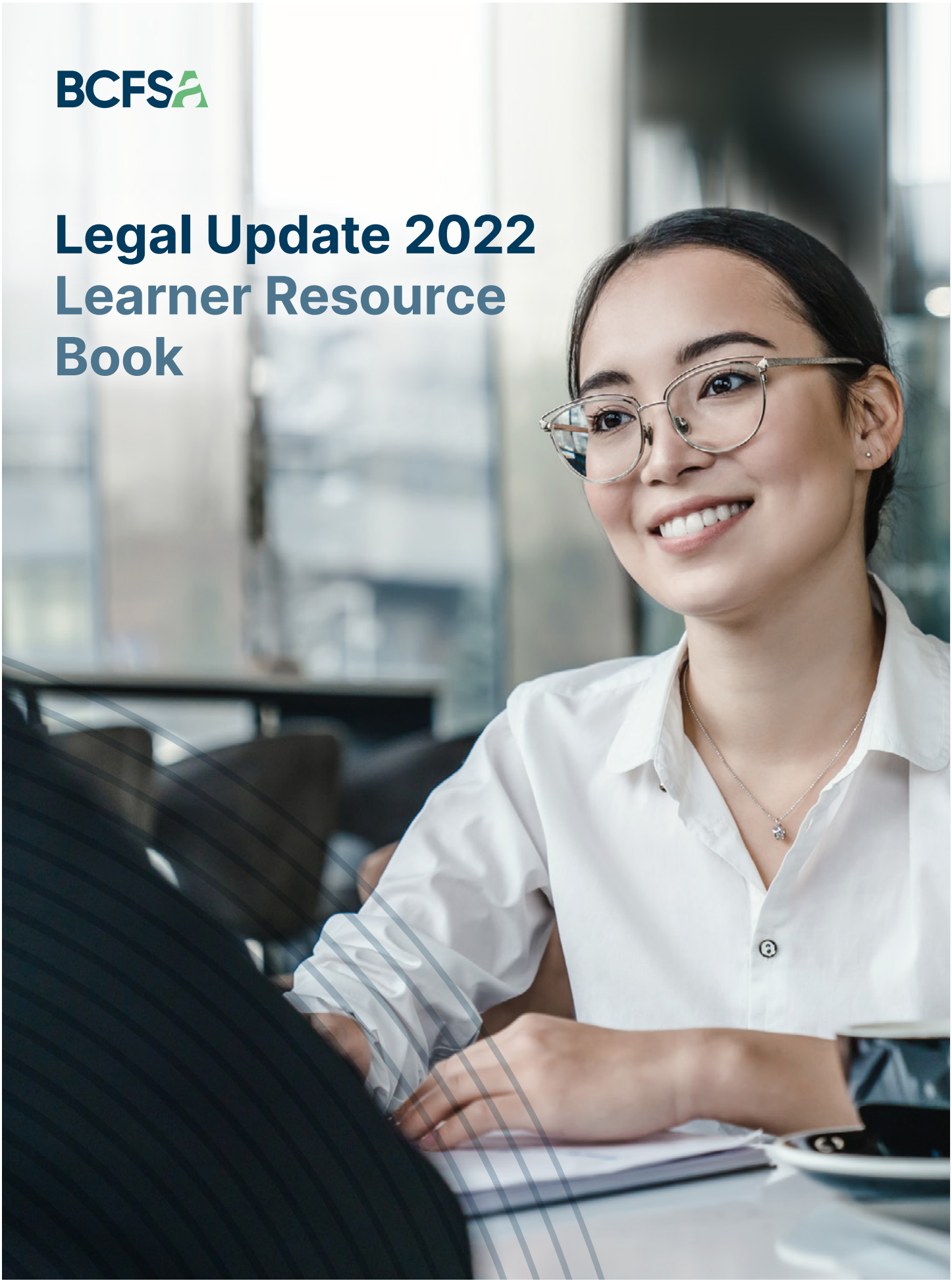
BCFSA

Legal Update 2022
Learner Resource Book



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Disclaimer

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Introduction

The Legal Update 2022 Learner Resource Book contains all written content from the online portion of this course. This course is made up of both online and classroom-based elements. The online material will ensure that you have reviewed the relevant requirements in advance of the live virtual classroom session. As a real estate professional, it is your obligation to stay up to date on current legal requirements, ethical implications, and professional considerations, whether you provide residential or commercial trading, strata management, or rental property management services. This course provides learners the opportunity to create their own learning pathway by completing four mandatory modules and two elective modules. The mandatory modules (four) are prescribed by British Columbia Financial Services Authority based on the category of real estate licence. The additional elective modules (two) are to be self-selected by the learner based on their preference and interest. This will complete the six-module total necessary for re-licensing credit. All eleven modules are accessible and available to all learners if they wish to expand their knowledge beyond the minimum requirements and stay up to date on current legal topics in the profession.

Module One: Insurance

Module One: Insurance

Insurance touches all aspects of real estate. This module is intended to give you an understanding of the various types of real property insurance, and the insurance required for purchase and loan transactions. This module will also cover what strata property managers need to know about insurance in order to advise their strata corporations appropriately, and reduce the risk of professional liability.

LEARNING OBJECTIVES

After completing this module, you will be able to:

- Recognize the importance of buyers and landlords obtaining homeowner insurance;
- Identify the different types of homeowner insurance;
- Understand standard insurance requirements for purchase and loan transactions;
- Understand the insurance issues that are relevant to advising strata corporations; and
- Identify whose insurance should apply when damage occurs in a strata building.

UNDERSTANDING PROPERTY INSURANCE

The purpose of purchasing property insurance is to ensure the policy holder will be made financially whole following a loss or damage to property. Property owners facing similar risks of losses can pay a "premium" to an insurance provider, who will generally pay for losses covered under their policies. Typically, the cost of the premium is much less than the potential loss that would be incurred if the risk materialized. An insurance provider is able to pay for losses if they occur, because usually only a few property owners will actually suffer loss. Essentially, the premiums paid by all property owners pay for the losses of the few.

Just as there are many different types of real property, there are many different kinds of property insurance. This chapter will discuss homeowner insurance, including the following types of homeowner insurance:

- Strata owner insurance;
- Renter insurance;
- Landlord insurance;
- Vacation property insurance; and
- Commercial property insurance.

Most homeowner insurance covers theft, damage or loss to a home, and/or its contents. A homeowner policy may also reimburse insurers for additional living expenses if the home is temporarily unavailable. In addition, homeowner insurance often covers third party liability up to the limits of the policy. For example, if someone slips and falls in Orlando's driveway, or Orlando's tenant starts a fire in his house and causes damage to a neighbour's home, then Orlando could turn to his homeowner policy for possible coverage if the slip-and-fall victim or neighbour sues Orlando for damages.

Strata owner insurance is a type of homeowner insurance for strata units (for example, condominiums and townhouses) that are part of a larger strata property. The strata corporation should have a master insurance policy (strata corporation insurance is discussed in detail below) that covers the common property, common assets, and the buildings shown on the strata plan. The strata corporation's policy does not cover the fixtures (as defined in the *SPA*) built or installed on a strata lot, unless the fixtures were built or installed by the owner developer as part of the original construction on the strata lot. Refer to discussion on Obtaining Insurance for Strata Corporations for further information. Consequently, owners of strata units should have their own strata owner insurance policy that covers damage or loss for anything not covered by the strata corporation's master policy, any upgrades to the strata lot and their personal property. Typically strata owner insurance policies also cover damage to other units or the strata corporation's common areas if they are caused by an accident that happens in the policyholder's unit. The strata owner insurance policy should also cover the homeowner's pro rata portion of the deductible on the strata corporation's master policy on the building, as well as any other portion of the deductible that the homeowner may be held responsible for.

Renter insurance is a type of homeowner insurance. It can be for a house, strata unit, co-op, or manufactured home—to name a few examples. Since the renter does not own the property, it typically only covers the renter's possessions in the property and third party liability, but usually does not cover damage to the property (unless the result of a third party liability claim).

Landlord insurance is a type of homeowner insurance that includes terms that are appropriate to renting all or a portion of the home. Even if a homeowner's tenant has renter insurance, as the tenant's policy does not typically cover damage to the property, a homeowner should have landlord insurance.

Vacation property insurance is a type of homeowner insurance with terms and conditions that are appropriate for a residential property that is not lived in full time as a primary residence. Since a vacation property is not occupied year-round, there may be an increased risk of loss due to burglary or vandalism. As well, any damage that occurs to the property can go unnoticed (and potentially get worse) while the owners are away.

Commercial property insurance is a type of homeowner insurance that covers the physical assets of a business, such as buildings, equipment, electronics, furniture, inventory, and signage. It can be obtained for a commercial space that is owned, a leased office space, a home-based business, or a business without a consistent address. Some business owners purchase additional coverage for business interruptions, which is designed to compensate businesses for loss of income as well as expenses incurred if business operations are interrupted because of an insured loss under a commercial property insurance policy.

In addition, in complex commercial matters, it may be possible for a buyer to obtain "representation and warranty" insurance. This kind of insurance protects against breaches of representations and warranties of a seller in a commercial transaction. It can be useful in resolving difficult negotiations. As these policies also have various exclusion and limitations, prudent real estate licensees will advise their clients to discuss the costs and benefits of these policies with their lawyer.

Real estate licensees should know enough about insurance to be able to help their clients seek out advice from a licensed insurance agent to help them obtain sufficient insurance for their real property. A first-time home buyer may not know anything about homeowner insurance, and be unaware that the process of finding insurance begins before they have even completed their purchase. For example, most insurers will want to see the results of a home inspection, because

they will want to know details about the property's wiring, plumbing, hot water tank, furnace, and roof. A buyer who does not obtain a home inspection may have a hard time finding insurance. Buyers of strata units will need to consider insurance issues unique to strata corporations— this topic is discussed in depth later in this module. Landlords should be aware that landlord insurance can protect both their property and their loss of rent. Tenants should be aware that renter insurance can protect them against the loss of their personal belongings, legal liability, and can also help them pay for another place to stay if their rental property becomes uninhabitable. As well, contracts of purchase and sale may include clauses making the transaction subject to the buyer's ability to obtain certain approvals from a licensed insurance agent. Here are two examples of such clauses:[1]

- Subject to the Buyer obtaining approval, on or before (date), from a licensed insurer for property (including fire) and liability insurance for the Property on terms and at rates satisfactory to the Buyer. This condition is for the sole benefit of the Buyer.
- Subject to the Buyer obtaining, on or before (date), confirmation from the Buyer's insurance agent that the (select wood stove, fireplace insert or chimney) installed on the Property will not affect the Buyer's ability to obtain property (including fire) and liability insurance, and if that insurance is available to the Buyer, will not result in a cost for that insurance that is unsatisfactory to the Buyer. This condition is for the sole benefit of the Buyer.

Insurance policies cover different kinds of losses, but they do not cover losses that are specifically excluded. Some common exclusions are:

- Damage caused by wear and tear, corrosion, rust, or general deterioration over time;
- Damage cause by flood, earthquake, landslide, avalanche or wildfire;
- Damage arising from the freezing of indoor plumbing; and
- Damage caused by insects and rodents (e.g. termites, mice, or squirrels).

1 These examples are taken from the "Clauses" page on BCFSA's Knowledge Base.

Buyers may be able to purchase additional optional coverage (called endorsements) to insure against these risks. Buyers must consider their specific insurance needs, and what additional coverage they should get. For example, if a buyer's new home backs onto a golf course, they may want to purchase a glass-breakage policy.

Early in a real estate transaction, real estate licensees should advise their clients to consult a licensed insurance agent to help them determine what type of policy and coverage they need.

Understanding title insurance and typical insurance requirements for obtaining mortgages

In Canada, most banks require that appropriate homeowner insurance be in place as a condition of providing a mortgage loan. In most cases, a homeowner will be in default of the terms of their mortgage if they allow the insurance to lapse.

In addition, in British Columbia, title insurance is commonly used by lenders in financing mortgages. Title insurance protects a buyer, or a mortgage lender, or both, against losses caused by invalid or defective title to a property. Title problems could arise from fraud or from mistakes. Mortgage lenders may require buyers of non-strata property to provide either proof of title insurance, or a property survey, the latter of which can be more expensive to obtain.

