take the news well. Harj feels uneasy after the call with Kris. Harj is uncomfortable about keeping the replacement home transaction a secret from Parm. Additionally, Harj knows that Parm is in no rush to refinance. Harj knows that refinancing now would incur a large prepayment penalty, whereas refinancing at the mortgage renewal date (eight months away) would avoid the prepayment penalty entirely. Harj has not yet explained the prepayment penalty to either Parm or Kris.

A conflict of interest has developed in this scenario. Acting in Parm's best interests would mean recommending the parties to wait eight months before refinancing the mortgage, because it is in Parm's best interest to avoid the prepayment penalty. Acting in Parm's best interests would also mean telling Parm about Kris' replacement home, including Harj's role as mortgage broker in that transaction. On the other hand, acting in Kris' best interests would mean recommending the separating spouses to refinance now, so that Kris can avoid breaching the purchase contract. Kris has also told Harj to keep the replacement home a secret from Parm. If Harj ignores those instructions, he would not be acting loyally to Kris. Finally, Harj has a personal interest in recommending a refinance now. Refinancing now could provide Harj with two potential commissions: a commission on the refinance and a second commission on Kris' new mortgage. Given the conflicts of interest, Harj should speak to his designated individual and consult his brokerage's policy manual right away. Harj and his designated individual may decide that Harj can no longer act for either party and that both parties need legal advice.

Rental Property Managers and Strata Managers

In some separation or divorce scenarios, the separating spouses choose to continue co-owning rental property, rather than selling it and dividing the proceeds. This may be an attractive option where the rental rate is particularly high and the spouses want to divide the earnings, or where the market value of the property is relatively low, and the spouses are waiting for the value to appreciate before selling. In a situation where two spouses wish to actively participate in decisions about rental property, rental property managers should ensure that the service agreement specifies which spouse (or both) has the authority to instruct the rental property manager. The spouses should also obtain legal advice on the service agreement.

A rental property manager acting for two spouses should also be careful if providing other real estate services to one of the spouses as this may lead to conflicts of interest. For example, a rental property manager who also holds a trading services licence may be managing a property that is co-owned by two spouses. However, this licensee should be cautious about also helping one of them buy a property. This situation may lead the rental property manager to prefer the interests of the spouse with whom they have a trading services relationship.

Strata managers may encounter problems when strata lot owners undergo separation or divorce. For example, a strata corporation may have the contact information for spouse A. Spouse A resides in a separate residence, not in the strata lot. Unknown to the strata manager, spouse A and spouse B separate and spouse B retains ownership of the strata lot in the separation agreement. The strata fees are no longer being paid and spouse A stops responding to the strata manager's correspondence and demand letters. The strata corporation commences forced sale proceedings and spouse B is shocked, as they believed that spouse A was meant to pay these fees. At this point, the strata manager must inform spouse B and the strata corporation that they should obtain legal advice.

PRACTICE TIP

Strata managers should ensure that the contact information that they have on file is up to date. Owners and other persons with whom the strata manager corresponds should be encouraged to keep the strata manager informed of any changes to their contact information. Additionally, strata managers should confirm the contact information that they have on file if they suspect that the information may be out of date, such as if the strata manager's correspondence goes unanswered for a long period of time. Collecting alternative phone numbers or email addresses at the outset of a relationship may assist strata managers in the event that a person's contact information later becomes out of date.

BENEFICIAL OWNERSHIP

The word "beneficial owner" has two usual meanings when used by licensees:

- In a general sense, a "beneficial owner" is the person who enjoys the benefits of property ownership, despite not necessarily being the registered owner on title; and
- From a money-laundering perspective, "beneficial owner" is a term used in connection with the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act ("PCMLTFA")*.

It is important for licensees not to mix up these meanings when discussing the concept of beneficial ownership.

Beneficial Owners Generally

Let us look at the first meaning of "beneficial owner" (i.e., a person who enjoys the benefits of property ownership). In many instances, the property's registered owner is also the person who enjoys the benefits of ownership. In other words, the registered owner is most often also the beneficial owner. However, in some instances, the beneficial owner of a property may be someone other than the registered owner.

Licensees can encounter beneficial ownership in situations where a property has been placed in a trust, often for estate planning purposes. Commercial licensees often encounter properties that are registered in the name of a corporate "nominee" or "trustee," with beneficial ownership residing with another entity. In some commercial transactions, a buyer purchases beneficial ownership to land but does not register themselves on title. Instead, the buyer purchases the shares of the corporate title holder from the seller. Under current law, the buyer of the shares may not be liable to pay property transfer tax.

Licensees should exercise care when a registered owner is different than the beneficial owner because this may affect the enforceability of any agreements regarding the property. How can licensees determine whether a particular property has different beneficial and registered owners? Licensees may be able to identify the existence of beneficial ownership by reviewing title. For instance, a notation of trust can appear on title. However, there is no requirement that a trust be noted on title in order to have legal effect. For this reason, it is not always possible to tell from the title search alone whether the registered owner is also the beneficial owner of property.

Another tool that may be used to investigate beneficial ownership of real property is the Land Owner Transparency Registry ("LOTR"), which has been developed under the *Land Owner Transparency Act ("LOTA")*.[8]

A licensee can also be alerted to the possibility of beneficial interests if the person purporting to deal with the property is not the same as the registered owner. For example, in *De Cotiis v. Hothi et al*,[9] a licensee assumed that their client, PH, was the owner of a property without reviewing title. In fact, the registered owner of the property was PH's brother, GH. The licensee prepared a contract of purchase and sale listing PH as the seller, but the deal ultimately collapsed when GH refused to complete when the market rose. In the ensuing lawsuit, PH and GH made claims against the licensee for negligently drafting an unenforceable contract. The court ultimately found that GH was only registered on title as a trustee. The beneficial owners of the property were the members of GH's family, and GH was required to follow PH's instructions. While the licensee was ultimately exonerated, much of the stress of the litigation could have been avoided if the licensee had carefully reviewed title and sought advice from their managing broker before providing real estate services.

8 See BCFSA's detailed guidance on LOTA in its Knowledge Base at www.bcfsa.ca/industry-resources/real-estate-professional-resources/knowledge-base/information/land-owner-transparency-act-lota-information?hits=beneficial%20ownership

9 2019 BCCA 472

Licensees should recommend to their clients that they seek legal advice prior to engaging in property transactions in beneficial ownership scenarios. Licensees should not structure complex transactions themselves. For example, the Real Estate Errors and Omissions Insurance Corporation has handled claims where licensees attempted to prepare share purchase agreements themselves, but did so poorly.[10] As mentioned earlier, share purchase agreements are sometimes used in commercial transactions to transfer beneficial ownership of real estate. Always seek guidance from your managing broker when dealing with beneficial owners who are not registered on title.

As a strata manager. A beneficial owner of a strata lot who is not registered on title may wish to exercise rights in relation to the strata lot. Strata managers must carefully review the *Strata Property Act ("SPA")* to determine what rights such a person may have in relation to a strata lot. For example, section 36 of the *SPA* restricts access to strata corporation records to owners, authorized tenants, or persons with written authorization from owners or tenants. The definition of "owner" under the *SPA* does not generally include unregistered beneficial owners. Strata managers should consult their managing broker about any concerns they may have about beneficial ownership.

As a managing broker/designated individual. When your brokerage is involved with a beneficial ownership scenario, consider whether your brokerage's service agreement appropriately deals with any beneficial ownership issues. For example, commission agreements may not be enforceable depending upon the nature of the real estate transaction and the beneficial ownership structure of the real estate.

Beneficial Owners and Anti Money-Laundering ("AML") Obligations

Trading services licensees must also be familiar with beneficial ownership as used in connection with the *PCMLTFA*. Under the *PCMLTFA*, beneficial owners are the individuals who are trustees, known beneficiaries and settlors of a trust, or who directly or indirectly own or control 25 per cent or more of a corporation or an entity other than a corporation or trust, such as a partnership. As part of their AML obligations, when confirming the existence of an entity (including corporations, partnerships, or trusts) trading services licensees are required to collect and confirm the accuracy of beneficial ownership information. There are several tools available to assist trading services licensees with their obligation to collect and confirm beneficial ownership information. For more information, see BCFSA's guidance in its Knowledge Base.[11]

10 www.reeoic.com/news/risk-report/pitfalls-in-transactions-involving-corporate-parties
11 www.bcfsa.ca/industry-resources/real-estate-professional-resources/knowledge-base/guidelines/anti-money-laundering-guidelines#understanding-the-tools-available-and-the-importance-of-having-early-discussions-with-your-client-in-order-to-assist-with-your-aml-obligations-under-the-pcmltfa

POWERS OF ATTORNEY

Powers of attorney are commonly used in real estate transactions. A power of attorney provides an individual ("the attorney") with authority to act on behalf of another individual ("the donor") in financial and legal matters. Powers of attorney are often divided into two categories. A general power of attorney typically grants the attorney authority over all or some of the donor's financial affairs and, in some cases, property. An enduring power of attorney grants the attorney the same authority but allows the attorney to continue to act for the donor if the donor becomes mentally incapable of managing their affairs. Some enduring powers of attorney are triggered in certain instances, such as when the donor loses their capacity to manage their own financial affairs. All powers of attorney terminate upon the death of the donor.

In real estate transactions, the consequences of an invalid power of attorney can be significant. The British Columbia Land Title Office ("LTO") may reject a power of attorney if it fails to comply with applicable legislative or LTO practice requirements.

Some common reasons why the LTO may reject a power of attorney include:

- The donor's name in the power of attorney does not exactly match the name of the registered owner;
- The power of attorney contains substantively different alternative names for the attorney (e.g., "Jane Smith aka Jane Jones");
- The power of attorney does not grant the appropriate power to deal with the land (e.g., the power of attorney deals with the wrong property, or does not authorize a sale of the property);
- A power of attorney was prepared outside of BC and lacks the required extra-jurisdictional solicitor's certificate;
- The power of attorney has expired according to its terms or section 56 of the *Land Title Act*;
- The general power of attorney is invalid due to the donor's incapacity or death; and
- The enduring power of attorney has not yet been "triggered".

Apart from LTO requirements, lenders often have separate requirements regarding powers of attorney. For example, some lenders will permit use of a power attorney, but only if a lender title insurance policy is also obtained. Some lenders may have more restrictive conditions for use of powers of attorney. Mortgage brokers should carefully consider any such restrictions to avoid unanticipated issues later in the transaction.

Best Practices

Licensees working with clients who may be relying upon a power of attorney should take the following steps:

- Obtain a true copy of the power of attorney and read the entire document to ensure that the client has the legal authority to deal with the property;
- Consider obtaining the client's consent to contact their family members to determine whether anyone else holds a power of attorney;
- Consult with your managing broker or designated individual as to any brokerage policies or other appropriate due diligence relating to powers of attorney; and
- Advise clients to seek legal advice as soon as possible as to the validity of the power of attorney for the contemplated transaction.

Failure to exercise care when dealing with powers of attorney can result in professional discipline or other legal consequences for licensees or their clients. The following are a selection of disciplinary and civil cases addressing power of attorney issues.

Hays (Re)[12]

Two licensees, through their brokerage, listed a property for sale that was owned by an elderly couple as joint tenants. The 80-year-old wife told the licensees that she had a power of attorney from her husband to deal with the property. The licensees either failed to read the power of attorney or misread it. Neither licensee advised the client to seek legal advice as to the power of attorney. Prior to completion, the conveyancing lawyer discovered that the power of attorney had expired. Also, the power of attorney did not provide the wife authority over the husband's affairs, but rather, the opposite. As a result, the sale collapsed. The licensees entered a consent order requiring them to pay a disciplinary penalty of $20,000 and enforcement expenses of $1,500, and to take remedial education.

Uy (Re)[13]

A licensee whose brokerage had entered a listing contract with a client who was not the registered owner of the listed property. The client said that the registered owner, the client's ex-husband, had given her a power of attorney to deal with the property. The licensee did not take reasonable steps to verify that the client had the authority to sell the property. The licensee also did not obtain the consent of the registered owner with regards to the sale of the property. Retroactively, after a contract of purchase and sale was entered, the registered owner executed a power of attorney in favour of the client. The licensee entered a consent order requiring him to pay a discipline penalty of $5,000 and enforcement expenses of $1,500, and to take remedial education.

Malek v Tanbakookar[14]

Out-of-town sellers executed a power of attorney they believed would allow their attorney to complete the sale of a property on their behalf. On the completion date, the buyer told the sellers that they were experiencing financial difficulties and could not complete the purchase. The sellers claimed the buyer's $70,000 deposit. However, the buyer discovered that the power of attorney delivered by the sellers was defective. The power of attorney did not provide the sellers' attorney with authority to transfer the property. In the ensuing lawsuit, the court ordered the deposit to be returned to the buyer. Even though the buyer had breached their obligation to pay the purchase price, the sellers had also breached their obligation to transfer the property, since no transfer would have been possible using the defective power of attorney. Had the seller obtained timely, appropriate legal advice on their power of attorney, they may not have lost their rights to the $70,000 deposit.

As a managing broker/designated individual. Consider reviewing your brokerage's policy manual to ensure that it contains appropriate guidance to licensees with respect to powers of attorney. Even where a valid power of attorney exists, consider whether clients should be encouraged to personally sign documents when able. Consider also whether licensees should attempt to obtain direct confirmation from donors as to authority. Apart from a collapsing transaction, an invalid power of attorney may also prevent a brokerage from claiming its commission.

As a strata manager. Persons who hold valid powers of attorney can undertake some functions on behalf of donors in strata matters. For example, an attorney may vote on behalf of an owner during a strata meeting. However, attorneys are generally unable to sit on a strata corporation's strata council. If an attorney wishes to sit on a strata council, ensure that the strata corporation has a bylaw in place permitting this to occur.

12 2020 CanLII 63613 (BC REC)
13 2018 CanLII 64967 (BC REC)
14 2012 BCSC 1742

Cognitive Impairment

Licensees may encounter clients who are experiencing cognitive impairment. A key question for licensees is whether the person they are dealing with has the capacity to enter contracts.

The legal requirements for capacity to enter a contract are as follows:

- A contracting party must be able to understand the contract's terms;
- This contracting party must also be able to form a rational judgment of the contract's effects upon their interests; and
- The other contracting party must not have knowledge of the first contracting party's cognitive impairment.[15]

Where a person lacks capacity to manage their own affairs, there are personal planning arrangements which may allow others to manage their financial affairs.

Enduring Powers of Attorney

As discussed, a power of attorney agreement may be enduring, meaning it continues to be legally effective after the adult becomes incapable of managing their affairs. An enduring power of attorney may contain immediate appointments – attorneys who can act while the adult is capable, or 'springing' appointments – attorneys who can only act once the individual becomes incapacitated.

Representation Agreements

Under the *Representation Agreement Act ("RAA")*, a person may enter into a representation agreement to give a representative authority to make health care and personal planning decisions on their behalf, as well as certain legal and financial decisions. A representation agreement may provide the powers contained under section 7 or 9 of the *RAA*. Section 7 powers cover minor and major health care and personal care, obtaining legal services, instructing counsel, and routine management of financial affairs.

Routine management of financial affairs does not include:

- Instituting on the adult's behalf a new loan, including a mortgage (however, renewing or refinancing a loan including a mortgage loan is acceptable if the principal amount is not increased and no new mortgage registration is made in the LTO); or
- Purchasing or disposing of real property on the adult's behalf.

Before certain legislative amendments came into effect on September 1, 2011, agreements made under section 9 of the *RAA* provided representatives with similar financial and legal authority as enduring powers of attorney. Those older section 9 agreements remain valid. However, section 9 representation agreements made after September 1, 2011 no longer provide expanded financial and legal decision-making authority to representatives.

Licensees should carefully review the personal planning documents that may be used in a transaction. Reviewing these documents in a timely way may help spot problems early. For example, a section 9 Representation Agreement made after September 1, 2011 will not provide the representative with authority to make financial and legal decisions on behalf of a person. A section 7 representation agreement will also not provide the representative with authority to make legal or financial decisions on behalf of a person other than routine management of financial affairs. Depending on the circumstances, a representative may require an enduring power of attorney to carry out a particular transaction. It is extremely important to obtain and review personal planning documents in a timely way and advise clients to obtain legal advice on such documents as early as possible.

15 British Columbia Law Institute Report no. 73, "Report on Common-Law Tests of Capacity", published September 2013, pgs. 133-134, citing Bank of Nova Scotia v. Kelly, 1973 CanLII 1289 (PE SCTD)

Committeeship

If personal planning has not been done, an individual's family members or friends may need to apply to court for a committeeship order in order to deal with a person's property. Alternatively, the Public Guardian and Trustee of British Columbia[16] may be appointed as committee for an individual if there is no one more suitable to perform that function. The committeeship appointment process can be expensive and can take months to complete. For this reason, a licensee who encounters mental incapacity issues should recommend that their client obtain legal advice as soon as possible, especially when no personal planning documents can be located.

BEST PRACTICES

It is not the role of the licensee to assess whether their client has sufficient capacity to enter a contract. The role of the licensee is to recognize when issues relating to cognitive impairment may exist and then to act appropriately. When licensees encounter clients or potential clients who appear to be experiencing cognitive impairment, the licensee should take the following steps.

Step 1: Consult with your Managing Broker/ Designated Individual and your Brokerage's Policies

Cognitive impairment is not an infrequent occurrence in our society and it is important to seek guidance early when these issues may be present.

Step 2: Ask the client whether they have any personal planning arrangements in place

Has the client created any powers of attorney or representation agreements? Are there any committeeships in place or anything of that nature? If the person is unable to answer, can they provide the names of any trusted family, friends, or other persons (e.g., lawyers) whom you may contact for more information?

Step 3: Contact the client's family or friends, with the client's consent

BCFSA recommends that licensees in these situations "should contact family members to determine whether they or anybody else hold a power of attorney or have been appointed as a legal representative or substitute decision-maker for this person under any of these statutes to ensure that this person is making the right decisions."[17]

16 For more information about the Public Guardian and Trustee, visit: www.trustee.bc.ca/Pages/default.aspx

17 www.bcfsa.ca/industry-resources/real-estate-professional-resources/knowledge-base/report-council/april-2014-report-council-newsletter?hits=cognitive#assisting-clients-with-cognitive-impairments

Step 4: Obtain and review any personal planning documents

Where personal planning documents exist, BCFSA recommends that licensees obtain a true copy of the document for their file and read the document to ensure that they are dealing with the person who has the legal authority to deal with the property.[18]

A title search may also provide capacity-related information. For example, committees (including the Public Guardian and Trustee) and attorneys acting under enduring powers of attorney are both permitted to register caveats against title to the property of an incapable individual.

Step 5: Recommend legal advice

Once the licensee has obtained and reviewed copies of any personal planning documents, the licensee should recommend that the client or their representative obtain legal advice about whether their personal planning documents are useable for the client's intended purpose. Where a person may be experiencing cognitive impairment, but no personal planning arrangements appear to exist, the licensee must ensure the client obtains legal advice prior to entering any contracts. Licensees should consult with their managing broker or designated individual prior to entering into any service agreements with such a person. It may be prudent for the brokerage to obtain legal advice as to enforceability of such service agreements.

Failure to handle issues of cognitive impairment and personal planning documents appropriately can lead to professional discipline. The following are a selection of disciplinary cases involving licensees and cognitively impaired persons.

Cowling (Re)[19]

A listing licensee filled out listing documents and left them with his client. The client said her husband was in hospital recovering after a fall, and that she would take the documents to be signed by him. Later, the client returned the listing contract with both her and her husband's signatures. The licensee signed as witness to both signatures despite not witnessing the husband's signature (or the wife's, apparently). The licensee listed the property for sale. Subsequently, the Public Guardian and Trustee wrote to the licensee stating that it had been appointed as committee for the financial and legal affairs of the client's husband. It registered a caveat against the property to protect the husband's interest. The licensee told his client that she would need to deal with the Public Guardian and Trustee. However, the licensee failed to cooperate with the requests of the Public Guardian and Trustee, such as the request for a copy of a listing agreement and a request that the listing be canceled. The licensee entered into a consent order that he be suspended for seven days, that he attend remedial education, and that he pay enforcement expenses of $750, for:

1. Failing to ascertain the nature of the Public Guardian and Trustee caveat;

2. Signing as witness to the husband's signature without actually seeing him sign the contract; and

3. Failing to provide a copy of the listing contract to the Public Guardian and Trustee upon request.

18 ibid
19 2007 CanLII 71561 (BC REC)

Roshinsky (Re)[20]

A licensee was engaged by a 90-year-old single woman, Ms. S., to sell her home and purchase an apartment. The licensee showed Ms. S. an apartment that he had listed for a developer and told Ms. S. that the developer might be interested in buying her home. The next day, the licensee, Ms. S., and the developer's representative met at Ms. S.'s house. Ms. S. and the developer entered into a contract for the sale of Ms. S.'s home to the developer for $525,000. This was well below the listing price of $700,000. Additionally, Ms. S. and the developer entered into a contract for the purchase of the developer's apartment for $245,900. The listing price was $248,800. At the same time, Ms. S. and the developer signed a Limited Dual Agency Agreement, permitted under the Real Estate Services Rules at that time. Ms. S. later took the contracts to her lawyer. The lawyer contacted the licensee immediately and requested that the contracts be canceled. The lawyer was also named as Ms. S.'s representative in a representation agreement, which appointment became effective a few days after these events when Ms. S. was found by a doctor to suffer from dementia or a form of Alzheimer's impairing her memory, insight, and judgement. The licensee stated that he never suspected that Ms. S. was experiencing any cognitive impairments. He said Ms. S. told him that money was not her objective. The licensee entered into a consent order to be suspended for 30 days, complete remedial education, and pay enforcement expenses of $1,000, for:

1. Acting as a limited dual agent when he ought to have known that Ms. S. required sole agency representation.

2. Failing to ensure that Ms. S. received appropriate legal advice before entering into contracts that appeared to favour the developer over Ms. S.

3. Failing to act in the best interest of his client, Ms. S., by failing to incorporate into the written contract a verbal term permitting Ms. S. to rescind or cancel the transactions at her option.

Parsons (Re)[21]

A licensee represented a buyer in her purchase of a condominium unit in Victoria for $180,000. The building suffered from water ingress. Within six months after the purchase, the buyer was levied a proportionate remediation cost of $59,596.86 in connection with the water ingress. The buyer was unable to pay the levy and therefore granted a second mortgage to her mother in exchange for a loan.

Prior to buying the condominium, the buyer was searching for a new home after a marital breakdown and could not afford to spend more than $200,000. Early in the agency relationship, the buyer began experiencing serious mental distress and was hospitalized in a psychiatric ward after attempting suicide. The licensee was aware of the buyer's hospitalization, her instability, her vulnerability, and her compromised ability to comprehend basic facts about the condominium purchase.

The licensee was previously the listing agent for the condominium purchased by the buyer. However, the licensee referred the listing to his son, another licensee, before the buyer purchased it. The licensee never told the buyer that he was the former listing agent for the condominium or that the current listing agent was the licensee's son. Additionally, the contract to purchase the condominium was subject to receipt and satisfactory review of strata documents. The licensee obtained and reviewed strata documents, including an engineer's report, relating to the condominium. However, he failed to provide them to the buyer or discuss them with her prior to her removal of subjects. There were clear indications of water ingress and financial levies in the strata documents and engineer's report.

20 2011 CanLII 27679 (BC REC)
21 DECISION NO. 2015-RSA-002 (FST)

Many findings of professional misconduct and conduct unbecoming were made against the licensee, including for failing to make inquiries about the buyer's ability to conduct business in a prudent manner in light of her condition, and failing to recommend that the buyer obtain independent legal advice in all of the circumstances. The licensee's licence was canceled and the licensee was prohibited from applying for relicensing for a period of 30 months. The licensee was also ordered to pay a discipline penalty of $5,000 and enforcement expenses of $7,500, and ordered to successfully complete remedial education.

Death of a Client

A licensee may be engaged by a client who dies during the engagement. A trading services licensee may encounter the death of a client in one of the following circumstances:

1. A client enters into a listing agreement but subsequently dies;
2. A client makes an offer and dies before acceptance; and
3. A client dies after entering a contract of purchase and sale.

Death of a client after entering a listing agreement

If a seller enters a listing agreement but dies during its term the listing agreement may survive the death of the seller. For example, section 15(E) of the standard multiple listing contract created by BCREA and CBABC states, "This Contract shall be binding upon and benefit not only the parties but also their respective heirs, executors, administrators, successors and assigns." However, there may be circumstances in which a court could find that a listing agreement terminates upon the death of the seller.

Should a seller die during the term of a listing agreement, the licensee should recommend any personal representatives of the seller to seek legal advice regarding the continuing enforceability of the listing agreement. The licensee should also discuss the circumstances with their managing broker, for further guidance. Your managing broker may decide not to enforce the brokerage's listing agreement.

As a managing broker. Should one of your brokerage's seller clients die during the term of a listing agreement, consider seeking legal advice if you intend to pursue any commission payments potentially owed under the listing agreement.

Death of a client after an offer but before acceptance

Generally speaking, if A makes an offer to B, but either A or B dies prior to acceptance, the offer will terminate and no longer be open for acceptance.[22] Exceptions exist to this general rule. In some cases, courts have found that offers remained open for acceptance even after the death of the offeror or the offeree.

If an offer has been made and the offeree or offeror has subsequently died prior to acceptance, your client should be advised to seek legal advice as soon as possible.

22 *The Law of Contract in Canada* (4th edition), page 47

Death of a client after entering a contract of purchase and sale but before completion

The doctrine of frustration states that a contract will terminate if an unforeseen event renders the contract physically or commercially impossible to fulfill. In real estate contracts, the death of a party will not normally frustrate the contract unless the contract involves personal obligations that only the deceased party could have performed. If it is possible for the deceased party's estate (e.g., their executors or administrators) to perform the obligations, then the contract will generally be enforceable after the party's death. Given that most real estate contracts of purchase and sale do not involve personal obligations, most real estate contracts will bind the personal representatives of a party after that party's death.[23]

While a contract of purchase and sale may continue to be binding after a party's death, there are practical difficulties that could arise in these situations. For example, before a property can be transferred by an executor under a will, the executor must obtain a grant of probate from the court. This process can take between three to six months or longer, depending on the complexity of the estate. As such, the parties may need to negotiate an extension on any completion date in order to allow the sale to complete after the seller's death.[24]

If a client has died after entering a contract of purchase and sale but before completion, the licensee should immediately recommend to the client's personal representatives that they seek legal advice as soon as possible.

As a managing broker. Remember that the deposit is still held by your brokerage as a stakeholder, and you must comply with the *Real Estate Services Act* in order to release the deposit.

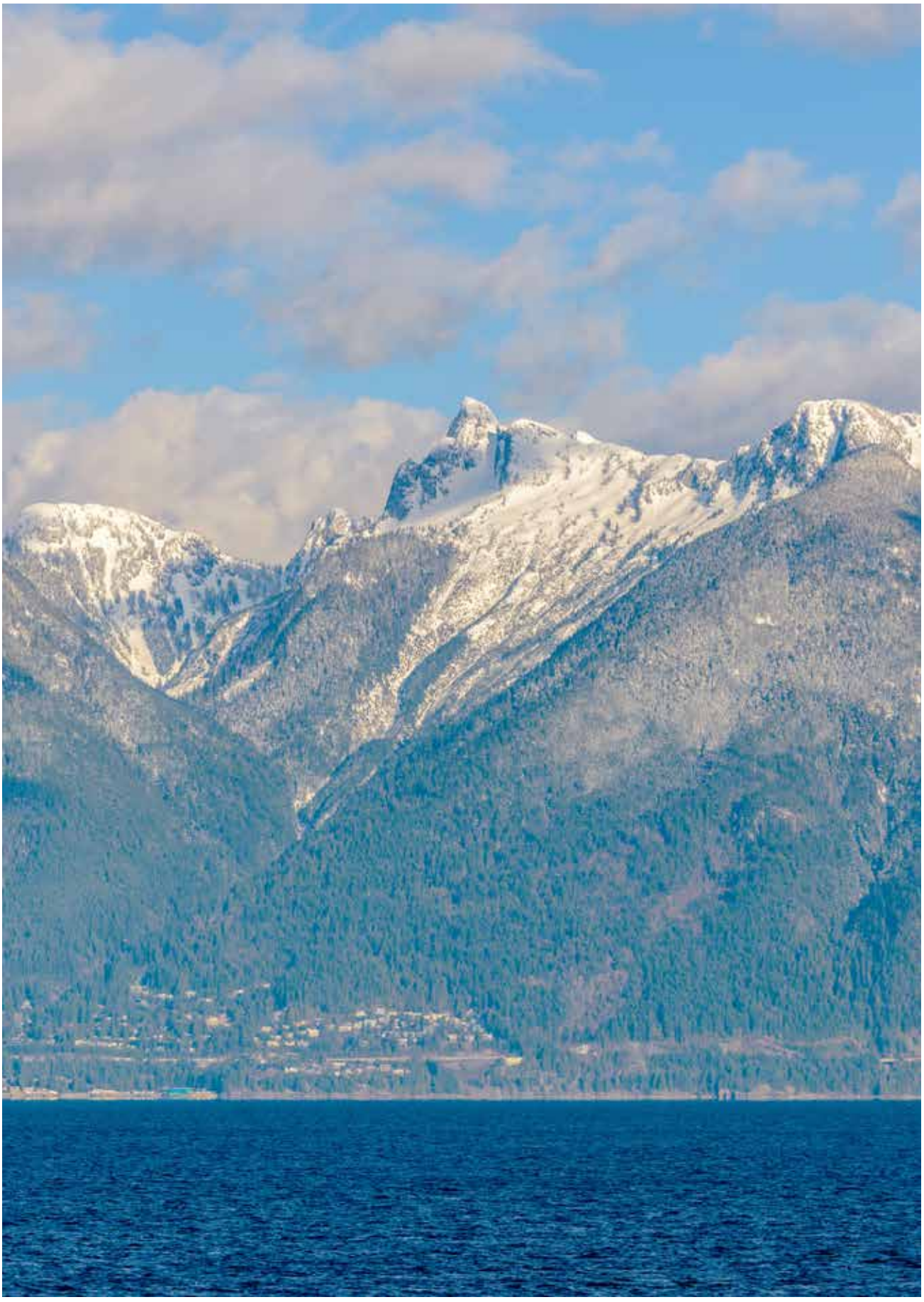
Licensees other than trading services licensees may also have to deal with the death of a client. For example, a rental property manager may be providing rental property management services to a landlord in the landlord's personal name and the landlord dies. Once again, the licensees should recommend to the client's personal representatives that they seek legal advice as soon as possible.

CONCLUSION

In the course of their work, licensees may encounter persons in a variety of personal circumstances. This module has discussed key considerations for licensees who encounter separating or divorcing individuals, beneficial ownership arrangements, powers of attorney, and other personal planning documents, cognitively impaired individuals, and client deaths. Careful consideration of the issues discussed in this manual, early consultation with one's managing broker or designated individual, and timely recommendation of third-party professional assistance such as legal advice will be invaluable to licensees when navigating these potentially challenging scenarios. Taking appropriate action in these situations will also help protect consumers and avoid regulatory and legal liability or licensees.

23 Clause 17 of the standard form Contract of Purchase and Sale created by BCREA and CBABC states, "In this Contract, any reference to a party includes that party's heirs, executors, administrators, successors and assigns".

24 If a licensee is assisting an executor to sell the property of a deceased person, consider including BCFSA's recommended "Estate Condition" clauses: www.bcfsa.ca/industry-resources/real-estate-professional-resources/knowledge-base/clauses/clauses?hits=executor#estate-condition-for-benefit-of-buyer-and-seller



Module Four: 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.

20 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.

IMPORTANT NOTE:

Licensees need to understand the rescission provisions in the *PLA* and the *HBRP Regulation* and how they may or may not apply to the transactions described in this module.

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.

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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 s. 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 increasingly 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.

2 Indian Act, RSC 1985, c I-5 [Indian Act], s 20(2).
3 *Ibid*, s. 20(6).
4 *Ibid*, ss 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*, s 37(1).
6 *Ibid*, s 37(2).
7 *Ibid*, s 54
8 *Ibid*, s. 29.

Nature of Registry

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.

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, s 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*, ss 5 and 5.1.
14 *Ibid*, s 18(1).
15 *Ibid*, s 20(1).
16 *Ibid*, s 6(1).
17 *Ibid*, ss. 26-27.
18 SOR/2007-231, ss 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 BC 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 BC 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 BC 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.

18 ibid
19 2007 CanLII 71561 (BC REC)

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. 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.

20 *Ibid*, s 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.

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.

21 Manual, *supra* note 10, s 2-1.

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*.

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-Governing First 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.

22 *FNLR Regulations, supra note* 19, s 10(2).

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.

FN[redacted] 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.

23 Manual, *supra* note 10, s 2.2.
24 *FNLR Regulations, supra* note 19, s 10(1).

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.

Module Five: Types of Ownership

This module discusses various forms of property ownership that licensees may encounter beyond traditional fee simple and leasehold property interests. The law of property ownership is complex and many forms of property rights have evolved over the course of history. This module will focus on variations on the concept of strata property and some of the less common forms of ownership that licensees may be likely to encounter during their careers. This module does not deal exhaustively with all types of property ownership and does not discuss Indigenous lands, which are covered in a separate module.

IMPORTANT NOTE:

Licensees need to understand the rescission provisions in the *PLA* and the *HBRP Regulation* and how they may or may not apply to the types of ownership described in this module

LEARNING OBJECTIVES

After completing this module, you will be able to:

1. Understand variations on strata property and some of the less common types of property ownership in British Columbia ("B.C.");
2. Understand some of the different ways that air space parcels can be used;
3. Understand the different ways in which parking and storage can be allocated in a strata development;
4. Identify common issues that arise when dealing with different forms of property ownership; and
5. Recognize when additional due diligence is needed regarding different types of property ownership and understand how to obtain the information you need to advise your client.

05

INTRODUCTION

Whether engaged in trading services, strata management, rental property management or mortgage brokering, a licensee should have an understanding of different forms of property ownership. Licensees may need to explain to their clients the rights and responsibilities that come with different forms of ownership. In real estate transactions, the form of property ownership may dictate the appropriate standard form contract for the transaction, additional contract terms, appropriate transaction timelines and transfer mechanics, financing requirements, and special due diligence considerations (some of these are noted as "Due Diligence Tips" in this module). Licensees should be able to recognize when their clients may need legal or other specialized advice to understand the rights, responsibilities, and other requirements attached to different forms of property ownership.

Historically, the dominant forms of private real property ownership in British Columbia have been fee simple ownership and, to a lesser extent, leasehold. This module does not deal in detail with traditional fee simple and leasehold interests, but we have described them briefly below. Some of the forms of property ownership discussed in this module are variations on or have evolved from fee simple or leasehold interests, so an understanding of these traditional forms of ownership provides useful background and contrast.

When you think about what it means to "own" real property, fee simple ownership is probably what comes to mind, even if the legal terminology is unfamiliar. If you think of property ownership as a collection of rights, a fee simple interest is the most complete collection of rights available to a private landowner, as distinguished from the Crown. A fee simple owner owns their lands indefinitely - for so long as the owner has heirs - and absolutely. That said, the owner's fee simple interest does not include any rights reserved to the Crown or excepted from title in the initial grant of the lands by the Crown to the first fee simple owner (e.g., the right to take materials or parts of the land for roads or other public purposes, and ownership of minerals, oil and gas).

A fee simple owner can grant some of the rights that make up their fee simple ownership interest to third parties, without giving up their underlying fee simple title. Many of these grants take the form of title encumbrances that licensees will be used to seeing on title registrations, such as mortgages, covenants, easements, and rights of way. A fee simple owner can also grant registered and unregistered leases of its fee simple title. In general terms, a leasehold interest is a right to exclusive possession of real property for a term. Depending on the contractual terms of the lease, a tenant's rights in respect of the leased premises can be almost as complete as the fee simple owner's rights. However, a key feature of a lease is that the tenant's right to occupy and possess the leased premises reverts to the fee simple owner upon expiry or termination of the lease. In this way, a leasehold interest is always "lesser" than a fee simple interest.

The concept of fee ownership dates back to the Middle Ages. While it is still very much relevant today, other forms of property ownership have developed over time to address modern concerns, such as increased population density and urbanization. For example, condominium (now called strata property) legislation was introduced to British Columbia in the 1960s to allow buildings to be subdivided into units and provide a mechanism for communal decision-making and maintenance of common property. This module discusses some, but certainly not all, of the forms of property ownership that licensees may encounter, including air space parcels, different types of strata developments, strata property parking, and storage, shared ownership, manufactured homes, and co-ops.

AIR SPACE PARCELS

British Columbia real property law allows for the subdivision of real property into "volumes of air" or volumetric parcels, called air space parcels. Despite their name, air space parcels can be aboveground, underground or a combination of the two. While historically, the boundaries between parcels could only be defined by lines on the surface of the earth (though extending above and below the surface to a certain degree), the introduction of air space parcels has allowed for more creative subdivision options. For example, two or more air space parcels can be stacked one on top of the other, or different components of a building (e.g., residential, commercial, parking facilities) can be separated into distinct air space parcels. Air space parcels are not restricted to cubes or similar shapes, but can take any three-dimensional form. Air space parcels are created by registering an air space subdivision plan with the B.C. Land Title Office ("LTO"), showing the dimensions of the air space parcel(s) to be created and the dimensions of the remainder parcel. When an air space parcel is created, there may be a "remainder" parcel left over, which is any part of the original parcel of land that is not converted to an air space parcel.

Due to the flexibility that they afford, air space parcels are used increasingly in urban development scenarios, particularly in complex mixed-use development projects. Modern urban developments often contain a mix of components and uses on a single site or within a single building, such as commercial retail units ("CRUs"), office space, market residential units, residential rental units (including affordable housing), amenities (e.g., childcare centres), and parking facilities. Each of these components may have different operating requirements, budgets, owners, and ownership structures, which may not be able to co-exist within a single legal parcel. An air space parcel can be further subdivided by a strata plan, so air space parcels are useful for separating strata property and non-strata property components of a development. In addition to air space subdivision, developers can also separate residential and commercial components of a mixed-use building through the creation of separate sections within the same strata corporation. Sections within a strata corporation are discussed in more detail later in this module.

6 www.nytimes.com/2012/03/24/your-money/why-people-remember-negative-events-more-than-positive-ones.html
7 www.inc.com/andrew-thomas/the-hidden-ratio-that-could-make-or-break-your-company.html

By way of example, a modern mixed-use development in downtown Vancouver might consist of a tower and podium containing a variety of air space parcels, with each of the air space parcels containing one of the following:

- A commercial component containing CRUs, which the developer will own and lease to commercial tenants, together with a public pay parking facility serving the commercial component. Since the developer plans to own all of the CRUs and the commercial parking, it does not want to stratify the commercial component and be subject to the requirements of the Strata Property Act ("SPA").
- A residential component containing residential strata lots that will be sold to homebuyers and investors and affordable rental units that will be rented to eligible tenants, together with residential parking and storage facilities.
- A childcare centre that the developer will be required to convey to the City of Vancouver upon completion of the development, as part of the community amenity contribution that the developer was required to make in exchange for its rezoning and development approvals.
- There are a number of practical considerations that may need to be addressed when dividing a single building into several air space parcels, such as the following:
- Depending on the location of an air space parcel within a building, it may not be connected to a street or other public thoroughfare. In that case, access rights such as easements over adjacent parcels will be necessary to provide access to the air space parcel.
- Air space parcel boundaries might intersect critical building components, such as fire exits, sprinklers and other life safety systems, pipes, wiring, and structural supports. These and other important building elements required for compliance with the B.C. Building Code might not all be located within an air space parcel, so easements and covenants might be required to ensure that all of the air space parcel owners have access to these building elements and the right and obligation to maintain them.
- The owners of the air space parcels may have other shared obligations or responsibilities for shared costs. For example, a shared building lobby or parking facility used by all air space parcels might be located in one air space parcel, and the other air space parcels may be required to contribute a share of the operating and maintenance costs for the lobby or parking facility. Additionally, all air space parcels might be responsible for a share of general building expenses, such as building insurance, landscaping, and structural repairs.

Where some or all of the above concerns are relevant, developers will usually create an agreement between the air space parcels, sometimes called a master air space agreement or a reciprocal easement and cost sharing agreement. This agreement is registered on title to the air space parcels as a collection of charges to set out the rights and obligations between the owners of the air space parcels and, where applicable, the remainder parcel. These charges might include some or all of the following: legal notations, easements, restrictive covenants, section 219 covenants, statutory rights of way in favour of the relevant municipality, and equitable charges. A section 219 covenant is a special type of covenant that is in favour of the government, government agencies, municipalities, regional districts, or other persons or entities listed or designated under section 219 of the Land Title Act ("LTA"). While a "standard" restrictive covenant can only contain negative covenants (i.e., restrictions on what the land owner can do in respect of the lands), a section 219 covenant can contain positive covenants (i.e., things that the land owner must do in respect of the lands).

Agreements to share costs and other obligations among air space parcels can be problematic. In some cases, the allocation of responsibility for costs and other matters may not be equitable, resulting in a component of the development taking on more than its fair or proportionate share. In other cases, the positive obligations (e.g., to pay costs and perform maintenance) in these agreements may not be binding. With some exceptions, positive covenants do not "run with the lands," meaning they are only binding between the parties to the agreement and not on subsequent owners of the lands, even though the obligations may appear in a registered charge on title. There are various mechanisms used to try to overcome these challenges, such as voluntary assumption of the obligations by a strata corporation or other owner (i.e., an agreement to be bound to the reciprocal easement and cost sharing agreement), equitable charges - a form of registered financial charge intended to secure a financial obligations such as cost sharing, often in favour of a municipality - and section 219 covenants in favour of municipalities which, as a special case, can contain positive covenants that run with the lands. All of these mechanisms have their problems, and if not implemented properly may result in an unenforceable cost sharing agreement, as illustrated in the case study below. Accordingly, it is important for licensees to recommend that their clients obtain legal advice with respect to these arrangements.

Case Study[1]

This case involved a development that consisted of residential and commercial strata lots, retail space and commercial and office space spread over five air space parcels and a remainder parcel. The primary issue before the Court was whether the residential strata corporation was bound by the positive covenants in an easement agreement, particularly with respect to the cost-sharing provisions that required the residential strata corporation to pay 80 per cent of the operating costs of the parkade. The developer and the City of Vancouver had signed an easement agreement, prior to the formation of the strata corporation that stated that the developer would operate, maintain, and insure the parkade as the owner of the remainder parcel. The strata corporation had been paying to maintain the parkade even though it was not a party to this agreement and did not assume it when the strata corporation was formed. The strata corporation applied for a declaration that the parkade cost-sharing obligation in the easement agreement was unenforceable against it as a subsequent owner of the air space parcel since it was a positive covenant that did not run with the land.

The Court found that the positive covenants did not run with the land, despite the previous parties' intentions that it would be binding on subsequent owners. Therefore, the strata corporation was not bound by any of the positive covenants in the easement agreement, including the obligation to pay operating costs, as it was not a party to the initial easement agreement.

1 *The Owners, Strata Plan BCS 4006 v. Jameson House Ventures Ltd.*, 2019 BCCA 144. Licensees may also be familiar with the case Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp., 2020 SCC 29, which dealt with the enforceability of a parking agreement against a strata corporation that was entered into and registered prior to the formation of the strata corporation. The agreement was found to be enforceable on the basis that it had been ratified by the strata corporation. Strata managers dealing with issues regarding the enforceability of parking agreements should advise their clients to obtain legal advice.

DUE DILIGENCE TIPS

- How do you know if you are dealing with an air space parcel? The legal description of the property will generally include reference to an air space parcel rather than a lot or parcel (e.g., Air Space Parcel 3 vs. Lot 3 or Parcel C) and an air space plan (e.g., "Air Space Parcel 1 District Lot 1 New Westminster District Air Space Plan 12345"). The legal description of a remainder parcel will generally include a reference such as "Except Air Space Plan 12345."
- If the air space parcel has been stratified, the legal description of the strata lot will not indicate that the underlying property is an air space parcel, but the strata plan will. Also, look for charges on title to the strata lot and/or common property that indicate the property is subject to a reciprocal easement and cost sharing agreement.
- Licensees should advise their clients to obtain legal review of reciprocal cost sharing agreements, including to ensure that the property has appropriate access rights, to consider enforceability, to determine the owner's rights and responsibilities, and to ensure cost sharing provisions are equitable.
- Strata managers dealing with strata developments that are parties to air space agreements should ensure they understand the strata corporation's rights and obligations under these agreements. requirements. Licensees should advise their clients to obtain legal advice regarding the ground lease. Strata managers dealing with leasehold stratas should understand the strata corporation's rights and obligations with respect to the underlying ground lease.

STRATA PROPERTY

Licensees in B.C. will likely already have some familiarity with the concept of strata property and some of its forms. In B.C., strata property is governed by the S[DA] Some of the key features of a strata development are as follows:

- The division of a legal parcel into strata lots and common property is a form of subdivision. A legal parcel can be converted into a strata development by registration of a strata plan showing the strata lots and any common property to be created.
- A strata corporation is automatically formed upon registration of the strata plan. The strata corporation is a legal body that governs the strata property through an elected strata council comprised of strata lot owners.
- A strata lot owner has a fee simple interest it its strata lot and an interest in the common property as a tenant in common proportionate to their "unit entitlement."
- The common property of a strata development includes all property on the strata plan that is not included within a strata lot (e.g., balconies, patios, hallways, lobbies, and elevators). Depending on the type of strata development and the applicable strata bylaws, the common property may or may not include items such as exterior walls, doors, and windows.
- Some common property may be designated as limited common property for the exclusive use of one or more strata lots, but which does not actually form part of the strata lot, such as balconies and patios. The benefiting strata lot may share maintenance obligations with the strata corporation, depending on the type of maintenance and the applicable strata bylaws.
- Owners have obligations to pay monthly strata fees to the strata corporation, which include maintenance fees and contributions to a contingency reserve fund for emergency and capital repairs and replacements. If the strata corporation does not have sufficient funds to cover a given expense, the owners may also be called upon to pay a special levy.

- Upon wind-up of a strata development, the strata corporation, strata lots, and common property cease to exist and the owners of the former strata lots are left with a proportionate interest in the underlying lands as tenants in common.

Though uncommon, a strata lot may contain more than one dwelling unit. For example, in a building that contains both market residential strata lots and secured rental units (i.e., affordable housing units), the municipality may require that all affordable housing units be contained within a single strata lot to prevent them from being bought and sold independently.

Some other forms of strata developments that licensees may encounter include the following:

Bare Land Strata

In a bare land strata, the strata lots are parcels of bare land rather than units within a building. In this way, a bare land strata lot resembles a traditional fee simple parcel. However, a bare land strata is governed by a strata corporation and will contain common property, such as private access roads (i.e., not municipally owned) and utilities (e.g., water and sewer connections). Owners pay monthly fees to the strata corporation, which may cover insurance and maintenance costs, such as landscaping, snowplowing, repairing, and rebuilding access roads and utilities connections. A prudent licensee acting for a buyer of a bare land strata lot should investigate the common property to help their client determine what is included in the common property and what owner responsibilities are attached to it.

A bare land strata lot may contain one or more dwellings, depending on zoning, strata bylaws, and any applicable statutory building scheme. A licensee can determine if a property is a bare land strata by checking the strata plan filed in the LTO, which will say "Bare Land Strata Plan" and the legal description of the property on title will contain a reference to the strata plan number. Bare land stratas are common in certain suburban and rural areas in British Columbia.

Leasehold Strata

Leasehold stratas are the exception to the general rule that a strata lot owner owns its strata lot in fee simple. In a leasehold strata, the development is constructed on lands that are subject to a long term ground lease (e.g., a 99-year lease). The developer then subleases the strata lots to buyers. When the underlying ground lease ends, so does the owner's leasehold interest in its strata lot. Pursuant to the *SPA*, only certain types of entities are entitled to own the land underlying a leasehold strata. These entities are generally governmental or quasi-governmental in nature, and include the government of British Columbia, the government of Canada, municipalities, regional districts, a Nisga'a Village or the Nisga'a Nation, treaty First Nations, universities, and public authorities.

When representing a buyer of a leasehold strata lot, licensees should assist their clients to determine the remaining term and any rent obligations under the underlying lease, among other things. For example, is the rent entirely prepaid, or is it paid on an annual basis? The lease may provide that annual rental rates are tied to the value of the underlying land, meaning that annual rents may be subject to steep rent increases if the value of the underlying land goes up. A licensee can determine if a property is a leasehold strata because the title search will show the leasehold landlord as the registered owner, and the long-term lease will be registered as a charge on title. A licensee should obtain a copy of the underlying ground lease to determine the remaining term of the lease, the annual rental rates, and any escalation provisions, and advise their client to obtain legal advice regarding the ground lease.

Sectioned Strata

A strata development may contain a variety of different types of residential and non-residential strata lots, all of which may have different interests. The *SPA* allows a strata corporation to have "sections" to represent these different interests. **Sections can be created for the purpose of representing the different interests of:**

- The owners of residential strata lots and the owners of non-residential strata lots;
- The owners of non-residential strata lots, if they use their strata lots for significantly different purposes; or
- The owners of certain different types of residential strata lots, namely: apartment-style strata lots, townhouse-style strata lots, and detached homes.

A section is a corporation similar to a strata corporation (see section 194(2) of the SPA). A section has many of the same powers and duties as a strata corporation, but only with respect to matters that relate solely to the section. The strata corporation always retains its powers and duties in matters of common interest to all of the strata lot owners. For section-specific matters, the section has the power to establish its own operating fund and contingency reserve fund, require section owners to pay strata fees and special levies, enter into contracts and litigation, acquire property, and enforce section-specific bylaws and rules.

Licensees can determine whether a strata corporation has sections by reviewing the strata bylaws. In a sectioned strata, the strata bylaws must contain provisions providing for the creation and administration of each section. The strata plan may also show certain common property designated for the exclusive use of all strata lots within a particular section. Strata managers dealing with sectioned strata developments must clearly understand the administration of each section, including separate meetings, voting rights, and strata fees applicable to each section.

Licensees should be aware that a strata lot in a section may be required to pay strata fees and special levies to both the strata corporation and to the section. The strata corporation fees and section fees will be separately set out in two different Form B Information Certificates, one from the strata corporation and one from the section. It is important to review both of these Form B Information Certificates together to determine the total monthly fees payable to the strata corporation and the section.

DUE DILIGENCE TIPS

- Not all strata developments are created equal – consider which form of strata development you are dealing with in order to properly advise your client.
- Strata property purchases require additional document review, e.g., Form B Information Certificate(s), strata plan, strata bylaws, strata meeting minutes (ideally the preceding several years), depreciation reports, strata insurance, and title and common property charges.
- Review the bylaws to determine whether the strata development is sectioned. A strata lot in a section will have two Form B Information Certificates. Review both for key information about the strata lot's rights and responsibilities with respect to the strata corporation and the applicable section, including separate strata fees payable to each.
- Leasehold strata purchases require a review of the underlying ground lease to determine the remaining term of the lease, rent and other obligations, and any transfer requirements. Licensees should advise their clients to obtain legal advice regarding the ground lease. Strata managers dealing with leasehold stratas should understand the strata corporation's rights and obligations with respect to the underlying ground lease.

STRATA PARKING AND STORAGE

In some cases, parking stalls, garage areas, storage areas, and similar areas may be included within and form part of a strata lot. In other cases, the owner of a strata lot may be entitled to the use of parking and storage facilities that are not within the strata lot.

There are several different ways that these rights can be allocated to a strata lot. Licensees should be aware of the types of ownership rights applicable to strata parking and storage, as each has its own benefits and drawbacks and is subject to different transfer mechanics. It is important for strata managers to understand the parking and storage arrangements of the properties they manage. Where parking and/or storage are allocated as common property or by lease agreement, the strata manager may be required to manage the allocation and transfers between owners. The different allocation mechanisms are summarized in the table below

Type of Parking / Storage Allocation				
	Common Property	**Limited Common Property ("LCP")**	**Separate Strata Lot**	**Lease Agreement**
Who owns the parking stall or storage locker?	The strata corporation.	The strata corporation, but the parking stall or storage locker is designated for exclusive use of a specific strata lot.	The registered owner shown on title to the parking stall or storage locker strata lot.	The strata corporation, but the common property is leased to a separate entity, which is often affiliated with the developer, that controls allocation.
How can it be transferred?	The strata corporation can allocate and set out rules for transfer, usually in the bylaws. Buyer should obtain an assignment of parking/storage rights from seller.	The right to use limited common property is attached to the strata lot and automatically transfers to the new owner. No assignment needed.	Typically, there are no restrictions on transfer – can be bought and sold like any other strata lot. Must be specifically identified as "property" under the purchase contract to be included in the purchase.	The parking or storage lease sets out the transfer requirements. The transferee usually has to be another resident of the strata development.
Benefits	More flexible arrangement that may allow owners to reallocate parking amongst themselves. Owners will typically have no maintenance requirements.	Very secure – If owner/developer designated, change to LCP done by amendment to strata plan and a unanimous vote. If designated by a 3/4 resolution, change to LCP done by 3/4 vote at AGM or SGM.	Can generally be sold independently from the strata lot.	Buyer may be able to purchase rights to additional parking or storage. May provide some flexibility to re-allocate. Unregistered assignments are not subject to property transfer tax, unless included in purchase price for property.
Drawbacks	Rights of owners to use parking stalls and storage lockers are less secure and can often be re-allocated or taken away by the strata corporation or a regular vote of the owners.	No flexibility. Changing allocation of limited common property requires an amendment to the strata plan, which may require a unanimous vote. Owner may have some maintenance requirements.	Can result in some units no longer having associated parking and/or storage if the parking stalls or storage units have been sold; No restriction on non-residents owning parking stalls or storage lockers. Owner solely responsible for maintenance.	Has resulted in conflict between parking landlord and residents (e.g., where parking landlord has leased some units or stalls out to non-residents for a profit). May not be as secure as LCP. May require additional due diligence and paperwork.

While it is no longer permitted to allocate parking and storage by separate strata lot in new developments, this arrangement may be found in some older strata developments.

Discipline Decisions

Several discipline decisions illustrate that licensees will commit professional misconduct and be subject to disciplinary action where they do not take reasonable and sufficient steps to determine the number and type of parking spaces allocated to a strata property or where they provide misleading or inaccurate information regarding the same. For example, in *Roberts (Re)*,[2] a licensee that made incorrect representations about the number and type of parking spaces allocated to a property was subject to a penalty of $10,000 and was required to complete the Real Estate Trading Services Remedial Education Course.

DUE DILIGENCE TIPS

- Not all strata developments are created equal – consider which form of strata development you are dealing with in order to properly advise your client.
- Strata property purchases require additional document review, e.g., Form B Information Certificate(s), strata plan, strata bylaws, strata meeting minutes (ideally the preceding several years), depreciation reports, strata insurance, and title and common property charges.
- Review the bylaws to determine whether the strata development is sectioned. A strata lot in a section will have two Form B Information Certificates. Review both for key information about the strata lot's rights and responsibilities with respect to the strata corporation and the applicable section, including separate strata fees payable to each.
- Leasehold strata purchases require a review of the underlying ground lease to determine the remaining term of the lease, rent and other obligations, and any transfer requirements. Licensees should advise their clients to obtain legal advice regarding the ground lease. Strata managers dealing with leasehold stratas should understand the strata corporation's rights and obligations with respect to the underlying ground lease.

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SHARED OWNERSHIP

Licensees will often encounter situations where more than one person or entity shares ownership of a single property. In these cases, the owners hold their respective interests in the property in one of two ways: as "tenants in common" or as "joint tenants". These two forms of shared ownership have different legal implications, some of which are discussed below. Any number of people or entities can own a single property as either tenants in common or joint tenants, but for the sake of simplicity the examples below will focus on scenarios where there are only two owners.

One of the primary distinctions between tenants in common and joint tenants is that tenants in common each hold their own separate interest or share in the property. Joint tenants hold their interests together and cannot have separate ownership shares. In other words, where two tenants in common might each own 50 per cent of the property, joint tenants own 100 per cent of the property together. One of the implications of this is that tenants in common can own unequal shares in the property (e.g., 60%/40%, 1%/99%), whereas joint tenants' interests cannot be unequal.

Another key difference between tenants in common and joint tenants is what happens when an owner dies. In a joint tenancy, the deceased owner's interest automatically passes to the surviving joint tenant. This is known as the "right of survivorship." In contrast, if a tenant in common dies, their interest forms part of the deceased's estate and is dealt with under the deceased's will (if there is one) and the W*ills, Estates and Succession Act*. This distinction is relevant to any licensee involved in a transaction where a co-seller is deceased. If a joint tenant seller dies, the procedure to transfer his or her interest to the surviving joint tenant involves a simple and relatively quick filing, including the death certificate, with the LTO. If a selling tenant in common dies, court procedures and other legal steps are necessary before the deceased's tenant in common interest can be transferred to the deceased's estate – all of which can take months.

When two or more people own property together, the legal presumption is that they are tenants in common. This means that the co-owners will only be joint tenants if they specify their intention to be joint tenants (and meet other legal criteria that we will not consider here). Licensees can determine if co-owners of real property are tenants in common or joint tenants by looking at the "Registered Owner" section of the title search. The co-owners are tenants in common unless the title search shows "AS JOINT TENANTS" under the registered owner names. For tenants in common, their respective ownership shares may be shown (e.g., "AS TO AN UNDIVIDED 30/100 INTEREST" – meaning a 30 per cent interest as a tenant in common). If multiple owners are listed on title, without a statement identifying them as joint tenants or tenants in common, then the presumption is that they each own an equal share of the property as tenants in common.

Co-Ownership Agreements

Co-ownership can be problematic if some or all of the co-owners disagree on certain issues. To avoid future problems, it can be helpful for co-owners to set out their rights and responsibilities with respect to the property in a co-ownership agreement. These agreements often appear in the commercial context, but they are equally relevant for residential properties, such as shared vacation homes or investment properties.

While co-ownership agreements vary in complexity, they often deal with the following issues:

- Co-owner responsibilities, rules and conduct, and scheduling of use;
- How costs are shared between co-owners (e.g., repair and maintenance, property taxes);
- How major decisions about the property are made (e.g., renovations, capital repairs, refinancing, selling the property);
- Exit rights if a co-owner wants to sell its interest (e.g., is the consent of the other co-owners required, do they have a right of first refusal, qualifications for an incoming co-owner); and
- What happens if a co-owner fails to comply with its co-ownership obligations (e.g., dispute resolution or forced sale).

Licensees acting for potential co-owners, particularly unrelated parties, should ask their clients if they have considered a co-ownership agreement and recommend that they speak with a lawyer about setting up a co-ownership agreement before jointly purchasing a property. A co-ownership agreement may not be necessary in all circumstances, but prospective co-owners should carefully consider the issues that may arise in a co-ownership scenario in order to make an informed decision as to whether one is needed in the circumstances. It is usually much easier to set up a co-ownership agreement before purchasing a joint property than it is once the co-ownership relationship is already underway.

DUE DILIGENCE TIPS

- **To find out how a property is owned, check the title search. If the title search says "as joint tenants" under the owner names, then the owners are joint tenants. If not, they are tenants in common. .**

MANUFACTURED HOMES

Ownership of manufactured homes - sometimes referred to as "mobile homes" - can take different forms, each of which affect the rights of the owner/occupier.

Manufactured homes may be located on leasehold or fee simple property. In the leasehold scenario, the occupant usually owns the manufactured home, but leases a rental pad from the owner of the manufactured home park. In this scenario, the relationship between the owner of the manufactured home and the owner of the underlying land is generally governed by the *Manufactured Home Park Tenancy Act ("MHPTA")*, which is similar in many ways to the *Residential Tenancy Act*. The *MHPTA* does not apply in all situations (for example, it generally does not apply to campgrounds, parks, or reserve lands). Licensees representing manufactured home owners should recommend that their clients seek legal advice to determine what legislation applies to them.

Licensees acting for clients buying, selling, renting, and financing manufactured homes should keep the following in mind:

- **Manufactured Home Registry:** British Columbia has a Manufactured Home Registry that records the registered owners of manufactured homes. When a manufactured home is registered, the registrar issues a decal to the owner to confirm registration. The decal must be attached to the manufactured home. The Manufactured Home Registry also shows the following:
  - Name and address of the registered owner;
  - Make or model of the manufactured home;
  - Serial number of the manufactured home; and
  - Current location of the manufactured home.
- **Compliance with regulations:** In British Columbia, a person may not sell a manufactured home that was made after May 15, 1992, unless it complies with the *Manufactured Home Regulation* and the *Electrical Safety Regulation* (under the *Safety Standards Act*) and the seller discloses in writing that the manufactured home complies with those standards. Even if the manufactured home has a Canadian Standards Association ("CSA") sticker, the owner may have done work on the manufactured home that would invalidate the sticker (e.g., changes to wiring without a permit). Refer to the Manufactured Homes Guidelines in the Knowledge Base for more information.
- **Assignment of the rental pad:** The right to use the rental pad must be assigned to the buyer of a mobile home. The consent of the manufactured home park owner may be required. If the rental pad is not properly assigned, the new buyer may have to sign a new tenancy agreement with the landlord and may be subject to significant rent increases.
- **Standard form contract:** The British Columbia Real Estate Association("BCREA") and the Canadian Bar Association, BC Branch have a separate standard form Contract of Purchase and Sale of a Manufactured Home on a Rental Pad ("Standard MH Contract"). The Standard MH Contract has specific information that is relevant to the purchase of a manufactured home that is not found in the standard form Contract of Purchase and Sale used for fee simple lands (e.g., the make, model, and serial number of the manufactured home, disclosure of tenancy information, consent of the manufactured home park owner to assign the rental pad).
- **Financing:** Manufactured homes can be security for a loan. Instead of a mortgage registered in the LTO, the lender's security interest in the manufactured home will be registered in the Personal Property Registry. Buyers may need to find a lender that specializes in loans for mobile homes.
- **Taxes:** The owner of the manufactured home will usually be required to pay property taxes on the mobile home to the municipality, even though the owner does not own the underlying land.

If you are unfamiliar with manufactured homes, speak with your managing broker and review the manufactured home resources in the Knowledge Base before agreeing to represent a client in a manufactured home transaction. The Real Estate Services Rules state that you must not act outside your area of expertise. Doing so may put your client at risk and you may be subject to disciplinary action - see below case comment.

Discipline Decision

A discipline decision illustrates that licensees will be subject to disciplinary action for committing professional misconduct where they failed to ascertain whether a manufactured home had a valid CSA approval sticker or silver label, in accordance with the *Safety Standards Act*. In the decision Vogel (Re),[3] the licensee was subject to a penalty of $5,000 and was required to complete the Real Estate Trading Services Remedial Education Course and the Manufactured Homes: What REALTORS® Need to Know Course.

DUE DILIGENCE TIPS

- **Check the B.C. Assessment roll report, available through B.C. Online, which should include the Manufactured Home Registry number. Manufactured homes sold with fee simple land may or may not be registered. See the Manufactured Home Guidelines in the Knowledge Base for a complete discussion.**
- **Confirm that the information in the Manufactured Home Registry is up-to-date, including the location details, and there are no caution notices filed which would indicate another party is claiming an interest in the manufactured home.**

CO-OPS

A co-op is a form of shared property ownership where a co-operative association owns the land and building(s), and the members of the co-op own shares in the co-operative association. A co-op is similar to, but not the same as, a strata development in that members have to follow rules and contribute to shared costs in respect of the property. This type of property ownership is distinct from a non-profit government housing co-op, which is not discussed in this module. Unlike a non-profit housing co-op, members who purchase shares in a co-op are permitted to sell their shares for a profit when they want to move out of the co-op.

In some areas of British Columbia, co-ops have been a popular form of ownership over the past several decades. However, they are becoming less and less common, in part because it is often financially advantageous to wind up the co-op and sell the site as a whole to a developer for redevelopment.

Licensees trading in co-op property should be aware that a co-op interest is not a fee simple interest. Rather, a buyer of a co-op interest receives shares in the co-operative association (a type of corporation) and a leasehold interest in the co-op building. It is important to note that consent of the board of directors of the co-operative association is often required to transfer the co-op shares. That consent may be in the directors' sole discretion, even where the transfer is to a spouse or other family member of the transferor or to another occupant of the co-op unit.

3 2018 CanLII 107546

Due to the special nature of co-ops, a contract of purchase and sale for a co-op interest will need to contain specialized clauses, such as the following sample clause from BCFSA's Clauses in the Knowledge Base:

> *This Contract is for the sale by the Seller and the purchase by the Buyer of [number of shares] shares (the "Shares") in [name of co-operative entity], together with an assignment by the Seller to the Buyer of the Seller's rights and assumption by the Buyer of the Seller's obligations respecting a lease dated [date] (the "Lease") of unit [insert number], which lease is registered at the LTO under number [insert registration number].*
>
> *In this Contract, except for sections 5, 8 and 16, and except where the context otherwise requires, "Property" means the Lease and the Shares collectively. In sections 5, 8 and 16, "Property" means unit [insert number].*

Licensees preparing these contracts are advised to check the Knowledge Base for sample co-op clauses and to speak with their managing broker.

DUE DILIGENCE TIPS

- A title search will show the co-operative association as the registered owner of the property.
- The lease and assignments will be registered on title and should be obtained from the LTO for review. The lease will indicate the unit number and should indicate what co-op shares are related to the unit, but the licensee should request a copy of the share register from the cooperative association.
- Consider the co-op's agreement regarding fees and contributions to expenses. For example, strata corporations are required under the *SPA* to maintain a contingency reserve fund for major expenses (e.g., roof repairs). There are no such requirements for co-ops.

CONCLUSION

This module has reviewed some of the types of property ownership that a licensee may encounter. It is important before providing services that a licensee ascertain the nature of the property ownership interest and conduct the due diligence necessary to advise the client. Understanding the form of property ownership will help the licensee to identify issues that should be considered by the licensee or other professional advisors.

Module Six: Tenanted Properties

This module provides licensees with a practical overview of the *Residential Tenancy Act*[1] ("*RTA*") and how it applies to the management and sale of tenanted properties. You will learn about the key terms of a residential tenancy agreement, the various ways that a tenancy can be legally terminated, and the steps that must be taken when a tenant refuses to vacate a rental unit. You will also learn about the latest legislative amendments that impact rental unit management and real estate practice in British Columbia ("B.C."). It is important that you have a clear understanding of the *RTA* and how it impacts the duties and practices of rental managers and other licensees.

IMPORTANT NOTE:

Licensees need to understand the rescission provisions in the *PLA* and the *HBRP Regulation* and how they may apply to the terminations of tenancies discussed in this module.

LEARNING OBJECTIVES

After completing this module, you will be able to:

1. Describe practices of rental managers and trading services licensees in B.C. as they pertain to the management, marketing, and sale of rental units;
2. Identify required and recommended terms to include in a residential tenancy agreement;
3. Describe the circumstances in which a residential tenancy may be legally terminated and the proper procedures to obtaining vacant possession of a rental unit; and
4. Describe recent amendments to the *RTA* that impact mid-tenancy and end-of-tenancy matters.

06

RESIDENTIAL TENANCY AGREEMENTS

If you are a rental manager, you will act as the agent for the owner of the rental unit. In performing the duties of the owner, you will be expected to act reasonably and in full compliance with the *RTA* and other applicable legislation.

When acting as an agent for the owner, a rental manager may take on the role of "landlord" and undertake to perform the landlord's obligations under the tenancy agreement.

The *RTA* sets out specific procedures related to the marketing and sale of properties that are currently occupied by a tenant under a tenancy agreement. If the buyer requests vacant possession of the property on closing, the appropriate steps must be taken under the *RTA* to ensure that the tenancy is legally terminated, and the property vacated, before the real estate transaction is closed. Should the legal requirements for vacant possession not be met, the sale of the property could be jeopardized or delayed by a tenant's application for a dispute resolution hearing at the Residential Tenancy Branch ("RTB").

LEGAL REQUIREMENTS FOR RESIDENTIAL TENANCY AGREEMENTS

The R[illegible] section 13, sets out various required terms that every tenancy agreement in B.C. must include. Importantly, the *RTA* requires that all residential tenancy agreements be made in writing (apart from those tenancies that began before January 2004). Tenants must receive a copy of the fully signed tenancy agreement within 21 days of signing.

Remember: a tenancy agreement is a legal contract. When dealing with any legal contract, ensure that the terms of the agreement are clear and unambiguous. A well written tenancy agreement will eliminate speculation about the parties' respective rights and obligations respecting the rental unit. That protects the client's property and safeguards the rental manager's ability to manage the rental unit. The *RTA* requires that tenancy agreements be "easily read and understood by a reasonable person." See section 12 of the *Residential Tenancy Regulation*[2] ("*RTR*").

All residential tenancy agreements in B.C. must include a standard set of terms which are set out in the Schedule attached to the *RTR*. You can find these standard terms in the sample tenancy agreement published on the RTB's website. The standard terms, which cover matters such as deposits, locks, and guests, cannot be modified (*RTA*, section 14). Many rental managers choose to use the RTB's standard tenancy agreement. If you do not, you must ensure that the form and content of the tenancy agreement complies with all of the *RTA* requirements, including content and formatting. In addition to the standard terms, all tenancy agreements must include provisions such as the correct legal names of the landlord and tenant, the correct address of the rental unit, the address for service and telephone number of the landlord or landlord's agent, the date and term of the tenancy, and the amount of the security deposit. Refer to section 14 of the *RTA* for the detailed list of required terms.

1 S.B.C. 2002, c. 78.
2 B.C. Reg. 477/2003.

Ensure that these details are reflected correctly in the tenancy agreement because the RTB will rely on the language of the agreement in the case a dispute arises. A rental manager should ensure that any corrections or amendments needed to be made to a tenancy agreement are reflected in writing and made with the consent of both parties.

PRACTICE TIP

As a rental manager, it is important to ensure that the correct legal name for the landlord appears on the tenancy agreement and elsewhere. The *RTA*'s definition of a "landlord" does not distinguish between a property owner and a property manager in respect of rights and obligations. This means that if a property manager is listed as the sole landlord under a tenancy agreement, they may be named as such in a legal proceeding before the RTB. To avoid confusion over the rental manager's role in respect to the rental unit, the rental manager should be clearly identified as "the agent for the property owner" or "c/o the agent, rental manager" on the tenancy agreement and on any correspondence or documents exchanged during the tenancy. In some situations, a client might ask a rental manager not to include the client's name on the tenancy agreement. In that case, a licensee should consider their tolerance for legal risk and whether they have a solid indemnity clause in their own management agreement to protect them from liability for losses incurred under that agreement.

Before any trading services can be provided to a prospective tenant, BCFSA requires rental managers to clearly disclose their agency status by way of a Disclosure for Residential Tenancies form. Visit the BCFSA website to learn more about disclosure requirements and to obtain disclosure forms for residential tenancies.

While the requisite terms listed above cannot be modified or removed from a tenancy agreement, the parties may agree, by mutual consent, to add, change, or remove other terms in certain circumstances as permitted by the *RTA*. Any amendments to a tenancy agreement should be agreed to in writing by both landlord and tenant. As with the requirement that the tenancy agreement be clear, so should any changes to it.

There are many additional terms that can be added to a tenancy agreement to cover matters relevant to the rental unit that go beyond the *RTA*'s requirements. In the tenancy agreement itself, any additional terms should be clearly identified and distinguished from the required standard terms. One simple method to do this is to append the schedule of standard terms to the tenancy agreement as a mandatory addendum. Alternatively, captions or style/font changes can be used to indicate standard vs. additional terms. Additional terms may relate to topics such as smoking/vaping, cannabis, pets, parking, quiet hours, fees for additional occupants, tenants' insurance, commercial activities, alterations to the rental unit, extended absences, illegal activity, garbage/recycling rules, rules for the use of the rental unit and common areas, balcony/patio use, rules around barbecue use, and whatever else may apply to the specific tenancy. Such additional terms must comply with the *RTA* and other laws and should clearly represent the client's intention for the use of their property.