Imagine that Bahari buys a commercial space—a café with a beautiful, sunny deck. She has already ordered several sets of outdoor chairs and tables when she gets a notice from the municipality saying that the previous owner of the space constructed the deck without the required building permits. The municipality wants Bahari to remove the deck. If Bahari has title insurance, she may be protected against this loss.

As another example, imagine that Bob buys a house with a garage. A month after he moves in, he gets a letter from his new neighbour attaching a survey that shows that Bob's garage encroaches two feet onto the neighbour's property. The neighbour wants Bob to move his garage two feet over, so that it does not cross over the property line. Bob's title insurance may be able to protect him against this loss.

In certain circumstances (for example, if a borrower is providing less than a 20% down payment on the purchase price of a home), mortgage lenders will require the borrower to obtain mortgage insurance when they agree to provide a mortgage loan. Mortgage insurance protects mortgagors against the losses caused by a borrower defaulting on a mortgage loan under certain circumstances. In addition, a mortgage lender may provide optional creditor insurance that will cover the borrower's mortgage payments in certain circumstances ("such as disability or job loss"), or optional life insurance that will pay out all or a portion of the amount of the mortgage on the death of the borrower.

Lenders generally require to be named "first loss payee" under insurance policies obtained by the buyer. This means that if Bob grants a mortgage to buy his house, and then six months later his house is destroyed, his homeowner insurance proceeds may first be paid to his mortgagee.

Obtaining insurance for strata corporations

A strata manager should, subject to the requirements of its service agreement with the strata corporation, assist the strata council in obtaining and maintaining adequate insurance for the strata corporation. Under section 149(1) of the *Strata Property Act* ("*SPA*"), a strata corporation must obtain and maintain property insurance on, or covering:

- Common property;
- Common assets;
- Buildings shown on the strata plan; and
- Fixtures built or installed on a strata lot, if the fixtures are built or installed by the owner developer as part of the original construction on the strata lot. (This requirement to insure certain fixtures does not apply to a bare land strata plan. In addition, the government recently proposed changes to the *SPA* with respect to the requirement to insure fixtures, but those changes are not in force yet. The potential changes, as they currently read, will require strata corporations to obtain insurance coverage over all fixtures on a strata lot, even if the fixtures were installed after the original construction. The government will bring these changes into force by regulation, although the timing and specific detail are still uncertain.)

This property insurance is the strata corporation's master policy.

The Strata Property Regulation defines "fixtures" in section 9.1(1) as "items attached to a building, including floor and wall coverings and electrical and plumbing fixtures, but does not include, if they can be removed without damage to the building, refrigerators, stoves, dishwashers, microwaves, washers, dryers or other items".

Under section 149(4)(a) of the *SPA,* a strata corporation's property insurance must cover the strata corporation for full replacement value (except in certain circumstances prescribed by regulation). This means that the full amount of the cost of repairing or replacing something is insured up to

the limit set out in the policy, and subject to any deductible. Section 149(4)(b) of the *SPA* states that the strata corporation's property insurance must insure against "major perils" set out in the regulations and the strata corporation's bylaws. "Major perils" is defined in section 9.1(2) of the Strata Property Regulation as "the perils of fire, lightning, smoke, windstorm, hail, explosion, water escape, strikes, riots or civil commotion, impact by aircraft and vehicles, vandalism and malicious acts".

Strata corporations must also obtain and maintain insurance for a minimum of $2,000,000 against liability to others for property damage and bodily injury (*SPA*, s. 150). Most strata corporations, however, obtain liability insurance coverage limits of at least $5,000,000, as the damages from a significant injury claim can exceed $2,000,000.

In addition to the mandatory insurance coverage required by legislation, a strata corporation may also choose to purchase:

- Errors and omissions insurance for strata council members (and strata managers) against their liability and expenses for errors and omissions made in the exercise of their powers and performance of their duties (*SPA*, s. 151);
- Insurance in respect of a peril or liability of the strata corporation that it is not required to maintain insurance for (such as earthquake, crime insurance, pollution insurance, glass insurance, or boiler and machinery insurance) (*SPA*, s. 152(a)); or
- Insurance in respect of fixtures installed on a strata lot that were not built or installed by the owner developer as part of the original construction on the strata lot (*SPA*, s. 152(b)). (As discussed earlier, pending changes to the *SPA* if brought into force, would make it mandatory for strata corporations to obtain this insurance coverage.)

While these types of insurance are optional under the legislation, they may well be completely necessary in practice. Strata council members should consider carrying errors and omissions insurance for an amount appropriate to the size of the strata corporation for which they provide services. A strata corporation that is located in a flood zone would be irresponsible not to attempt to purchase flood coverage as part of its strata property insurance policy. In addition, because much of British Columbia is in an earthquake zone, many strata corporations choose to purchase earthquake coverage. Strata managers should encourage strata councils to seek advice from a licensed insurance agent on appropriate insurance coverage.

A strata corporation's insurance coverage does not just cover the strata corporation—it also extends to each owner, tenant, or other person who normally occupies a strata lot (*SPA*, s. 155). All of these persons are considered named insureds in a strata corporation's insurance policy. This is significant because named insureds generally have the benefit of the insurance policy coverage.

Under section 194(4) of the *SPA*, a section of a strata corporation may obtain coverage to expand on the perils insured by the strata corporation, or to increase the amount of coverage obtained by the strata corporation. This might be necessary if the section has greater risk of loss or damage than the strata corporation as a whole, or if the section acquires any property.

The strata council must review the strata corporation's insurance annually to make sure it is adequate and complies with the *SPA*, and must report on the insurance coverage at each annual general meeting of the strata corporation (*SPA*, ss. 154(a) and 154(b)). In addition, the strata corporation must inform owners and tenants as soon as feasible of any material change in the strata corporation's insurance coverage, including any increase in an insurance deductible (*SPA*, s. 154(c)).

Real estate licensees who manage strata property should help the strata council to review insurance coverage on an annual basis with the strata corporation's insurance advisor, to ensure that:

- The policy meets the requirements set out under the *SPA*, the Strata Property Regulation, and the bylaws of the strata corporation;
- The policy covers any optional insurance that the strata corporation needs; and
- The wording of the policy adequately protects every owner, tenant, and other occupant.

Every strata corporation is different and has its own specific risks and issues which may change over time. Strata managers should ensure that the strata corporation obtains annual insurance appraisals of the full replacement value of the property of the strata corporation, conducted by a qualified insurance appraiser. Regular insurance appraisals will help to protect the strata corporation from uninsured losses.

Strata corporation insurance policies typically have high deductibles, meaning that the strata corporation and the affected owners (with respect to any damage to those portions of the strata lot the owner is required to repair and maintain under the bylaws) have to absorb a high level of losses before a claim is made. In addition, if a strata corporation makes a claim under its insurance policy, they often risk that the insurance company will charge a higher premium or demand a higher deductible when they renew their insurance. This means that for some losses ("and especially where losses only slightly exceed the deductible amount"), the strata corporation may choose not to make an insurance claim, and instead may decide to pay for the loss or damage directly. However, this raises a number of issues. Some of the loss or damage may relate to portions of the strata lot that are insured but would normally be under the owner's duty to repair. The strata corporation is only permitted to use the operating fund and contingency reserve fund common expenses. Damage to a strata lot, which the owner has a duty to repair and maintain, may not meet the definition of common expense under the *SPA*. If so, under what authority does the strata corporation have to use funds above the deductible to pay for repairs? As a result, strata managers should recommend to their client that they should obtain advice from their lawyer and their insurance broker before deciding not to make a claim.

If a strata corporation claims against its insurance policy for an amount exceeding the deductible, the corporation absorbs the deductible as a common expense to which every owner contributes through their respective strata fees or a special levy. Generally, where the deductible is large and there are sufficient funds in the contingency reserve fund, a strata corporation will fund the payment of the deductible from the contingency reserve fund. The strata council will make this decision at a duly convened strata council meeting as the expenditure does not require strata corporation approval.

Sections 158(1) and (3) of the *SPA* states:

> "(1) Subject to the regulations, the payment of an insurance deductible in respect of a claim on the strata corporation's insurance is a common expense to be contributed to by means of strata fees calculated in accordance with section 99(2) or 100(1)."
>
> "(3) Despite any other section of this Act or the regulations, strata corporation approval is not required for a special levy or for an expenditure from the contingency reserve fund to cover an insurance deductible required to be paid by the strata corporation to repair or replace damaged property, unless the strata corporation has decided not to repair or replace under section 159."

However, section 158(2) of the *SPA* still allows a strata corporation to "sue an owner in order to recover the deductible portion of an insurance claim if the owner is responsible for the loss or damage that gave rise to the claim." As a result it is prudent for an owner of a strata unit to ensure that its homeowner or landlord policy will cover the strata corporation's deductible. For example, one strata corporation experienced significant water damage to its common areas after a tenant in a high-rise condominium tower hung clothing from the sprinkler heads in their unit, causing one of them to burst. In this situation, the strata corporation was able to recover the deductible on its policy from the strata unit owner, who, in turn, made a claim on their strata owner insurance policy that covered damaged caused by their tenants, including payment of the strata corporation's insurance deductible. If the owner's policy did not cover tenant liability or provide for payment of the strata corporation's deductible, then the owner of the strata unit could have been personally responsible to the strata corporation for payment of the deductible.

Insurance for strata property owners and tenants

At every annual general meeting during the report on insurance and if asked by the strata owners, tenants, or the strata council, strata managers should encourage strata owners and tenants to purchase insurance to cover their own needs, and to consult a licensed insurance agent to help them to determine appropriate coverage. This is because a strata corporation's property and general liability insurance will not protect a strata owner or tenant from every kind of loss. For example, a strata corporation's insurance policy will not cover:

- Damage to the contents of a strata lot, including the personal property (such as furniture, clothing, electronics, etc.) of the strata owner or tenant;
- Fixtures built or installed on a strata lot by anyone other than those fixtures installed by the owner developer as part of the original construction (however, as discussed earlier, if changes to the *SPA* come into force, strata corporations would be required to obtain insurance coverage over all fixtures on a strata lot, even if the fixtures were installed after the original construction);

- Replacements of the fixtures installed by the owner developer as part of the original construction (however, as discussed earlier, if changes to the *SPA* come into force, strata corporations would be required to obtain insurance coverage over all fixtures on a strata lot, even if the fixtures were installed after the original construction);
- Loss of use of the strata lot which provides the owner a place to live if the strata unit is uninhabitable during the repair of the loss or damage covered under the strata corporation's insurance policy; or
- The pro rata portion of the deductible of the strata corporation's policy applicable to the strata unit, or the portion for which the strata unit owner is held responsible.

Imagine that a strata lot has laminate countertops in the kitchen, which were installed by the developer. The strata owner, Omar, thinks that the countertops are ugly, so he decides to put in beautiful granite countertops at considerable expense. The strata corporation's mandatory insurance coverage will not cover damage to Omar's granite countertops, because it is his improvement to a fixture installed by the developer. Omar may obtain his own insurance coverage for his strata lot and its fixtures. (As mentioned earlier in this module, recently proposed changes to the *SPA*, if they are brought into force, will require strata corporations to obtain insurance coverage over all fixtures on a strata lot, even those which were installed after the original construction. As those proposed changes currently read, once they come into force by regulation, the strata corporation's mandatory insurance coverage must also cover damage to Omar's granite countertops.)

Section 161 of the *SPA* specifically allows strata property owners to obtain insurance coverage for any or all of the following:

- Loss or damage to the owner's strata lot, or to fixtures built or installed on the strata lot by the developer as part of the original construction, but only in respect of:
    - Perils that are not insured by the strata corporation, and
    - For amounts that are in excess of amounts insured by the strata corporation.
- Fixtures in the owner's strata lot, other than those built or installed by the developer as part of the original construction (which the strata corporation must insure);
- Improvements to fixtures built or installed by the developer (Omar's slate countertops fall into this category);
- Loss of the rental value of the strata owner's strata lot, in excess of the insurance coverage maintained by the strata corporation; and
- Liability for property damage and bodily injury, whether occurring on the strata lot or on the common property.

In addition, if a strata owner or their tenant causes damage to the strata property, the strata owner may be personally liable to reimburse a strata corporation for the deductible. This can be many thousands of dollars, and often tens of thousands of dollars. A strata owner may be able to cover the deductible in their homeowner policy, or landlord policy, as applicable.