Considerations for Rental Units in Strata Corporations: If the rental unit is a strata lot, you should review and cross-reference the strata corporation's bylaws and rules with any rules in the tenancy agreement and ensure that the tenancy agreement does not contravene the bylaws and rules as they may regulate matters such as pets, moving fees, and age restrictions. A tenant's use of a strata rental unit must be in full compliance with the strata corporation's bylaws and rules, which must be provided to the tenant by way of a Form K - pursuant to section 146 of the *Strata Property Act ("SPA")*. A tenancy agreement cannot contravene the bylaws as they take legal priority over the tenancy agreement. If a tenant fails to comply with the strata corporation's bylaws and rules, the owner may find themself liable for their tenant's breach and as a result, may be responsible to pay their tenant's unpaid fines or be subject to other disciplinary action by their strata corporation.

"MATERIAL" TERMS OF TENANCY AGREEMENTS AND THEIR CONSEQUENCES

The additional terms must reflect your client's wishes for their property and should provide the client with more than the minimal protections afforded under the *RTA*. Take special care to ensure that the additional terms are in compliance with the *RTA* or other applicable laws, such as privacy and human rights laws. Also, if an additional term is considered material or fundamental to the tenancy agreement, then that importance must be clearly disclosed to the tenant at the outset, in addition to the consequences of breaching that term.

A material term is a term that both parties agree is so important that a breach of such a term would give the other party the right to end the agreement (*RTA*, sections 45, 47). While a tenancy may be terminated for repeatedly breaching non-material terms of a tenancy agreement, a single failure to comply with a material term may justify ending the tenancy. For example, the payment of rent is considered a material term as rent is a fundamental component of the tenancy agreement. As a result, a tenant's failure to pay rent in full and on time at any point in their tenancy entitles the landlord to end the tenancy almost immediately, within 10 days, under the *RTA*.

It is a good practice to explicitly identify material terms in the tenancy agreement, either by the use of an initialing box beside the term and/or a clear statement in the term itself stating its materiality. Also, clearly identify the consequences of breaching a material term: the landlord will be entitled to serve a notice to end tenancy on the tenant immediately. Finally, ensure that the terms of the agreement are consistently enforced. If they are not, there is a high risk that the term will lose its materiality and compromise a party's ability to end a tenancy for a related breach.

If the landlord is in breach of a material term of the tenancy agreement and the tenant has notified the landlord of this breach and given the landlord a reasonable period of time within which to remedy the breach, and the landlord failed to do so, the tenant may end the tenancy by a One Month Notice to the landlord. Likewise, if a tenant is in breach of a material term of the tenancy agreement and the landlord has followed these same procedures, the landlord would be in a position to issue the tenant a One Month Notice to end tenancy for cause. Landlords and their agents should be aware of their own obligations under a tenancy agreement. For more information, review Residential Tenancy Policy Guideline 8: Unconscionable and Material Terms.

KEY TERMS TO KNOW

- **Security Deposits and Pet Deposits –** It is very important to comply with the *RTA* in respect to the collection and return of security deposits and pet deposits. If a rental manager fails to do so, they can find themselves or their clients facing an RTB Dispute Resolution Hearing. Each of a security or pet deposit must not be more than one-half of one-month's rent and must only be collected once. It must be paid by the tenant within 30 days of entering into the tenancy agreement, failing which, the landlord may issue a notice to end tenancy to the tenant. Likewise, it must be returned within 15 days of the later of the date the tenancy ends or the date the landlord receives the tenant's forwarding address in writing. Remember to collect a forwarding address from the tenant to return a security or pet deposit after the tenancy has ended.

The *RTA* outlines a clear legal process which must be followed if an owner, or their pet, has caused damage to a rental unit requiring a retention of some (or all) of a deposit. The landlord must either obtain the tenant's consent to keep a portion of the security or pet deposit, or if the tenant does not agree, then the landlord must promptly apply to the RTB for a Dispute Resolution Hearing for an order from the RTB permitting the landlord to retain a certain amount for valid repairs.

Pet Policies – A tenancy agreement may include terms prohibiting pets, or restricting the size, kind, or number of pets permitted to be kept on a rental unit, provided those agreements related to strata properties are consistent with the strata's bylaws. If pets are allowed to be kept in a rental unit, the tenancy agreement may impose certain obligations on the tenant, including the requirement that the Tenant pay a pet damage deposit. It is important to note that the right to restrict pets is limited by the *Guide Dog and Service Dog Act*,[3] which permits a tenant to have a guide dog or service dog where pets may not normally be kept. The legislation does not similarly protect the right to an uncertified "emotional support animal," however B.C.'s *Human Rights Code*[4] ("*HRC*") may impose a duty on a landlord to accommodate a disabled tenant who relies on their pet in connection to a disability. In any case, a landlord may not deny a tenant with a legitimately required guide or service dog if the rental unit would otherwise be available to them. This could raise the risk of a discrimination claim at the B.C. Human Rights Tribunal ("HRT"). Landlords should seek legal advice if they are presented with an issue relating to pets and disabilities.

CASE EXAMPLES GUIDE DOGS AND RENTAL UNITS:

Guide Dogs and Rental Units: In *Mann and Hutchinson v. Rufer and Simituk*,[5] a prospective tenant was refused consideration by landlords because he used a service dog. The HRT found that the landlords did not breach the *HRC* because they had a bona fide reasonable justification for their decision. The landlord's family dog was territorial and the rental basement suite was openly accessible, creating a concern that the two dogs could get into a fight.

3 2003, c. 81, s. 24; B.C. Reg. 477/2003, s. (b); 2015, c. 17, s. 15.
4 RSBC 1996, c. 10.
5 2009 BCHRT 322.

In *Devine v. David Burr*[6] and others, a landlord issued a notice to end tenancy on a tenant who was deaf and required the assistance of a care dog. The tenant's tenancy agreement was terminated by the landlord due to ongoing complaints from other tenants about the dog's behaviour. After the tenant was unsuccessful in disputing the notice at the RTB (resulting in an order of possession being granted to the landlord), the tenant challenged the termination by filing a human rights complaint to the HRT. The HRT found that there was no nexus between the tenant's disability and her eviction, and thus no discrimination by the landlord, as the reason for the termination was the dog's genuinely unruly behaviour and not the tenant's deafness.

Roommates / Occupants / Subtenants – Ensure that the tenancy agreement clearly states who the tenants are, as this is who will be held liable for the tenant's obligations as set out in the tenancy agreement. In addition to identifying who all the tenants are, a tenancy agreement should indicate any additional occupants, fees for additional occupants, and maximum occupants allowed. The difference between a tenant and an occupant is that an occupant is not party to the tenancy agreement, and therefore cannot be held liable for the tenant's duties under the tenancy agreement, such as the duty to pay rent on time, or to maintain the rental unit. A tenant can.

Occupants should not be confused with subtenants, which are a category of tenant. While an occupant may reside in the rental unit with the original tenant still living there, a true subtenancy will only be created if the tenant ceases to occupy any part of the rental unit. This distinction is important to recognize because a tenancy may be ended by a landlord where a subtenancy has been entered without the landlord's consent. A landlord cannot similarly terminate a tenancy for the sole reason that the tenant takes on an additional occupant but continues to live in the rental unit.

The effect of a clearly written occupancy clause was illustrated in *White v. Dunderdale*,[7] in which a landlord increased a tenant's rent by $200 per month after the birth of her child, in compliance with a term in the tenancy agreement which provided for a rent increase for each additional occupant. The HRT found that the landlord's decision was not discriminatory because it did not appear to be based at all on the fact that the new occupant was a child. The landlord was legally entitled to raise the rent for a new occupant regardless of the fact that they were a baby.

Maintenance Duties of Landlords and Tenants – Landlords must ensure that the rental unit is maintained in a state that complies with all legal health, safety, and housing laws and is suitable for occupation, keeping in mind the age, character, and location of the rental unit. This includes the requirement that reasonable accommodations be made for tenants with disabilities - again, keeping in mind the specific rental unit.

To ensure that the landlord fulfills their duties regarding the maintenance of the rental unit, a landlord may wish to conduct routine inspections. The *RTA* provides that the landlord may inspect the rental unit on a monthly basis for such purpose, provided that they give adequate notice of entry to the tenant.

As for the tenant, they are responsible to upkeep the rental unit in a "reasonably clean and sanitary manner." While a tenant is not required to repair "reasonable wear and tear" to a rental unit, they are required to repair damage that is caused by their, or their visitors', wilful actions or neglect. The landlord may be responsible to attend to repairs complained of by the tenant, if the repairs are required as a result of damage not caused by the tenant's negligence or wilful actions – for example, leaks, furnace repairs, structural issues, and appliance repairs.

6 2010 BCHRT 37.
7 2010 BCHRT 351.

If a rental unit is not maintained adequately, and a tenant suffers some loss or injury as a result, the landlord may be found liable under both the RTA and the *Occupiers Liability Act*[8] *("OLA")*. It is critical that rental managers ensure that their client's properties are properly inspected and maintained. In *O'Leary v. Rupert*,[9] a landlord who failed to maintain and adequately provide lighting for an icy sloped driveway, which they knew was routinely slippery, was found to be in breach of the landlord's duties under the *RTA* and *OLA*. In this particular case, the *OLA* applied because the landlord, who lived on the property and rented out their basement suite to the tenant, fell under the definition of an "occupier." While a landlord who does not live on the premises may not ultimately be liable under the *OLA*, if certain maintenance obligations are to be assumed by the tenant instead of the landlord (for example, shoveling the walks or mowing the lawn), it is wise to ensure that this is clearly spelled out in the tenancy agreement.

Emergency Repairs – It is important that landlords provide tenants with the name and telephone number of the person to be contacted for emergency repairs. This can either be given to the tenant in writing or posted in a conspicuous place on the residential property. If a tenant attempts to report an emergency repair to a rental manager and fails to contact the rental manager after two attempts, the tenant is entitled, after a reasonable time for a response has passed, to make necessary emergency repairs to the rental unit themselves to be reimbursed by the landlord or alternatively deducted from the next month's rent. As a rental manager, you should ensure that you are responsive to tenant's requests for emergency repairs. You do not want the headache or expense that often comes with the repair work that a panicked tenant might complete in your client's rental unit.

CONSIDER THIS SCENARIO:

An older rental unit suffers extensive water damage rendering the rental unit unlivable. The tenant cannot contact the rental manager after several attempts. In their desperate attempt to start the restoration process, and their inexperience dealing with such matters, they hire a friend - who they mistakenly believe is a qualified tradesperson - to attend the rental unit and remove the water-soaked flooring as soon as possible so that they can start drying out the property. Unfortunately, their friend is not certified nor experienced in emergency restoration work, so has no knowledge of asbestos risk and management, and tears out material containing asbestos. This would require extensive de-contamination work which could have been avoided had a certified and trained restoration professional been hired in the first place.

Human Rights Matters in Tenancies – The *HRC* enables tenants to make claims at the HRT if they feel that they have been subject to discrimination by the landlord – or another tenant, where the discrimination is related to the tenancy relationship. Under the *HRC*, landlords have an obligation to reasonably respond to accommodation requests from tenants with disabilities. Further, a landlord may not reject a prospective tenant on the basis of that tenant's disability. In practice, each *HRC* claim will be determined on its specific facts. For example, in *Davis v. Duenow*,[10] a landlord was found not to have acted discriminatorily when he refused to install a ramp at the rental unit after being advised by an engineer that it was not feasible for the location. Because he gave legitimate consideration to the tenant's request, and the request was simply not possible, the landlord did not act in breach of the *HRC*.

8 RSBC 1996, c. 337.
9 2010 BCSC 240.
10 2007 BCHRT 248

Privacy Considerations – Another consideration that rental managers must be aware of is the privacy rights of tenants, particularly in the context of ever-changing privacy laws and technology. Consider things like security cameras and doorbell cameras. In B.C., the Personal Information Protection Act ("PIPA") imposes rules and regulations on the use and retention of private or personal information, including security camera footage, personal contact information, guest logs, etc. For reference, the Office of the Privacy Commissioner publishes privacy guidelines for landlords online.

Refer to the BCFSA "Knowledge Base" for a list of standard clauses that can be used in relation to the purchase and sale of a leasehold property.

ENDING A TENANCY UNDER THE RTA

The two most common ways to end a tenancy are:

(1) By mutual consent of both parties; or

(2) By the landlord's or tenant's issuance of an appropriate "Notice to End Tenancy" in accordance with the relevant RTB procedures.

When terminating a tenancy by mutual consent, it is advisable that a landlord enter a "Mutual Agreement to End Tenancy" to be signed by all parties to the tenancy agreement, including any necessary written terms relating to the end of the tenancy (such as the date and time that vacant possession must be provided and, if necessary, a release of any tenancy-related disputes between the parties).

If a tenant does not consent to the termination of the tenancy, the landlord must issue a valid notice to end tenancy in the form required by the *RTA*. Depending on the circumstances of the termination, the notice period required will vary. Tenants in B.C. are afforded significant legal protections under the *RTA*. There are specific circumstances in which a tenancy may be legally terminated, and for each of these circumstances, there are clear guidelines which must be followed. Landlords must take care to follow the *RTA* carefully when taking steps to terminate a tenancy, otherwise the tenants may file a successful dispute at the RTB permitting them to remain in the rental unit. This could amount to significant financial liabilities for the owner of the property.

ENDING A TENANCY FOR NON-PAYMENT OF RENT – 10-DAY NOTICE TO END TENANCY FOR UNPAID RENT OR UTILITIES

If a tenant fails to pay rent, a 10-day Notice to End Tenancy for Unpaid Rent or Utilities (Form #RTB-30) may be issued, requiring the tenant to vacate the rental unit within 10 days. Likewise, following a written demand to the tenant providing at least 30 days' notice for non-payment, the landlord may treat unpaid utilities in the same way as unpaid rent, by issuing a 10-day Notice.

If the tenant does not pay the rent and/or utilities or dispute the 10-day Notice within five days, the tenant is obligated to vacate the rental unit upon the termination date. If a tenant refuses to vacate, then the landlord may be entitled to apply for an order of possession via a "Direct Request" application at the RTB for an order of possession on an expedited basis. Generally, if the specific documentary and service requirements for a Direct Request at the RTB are satisfied, the landlord will be granted vacant possession without being required to attend a participatory RTB hearing.

ENDING A TENANCY FOR CAUSE – ONE-MONTH NOTICE TO END TENANCY

If a tenant consistently pays rent late, or otherwise breaches a material term of the tenancy agreement and fails to correct the situation within a reasonable time at the landlord's request, a One-Month Notice to End Tenancy (Form #RTB-33) may be issued, requiring the tenant to vacate the rental unit on the last day of the next rental period. If issuing a notice for cause, ensure that the notice clearly and accurately details the reason for the ending of the tenancy.

The circumstances where a tenancy may be ended for cause are set out in section 47 of the *RTA*. They include, for example, situations where the tenant has been repeatedly late paying rent, the tenant has unreasonably disturbed another occupant or jeopardized their health or safety, or the tenant has failed to comply with a material term of the tenancy agreement and has not rectified the situation within a reasonable time after receiving written notice from the landlord. See the full list at section 47 of the *RTA*, and be mindful of the RTB Policy Guidelines, which provide additional guidance on the application of the *RTA*.

ENDING A TENANCY IN SPECIAL CIRCUMSTANCES – ONE-MONTH NOTICE TO END TENANCY

Under section 44 of the RTA, a tenant may end their fixed term tenancy agreement by issuing a One-Month Notice to End Tenancy due to special circumstances involving family violence or admission to long-term care. When a tenancy is ended in either circumstance, all tenants under the tenancy agreement must vacate the rental unit unless a new agreement is entered into by the Landlord permitting the remaining tenants to stay.

CASE EXAMPLE: HARASSMENT OF OTHER TENANTS:

In *Kamali v. Affordable Housing Societies*[11], the landlord successfully ended a tenancy for conduct which reasonably disturbed other tenants. Though the tenant disputed the One-Month Notice to End Tenancy at the RTB, they were not successful because the landlord produced evidence showing a pattern of complaints made by other tenants respecting the offending tenant's disturbing and harassing behaviour. The Notice to End Tenancy was upheld because the landlord established that they took a systematic, measured, and responsible approach to the complaints, including warnings, meetings to discuss the concerns, and a detailed letter outlining the concerns and consequences if the tenant's behaviour did not change. Finally, the tenant was also offered a transfer to alternative affordable housing, which he declined. As such, the landlord was found to have acted reasonably.

11 2009 BCHRT 216 (and affirmed in 2012 BCSC 692).

ENDING A TENANCY FOR PERSONAL USE OR SALE OF PROPERTY – TWO-MONTH NOTICE TO END TENANCY FOR LANDLORD'S USE OF PROPERTY

Section 49 of the *RTA* is of particular importance to trading services licensees as well as rental managers in B.C. If a licensee is selling a property that is currently occupied as a rental unit, or a rental manager is managing a property that is being sold, section 49 should be carefully reviewed.

Section 49 applies if a landlord intends, in good faith, to take back possession of the rental unit for themselves or for their close family member or, alternatively, if the rental unit is being sold and the purchaser intends, in good faith, to take possession of the rental unit for themselves or for their close family member, as permitted by the *RTA*. In such circumstances, a Two-Month Notice to End Tenancy (Form #RTB-32) may be issued to the tenant.

It is important to remember that if the tenancy is for a fixed-term, the actual notice period may be longer than two months as the effective date of the Two-Month Notice cannot be earlier than the end of the fixed-term of the tenancy. Also, be aware of a major risk inherent in this type of notice to end tenancy — if the tenant disputes the notice, then an RTB hearing could be set at a future date that conflicts with the possession date for the sale of the rental unit.

If a purchaser of a rental unit has requested, in writing, that the landlord or licensee terminate the tenancy for personal use by the purchaser, then a notice containing the purchaser's name and address must be included with the notice to end tenancy. The standard RTB form for such notice and other relevant notices is posted on the RTB's website. If a tenancy is ended on the request of a purchaser, the purchaser must occupy the rental unit within a reasonable period of time after the effective date of the Two-Month notice and the purchaser must occupy the property for at least six months after taking possession of the property.

Licensees should be aware of the tenant's right to dispute a Two-Month Notice to End Tenancy and should consider this risk when negotiating a closing date for the sale. If a tenant disputes a Two-Month Notice to End Tenancy, the tenant will be entitled to a hearing before the RTB. Given its backlogs, it is not unusual for the RTB to issue a hearing date that is three to five months after the date that the tenant applies for dispute resolution. If there is a conflict between the possession date and the scheduled date for the RTB hearing, the sale of the property could be impeded or delayed as the tenant is not legally obligated to leave the rental unit until the RTB hearing is decided, assuming it is decided in the landlord's favour.

The BCFSA recommends the use of a "Notice to End Tenancy" clause in a contract of purchase and sale, requiring the current landlord (being the seller) to deliver the Notice to End Tenancy upon the buyer's request and for the buyer (or the buyer's close family member) to personally occupy the property. To be clear, only the seller can serve this notice – it cannot be served by the buyer for any reason. The standard clause language on BCFSA's Knowledge Base for such a clause is as follows:

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

Section 49 also provides that a landlord may issue a Notice to End Tenancy with two months' notice or more, if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit. A "close family member" is defined to include only the landlord's parent, spouse or child, or the parent or child of the landlord's spouse. The property must actually be occupied as indicated for at least six months following the end of the tenancy. If it is not, and is vacated shortly after possession is taken, then the tenant could re-apply to the RTB for an order of compensation amounting to one year of rental payments. If there is legitimate doubt that the tenant will leave at the date on the notice, you should advise a seller client to consult with a lawyer to add wording in the purchase and sale agreement which contemplates that a Two-Month Notice to End Tenancy will be issued by the landlord/seller on behalf of the purchaser; if the tenant contests the notice, the landlord/seller does not guarantee vacant possession of the property by the closing date. If acting for a buyer in these circumstances, you should advise the buyer to seek legal advice.

Per section 49, if the landlord intends in good faith to demolish the rental unit or convert the rental unit into a non-residential use, the landlord must give a minimum of four months' notice to end a tenancy for personal use, as opposed to just two months. Regardless of how much notice is required, however, if the tenancy agreement is for a fixed-term tenancy with a predetermined expiry date, the notice will only be effective on that date as the tenancy cannot be terminated under section 49 prior to the end of the fixed term.

Notice and service requirements are critical at the RTB. It is not uncommon for a Notice to End Tenancy to be deemed invalid by the RTB for minor technicalities, such as a typographical error on the Tenancy Agreement or a failure to provide adequate evidence of service to the RTB. Whenever a Notice to End Tenancy is used, ensure that all of the details on the form are correct, and that the legal conditions to end the tenancy have all been met. Also, be sure that the notice is signed and dated by the landlord giving the notice, and if you are signing on behalf of the landlord, indicate clearly your role as an agent for the landlord. All of the RTB forms can be found at the B.C. Government website.

Recently, in 2021, the *RTA* was amended to permit "any other means" of service as provided for in the RTR, specifically including email service. If email service is to be agreed to be used by the parties, a term providing for such email service and clearly indicating the landlord's and tenant's email address, should be included in the tenancy agreement.

"RENOVICTIONS" – ENDING A TENANCY FOR SIGNIFICANT RENOVATIONS BY RTB ORDER

The *RTA* was amended in 2021 to require landlords to apply to the RTB for an order authorizing them to end a tenancy for the purpose of making significant renovations or repairs to the property.

All of the following conditions must be satisfied for such an order to be approved by the RTB:

- The landlord must intend in good faith to renovate or repair the property and has all necessary permits and approvals required to do so;
- The renovations or repairs must require the rental unit to be vacant;
- The renovations or repairs must be necessary to prolong or sustain the use of the rental unit or the building in which it is located; and
- The only reasonable way to achieve vacancy as necessary is to end the tenancy agreement.

If the order is granted, the order of possession must not be for earlier than four months from the date the RTB makes the order. In addition, the order cannot end a fixed-term tenancy prior to the end of the fixed term. Upon obtaining vacant possession, the landlord must proceed with the approved renovations within a reasonable amount of time after the tenancy is terminated. Failure to do so, without any evidence of extenuating conditions which delayed the renovations or repairs, will result in the landlord owing the tenant the equivalent of 12 months' rent.

Under section 51.2 of the *RTA*, tenants who live in a rental unit containing five or more rental units are granted a right of first refusal to enter a new tenancy agreement for the rental unit upon completion of the renovations or repairs for which the previous tenancy was ended under section 49.2. If a tenant wishes to exercise this right, they must serve upon the landlord a Tenant Notice: Exercising Right of First Refusal (Form #RTB-28).

WHAT ARE THE LANDLORD'S AND TENANT'S OBLIGATIONS AT THE END OF A TENANCY?

Tenant's Duties – At the end of a tenancy, the tenant must leave the rental unit reasonably clean, and undamaged, except for reasonable wear and tear. Additionally, the tenant must return all keys and means of access to the rental unit or residential property.

Landlord's Duties – However a tenancy is ended, the RTA requires that a move-out inspection be completed after the end of the tenancy. This can be either on or after the day the tenant ceases to occupy the rental unit, or on another day agreed upon by the parties. The tenant is generally expected, but not required, to participate in the move-out inspection. It is up to the tenant whether they choose to attend, however, the landlord must provide the tenant at least two opportunities to attend. If those invitations are refused, then and only then can the landlord proceed with the move-out inspection without the tenant present. The move-out inspection is very important in terms of identifying and protecting the client from repair costs that ought to be covered by a security or pet deposit. Within 15 days of the latter of the tenancy ending or the landlord having received the tenant's forwarding address in writing, unless the landlord obtains the tenant's written consent to retain all or part of a deposit, the landlord must promptly return the tenant's deposit(s) in full or make a claim against the deposit(s) by applying to the RTB for dispute resolution.

20 *Ibid*, s 6.

OVERHOLDING TENANTS: WHAT HAPPENS IF A TENANT REFUSES TO LEAVE?

If a tenant fails to vacate the rental unit after a valid and undisputed Notice to End Tenancy has been issued, then the landlord is entitled to seek an order of possession by application to the RTB for a Dispute Resolution Hearing. If an order of possession is granted by the RTB, and still not respected by the tenants, the matter may be escalated to the B.C. Supreme Court by way of an application for a court-enforceable Writ of Possession. At that point, a bailiff may be hired to secure vacant possession of the rental unit, after significant time and expense.

Under section 55 of the R[illegible] landlord may request an order of possession for a rental unit in any of the following circumstances by making an application at the RTB for dispute resolution:

- A notice to end tenancy has been given by the tenant;
- A notice to end tenancy has been given by the landlord, the tenant has not disputed the notice, and the time for doing so has expired;
- The tenancy agreement is a fixed-term tenancy that, in circumstances set out under section 97(2)(a.1) of the *RTA*, requires the tenant to vacate the rental unit at the end of the term;
- The tenancy agreement is a sublease agreement; or
- The landlord and tenant have agreed in writing that the tenancy is ended.

Process for Removing an Overholding Tenant

A tenant who continues to occupy a rental unit beyond their tenancy is called an "overholding tenant." An overholding tenant is liable for all rent and utilities that they would normally owe.

However, rental managers should note that, when accepting payments beyond the effective date of a notice to end tenancy, they should state in writing that:

- The payment is being accepted for "use and occupancy only," and it does not cancel the notice to end tenancy or indicate a reinstatement of the tenancy; and
- The tenant is still obligated to move out.

If a landlord is successful in establishing that the Notice to End Tenancy is valid, the RTB will grant the landlord an order of possession, which can be served on the tenant immediately. An order of possession will legally establish the landlord's right to possession of the rental unit and order the tenant to provide the landlord with vacant possession within 48 hours of service of the order of possession. Nevertheless, it is important to remember that the tenant is still entitled to file an Application for Review Consideration by the RTB. The landlord should check with the RTB and confirm whether the tenant has applied for Review Consideration or not.

Obtaining Writ of Possession & Hiring a Bailiff

If a tenant continues to overhold after an order of possession has been obtained by the landlord, the landlord cannot simply force the tenant out. Instead, they must follow the legal process outlined in section 57(2) of the *RTA*, which states that a landlord may only take actual possession of a rental unit that is occupied by an overholding tenant if the landlord has a Writ of Possession from the B.C. Supreme Court. When making an application to the B.C. Supreme Court, the landlord can apply both for a Writ of Possession and for an order of compensation for any period that the overholding tenant occupies the rental unit after the tenancy is ended (if they fail to pay for "use and occupancy" of the rental unit).

The process for obtaining a Writ of Possession from the B.C. Supreme Court is simple from a legal standpoint, so long as the proper procedures have been followed correctly. The landlord will need to provide a sworn affidavit to the court confirming that they followed the proper steps, and the court will grant the Writ of Possession. The B.C. Courts website contains a helpful guide on obtaining a Writ of Possession.

Once a Writ of Possession has been obtained, the landlord can hire a bailiff to enforce the termination of the tenancy by removing the tenant and their belongings from the rental unit and changing the locks. Bailiffs that are contracted with the Ministry of the Attorney General are the only people that can legally enforce a Writ of Possession. No one else has the power or authority to remove an overholding tenant from a rental unit.

While bailiff services can be costly, the landlord can apply for a monetary claim at the RTB to hold the tenant responsible for the cost of the bailiff fee, which generally ranges between around $2,000 to $4,000. The bailiff can also retain and sell certain non-exempt property of the tenant's to cover the cost of their fee.

FRUSTRATED TENANCIES

A tenancy agreement is frustrated when a rental unit is uninhabitable or the tenancy agreement can otherwise not be performed. For example, a tenancy agreement may be frustrated by a fire or flooding which damages a significant portion of the rental unit. When a tenancy agreement is considered to be frustrated by the landlord, a landlord must apply to the RTB for an order that the tenancy has been frustrated and as a result, the landlord should be granted an order of possession. A frustrated tenancy cannot be ended merely by notice to the tenant as with the other reasons to end a tenancy described above.

DISPUTE RESOLUTION PROCEEDINGS AT THE RTB

The RTB additionally may be turned to for dispute resolution in respect to mid-tenancy disputes that may arise between a landlord and tenant. Dispute proceedings at the RTB are held via telephone. The circumstances where the RTB may decide on a tenancy-related dispute are set out in section 58 of the *RTA*, and include disputes in respect of the parties' rights, obligations, and prohibitions under the *RTA* or under the tenancy agreement, or which related to the tenant's use, occupation, or maintenance of the rental unit (or of common facilities).

In limited circumstances, a decision by the RTB in respect to a tenancy dispute may be disputed by applying to the B.C. Supreme Court for a judicial review of the application. If the decision is patently unreasonable, or if the decision includes an error of law or fact by the arbitrator, the RTB's decision may be scrutinized by the court. Unlike RTB hearings, the judicial review process is highly complex and requires a strong understanding of the law. Rental managers whose clients are facing a judicial review application should be sure to consult with and retain a lawyer to represent their clients in the proceedings.

CONCLUSION

As a licensee, you should now have a good understanding of the duties involved in the management and sale of rental units. That would include understanding the key terms of a tenancy agreement, the processes by which a tenancy can be legally terminated, and the steps to take when a tenant refuses to vacate a rental unit when legally required to. Additionally, licensees should understand the dispute resolution processes available to landlords and tenants. Moreover, licensees should also understand how the *RTA* framework impacts mid-tenancy and end-of-tenancy matters. When dealing with the management and/or sale of a tenanted property, careful attention should be paid to ensure compliance with the specific rules and requirements set out by the *RTA*.

Module Seven: Strata Property Management

This module focuses on common areas that create challenges for strata managers providing services to strata corporations. These challenges arise from the start of the relationship with the client when taking over management of the strata corporation. They continue through day to day strata management responsibilities including assisting with strata council meetings, facilitating general meetings, and handling bylaw enforcement. In this module, we will review decisions of the B.C. Supreme Court ("BCSC") and the Civil Resolution Tribunal ("CRT") to assist you in adopting best practices.

LEARNING OBJECTIVES

After completing this module, you will be able to:

1. Identify what documents to obtain and review when taking over management of a strata corporation;
2. Describe best practices for strata council meetings;
3. Understand general meeting procedures including proxy certification; and
4. Identify each of the steps of bylaw enforcement to avoid mistakes that lead to overturning of fines.

07

TAKING OVER MANAGEMENT OF A STRATA CORPORATION

When a brokerage first takes over a new client, the strata manager will have to quickly become knowledgeable about the client. To do so, the strata manager should review certain key documents, including the strata plan, the bylaws, the schedule of unit entitlement, the schedule of voting rights, easements affecting the common property, the approved budget for the current fiscal year, minutes of the most recent strata council and general meetings, and contracts with third parties. These documents will provide a good overview of the strata corporation and help to identify any challenges.

What the Documents Tell You

The strata plan will help in determining the layout of the complex and locating the areas of common property, limited common property, and the strata lots. It will show the boundary of the strata property and may make reference to any easements or adjoining air space parcels. The bylaws will help identify the types of issues that may impact the community, what is required in terms of approvals of alterations, and the scope of the strata corporation's duty to repair and maintain. The approved budget will set out the types of expenses that are generally incurred and the limit of the strata council's authority to spend on common expenses. The easements will provide information as to whether persons outside of the strata corporation have access to the common property and the extent of their rights.

If the strata corporation is established in an air space parcel, the easements will set out the systems that are shared between the strata corporation and the owner of the other parcel. They will also set out how the repair and maintenance expenses for those systems are allocated, who is responsible for doing the repairs and maintenance and how those expenses are invoiced or collected, as the case may be.

Every strata corporation will have a schedule of unit entitlement.[1] This document is important for determining the allocation of expenses among the owners. Another important document is the schedule of voting rights.[2] It lists the residential strata lots separately from the non-residential strata lots, if there are any. It also sets out how many votes each strata lot holds. Sometimes, where the strata corporation consists of only residential strata lots, a schedule of voting rights is not filed. In that situation, each strata lot will have one vote. However, there are circumstances where a residential strata lot may have less than one or more than one vote. For example, an owner may have bought two adjacent strata lots and consolidated them into one strata lot. There is no requirement under the *Strata Property Act ("SPA")*, SBC 1998, c. 43 to amend the schedule of unit entitlement when two strata lots are consolidated. As a result, at first glance, it may look like a single strata lot, but the owner will still hold two votes.

The contracts with third parties will not only help the new strata manager understand what work is done regularly, but they should also be reviewed and diarized to determine when they are coming up for renewal and when they can be canceled. This way, the strata manager can obtain instructions from the strata council about whether they wish to terminate the contract at a time when it is permissible to do so. There may be other documents, including tenancy agreements for a strata corporation owned strata lot or employment agreements, that should be reviewed to get a complete picture of the strata corporation.

1 A strata corporation established under the SPA will have a Form V – Schedule of Unit Entitlement filed in the land title office as a separate document. For strata corporations established before the *Strata Property Act* came into force, the schedule of unit entitlement forms part of and is incorporated in the strata plan.
2 A strata corporation established under the SPA will have a Form W – Schedule of Voting Rights filed in the land title office as a separate document. For strata corporations established before the *Strata Property Act* came into force, the schedule of voting rights forms part of and is incorporated in the strata plan.

Filed Documents Only

It is also critical for the strata manager to have access to the version of the strata plan filed at the B.C. Land Title Office ("LTO"), the bylaws, and the schedules of unit entitlement and voting rights. The strata corporation is required to have the filed strata plan as part of its records (*SPA*, s. 35(2)(b)). Section 20 of the *SPA* sets out the documents the developer must provide to the strata corporation at the first annual general meeting ("AGM"). One of those documents is the filed strata plan. Sometimes the developer only provides the draft version that was included in the disclosure statement. Because of changes made in the course of construction, the final strata plan that is filed in the LTO may differ from the one in the disclosure statement. When finalizing the strata plan for registration, the developer may decide to change or add designations of limited common property. The parking stalls may have been allocated on the filed strata plan.

Similarly, it is important to have the filed schedule of unit entitlement and schedule of voting rights. Like the strata plan, it is possible that the developer only provided the strata corporation with a draft version. Unit entitlement, in particular, may end up changing from the time it is set out in the disclosure statement to registration at the LTO. As a result, the strata manager should check the strata fee schedule to make sure that the correct unit entitlement is being used to calculate strata fees. Where there is an error, the strata corporation may need legal advice.

There have been a few cases where the strata corporation discovers years after it had been established that there was an error in unit entitlement used to calculate strata fees. In *Robert v. Strata Plan NES 2402*,[3] it turned out that once the correct unit entitlement was applied, Mr. Robert had been paying too much in strata fees. The strata corporation used the incorrect unit entitlement since 2002, when the strata corporation had first been created, until 2020. Mr. Robert wanted all of the owners that had overpaid to be reimbursed. The CRT held that since the annual general meeting notice package for each fiscal year would have contained sufficient information for an owner to discover the unit entitlement issue, owners were not entitled to compensation all the way back to 2002. Instead, Mr. Robert's claim for compensation was limited to the overpayments approved at the annual general meetings held in the two years prior to the filing of the CRT dispute because the limitation period had expired for the earlier claims. The CRT ordered that the strata fees for that two year period be recalculated. In addition, those owners who over or under paid and who were still owners would have to be credited the overpayment in their account or pay the shortfall.

3 2021 BCCRT 536

The bylaws of the strata corporation should be the version obtained from the LTO. Some strata corporations will create an "unofficial" consolidated version of the bylaws for the convenience of owners since they are easier to read. This consolidated version is a compilation of the registered bylaws in one single document taking into account all the amendments. However, it is neither approved by the owners at a general meeting nor registered in that format in the LTO. If there are errors in the consolidation, the strata corporation and its owners, tenants, and occupants could be relying on the incorrect bylaws. This could result in problems enforcing the bylaws. For example, if a bylaw is missing from the consolidation, such as a smoking ban bylaw, a prospective buyer who receives the unofficial consolidation attached to the Form B may be making buying decisions assuming that residents are permitted to smoke in their units. In addition, this could result in problems where the consolidated bylaws are provided to buyers when they make a request for the strata corporation's bylaws. They are relying on the bylaws, including any errors in the consolidation, when they are buying. As a result, best practice is to rely on the registered bylaws obtained from the LTO.