Strata tenants should purchase insurance to cover their needs. The strata corporation's insurance and the landlord strata owner's insurance will not cover losses suffered by, or incurred by, tenants and their visitors. A strata tenant may wish to purchase insurance coverage for:

- Personal property;
- Liability;
- Additional living expenses in excess of the normal cost of living in the event of an insured loss; and
- Water damage, earthquake, or sewer backup.

Insurance affordability and availability

British Columbia's strata insurance market is currently unhealthy. A combination of factors have caused strata insurance prices to increase quickly and dramatically. As a result, many strata corporations are struggling to obtain and pay for insurance coverage. In December 2020, British Columbia Financial Services Authority ("BCFSA") released a report on the province's strata insurance market, titled *Strengthening Foundations: A Report of the State of Strata Property Insurance in British Columbia*. More information can be found at *A Report on the State of Strata Property Insurance in British Columbia* (bcfsa.ca). This report suggested that insurers have been experiencing lower profitability from strata corporation insurance due to numerous minor claims that appear to result from construction defects or poor maintenance, which has correspondingly led to higher premiums and deductibles and insurers becoming more careful about which buildings they are prepared to insure. The report concluded that "there are no simple solutions" for the current problems with the strata insurance market, and that it may take years to bring the market back to healthy state.

The provincial government has recently introduced a number of regulatory changes in an attempt to solve the problem of expensive strata corporation insurance. These changes are discussed below.

Recent regulatory changes

As of August 14, 2020, the *SPA* requires strata corporations to let strata owners and residents know as soon as feasible when the insurance deductible for the strata corporation changes, or when any other material change to the insurance policy occurs (*SPA* s. 154(c)). This is to allow strata owners to update their homeowner insurance policy in order to purchase enough insurance coverage to allow them to pay their strata unit's pro rata portion of the strata corporation's insurance deductible (or the cost of the loss to the property, if it is less than the deductible). As well, strata corporations may now use their operating fund or contingency reserve fund to pay for property and liability insurance required under the *SPA* or the strata corporation's bylaws without a vote of the strata owners, if there are reasonable grounds to believe that an immediate expenditure is necessary to obtain the required insurance (*SPA* s. 98(3)).

Prohibition on Referral Fees

Effective September 13, 2020, insurance agents and insurance providers are prohibited under the *Financial Institutions Act* from paying referral fees in relation to strata insurance, unless the person making the referral is a licensed insurance agent or salesperson (*Financial Institutions Act*, s. 178). This means that strata managers may not collect fees for referring strata corporations to insurance providers. The Insurance Council of British Columbia can suspend, cancel or restrict licences, and impose fines for violations by any licensed insurance agent of this prohibition on referral fees.

Advance Notice of Material Changes to Insurance

Effective November 30, 2020, insurers or insurance agents must provide 30 days' advance notice to strata corporations of their intention to not renew an insurance policy or of any material changes to the policy. This ensures that strata corporations are warned in advance of cost increases, so that they may find alternate insurance if necessary. Insurance agents are also required to disclose their commission amount (or a reasonable estimate) to strata corporations, or else face strict penalties.

Strata managers must inform their strata council immediately if they receive notice from the strata corporation's insurer of any changes to the strata corporation's insurance policy or coverage. More information about the duty of strata managers to provide timely information to strata councils is set out in RECBC's Spring 2021 Report from Council Newsletter.

Ending Best Terms Pricing

On December 1, 2020, BCFSA announced that the strata insurance industry had agreed to effectively end the practice known as Best Terms Pricing in British Columbia by January 1, 2021. BCFSA explained the insurance practice of Best Terms Pricing as follows:

> "Insuring strata properties often requires brokers to bring together multiple insurers with each insurer taking a portion of the total risk. The resulting insurance policy is often referred to as a subscription policy. In putting together such a policy, each insurer would submit its own bid. Under Best Terms Pricing, the final premium paid by strata owners was typically based on the highest of those bids, even if the majority of quotes were lower."

BCFSA collected sample data and found that approximately 94% of strata insurance properties had been negatively impacted by Best Terms Pricing.

In BCFSA's press release announcing the elimination of Best Terms Pricing by January 1, 2021, BCFSA's CEO Blair Morrison was quoted as saying:

"Thanks to the positive cooperation from industry, BCFSA has been able to obtain assurances that the practice will be quickly phased out of B.C.'s strata insurance market [...]. This is an important step forward as we work to ensure long-term stability in the strata property insurance market while also protecting strata owners."

Additional Changes

Other changes may be brought into force by regulation at a later date, after further consultation with the strata insurance industry and other stakeholders. On its website, the Government of British Columbia states that these changes would do the following:

- Set out clear guidelines for what strata corporations are required to insure, to help strata councils and owners make informed decisions on strata corporation, strata owner and tenant insurance policies;
- Protect strata unit owners against large lawsuits from strata corporations if the owner was legally responsible for a loss or damage, but it occurred through no fault of their own;
- Identify the circumstances, if any, when strata corporations are not required to get full replacement value insurance coverage;
- Strengthen depreciation reporting requirements, including limiting the ability of strata corporations to avoid completing depreciation reports; and
- Change the minimum required contributions made by strata unit owners and developers to a strata corporation's contingency reserve fund.[2]

Dealing with damage—whose insurance applies?

The payment of an insurance deductible in respect of a claim on the strata corporation's insurance is a common expense to which the owners must contribute by means of their strata fees (*SPA*, s. 158(1)). If a strata property owner is responsible for the loss or damage that led to the insurance claim, then the strata corporation may sue the owner to recover the full amount of the deductible (*SPA*, s. 158(2)).

Deductibles can be tens or even hundreds of thousands of dollars, depending on the risks insured, and the claims history of the strata corporation. Every strata property owner should obtain insurance to cover payment of a deductible under the strata corporation's property insurance policy.

The strata owner is "responsible" if they are the primary cause of, or are legally accountable for, the damage, unless strata bylaws set a different threshold for responsibility. The standard bylaws do not include a bylaw that allows for the chargeback of a deductible. It is prudent for a strata corporation to have a bylaw that allows for the chargeback of a deductible or losses below the deductible using the responsibility threshold. This is a complicated area of law that continues to evolve. It is recommended that strata managers have these chargeback bylaws reviewed every few years. For example, a strata corporation could have a bylaw that states that an insurance deductible will be charged to a strata owner if the insurance claim arises from the owner's negligence. This means that to collect the deductible from an owner, the strata corporation will need to have evidence that the owner's negligence caused the damage rather than simply having to show the owner is legally responsible.

2 www2.gov.bc.ca/gov/content/housing-tenancy/strata-housing/operating-a-strata/finances-and-insurance/insurance

Imagine that a washing machine overflows in a third-storey strata unit, owned by Octavia. The water flows into a common hallway, and into the unit below, causing lots of damage. If the strata corporation has a bylaw that only allows for a chargeback of the deductible or the repair costs of the damage below the deductible where the owner is negligent, the strata corporation will need to have their plumber investigate to determine the cause of the washing machine malfunction and evidence that the malfunction was caused by something the owner did or failed to do. Only if there is proof of negligence will the strata corporation be able to recover its losses from Octavia. On the other hand, if the strata corporation's bylaw uses the responsibility threshold, the only evidence required is proof that Octavia's washing machine malfunction caused the damage. Since the washing machine belongs to Octavia, she is legally responsible for it. As such, the strata corporation can recover from Octavia the amount of the strata corporation's insurance deductible, or, if the loss is less that the deductible, for the amount of the loss to the property, provided the strata corporation has a bylaw that allows for the chargeback of losses below the deductible where the owner is responsible. Since Octavia is a named insured under the strata corporation's insurance policy, the strata corporation's insurer cannot make a claim against Octavia to recover money paid out on behalf of the strata corporation. The damaged unit below Octavia's unit is owned by Omar. The insurer of Omar's unit may bring a claim against Octavia for any amounts that his insurer is required to pay to repair or replace any damaged property in Omar's suite that is not covered by the strata corporation's insurance policy. This type of claim is called a subrogated claim.

Making insurance claims on behalf of a strata corporation

A strata corporation should give its insurance provider notice as soon as it becomes aware of a potential claim. Failure to give prompt notice to the insurer can result in the insurer denying the claim. A prudent strata manager who becomes aware of a potential claim will immediately review the strata corporation's insurance policy, which will set out requirements for how notice may be given to the insurer. For example, the policy may require that notice of a claim be given in writing, and sent to a specific individual.

If it is not immediately obvious which insurance policy may be able to respond to a specific claim, the strata corporation should give notice under all possible policies. Insurance coverage is either written on an "occurrence" basis, or a "claims-made" basis. If coverage is occurrence-based, then the insurance policy in place at the time of the incident causing the damage or loss will respond to the claim. Property insurance and general liability insurance are often occurrence-based. "Claims made" coverage means that the insurance policy in place at the time that the claim is made will respond to the claim.

A prudent strata manager will also check to see if the policy contains a limitation period for court actions against the insurance provider. The policy may require that any court action against the insurer be commenced within one year of the date of the damage or loss. If the insurer denies coverage on the claim, then the strata corporation will need to act promptly to sue the insurer before the year is up. If the strata corporation dawdles and does not start the court action within a year, then it would lose its right to claim on the policy.

Wise strata managers will consider advising their client to contact a lawyer for advice if they have questions about making an insurance claim, or about whose insurance should apply in the event of loss or damage.

Module Two: Contract of Purchase and Sale

Module Two: Contract of Purchase and Sale

MODULE DESCRIPTOR

This module discusses the power and pitfalls of the contract of purchase and sale. This module examines in detail some of the standard clauses in the British Columbia Real Estate Association ("BCREA") residential form of contract of purchase and sale ("the Standard Residential Contract") and commercial form of contract of purchase and sale ("the Standard Commercial Contract") in order to discover why they are included and what precisely they mean. We will also discuss some terms to consider including to supplement the standard form purchase contracts, and certain contract law principles to keep in mind when making changes or additions to the contract.

LEARNING OBJECTIVES

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

- Understand the rationale behind and the meaning of the language used in certain clauses in the Standard Residential Contract and the Standard Commercial Contract;
- Explain the elements required of a clear subject clause;
- Identify circumstances where additional terms should be included in the contract of purchase and sale; and
- Understand how to prepare internally consistent and clear contracts of purchase and sale.

INTRODUCTION

They say the devil is in the details, and that is more true with contracts than it is with almost anything else. Not only must contracts be clear, they must also be internally consistent. Having standard form contract and clause precedents is very useful in setting common expectations among real estate licensees, and allowing real estate licensees to master what the standard contracts do and do not include. However, there is never going to be a one-size-fits-all agreement when you are dealing with something as complex as real estate. The good news is contracts are very flexible creatures. The bad news is you need to look into all their nooks and crannies if you want to start using them to your client's best advantage. This module will help you do just that.

SELECT STANDARD TERMS — AND WHAT THEY MEAN

Deposit Clause

In the Standard Residential Contract, the deposit is discussed in section 2. By default, the deposit amount is due within 24 hours of acceptance of the offer or counteroffer, as the case may be. There is a blank line on which to specify to whom the deposit will be paid. The standard form language assumes that it will be paid to a brokerage since it states the deposit will be held in trust in accordance with the *Real Estate Services Act* ("*RESA*"). However, the deposit can be paid to whomever the parties specify. Common examples of persons receiving the deposit in trust as a stakeholder under *RESA* include a conveyancing lawyer or notary public. The buyer's failure to pay the deposit as specified entitles the seller to terminate the contract.

Whoever receives the deposit as stakeholder must hold it and wait for direction from both parties to the transaction as to how and to whom to pay it out. The only exception is a pre-authorization in section 2 to pay the deposit to a conveyancing lawyer or notary who agrees to hold the deposit money in trust as a stakeholder under *RESA*. If the sale does not complete, the deposit should be returned to the stakeholder who originally received it, and if the parties to the contract cannot agree on how it is to be paid out, the person receiving the deposit as stakeholder will have to apply to pay the deposit into court pending a decision by the court or a settlement of the parties.

There are now numerous methods by which a buyer can pay a deposit. Section 2 says the deposit can be paid by uncertified cheque or in any manner set out in section 10. Section 10 allows payment of the deposit, and other amounts owing under the contract of purchase and sale, by certified cheque, bank draft, wire transfer, cash, or notary, lawyer or real estate brokerage trust cheque.

The Standard Commercial Contract treats the deposit in section 5 and 15 in the same way as the Standard Residential Contract in terms of the seller's ability to terminate the contract if it is not paid, authorization to pay the deposit to a conveyancer, and the requirement to otherwise release the deposit only on agreement of the parties or on payment into court. However, it does not default to a particular payment deadline so the parties must specify what the parties have agreed to in terms of the timing of the deposit payment. Also, unless specifically agreed, a deposit cannot be paid by uncertified cheque, unlike as prescribed in the Standard Residential Contract. The Standard Commercial Contract further contemplates that the parties may want to include additional deposit terms in a schedule 15 to be attached to the contract. In the Standard Commercial Contract, the schedules use the same numbers as the sections of the contract that they relate to, making it easier to keep track of which schedule modifies what contract section.

There are a number of ways that a client may want to change the deposit clause, for example to change the timing of payment or to set up a two-stage deposit. There are many suggested deposit clause options in British Columbia Financial Services Authority ("BCFSA") knowledge base to consider using. That knowledge base is an excellent resource to assist with drafting additions to the contract.

Finally, section 12 of the Standard Residential Contract and section 28 of the Standard Commercial Contract make the deposit non-refundable if the buyer fails to pay the balance of the purchase price on or before completion date. Though that does not change the stakeholder obligations of the party holding the deposit, it does make clear who ultimately will be entitled to the funds unless the buyer can prove it is entitled to some kind of set off.

Title Clause

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

The Standard Commercial Contract specifically contemplates including additional permitted encumbrances, or other charges on title that the buyer does not need to be removed. These may relate to charges required to operate the business located on the property or other encumbrances that will not impede operations or detract from the property's value.

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

Transfer of Property Risk

Section 16 of the Standard Residential Contract and section 32 of the Standard Commercial Contract specify that all buildings and included items will remain at the risk of the seller until 12:01 a.m. on the completion date. This risk clause makes clear that the seller (and the seller's insurance) is responsible for any property damage that happens after the contract of purchase and sale has been signed but prior to completion. Without this clause, risk would pass to the buyer at the time the contract of purchase and sale was made, which could be unfair for a buyer who has no control over, and possibly even access to, the property until the completion date. Where a significant loss occurs between the making of the contract and completion, this puts the seller in technical breach of the contract because they are unable to deliver the property in the agreed condition. However, the buyer can accept that breach or they can decide to proceed with the contract. If they choose to proceed, the buyer is entitled under common law to a reasonable amount of time to determine the impact of the loss or damage and to obtain details of the applicable insurance coverage. In that case, the parties are required to negotiate with each other in good faith to reasonably extend the time for completion as well as to come to an agreement on how to address the impact of the loss or damage, though the buyer is not entitled to an entirely new agreement (see *Gill v. Zhang,* 2016 BCSC 1464).

Section 32 in the Standard Commercial Contract also deals with insurance proceeds where some loss or damage occurs to the property between the making of the contract and closing. It states that insurance proceeds related to that loss will be held in trust for the buyer and the seller according to their interests in the property. This leaves open the possibility that the buyer could become entitled to some of the sellers' insurance monies rather than requiring the seller to repair the damage. If there is a long closing or the nature of the commercial property is such that loss or damage prior to closing is an increased risk, the parties and their real estate licensees (and lawyers) should consider being more detailed in an attached schedule about how to split insurance proceeds.

Representations and Warranties

Section 18 of the Standard Residential Contract and section 36 of the Standard Commercial Contract deal with representations and warranties, or additional promises or agreements outside what is included in the written contract. As a general rule, where parties enter into a written contract, the law considers what is written down to be the entire agreement between the parties. The theory is that if parties took the time to write down their respective obligations, they likely took care to be complete rather than writing down some of the agreed terms and leaving others unwritten. The representations and warranties clause makes it even more clear that the parties are only able to rely on the promises contained in the written document. In other words, if it is not included in the contract, it is not an enforceable promise. If there were agreements about property condition, included items, state of cleanliness, or any other agreement that is important to the client, a real estate licensee should ensure that it is written somewhere in the contract because if it is not, section 18/section 36 will make it very hard if not impossible for the party relying on an unwritten term to hold the other party to that part of the bargain. That said, the contract will not protect a seller who has made knowingly false, or fraudulent, statements about a property's condition.

Incorporating related documents into the contract to make them into enforceable contract terms is discussed in more detail below.

Acceptance Irrevocable

Most real estate contracts are not firm on the date they are made, unless they are subject-free. In other words, a buyer will not be required to complete the purchase unless and until it has waived or satisfied all of the subject clauses (legally called "conditions precedent") it has bargained for itself. However, because of section 22 in the Standard Residential Contract and section 40 in the Standard Commercial Contract, the seller is not in the same position. Even though the contract may not be firm, in that the buyer has the opportunity to walk away if it does not remove subjects, the seller cannot withdraw its acceptance of the contract. Once the seller has agreed to accept an offer or counter-offer, the only way it can avoid its obligations under the contract is if the subject removal period has expired and the buyer has failed to remove or waive subjects, or if the buyer breaches the contract in such a fundamental way that the seller is entitled to terminate it.

SO YOU WANT TO MAKE SOME CHANGES...

As noted above, nothing as complicated as a real estate transaction can fit squarely into the standard form contracts every time. The forms are very useful precedents, and they cover all of the basics, but they can and should be revised or amended in appropriate circumstances to better suit a client's needs.

There are some important guidelines and laws that govern how the standard form contracts can be amended, however. The first, referred to above, is the requirement that a contract be internally consistent. This means it is not as simple as adding a term a client asks for into a schedule or the additional terms section and calling it a day. A real estate licensee must also review the rest of the contract to make sure that no other term, either in the standard terms or another schedule or addition, deals with the same subject matter. When a contract deals with the same subject matter differently in different places, that leaves it open to each side to argue which is the term that the parties really meant to include. Where a term in the standard form overlaps in any way with the subject matter a client wants to address in more detail, it is best practice to strike out the related term in the standard form, and repeat the part of the standard term that still applies, if any, into the schedule along with whatever modifications are required to achieve the client's purposes. If a real estate licensee has any doubt about how to word a clause or what impact adding terms may have on the standard form, and the BCFSA knowledge base does not assist, the real estate licensee should seek the assistance of their managing broker. If the managing broker cannot resolve the issue, the client should be directed to seek legal advice, since a lawyer is in the best position to make sure that all the contract law requirements are met and to ensure that clauses are properly drafted. Improperly worded clauses can result in a complaint to BCFSA or legal action against the real estate licensee.

The second guideline of note relates to subject clauses in particular. These are the most commonly included changes or additions to the contract of purchase and sale. Though they may deal with specific requests of the buyer or seller, or be recommended given a unique characteristic of the property, a real estate licensee should still ensure that the standard form contract being used does not deal with the topic in another clause. Subjects also require clear dates by which the applicable party must fulfil or waive the subject condition because the contract of purchase and sale is not firm or binding on the buyer until those subject clauses are waived or declared fulfilled. Lack of clarity on the waiver deadline needlessly leaves both parties' rights and obligations unclear.

A related note are the phrases included after most subject clauses: "This condition is for the sole benefit of the [buyer/seller]". What this means in law is that the party (or parties) named is the one who gets to decide whether the subject can be waived in order that the contract can become binding. If a subject term does not include that reference after a given subject clause, that does not mean that the contract can never become binding. However, it means that it is less clear who has the power to decide whether the subject can be waived, leaving room for disputes. It is better to be clear about who makes that decision. In certain cases, such as when the parties are negotiating a related lease agreement, a subject may appropriately need to be waived by both parties. In that case, the contract can simply say "This condition is for the benefit of both the buyer and the seller".

Amendments

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 to 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 continue to govern. Where amendments are made to applicable dates in the contract, the parties should reiterate that time is still of the essence. This should avoid an argument that timelines under the contract are no longer strictly enforceable since the parties have already agreed to change them, suggesting they are no longer as important.

Additional Terms to Consider Including

Incorporating other Documents into the Contract

The contract of purchase and sale, as noted, deals with all of the basics. However, there are other important documents disclosed by the seller to the buyer in the property sale process. Most notable and common of these documents in the residential context are the Property Disclosure Statement ("PDS") and the title search.

From a buyer's perspective, the PDS and title search should always be incorporated into the contract. Incorporating these documents turns the statements made in the documents and the information disclosed into contractual terms. While errors in the PDS and on title may in some cases form the basis of legal action by a buyer even if not included in the contract, a claim in contract is the most straightforward claim a party can bring so is preferable to almost any other type of legal claim.

It is not enough, however, to simply attach the PDS or title search to the end of the contract. That does not incorporate them into the contract or give them the effect of contractual terms. Rather, one of the following groups of terms should be included:

If the PDS and title search have already been obtained and/or disclosed:

- The attached Property Disclosure Statement dated ("date") is incorporated into and forms part of this Contract.

  Plus one of the following two clauses A OR B:

A. On the Completion Date, in addition to the encumbrances set out in section 9 of the Contract, title to the Property will be subject to the encumbrances and legal notations expressly indicated to remain on title as shown on the copy of the title search that is attached to this Contract.

B. On the Completion Date, in addition to the encumbrances set out in section 9 of the Contract, title to the Property will be subject to:

   1. [List other encumbrances and legal notations to remain on title];
   2. [...]; and
   3. [...]

set out in the copy of the title search that is attached to this Contract.

Clause A is most appropriate where the attached title search is marked up to specify which encumbrances and legal notations are to remain on title. Including a marked up copy may be more efficient when there are a large number of encumbrances that will remain on title. This also reduces the risk that one or more encumbrances or notations is missed, or of mistakes being made in transcribing the encumbrance or notation details.

If the buyer has not obtained a copy of the PDS or title search prior to making an offer, the following clauses are more appropriate:

- Subject to the Buyer obtaining and being satisfied, on or before (date), with a Property Disclosure Statement with respect to the Property.

  This condition is for the sole benefit of the Buyer.

  If this condition is satisfied or waived, the Property Disclosure Statement will be incorporated into and form part of this Contract.

- Subject to the Buyer being satisfied, on or before (date), with the title, encumbrances and legal notations affecting or benefitting the Property. This condition is for the sole benefit of the Buyer.

  On the Completion Date, in addition to the encumbrances set out in section 9 of the Contract, title to the Property will be subject to the encumbrances and legal notations expressly indicated to remain on title as shown in the title search that is attached to this Contract.

As will be discussed again below, even if incorporated into the contract, the PDS is not a guarantee that the property does not have any of the potential defects listed in the statement. A buyer's agent should still recommend the client perform a property inspection and discuss the PDS results with the property inspector.

Disclosable Defect but Repairs Done

1. The obligations on a seller to disclose the existence of property defects, and the related obligations of a listing agent, are a discussion topic unto themselves. However, where there is something that the seller must disclose, or a prior defect that would have been disclosable if it had not been repaired, a seller can provide even more protection against future claims by the buyer by including a term that describes the repair work done to remedy the defect. Suggested language is this:

   The Seller discloses that the Property did have (describe condition) but has undergone the following corrective measures:

   ("List")

   The Buyer accepts the condition of the Property in reliance on these corrective measures.

This clause acknowledges the repairs and has the buyer specifically accept the current condition of the property despite the prior defect. It is very difficult for a buyer who has agreed to this term in the contract of purchase and sale to later claim damages related to the defect. The list of repairs should be complete and accurate, including dates where the sellers can provide them.

Warranty of Property's Condition—One Step Beyond Disclosure

The PDS discloses what the seller knows or ought to know about a property's current condition. It is not an enforceable promise by the seller that the property is not suffering from the possible defects referred to in the PDS. A buyer will only be able to recover losses from a seller where the buyer can show that the seller carelessly or deceitfully included wrong answers in the PDS. The buyer discovering a defect mentioned in the PDS after closing is not enough.

If there is reason to suspect a particular defect or there are some questions about the state of the seller's knowledge, the contract can include a warranty clause about the property's condition. This takes some of the sting for a buyer out of the representations and warranties section mentioned above by including a specific exception to the general exclusion. A warranty clause goes beyond what a seller does or should know about the property, and promises that the defect(s) referred to are not present. This makes the seller liable to the buyer if the buyer discovers later than a warranted defect is present, whether the seller knew or should have known about the defect or not. Because of this increased liability, a seller should be careful about making a warranty unless they have intimate historical and present knowledge of the property.