Finally, to be set up for success, the strata manager should review the service agreement between the brokerage and the strata corporation. This is critical for the strata manager to understand the scope of their authority and to manage their client's expectations in terms of what services they can rely on the strata manager to provide. This is actually critical to review not just at the beginning of the relationship, but periodically over the course of providing strata management services. Otherwise, the strata manager could inadvertently go beyond their scope of authority and find themselves in breach of Section 30(c) of the Real Estate Services Rules.

THE STRATA COUNCIL MEETING

The strata council meeting is an important meeting for strata managers. At the first strata council meeting held after the AGM, the council members elect from among themselves the president, vice president, treasurer, and any other officers required under the bylaws. This can assist in knowing who the point of contact is for various issues. In addition, strata council meetings give the strata council an opportunity to discuss issues and make decisions relating to the strata corporation. From those decisions, the strata council directs the strata manager. Properly convening and documenting the strata council meeting ensures that strata council decisions together with the instructions to the strata manager to act on those decisions are clearly defined. When those decisions and instructions are not clearly set out, mistakes can be made and misunderstandings happen. The strata manager could inadvertently find themselves taking action on a matter where they were not specifically instructed to do so. This could put them in breach of Section 30(c) of the Real Estate Services Rules by acting beyond their scope of authority.

The bylaws of the strata corporation set out how strata council meetings are called, who can attend and how those meetings are conducted. As a result, it is critical to review the strata corporation's bylaws. While many strata corporations retain the bylaws in the Schedule of Standard Bylaws to the *SPA* ("Standard Bylaws") with respect to strata council matters, not all do so. As a result, best practice is to review the bylaws registered at the LTO and ordered from the Land Title & Survey Authority to have them available at strata council meetings. For the purposes of this module, we are assuming that the Standard Bylaws have not been amended.

Notice of Strata Council Meetings

Standard Bylaw 14 allows for any strata council member to call a strata council meeting on one week's notice, specifying the reason for calling the meeting. The notice does not have to be in writing. For more urgent matters, a strata council meeting can be held on less than one week's notice if all the strata council members consent in advance of the meeting. Alternatively, less than one week's notice is also permitted if the meeting is needed to deal with an emergency situation and all strata council members consent in advance of the meeting or are unavailable to provide consent after reasonable attempts to contact them.

The strata council is also required to inform the owners about a strata council meeting as soon as feasible after the meeting has been called. In practice, strata council meetings are set well in advance. Some will set the dates for all the strata council meetings for the year at the first strata council meeting after the annual general meeting. Others have a fixed schedule, like the second Wednesday of every month. While others pick a date for the next strata council meeting at the strata council meeting and then report it on the last page of the minutes. In terms of the agenda for a strata council meeting, the bylaws do not set out any requirements. Often, the strata manager is tasked with creating an agenda and circulating it in advance of the meeting, but the strata council ultimately approves the agenda in advance of the meeting.

Who Can Attend?

Owners may attend strata council meetings as observers if the strata corporation has Standard Bylaw 17. This means that owners are permitted to watch but do not have a right to speak except during the portion of the meeting which is a hearing requested by that owner. In addition, Standard Bylaw 17 allows the strata council to exclude observers from those portions of the meeting that relate to bylaw contravention hearings, rental restriction bylaw exemption hearings where the owner is claiming hardship, or any other matter, if the presence of observers would, in the strata council's opinion, unreasonably interfere with an individual's privacy. All decisions at strata council meetings are to be made by a majority of strata council members present in person at the meeting (Standard Bylaw 18). The Standard Bylaws permit strata council meetings to be held electronically. Those in attendance electronically are defined to be "present in person" for the purposes of quorum and voting at the strata council meeting.

Minutes

The SPA and the bylaws contain very little guidance on the format or what is to be included in the minutes. Standard Bylaw 18 requires that the results of all votes be included. The BCSC in *Kayne v. Strata Plan LMS 2374*[4] ("*Kayne*") noted that it is perfectly acceptable for minutes to simply record the decisions taken by strata council without detailing the discussions that lead to the decisions.

When the SPA was drafted in 1998, very few had access to their own personal computers and smart phones were non-existent. With the proliferation of email, the world moves fast and people demand quick responses. As a result, it has become fairly common practice for strata councils to consider issues between strata council meetings by email. The BCSC in *Kayne* confirmed that the SPA requires minutes at any meeting where strata council decisions are made. However, the court also acknowledged that there are times when strata council members might meet informally to discuss issues. Those informal meetings do not require minutes. The court cautioned that any decisions taken at such informal meetings are not valid unless and until they are ratified at a properly convened and minuted strata council meeting.

As a result, where strata councils are making decisions between strata council meetings, best practice is to keep a running list of those decisions so that they can be formally ratified at the next strata council meeting. That said, if the strata council only meets a few times a year and some of those decisions will be acted upon months before the next strata council meeting, a prudent strata manager would recommend calling a short electronic strata council meeting to ratify all those emailed decisions so that they can be minuted and be valid.

4 2007 BCSC 1610

GENERAL MEETINGS

Introduction

General meetings are the forum for owners to make the big decisions. Although the strata council exercises and performs the duties of the strata corporation, the *SPA* does require owner approval for certain things at a general meeting (the "GM"). **Some of these major decisions include:**

- Electing a strata council;
- Approving the annual budget;
- Amending bylaws;
- Approving special levies;
- Approving expenditures from the contingency reserve fund to fund common expenses that occur less often than once a year;
- Approving significant changes in the use or appearance of common property;
- Borrowing funds to pay for a large project;
- Designating limited common property;
- Amending the strata plan;
- Amending the schedule of unit entitlement; and
- Winding up the strata corporation.

The typical strata council will rely heavily on their strata manager to ensure that their GMs are called and conducted properly. Mistakes can be costly and cause delays. To correct the errors, a new GM may need to be called. If challenged at the CRT, the strata corporation will likely need legal advice. In addition, the CRT may hold that the business conducted at the GM was invalid. Correcting the error may be complicated where the strata corporation has already acted on the resolutions that were later declared invalid.

TYPES OF GENERAL MEETINGS

There are two types of GMs, the AGM and the special general meeting (the "SGM"). At the AGM, there is specific business that must be conducted, including the approval of the annual budget, report about the strata corporation's insurance coverage, and the election of council. Every strata corporation, regardless of size, must hold an AGM no later than 2 months after the strata corporation's fiscal year end, unless all eligible voters waive, in writing, the holding of the meeting (*SPA*, ss.40, 41). The fiscal year end is the last day of the month in which the first AGM is held (*SPA*, s.21(1)).

An SGM is a GM that is not the AGM. It may be called at any time and for any purpose where the strata council requires owners' approval by a majority vote, three-quarters vote, 80 per cent vote, or unanimous vote resolution, but does not want to or cannot wait until the next AGM. In addition, owners who collectively hold at least 20 per cent of the strata corporation's votes can demand, in writing, that the strata council hold an SGM. The strata council must hold the owner demanded SGM within four weeks of receiving the demand. While the strata council can add other business, including other resolutions, to the agenda of an owner-demanded SGM, the owner-demanded resolutions or business must go first.

To address the short timeline to hold the SGM, the president of the strata council is permitted to call it without holding a strata council meeting (*SPA*, s.43(4)). If the strata council does not meet the time requirements to hold a special general meeting, the persons making the demand may themselves hold the SGM (*SPA*, s.43(6)). This does present its own set of challenges. For example, the persons making the demand might not have the correct addresses to give notice of the SGM to all the owners, not know who is eligible to vote, and may not have access to the usual venue for GMs. The strata manager is not able to assist these owners in calling their own SGM without express instructions from the strata council.

NOTICE PACKAGE

Timing

Notice of a GM must be given to every owner, every mortgagee that has given the strata corporation a Mortgagee's Request for Notification, and every tenant who has been assigned the landlord's right to vote (*SPA*, s.45(1)). The strata corporation must give "at least" two weeks' written notice unless there is a winding-up resolution. Where a winding-up resolution is being considered, a strata corporation must give "at least" four weeks' written notice. Section 25.2 of the *Interpretation Act*, RSBC 1996, c.238 states that when the legislation says "at least," you need to add two days to the notice period to comply with the legislation. Also, the notice must be delivered by one of the delivery methods set out in the *SPA* (*SPA*, s.61(1)). Where it is done by mail or email, delivery is conclusively deemed to have been given 4 days after it is mailed or emailed (*SPA*, s.61(3)). Unless the strata corporation is able to hand deliver the notice to each owner, the notice has to be sent twenty days before the scheduled date of the GM in order to meet the requirements.

The court has interpreted an email address to be a "mailing address" outside of the strata plan for the purposes of delivering notices (*Azura Management (Kelowna) Corp. v. Strata Plan KAS2428*[5] ("*Azura*")). In addition, in 2009, the SPA was amended to add email as a method of delivery where the owner had not provided a mailing address outside of the strata plan. However, the owner must have expressly stated that they were providing their email for the purposes of receiving notices. Even if the owner uses email to correspond with the strata corporation, that use is not considered sufficient consent.

The *SPA* does have a curing provision that ensures that a GM is not invalid just because a person entitled to notice did not receive it. However, the strata corporation must have made a reasonable attempt to give proper notice (*SPA*, s.47). The court found that a GM was valid even though the notice did not include a description of the matters being voted on, but was eventually provided before the date of the GM.[6] A mistake in sending out the notice less than 20 days can be cured by s.47 of the *SPA* (T*he Owners, Strata Plan NW 499 v. Kirk*[7] ("*Kirk*"); the deliberate failure to provide an owner notice cannot be cured.[8]

Content

The content of the notice, including the agenda, is determined by the strata council at a strata council meeting (*SPA*, s.46(1)). The bylaws set out the order of business for a GM. Owners who collectively hold at least 20 per cent of the strata corporation's votes may, by written demand, require the inclusion of a resolution or matter at a GM. Those resolutions or matters must be included in the agenda (*SPA*, s.46). If owners demand the calling of an SGM, the strata council still determines the agenda and can include its own resolutions, but the resolutions or matters proposed by the owners go first in the agenda (*SPA*. s.43(5)).

For proper notice, you must include:

- The details of the meeting, such as the date, time and location;
- A description of the matters that will be voted on at the meeting, including the precise wording of any three-quarters vote, 80 per cent vote or unanimous vote resolution (*SPA*, s.45(3)); and
- If it is an AGM, the proposed budget and the financial statements for the fiscal year that is ending or has just ended.

5 2009 BCSC 506 at para 39, varied 2010 BCCA 474 for other reasons
6 *Azura, supra*, at para 41
7 2008 BCSC 759 at para 24
8 *Kirk, supra* at para 75-77

There are a number of other items that may be included in the notice package. For example, the insurance summary of coverages is there because of the requirement to report on insurance at the AGM. The strata council might include a form of proxy to encourage participation at the GM. Additional information or background to explain the reason for a resolution can also be included. That said, notices should be "restricted to factual matters and should remain as neutral."[9] That principle was further expanded in *Macdonald v. The Owners, Strata Plan EPS 522*[10] ("*Macdonald*"). In this case, the preamble to the resolution explained why the strata council was proposing a change. One of the owners objected for a variety of reasons. The BCSC held that the notice should have reflected the concern raised by the owner. The strata council must ensure that the notice package does not move from setting out facts into persuasion without full disclosure of the potential downsides. Where the resolution is controversial, the notice should outline both sides in a few paragraphs.[11]

QUORUM, CHAIRING, AND OTHER ISSUES

The *SPA*, regulations and bylaws have few provisions that guide the conduct of GMs and the procedures to be followed. Unless the bylaws have been amended, quorum is eligible voters holding one third of the strata corporation's votes. If quorum is not achieved and the bylaws have not been amended, the meeting is adjourned one week at the same time in the same place. This can present difficulties where the venue for the GM has to be booked several weeks in advance. The bylaws can be amended to allow quorum to be those present in person or by proxy after waiting a short period of time. This can address the venue issue.

The president of the strata council chairs the GM unless the president is unwilling or unable to do so, in which case the vice president steps in to chair. If neither the president nor vice president are willing or able to chair, a chair is elected from among those present at the meeting. The bylaws can be amended to determine or limit who can be chair. As a result, if the strata council wants the strata manager or a third party to chair the GM, check the bylaws to ensure that is permitted. In addition, all decisions made at a GM are by majority vote unless a different voting threshold is required under the *SPA* or the bylaws.

Proxy Issues

When an owner is unable to attend a GM, the *SPA* permits an owner to send someone to stand in their place. That person is a proxy. Standard Bylaw 27 provides that one of the items on the agenda of every general meeting is the certification of proxies. Often, the strata manager is tasked with certifying proxies. Proxy certification is the process of determining whether the proxy document is valid in order to allow the proxy to be registered as an eligible voter on behalf of the appointing owner. Knowing what is important in order to certify a proxy is key to ensure the proper conduct of GMs.

The governing provision, section 56 of the SPA, sets out the following requirements:

- The proxy document must be in writing, and signed by the appointing owner;
- The proxy document can be revoked at any time;
- The proxy document may be general, for a specific meeting or a specific resolution;
- Employees and a person who provides strata management services to the strata corporation cannot be proxies; and
- The proxy has all of the powers the strata lot owner would normally hold in the meeting, unless expressly limited in the proxy document.

9 *Azura, supra*, para 48
10 2019 BCSC 876
11 *Macdonald, supra* at para 100

The BCSC in *Macdonald*[12] was asked to review and determine the validity of a number of proxies arising from a contentious AGM. **The court held that:**

- A proxy must be signed by hand or digitally. Typing the owner's name using a script type font is not a digital signature;
- Any changes on the proxy document should be initialed or marked in some way that makes it clear that the appointing owner made the change;
- The proxy document should name the individual who will be the proxy. A proxy document that refers to "strata council member", for example, is invalid and should not be certified; and
- A blank proxy is invalid. A proxy with no named appointee is also invalid.

While section 56 of the *SPA* imposes few requirements, they must all be met in order for the proxy to be certified at the general meeting.

There is no provision in the *SPA* that would allow a strata corporation to require all voters to attend a GM by proxy or vote by proxy. In *Curll v. Strata Plan NW 2926*,[13] Mr. Curll, an owner at the strata corporation, took issue with how the AGM was conducted. The strata corporation sent out a notice package that did not include a location for the AGM but did include a "restricted proxy form." That proxy document did not ask an owner to name a proxy. It restricted the proxy to voting only, with a series of voting tick boxes beside each resolution. It listed eight candidates for the strata council election. At the time appointed for the meeting, the strata manager and one of the owners met and held the meeting and counted the votes from the proxies. The CRT held that the AGM was invalid. Neither owners nor their proxies were permitted to attend the AGM in person or electronically. Contrary to the bylaws, voting cards were not issued, and non-voting occupants could not attend. Despite those findings, the CRT declined to order the strata to do anything. The reason for not making an order was that Mr. Curll did not ask for the resolutions to be invalidated. Although he wanted a new strata council election, by the time the CRT decision was rendered, the AGM, where a new strata council would be elected, was only a few weeks away. There would be no practical utility in ordering a new election for a strata council that had just about completed its term.

12 *Macdonald, supra*, at para 97 - 100
13 2021 BCCRT 504

Similarly, the *SPA* does not permit a strata corporation to limit the "in-person" attendance at the GM to a select number, forcing any other owners who wish to vote to grant those select persons their respective proxies. In addition, a strata corporation cannot actively discourage in-person attendance or deliberately pick a too-small venue to encourage owners to attend by proxy. In *Hodgson v The Owners, Strata Plan LMS 908*[14] the strata corporation held their AGM in the strata corporation's meeting room which has a 60 person maximum capacity. The strata corporation noted that it would "strictly adhere to government distancing regulations" and stated that owners do not need to attend in person. The CRT found that the because of the size of the venue and the Public Health Orders, the strata corporation could not accommodate all owners and proxies that could arrive in-person. As such, even though the proxy document including the AGM notice package allowed an owner to select one of four strata council members or any other person to be proxy, the meeting was declared invalid.

The strata corporation cannot dictate who can hold a proxy, require a specific form of proxy, or demand that the proxy have limited powers. An owner has the option to grant their proxy full proxy powers. Owners can choose who will be their proxy. While the proxy form included in the notice package can list strata council members' names as a proxy, it must also provide space for the owner to select someone else if they want (*Shen v The Owners, Strata Plan EPS 3177*;[15] *Balayewich v The Owners, Strata Plan LMS 317*[16]).

Once the proxy form has been certified at the start of the meeting, the proxy form should be given back to the proxy. It is not the strata corporation's duty to ensure the proxy is voting or acting in accordance with the directions on the proxy form.

RULES OF ORDER

Beyond the voting procedures set out in Standard Bylaw 27, neither the *SPA* nor the Standard Bylaws set out any particular rules of procedure. Despite that, strata corporations often adopt formal parliamentary language when conducting a GM. An eligible voter will "motion" to put a resolution on the floor, that motion is then "seconded" by another eligible voter, and then the chair "opens up the floor" for discussion. The owners then can have a discussion about the resolution with the chair determining the order of speaking and the length of time each person speaks. Someone may want to "raise a point of order," and then if the discussion becomes tiresome, someone else might "call the question." None of these formalities are set out in the *SPA* or bylaws.

Some strata corporations will try to follow formal rules of order. In *Strata Plan NW 971 v. Daniels*,[17] the strata corporation used Robert's Rules of Order[18] ("Robert's Rules") at a GM to allow the strata council to revote the resolution on a different date without having to issue a new notice package. The Court of Appeal found that a strata corporation can use some of Robert's Rules provided that the rule used was not unfair. That said, if a strata corporation does use Robert's Rules or another style of formal procedures, care should be taken that the rules used do not contravene the *SPA* or bylaws.

14 2021 BCCRT 463
15 2020 BCCRT 1157
16 2021 BCCRT 110
17 2010 BCCA 584
18 Roberts Rules of Order are a manual of parliamentary procedures originally developed in the 1800's by US Army Officer Henry Martyn Robert

Motions from the floor are resolutions that an eligible voter asks to be approved at the GM without prior notice. Section 45(3) of the *SPA* requires that the notice of the GM include a description of the matters that will be voted on at the meeting, including the proposed wording of any resolution requiring a three-quarters vote, 80 per cent vote or unanimous vote. There does not appear to be any provision for a motion to be made from the floor on a matter that was not included in the notice (*Leung v. Strata Corporation LMS 2835*[19]). There are two exceptions to this principle. Eligible voters can propose a motion to amend a resolution requiring a three-quarters vote from the floor, but only if the amendment does not substantially change the resolution and the amendment is approved by a three-quarters vote (*SPA*, s.50(1)). The second exception relates to directions to the strata council (*SPA*, s.27). The owners can, by resolution passed by a majority vote at a general meeting, direct or restrict the strata council in the exercise of its powers without notice (*Fung v. Strata Plan NW 1294*[20]). For example, the owners can put forward a motion to direct strata council to investigate the costs of a project and report back the results to the owners by a certain date.

VOTING

Voting is determined by the *SPA* and bylaws. At a GM, matters are decided by majority vote unless a different voting threshold is required or permitted by the *SPA* or the regulations (*SPA*, s.50(1)). The *SPA* has a number of provisions that set a different voting threshold. For example, section 128 of the *SPA* requires a three-quarters vote, to approve a resolution to amend bylaws of a strata corporation comprising only residential strata lots. Each strata lot has one vote unless different voting rights are set out in the schedule of voting rights. As a result, it is important to have the schedule of voting rights at the GM. Typically, non-residential strata lots have more or less than one vote and their vote is often not a whole number.

A strata corporation is entitled to adopt a bylaw to take away an owner's right to vote, except in matters that require an 80 per cent or unanimous vote, where the strata corporation is entitled to register a Form G – Certificate of Lien against the owner's strata lot.

To be entitled to register a Form G:

- The owner must be in arrears of those amounts set out in section 116 of the *SPA* (strata fees, special levies, interest on strata fees or special levies in accordance with an applicable and valid bylaw, the costs of th e work taken as a result of a work order, or the strata lot's share of a judgment against the strata corporation);
- The strata corporation must have issued a demand letter in accordance with section 112 of the *SPA*; and
- The deadline for payment in the demand letter has expired.

19 2001 BCSC 1602 at para 5
20 2019 BCCRT 443 at para 43

A vote is typically exercised by the owner. Others may have a right to vote as follows:

- A tenant will be entitled to vote if they have been assigned the right to vote in accordance with section 147 or 148 of the *SPA* (*SPA*, s.54(1)(b));
- A proxy will be entitled to vote if appointed as a proxy in accordance with section 56 of the *SPA*; and
- The mortgagee of a strata lot will be entitled to vote in relation to resolutions dealing with insurance, maintenance, finance, or other matters affecting the security for the mortgage but only if the mortgage gives the mortgagee the right to vote and the mortgagee has given notice to the strata corporation that it will be voting.

The *SPA* defines both majority[21] vote and three-quarters vote[22] in such a way that abstentions do not impact the outcome of the vote. On the other hand, abstentions effectively operate as "no" votes in 80 per cent[23] and unanimous[24] voting thresholds.

For example, at a GM for a strata corporation comprising both residential and non-residential strata lots with a total of 100.78 votes, the voting thresholds would apply as follows:

- Where the total votes cast in relation to a resolution not including abstentions are 55.78, to achieve a majority vote, more than 27.89 votes must be cast in favour;
- Where the total votes cast in relation to a resolution not including abstentions are 55.78, to achieve a three-quarters vote, more than 41.835 must be cast in favour;
- To achieve an 80 per cent vote, more than 80.624 votes must be cast in favour; and
- To achieve a unanimous vote, all 100.78 votes must be cast in favour.

In the case of fractional votes, there is no rounding up or down of the votes or voting thresholds when the outcome of the vote is being calculated.

Section 27 of the Standard Bylaws requires that, at the time of registration, voting cards are issued to the eligible voters. Generally, a vote is decided by a show of voting cards, unless a precise count is requested by an eligible voter. If a precise count is requested, the chair decides the method of voting. Section 27 expressly recognizes a show of voting cards, roll call, or secret ballot as a precise count method. However, it also refers to "other method," which leaves it open for the chair to find some other way to determine a vote by precise count. Despite the chair having the power to determine the method of voting where a precise count is requested, section 27 requires a secret ballot where an eligible voter specifically requests one. For a secret ballot to be valid, all voters must be able to vote without other persons being able to see how they voted (*Imbeau v. Strata Plan NW 971*[25]). As a result, if there is no private space where ballots can be marked, the strata manager will often bring cardboard voting booths to create the necessary private space.

When the vote is taken, if there is a tie, the president casts a second deciding vote. If the president is absent, unwilling, or unable to vote, the vice president fulfills the deciding vote role. Once the voting is tabulated, the chair must announce the outcome, including the number of votes for and against the resolution where a precise count is requested. That result must be recorded in the minutes.

21 The SPA defines "majority vote" as a vote in favour of a resolution by more than one-half of the votes cast by eligible voters who are present in person or by proxy at the time the vote is taken and who have not abstained from voting.
22 The SPA defines "3/4 vote" as a vote in favour of a resolution by at least three-quarters of the votes cast by eligible voters who are present in person or by proxy at the time the vote is taken and who have not abstained from voting.
23 The SPA defines "80% vote" as a vote in favour of a resolution by at least 80 per cent of the votes of all the eligible voters.
24 The SPA defines "unanimous vote" a vote in favour of a resolution by all the votes of all the eligible voters.
25 2011 BCSC 801

STRATA COUNCIL ELECTION

Section 25 of the *SPA* provides that at each AGM, the eligible voters present in person or by proxy elect a strata council. Unless the strata corporation consists of less than four owners or four strata lots, Standard Bylaw 9 requires a strata council to consist of three to seven members. The *SPA* is silent on precisely how the strata council is elected. Election is not defined in the SPA. Section 50(1) of the *SPA* says that all decisions at a GM are made by majority vote unless another voting threshold is provided in the *SPA*.

Usually, when the time arrives for strata council election, the chair calls for nominations. If there are more than seven nominees, there is a vote. In person, this usually means a ballot where voters are permitted to list up to seven of the nominees on the ballot. Using this process, the strata corporation could end up with some of the candidates receiving more than 50 per cent of the votes, while others do not achieve the majority threshold. However, the ballots do not note abstentions or "no" votes. The strata corporation in *Curll v. Strata Plan NW 2926*[26] ("*Curll*") used a similar process where the owners selected up to seven nominees noted on the proxy document. To be elected, each nominee had to receive more than half of the strata corporation's votes present in person or by proxy. All those selected were counted as in favour votes. However, it was unknown if on any particular proxy, the voter was voting against or abstaining from voting all those nominees that the voter had not voted in favour. As a result, any abstentions were counted as "no" votes, meaning that, in effect, the nominees had to achieve more than a majority vote.

The CRT in *Curll* noted that the strata council had not explained the election process in the notice package or on the proxy form. Ultimately, the CRT found that the AGM, including the strata council election, did not comply with the *SPA*. Because the CRT decision was issued in the same month that the strata corporation was holding its next AGM, the CRT found that there was no utility in requiring the strata corporation to hold a new election. Had the decision been made a few months earlier, the result would likely have been different. As a result, best practice is to have a bylaw that mandates the strata council election procedure or have owners at the AGM vote by majority vote resolution the procedure to be adopted.

A similar issue arises when the number of nominees is less than the maximum number of strata council members permitted. In *Yang v Re/Max Commercial Realty Associates (482258 BC Ltd.)*,[27] the strata corporation had a long history of electing strata council by acclamation. Starting in 2013, the owners at the AGM approved a resolution by majority vote to have the election proceed by acclamation. The court acknowledged that a vote by acclamation was a form of election process and therefore, permissible. However, a better practice was to avoid elections by acclamation and require a vote unless the majority have approved a resolution to have the election proceed by acclamation.

26 2021 BCCRT 504
27 2016 BCSC 2147, aff'd 2017 BCCA 341

ELECTRONIC MEETINGS

Traditionally, GMs are held in person. The venues vary significantly from school libraries, municipal halls, community centres, to the amenity room in the common property of the strata corporation. Sometimes, they are a "bring your own chair" affair in the laundry room or lobby of the building. The parking garage is another not so uncommon venue. Resort strata corporations where owners typically reside all over the province, country or even the world have been holding GMs electronically for some time. For the rest, strata corporations have had to adapt to electronic meetings in light of the COVID-19 pandemic and the various Gatherings and Events Orders made by the Provincial Health Officer that prohibited in person gatherings.

For the most part, electronic GMs are just like "in-person" meetings, but with some creative adaptations. For example, the venue of the GM is the electronic platform. The notice of the GM will have the link to log into the GM rather than a physical location or venue listed.

Though the notice does not need to be changed in any other way in order to comply with the notice requirements, there are a few items that are useful to include until everyone is practiced at attending an electronic GM:

- Rules of order that will be followed;
- Voting instructions;
- Instructions about logging in generally and how the electronic GM will be conducted; and
- Directions on how to submit a proxy document for registration and certification.

It can also be very useful to call an information meeting about a week before the GM to allow for a full discussion about the resolutions and the agenda generally and to practice logging in.

The other aspect that requires adapting is registration and certifying proxies. If a significant number of proxies are anticipated, it makes a lot of sense to ask owners to submit their proxies in advance of the GM. This allows the strata manager to review the submitted proxy and confirm it can be certified. Then, on the day of the meeting, the proxy registers, but with the pre-certification process, the registration process is streamlined. Of course, despite the request for early submission of proxies, the strata corporation must be prepared to accept any proxies after the deadline, if they are submitted before the meeting. In *Preshaw v The Owners, Strata Plan VIS 5792*,[28] the strata corporation refused to accept proxies presented at the start of an electronic GM. The strata corporation took the position that it had always required the proxies to be delivered two days before the meeting. The CRT held that Standard Bylaw 27 included certifying proxies as part of the agenda of the GM, which suggests they must be completed at the meeting and not days before the meeting. While it is permissible to request proxies in advance for organizational purposes, neither the *SPA* nor the Standard Bylaws permit a strata corporation to refuse proxies presented at the GM. As a result, a strata corporation cannot refuse to allow proxies presented at the meeting. If presented at the meeting, proxies can show their proxy document on screen or send a picture of it by text or email.

28 2021 BCCRT 384
29 2011 BCSC 801

Finally, there is the issue of voting cards. The Standard Bylaws require voting cards to be issued. Physical voting cards cannot be distributed. However, most video conference platforms allow for persons to set out their name. Rather than a name, the number of votes and strata lot number can be used to identify each attendee. That would operate as voting card. If the platform allows for raising hand icons, that can be the equivalent of a show of voting cards. The biggest challenge, however, is in relation to secret ballots. Thus far, the technology used in video conferencing platforms has not advanced in such a way to allow a secret ballot. A secret ballot is one in which a voter is able to vote without other persons being able to see how they voted (*Imbeau v. Owners, Strata Plan NW 971*[29]). To avoid the difficulty with secret ballots in an electronic GM, the bylaws would need to be modified to eliminate them in an electronic GM context.

Section 49 of the *SPA* allows for electronic attendance at a GM, but only if there is a bylaw. The Standard Bylaws do not allow GMs to be held electronically. While some strata corporations had amended their bylaws to allow for electronic general meetings prior to the pandemic, many had not. The B.C. Government enacted Ministerial Order 114 on April 15, 2020 allowing any strata corporation to hold a general meeting electronically without a bylaw during the state of emergency that had been declared because of the pandemic.

On July 10, 2020, Ministerial Order 114 was repealed. It was incorporated into the *Covid-19 Related Measures Act*, which allowed the government to set an expiry date for the Ministerial Order by Order in Council. On February 16, 2021, an Order in Council was passed which provided that the portion of the *Covid-19 Related Measures Act* that allowed strata corporations to conduct their meetings electronically be repealed effective July 10, 2021. Since then, the February 16, 2021 Order in Council has been repealed and replaced a few times. Currently, the expiry date is December 31, 2022. As such, if a strata corporation wants to continue to hold electronic GMs, they will need to have amend their bylaws by the end of 2022. If a strata corporation missed the deadline, the strata manager may want to recommend that the strata corporation amend their bylaws so that future GMs can be held electronically.

BYLAW ENFORCEMENT

Enforcement Protocol

Assistance with the enforcement of bylaws is often one of the most tedious and time consuming tasks that a strata corporation will require of the strata manager.

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.

However, before imposing a fine, charging back the costs of remedying a bylaw or rule contravention, or denying access to a recreational facility, the strata corporation must comply with section 135 of the *SPA*.

29 2011 BCSC 801

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. The notice must include particulars of the complaint and give the owner an opportunity to respond, including a hearing if requested;

3. After the deadline for the owner to respond passes, the strata council decides by majority vote at a strata council meeting, after considering the owner's response, if any, whether the bylaw has been contravened and, if so, whether a fine will be levied. 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 of its decision about the bylaw or rule contravention allegation and the fine levied, if any; and

5. If the strata council decides to levy a fine, 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 in *Terry v. The Owners, Strata Plan NW 309*[30] said that section 135 is not complex and its requirements are straightforward. Again, in *Strata Plan NW 307 v. Desaulniers*,[31] the Court of Appeal reiterated this point and noted that the "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 requires that a strata manager act with reasonable care and skill (s.34).

An area of difficulty is continuing contraventions. Section 135 of the S[illegible]A 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 continuous contravention? In *Strata Plan VR 2000 v. Grabarczyk*,[32] 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 continuous contravention because it stopped and started again. These were repeated contraventions. The court cancelled the fines for continuous contraventions, such that the total fines were reduced to $2,500.

Common Myths and Errors

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 T*erry v. The Owners, Strata Plan NW 309*[33] 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 BCCA 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.

30 2016 BCCA 449
31 2019 BCCA 343
32 2006 BCSC 1960, affirmed 2007 BCCA 290
33 2016 BCCA 449

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 (s.130(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 is not a problem because s.131 makes the owner responsible for paying any of the fines that the tenant did not pay. In *Lin v. Strata Plan EPS 3602*,[34] 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 notice of the complaint and an opportunity to respond to the tenant.

Levying the fine and then not providing an opportunity to respond is also a common error. In *Fariborz v. Strata Plan EPS 1945*,[35] 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 license 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.

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*,[36] 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.

34 2020 BCCRT 52
35 2022 BCCRT 268
36 2022 BCCRT 191

When a procedural mistake is made, it is possible to correct the error. In *Cheung v. The Owners, Strata Plan VR 1902*,[37] the BCSC 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.

CONCLUSION

While managing a strata corporation involves far more than what is outlined in the module, these fundamentals are integral to success. By reviewing the proper documents to ensure a correct start to the relationship with your client, you can catch potential errors. Assisting with meetings and in particular general meetings is another area that is simple but can have many pitfalls. The strata manager needs to ensure the notice of the general meeting is sent out correctly, ensure the correct information is included and determine when the meetings can be held electronically. At the general meeting itself, the strata manager needs to be equipped to assist with certifying proxies and general meeting procedures. Another key area is the enforcement of bylaws. While the strata council is responsible for the enforcement of its bylaws, the client looks to the strata manager to understand this process. With the CRT requiring strict compliance with the *SPA*, it is really important to make sure the strata manager has an excellent working knowledge of each step in the process.

37 2004 BCSC 1750

Module Eight: Cybersecurity

This module provides licensees with an overview of current cybersecurity risks and threats along with strategies to prevent, mitigate, and recover from them. You will learn about cybersecurity attacks, proper data handling, privacy, authentication, and best practices to protect yourself, your brokerage, and your clients. As a managing broker or designated individual, it is imperative you have the necessary tools and procedures in place to protect your organization and your clients from internal and external threats.

LEARNING OBJECTIVES

After completing this module, you will be able to:

1. Identify and recognize common cybersecurity threats and understand how to prevent and recover from cybersecurity attacks;
2. Understand the consequences of mishandling information and be able to identify the best practices to avoid mishandling of information;
3. Understand the importance of proper authentication and be able to identify the tools and best practices available to bolster security; and
4. Identify cybersecurity best practices and hygiene.

08

CYBERSECURITY

According to an international online survey by *The Harris Poll*, over half of respondents have experienced cyber crime, either through malicious software, unauthorized email access, or unauthorized social media access.

Cybersecurity is the practice of protecting systems, networks, and programs from digital attacks. At home or at work, proper cybersecurity processes and habits can protect your computers, mobile devices, internet connected devices, networks, and servers as well as all the data they use, store, or communicate.

SOCIAL ENGINEERING

A malicious actor will use social engineering to influence people to provide information, gain access to digital systems, or access to physical locations often bending or breaking procedures set by the organisation. Social engineering attacks use psychological manipulations through the principles of authority, intimidation, scarcity, urgency, or familiarity.

- **Authority:** the attacker will pose as a person of authority.
    - "As a police officer, I need to review your recent transactions in relation to an Anti-Money Laundering ("AML") investigation."
- **Intimidation**: the attacker threatens or alludes to a threat if the demand is not realized.
    - "It would be a shame if your clients found out about this."
- **Scarcity:** the attacker requests a quick response for fear of missing out on a desired outcome.
    - "We can only give a few of these fantastic deals on mortgage rates so you've got to send over the documents now before they're gone."
- **Urgency:** the attacker creates a sense of urgency to take advantage of a desired outcome or to prevent an unwanted outcome.
    - "The CFO absolutely needs these funds transferred today to complete the acquisition or the deal will fall through."
- **Familiarity:** the attacker will make themselves likable so the victim will willingly comply.
    - A malicious actor may try to gain the sympathy of office workers by having their hands full with coffee and donuts or boxes full of documents. They will rely on their victim's benevolence to help them gain access to the building or to a secure area.

You may be faced with the social engineering attack methods described above in person or virtually through attacks such as phishing or more sophisticated whaling attacks.

Phishing

A phishing attack consists of fraudulent emails that coaxes the victim to click on a link in an email, to download a malicious file, to provide information, or to complete some tasks. The link may also download malicious content onto the victim's device which may then secretly collect sensitive information like client information or passwords. The malicious code might prevent access to your data until a ransom is paid or may delete all the data. Worse yet, the malicious code may spread to the networks the device connects to and from there spread to other devices on the infected network.