The suggested warranty language is this:

> The Seller represents and warrants that, to the best of the Seller's knowledge, the Property does not have (describe condition).

Possible Health, Safety or Environmental Condition

In certain cases, there may be a concern with the property that for whatever reason, the parties do not need or want to investigate more fully prior to completion. The seller needs to disclose the existence of this concern, or that there is a potential concern that is reasonably suspected by the seller, even if it is not confirmed. If the buyer wants to proceed despite this concern, the seller should include a term in the contract of purchase and sale that acknowledges this potential concern and indicates that the buyer is accepting the current condition regardless. The suggested clause in these circumstances is:

The Seller discloses, and the Buyer acknowledges, that the Property contains or has contained (describe condition) and the Buyer accepts the Property in this condition.

This clause is of particular benefit to the seller since it confirms disclosure and results in the buyer committing in the contract to accept the property notwithstanding the concern raised.

Unauthorized Accommodations

Depending on the location of real estate practice, unauthorized accommodations or illegal suites can be fairly common. So long as it is disclosed to the buyer that the accommodations are not authorized then the buyer can decide whether or not they are willing to proceed with a purchase in the circumstances. A real estate licensee can also make their own inquiries with the applicable municipality about the legality of a property's suite.

When acting for the buyer, however, a real estate licensee should be aware of the potential consequences of the unauthorized accommodations. Depending on what feature(s) of the accommodations is not authorized, a local government may require that additions or changes be removed or upgraded to meet current bylaws or other regulatory standards. A buyer may also experience difficulties obtaining or maintaining insurance or mortgage financing. Therefore, it is not an issue to be treated lightly. If the buyer does not or cannot continue to rent out the illegal suite, they will not generate any revenue from it, either.

As an added layer of protection for the seller and the buyer's agent against the buyer later claiming it did not understand the impact of the unauthorized accommodations, consider adding the following term:

> The Buyer acknowledges that the Property contains unauthorized accommodation and understands the potential consequences including loss of income if the Buyer is required to discontinue any rental of that unauthorized accommodation.

Limits on Scope of Real Estate Licensee's Advice

In a straightforward residential real estate transaction, there may not be anything in particular the buyer should be aware of or should investigate beyond reading the PDS carefully and performing an inspection. However, some properties, because of their nature or location, require the buyer to turn their minds to other obligations or restrictions. It is important for the real estate licensee to both discuss clients' needs with them and to inform themselves about these issues so they can be in a position to advise their clients where they are able, and, more likely, refer them to other licensees as necessary. Some examples include developer disclosure documents in the pre-sale context, the implication of land being located in the Agricultural Land Reserve, lands using licensed ground water or surface water, and other environmental sensitivities, just to name a few.

Including a term to the effect that the client has been advised to seek independent legal advice on the terms of the contract and the property purchase in general is always a wise move. Where there are peculiarities about the property such that more than generic legal advice is advisable, this is even more so. Example clauses to include that address the contract terms generally are the following:

> Subject to the Seller receiving, on or before (date), approval by the Seller's legal, accounting and other professional advisors of the terms and conditions of this Contract. This condition is for the sole benefit of the Seller.

> Subject to the Buyer receiving, on or before (date), approval by the Buyer's legal, accounting and other professional advisors of the terms and conditions of this Contract. This condition is for the sole benefit of the Buyer.

Where there are specific legal issues to investigate, the following clauses are more fitting:

> Subject to the Seller obtaining, on or before (date), legal advice satisfactory to the Seller concerning "(define applicable legal issue, e.g., easement, builders' lien, financing"). This condition is for the sole benefit of the Seller.
>
> Subject to the Buyer obtaining, on or before (date), legal advice satisfactory to the Buyer concerning (define applicable legal issue, e.g., easement, builders' lien, financing) on or before (date). This condition is for the sole benefit of the Buyer.

Lastly, once a client has been advised to seek the help of other professionals on certain issues, a real estate licensee should not attempt to provide any advice of that nature to a client. If a real estate licensee takes on responsibility for providing some of that advice, that can attract duties to the client over and above those that are imposed by the agent-client relationship. It is best to guide the client to persons whose expertise covers the issue in question and leave it to them to discuss. Then the real estate licensee can incorporate that third party advice into the contract as instructed by the client or their advisor.

Confidentiality of Terms

While real estate licensees owe their clients a duty of confidentiality because of their special relationship of trust, the same is not true for parties to a contract of purchase and sale. Confidentiality concerns normally arise in the context of commercial property so the Standard Commercial Contract includes a confidentiality clause. However, the circumstances of a residential property transaction may also be sensitive and one or more parties may be concerned about the terms of the contract becoming public or being disclosed to others who are not involved in the transaction. If the parties want to keep the contract terms confidential, the following is a suggested addition to the Standard Residential Contract:

The Seller and the Buyer agree that the terms and conditions set out in this Contract will not be disclosed to any other person, other than professional advisors and lenders, without the prior written consent of the Seller and the Buyer.

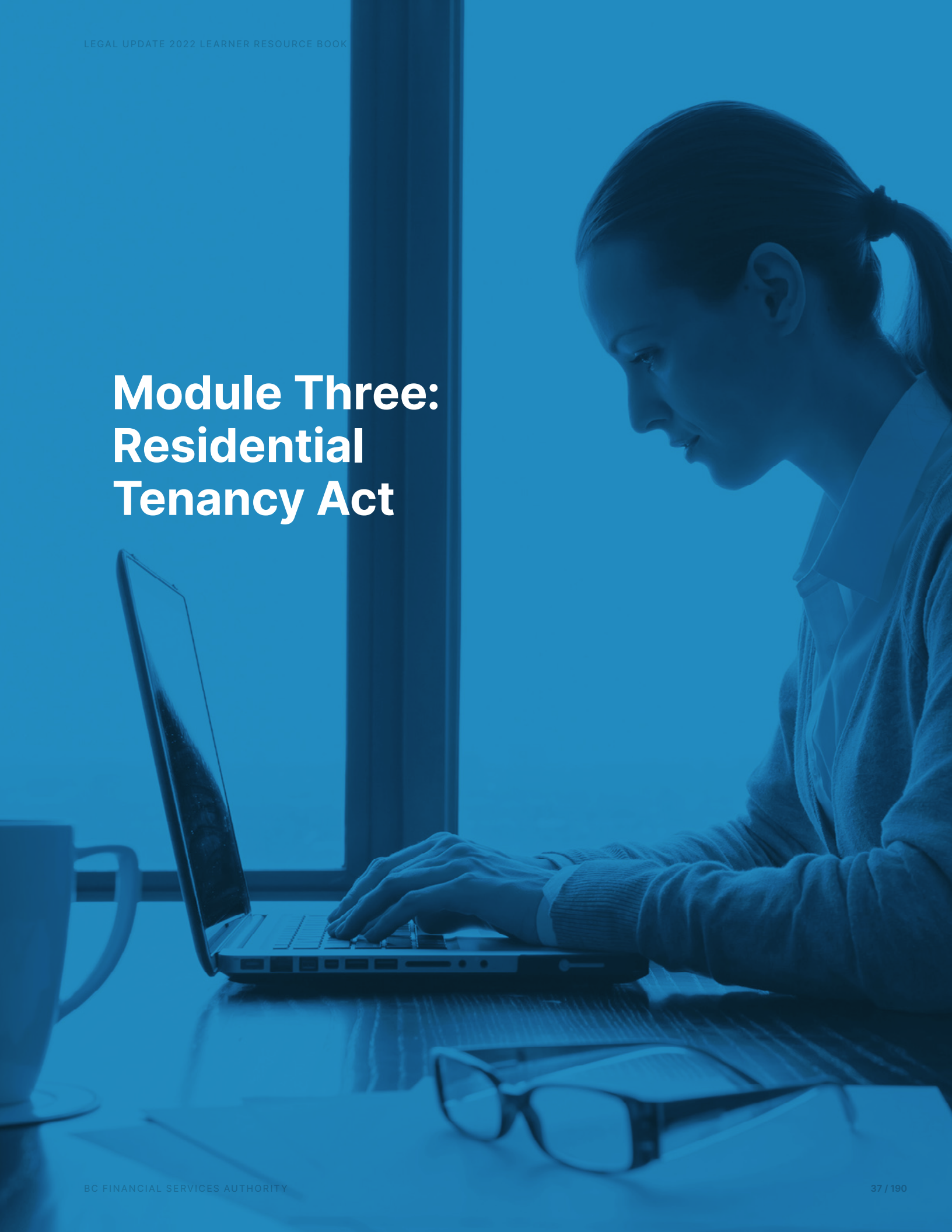
This clause can be amended if there are certain other categories of people that the buyer or seller need to be able to disclose terms to for a legitimate reason. This clause also imposes a duty of confidentiality on both parties. While it may only be one party who is concerned about disclosure, confidentiality clauses are not generally effective unless both parties agree to abide by them. There also may be other confidentiality obligations between the parties based on a prior relationship or agreement, but this discussion assumes the contract of purchase and sale governs the parties' entire relationship as it concerns the transfer of property.

Finally, it is important that your clients understand that a confidentiality clause in an offer or counteroffer is not binding on the other party until an offer or counteroffer including the confidentiality clause is accepted. If your client wants to impose confidentiality obligations over negotiations, you should recommend to your client that they seek advice about a non-disclosure agreement they can present to the other party before negotiations begin.

CONTRACTS – A POWERFUL TOOL

Contracts can be intimidating. Alternatively, they can become so familiar that their authority and complexity is underestimated. The goal in this module has been to show how contracts, when given the respect and attention they deserve, can be a powerful tool and one that is key to the success of a property transaction. A real estate licensee's understanding of the contract of purchase and sale and knowledge of how to modify it to best suit a client's need is one of their main assets in providing value to the client.

Module Three: Residential Tenancy Act



Module Three: Residential Tenancy Act

MODULE DESCRIPTOR:

This module provides rental property management licensees with a practical guide to the *Residential Tenancy Act*, S.B.C. 2002, c. 78 ("*RTA*"). You will learn about the beginning stage of a residential tenancy, and the laws and best practices that apply. You will also learn about the latest legislative amendments that impact rental property management in British Columbia. As a rental property manager, it is important that you have a broad and clear understanding of how the *RTA* applies to your day to day management of a rental property in British Columbia.

LEARNING OBJECTIVES FOR THE MODULE

After completing this module, you should be able to:

- Describe best practices for processing a rental application and conducting a tenant interview under the *RTA* and other laws;
- Identify required and recommended terms for inclusion in a residential tenancy agreement;
- Describe recent amendments to the *RTA* that impact mid-tenancy matters; and
- Describe recent amendments to the *RTA* that impact end of tenancy matters.

BEGINNING A RESIDENTIAL TENANCY

The trailer to a blockbuster movie. The opening verse of a hit song. The preface to a best-selling book.

The importance of a good introduction cannot be understated, and the same can be said for the beginning of a residential tenancy. How a residential tenancy begins is a critical component of the rental process and an essential step to developing a successful landlord/tenant relationship. As a rental property manager, it is important to know the laws that govern this stage of a residential tenancy, and to develop best practices when bringing a new tenant into a client's property.

RENTAL APPLICATIONS AND INTERVIEWS UNDER THE *RTA*

Before opening the door to a new tenant, licensees should take special care during the tenant selection process. Licensees should also remain mindful of their client's expectations. Does the client expect the licensee to obtain their final approval before approving a prospective tenant? Does the client have any special rules for their property which might impact tenant selection? Is the client an experienced landlord, or are they largely unfamiliar with renting a property? When commencing rental property management services, rental property managers should work closely with their client to ensure that their involvement and expectations for the tenant selection process are clearly understood and accurately reflected in the service agreement. In short, it is important for rental property managers to ensure that their expectations and their client's expectations are quite literally on the same page.

More Information:

To learn more about the law of agency and best practices when creating a service agreement, consult the Agency Module.

Although different clients may have different expectations for their rental properties, there will be some common ground in the tenant selection process. A good tenant is someone who pays rent on time, takes care of the rental property, and gets along with their neighbours. A good tenant is also someone who can be entrusted with a client's asset, and who abides by the terms of their tenancy agreement. Ideally, a good tenant will also be someone who wishes to stay long-term. Given these preferred tenant characteristics, how can a rental property manager find the right tenant for their client's property?

Questions for Consideration:

For example: How do you identify a good tenant? (What are some key items rental property managers should look for?)

- Demonstrate good rental history with landlord (for example: landlord references);
- A favorable credit check;
- Employer references; and
- Proof of income.

How would you differentiate between a good rental application and a bad rental application?

Like all good relationships, a good residential tenancy starts with a good introduction. Unfortunately, the *RTA* does not offer much guidance for this stage of a residential tenancy. Indeed, the only reference made to a rental application is section 15 of the *RTA* which prohibits collecting fees for accepting or processing a rental application or for investigating an applicant's suitability as a tenant. In addition, neither the *RTA* nor the Residential Tenancy Branch ("RTB") offers any suggested forms for rental applications, guidelines for rental interviews, or tenant selection policies. As a result, significant responsibility falls to the rental property manager to ensure that the tenant selection process they follow protects their client's best interests and meets their client's expectations for their rental property. Fortunately, the RTB does publish a list of organizations and other resources that provide sample rental application forms, online training and other assistance for this stage of the rental process. In addition, British Columbia Financial Services Authority ("BCFSA") publishes mandatory agency and disclosure forms which explain the licensee's role to prospective tenants in managing their client's rental property before a tenancy begins. Rental property managers are encouraged to consult these additional resources.

More Information:

To learn more about disclosure requirements and to obtain disclosure forms for residential tenancies, visit the BCFSA Website at: www.bcfsa.ca

To view a complete list of organizations and other resources the RTB recommends for rental application assistance, visit: www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies

Keeping in mind the characteristics of a good tenant, the rental application and interview should ask for information that serves as a reliable predictor of how the tenancy might unfold. Minimally, a prospective tenant should be asked to supply the following "who's who" information for consideration:

- The names of all of the proposed tenants;
- The names of all of the proposed occupants (if different from the tenants);
- The current address, telephone number, and e-mail address for all of the proposed tenants; and
- A list of landlord references who can be contacted about their application.

Apart from knowing who will be occupying the rental property, it is also important to collect information which might signal any "red flags" for the potential tenancy itself. A red flag might include an inability to pay rent, a history of disruptive conduct or serious criminal activity, dishonesty, frequent relocations, or even a recent eviction. There are a couple of ways to collect this information. The first way is to ask the prospective tenant(s) directly as part of the rental application or interview. The second way is to engage a third party company to verify the requested information (e.g. a credit report from a reporting agency).

As part of reviewing any rental application or interview, extra caution should be taken to confirm the identity of the proposed tenant(s). Identity verification can be accomplished by reviewing the individual's photo identification at the time of completing the rental application or conducting the interview, or at the very least, prior to signing the residential tenancy agreement. In addition to providing the prospective tenant with a copy of the BCFSA Disclosure for Residential Tenancies form, the rental property manager should also provide the tenant with a copy of the proposed tenancy agreement so that all parties are clear as to what rules will apply to the rental property. If the rental property is located in a strata corporation, special care should be taken to ensure that applicants are also aware of any other rules governing the property that are not otherwise specified in the tenancy agreement itself. Best practices entail reviewing these materials with the applicant, including the Disclosure for Residential Tenancies form, to ensure that the applicant understands these documents, and to answer any questions they may have about the rental property or the rental manager's role in renting the property. If there are any special requirements for the rental property (e.g. a non-smoking requirement; a no-pets rule; or perhaps a strata corporation bylaw that includes minimum age requirements), they should be clearly disclosed at the outset.

Although the rental application process is not captured under the *RTA*, the Courts have nonetheless recognized that a failure to conduct an adequate review of a rental applicant can expose the rental property manager and their company to significant liability.

Case Study: *Said v. Meadow Ridge Classic Realty,* 2014 BCPC 129

The BC Provincial Court ("Small Claims") considered a claim brought by a property owner against their former property management company after tenants "trashed" their family home for months. The owner retained the property management company to rent their home for one year while the owner, his wife and young children traveled in Egypt. The Court observed that the family's "dream vacation" was ultimately turned into a "complete nightmare", however, due to the property manager's failure to adequately vet the tenants as part of the rental application process.

Although the service agreement entrusted the property management company to locate prospective tenants using "due diligence" and generally oversee the tenancy for the owner's benefit, the services rendered fell well below these basic obligations, beginning with the rental application. The Court found that the manager had accepted a "grossly unsatisfactory and unsuitable" tenant for the property without conducting a proper interview or investigation of the prospective tenant. The Court noted that the rental application form itself included "many unheeded red flags", including the use of inconsistent surnames, omitted employment status, missing credit information, and suspicious landlord references. Contrary to the property manager's testimony that a credit report was obtained and then shredded for privacy, the Court concluded that no such check was likely performed. The Court also noted that a simple "Google search" of the prospective tenant would have revealed troubling background information, including a history of criminal convictions, drug trafficking, firearm bans, a vicious dog attack, and child endangerment.

In the end, the Court found that the property manager was grossly negligent in their management of the rental property and awarded the owner the maximum payment order at that time: $25,000 damages, plus all fees, disbursements, and court ordered interest.

Questions for Consideration:

How might an applicant's answers to the following interview questions impact whether or not they should be accepted as a tenant?

Are you currently renting?	Yes.
Have you ever been evicted?	No, I agreed to leave my last property because I did not like how it was being managed.
How long have you lived at your current home?	6 months.
Did your last residence have bedbugs or any pests?	My specific rental unit did not have any pests.
Do you have any pets?	No.
Do you carry tenant insurance?	If it is required.
I did not like the way my previous rental was being managed.	I did not like the way my previous rental was being managed.
What is your current occupation?	Rollercoaster technician.

Answer: Overall, the answers provided by the tenant suggest a need for further investigation in order to confirm whether or not they have encountered problems in previous rental properties.

Rental Applications & Interviews under Other Laws

Although the *RTA* is largely silent with respect to processing rental applications and conducting rental interviews, other laws do apply. Rental managers should become familiar with these other laws and learn how they impact the beginning stage of a residential tenancy: in particular, the *Personal Information Protection Act*, S.B.C. 2003, c. 63 ("*PIPA*") and the Human Rights Code, R.S.B.C. 1996, c. 210 ("HRC").

PIPA

Processing rental applications and interviewing prospective tenants invariably involve collecting, using and disclosing a lot of sensitive personal information. All of these activities are governed by PIPA. In most circumstances, a rental property manager will need the prospective tenant's consent to collect, use or disclose their personal information. As a general rule, the only personal information that may be collected from a potential tenant is information that is "reasonably necessary" to decide whether or not to accept their rental application (section 7). PIPA authorizes potential tenants to refuse to provide any information that is overly intrusive or irrelevant to processing their rental application without any adverse consequence (i.e. a rejected rental application).

In September 2019, the B.C. Office of the Information and Privacy Commissioner published guidelines for landlords and tenants which explain privacy requirements for this stage of a residential tenancy. Rental property managers should consult these guidelines as part of developing their own best practices for constructing rental applications and conducting rental interviews.

Once information is collected, it must also be safely stored and protected from unauthorized access for a minimum period of one year (section 35). This retention requirement applies to copies of credit reports, the rental application, or notes from a tenant interview, regardless of whether or not the applicant was accepted or rejected as a tenant.

Questions for Consideration:

Which of the following personal information is reasonably necessary to decide whether to rent to a potential tenant? Which information is unnecessary or irrelevant?

Income

Asking for proof of income may be reasonable to establish if a tenant can pay the rent. The OIPC recommends asking for this personal information if the tenant is unable to provide sufficient landlord references to verify their ability to pay rent in the past.

Recommendation: OIPC September 2019 Guidance Document for Landlords and tenants.

Credit history

Knowing the prospective tenant's rental payment history is reasonably necessary to determine whether or not to accept their rental application. The OIPC permits landlords to collect a report from a reporting agency so long as the applicant consents and is told the purpose for this collection. The OIPC also permits landlords to request an applicant's consent to perform a credit check as part of their standard application process but only at the end of the tenant selection process and only for those persons who may be offered the tenancy.

Recommendation: OIPC September 2019 Guidance Document for Landlords and tenants.

Criminal history

Asking for an applicant's criminal history may be relevant to deciding whether or not to rent to them, however the OIPC recommends only collecting this information if the nature of the rental property or neighbourhood require these considerations. For example, if the rental property is located beside a school or daycare, such that an applicant prior criminal history may be relevant to whether they present a risk to the local community, it may be relevant to obtain a criminal record check.

Recommendation: OIPC September 2019 Guidance Document for Landlords and tenants.

Marital status

Not relevant. This information is not reasonably necessary to determine whether or not to rent to a prospective applicant.

Recommendation: OIPC September 2019 Guidance Document for Landlords and tenants.

Landlord references

Collecting references from an applicant's prior landlord(s) is reasonably necessary to deciding whether or not to accept a rental application.

Recommendation: OIPC September 2019 Guidance Document for Landlords and tenants.

Banking information

This information is irrelevant. The OIPC prohibits landlords from collecting an applicant's banking information prior to establishing a tenancy. However, after an applicant has been approved as a tenant, it may be reasonably necessary to collect this information if the tenancy agreement requires rent to be paid in a certain way (e.g. pre-authorized debit).

Age

It depends. The *Residential Tenancy Act* permits landlords to rent to a minor. However, the OIPC recognizes that a person's age may be relevant in certain housing developments (e.g. a strata corporation that is reserved for persons who are over 55 years of age). The OIPC also permits landlords to obtain an applicant's birth date for the purpose of performing a credit check as an alternative to the Social Insurance Number.

Recommendation: OIPC September 2019 Guidance Document for Landlords and tenants.

Social Insurance Number

It depends. Once an applicant has been determined to be someone who may be accepted as a tenant pending the outcome of a credit check, it may be reasonable to collect an applicant's Social Insurance Number for the sole purpose of conducting this credit check. However, the OIPC recommends using less invasive personal information when available (e.g. an applicant's full name and date of birth is usually sufficient).

Recommendation: OIPC September 2019 Guidance Document for Landlords and tenants.

HRC

Just as rental property managers need to remain mindful of a prospective tenant's privacy rights, so too does the rental property manager need to remain mindful of a prospective tenant's human rights (including the duty to accommodate). In B.C., the HRC protects persons from discriminatory acts and barriers to their full and free participation in society, including access to housing. Under the HRC, all persons are protected from being denied the opportunity to submit a rental application or enter a lease on the basis of a protected personal characteristic (e.g. family status; marital status; sex; physical and mental disability; ancestry). The HRC's protections have also been expanded to include other personal characteristics in recent years, such as gender identity and expression. For a current list of protected characteristics, rental property managers should consult sections 8 and 10 of the HRC.

Questions for Consideration:

Considering the following questions asked during a rental interview. Do any of these questions raise the potential for a complaint under the HRC?

Do you have any children? Yes. This question may raise an issue under the "family status" protections of the HRC. Instead, consider asking the number and age of the occupants that will occupy the unit.

Do you receive income assistance? Yes. This question may raise an issue under the "lawful source of income" protections under the HRC. Instead, consider asking for a credit report or credit check in the event the applicant will be offered the rental property pending confirmation of their ability to pay rent.

Are you married? Yes. This question may raise an issue under the "marital status" or "family status" protections udner the HRC.

Can I look at your photo identification? No, this question would not be offside the HRC.

What is your age? It depends. Because the *RTA* allows minors to enter into a tenancy agreement, this question may trigger the "age" protections under the HRC unless there are specific age-related requirements for the housing (e.g. a 55 year or older strata corporation).

Do you have any medical conditions? Yes. This question may raise an issue under the "disability" protections of the HRC.

Do you have any pets? No. Asking whether or not an applicant has any pets does not contravene the HRC. However, preventing an applicant from renting a property because they medically require an animal to accommodate a physical or mental disabilty would be a breach of the HRC.

Where were you born? Yes. Asking this question may raise an issue under the "race," "place of origin" and "ancestry" protections under the HRC.