The link in the email may point to a website that impersonates ("spoofs") a website the victim trusts to collect more personal information such as account numbers, passwords, or information useful for taking over accounts.

Vishing

Vishing is a variation on phishing using voice or text messaging. Similarly, these methods will coax the victim to provide personal information or click on a link to download malicious content to a mobile device. Common voice call attacks impersonate the Canada Revenue Agency or Canada Border Services Agency and use threats to extract payments. Common text message attacks impersonate telecom providers or banks to solicit banking information with the promise of a prize or payment.

Spear Phishing and Whaling

Spear phishing is a more elaborate, targeted attack that will use personal information to gain the victim's trust more effectively. **For example, a spear phishing email might:**

- Contain victim's name and title;
- Impersonate a client, colleague, or superior; or
- Use information related to ongoing real estate transactions to establish trust.

Whaling attacks are even more sophisticated and specifically target executives ("whales"), such as managing brokers or designated individuals. Spear phishing and whaling attacks may attempt to extract large sums from your brokerage by convincing the victim to issue large payments with little or no recourse for recovery, often because the payments are made to foreign accounts.

Recognizing a Phishing Attempt

Mitigating phishing and its variants requires awareness and attention. Here are signs of a phishing attempt:

- Email or website appearance does not exactly match the real layout;
- Spelling mistakes in the content of the email or website;
- Unsolicited emails from external sources (email title prefaced with [EXT]) asking for information or to execute financial transactions;
- Suspicious email addresses that are not an exact match of the organization's email format;
- Suspicious email addresses claiming to be from official sources e.g.:
  - info.BCFSA@hotmail.ca,
  - realestate@gooooooogle.org,
  - rcmp@canada1243.com.
- Email communication from financial institutions asking for personal information or asking to follow a link in the communication rather than contacting them through official communication channels;
- Unsolicited text messages; or
- Automated voice calls threatening legal action from Canadian agencies.

What to do in the event of a phishing attempt?

- Do not click on the link;
- Do not download an attached file;
- Do not share or submit any information;
- Contact your security provider and forward the email to the designated security mailbox (security provider mailbox for spam emails) if possible; and
    - Your security provider may be able to use the email to prevent further attacks within your brokerage.
- If you have reasons to doubt the validity of the email or text because you suspect the individual is being impersonated or their request is unusual, reach out to them by different methods (face to face, email, text, call) to confirm the validity of the request.

What to do if you have fallen victim to a phishing attack?

- Inform your managing broker or designated individual and your IT or security provider;
- Immediately change your passwords on the affected services and devices;
    - If you use the same password on multiple devices or services, change those as well.
- If you suspect a fraudulent financial transaction has occurred, such as an unauthorized or fraudulent payment, immediately escalate the incident to your managing broker or designated individual and follow the process to report the incident to the relevant authorities; and
- If you suspect you have malicious software on your device, immediately disconnect the device from the network and escalate the incident to your managing broker or designated individual and your IT or security provider.

USB Drop Attacks

A USB drop attack consists of leaving a USB key or hard drive in public places such as parking lots or near offices in the hopes that a curious individual will find it and plug it into their computer. The malicious code on the USB key will then attempt to infect the computer and the network it connects to. Attackers may disguise the USB device to look unassuming or to belong to someone you might be familiar with.

It is imperative never to plug in a USB device you are not familiar with to your computer. If you find a USB device, give it to your IT or security provider immediately without plugging it into a computer.

Ransomware

Ransomware is malicious code that encrypts data on a device making the data inaccessible until a ransom is paid. The malicious code may present a deadline to issue a payment before which it may permanently delete the data or share the data with the public.

Ransomware may infect a device through phishing emails, USB drop attacks or visiting unsafe websites.

- If your device is compromised by a ransomware attack, alert your IT or security provider immediately. They may be able to recover your data from a recent backup and prevent the spread of the attack within your network;
- If a solution to this particular ransomware has been discovered by the security community, it may be possible to obtain a decryption key without paying the ransom; and
- In circumstances where no other solutions are available and the data must be recovered, it may be possible to pay the ransom and recover the data.
    - Has your brokerage consulted with a legal advisor to determine your brokerage's process for handling ransomware attacks?

Tailgating

Tailgating is the practice of an unauthorized person following an authorized person into a secure location and bypassing security measures, such as key cards ("badging"). An attacker may simply follow an individual or a group through the doors or into a secured elevator. They may ask for directions or pretend to be new to the department. Like the social engineering attacks described above, they may create a plausible reason for not being able to badge.

To protect the integrity of the brokerage and the security of the information systems and documents held there, it is important always to badge when coming through the secured doors. Even if you are coming through with a superior or subordinate, or if a friend is offering to let you in, everyone must badge to gain access every time.

If confronted with a situation where an individual is unable to badge, offer to help them to the security desk so they can confirm their identity and obtain a temporary badge. If the individual is refusing to badge, inform your security desk right away, if you have one, or your managing broker or designated individual.

DATA HANDLING & PRIVACY

Privacy

Data - whether client information, the brokerage's data, or personal data - must be handled with care and protected. Mismanagement of data leading to data loss or data falling into the wrong hands may bring your brokerage reputational loss, financial loss, fines from your regulator, threats of lawsuits, and may disrupt business operations.

Personal Information

Personally identifiable information ("PII"), also known as personal information ("PI") within the Personal Information Protection Act ("PIPA"), is information that can be used to identify an individual, such as:

- Social insurance number ("SIN"), or other pieces of identification;
- Financial records;
- Medical records;
- Email, phone number, or home address; and
- Pictures or videos.

Other personal information, on their own, do not necessarily constitute PII, but together they can help narrow down the identity of an individual, such as:

- Date of birth;
- Employment information;
- Education information; and
- Physical description.

Personal Information Protection Act ("*PIPA*")

PIPA is the statute governing privacy in the private sector in British Columbia. *PIPA* outlines 10 basic obligations concerning the collection, use, and disclosure of PI. Failure to comply with *PIPA* may result in fines. **The obligations delve into:**

1. Accountability and responsibilities when collecting personal information.

    a) E.g., Developing privacy management programs.

2. The purpose behind collecting specific personal information and the reasonable person test.

    a) E.g., Collecting name and contact information to communicate with the consumer.

3. The types of consent required when collecting personal information.

    a) Express consent – when a client is willingly providing information knowing how it will be used (e.g., official forms, interviews).

    b) Implicit consent – when a client volunteers information that a reasonable person would deem appropriate in that circumstance (e.g., a client mentions who they are married to).

    c) Consent by not declining – when a client is informed that the information they provide may be used unless they opt-out within a reasonable time frame (e.g., online survey, official forms with opt-out).

4. The principle of limited collection, where you only collect required information.

    a) E.g., Collecting a SIN or a home address might be necessary, however your brokerage is unlikely to require medical records.

5. The principle of limited use, where your brokerage only uses PI according to the stated purpose and is required to obtain new consent if you intend to use PI for other purposes.

    a) E.g., If collecting information for a real estate transaction, you must not disclose this information to a builder with whom you have a business relationship.

6. The accuracy and completeness of the information along with requirements to update them upon the client request.

    a) E.g., You may need to review a piece of identification to confirm a client's date of birth.

7. Reasonable security measures to prevent breaches (see Data breach).

    a) E.g., Limit access to PI by external and internal access.

    b) E.g., Breach procedures.

8. The brokerage's openness to make available to individuals the process to access their own PI and the process to make a complaint about PI practices.

    a) How easy is it for your clients to request access to their PI?

9. How clients, customers, and employees have a right to access their personal information while maintaining other's privacy, and how long your organization must retain this information.

    a) E.g., A client might have the right to review video footage where they appear, but other client's faces should be blurred.

10. The brokerage's process to respond to a challenge to their compliance of PIPA and other avenues for submitting a complaint.

    a) Does your brokerage have a written complaint handling procedure?

When selecting, purchasing, and using third party applications, be sure to conduct due diligence to confirm that proper safeguards are in place ensuring that your brokerage will remain compliant with *PIPA* requirements.

Limit Access

PIPA requires organizations to take reasonable security measures to prevent breaches.

A first step consists of limiting access to PI. The principle of least privilege demands that access to data or systems is limited to the minimum requirements to accomplish a task or role. For example, a licensee would have access to client information but not to the brokerage's payroll system.

Another way of limiting access is to periodically review the data, systems, and permissions to which people in your brokerage have access. The longer people stay in a role the more privileges they accumulate, despite not needing them for their new roles or as their roles evolve. Regularly removing unneeded privileges reduces the risk of abuse.

A further step would be to implement role-based access control, where your brokerage automates the granting and revoking of accesses and privileges based on roles and responsibilities.

If a task is highly sensitive, consider implementing a separation of duties by splitting a task in two with each of the two individuals having distinct responsibilities. For example, have one individual handling deposit receipts and another individual preparing trust account reconciliations to limit abuse or errors.

Data Breach

In the event of a breach, PI[illegible]ecommends a four-step protocol:

1. Contain the breach
   a. Stop the unauthorized practice;
   b. Recover records where possible;
   c. Change passwords or access codes; and
   d. Correct weaknesses that led to the breach, where possible.
2. Evaluate the risk
   a. Identify the type and sensitivity of the compromised PI;
   b. Determine the cause and extent of the breach;
   c. Determine how many people are affected by the breach; and
   d. Determine if future harm can come from the breach (e.g., identity theft).
3. Notification
   a. Determine if it is necessary to notify impacted individuals, especially if notifying them will reduce the harm of the breach;
   b. Notify the Office of the Information & Privacy Commissioner ("OIPC"); and
   c. Notify the police and RCMP.
4. Prevention strategies
   a. Develop strategies for the future; and
   b. Provide staff with regular and refresher privacy training.

Does your brokerage have a breach policy in compliance with P[illegible]requirements?

The licensee should also report the breach to the managing broker or designated individual, who will then need to consider whether the breach is significant enough that it should be reported to BCFSA.

Physical documents

Despite the evolution of paperless processes, you might still have physical documents containing PI that you must take care to safeguard.

- Lock away documents containing sensitive information, confidential information or PI when leaving your office, even if it is only for a short break;
- Lock away documents before allowing another client or licensee into your office. It might take a minute or two, but they will appreciate your commitment to client privacy; and
- Store documents and files in a secure archive when you no longer need to access them regularly (e.g., the transaction is complete; you use digital copies of the files).

AUTHENTICATION

Before gaining access to a secure system like your computer, your organization's intranet, or a government agency's portal, you need to prove who you are, typically with a username and password. In other words, you need to authenticate yourself.

The risk inherent to using weak passwords is that an attacker might be able to easily guess the password to a system, gain access, and perform fraudulent activities. Worse yet, if the same password is used on multiple systems, the attacker could quickly gain access to other systems or accounts belonging to that individual.

Passwords

Passwords need to be easy to remember by the user, but difficult to guess by others. H**ere are guidelines to create effective passwords:**

- Create long passwords, using 12 to 20 characters when possible;
    - Each additional character makes the password exponentially more difficult to guess.
- Use upper- and lower-case characters along with numbers and special characters;
    - The variety of character types significantly increases the difficulty to guess the password.
- Do not use keyboard patterns to create a password (e.g., qwertyuiop);
- Do not use common words or names in your passwords;
- Do not use your date of birth or that of a loved one;
- Do not reuse passwords (older passwords or passwords used on other services);
- Use a mnemonic phrase to create a strong password;
    - Create a long phrase that would be easy for you to recall;
        - "Oh boy, my clients are ecstatic about their approved offer. They can't wait to move in."
    - Use one letter from each word to create a password;
        - "obmcaeataotcwtmi".
    - Substitute letters with upper case, numbers, and special characters;
        - "0Bmc@eA+4o#Cwtm1".
    - The above password would be very strong since it is 16 characters long, it uses a combination of character types and does not contain English words. Despite its apparent incoherence, recalling it is feasible by recalling the phrase and the character substitutions;
- Use password managers or software that can store and manage online credentials. Password managers can also generate passwords;
- Implement single sign on ("SSO") or federation: a solution that requires the user to enter their password once per session but grants them access to all the accounts supported by the solution. Simplifying the number of passwords to remember greatly reduces the need to write passwords down and accidentally leave them exposed;
- Do not leave passwords on Post-It notes around your desk;
- Always change default passwords when integrating new hardware or software; and
- Do not keep login information or passwords written on or near your desk.

Even if you do everything right to securely manage your passwords, they may still fall in the wrong hands if third party applications, vendors, or partners suffer data leaks. Regularly changing your passwords (e.g., every 60 days) can mitigate such risks. Be mindful that if your staff use many systems, each with a different password policy and different password change date, your staff may become confused and frustrated and resort to shortcuts such as writing down the passwords near their workstation.

Multifactor Authentication

Services or systems that require higher levels of security may use multi factor authentication ("MFA") requiring another piece of information.

MFA requires at least two types of the following for authentication:

- Something you know: password, security questions, or social insurance number;
- Something you are: fingerprint, iris scan, facial recognition, or voice recognition; and
- Something you have: phone number, authentication application, or physical token.

MFA, sometimes called 2FA (when two factors are used), significantly raises the security level of your systems. For example, after entering the correct user ID and password, an application may request a temporary code sent to your email or mobile device or generated by an authentication application such as Microsoft's Authenticator.

Electronic signatures

Signing legal documents with electronic signatures can provide plenty of convenience when completing a transaction. Nonetheless, great care must be taken to ensure the integrity of the transaction.

- Your brokerage should investigate the different electronic signature solutions available that will best fit your brokerage's needs.
    - Signing method: draw a signature, scan a signature, type a consent statement, click to sign.
    - Security: does the vendor's security policy meet or exceed your requirements?
- Are you using a solution that carries an audit trail to validate that no parts of the documents were modified after signing?
- Have you obtained consent from all parties involved to use electronic signatures?
- How confident are you that the individual receiving the email will be the authorized signatory?
    - If not, is there a valid power of attorney in place?
    - Have you communicated with that email address previously?
- How confident are you that your clients will understand the instructions and the implications of the electronic signature?
    - Have you explained the instructions and the implications of the electronic signature to your clients?
    - Is the electronic signature an appropriate solution for this client?
- Have you explained the contents of the document to the client and given the client sufficient time to review the document and to discuss any issues or questions with you?

SECURITY BEST PRACTICES AND HYGIENE

Cybersecurity threats are constantly evolving, however there are basic precautions you can take to protect yourself.

Security habits:

- Do not delay software updates for your applications or operating system (Windows, MacOS) as they often contain security patches for recently discovered vulnerabilities;
- Regularly back up your data; and
    - Consider automating your backups to a cloud service.
- Use a trusted virtual private networks ("VPN") solution, as recommended by your security provider, whenever possible to create a secure connection to your network.

Governance:

- Stay up-to-date with your brokerage's security training; and
    - Consider security exercises to test your brokerage's preparedness.
    - Use the results to tailor the annual security training.
- Consider purchasing insurance to cover damages from cyber incidents such as breaches or ransomware attacks.

Security in public spaces:

- Hide your screens when using a laptop in public spaces; and
    - Some computers come equipped with dimming features.
    - Physical privacy screens may be available to purchase.
- Do not leave your laptop in a car unattended: take it with you until you can secure it.

Email and download best practices:

- Avoid entering the email address of recipients until after the email has been drafted;
- Validate each email address before sending out an email;
    - Consider turning off autocomplete of email addresses in emails.
- Recall emails sent in error within your brokerage;
- Before interacting with an email (clicking a link or downloading a file), take a moment to confirm that the email address of the message you received is coming from within your organization (no "[EXT]" prefix and the format matches your brokerage's standard) or that it is from a trusted email address;
- Only download internet files approved by your brokerage's security policy;
- Only download files from trusted and approved sources; and
- Only download file types you recognize (e.g., .xls, .docx).
    - Consider disabling unneeded and unknown file types on your systems.
    - Consider disabling Macros (Macros in Excel or Word files may contain malicious code).

CONCLUSION

Cybersecurity ought to be a serious concern for all managing brokers and designated individuals. They should ensure that proper cybersecurity hygiene and best practices are implemented throughout the brokerage combined with regular training for staff. Staying vigilant can significantly reduce the risks or impacts related to a cyber attack or breach.

Module Nine: Mortgage Agreement and Client Relationship Topics

This module discusses several topics that are relevant to mortgage brokers.[1] Mortgage brokers will learn about certain key legal terms contained in mortgage agreements, including prepayment terms, mortgage assumption terms, and portability terms. This module will discuss the importance of these terms and the relevance of them to the borrower. This module will then discuss fiduciary and agency relationships, how mortgage brokers might enter such relationships with clients, and the implications of doing so.

IMPORTANT NOTE:

Licensees need to understand the rescission provisions in the *PLA* and the *HBRP Regulation* and how they may apply to the terminations of tenancies discussed in this module.

LEARNING OBJECTIVES

After completing this module, you will be able to:

1. Understand how prepayment penalties and privileges can affect borrowers;
2. Describe the legal characteristics of mortgage assumptions and how mortgage assumptions may affect prepayment penalties;
3. Discuss portability clauses in mortgages and key things to consider when considering a port; and
4. Understand when mortgage brokers may enter into fiduciary or agency relationships with others.

09

LEGAL TERMS OF MORTGAGE AGREEMENTS

Mortgage agreements are complex contracts with a significant number of terms. It is very important for borrowers to understand their mortgage agreement because the mortgage agreement explains the rights and obligations of the borrower and the lender. Once the borrower enters into the mortgage agreement, both the borrower and the lender must comply with the terms of the mortgage agreement. Once entered into, the terms of the mortgage agreement cannot be changed by the lender without the borrower's consent, or vice versa.

It is also important to understand the terms of the mortgage agreement take priority over lender policies or guidelines that are not terms of the mortgage. In other words, the lender cannot impose new terms upon the borrower that are not contained in the mortgage agreement itself, even if the new terms derive from the lender's internal policies.

Given the importance of mortgage agreements, mortgage arrangers must explain important mortgage terms to borrowers, including how those terms may apply to the borrower's particular circumstances. This allows borrowers to make an informed decision about whether or not a particular mortgage product is suitable, both when initially entering a particular mortgage agreement, and each time a mortgage agreement is renewed. Lenders may request changes to a mortgage agreement when renewing a mortgage, at the end of the mortgage term. For this reason, when the mortgage broker arranges the initial mortgage for a borrower, the mortgage broker should tell the borrower to carefully review the terms of the mortgage again, when the mortgage comes up for renewal. The mortgage broker should tell the borrower to contact them if the borrower has any questions at the time of renewal. If the borrower wants to renew the mortgage with the current lender, the borrower must either accept the lender's terms or attempt to negotiate with them. Otherwise, the borrower must repay the mortgage balance or refinance the mortgage with a different lender. Remember, if a mortgage is not renewed then the borrower must repay the outstanding mortgage balance at the end of the mortgage term, either with their own resources or by refinancing.

Borrowers who misunderstand their rights and obligations under a mortgage may experience unexpected financial or legal consequences. Mortgage brokers may also experience regulatory or legal consequences for failing to explain important mortgage terms to their clients.

Finally, mortgage brokers are not expected to be experts on the topic of mortgage law and should not attempt to provide legal advice to clients. If a borrower has questions about a mortgage agreement that exceed the scope of a mortgage broker's expertise, the borrower must be advised to seek legal advice.

1 The term "mortgage broker" under the Mortgage Brokers Act includes various types of activities, including mortgage arranging, mortgage lending, mortgage administration, and mortgage trading activities. Not all of the information in this module will apply equally to all types of mortgage broker activity. Additionally, in this module the term "mortgage broker" will generally also include submortgage brokers, unless the context suggests otherwise.

Prepayment Privileges and Penalties

Repayment of principal during the mortgage term, over and above the set repayment schedule in the mortgage agreement, is called "prepayment." For example, if a borrower repays their entire mortgage loan balance one year into a five-year term, this would be considered prepaying the mortgage. Borrowers must understand the prepayment terms in their mortgage, and their practical implications.

Mortgage agreements are often put into three general categories, based upon their prepayment terms:

- The first category of mortgage agreements allow the borrower to prepay as much of the mortgage principal as they wish at any time during the mortgage term, without penalty. These types of mortgage agreements are commonly referred to as "open mortgages."
- The second category of mortgage agreements do not allow the borrower to prepay the mortgage at all. Rather, the borrower must only make mortgage payments based on the repayment schedule set out in the mortgage agreement. These mortgage agreements are commonly referred to as "closed mortgages." Given the inflexibility of closed mortgages, they are not particularly common in today's residential mortgage industry.
- The third category of mortgage agreements may contain terms that allow the borrower to prepay their mortgage balance before the due date, but only if the borrower also pays a "prepayment penalty." In addition, mortgage agreements in this third category may also allow the borrower to make partial prepayments on the mortgage, over and above the set repayment schedule, without penalty (e.g., "borrower may prepay up to 10 per cent of the outstanding balance per calendar year, without penalty"). These terms are called "prepayment privileges." Mortgage agreements in this third category are commonly referred to as "partially open mortgages."

Lenders may use these names ("open," "closed," or "partially open") when marketing their mortgage products. They may also use other names. Remember, the name of a particular mortgage is not necessarily determinative of that mortgage's prepayment terms. As a mortgage broker, you must always review the mortgage agreement itself to determine the applicable prepayment terms.

Where to Find Prepayment Terms

Prepayment terms can be found in the mortgage agreement. Typically, the lender's Standard Mortgage Terms will contain provisions about prepayment. These Standard Mortgage Terms are relatively lengthy, and are filed by the lender in the B.C. land title office ("LTO") where they can be accessed and viewed by members of the public. Later, when a borrower enters into a mortgage agreement with a lender, the lender will register a prescribed two-page mortgage document (known as the "Form B") against title to the borrower's property. The Form B is the only document that the lender can register against title to an individual borrower's property. The relatively short Form B will contain some terms of the mortgage agreement, such as the names of the parties, the legal description of the property, and the principal amount. The lender will typically incorporate its Standard Mortgage Terms into the Form B by making a notation in section 9 of the Form B. This practice removes the need to file the lender's lengthy Standard Mortgage Terms each time it registers a mortgage.[2] A copy of the Standard Mortgage Terms must be provided to the borrower when the mortgage is executed.

While prepayment terms are typically found in the Standard Mortgage Terms, the shorter Form B filed against title can sometimes modify the prepayment terms in the Standard Mortgage Terms. Therefore, mortgage brokers must review both the Standard Mortgage Terms and the shorter Form B to understand the prepayment terms of a mortgage.

2 Note that some mortgage lenders may not use separate Standard Mortgage Terms in their mortgages. Instead, they may attach additional mortgage terms (sometimes called "express terms") as an appendix to the Form B that is filed on title. If a lender wishes to append its express terms to the Form B on title, it can do so by making a notation in section 9 of the Form B.

Before discussing the prepayment terms in a borrower's current mortgage with that borrower, the mortgage broker should ask the borrower for their Form B and their lender's Standard Mortgage Terms. Alternatively, the mortgage broker should obtain copies from the LTO itself. Mortgage brokers should also note that in some types of mortgage registrations (sometimes called "collateral charge" registrations), the documents registered on title may not contain all of the terms of the mortgage. Rather, those terms may be contained in a separate loan agreement. In these cases, mortgage brokers may need to obtain the loan agreement from the borrower, because a land title search will not reveal all of the terms of the mortgage.

Additionally, individual borrowers (i.e., natural persons) who obtain mortgage loans for consumer purposes are entitled to increased prepayment penalty disclosure as a result of federal and provincial consumer protection legislation. For example, consumers in British Columbia are entitled to receive cost of credit disclosure statements from mortgage brokers and lenders under B.C.'s *Business Practices and Consumer Protection Act* ("*BPCPA*"). These disclosure statements provide information about prepayment of the mortgage. Additionally, federal legislation, such as the *Bank Act*, requires federally regulated lenders such as chartered banks to make disclosure about prepayment terms. Disclosure can be made in the mortgage agreement or in a separate document. The disclosure must be "clear, simple and not misleading" and must describe the formula used to calculate the penalty amount.[3] Mortgage brokers should review these disclosures when discussing prepayment penalties with a borrower.

If mortgage brokers have questions about how to obtain information about the prepayment terms of a particular mortgage, they should seek guidance from their brokerage's designated individual.

Prepayment Penalty Amounts

Many borrowers believe, mistakenly, that the only prepayment penalty that may be charged is "three months' interest." This is not correct. As mortgage brokers know, three months' interest is usually the minimum charge.

In mortgage agreements that contain prepayment penalties (e.g., "partially open mortgages"), the prepayment penalty is usually equal to either:

- Three months' interest on the outstanding balance; or
- The greater of three months' interest on the outstanding balance and the interest rate differential ("IRD").

The IRD calculation attempts to reimburse the lender for the loss of interest income that it will experience as a result of allowing prepayment. Here's a simple illustration:

> *Yee has a partially open, fixed rate mortgage and wants to prepay it one year into a five-year term, due to a job relocation. Had Yee not prepaid, they would have paid total interest of $40,000 over the next four years. Mortgage rates have fallen over time. For that reason, on the prepayment date, the lender cannot re-lend at the same, high rate of interest that Yee is required to pay under his mortgage. If the lender re-lends at current interest rates, the lender will only be able to make $30,000 in interest over the next four years. Therefore, the IRD penalty would be equal to roughly $10,000 ($40,000-$30,000).*

Typically, only fixed rate mortgages charge prepayment penalties equal to the greater of three months' interest or the IRD. Most variable rate mortgages only charge prepayment penalties equal to three months' interest. However, some specialized variable rate mortgage products (e.g., ones that offer a discounted variable rate) may charge borrowers a prepayment penalty equal to the greater of three months' interest or a percentage of the outstanding mortgage balance (often three per cent). This penalty can be significant and must be weighed against the discounted rate offered in the speciality product.

3 For more information about federal consumer protection disclosure respecting prepayment penalties, visit: www.canada.ca/en/financial-consumer-agency/services/industry/commissioner-guidance/guidance-9.html

Due to section 10 of the *Interest Act*, prepayment penalties on individual borrowers cannot exceed three months' interest after more than five years has elapsed on a mortgage with a term longer than five years. However, because most mortgage agreements with individual borrowers have terms of five years or less, after which the borrower either repays the loan or renews the mortgage, section 10 rarely applies. Each time a mortgage is renewed the lender normally resets the five-year clock under section 10 by re-dating the mortgage to be as of the renewal date. Then, under the renewal agreement, the five-year period starts from that date.

Finally, remember that repaying a mortgage at the end of the mortgage term is not considered "prepayment," since the mortgage is due, in full, at the end of the term. Therefore, no prepayment penalty can be charged by a lender if a mortgage is repaid at the end of the mortgage term.

Illustrative Calculations

You may make it part of your practice to prepare illustrative prepayment penalty calculations for your borrower clients. While it is acceptable (and sometimes even helpful) to do this, you must ensure that the borrower understands that the calculations are being done for illustrative purposes only, and that they are only estimates. Precisely calculating a prepayment penalty can be complicated. Many lenders calculate these penalties differently. Even a concept as seemingly simple as three months' interest on the outstanding balance can raise complications. For example, what interest rate will be used to calculate the three months' interest penalty? Some lenders may use the mortgage rate of interest while other lenders may use some other interest rate, such as the prime rate. The rate that will be used to calculate the prepayment penalty should be specified in the mortgage agreement. This is just one potential complication that may arise when determining prepayment penalty amounts. Mortgage brokers should review the mortgage agreement before discussing prepayment penalty amounts with a borrower.

This is not to say that mortgage brokers should not provide estimates about prepayment penalties to clients. Mortgage brokers may carry out illustrative calculations of prepayment penalties based on the mortgage agreement and the lender's disclosure statements. These calculations can be simplified, to not take issues like compounding frequency into account, for example. Illustrative calculations can help borrowers understand these penalties more clearly. Mortgage brokers understand that the best mortgage is not always the one with the lowest rate. Sometimes a deceptively low rate mortgage may have a large pre-payment penalty, to help compensate the lender for the lower interest. Showing borrowers illustrative calculations and estimated prepayment penalties under different mortgages can help the borrower understand why a certain mortgage product may not be as attractive as its relatively low interest rate alone may suggest. However, it must be emphasized that mortgage brokers who provide prepayment penalty estimates to borrowers must explain to the borrowers (orally and, if possible, in writing on the calculations themselves) that the calculations are estimates provided for illustrative purposes only. Borrowers must consult the lender themselves, or third-party experts like actuaries or accountants, for exact prepayment penalty calculations.

Advising Borrowers

There may be several reasons why a borrower may be interested in prepaying their mortgage:

- They want a new mortgage with a lower interest rate;[4]
- They want to buy a new property and must discharge their existing mortgage; or
- Their financial situation has changed and they want a different mortgage product.

When advising a borrower about prepayment penalties and privileges in a mortgage agreement, the mortgage broker must carefully consider that borrower's particular circumstances. For example, if a person contacts a mortgage broker because they intend to purchase a new property, a mortgage broker may need to consider the following:

1. Does this borrower have an existing property and an existing mortgage? What is happening with the existing property/mortgage? (e.g., does the borrower intend to keep the existing property and mortgage, as is? Does the existing property need to be sold? Can the borrower afford to service both their existing mortgage and the new one they require for the new property?)

2. Will any prepayment penalties apply if the borrower discharges their existing mortgage? If yes, can those penalties by minimized in some way (e.g., waiting until mortgage renewal, using prepayment privileges, assumability, portability, etc.)?

3. If the borrower will be getting a new mortgage loan to buy their next property, what prepayment penalties and privileges will suit this borrower best?

CONSIDER THE FOLLOWING SCENARIO:

Dakota and Sam recently married and want to purchase a one-bedroom condominium together. Sam currently owns a condominium with a mortgage registered against it. The couple will be selling and moving out of Sam's condominium as they start their new family together. Sam currently has a partially open mortgage with 12 months remaining on the five-year term. You review Sam's mortgage agreement and calculate that if Sam were to discharge his mortgage now, he would be charged approximately $5,929.26 as a prepayment penalty. However, there will be no prepayment penalty if Sam pays the mortgage out in 12 months, at the end of the mortgage term. You have considered whether mortgage assumption or portability may be options for minimizing Sam's prepayment penalties. However, after consulting with your brokerage's designated individual, you conclude those are not realistic options in this scenario. Also, talking with Sam and Dakota, you learn that they want to have children within two to three years. Dakota is expecting a sizeable inheritance from her mother's estate within the next year.

4 When advising borrowers who are interested in prepaying one mortgage in order to change lenders, ensure that they consider whether the interest rate savings with the new lender will outweigh the fees and penalties, including prepayment penalties, that they may incur to switch. For more information and useful examples, visit: www.canada.ca/en/financial-consumer-agency/services/mortgages/break-mortgage-contract.html

In this scenario, you would advise Dakota and Sam about the prepayment penalties that Sam faces on his current mortgage, and how that penalty may change over time. This will allow the couple to make a more informed decision about when to complete the sale of Sam's current condominium since the mortgage will likely be paid off upon completion. You should also advise them about prepayment terms contained in any mortgage products that you recommend for the purchase of their next condominium. Explain how these terms may affect the couple's ability to make large prepayments using Dakota's inheritance. Also, given their growing family, it is reasonable to expect that the couple may wish to increase the size of their home sometime before the end of their mortgage term. Therefore, they should understand any prepayment penalties they may face on an early discharge, as well as any mortgage assumption options or portability rights they may have in their next mortgage agreement (these topics are discussed in more detail later in this Module).

PRACTICE TIP

Once you arrange a mortgage for a borrower, encourage that borrower to contact you as soon as possible if they start thinking about prepaying their mortgage. The earlier the borrower contacts you, the more options they may have to reduce any potential prepayment penalty amounts and save themselves money. For example, imagine you have a borrower client, Mark, who wants to sell their house by the end of next year. Mark has a partially open mortgage and will have to pay a prepayment penalty on the sale. Fortunately, Mark can reduce their future prepayment penalty by taking advantage of the annual, penalty-free, 10 per cent prepayment privilege in their mortgage agreement. However, Mark must make the 10 per cent prepayment by the end of this year, well in advance of the anticipated sale. This is because some mortgage agreements (including Mark's) restrict the use of prepayment privileges if the borrower prepays the full mortgage balance at the same time as, or a short time after, using their prepayment privilege (e.g., within the same calendar year). This is just one of many examples showing why it is important for borrowers to contact their mortgage broker in a timely manner when they first begin thinking of prepaying their mortgage.

Mortgage Assumptions

An assumable mortgage is a mortgage that allows a buyer to assume, or take over, the responsibilities of the seller under the seller's mortgage. In determining whether or not a mortgage is assumable, mortgage brokers should consider whether the mortgage agreement contains a "due on sale" clause such as the following:

> *In the event that the Mortgagor sells, agrees to sell, or otherwise disposes of the said lands, the full amount then owing of the principal and interest secured hereby shall become due and payable forthwith, at the option of the Mortgagee.*

"Due on sale" clauses effectively prevent the mortgage from being assumed by anyone unacceptable to the lender. If a lender enforces a "due on sale" clause, all amounts owing under the mortgage (including a prepayment penalty) would be due and owing. A variation on this clause might provide that the mortgage is assumable only where the lender gives written approval prior to the sale. Credit union mortgages will always contain a "due on sale" clause because they are unable to lend funds to non-members or other applicable restrictions. Even if a mortgage contains a "due on sale" clause, the lender may still allow the mortgage to be assumed, depending on the circumstances. Another factor that may affect the assumability of a mortgage is if the mortgage registration stands as security for other obligations outside of the mortgage loan itself (e.g., lines of credit, guarantees, etc.).

A seller may be able to avoid prepayment penalties on the sale of the property if the buyer agrees to assume the seller's mortgage (although other fees, including legal fees, may apply). A buyer may wish to assume a mortgage if the terms of the mortgage are attractive (e.g., lower than market interest rate).

Continuing Liability of the Seller after an Assumption

It is important for sellers to understand the risks of allowing a buyer to assume a mortgage. Court decisions have made it clear that the seller may still be required to repay the mortgage loan to the lender if the buyer who assumes the mortgage defaults on their payment. This requirement is known as the seller's "personal covenant." Special caution is necessary where the buyer is a limited liability company, which may have no assets, or where the purchase involves a revenue-producing property but the buyer has no independent source of income from which to make payments. However, a seller may be relieved of their personal covenant in certain situations, such as when the *Property Law Act* ("*PLA*") applies to the mortgage assumption, as discussed later in this section.

When a seller transfers their interest in a property to a buyer who assumes the mortgage, the seller will usually require the buyer to sign an agreement promising to make all the necessary payments to the lender. In addition, the buyer will usually promise to reimburse the seller if the lender starts a court action against the seller on their personal covenant. Even without such an agreement, the *PLA* will imply these promises unless the parties specifically exclude them in their agreement. However, even though the buyer signs the agreement, the liability of the seller (the original borrower) on their personal covenant may continue (subject to the provisions of the *PLA*, discussed next). If the buyer defaults, the promise to reimburse the borrower is worth very little if the buyer has no money.

The *PLA* limits the seller's continuing liability under the personal covenant where they sell a property subject to a mortgage to a buyer who assumes the seller's mortgage. To enjoy the protection of the *PLA*, the mortgage must be for a "residential purpose." **This means the loan must be either:**

- To acquire the residence;
- To make improvements to the residence;
- To make expenditures for a household or family purpose; or
- To refinance for one of the above three purposes.

If the mortgage was for a residential purpose, then the *PLA* will limit the continuing liability of the seller under the personal covenant in certain situations. For instance, if a lender approves a buyer's assumption of the mortgage in writing, then the seller's liability under the personal covenant will cease.

The lender is not allowed to withhold its approval unreasonably, subject to the following requirements:

- The request for it must be made within three months of the transfer of the property; and
- The lender is entitled to reasonable financial information about the buyer and may claim reasonable expenses for obtaining a credit report and handling costs.

Liability of the Buyer after an Assumption

Under contract law principles, if a buyer assumed a seller's mortgage, it would not be possible for the lender to sue that buyer for unpaid mortgage payments. This is because the buyer was not a party to the original mortgage agreement. However, the *PLA* overrides the law of contract and provides lenders the right to sue buyers who have assumed a mortgage or taken over a seller's interest under an agreement for sale. This right is available to all lenders, regardless of the purpose of the loan (i.e., it does not matter if the loan is for a residential or other purpose). This means that where a seller sells property subject to a mortgage which is assumed by the buyer, if the buyer defaults, the lender is allowed to sue the buyer directly to recover the debt just as if the buyer were a party to the mortgage between the lender and the seller (original borrower).