Importantly, the HRC does not actually require an intention to discriminate in order for an action to be considered discriminatory and a breach of its requirements. So long as a person's protected characteristic was a factor in a decision whether or not to rent a property to a potential tenant, that decision can breach the HRC and result in liability for the rental property manager. Even remarks made during the course of a rental interview or tour of a rental property can result in a successful human rights complaint.

Case Study: *Cha v. Hollyburn Estates Ltd.*, 2005 BCHRT 409

In *Cha v. Hollyburn Estates Ltd.,* 2005 BCHRT 409, one wrong word said during the rental application stage led to a successful complaint.

While on a tour of a rental property, a building manager advised two prospective tenants that a one bedroom suite available for rent would not actually be made available to them and their baby because such properties would not be rented to a "family." Despite offering the pair an opportunity to look at a two-bedroom suite in the building and despite explaining the remark as an attempt to describe the building's maximum occupancy policy for one bedroom suites, the Tribunal nonetheless found the interaction discriminatory by virtue of the "family status" protection of the *HRC*.

Although the Tribunal confirmed that the occupancy policy itself did not appear discriminatory on its face, the Tribunal did find that the "effective denial of an opportunity to apply to rent a one bedroom apartment, in the particular circumstances of this case, was discriminatory." In short, the Complainants were told that they could not rent the suite because they were a "family", not because they exceeded the building's maximum occupancy policy. The Human Rights Tribunal ordered the management company to pay $500.00 to the Complainants for injury to dignity, feelings and self-respect, and ordered that the management company cease discriminating on the basis of family status in the future.

Residential Tenancy Agreements under the *RTA* and other laws

Although the *RTA* does not include any content or formatting requirements for rental applications, the *RTA* does contain several content and formatting requirements for residential tenancy agreements.

At the outset, the *RTA* requires that all residential tenancy agreements be made in writing apart from those tenancies that began before January 1, 2004 (section 12). Tenants must also receive a copy of the fully signed tenancy agreement within 21 days after signing. The requirement for a written form of tenancy agreement eliminates speculation as to the parties' respective rights and obligations respecting the rental property. Remember that a tenancy agreement is no different than any other contract. To that end, having clear and certain terms for the residential tenancy relationship protects the client's investment and further safeguards a rental manager's ability to manage the rental property. The *RTA* also requires that tenancy agreements be "easily read and understood by a reasonable person" (section 12, RT Regulation).

In addition to requiring that all residential tenancy agreements be recorded in writing, the *RTA* requires that certain information be included in every agreement, including the parties' correct legal names, the rental property address, the duration of the tenancy, and rent payment obligations. The full list of requirements is found in section 13 of the *RTA*.

The requirement to include the "correct legal names of the landlord" is an important one for rental property managers. The *RTA*s definition of "landlord" does not actually distinguish between a property owner and a property manager in terms of their respective rights and obligations under the *RTA*. As a result, rental property managers may be named in a legal proceeding before the RTB if they are identified as the sole landlord under the agreement or in any other documents arising from the residential tenancy (e.g. the condition inspection report; a notice to end tenancy; other tenant communications). To avoid any confusion over a rental property manager's role in the residential tenancy agreement, the rental property manager should be clearly identified as "the agent for the property owner" or "the property owner c/o the agent, rental property manager" on the tenancy agreement itself, as well as any other correspondence or documents exchanged during the tenancy. Remember, BCFSA also requires rental property managers to clearly disclose their agency status by way of the Disclosure for Residential Tenancies form before a residential tenancy agreement is even signed. To learn more about disclosure requirements and to obtain disclosure forms for residential tenancies, visit the BCFSA website.

In addition to requiring certain components be included into every residential tenancy agreement, the *RTA* mandates certain terms and formatting (section 13, *RTA*; section 12, RT Regulation). These terms are known as "standard terms" and can be found in the Schedule attached to the Residential Tenancy Regulation, B.C. Reg. 42/2021 (RT Regulation). The standard terms also appear in the "sample" residential tenancy agreement published by the RTB, and cover matters such as pets, deposits, locks, and guests. None of these terms can be modified (section 14, *RTA*). In addition, apart from limited exemptions for some housing providers, all of these terms must be clearly differentiated from any other terms that might be added to the tenancy agreement (sections 2, 13, RT Regulation). Rental property managers who do not utilize the sample residential tenancy agreement from the RTB must ensure that the form and content of their form complies with *RTA* requirements, including content and font size.

More Information:

To view the sample residential tenancy agreement published by the RTB. To see all of the standard terms, view the Schedule to the RT Regulation, B.C. Reg. 42/2021.

Although the *RTA* prohibits landlords and tenants from contracting out of these legislative requirements (sections 5 and 6), the legislation does leave room for "additional terms". Additional terms are terms that go beyond what the *RTA* and other applicable laws require. Additional terms must be clearly identified in the agreement in order to distinguish them from the standard terms required by law. One method is to mark each standard term with the caption "*RTA* Required Term" or alternatively include a clause that explains that standard terms are depicted by a different font, colour, style in the agreement (e.g. italics, bolded, red, underlined). Another method is to append the Schedule of standard terms as a mandatory addendum to the tenancy agreement. Whatever method is chosen, there must be an obvious differentiation between the standard terms required by law, and the landlord's terms added for the specific property. Whatever terms are added should also comply with the *RTA* and other laws, and should represent the client's intention for their property. Common additional terms including the following topics:

- Smoking /Vaping
- Pets
- Parking
- Quiet Hours
- NSF Charges
- Liquidated Damages
- Garbage/Recycling Rules
- Cannabis (growing and smoking)
- Storage Rules
- Tenant/Guest Conduct
- BBQ Use
- Balcony/Patio Use
- Recreational Facility Rules
- Maximum Occupancy
- Additional Occupant Fees
- Tenant Insurance
- Commercial Activities
- Property Alterations
- Extended Absences
- Water-filled items
- Illegal Activity
- Strata Corporation Bylaws & Rules
- Strata Corporation Moving Fees
- Security Systems
- Smoke Alarms & Fire Inspections
- E-mail Service & Electronic Signatures
- Hazard & Pest Reporting
- Use of Rental Unit & Common Areas

Scenario:

Your client has engaged you to rent their three bedroom strata townhouse. The Strata Corporation has bylaws requiring move-in and move-out fees, as well as a no pets bylaw and a bbq prohibition. Your client does not mind if the tenant brings a dog into the rental unit, but would like you to ask for a pet damage deposit. Your client has also indicated that they do not want any smoking or vaping in their property.

Question: You are preparing a tenancy agreement for your client. Based on what you have learned from your client and in light of what you know about the Strata Corporation's bylaws, which of the topics listed in the above table would need to be included in your draft agreement?

Answer: The following topics should be included in your agreement given the Strata Corporation's bylaws, and your client's instructions: BBQ Use; Smoking and Cannabis; Pets; Strata Corporation Bylaws & Rules; and Strata Corporation Moving fees. Remember that any additional term you create for your client must comply with the Strata Corporation's bylaws. This means that even though your client is okay with bringing a pet into their rental property, the Strata Corporation's bylaws banning pets takes priority in this situation and must not be contradicted in the tenancy agreement.

The additional terms should reflect the client's preferences for their property and should also provide the client with more than the minimal protections prescribed by the *RTA*. Special care should be taken to ensure that these additional terms do not run afoul of the *RTA* or other applicable laws (e.g. privacy and human rights). In addition, if an additional term is considered to be "material" or fundamental to the residential tenancy agreement, then that importance should be clearly disclosed to the tenant at the outset, in addition to the consequences of breaching that term.

What makes a material term "material"? Material terms are terms that both parties agree are so important that even the most minor breach will give the other party the right to end the agreement (sections 45, 47, *RTA*). Although a tenant may be evicted for repeatedly breaching other terms of their tenancy agreement, a tenant's failure to comply with a material term does not require repeated infractions in order to justify ending the tenancy. For example, a tenant's obligation to pay rent is regarded as a material term because rent is an integral component of the rental contract. As a result, a tenant's failure to pay rent in full and on time at any point in their tenancy enables a landlord to immediately end the tenancy under the *RTA*. The materiality of a term can be identified by including an initialing box beside the term and/or a clear statement in the term itself (i.e. This is a material term of this tenancy agreement. Failure to comply with this term constitutes a breach of a material term of this Agreement for which the Landlord may serve a notice to end tenancy in accordance with the Act.) Beyond identifying a term as material in the agreement itself, material terms must also be promptly and consistently enforced. If a term is not consistently enforced, then there is a high risk that the term will lose its materiality and compromise a party's ability to end a tenancy from a related breach.

Case Study: Colliers Macaulay Nicolls Inc. v. Wilkinson, 2012 BCSC 1253

The Court was tasked with reviewing an RTB decision respecting the enforcement of a material term. The material term at issue in this case was a "no pets" provision. Although it was not disputed that this term was included in the written tenancy agreement, the tenant gave evidence that the building manager was aware that she had two birds and specifically approved "two legged but not four legged pets". The birds ("two finches") were evidently gifts commemorating the death of the tenant's mother, and as such, had significant sentimental value for the tenant.

Eventually, the landlord sought to enforce the "no pets" provision as a material term and demanded the birds' removal. The matter escalated to the RTB. At the hearing, the tenant challenged the materiality of the term and gave evidence that the rental property manager knew about her finches for some time without issue, and through non-action, approved the pets. The RTB upheld the tenant's challenge and agreed that the no pets' term was no longer material because the rental property manager delayed enforcing it against the tenant. On judicial review, the Court agreed with the RTB's interpretation of "materiality" and upheld the decision. In the end, the judicial review was dismissed, and the birds were permitted to stay perched at the rental property.

RECENT CHANGES TO THE *RTA*

Staying familiar with the *RTA* means staying on top of legislative changes. Like any law, the *RTA* is subject to change. Fortunately, the Residential Tenancy Branch website includes a "news feed" which broadcasts legislative changes and even identifies upcoming changes that have not yet taken effect. It is important to review the RTB website from time to time for updates to these laws.

Up in Smoke

In October 2018, the *RTA* was amended to catch up with the federal legalization of cannabis, as well as B.C.'s own control and licensing laws. Section 21.1 was added to the *RTA* for the purpose of clarifying how cannabis legalization impacted existing tenancy agreements with respect to cannabis smoking and growing. Under this section, any existing tenancy agreement that included a "no smoking" term and that did not otherwise include a term expressly permitting cannabis smoking would automatically "include a term that prohibits or limits smoking cannabis in the same mannner as smoking tobacco is prohibited or limited." Importantly, however, the *RTA* did not include cannabis vaping within the definition of cannabis smoking and this term only applied to existing tenancy agreements at the time that cannabis smoking was legalized. As a result, any landlord wishing to prohibit vaping in their existing leases, or those landlords wishing to prohibit smoking or vaping in new leases, needs a specific additional term in their tenancy agreement in order to be enforceable against a tenant. In addition to these protections, all existing tenancy agreements were deemed to include a term prohibiting cannabis growing in or about the residential property unless the tenant was already growing (and authorized to grow) medical cannabis under the tenancy agreement or federal law. Again, any new tenancy agreement made after the cannabis legalization date would not be able to cut out cannabis growing unless an additional term was included in the tenancy agreement prohibiting the activity.

Remember that even an enforceable term can be rendered unenforceable if its enforcement would contravene the HRC. Section 10(1)(b) of the HRC prohibits discrimination as it relates to a term or condition of a tenancy. As noted earlier, the HRC prevails over all other laws, meaning that even an otherwise valid cannabis smoking, vaping or growing prohibition may not be enforced if a tenant's protected characteristic (such as a physical or mental disability) requires accommodation. Whether or not a tenant must be accommodated will depend on the medical evidence available and the specific circumstances of each case.

Special Delivery

One of the most significant updates to arrive in the last few years expanded service/delivery methods for landlords and tenants. On March 1, 2021, the *RTA* was amended to permit "any other means" of service as provided for in the Regulations. These Regulations were amended to specifically authorize e-mail service. Provided that a tenant clearly gives their landlord an email address to be used as an address for service in their tenancy, documents are permitted to be given to the tenant using this method. Best practices would be to authorize the tenant's e-mail service/delivery option in the residential tenancy agreement itself.

Sample E-mail Service Term

#_____ E-mail Service: The following e-mail address(es) may be used for serving and/or delivering documents under the *RTA*. A document served and/or delivered via e-mail is deemed to be received on the third day after the e-mail is sent, or as otherwise prescribed under the *RTA*.