Whenever assumption is being considered, the mortgage broker must recommend their clients seek legal advice as soon as possible to ensure that the assumption is feasible and appropriate steps are taken to protect the client's legal interests.

Portability

A portable mortgage gives a borrower the ability to take their current mortgage with them to a new property. The following is an example of a portability clause that may be found in a mortgage agreement:

If the Mortgagor repays the mortgage money in connection with a genuine sale of the property to a person with whom the Mortgagor deals at arm's length and completes the purchase of a new residence within 60 days of repaying the mortgage money, the Mortgagee will, on application by the Mortgagor, provide financing for the purchase of the new residence on the security of a mortgage (the "New Mortgage") on such residence, on the following basis...

Porting a mortgage may allow the seller to avoid paying a prepayment penalty upon the sale of the property (though other types of fees may apply) or maintain favorable loan terms (e.g., a low interest rate).

There are several considerations for mortgage brokers and borrowers who are considering porting a mortgage:

- A borrower will only be able to port their mortgage if they re-qualify for their mortgage loan under current lender and government guidelines. This includes current "stress test" guidelines which apply to federally regulated lenders. This could reduce the borrower's maximum mortgage approval, thereby decreasing the amount of the mortgage balance that can be ported to the new property. Additionally, the lender will review the new property to determine whether it is sufficient security for the mortgage loan amount.
- Presuming the borrower can re-qualify, if additional money is required, a lender may allow for a blended rate combining the "old" loan amount at its rate of interest with the "new" loan amount at current interest rates. The lender may also extend the mortgage term (i.e., "blend and extend").
- If the current mortgage balance is too large for the next purchase, the excess balance may need to be repaid to the lender. Prepayment penalties may apply in this situation.
- The period of time to complete the port under many mortgage agreements varies between 30 and 120 days after repayment of the mortgage (i.e., the borrower must complete the purchase of a new property between 30 and 120 days after selling the old property and repaying the original mortgage). This may not be enough time to complete the sale of the existing property and the purchase of the new property.
- While mortgages with credit unions may also contain portability clauses, the credit union may not be able to port a mortgage outside of the province or outside of a specified geographical area.

Mortgage brokers should carefully scrutinize these and other relevant considerations, the borrower's circumstances, and the portability clause in the mortgage agreement before providing the borrower with advice as to portability. Where appropriate, the mortgage broker should promptly recommend the borrower to seek legal advice as to portability issues.

If the mortgage broker has any questions or concerns about these or any other contractual terms within a mortgage agreement, they should consult with their brokerage's designated individual. As stated earlier, a mortgage broker may also wish to recommend that the borrower obtain legal advice regarding the terms of their mortgage agreement.

Fiduciary and Agency Relationships of Mortgage Brokers

In certain circumstances, a mortgage broker may enter into a special legal relationship with a client known as a fiduciary relationship. It is worth emphasizing at the outset of this section that certain categories of mortgage brokers (e.g., private lenders) are far less likely to enter fiduciary relationships than mortgage arrangers, as will be discussed later.

In a fiduciary relationship, one party, the fiduciary, must act in the best interests of another party, the beneficiary. Under the common law, fiduciaries owe a duty of loyalty to the beneficiary, and must put the interests of the beneficiary ahead of all others.

Certain categories of relationships are automatically presumed to be fiduciary relationships, such as lawyer-client or doctor-patient. The mortgage broker-client relationship is not an established category of fiduciary relationships. However, even if a particular relationship does not fall into an established category, it is still possible for that relationship to be fiduciary in nature. Simply put, in order for two persons to be a fiduciary relationship:

1. The first person must have undertaken to act in the best interests of the second person;

2. The second person must be vulnerable to the first person's actions, in the sense of the first person having some power or control over them; and

3. The first person can act in a way that affects the second person's legal interests or their substantial practical interests.[5]

If these criteria are satisfied in a particular relationship, the relationship may be found to be a fiduciary relationship. In other words, it is possible for mortgage brokers to enter into fiduciary relationships with lenders or borrowers despite mortgage brokers not being an established category of fiduciaries. If this occurs, the mortgage broker will owe various fiduciary duties to the lender or borrower, such as the duty of loyalty and the duty to avoid conflicts of interest.

A mortgage broker may be sued in civil court for breaching fiduciary duties. If this occurs, the court must make a determination about whether or not the mortgage broker in question was actually in a fiduciary relationship with the plaintiff. The court would consider the three criteria set out above in making that determination. For this reason, mortgage brokers should carefully monitor their behaviour and communications with lenders and borrowers and consider whether or not they may be acting in a fiduciary capacity. This is discussed in greater detail in the following section.

Mortgage Brokers as Fiduciaries and Agents

The term "mortgage broker" is broadly defined under the *Mortgage Broker Act* ("*MBA*"). Some activities that require a mortgage broker registration are unlikely to give rise to fiduciary relationships. For example, a private lender will rarely be found to be in a fiduciary relationship with borrowers. This is because it is generally understood that a lender acts for their own best interests, not the borrower's best interests. Mortgage brokers who buy and sell mortgages on their own behalf or collect money payable under mortgages are also unlikely to be fiduciaries. If a mortgage broker is sued for breach of fiduciary duties, the court will examine the circumstances of the case carefully to determine whether or not the criteria for a fiduciary relationship are present.

5 *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24

The mortgage brokering activity that is most likely to create fiduciary obligations is mortgage arranging. This includes mortgage arrangers who assist borrowers and mortgage arrangers who assist lenders. This is especially true if a mortgage arranger takes on the role of trusted adviser to their client. Additionally, a mortgage broker who acts as an agent for a client may also be found to be in a fiduciary relationship with that client. An "agent" is a person who is authorized to act on behalf of another person, the "principal," in their dealings with others, and who has the power to affect the principal's interests by their actions.

It is important to reiterate that not all relationships established by mortgage arrangers will be fiduciary or agency relationships. Mortgage arrangers have a choice in determining the types of relationships they enter into. Some mortgage arrangers may be comfortable entering fiduciary relationships with others. For example, some borrowers view their mortgage broker as an advisor, and may trust their broker to act in their best interests during the mortgage arranging process. Such borrowers may refer other borrowers to the mortgage broker in the future, and may return to the broker again and again in the future. Mortgage brokers may be comfortable establishing fiduciary relationships with such borrowers and may provide assurances to the borrower that they will act in the borrower's best interests.

On the other hand, mortgage arrangers who wish to avoid entering fiduciary or agency relationships should avoid suggesting (orally, in writing, or by their actions) that they will put the interests of the client before all others. They should also ensure that the client is making decisions independently, based on all of the relevant information. If a particular client appears particularly vulnerable (in the sense that the mortgage broker has significant influence, control, or power over them, not necessarily because they belong to a vulnerable class of people), overly-trusting, or overly-reliant on the mortgage broker, there is a higher risk of the broker-client relationship being fiduciary in nature. This may necessitate greater precautions by the mortgage broker to ensure that the client understands the true nature of the relationship. A mortgage broker may wish to recommend that a particularly vulnerable client obtain legal advice regarding a mortgage transaction. This may help avoid the suggestion that the client was vulnerable to the mortgage broker. Unless the mortgage broker is willing to act as a fiduciary, clients should not be given the impression that the broker is working solely for them or as their agent. This could occur inadvertently. For example, a mortgage broker may say to a borrower, "don't worry, I'm on your side" or "you don't need to worry, I'm taking care of everything." Comments like these may unintentionally lead the client to misunderstand the nature of the broker-client relationship, and cause the client to think of the mortgage broker as their agent or fiduciary.

As a designated individual, consider reviewing your standard brokerage service agreement to explore what type of relationship your brokerage is entering into with its clients. Client service agreements often set out the nature of the services to be provided by the mortgage broker. They may state that the mortgage broker is acting as an independent contractor and not as an agent of the borrower. Agreements may also clarify that the mortgage broker will have separate contractual agreements with various lenders. If a mortgage broker is hired by a borrower client to arrange a mortgage for the borrower, but there is a possibility of the mortgage broker lending its own money to the client, consider expressly contemplating this within the client service agreement. It may be useful to discuss your brokerage's service agreement with your brokerage's legal advisor. Designated individuals may also wish to discuss client relationships and duties with their submortgage brokers, to ensure that submortgage brokers act in a way that is consistent with the brokerage's service agreement.

There are several cases which have considered whether or not mortgage brokers are fiduciaries.

Advanced Realty Funding Corp. v. Bannink[6]

The fiduciary duty of loyalty includes a duty to make complete disclosure of all facts that could affect the client's decision, including facts about conflicts of interest. In *Advanced Realty Funding Corp. v. Bannink*, a mortgage broker was hired to arrange a mortgage for a borrower. The borrower signed a document described as a "commission and fee contract" with the mortgage broker. This contract stated that the borrower would pay the mortgage broker a commission. It also stated that the broker may receive a finder's fee from any lender. The mortgage broker arranged a mortgage with a lender that would have paid a finder's fee to the mortgage broker. The borrower initially accepted the mortgage. Later, the borrower's lawyer told the borrower that the borrower could obtain a lower interest rate with another lender. This caused the borrower to refuse to proceed with the first mortgage. The mortgage broker sued the borrower for its commission which it said it earned by arranging the mortgage. The borrower said the mortgage broker was not entitled to commission because it never disclosed the finder's fee to him. The court agreed with the borrower that the mortgage broker did not attempt to explain the finder's fee to the borrower. The court stated that this amounted to a breach of the fiduciary duty owed by the mortgage broker, as an agent, to the borrower. It was not enough to bury reference to the finder's fee within the commission contract. The broker should have clearly explained the nature of the fee to the borrower, including how it would be calculated, the amount payable, and should have ensured that the client understood and expressly consented to payment of the finder's fee. Because the mortgage broker failed to do that, the borrower was not required to pay the mortgage broker's commission.

Mortgage Genie Inc v. Johnson[7]

A fiduciary must act in the best interests of a beneficiary. In *Mortgage Genie Inc v. Johnson*, a mortgage broker was approached by a borrower facing foreclosure proceedings. The second mortgage on the borrower's property had fallen into default and the borrower needed funds to repay that loan. The mortgage broker met with the borrower and had her sign documents for a new high-interest second mortgage. The new second mortgage was with a company in which the mortgage broker had an ownership interest. The court found that the mortgage broker was in a fiduciary relationship with the borrower, whom the court described as "retired, elderly, and frail." The court found that the borrower was relying on the mortgage broker to make the best possible mortgage arrangement for her and was vulnerable to him.

The court found that the mortgage broker was not entitled to his commission because he breached his duty to act in the best interests of the borrower by:

- Failing to explore all of the borrower's options and failing to suggest the best possible arrangement for the borrower;
- Steering the borrower towards a high-interest loan with the mortgage broker's own company;
- Failing to disclose the conflict of interest: a printed statement in one of the documents that "Lender is an affiliated or related company of the brokerage" was insufficient disclosure;
- Having the borrower sign a document promising to pay the mortgage broker his fee even if the defendant later refused to accept the mortgage from the mortgage broker's company; and
- Not recommending that the borrower obtain independent legal advice on the mortgage documents, especially due to the conflict of interest in the transaction and the vulnerability of the borrower.

7 2014 CanLII 26813 (ON SCSM)
8 1982 CanLII 675 (BC SC)

Sinclair v. Smith[8]

Mortgage arrangers who work with lender clients may also be found to be in fiduciary relationships with those clients. In *Sinclair v. Smith*, a widow (Sinclair) contacted a mortgage broker because she had $25,000 to invest. Sinclair asked the mortgage broker if he could invest the money for her. The mortgage broker invested the funds in a mortgage on behalf of Sinclair. However, the mortgage fell into arrears and the property was sold. There was insufficient equity to repay Sinclair's investment. Sinclair sued the mortgage broker. The court found that the mortgage broker acted as an agent to Sinclair and owed her fiduciary duties. The mortgage broker failed to carry out his duty of complete disclosure in several important respects. First, the mortgage broker failed to advise Sinclair that the property owner would be using $6,000 out of the $25,000 loan to repay the mortgage broker for a separate, personal debt. Therefore, the mortgage broker had an undisclosed conflict of interest in the transaction. Additionally, the mortgage broker previously told Sinclair that his company would also be advancing a mortgage loan to the borrower at the same time as Sinclair. However, the mortgage broker's company did not end up proceeding with its mortgage loan. Instead, the mortgage broker arranged for another short-term mortgage to be registered on the property which had priority to Sinclair's mortgage. None of these facts were disclosed to Sinclair. As a result of the mortgage broker's breach of fiduciary duty, the court ordered the mortgage broker to repay Sinclair's $25,000 investment to her, with interest.

Canadian Western Trust Co. v. Balakshin[9]

While mortgage arrangers may be found to be in fiduciary relationships with persons who place trust in them, mortgage arrangers are less likely to be fiduciaries when dealing with persons who do not put a great deal of reliance upon their skill and advice. In *Canadian Western Trust Co. v. Balakshin*, the plaintiff (Canadian Western), a mortgage lender and a licensed mortgage broker, was introduced by the defendant (Balakshin), also a mortgage broker, to a property owner who needed money to complete extensive building renovations. Canadian Western loaned money to the property owner in exchange for a third mortgage on their property. After defaulting on the first and second mortgages, the property was foreclosed upon. After a judicial sale, there was no money left to repay Canadian Western's third mortgage. Canadian Western sued Balakshin, alleging Balakshin had failed to disclose important information about the property to Canadian Western. The court dismissed Canadian Western's claims. The court found that the relationship between Canadian Western and Balakshin was not fiduciary. There was no evidence that Balakshin had any discretion or power over Canadian Western in the transaction. There was also no evidence that Canadian Western was vulnerable, or that they relied on the Balakshin's expertise as a mortgage broker when making the investment. In fact, both parties were experienced mortgage brokers with years of experience in the field. The court found that Canadian Western was well aware of the risks involved in the investment, and made a calculated choice to invest based on the information they had.

8 1982 CanLII 675 (BC SC)
9 1982 CanLII 675 (BC SC)

Rescon Financial Corp. v. New Era Development (2011) Inc.[10]

In *Rescon Financial Corp. v. New Era Development (2011) Inc.*, a mortgage broker (the plaintiff) successfully obtained a mortgage loan commitment for a developer (the defendant). However, the developer refused to pay the mortgage broker the agreed-upon fee of $400,000 for securing the financing. The mortgage broker sued the developer for the fee and was successful. One of the arguments made by the developer was that the mortgage broker was not entitled to its fee because it breached certain fiduciary duties. This argument was not accepted by the court, because the court determined that the relationship between the mortgage broker and the developer was not fiduciary in nature. The court stated that there was little trust, confidence, and reliance placed by the developer in the mortgage broker. For example, in a prior transaction, the developer chose not to proceed with a mortgage arranged by the mortgage broker, and instead obtained a loan from another lender entirely. Additionally, the developer repeatedly second-guessed the mortgage broker's advice and threatened to hire another mortgage broker. Finally, when the mortgage broker obtained the mortgage loan commitment for the developer, the developer initially chose to walk away from the transaction despite the mortgage broker's recommendation to proceed.

CONCLUSION

In this module, mortgage brokers learned about key mortgage terms and the relevance of those terms to borrowers. The best mortgage for a particular borrower is not always the one with the lowest interest rate. Mortgage brokers who understand prepayment terms, mortgage assumption terms, and portability terms in mortgages will be better able to educate their clients as to the implications of these terms and which mortgage product is most suitable for them. Additionally, this module covered important legal relationships that may be entered into, or be deemed to have been entered into, between mortgage brokers and clients – specifically fiduciary and agency relationships. A good understanding of these topics will help mortgage brokers ensure that there are no misunderstandings in the client relationship about the role and duties of the mortgage broker. Such misunderstandings can increase the risk of client dissatisfaction, reputational loss for the mortgage broker, and regulatory complaints and civil lawsuits against the mortgage broker.

10 2016 BCCA 449

Module Ten: Due Diligence and Disclosure Topics for Mortgage Brokers

In this module mortgage brokers[1] will learn the importance of carrying out due diligence, and how performing due diligence can help them to ensure that the information they disclose to others is correct. This module will address mortgage broker obligations when passing on information from borrowers to lenders, and when arranging stated income mortgages for self-employed borrowers. The module will also discuss mortgage broker obligations in co-brokering situations and the prohibited practice of "fronting." Finally, this module will review important statutory disclosure obligations of mortgage brokers.

LEARNING OBJECTIVES

After completing this module, you will be able to:

1. Understand the obligation to verify information being passed on from borrowers to lenders;
2. Discuss due diligence and disclosure obligations when arranging mortgages involving self-employed borrowers (including stated income mortgages);
3. Discuss mortgage broker obligations in co-brokering situations;
4. Understand what the practice of "fronting" is, and the prohibition on that practice in the mortgage brokering industry; and
5. Describe key statutory disclosure obligations of mortgage brokers.

10

PASSING ON INFORMATION FROM BORROWERS TO LENDERS

All mortgage brokers must ensure that they provide accurate information to others.

If a mortgage broker performs mortgage arranging activities, they must ensure that the information they provide to lenders[2] is accurate. This includes information from the borrower that the mortgage broker passes on to the lender. A mortgage broker is not simply a passive conduit through which a prospective borrower provides information to a lender. The Registrar of Mortgage Brokers (the "Registrar") expects mortgage brokers to use reasonable due diligence to verify the information they pass on. Lenders need accurate information about prospective borrowers and properties for many reasons, including to:

- Make informed lending and investment decisions;
- Prevent fraud and money-laundering; and
- Prevent borrowers from entering unsuitable mortgage agreements (e.g., mortgages that they cannot afford).

Failure to provide accurate information to lenders can create problems for both borrowers and lenders and may constitute mortgage application fraud. Mortgage brokers may also face regulatory or legal consequences for providing inaccurate information to lenders. Finally, failing to take steps to verify information given to lenders can tarnish the reputation of the mortgage broker and the mortgage broker industry as a whole.

BCFSA provides guidance to mortgage brokers regarding the due diligence required when passing on information received from borrowers to lenders:

> *[...] 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. This office takes the position that a mortgage broker has a duty to ensure the information being sent to a lender has been verified. [...] reasonable due diligence must be undertaken to ensure that the information being passed on to lenders is accurate. [...] If mortgage brokers do not verify the information they are forwarding to lenders, then mortgage brokers should advise the lenders in writing that none of the information has been verified.*[3]

1 The term "mortgage broker" under the Mortgage Brokers Act includes various types of activities, including mortgage arranging, mortgage lending, mortgage administration, and mortgage trading activities. Not all of the information in this module will apply equally to all types of mortgage broker activity. Additionally, in this module the term "mortgage broker" will generally also include submortgage brokers, unless the context suggests otherwise.

2 This section will refer to "lenders", for convenience. However, mortgage arrangers should understand that the duty to pass on accurate information also applies if the mortgage broker is providing information to investors.

3 Information Bulletin – Misleading Information: www.bcfsa.ca/media/1517/download

The following cases involve mortgage brokers who failed to properly verify information before passing it to the lender.

Amirmoazami (Re)[4]

Failure to exercise appropriate due diligence can lead to regulatory consequences. In *Amirmoazami (Re)*, a submortgage broker entered a consent order requiring her to pay a $45,000 administrative penalty. The submortgage broker submitted documents to lenders that she knew or ought to have known were altered to inflate the applicant's capacity to borrow. The submortgage broker failed to conduct reasonable due diligence by not confirming unusual or suspicious financial information from borrowers.

Singh (Re)[5]

Similarly, in *Singh (Re)*, a submortgage broker's registration was cancelled for ten years among other sanctions. The submortgage broker submitted numerous mortgage applications which overstated the borrower's true income. The income information provided to the submortgage broker contained contradictions that were suspicious on their face. However, the submortgage broker did not take reasonable steps to verify their accuracy. There was no evidence to suggest that the submortgage broker falsified any of the records himself.[6]

Asadi (Re)[7]

In *Asadi (Re)*, a submortgage broker's registration was canceled for life and the submortgage broker was required to pay an administrative penalty of $15,000 and partial investigation costs of $8,000. Several inconsistencies were discovered in mortgage applications submitted by the submortgage broker to various lenders. Considering the evidence, the Registrar determined that the submortgage broker had breached the *Mortgage Brokers Act* ("*MBA*") by failing to conduct appropriate due diligence and "know your client" procedures, among other things. A few examples of the inconsistencies discovered include:

- In one application, the borrower's stated employer (a healthcare organization) was not registered in the corporate registry and did not match the name of the borrower's last known employer in their credit report. A few months later, the submortgage broker submitted a second mortgage application for this borrower which contained information about the borrower's income and assets that was inconsistent with the first application. Included in the second application was a bank statement for the borrower which showed net pay deposits that were far less than the borrower's stated income, and the income shown in the borrower's tax documents.
- In another application submitted by the submortgage broker, the borrower claimed to own a fleet of taxi cabs. However, when the Registrar contacted the cab company they were advised that the borrower was only a driver, not an owner, and that he had quit in order to become an electrician instead.
- In a third application submitted by the submortgage broker, the borrower claimed to own a daycare for the past five years. However, Registrar staff discovered that the daycare was not registered in the corporate registry, the borrower was a sole proprietor of another business registered six months after the date of the mortgage application, and the income provided in the borrower's tax documents appeared high given restrictions on the number of children that can attend family-run daycares.

4 www.bcfsa.ca/media/231/download
5 www.bcfsa.ca/media/254/download
6 www.bcfsa.ca/system/files/decisions/1497/19-036-qualification-decision-singh-redacted.pdf
7 www.bcfsa.ca/media/208/download; https://www.bcfsa.ca/media/209/download

Pryce v. Vuckovich[8]

Apart from serious regulatory consequences, failure to verify information from borrowers before passing it on to lenders can lead to mortgage brokers becoming civilly liable for negligence. In *Pryce v. Vuckovich*, an Ontario mortgage broker ("Mott"), who was also a professional accountant, had been providing mortgage broker services to a family of private lender/investors for several years. Two sisters in the family inherited a sum of money from their parents and Mott offered the sisters various mortgage investment opportunities, which they invested in. Neither sister had any prior experience as mortgage lenders/investors. They trusted Mott to guide them appropriately.

The events which led to the lawsuit were as follows. Mott received a call from another mortgage broker ("Di Domenici") whose borrower clients required a second mortgage, urgently. Di Domenici told Mott that there was an appraisal on the property but that she did not have time to send it over to Mott. Di Domenici indicated that the appraised value of the property was $3,690,000. Di Domenici asked whether Mott had any lender clients who might be interested in the opportunity.

Mott contacted the sisters and recommended the mortgage investment opportunity to them. Mott told the sisters that there was a $3,960,000 appraisal of the property and a first mortgage of $1,900,000. Mott did not warn the sisters that it was risky to rely on the appraised value of $3,690,000 because Mott had not actually seen a copy of the appraisal.

Based on Mott's recommendation, the sisters chose to loan $600,000 on a second mortgage. The mortgage soon fell into default and the property was sold for only $960,000, far less than the alleged appraisal value. As it turned out, there were significant problems with the appraisal which Mott only discovered after the fact, when she eventually obtained a copy of the appraisal. The net sale proceeds were applied against the first mortgage only and there was nothing left to repay the sisters. The sisters lost their entire $600,000 investment and sued Mott for negligence. The court found that Mott's recommendation of the mortgage investment opportunity, without ever having reviewed the appraisal, amounted to negligent misrepresentation. The court stated:

There is no question that Mott acted negligently here. She recommended the Vuckovich mortgage to the Pryce family without her ever seeing an appraisal of the property...Di Domenici's excuse for not faxing the appraisal to Mott makes little sense...there was no genuine reason why Mott had to rely on verbal confirmation of the appraisal without her own personal review of the document.

Mott was held personally liable for the sisters' loss and ordered to compensate them for her negligence. This case highlights the importance of verifying information received from a borrower, or a borrower's representative, before passing it on to a lender.

8 [1999] O.J. No. 20 [Ontario Court of Justice (General Division)]

As a designated individual, consider using checklists or other written procedures to ensure that submortgage brokers take reasonable steps to verify the information being passed on to lenders. **Information that may need to be verified might include:**

- Suspicious or unusual employment or income documents (e.g., job letters that contain spelling errors or come from organizations that cannot be found in the corporate registry or through internet searches, tax documents that do not support what the borrower says their income is, bank deposits that do not support the borrower's income in their tax return);
- Suspicious or unusual down payment sources (e.g., an 18-year-old student claiming to have hundreds of thousands of dollars of down payments as a result of "savings");
- Suspicious or unusual asset and debt profiles (e.g., a recently divorced client who said that they received a small divorce settlement appears to own multiple properties in British Columbia);
- Purchase prices or appraisals that do not accord with the area and type of property;
- Suspicious or unusual loan balances in mortgage statements (e.g., a mortgage was registered on title a few months ago to secure a loan of $1,250,000, but a current mortgage statement supplied by the borrower shows that the current loan balance is only $500,000. No reasonable explanation is given for the significantly reduced balance); or
- Suspicious or unusual occupancy declarations (e.g., the person is claiming that the property will be owner-occupied in the mortgage application, but the property is much farther from their office than their current home).

It would be an impossible task to develop comprehensive written procedures covering all potential scenarios and concerns that may arise in a mortgage application. For this reason, in addition to having good written procedures, submortgage brokers must be trained to examine all components of a loan application critically, in context, to spot unusual, incomplete, inconsistent, or incorrect information. Designated individuals should encourage submortgage brokers to consult with them whenever they have concerns about a mortgage transaction.

SELF EMPLOYED BORROWERS AND STATED INCOME MORTGAGES

Self-employed persons may write-off significant amounts of their gross income with business expenses. This practice may offer income tax advantages to the self-employed person. However, it may also interfere with their ability to obtain a mortgage loan. This is because self-employed persons may have trouble proving their income to lenders using traditional methods, such as by providing their tax returns.

One option for such borrowers is the "stated income mortgage," commonly offered by private lenders. Self-employed borrowers may qualify for a stated income mortgage by declaring their income in their mortgage application, or in a separate declaration form. The declared income amount is neither their gross business income nor their net income for tax purposes, but a "reasonable" estimate of their actual income, which may fall somewhere in between their gross and net income. Income verification and documentation requirements for stated income mortgages (and similar mortgage products targeted at self-employed persons) are sometimes less stringent than in typical mortgage applications. This may make stated income mortgages attractive to self-employed borrowers.

Apart from the usual due diligence expected from mortgage brokers in all mortgage transactions, mortgage brokers who arrange stated income mortgages on behalf of self-employed borrowers have additional due diligence requirements:

The lack of supporting documentation required for stated income mortgages may lead some borrowers to provide misleading information [...] some mortgage brokers have enquired about whether it is acceptable for borrowers to simply fill in the number representing their stated income which is sufficient to qualify them for the mortgage they are seeking, as some lenders have indicated that this is acceptable. Please be aware that mortgage brokers must undertake reasonable due diligence to ensure that the information being passed on to lenders is accurate and not misleading, even if it appears that the lender encourages or tolerates misleading statements from borrowers about the source or amount of income on stated income applications. Exercising due diligence for stated income mortgages would require mortgage brokers to ensure that the borrower knows to state only truthful information in the mortgage application. If there are any misrepresentations about the amount or source of income, lenders may place responsibility for the misrepresentations on the mortgage broker who submitted the application, while borrowers may blame the mortgage broker for counseling them to provide false information. In addition, the Registrar of Mortgage Brokers may seek to impose regulatory penalties against any mortgage broker who does not exercise due diligence in ensuring that information contained in stated income mortgages is accurate and not misleading.[9]

The Registrar has disciplined mortgage brokers for failing to perform due diligence when submitting mortgage applications on behalf of self-employed borrowers.

Kia (Re)[10]

In Kia (Re), a submortgage broker (Kia) failed to verify the incomes of self-employed borrowers before submitting mortgage applications for them. The Registrar noted that several factors were present in this case that should have alerted Kia to the need to conduct additional due diligence regarding the borrowers' incomes. **For example, in the case of one borrower:**

- Two significantly different stated incomes were submitted in loan applications to separate lenders within days of each other (an income of $85,000 was submitted to one lender and an income of $40,000 to the other);
- Both stated incomes were significantly higher than the applicant's line 150 income in their income tax return (only $10,000);
- The applicant's stated business expenses of $15,000 did not seem probable given that the applicant claimed to run an auto dealership; and
- Kia also failed to refer to any reliable financial documents to verify the applicant's stated gross business revenue of $100,000.

9 www.bcfsa.ca/media/1523/download
10 www.bcfsa.ca/media/249/download

Despite these inconsistencies and contradictions, Kia did not conduct due diligence to verify what the applicant's true income was. Instead, as mentioned, he submitted different loan applications to different lenders which included extremely different stated incomes for the borrower. In his testimony, Kia stated that he included different income amounts in the different loan applications because of differences in lender policies. The Registrar considered all of the evidence and determined that Kia breached his responsibilities under the *MBA*.

The Registrar stated that, when submitting stated income mortgage applications on behalf of prospective borrowers, the Registrar expects mortgage brokers to:

- Conduct reasonable due diligence to determine the actual income of the prospective borrower; and
- Accurately disclose the prospective borrower's income to the lender in the loan application.

The Registrar stated that "The actual income of a self-employed borrower must be determined and disclosed to a lender even when the lender's policy is to accept amounts higher than the borrower's actual income." Here, the Registrar found that Kia simply approximated the prospective borrower's income in the loan applications without taking steps to first corroborate the borrower's actual income. In the case of one borrower, Kia never reviewed any reliable records to verify their income. During the disciplinary hearing, Kia referred to a Notice of Assessment for the borrower and what it may have contained, but Kia did not provide a copy of the Notice of Assessment to the Registrar. It is unclear whether Kia ever obtained any of the borrower's financial documents for his brokerage's records. The Registrar found that Kia "knowingly failed to verify [the borrower's] actual income," and stated, "submortgage brokers must verify income and not rely on educated guesses as to what a borrower should earn."

The Registrar also stated that mortgage brokers must provide prospective lenders with complete information about an applicant's assets and debt, including information about concurrent loan applications. In this case, Kia submitted two separate loan applications to two separate lenders for two separate properties on behalf of the same borrower. However, Kia failed to inform either lender about the other loan application. This could have caused the lenders to misunderstand the applicant's true asset and debt profile and miscalculate the applicant's debt servicing ratios, especially if both loan applications were approved. Further, Kia failed to advise a lender that an owner-occupied property was expected to later become a rental. Mortgage brokers must advise lenders if an owner-occupied property is expected to become a rental, because lenders perceive rental properties to be riskier than owner-occupied properties.

The Registrar sanctioned Kia as follows:

- He was suspended for two years, required to successfully complete the "Mortgage Brokerage in British Columbia Course" as a condition of re-registration and required to cooperate with any audits by the Registrar (and pay the costs of the audits) for a two-year period after re-registration;
- He was prohibited from being a Designated Individual for seven years; and
- He was required to pay the costs of the disciplinary proceedings.

Kia later appealed the Registrar's decision to the Financial Services Tribunal. However, he was unsuccessful.

As a designated individual, consider reviewing your brokerage's policies and procedures to ensure that proper due diligence is carried out when working with self-employed borrowers. Submortgage brokers must be taught to take reasonable steps verify a self-employed borrower's income in all loan applications (e.g., request and review the borrower's financial statements or tax returns, complete with the statement of income and expenses). What steps are considered "reasonable" will depend on the circumstances of each transaction, including the sophistication of the lender (i.e., small or unsophisticated private lenders may merit more due diligence than large and sophisticated institutional lenders). Submortgage brokers should be trained to identify red flags in a file, such as inconsistent information from the prospective borrower about their true income, incomplete or missing backup documents, or logical inconsistencies. Missing or wilfully ignoring red flags could lead to reputational damage, civil liability, and regulatory sanctions. Submortgage brokers must be reminded to keep excellent records of due diligence carried out on self-employed borrowers, and any disclosures made to lenders. In the *Kia (re)* case, Kia claimed that he made important additional disclosures to lenders and underwriters by telephone, fax, and email, but said that he did not keep records of these disclosures because he expected the lenders to do so. Unsurprisingly, without documentary proof, the Registrar could not accept Kia's testimony that these critical disclosures were ever made. The Registrar further criticized Kia because he served as the designated individual of his brokerage, and thus should have understood the importance of record-keeping. Designated individuals should take heed of these comments and ensure that proper record-keeping practices and technologies are in place in their brokerages.

CO-BROKERING AND "FRONTING"

Mortgage brokers or submortgage brokers, either from the same brokerage or separate brokerages, sometimes work together to arrange mortgages. Remember that, in co-brokering situations, both brokers share liability for any compliance issues. Therefore, each co-broker should ensure that the information supplied to lenders by the other co-broker is accurate. Also, remember that all persons who arrange mortgages are subject to the registration requirement under the *MBA*. "Arranging mortgages" includes activities such as soliciting borrowers for mortgage referrals, taking mortgage applications, providing mortgage advice, and reviewing mortgage documentation.[11] Mortgage brokers who engage in co-brokering should be aware of the following guidance from BCFSA:

Mortgage brokers enter into co-brokering arrangements with other mortgage brokers when they share the responsibility to originate mortgages with other mortgage brokers [...] Mortgage brokers and submortgage brokers must ensure that they do not co-broker a mortgage transaction with a person in British Columbia who is not registered under the Mortgage Brokers Act, [...] Both brokers in a co-brokering arrangement are equally liable for the mortgage transaction and will share regulatory responsibility for compliance issues. However, if an individual in a co-brokering arrangement is not registered, and there are regulatory compliance issues with the transaction, it is likely that the registered broker will be the focus of disciplinary proceedings. In addition, ... compliance problems are more likely to occur in co-brokered transactions with unregistered individuals. In some cases, brokers who co-broker mortgages with unregistered individuals may be participating in fraudulent transactions.[12]

11 Information Bulletin – Making Mortgage Related Referrals: www.bcfsa.ca/media/1524/download
12 Information Bulletin – Co-Brokering: Requirement for Both Mortgage Brokers in a Co-Brokering Arrangement to be Registered: www.bcfsa.ca/media/1531/download

The practice of registered persons facilitating the mortgage brokering activity of unregistered persons is commonly referred to as "fronting." Fronted loan applications may include falsified documents that are used to mislead lenders and inflate an applicant's borrowing capacity. BCFSA considers fronting to be prejudicial to the public interest. There have been many regulatory decisions involving fronting arrangements. A registered person who fronts for an unregistered person will be the primary focus of BCFSA disciplinary activities. For example, in *Erfani (Re)*,[13] a registered submortgage broker, Erfani, allowed an unregistered person, Chaudhary, to use her Filogix account to submit falsified mortgage applications under Erfani's name. Chaudhary improperly provided mortgage arranging services to various borrowers despite not being registered under the *MBA*. Erfani never met with or took direct instructions from any of the borrowers. Erfani entered a consent order prohibiting her from ever re-applying for registration and requiring her to pay partial investigation costs of $15,000. Chaudhary testified before the Cullen Commission[14] and admitted to personally altering documents to support fronted mortgage applications.[15] Chaudhary explained that he had a network of registered mortgage brokers who fronted loan applications for him. Chaudhary stated that he typically did all the "legwork," like finding and meeting with borrowers. Then, Chaudhary would provide the registered mortgage brokers with all of the documents they needed to submit the loan applications into Filogix. If the loan were approved, the registered person would pay 25-30 per cent of their commission to Chaudhary, in cash. In 2021, two further notices of disciplinary hearing were issued by BCFSA against registered individuals who allegedly fronted for Chaudhary.[16] Additionally, in 2019, the Registrar issued a cease and desist order against Chaudhary under sections 21, 8(1.4), and 8(2) of the *MBA*.[17] The order was made on the basis that Chaudhary had secured over $511 million in total mortgage proceeds from lenders between 2009 and 2018, produced falsified documents in support of mortgage applications, and was supported by a network of real estate and mortgage professionals who facilitated his unregistered mortgage broker activity.

As a designated individual, consider reviewing your brokerage policies to ensure that they provide adequate protections in co-brokering or referral[18] situations. In one case, the brokerage of a submortgage broker who was sanctioned for fronting changed its practices to properly investigate all future referrals. A "referral" section was added to the brokerage's file documentation to collect information before working on the file.[19] Where mortgage applications originate from an external referral or co-brokering source, it may be prudent for the brokerage policy manual to require increased due diligence and designated individual oversight over the mortgage arranging process. BCFSA expects brokerages to conduct policy and procedures training for new staff, ongoing training for existing staff, as well as to periodically review and update policies and procedures where necessary.

13 www.bcfsa.ca/media/268/download
14 The Commission of Inquiry into Money Laundering in British Columbia, otherwise known as the "Cullen Commission", was established by the provincial government in order to investigate money laundering issues in the province. For more information, visit: https://cullencommission.ca/.
15 cullencommission.ca/data/transcripts/Transcript%20February%2024,%202021.pdf
16 www.bcfsa.ca/media/286/download; https://www.bcfsa.ca/media/288/download
17 www.bcfsa.ca/media/258/download
18 Note that some persons who make mortgage-related referrals are required to register under the *Mortgage Brokers Act*. BCFSA has provided guidance about the registration requirement for persons who make mortgage-related referrals: www.bcfsa.ca/media/1524/download
19 www.bcfsa.ca/industry-resources/mortgage-broker-resources/mortgage-brokers-forms#investorlender-information-statement

STATUTORY DISCLOSURES UNDER THE MORTGAGE BROKERS ACT AND THE BUSINESS PRACTICES AND CONSUMER PROTECTION ACT

There are three key disclosure requirements that apply to mortgage brokers under the MBA and the Business Practices and Consumer Protection Act ("BPCPA"). Careful compliance with these disclosure obligations ensures that consumers make informed mortgage decisions and also helps mortgage brokers avoid situations where clients are misled or surprised by certain aspects of a mortgage transaction.

Disclosure to Investors and Lenders – Form 9

According to section 17.1 of the MBA in a transaction where a mortgage broker:

(1) Arranges a mortgage in which another person is to be the mortgagee;

(2) Arranges a sale of a mortgagee's interest in a mortgage to another person; or

(3) Sells the mortgage broker's own interest as mortgagee under a mortgage to another person,

the mortgage broker must provide a written disclosure statement to the other person in the prescribed form. The prescribed form for this disclosure is the Form 9, which can be found on BCFSA's website.[20]

The Form 9 must be given to the lender/investor before any advances are made or, if the funds are paid into trust, before the funds are released from trust. Upon mortgage renewal, the mortgage broker must deliver an updated Form 9 to the lender/investor. A lender/investor is not obligated to advance funds unless the mortgage broker has provided the Form 9 to the lender/investor.

The purpose of the section 17.1 disclosure is to ensure that those lending money or investing in mortgages are provided with certain basic information about the transaction in which they are about to enter. This is important because mortgage brokers, especially those advising private lenders, may owe a duty to the lender/investor to ensure that the mortgage investment is one that is suitable for them. This prescribed form will allow key information to be succinctly presented to satisfy both the lender/investor's informational needs as well as the broker's compliance with statutory and other legal duties. A mortgage broker must retain a copy of the Form 9 for a period of at least seven years (section 17.2).

Despite the protection that the Form 9 may offer lenders/investors, the legislation recognizes the fact that certain parties are capable of sufficiently protecting themselves, such that a Form 9 is not necessary. The *Mortgage Brokers Act Regulations* state that a mortgage broker does not have to provide a lender/investor with a Form 9 if the lender/investor is a "sophisticated person." Sophisticated persons include savings institutions, insurance companies, and other mortgage brokers.[21] In addition to the exemption for sophisticated persons, there are other exemptions from Form 9 disclosure that relate to mortgages which are dealt with under the *Securities Act*.

More information on the Form 9 is available in BCFSA's Information Bulletin MB 11-005.[22]

20 www.bcfsa.ca/industry-resources/mortgage-broker-resources/mortgage-brokers-forms#investorlender-information-statement
21 The full list of persons who fall within this exemption is found in section 16 of the *Mortgage Brokers Act Regulations*
22 www.bcfsa.ca/media/1537/download

Conflict of Interest Disclosure to Borrowers and Lenders – Form 10

The *MBA* requires disclosure by a mortgage broker to borrowers and lenders of any direct or indirect interest the mortgage broker or any "associate" or "related party" of the mortgage broker may acquire in the transaction. The definition of "associate," for the purposes of sections 17.3 and 17.4, includes submortgage brokers employed by the mortgage broker.[23] In other words, the *MBA* places equal obligation to provide conflict of interest disclosure on both mortgage brokers (i.e., brokerage firms) and individual submortgage brokers. Furthermore, the disclosure must be provided to each person who is a borrower or lender in the transaction. The content contained in the disclosure should be identical, regardless of the recipient. Disclosure is made by way of a prescribed form known as the "Form 10," which can be found on BCFSA's website.[24]

As mentioned, both direct and indirect interests must be disclosed. A "direct interest" is one in which the interest is immediately known and flows directly from the transaction. It includes both monetary and non-monetary interests. BCFSA has provided a non-exhaustive list of common direct interests, including base commissions, known volume bonuses, and circumstances where the mortgage broker or a family member of the mortgage broker has ownership interests in the lender or the borrower. By contrast, an "indirect interest" is one in which the interest is not triggered immediately or obviously, but may be contingent upon other factors for it to be acquired. Indirect interests include any kind of benefit, monetary or not. Examples of common indirect interests include expected trailer fees payable if the borrower renews the mortgage with the lender, potential volume bonuses based on the amount of business the mortgage broker brings to a lender, and benefits arising from achieving a certain status with the lender.

Form 10 is concerned with conflicts of interest. A conflict of interest exists when there is a risk that a mortgage broker's advice to one party may be influenced by the interests of another party, including the mortgage broker themselves. For example, a commission payment from a lender creates risk that the mortgage broker will recommend that particular lender to maximize their own commission, rather than because the lender offers the best mortgage product for the borrower. The purpose of Form 10 disclosure is to ensure that all parties working with the mortgage broker are aware of any competing interests that may affect that mortgage broker's advice or service to them. That said, it should be emphasized that a mortgage broker does not have to assess whether or not a conflict of interest actually exists in a transaction before making Form 10 disclosure. The *MBA* simply requires that the broker disclose all interests (direct and indirect) that exist in mortgage transactions. Disclosing all interests provides complete transparency to borrowers and lenders involved in the transaction. This allows each party to make their own assessment of the factors which may influence the broker acting in the transaction.

23 The *Mortgage Brokers Act* Regulations provide detailed definitions of "associate" and "related party", which mortgage brokers should carefully review to understand their disclosure obligations. In particularly complex scenarios, mortgage brokers may also wish to obtain legal advice on how the definitions of "associate" and "related party" may relate to their own situations.

24 www.bcfsa.ca/industry-resources/mortgage-broker-resources/mortgage-brokers-forms#conflict-of-interest-disclosure-statement8239thinspborrower-and-lender8239thinspprescribed

This is not to say that mortgage brokers need not concern themselves at all with conflicts of interest so long as Form 10 disclosure is made. In some circumstances, a mortgage broker may need to take additional steps to deal with a conflict of interest, apart from simply providing Form 10 disclosure. For example, mortgage brokers should be particularly careful about conflicts of interest if they have entered a fiduciary or agency relationship with another person, as discussed in the *Mortgages and Client Relationship Topics* module. Mortgage brokers should also be cautious if their actions could, in light of a conflict of interest, amount to conduct that contravenes other sections of the *MBA*. Imagine a situation where a mortgage arranger is helping a borrower to refinance their mortgage, and receives confidential information from the borrower that the borrower is undergoing divorce proceedings and is desperate to refinance. The mortgage broker may be unsuccessful in arranging third party financing for the borrower. If the broker offered to lend the borrower money themselves, or through an associate or related party, on predatory loan terms, this might amount the broker taking advantage of the confidential information that they have about the borrower's personal circumstances. In this situation, even if the broker discloses its interest in the mortgage transaction using a Form 10, the broker may still be disciplined by BCFSA for engaging in conduct that is prejudicial to the public interest or unconscionable, in contravention of the *MBA*. Submortgage brokers should consult their designated individual about any concerns they may have about how to appropriately address conflicts of interest in their practice.

BCFSA recognizes that competing interests are not always avoidable, and that the existence of a conflict does not necessarily mean that the mortgage broker has committed any wrongdoing. However, conflicts have the potential to influence the objective performance of a mortgage broker's duties to their clients.

Form 10 disclosure must be provided to the borrower as early as possible before they sign the mortgage agreement or a related agreement that commits them to the mortgage. Form 10 disclosure must be provided to a lender on or before release of the funds from trust or the advance of funds to the borrower if the loan proceeds are not being held in trust. A copy of all Form 10s must be kept on file by the mortgage broker for at least seven years (section 17.5 of the *MBA*). It is also advisable to retain proof of delivery of the Form 10, as some parties who receive the Form 10 may choose not to sign it to acknowledge their receipt of it.

The Registrar expects mortgage brokers to provide Form 10 disclosure that is:

1. Clear and understandable (simple language, free of unnecessary industry or technical terminology);

2. Comprehensive, complete, and accurate (sufficient qualitative and quantitative information should be provided to fully describe interests); and

3. Meaningful to users (users should have a full understanding of the interests and be able to make informed decisions and otherwise act on the information).

Additionally, the Registrar expects that:

- Any interest which has a monetary value must be expressed as a dollar amount;
- Any interest which has no monetary value must be described in a manner that is true, plain, and not misleading; and
- If a related party or associate acquires an interest in the transaction, the nature of the relationship must be described clearly to enable users to understand the relationship.

Some exemptions exist from the Form 10 requirements. A mortgage broker is exempt from section 17.3 of the *MBA* if the matters required to be disclosed under section 17.3 have been disclosed in an offering memorandum or a prospectus prepared in accordance with the *Securities Act* and the offering memorandum or prospectus has been provided to every person who is a borrower or lender in the transaction who would otherwise have been entitled to receive a Form 10.

For further information regarding Form 10 disclosure, see BCFSA's Mortgage Broker Conflict of Interest Guidelines and Frequently Asked Questions ("FAQs").

Disclosure to the *Borrower under the Business Practices and Consumer Protection Act* ("*BPCPA*")

Part 5 of the *BPCPA* states that specified disclosure (sometimes referred to as a "disclosure statement" or "cost of credit disclosure") must be given by mortgage brokers and lenders to individuals who borrow for primarily personal, family, or household purposes, regardless of whether the broker or lender is charging additional fees or expenses. Where a mortgage broker arranges a mortgage loan and the lender does not carry on the business of lending money, the mortgage broker is responsible for providing the disclosure statement to the borrower.

The *BPCPA* does not contain prescribed disclosure forms, notices, or statements of account. However, it does prescribe the required content in sections 84 to 92. The *BPCPA* requires that disclosure be given to the borrower two business days prior to the borrower incurring an obligation under a credit agreement, unless the two-day period is waived by the borrower. Disclosure is also required at certain other times during the term of the mortgage, as specified in the *BPCPA*.

Because of the high cost of a mortgage in comparison to the average person's resources, protection of mortgage consumers is very important. Additionally, because of the complexity that can characterize mortgage finance transactions, the disclosure obligations imposed on mortgage brokers are designed to ensure that borrowers fully understand their mortgage transactions. Submortgage brokers should consult their brokerage's designated individual about any questions that they may have relating to their disclosure obligations.

CONCLUSION

Mortgage brokers are required to exercise due diligence in the course of their business. This means that mortgage brokers must take reasonable steps to ensure that the information they disclose to others is correct. Conducting due diligence does more than simply protect the mortgage broker from liability, it also improves the mortgage broker's reputation and the reputation of the industry as a whole. In this module, mortgage brokers learned about their obligation to verify information from borrowers before passing that information on to lenders. Mortgage brokers also learned about their obligations to conduct reasonable due diligence and provide complete disclosure when arranging stated income mortgages for self-employed borrowers. This module discussed mortgage broker obligations in co-brokering scenarios and the improper practice of fronting. Finally, key statutory disclosure obligations of mortgage brokers were reviewed.

Module Eleven: Land Assemblies

This module focuses on land assemblies: the acquisition of multiple parcels of land which share borders with each other but are owned by different landowners for the purposes of consolidating into a larger parcel for re-development. This module will discuss what a land assembly is, discuss the roles of licensees representing buyers and sellers involved in land assemblies, and identify certain advantages and disadvantages of various types of land assemblies. The module also discusses contractual considerations, including sample clauses, and seller defaults. Finally, the module explores the concept of de-stratification, also known as "strata wind-ups," being a modern type of land assembly responding to British Columbia's ("B.C.") stock of aging strata developments.

IMPORTANT NOTE:

Licensees need to understand the rescission provisions in the *PLA* and the *HBRP Regulation* and how they may apply to the transactions discussed in this module.

LEARNING OBJECTIVES

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

1. Understand the key features of a land assembly, including the multiple parties involved and the basic structure of the resulting transactions;
2. Explain the advantages, common challenges and pitfalls associated with open and closed land assemblies;
3. Describe common contract provisions that are used in land assembly purchase agreements and which are designed to protect the interests of different parties;
4. Understand strata wind-up procedures and applicable legal principles; and
5. Identify the legal and regulatory restrictions on licensee representation in the context of land assembly transactions.

11

WHAT IS A LAND ASSEMBLY?

The Basics

A land assembly is a land acquisition strategy. Often an individual parcel of land, especially a residential parcel, is too small to be useful for a development project. Land assemblies therefore involve a buyer acquiring more than one parcel of land from different selling landowners with the end goal of forming one or more larger parcels to develop. Land assemblies are typically undertaken by developers with the capital and organizational means of tying up and ultimately acquiring numerous lots to eventually develop. Nevertheless, an assembler with no intention of constructing a development may also seek to purchase multiple adjacent parcels to ultimately sell as a package to an interested developer for a profit. For ease of understanding, in this module the assembler or the buyer will be referred to as the developer.

Generally, there are two types of land assemblies: public and private. A public land assembly involves a government party acquiring multiple parcels of adjacent lands through expropriation. Conversely, a private land assembly refers to a land acquisition process where a developer negotiates and completes a series of transactions with willing landowners of adjacent lands. This module focuses solely on private land assemblies.

Land assemblies can involve different types and classes of properties, including vacant lots, residential homes, commercial or industrial properties, and stratified buildings. Land assemblies are increasingly popular in B.C. given the continuing shortage of suitable development sites in the province and the perceived win-win situation for landowners and developers. Land assemblies offer developers the opportunity to reconfigure existing land parcels into larger, more lucrative development properties. Developers are therefore able to capitalize on the need for higher density living and working in municipal areas which have been designated by new or amended official community plans, being official development plans in the City of Vancouver, that allow for and prioritize such density. Land assemblies also represent financial opportunities for existing landowners as developers are often prepared to pay above market values.

However, despite the capital potential of land assemblies for both developer and seller, these transactions have many challenges, complexities, and pitfalls. **These may depend on factors such as:**

- The location of the properties;
- The sophistication of the respective parties; and
- The number of parcels involved.

Land assemblies inevitably involve multiple parties with competing interests and motivations. A successful land assembly requires the cooperation and agreeability of all parties involved – landowners and developers. Land assemblies also often involve multiple licensees and lawyers, each motivated to secure the best deal for their respective clients.

REPRESENTATION IN LAND ASSEMBLIES

The Role of Licensees

Licensees dealing with land assemblies often have and require specialized experience in this field in order to effectively address client needs.

In particular, land assembly licensees should have ample knowledge of:

- Commercial real estate transaction processes;
- Commercial financing;
- Applicable zoning laws;
- Recent land sales;
- Current official community plans and official development plans; and
- Local factors (e.g., project support, political climate, etc.).

These are all important factors regardless of whether a licensee is acting for a developer or a seller. A developer's licensee in a land assembly also must have strong communication skills and extensive knowledge of the developer's proposed development. Land assemblies often involve landowners that remain hesitant or even refuse to sell to a developer, also known as a holdout, due to a variety of concerns. These concerns range from emotional attachment to their property, to fears the development will alter the character of their community. For land assemblies that occur over a long period of time, a seller's licensee will need to organize the sellers and keep them committed to their respective purchase agreements. In situations where the sellers are unrepresented, the developer's licensee will similarly need to keep sellers committed and organized, while being careful not to give the impression they are acting for the sellers or create a conflict of interest. A licensee should remember to act within their area of expertise and to advise the client to seek independent professional advice on matters outside the expertise of the licensee (see Real Estate Services Rules, Section 30(d)).

Developers and sellers should retain legal advice on any land assembly given the complexities of these transactions. In *Lalli v. Singh*,[1] the relevant parties to a land assembly prepared their respective purchase and sale agreements without obtaining legal advice. The B.C. Supreme Court ultimately declared the contracts to be too uncertain to be enforceable. For instance, the Court was unable to interpret or reasonably correct provisions establishing the timing and triggers for deposits and closing under the contract, which were ambiguously tied to municipal approvals without sufficient context or detail. This case serves to remind parties of the value of obtaining legal advice on any land assembly, particularly for preparing complex contracts of purchase and sale and options to purchase (as discussed more below).

Restrictions on Licensees and Potential Conflicts of Interest

Since 2018, the *Real Estate Services Act* ("*RESA*") and the Real Estate Services Rules restrict dual agency, except in rare circumstances. Consequently, a licensee cannot act for both a buyer and a seller except in remote locations that are under-served by licensees and where it is impracticable for the parties to be provided trading services by different licensees.

Many challenges therefore arise when licensees are not transparent about who they represent in a land assembly. Land assemblies inevitably trigger conflicts of interest due to the involvement of multiple parties. These challenges intensify when a land assembly involves unrepresented sellers. For example, consider the role of a developer's licensee in a land assembly. One of the most important skills for a developer's licensee is to build rapport with landowners with the ultimate goal of convincing the targeted owners to sell to the developer. However, in doing so, the developer's licensee may inadvertently cause the seller to misinterpret the licensee's conduct as representation and agency. In these scenarios, a developer's licensee must always clarify that they only represent the developer's interests and do not act for the seller. The developer's licensee must also inform the unrepresented seller on the risks of entering the transaction without representation. These types of disclosures should be clearly documented by use of the BCFSA's Disclosure of Representation in Trading Services and Disclosure of Risks to Unrepresented Parties forms, as applicable. Also, a developer's licensee should encourage unrepresented sellers to retain their own licensee and seek out legal representation.

1 2007 BCSC 396

While a licensee cannot represent both a developer and a seller in a land assembly transaction, it is possible for a licensee to represent multiple sellers. In a land assembly, a developer typically enters into separate contracts of purchase and sale ("CPS") with individual sellers. In that situation, a licensee can represent multiple sellers given that each CPS is a separate transaction from one another. This would seemingly make sense since the sellers would share a lot of similar interests and concerns and a licensee for multiple sellers can become very knowledgeable about the proposed development. However, this can easily give rise to a conflict, especially if at any point one of the sellers tries to advance their own interests ahead of the other sellers or if the licensee learns something about one of the properties that affects the interests of the other sellers.

As discussed above, holdouts are a common problem with land assemblies. What are the obligations of a licensee if the licensee learns that one of the sellers the licensee represents intends on holding out at the last minute? One way of dealing with this type of conflict is to ensure that all of the sellers are aware of the potential conflict at the outset and authorize the licensee to share among the sellers confidential information relevant to the shared interests of the other sellers in the transaction which the licensee represents. The licensee should ensure that such consent is provided in writing. To ensure transparency, it is also good practice for the licensee to collect all the sellers' email addresses at the outset and copy all the clients on communications pertaining to the transaction.

In addition, it may be advisable for the sellers to enter into one joint listing agreement for the sale of the assembled lands, rather than separate listing agreements. This type of agreement, typically prepared by legal counsel, can establish procedures for addressing potential conflicts should they arise. However, such joint listing agreements are not always advisable, particularly when one or more of the sellers is uncooperative with the other sellers or unreceptive to joint sales approaches. In those cases, a separate representation agreement may be more prudent. Licensees must always be cautious of potential conflicts of interest, especially when representing multiple parties. If it appears at the beginning of the proposed transaction that one or more sellers may not be aligned with other sellers, the licensee should recommend separate representation for them.

In the context of strata wind-ups, the same dual agency restrictions apply. Licensees cannot simultaneously represent the strata corporation and individual owners of the strata units forming the strata corporation. The strata corporation is legally treated as a separate entity with separate interests from that of its individual owners. Licensees must therefore always be careful to understand this distinction before agreeing to represent either the strata corporation itself, or one or more of its individual owners. For example, it would be a conflict of interest for a licensee representing a strata corporation to provide advice to an individual owner which, although beneficial to the owner, is not necessarily in the best interests of the strata corporation as a whole.

Finally, licensees cannot provide real estate services on a land assembly outside their licensed brokerage. For example, in the Real Estate Council disciplinary case of *(Re) Dhaliwal*,[2] the Real Estate Council discipline committee found a licensee committed professional misconduct by providing "trading services" (as defined under *RESA*) outside their brokerage. The licensee, while licensed with a brokerage, provided trading services to or on behalf of a developer in the licensee's capacity as development manager when he was in charge of land acquisition and assembly for the developer. The licensee should have provided those trading services through a service agreement between his brokerage and the developer. The licensee was suspended and required to pay a discipline penalty to the Real Estate Council.

TWO APPROACHES TO TYING UP LAND FOR A PRIVATE LAND ASSEMBLY

An early, but vital, consideration for a private land developer is whether to proceed with an "open" or "closed" negotiation strategy.

(1) Open approach

In an open approach, the developer is transparent with landowners about the proposed land assembly and development when negotiating the various purchase agreements. The developer may elect to adopt this approach as a strategy to foster cooperation among prospective sellers and get public support for the project. However, the open approach may also be the only option available to the developer if the public is aware of the developer's interest, or the prospect of keeping the assembly secret is unlikely or overly burdensome.

(2) Closed approach

In a closed approach, the developer elects to keep the land assembly secret until purchase agreements are entered into, or the titles of all of the parcels are secured with options to purchase, for all the properties needed for the proposed development. Under this approach, the developer commonly purchases the target lands with the assistance of numerous discreet licensees who do not tell the sellers very much information about the purchase, such as the fact that it is an assembly or that the licensee is, or is acting on behalf of, a developer.

Advantages of the open approach

Each of the two approaches described above has its benefits and drawbacks. A notable advantage of an open approach is that its inherent transparency may offer developers increased flexibility with respect to contractual terms.

Since the developer can openly reference the land assembly in purchase agreements with landowners, the developer can protect their interests by making individual purchase agreements subject to the successful purchase of all other lots in the assembly. The open approach model therefore offers a safety mechanism for developers. It also allows developers to proceed further with their development plans before fully committing to buying the lands. The developer would likely negotiate and be able to begin pursuing rezoning with the municipality without removing subject conditions.

Transparency under the open approach model can also work to earn trust among targeted landowners. Landowners are also more likely to engage in the process if they know they are receiving deal terms similar to their neighbours. This exhibits fair and equal treatment of the landowners. The open approach is also free from the risks and implications of detection associated with the closed approach.

2 2018 CanLII 12707

Disadvantages of the open approach

The biggest detractor from the open approach is the increased likelihood of holdouts. The reason for a holdout's refusal to sell varies on a case by case basis. However, there are generally two primary motives. First, a holdout may refuse to sell because they are aware of their land's development potential and corresponding value. In refusing to sell, the holdout hopes the developer will offer them more money in order to ensure the assembly succeeds and no further delays occur. Second, a holdout may refuse to sell due to sentimental attachment to their property or because they disagree with the proposed development in their community.

Whatever the motivation, holdouts can pose considerable risks to a land assembly. The inflated purchase price required to convince the owner to sell may impact the feasibility of the proposed project. If a holdout cannot be convinced, the significance of the holdout's specific parcel to the entire assembly may be detrimental. For example, if a holdout's property is on the outer boundary of a proposed development, the developer may be able to adapt its plans to no longer require that particular parcel. By contrast, a holdout parcel at the center of a proposed development or one of considerable size could frustrate the proposed development entirely.

While the increased likelihood for holdouts seemingly makes the open approach untenable, there are a number of contractual options available to developers to mitigate this issue, as discussed below.

Advantages of the closed approach

The primary advantage to a developer of a closed approach land assembly is the potential to negotiate lower prices for the parcels of land. Each seller may be unaware of their property's development potential, the value the developer attributes to the land, the importance of the property to the overall project, and the specifics of other contracts the developer has entered into with neighbouring landowners. A successful closed approach to assembling land also limits the likelihood of a financially motivated holdout. Apart from a favourable negotiation position, a closed approach can also mitigate against public dissent for and negative publicity surrounding the development project. If the developer can successfully purchase the required parcels of land without extensive public discussion, the developer can avoid community pushback during the early acquisition stages of the project.

Disadvantages of the closed approach

The primary disadvantage of closed approach land assemblies is the effect detection can have on the assembly. The success of a closed approach land assembly depends on the developer's ability to keep the assembly secret. If targeted landowners and community members uncover the secret assembly plans, they may interpret that secrecy as deceptive, leading to potential dissent and distrust towards the developer. For a reluctant seller with emotional or social motivations, this would be detrimental.

The potential success of a closed approach largely depends on the location of the targeted lands, the personalities of the landowners, the number of parcels involved, and the projected time frame for the acquisitions. The faster a developer can acquire its targeted parcels, the greater the likelihood the assembly will go undetected during the acquisition stage. A developer and its representatives are also more likely to maintain the required secrecy under the closed approach in more remote areas with less communication between neighbouring landowners. These are risks to be assessed based on the individual characteristic of the assembly.

As we know, people in B.C. love to talk about real estate prices. Due to the direct correlation between faster information dissemination and the failure of a closed approach land assembly, the closed approach is becoming less and less common. Using a confidentiality provision and discreet developer agents to purchase land secretly can help keep closed approach land assemblies from becoming public knowledge. Nevertheless, modern forms of communication and access to public land and corporate registries greatly increases the risk a secret land assembly will be detected before the targeted lands are under contract.

The closed approach to land assemblies also limits a developer's options with respect to the conditions to include in a conditional contract as the developer cannot let on that a land assembly is happening, such as including the assembly condition or other open approach contract provisions.

PURCHASE CONTRACT CONSIDERATIONS

While legal advice and preparation of legal documents is key to the land assembly process and eventual completion of land assembly transactions, it is common for a licensee to be involved with preparing or reviewing a CPS for properties that are the subject of a land assembly. The majority of assembly contracts are conditional contracts, meaning a contract subject to conditions precedent. It is also possible to have options to purchase, where the developer acquires the right to purchase the property at their discretion. Options to purchase are not commonly used but offer a primary advantage of being registrable on the target property's title. In recent years, most assembly arrangements are made by conditional contracts which include the registration of an option to purchase at the B.C. Land Title Office ("LTO"), as further discussed below.

Conditional Contract Provisions

In a land assembly, licensees drafting a CPS should consider including some of the following contractual provisions, as applicable. **Below, we have given some sample, relatively simple clauses that can be used.** Often, more complex clauses may need to be used. If a licensee has any doubts or concerns about any clauses, the licensee should speak to their managing broker. The licensee should also recommend that the client seek legal advice.

- Subject conditions: Subject conditions are terms that, if included in a contract, mean the performance of some of the provisions of that agreement (for instance, the obligation to complete) are not due unless and until the conditions are satisfied or waived. Notably, this does not mean that the parties have not yet entered into an enforceable contract. While such conditions remain unfilled, the parties remain subject to a binding agreement. It is also important to note that the party benefitting from such a condition has the obligation to use reasonable efforts to satisfy the condition. This was confirmed by the Supreme Court of Canada in *Dynamic Transport Ltd. v O.K. Detailing Ltd.*[3] For example, if a CPS is subject to a condition that the developer obtain satisfactory financing for the transaction (being a common subject condition in real estate transactions), the developer is under a duty to act in good faith and take all reasonable steps to obtain satisfactory financing to complete the purchase. Otherwise the developer may be in default under the contract. The same good faith obligation applies to the following subject conditions commonly found in land assembly purchase agreements:
    - **Assembly condition:** An assembly condition requires that the developer must enter into a binding CPS with every property in the proposed assembly prior to the subject CPS being firm. An example of this provision would be:

        [...] subject to the Buyer entering into agreements of purchase and sale, in aform satisfactory to the Buyer, in its sole discretion, in respect of each of the following properties: [...]

        There are two primary advantages to such a condition. First, the developer can ensure that it is able to sway all holdouts to sell before committing to the assembly. Without such a condition, a developer may be at risk of being bound to purchase only a portion of the parcels necessary for its assembly. Second, the assembly condition can work to gain active support amongst willing sellers once they realize their sales proceeds will only be realized once all other property sales are successfully negotiated. Such peer pressure reduces the likelihood of a holdout. This condition is not available under a closed approach land assembly as its presence in a contract would tip off the seller that the developer is planning a land assembly.
    - **Rezoning condition:** If the existing zoning for the parcels does not align with a developer's intended development project, the developer will want to make sure the land can be rezoned before committing to the purchases. The CPS should therefore require the seller to cooperate with the developer on the rezoning. This could include allowing the developer to put up signs on the lands pertaining to the rezoning application, to engage in discussions with local government and to commence the rezoning application itself. From the developer's perspective, ideally the CPS would be conditional on the rezoning completing. However, the seller typically will not want to permit its land to be fully rezoned until closing has occurred as, among other things, the rezoning could result in higher property taxes for the landowner. As a compromise, the developer should consider arranging for its CPS to be conditional on the developer obtaining at least third reading for the rezoning, as this affords the developer with a reasonable degree of certainty it will achieve rezoning from the local government. Such a condition also protects the seller's interests as, if drafted properly, the rezoning condition is satisfied upon third reading being obtained, thereby committing the developer to purchasing the applicable land before the rezoning is officially approved by the municipality and legally enacted

3 [1978] 2 SCR 1072

at fourth reading. This is also a condition which is not available under the closed approach land assembly.

- Feasibility condition: A feasibility condition is a fairly general condition that allows the developr to walk away if the developer determines that the proposed project is not feasible. This provision must be drafted carefully as the condition cannot be so vague that it renders the entire CPS too vague to be enforceable and the CPS is in actuality an option to purchase, versus a conditional contract. This is a condition which can be used under the open approach as well as the closed approach. With respect to an open approach, it would be advisable to include the adjacent properties as well as the subject property in your provision. With a closed approach, the condition should not include any reference to the redevelopment or assembly of the lands.

- **Options to Extend:** Especially under the closed approach, developers should consider providing themselves with multiple extensions to the due diligence period, usually to be exercised in exchange for a payment to the seller which is credited to the purchase price. This gives the developer time to tie up other lands before committing to closing on a particular parcel, however, the developer will need to stay on top of its condition dates to make sure nothing is missed! An example of this provision would be:

  The Seller agrees to give to the Buyer ___ options to extend the Condition Waiver Date by up to one (1) month each up to a maximum of _____ months. For each of the _____ times the Buyer may exercise this option, the Buyer shall pay to the Seller a non-refundable fee of _____ Dollars ($____.00). The non-refundable fee shall be paid directly to the Seller and shall form part of the Purchase Price if the Buyer completes the purchase of the Property.

- Closing conditions: Similar to subject conditions, closing conditions help developers address the risk of being unable to successfully close purchase agreements with all targeted owners. Despite entering into a purchase agreement with an owner, the developer still faces the risk that a seller will default under the CPS, especially if there is a long period of time between subject removal and the closing date. This can be a recipe for seller's remorse, especially if the property values have risen in the interim. An effective way of protecting the developer against this is to make an assembly condition both a subject condition and a closing condition, meaning that if any CPS in the assembly fails to close then the developer is no longer obligated to complete the other CPS in the assembly.
- **Most favoured nation:** A most favoured nation clause ("MFN") is an effective tool to mitigate against strategic holdouts. A seller who enters into a purchase agreement featuring an MFN is entitled to any higher sale price, based on proportional area of their property, the developer negotiates with subsequent sellers in the proposed assembly footprint. In other words, a seller with an MFN clause will see their own sale price increase if their neighbours subsequently negotiate with the developer for a proportionately higher sale price. Therefore, an MFN removes the incentive for sellers to holdout since the seller can achieve a higher sale price without having to strategically delay negotiating with the developer.

- **Delayed possession:** Delayed possession involves executing a purchase agreement whereby the possession date thereunder is set to occur after closing, often months later. The terms of the delayed possession are typically set out in a separate agreement between the developer and seller, whereby the developer agrees to permit the seller to remain in the property after completion on an "as is, where is" basis. Delayed possession agreements are particularly valuable as they allow the developer to avoid paying speculation and vacancy tax, and/or empty homes tax on the properties, while co-ordinating municipal approvals for their development. In addition, with the original owners still occupying the property, the developer does not need to board up the vacant property to avoid the risk of potential break-ins, vandalism, or squatters. Sellers may be able to leverage this developer predicament and negotiate a rent free delay in possession period. Delayed possession also allows sellers to access the sale proceeds while still having premises to occupy. This provision is more often utilized in an open approach land assembly than a closed approach, as the developer's true intentions will likely become evident at some point during the seller's possession, which might not be well received. An example of this provision would be:

  > *Notwithstanding the possession date set out in this Contract, provided the purchase and sale of the Property completes on the Completion Date in accordance with the Contract, then the Seller may, at its option, continue to remain in possession of the Property following the Completion Date until no later than _____ (the "Vacant Possession Date"), and the Buyer will have vacant possession of the Property from and after the Vacant Possession Date. In order to exercise such option, the Seller must execute and deliver to the Buyer a delayed possession agreement (the "Delayed Possession Agreement") in the Buyer's form. If the Seller fails to execute a Delayed Possession Agreement, then the Possession Date for the Property will be as set out in Section ____ above.*

  The primary concern with a delayed possession agreement from a developer's perspective is the inadvertent creation of a tenancy governed by the *Residential Tenancy Act* ("*RTA*"). To avoid the robust protections and rights offered to tenants under the *RTA*, the agreement must clearly stipulate that it does not create a tenancy. Rather, it is merely the intention of the parties that the date of vacant possession of the property under the purchase agreement is delayed to such date as set out in the possession agreement. Such agreements also typically include the right for each party to terminate the arrangement on short notice.

  In any case, in B.C. there appears to be no judicial or Residential Tenancy Branch ("RTB") consideration of the enforceability of delayed possession agreements relating to sellers maintaining possession after completing the sale of their property. Licensees are therefore cautioned that, irrespective of a party's intent to avoid creating a residential tenancy, a court or the RTB may treat a delayed possession agreement as a tenancy subject to the *RTA*. Relying on Section 5 of the *RTA*, a court or the RTB may view a delayed possession agreement as an attempt to "contract out" of residential tenancy law. For this reason, parties are advised to obtain legal advice before entering into a delayed possession agreement.

- **Assignment:** In order to avoid paying unnecessary property transfer tax and to facilitate the subsequent consolidation of the lands, it is vitally important all lands under an assembly are conveyed to the same registered owner. Since developers under the closed approach will likely enter into purchase contracts using various agents or shell entities as the named buyer, assignment clauses, if properly drafted and exercised, ensure that on closing the purchased interests will pass freely to the same developer entity. An assignment clause should include an unconditional right for the developer to assign their interest without the seller's consent, or at least the right to direct the seller to transfer title to a named nominee. Flexible assignment clauses are also common in open approach land assemblies wherein smaller developers enter into numerous purchase agreements for various parcels and proceed to assign the interests in those agreements to larger developers with the resources available to close on the CPS and begin development. For a sample assignment clause, see the "Clauses" page on BCFSA's Knowledge Base. Licensees should also remember to consider their licensee obligations regarding assignment terms under Section 8.2 of the R*eal Estate Services Regulation*.
- **Confidentiality:** For the purposes of a closed approach land assembly, a confidentiality provision is imperative. An example of such a provision for a closed approach land assembly would be:

  The Seller agrees to keep the existence and terms of the Contract (including the Purchase Price) strictly confidential, except that this duty of confidentiality shall not apply to any information that becomes generally available to the public, except where made available in violation of this section, or must otherwise be disclosed by operation of law or by order of a court of competent jurisdiction. The Seller may also give any such confidential information, on a confidential basis, to its directors, officers, employees, legal and financial advisors, and consultants for the purposes of assisting with this transaction.

  One notable issue with this confidentiality provision is it is only enforceable once the contract is fully signed and binding. Accordingly, the developer's licensees should consider having the parties sign a Non-Disclosure Agreement before commencing initial contract discussions to ensure confidentiality throughout the negotiation period.

Deposits

As sellers are typically financially motivated, setting out an appealing deposit structure is important. A common feature of assembly contract deposits is that the initial deposit payable upon execution of the CPS is nominal but later increases by way of a second deposit after subjects are removed. A second common feature is that the first and second deposit are often released to the seller in advance of closing. This comes with a catch: the release of a deposit is typically timed so that all conditions have been removed and the seller has provided the developer with a registrable option to purchase, as discussed below. However, there is still a risk that the seller could default and refuse to sell. In such a situation, it may be very difficult to get a released deposit back, despite the developer's entitlement to it. For this reason, deposit amounts are usually not very large.

Registrable Options to Purchase

While an option to purchase agreement is a now rarely used alternative to the conditional contract, a registrable option to purchase is commonly used nowadays as a supplemental piece to the conditional contract. A registrable option to purchase is an agreement that can be registered in the LTO as a charge against the title of the subject property. Having a charge on title helps secure the property, especially in land assemblies that are structured to have a long period between condition removal and the completion date, by preventing the seller from transferring the property to anyone else and providing notice to the world that the developer has purchase rights to the property. While a provision in a CPS to commit to an option to purchase is simple in theory, it takes some careful contract drafting to make sure the timing lines up with the condition removal date and the date deposits are released. An example of a simple option to purchase provision would be:

> *The Buyer's solicitors shall prepare and deliver to the Seller a draft form of registrable option to purchase the Property in respect of this transaction. Upon full registration of the Option to Purchase against title to the Property, the Deposit shall be released from the Buyer's solicitors directly to the Seller.*

The developer's lawyer will be needed to assist with preparing and registering the registrable option to purchase, which the seller's lawyer may review and comment upon. It is important to consider that work when planning the timing of the deposit release and it is prudent to ensure the signed CPS is passed onto the developer's lawyer as soon as possible.

SELLER'S DEFAULT

Despite the various contractual protections afforded under open and closed approach land assemblies, there is always the risk that a seller will default under the terms of the purchase agreement. A default can seriously jeopardize the proposed development project and will inevitably lead to delays and added costs. However, there are legal remedies available to a developer in the case of seller default.

The most common remedy for a breach of contract is monetary damages. Damages are intended to compensate the wronged party and to put the wronged party in the financial position they would have been in if the breach did not occur. However, this is not particularly helpful in the context of a seller default under a land assembly purchase agreement as the developer may have already acquired the other parcels for the assembly.

As an alternative to monetary damages, the developer may be able to sue the seller for specific performance. Specific performance is a special remedy reserved for situations where monetary compensation will not adequately address a party's losses. Through specific performance, a court orders a party to actually perform its promise under the CPS. In the case of a purchase agreement in a land assembly, the court can order the seller to sell the property to the developer rather than pay damages for the default.

To achieve this result, the court must be satisfied that an order to sell the property is the only available remedy to adequately compensate the developer. In particular, courts consider the "uniqueness" of the property in question. In the context of land assemblies, the court will consider whether the property in question is integral to the proposed development in the sense that the developer's plans will be derailed or sufficiently affected if the sale does not transpire. Finally, specific performance can only be ordered if it can be delivered by the seller. If the developer does not file their claim quickly and the seller has already sold the property to an innocent third party, a court is unlikely to undo the innocent party's purchase. Given all of these requirements, specific performance can be difficult to accomplish. Considering the difficult nature of specific performance, registering an option to purchase is advisable. Upon tying up a piece of property, arranging for an option to purchase to be registered on title will help ensure it is not sold to a third party while the developer assembles the balance of the lands.

In *Pennyfarthing Construction Co. Ltd. v. Li*,[4] the court ordered specific performance of a purchase agreement in a proposed land assembly, having been satisfied the developer established the property in question was unique. The developer had already acquired ownership of two contiguous properties to the north and south of the disputed property. Without the property, the two acquired properties would be of little use to the developer and the land assembly would not be possible.

Conversely, in *1124259 BC Ltd. v. 1069185 BC Ltd.*,[5] the court refused to order specific performance after a seller defaulted on its purchase agreement with a developer seeking a land assembly. The court found that the proposed assembly plan was unclear and it was unlikely the developer would be able to acquire the adjacent properties required to execute the assembly.

4 2016 BCSC 1959
5 2018 BCSC 1655

DE-STRATIFICATION (STRATA "WIND-UPS")

A strata wind-up or de-stratification is a specialized form of land assembly. In most cases, strata wind-ups occur in older strata complexes that are no longer financially viable or stable ventures due to aging infrastructure and increasing insurance and maintenance costs. Strata owners may seek to pursue a wind-up to capitalize on the increasing land and development value tied to a strata when land values exceed the aggregate value of the individual strata lots and the common property. Older strata complexes also tend to be zoned for medium density. Strata wind-ups therefore enable developers to acquire desirable development sites and rezone them for greater density and building allowances, thereby unlocking their redevelopment potential.

The *Strata Property Act* ("*SPA*") allows strata corporations to "wind-up" with an 80 per cent supermajority vote. If the strata corporation has five or more strata lots, the strata corporation must also obtain an order from the B.C. Supreme Court confirming the winding-up resolution approved by the strata corporation.

Strata owners who seek to voluntarily cancel a strata plan and wind-up will typically use a lawyer and a liquidator to assist with and co-ordinate the wind-up process, deal with the disbursement of wind-up related revenue and expenses, and work with the licensee to negotiate and complete the sale of the entire complex to the third party, or any combination of these tasks. The range of tasks the lawyer, the licensee, and the liquidator are responsible for generally depends on where in the wind-up process the lawyer is retained, the licensee is engaged, and the liquidator is appointed, which generally depends on the strata owners' collective inclination to wind-up. It is possible to complete a strata wind-up without a liquidator, for example, in a perfect strata corporation where there is a proactive strata owner leading the process and every other strata owner is agreeable and keen to sell. While a lawyer and a liquidator carries certain costs, the strata council can rely on the liquidator's specialized expertise in the winding up process where complexities can easily arise.

Strata wind-ups involve complex procedural processes and carry considerable costs in terms of both time and money. The *SPA* requires strata owners who voluntarily elect to wind-up to pass a resolution requiring an 80 per cent supermajority vote and file other documentation that strictly adheres to the legislation. For instance, in *The Owners, Strata Plan VR 1966, (Re)*,[6] the court declined to approve a strata wind-up because the required 80 per cent supermajority resolution failed to adhere to the strict requirements set out in the *SPA*. It was also contested in *Buckerfield v. Strata Plan VR 92*[7] as to whether the 80 per cent supermajority vote needed to occur before listing a strata complex for sale. On appeal, it was determined that the strata corporation may decide by a majority vote resolution to list the development for sale, provided that the listing contract and any contract of purchase and sale is subject to the supermajority vote. These cases demonstrate the procedural complexities of strata wind-ups. As well there are cases arising from minority dissenters who contest the validity of a successful 80 per cent supermajority vote. An example of this is *Strata Plan NWS837 (Re)*.[8] The B.C. Supreme Court confirmed the 80 per cent supermajority resolution despite the dissenter's allegations that the process leading up to the 80 per cent supermajority vote was unfair and that permitting the wind-up and sale to proceed would result in "significant unfairness" and "significant confusion and uncertainty." Therefore, licensees involved in strata wind-ups should always ensure their clients seek out professional and experienced legal representation to successfully carry out their voluntary wind-up.

CONCLUSION

Land assemblies are complex and nuanced transactions. Before representing a party in a land assembly, it is important for licensees to understand and consider the key features of these transactions, the interests and motives of the different parties, and the various challenges and pitfalls associated with land assemblies. It is again important for licensees to remember their obligation to advise a client to seek independent professional advice on matters outside of the expertise of the licensee. If approached and undertaken properly, land assemblies represent worthwhile opportunities for licensees and their clients (whether they be developers or existing landowners).

6 2017 BCSC 1661
7 2019 BCCA 196
8 2018 BCSC 564

Module Twelve: On The Radar – Accuracy

This article discusses the importance of a licensee obtaining and providing accurate information. The consequences of providing inaccurate information can be great, including discipline by the regulator and civil law suits by clients and non-clients.

LEARNING OBJECTIVES

By the end of this article you will be able to:

1. Understand the discipline consequences of failing to provide accurate information;
2. Understand the importance of discussing relevant information with clients and non-clients; and
3. Identify some steps a licensee may take to avoid providing incorrect information.

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INTRODUCTION

Accuracy is a very important issue for all licensees. Licensees are often the subject of civil cases and discipline matters because licensees have not researched accurate information, assumed information provided to them was accurate, or provided inaccurate and incomplete information to clients and non-clients. Licensees should always be asking themselves: "Is this true and correct? How do I know it is true and correct?"

A bit later in this article, we will discuss two recent civil cases dealing with accuracy. We will begin with some discipline cases.

ACCURACY – DISCIPLINE CONSEQUENCES

Warning Signs

There may be warning signs that should cause you to check whether the information is accurate. In *Re Scherer*[1] the licensee was disciplined because she, as the listing agent, failed to use reasonable care and skill when she advertised a property as measuring 9,329 square feet when the actual size was considerably smaller. The information was taken from BC Assessment Authority data. The certificate of title listed a covenant which referred to a greenbelt. The licensee had viewed two aerial photos of the property which showed it to be an irregular shape. As part of the closing, the buyer's lawyers received a land survey requested by the bank. It showed the lot's size as approximately 7,556 square feet. The licensee acknowledged that on receiving the aerial views of the property and seeing the irregular shape she should have further investigated to determine the accuracy of the advertised lot size. The licensee was disciplined for failing to use reasonable care and skill. While the case focused on the seller's agent, licensees have also been disciplined when acting for buyers and not providing correct information for their buyer clients.

Strata Management

Strata managers have often been disciplined for accuracy issues. In *Re Eisenhaur*[2] the licensee authorized payment of an invoice that did not pertain to the strata client and charged the invoice to the strata client's expense account. The licensee also failed to provide owners' correspondence, strata meeting agenda, and supporting documents to the strata client within 48 hours as per the terms of the service agreement. Being accurate means carrying out your duties in accordance with any service agreement.

Reliance

In *Re Leong*,[3] the licensee relied on information contained in a previous listing. There was an accessory building separate from the house, which was advertised as ideal for a studio or guest bedroom. The licensee had a floor plan prepared for the property that indicated the second floor of the accessory building was a bedroom. After the buyers took possession, they were advised by the City of Victoria that the accessory building could not be used as a bedroom. The licensee acknowledged he should have taken further steps to confirm the accuracy of the listing information and was found to have committed professional misconduct.[4]

Information provided to lenders

- As discussed in the *Due Diligence and Disclosure Topics for Mortgage Brokers module*, if you arrange mortgages, you must ensure that the information provided to lenders is accurate. That includes information from the borrower that the mortgage broker provides to the lender. The failure to provide accurate information to lenders can create problems for both borrowers and lenders and may be considered mortgage application fraud. Mortgage brokers may face regulatory and civil consequences for providing inaccurate information to lenders.

1 2011 CanLII 76226
2 2014 CanLII 84968
3 2020 CanLII 63596
4 www.bcfsa.ca/industry-resources/real-estate-professional-resources/knowledge-base/practice-resources/property-measurements?hits=floor,measurements,measurement#computation-of-square-area

Failing to inquire about accuracy

A licensee may in certain circumstances be disciplined for failing to ensure the accuracy of information provided by the seller and given to the buyer. In *Re Toor*[5] the licensee acted as a limited dual agent, permitted at the time the facts occurred.

The licensee was found to have committed professional misconduct while representing the seller, the owner builder of a new home, in that, among other things the licensee:

- Failed to ensure the seller had complied with the provisions of the *Homeowner Protection Act* ("*HPA*") and met the conditions for selling the property prior to listing the property; and
- Failed to make sufficient inquiries of the seller or with the BC Housing New Homes Registry to confirm the accuracy of the documents he had received from the seller.
- The licensee was found to have committed professional misconduct while representing the buyer in that, among other things, the licensee failed to:
- Take sufficient steps to ascertain whether the seller had complied with the provisions of the *HPA*;
- Ensure the buyer received a copy of the Disclosure Notice required under the *HPA*; and
- Include a term in the contract that indicated the Disclosure Notice had been provided by the buyer.

Subsequent Consequences

The issue of accuracy can arise in a qualification for licensing hearing. In Re Singh[6] the applicant had been a mortgage broker and was applying for a trading services licence. As a mortgage broker, he had been disciplined for, among other things, submitting 17 mortgage applications to lenders containing misleading income information, failing to obtain tax documents and income information directly from a borrower (instead accepting them from a third party), and failing to conduct due diligence on income information on several borrowers resulting in the submission of misleading information to lenders. While the applicant was successful in the application, licensing was subject to 21 conditions, including conditions relating to supervision, frequent meetings with the managing broker, and keeping the managing broker informed of real estate services being provided. The failure to seek out and provide accurate information can have long lasting consequences.

ACCURACY - CIVIL CASES

Property Transfer Tax ("PTT")

Shave v Century 21 Assurance Realty ("*Shave*"),[7] highlights the perils of a licensee failing to ensure the client read and understood the contract of purchase and sale, and failing to ensure that the contract, as drafted by the licensee, was accurate. The buyers had recently moved to BC from the United Kingdom for work. The licensee, the designated agent for the buyers, was aware of this. The buyers made a conditional offer on a property. The offer contained a representation that the buyers were not Canadian citizens or permanent residents of Canada. That was true. The transaction did not proceed.

5 2019 CanLII 37495
6 2020 CanLII 118732
7 2022 BCSC 183

The buyers travelled to the United States to finalize their work visas. The licensee misunderstood what the buyers said about the trip and thought that the buyers had obtained their permanent residency. The buyers made an offer on a different property. The licensee changed the Canadian residency declaration to "yes" without confirming that with the buyers. While the licensee had thoroughly reviewed the first offer in person with the buyers, the licensee did not review the second offer with the buyers. Instead, the licensee sent it by email for electronic signature by the buyers, asking them to read it carefully. The licensee did not bring the residency change to the attention of the buyers. After the transaction completed, the province charged the buyers with the 20 per cent additional tax, commonly known as the "Foreign Buyers' Tax" – almost $175,000.

The court found the licensee 75 per cent liable, the buyer's lawyer 20 per cent liable and the buyers five per cent liable. The court found the licensee had a duty to advise the buyers of the existence of the tax. However, the licensee did not need to advise on whether the tax would be payable. The licensee needed to bring the issue to the attention of the buyers so they could seek appropriate advice. The judge stated "I find that any reasonable realtor would understand that the risk, or the requirement, of paying an extra 20 per cent for a family home would be an extremely important piece of information for prospective purchasers." Further, the judge found that the licensee was also negligent when he made a change on the standard form contract for the second offer despite knowing that the buyers had declared that they were not permanent residents in the first offer. Having the information that the buyers were not permanent residents at the start of his retainer, the licensee clearly had an obligation to confirm their status at the time of the second offer. The licensee's explanation for the change was the licensee's understanding that the buyer's citizenship was "finalized" when they made their trip to the United States.

Lessons learned

There are many lessons to be learned from the Shave case. First, you do not have to be an expert on matters of Property Transfer Tax ("PTT"). You need to advise potential buyers of the existence of the tax, but beyond that, you need to send the client to a professional advisor for proper advice. Second, do not make changes to documents without thinking about the change. Why are you making the change? Are you sure of the facts that would cause you to make a change? In *Shave*, the licensee did not raise the change with the buyers. Third, if using electronic signatures, do not forget to still use the same diligence and skill you would use in explaining the terms of the contract. As the BC Supreme Court stated in *Price v Malais*[8] "...lay people, like the vendors, will usually sign documents prepared for them by experts. They assume, understandably, that everything is all right, as their advisors would tell them if it wasn't so."

Agricultural Land Reserve

Another important recent court decision is Lu[illegible]ry Holding Corp. v Fyfe.[9] This is a very long case which touches on a number of subjects, including, as described by the court, the "client" relationship, the dual agency relationship, implied agency and the "customer" relationship. As part of the discussion, the judge examines the duties owed in each of those relationships. The problem in the case arose because the buyers (plaintiffs) claimed that the listing agent (one of the defendants along with the brokerage and the licensee's personal real estate corporation) should have advised them that there was an Agricultural Land Reserve ("ALR") boundary review underway and that the property ("Property") had been identified as the subject of a proposed change in status. The buyers also complained that the licensee did not tell them about the option ("Option") they had to opt out of the ALR inclusion. In this case, accuracy involved whether the information given to the buyers was complete.

8 1982 CanLII 751 BCSC
9 2021 BCSC 167, appealed, but appeal allowed only to the extent to rectify damages for lost profits. 2022 BCCA 185

The sellers answered "yes" in the Property Disclosure Statement ("PDS") to the question "Is the Land in the Agricultural Land Reserve?" The PDS provided further detail: "an estimated 100 acres is in the ALR, 60 acres is out of the ALR." The buyers wanted to buy the Property to build a resort focused on executive retreats. The buyer told their plans to the licensee. The buyers viewed the Property with the licensee in August 2013. At the same time, there was an ALR boundary review. The licensee attended a boundary review hearing, and it was alleged that the licensee had also received correspondence relating to submissions regarding the ALR boundary. The buyers made some inquiries of the licensee about roads, access, power lines, and rights of way to which the licensee responded. The licensee did not advise the buyers to retain their own real estate agent or any other professionals. The buyers, residents of Alberta, had a lawyer in Calgary. They did not ask the lawyer to research the ALR issue.

In early April the buyers emailed the licensee stating they wanted to make an offer on the Property. At that time, the licensee sent a link to certain purchase documents including the PDS, the Working with a REALTOR® brochure and the standard form contract of purchase and sale. The licensee did not provide an explanation of any of the documents. The buyers elected the customer relationship. The contract was executed on November 13, 2013. November 18, 2013 was the Agricultural Land Commission ("ALC") deadline for owner responses to avoid inclusion of their property with the ALR. The deal completed on November 29, 2013. On January 22, 2014, the ALC included all of the Property in the ALR.

The plaintiff buyers commenced planning work to develop the Property. In June 2014, they applied for a permit for the development to the Regional District. They were informed that a portion of the Property known as the "North Site" now lay within the ALR as a result of the inclusion and the permit could not be approved. The plaintiffs eventually abandoned their original plans and pursued other plans for the Property, claiming against the defendants for costs thrown away in pursuing their original plan and increased capital costs for their alternative plan.

The judge reviewed the nature of the relationship. The buyers claimed there was an implied agency relationship. The licensee argued there was simply a customer (non-agency) relationship. The judge found, based on the extensive dealings with the buyers which amounted to providing trading services and the lack of discussion about the nature of the relationship, there was an implied agency relationship. As such, the licensee was obligated to advise the client to seek independent professional advice on matters outside the expertise of the licensee, to disclose to the client all known material information respecting the real estate services and the real estate to which the services relate, and use reasonable efforts to discover relevant facts respecting any real estate the client is considering acquiring (quoting the Real Estate Services Rules as they existed at that time). Clearly the licensee did not provide accurate information on the ALR status. What was provided in the PDS was incomplete. With respect to the information in the PDS, the court commented "But if the split was material, then so was the known proposal for this split to change. The licensee knew for a fact that there was a proposal to bring the entire Property into the ALR." With respect to the Option to opt out of the ALR, the court commented that the licensee knew the Option was available but did not know how or when it might expire. The licensee did not let the buyer know that the buyer, as the new owner, could be in a position to exercise the Option. The court also referred to section 5-13 of the Real Estate Services Rules (now section 59) concerning the disclosure of material latent defects. As mentioned, the licensee knew about the buyer's plans to build a commercial resort on the property, and therefore, should have disclosed the proposed ALR inclusion to the buyer as a material latent defect.

The judge found that even if the relationship were only a customer relationship, the licensee had a duty to disclose the available agency options, to promptly inform the buyers of the ALR boundary review, and to urge the buyers to seek independent advice on the suitability of the Property for the proposed use. The judge cited a number of cases in this regard, including *McGuire v Kernel Construction & Development Ltd*[10] where the court found that a real estate agent has a duty to disclose all material facts known to them which could affect a reasonable purchaser's willingness to enter into an agreement of purchase and sale. The judge also referred to McIntosh v Papoutis[11] where the court found "real estate agents have been found liable to purchasers for representations made regarding the property being purchased … an agent may be liable to a purchaser where he is aware or should be aware of a problem or defect with a property and fails to reveal it to the purchasers."

CONCLUSION

It is clear from the above discipline cases and civil cases that the duty to provide accurate information is a most important duty. It can apply to seller's agents, buyer's agents, rental property managers, strata managers, and mortgage brokers. Not only are there potential civil and regulatory consequences, but there may also be reputational consequences, which may follow you for a long time.

10 2019 BCSC 58
11 2009 BCSC 174

Module Twelve: On The Radar – Area of Expertise

This article identifies some of the common concerns that arise if a licensee attempts to provide services outside a licensee's area of expertise. It also sets out some steps that a licensee should consider taking when one of those concerns arises.

LEARNING OBJECTIVES

By the end of this article you will be able to:

1. Identify some common situations that may arise when you may be acting outside your area of expertise; and
2. Describe some steps you should consider when dealing with an issue beyond your area of expertise.

INTRODUCTION

It may be tempting to take on a transaction because of the potential remuneration, even though the transaction is one not normally within your practice, and therefore beyond your area of expertise. That could be an expensive choice, both in terms of civil liability and regulatory penalties. Ask yourself, before you take on the transaction, "Am I comfortable assisting the client in the transaction? Do I have the knowledge and the experience required to act in the best interests of this client?" One way of answering that question may be "Would I be comfortable if I were the client and I were acting on the client's behalf, or would the client be better served by one of my colleagues?" One way of dealing with this situation is to seek the advice of your managing broker or designated individual who may be able to provide appropriate support to you.

The guidelines and reports in the Knowledge Base are full of warnings about acting outside your area of expertise. The issue can be as simple as the physical location of the property. If you have only sold real estate in existing subdivisions in urban centres, would you have the expertise to help a seller list and sell a vacation property on a lake in rural British Columbia? Probably not, considering that you may have to deal with issues such as riparian rights, wells, and septic fields. The issue may be as complex as air space parcels or leasehold strata. Or the issue may involve a transaction that may be totally outside of the experience of you or your brokerage such as a transaction involving Indigenous lands.

Finally, you may take on a transaction that you are generally competent to handle, but specific issues may still arise in that transaction which may exceed your expertise. For instance, you may be very comfortable handling purchases of condominiums in buildings in Vancouver. However, in one such transaction, you may find out that your buyer client is a foreign national. In that situation, even though you are competent in this type of transaction, the status of the buyer raises tax issues about which you cannot give advice. As such, the buyer must be told to seek professional advice on that specific issue.

Some circumstances that should prompt you to consider whether you are acting within your area of expertise include:

1. **Subject-free offers:** The Knowledge Base states "if your client is considering making a subject-free offer, you should advise them to consider seeking the advice of a mortgage broker, home inspector, property insurer, lawyer or other appropriate, specialized professional before making an offer."

2. **Tax issues:** When clients have questions about the tax implications of a real estate transaction that are outside your expertise…it is recommended that you advise your clients to seek independent professional advice, from a professional accountant or a taxation lawyer.

3. **Powers of Attorney:** You may not be acting with reasonable care and skill and in the best interests of your client if you advise on powers of attorney instead of recommending that the client obtain legal advice in respect of the power of attorney. In the Personal Circumstances module we refer you to the *Hays case*[1] where the licensee either misread or failed to read the power of attorney. It had expired. As well, it did not provide the wife with authority over the husband's affairs – rather it was the opposite.

4. **Acting in the Best Interests of your Client:** The Knowledge Base states, "Listening to your client and providing them all the information they need to make informed decisions …is the key. At times, acting in your client's bests interest may even require referring your client to someone else if your client's needs are outside your area of expertise."

1 2020 CanLii 63613 (BC REC)

5. COVID-19: You may be a strata manager dealing with cleaning of common areas. The strata council may wish to get advice about sanitization from health and safety professionals as this would be outside of the strata's managers expertise

6. Stated income mortgages: As a mortgage broker do you understand the extra due diligence and supporting documentation that may be required?

Other circumstances requiring particular care include manufactured homes, presales, owner built homes, and GST.

See Consent Order *Re Stoesz*,[2] where the licensee was disciplined for committing professional misconduct by failing to act in the best interests of the buyer and acted out of his area of expertise. He neglected to include a clause in the contract of purchase and sale for the buyer to receive and approve information or obtain independent professional advice regarding whether GST was applicable in the purchase.

Act within your Licence

Part of operating within your area of expertise is ensuring that you are acting within the terms of your license. Trading services licensees might be tempted, as a favour and for "free," to help friends, family, and clients with services that fall within rental property management services. A common example would be a licensee collecting rent cheques on behalf of a landlord friend who is out of the country on vacation. You may think that collecting rent cheques is within your expertise, but it is not part of your licensed expertise. You cannot provide the service because you are not licensed to do that, even if you do not charge for that favour or service.

Managing Broker/Designated Individual Guidance

Many of these issues can be dealt with by a licensee seeking the advice of the licensee's managing broker. If the licensee has any concerns or doubts, the licensee should talk to the managing broker. If the managing broker cannot help, the managing broker may consider obtaining professional advice, referring the matter to another licensee in the brokerage, or even referring the matter to another brokerage with the client's consent.

Legal Advice

Licensees often ask about obtaining legal advice. The general course of action is for the licensee to recommend to the client that the client obtain legal advice, or other professional advice as appropriate, such as the advice of an accountant. The licensee should not, in the normal course, be obtaining legal advice about the client's transaction. That is for the client to consider. In any event, a licensee cannot provide legal advice as that would be practising law and would be prohibited under the *Legal Professions Act*. You should, however, be communicating all your concerns to the managing broker. As set out above in "Tax issues," when clients have questions about tax implications that are outside a licensee's expertise the licensee should recommend that the client obtain professional advice, which may include legal advice.

There are circumstances where a licensee must recommend that the client obtain legal advice. For example, if the deposit is to be paid to some person or entity other than the brokerage, the licensee must advise the client to obtain legal advice regarding the provisions in the contract for holding the deposit before signing the contract and should include a clause to that effect in the offer (or counter-offer). Alternatively, the contract could be subject to the seller or buyer's lawyer approving those provisions. These clauses could be used for either the seller or buyer.

Finally, keep in mind that the seller or buyer may not only need legal advice but may need accounting, tax, or other advice. For this reason, the Knowledge Base clause refers to "professional advisor's approval." Once again, the clause could be used for either the seller or buyer.

CONCLUSION

It is important for licensees to stay within their area of expertise, consult their managing broker or designated individual, or refer clients to other professionals for advice when necessary. Licensees wishing to expand their area of real estate expertise should do so carefully and ensure that they seek training opportunities

2 2015 CanLII 89777 (BC REC)

Module Twelve: On The Radar – Real Estate Teams

Amendments to the Real Estate Services Rules ("Rules"), coming into force on April 1, 2023, will help strengthen the regulation of real estate teams ("teams") of licensees who work together to provide trading services to consumers. The amendments will better protect consumers by clarifying existing requirements and practices within the Rules and corresponding regulatory guidelines.

This article will explore the amendments and how they impact licensees in the following areas:

- What is a team;
- Registration of a team;
- Agency and teams;
- Advertising and teams; and
- Other considerations when working on a team.

LEARNING OBJECTIVES

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

1. Understand the definition of a real estate team, including the requirement to register a team;
2. Understand how agency rules apply to teams; and;
3. Understand the advertising requirements for teams and team members.

WHAT IS A REAL ESTATE TEAM?

The amendments to the Rules defines a real estate team as "a group of two or more licensees that is registered as a real estate team under Division 4 of Part 4." Under Division 4 of Part 4, groups of two or more licensees must register as a team if the licensees in the group do any of the following in the course of providing trading services:

- Represent themselves to the public as a single entity (does not apply if the single entity is a brokerage); or
- Are regularly engaged as designated agents of the same client; or
- Regularly work together in a manner that is consistent with the licensees being implied agents of the same party.

The requirement to register a team has been purposefully designed to be flexible enough to capture licensees who may not be holding themselves out publicly as a team but who nevertheless work together on a regular basis to provide trading services in a manner that – through the actions and conduct of the licensees – would lead a party to believe that the licensees are acting as their agent.

As a licensee, you must be mindful of how you interact with other licensees and with consumers to avoid unintentionally creating the impression that you are working together as a team.

Examples of activities that may indicate that a group of licensees is working as a team includes, but is not limited to:

- Having shared access to confidential client information;
- Sharing a phone number, other than a brokerage phone number, or other contact information (e.g. email address) where a client may discuss or share confidential information;
- Regularly fielding calls or inquiries from one another's clients (e.g., on a rotating schedule to cover evenings or weekends);
- Jointly meeting – whether with clients, other licensees, or third parties – where confidential client information is discussed;
- Listing multiple licensees on written service agreements or disclosures of representation in trading services, except instances where a co-listing agreement is entered into;
- Referring to themselves by a joint name, not limited to advertising materials (e.g., on office documents or voicemail); and
- Having a standing commission sharing agreement between multiple licensees.

If you are part of a group of two or more licensees that regularly undertake any activities that would lead a consumer to believe that you are acting together as a team, such as those listed above, you fall under the new requirement to register as a team. You and your colleagues will need to consider whether to register with BCFSA as a team or cease undertaking certain activities in order to comply with the amended Rules. Keep in mind that if a licensee is using another licensee as an assistant, those licensees constitute a team, even though the assistant may be providing limited real estate services.

REGISTRATION OF A TEAM

Once the amendments come into force on April 1, 2023, all licensees wishing to join a team or acting as a team (but not yet registered) will be required to register with BCFSA. To register with BCFSA, an online application to create or join a team will need to be completed along with payment of a $50 licence amendment fee. Such requests will need to be approved by the licensees' managing broker, as well as BCFSA staff. Once BCFSA receives the request to register, along with the managing broker's approval, staff will review the application information and process the request. Registered teams will be publicly searchable via BCFSA's online licensee search.

Licensees are reminded that there are no exemptions to the requirement to register as a team. This means that licensees that were previously advertising under a joint name and were exempt from having the regulator approve their name, such as teams of family members who advertised under a shared last name (e.g., The Bloggs), will need to register. Family members are reminded that even if they do not advertise under a shared name, but are discussing confidential client information, they will need to register as a team or cease this behaviour. Further, licensees that were previously acting as a team but were not advertising under a joint name, will also have to register (e.g., a licensee providing trading services with a licensed assistant).

Licensees that wish to create a new team or continue operating as a team under the new regulatory regime must ensure that their team consists of at least two licensed members. Once the amendments are in force, existing teams consisting of a single licensee (e.g., a licensee and their unlicensed assistant) will either need to disband their team or find a second licensee who wishes to join the team.

AGENCY AND TEAMS

BCFSA has a long-standing regulatory practice of considering a team – and all its members – to be the designated agent of any of the team's clients. While this practice was previously outlined in guidance, it is now built into the Rules.

Because each member of a team works closely with their team members and may share or have access to confidential client information, they must collectively represent the same client(s). This collective agency means that each licensee on the team owes the same agency and fiduciary duties to each of the team's clients; it also means that all trading services must be provided through the team only. A licensee that wishes to transact with a specific client outside of the team temporarily is not allowed to do so; they may only provide trading services through their team until they officially leave the team by submitting an application to BCFSA.

Once registered with BCFSA as a team member, a licensee continues to be a team member – and carry the same the agency and fiduciary duties as their fellow team members – until such time as they officially cease to be a team member. What this means in practice is that two members of the same team cannot represent both a buyer and a seller client in a single transaction, nor can they represent two or more buyer clients that are interested in making an offer on the same property. As per section 63 of the Rules, the prohibition on dual agency applies to each member of the team. If either of these scenarios arises, the team will need to refer each client to other licensees outside of their team or, if both clients agree, continue to act for one client and refer the other client to another licensee. The one exception to this would be if the very restricted dual agency exemption under the Rules applies to the specific scenario.

ADVERTISING AND TEAMS

The amended Rules also introduce new requirements for advertising and teams. Any real estate advertising published by a real estate team must identify the team's name. If a team member wishes to advertise themselves as an individual, they must still identify their team name. As with any advertising by a licensee, it must also include the name of the brokerage (prominently displayed) with which they are licensed.

When deciding on a team name, licensees must ensure that the name does not suggest or give the impression that their team is a brokerage. BCFSA recommends that licensees use the term "team" in their name to help the public recognize that they are providing services through a team of licensees.

If a licensee is transferring to a new team or leaving a team to work on their own, they must update their advertising materials immediately to reflect the change. Licensees who are considering doing this should prepare in advance to ensure they are complying with the Rules once they officially change or leave a team.

OTHER CONSIDERATIONS WHEN WORKING ON A TEAM

Licensees must remember to be careful when they join a team and what joining a team means. For example, when working with other team members there is a greater potential for conflicts of interest to arise, as existing personal or professional relationships may create situations where confidential information or vested interests may put into question whether the actions of the licensee can remain unbiased. Licensees are reminded that they have a duty to take reasonable steps to avoid conflicts of interest and to promptly and fully disclose conflicts when they do arise.

Licensees are also reminded that while it may be tempting to work outside of a team for a single transaction (e.g., to represent an old client or a friend or to represent a client in a transaction involving other members of their team), this is not possible under the amended Rules unless they formally de-register and remove themselves from the team roster. Even if the licensee is no longer a registered team member, they must consider the potential conflicts of interest that may arise when representing a client in a transaction involving a member of their former team.

Finally, licensees that are on a team but wish to utilize one of the licensee exemptions under Part 9 of the Rules, such as managing rental real estate owned by the licensee, may do so. Although team members can only provide trading services through their team, if an exemption under Part 9 of the Rules applies, licensees may provide these services outside of their team.

CONCLUSION

Ultimately, more formalized regulation of teams will provide greater consumer protection, while still enabling British Columbians to take advantage of the benefits that teams offer their clients. Leading up to these amendments, consumers and real estate licensees alike expressed confusion about the agency and fiduciary duties real estate team members collectively owed to their clients. As well, BCFSA's market conduct department and practice standards advisors received complaints and inquiries about teams, including undisclosed teams, dual agency by members of the same team, and other conflicts of interest, while managing brokers shared concerns about their ability to provide adequate oversight of team operations. BCFSA believes that managing brokers play a central role in ensuring compliance with the regulatory requirements, and a stronger role for managing brokers in overseeing teams will assist them to identify issues related to teams at their brokerage, and set appropriate controls, policies, and procedures to address them. Licensees that have questions about the upcoming changes respecting teams may contact a practice standards advisor for more information.

MULTIPLE CHOICE QUESTIONS

1. Which of the following is not a team:

(a) A licensee and that licensee's "licensed assistant";

(b) Three licensees who regularly work together and share confidential information about their clients;

(c) A licensee who refers a client to another licensee; or

(d) Family members who are licensees and act under a joint family name.

Answer: C. A mere referral does not constitute acting as a team. Family members who are licensee and act under a joint family name are no longer exempt from having the regulator approve the name: they now need to register as a team.

2. Which of the following statements is false:

(a) Each member of a team owes the same fiduciary duties to each of the team's clients;

(b) A member of a team can represent the seller while another member of the same team can represent the buyer;

(c) All real estate advertising of a time must include the team name; or

(d) A team member cannot do a single transaction outside the team unless the member formally de-registers.

Answer: B. Because each team member works closely with their team members and may share or have access to confidential client information, they must collectively represent the same client(s). A licensee who wants to transact with a specific client outside the team temporarily cannot do so unless they officially leave the team by submitting an application to BCFSA.

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