Tenant(s) Permitted E-mail Address: _____

Landlord / Agent Permitted E-mail Address: _____

By way of reminder, each service/delivery method comes with its own service/delivery timeline (section 90). Accordingly, it is important to double check when a document is deemed to be given or served when selecting a service/delivery method. Regardless of which method is chosen, it is also important to confirm receipt. If it can be proven that a document was received sooner or later than the timeline prescribed under the *RTA*, then this may impact other deadlines under the legislation (e.g., timeline to dispute an eviction notice). To confirm successful e-mail service, consider using a "delivery receipt" and "read receipt" option.

You've Been Served

Service/Delivery Method	When Document Considered Received
Hand-delivery to Tenant	Same day
Leaving document with Adult Resident	Same day
Mail or Registered mail	5th day after it is mailed
Mailbox or Mail slot	3rd day after it is left
Door or Conspicuous Place posting	3rd day after it is attached
Facsimile	3rd day after it is sent
E-mail	3rd day after it is sent

Special Circumstances for Ending a Tenancy

A tenancy may come to an end for many reasons (section 44). In May 2020, the *RTA* expanded a tenant's ability to end their fixed term tenancy agreement on one month's notice due to "special circumstances" involving family violence or admission to long-term care. The purpose of this amendment was to assist tenants with ending their tenancies earlier than agreed in cases when their continued residency creates a health or safety risk for them or their family. When a tenancy is ended for either circumstance, all tenants subject to the residential tenancy agreement must vacate the rental unit unless a new residential tenancy agreement is entered into by the landlord with the remaining tenants permitting them to stay.

In order to qualify for this end of tenancy option, the tenant must provide the landlord with a mandatory form from the RTB entitled "Ending Fixed-Term Tenancy Confirmation Statement" (sections 41, 42). This form must be completed by an authorized third party verifier as defined under the *RTA* (section 39), must confirm that the tenant is eligible to end their tenancy due to family or household violence, and must be dated and signed within 90 days of issuing the notice to end tenancy. Authorized third party verifiers include but are not limited to medical practitioners, police officers, registered clinical counsellors, social workers, and lawyers.

Similarly, those tenants wishing to end their tenancy for the purpose of transitioning to long-term care may do so provided that they are assessed as requiring this care or already admitted to a long-term care facility. The purpose of this end of tenancy option is to accommodate those persons who are unlikely to return to living independently under a tenancy agreement. As with the other special circumstances for ending a tenancy early, a tenant wishing to end their tenancy for this category must submit the same Ending Fixed-term Tenancy Confirmation Statement completed by an authorized third-party verifier within 180 days of issuing their notice to end tenancy. Those qualified to verify a tenant's eligibility to end their tenancy for long-term care purposes include medical practitioners, long-term care managers, and occupational therapists (section 40).

Elimination of "Must Vacate" Clause

While the *RTA* expanded to permit more ways for a tenant to end their fixed term tenancy early, the legislation was previously amended to remove one common end of tenancy option for landlords: the "must vacate" clause.

Effective December 11, 2017, all existing and future fixed term tenancy agreements in the province were prohibited from requiring a tenant to vacate the rental property at the end of the term unless the tenancy was a sublease or it was a prescribed circumstance under the RT Regulations (section 44, 97(2)(a.1), *RTA*; 13.1, RT Regulations). The purpose behind this change was to eliminate a perceived "loophole" under the *RTA* which enabled landlords to compel existing tenants to enter into a new fixed term lease under a much higher rent in order to remain at the rental property. As a result of this amendment, tenancies continuing on a periodic basis were subject to the maximum rent increase amount and timing prescribed under the *RTA* (sections 42, 43). At this time, the only prescribed circumstance in which a landlord may require a tenant to vacate the rental unit at the end of their fixed term tenancy is when the landlord or their "close family member" (as defined under the legislation) plans in good faith to live in the rental unit. In all other circumstances, all fixed term tenancies must continue on a month to month basis unless the tenancy ends by way of another permitted category under section 44 of the *RTA*.

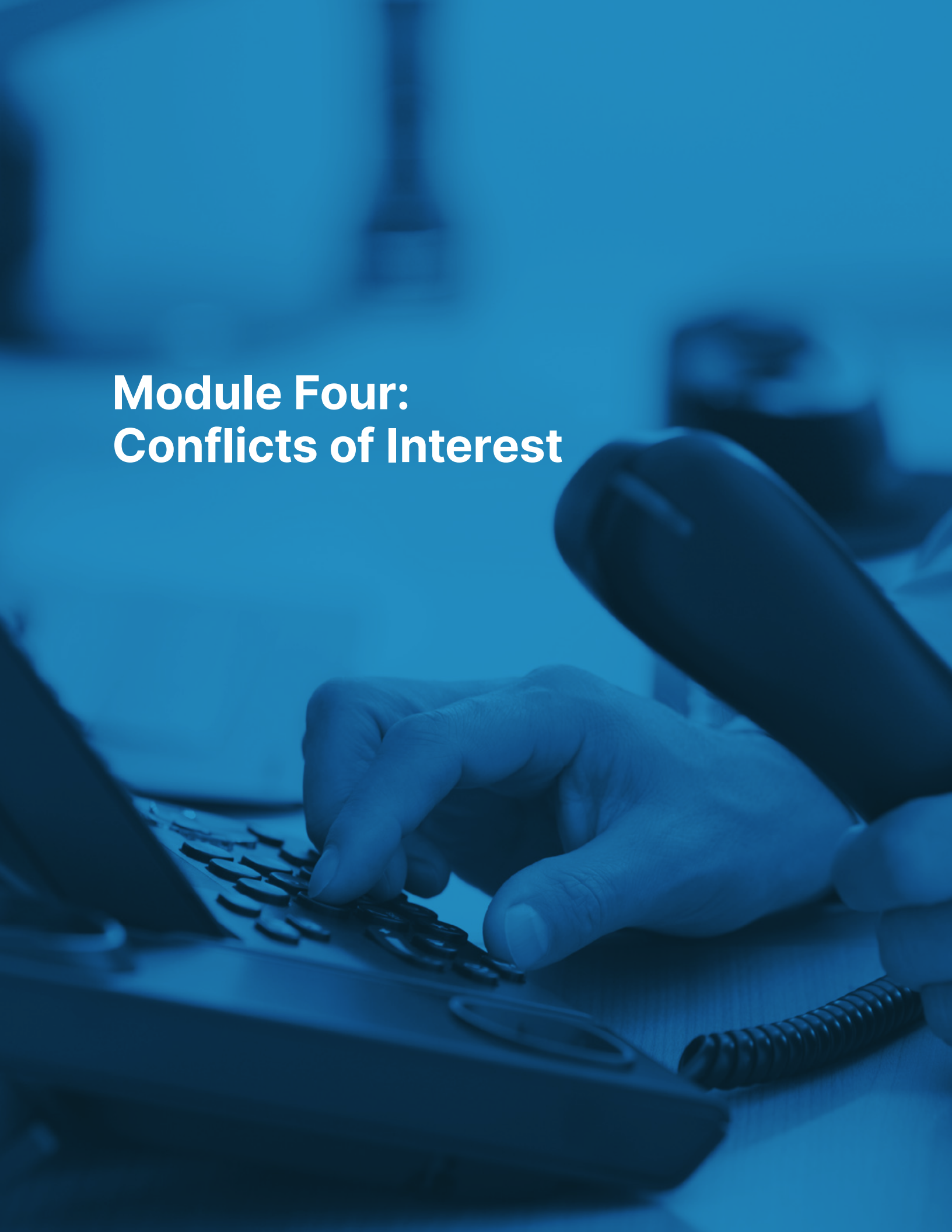
xEnding Tenancy for Significant Renovations

If it ain't broke, don't fix it. And if it ain't legit, don't evict.

As of July 1, 2021, the *RTA* was amended to require landlords to apply to the RTB for an Order authorizing them to end a tenancy for the purpose of making renovations or repairs to the rental unit. All of the following conditions must be satisfied in order for an Order to be approved:

- The landlord intends in good faith to renovate or repair the rental unit and has all the necessary permits and approvals required by law to carry out the renovations or repairs;
- The renovations or repairs require the rental unit to be vacant;
- The renovations or repairs are necessary to prolong or sustain the use of the rental unit or the building in which the rental unit is located; and
- The only reasonable way to achieve the necessary vacancy is to end the tenancy agreement.

In the event the eviction notice is granted, the Order of Possession must not be earlier than four months from the date the Branch makes the Order. In addition, the Order must not end a fixed term tenancy before the end date of the fixed term. In addition, the tenant must receive compensation in the amount of one month's rent on or before the eviction date. A failure to proceed with the approved renovations or repairs within a "reasonable" period of time after the eviction and without evidence of extenuating circumstances which delayed the renovations or repairs will result in the tenant being owed the equivalent of 12 months' rent. It is anticipated that the RTB will publish mandatory forms for landlords to use in the coming months.



Module Four: Conflicts of Interest

Module Four: Conflicts of Interest

INTRODUCTION

This module will assist real estate licensees to identify potential conflicts of interest that may arise in their real estate practice. It also seeks to provide practical guidance regarding how to deal with conflicts of interest. This module will consider various scenarios in which conflicts of interest may arise, and will discuss how a real estate licensee can resolve these conflicts to ensure that they comply with their duties to their clients and with the Real Estate Services Rules.

LEARNING OBJECTIVES

After completing this module, you should be able to:

- Identify common conflicts of interest that may arise when providing trading services;
- Identify conflicts of interest issues that arise relating to remuneration;
- Identify some conflicts of interest that may arise when providing strata management or rental property management services; and
- Explain how real estate licensees should deal with conflicts of interest.

INTRODUCTION

As discussed in the Agency module, agents owe certain fiduciary duties to their clients. These fiduciary duties exist at common law, separate from the *Real Estate Services Act* and the Real Estate Services Rules. One fiduciary duty is to act in the best interests of the client. That duty is also set out in section 30 of the Real Estate Services Rules, which requires a brokerage and its licensees to "act in the best interests of the client." A conflict of interest arises where there is a substantial risk that a real estate licensee's ability to act in the best interests of their client may conflict with the real estate licensee's own interests or their duties owed to another client, former client, or third party. Section 30 of the Real Estate Services Rules requires licensees to take reasonable steps to avoid any conflict of interest.

IDENTIFYING THE CONFLICT

Conflicts of interests are the biggest threat to a real estate licensee's ability to act in their clients' best interests. Conflicts of interest can arise in many situations. Some conflicts are easy to spot. For example, a real estate licensee providing trading services who has two unrelated clients who both want to make an offer to purchase the same property is clearly in a conflict of interest. Please refer to the Dual Agency section of this module for more information regarding this particular situation. A rental property manager or strata manager who receives a referral fee for recommending a product or service (e.g., a contractor) to a client may also be in a conflict of interest.

However, some conflicts of interest are not always so obvious. Your own interests in a property, whether financial or personal, can also give rise to a conflict of interest between you and your client. Further, your personal relationship with a third party may also give rise to conflicts of interest, even if you have never provided real estate services to that third party.

HOW TO DEAL WITH THE CONFLICT

As a real estate licensee you will likely encounter many conflicts of interests in your practice. Some conflicts are unavoidable. Real estate commissions provide a useful example, as discussed in the following section. Further, as you become more experienced, you will become more likely to encounter former clients or people with whom you have had other personal or business relationships. Real estate licensees who practice in smaller communities or who practice in more niche areas may also find that conflicts of interest arise more frequently, as their pool of clients and potential clients may be smaller.

A real estate licensee is required to take reasonable steps to avoid any conflicts of interest. Where a conflict of interest arises, section 30 of the Real Estate Services Rules requires a brokerage and its related licensees to promptly and fully disclose the conflict to the client. Your brokerage should also have policies and guidelines concerning conflicts of interests to help you navigate these situations. Whenever you suspect you may be in a conflict of interest, you should consult these policies and guidelines and talk to your managing broker.

Remember, even the perception of a conflict will give rise to a requirement that the real estate licensee disclose the potential conflict to their client. This remains true even where there is no evidence suggesting that a real estate licensee has failed to act in the best interests of their client.

The practice of designated agency is an attempt to resolve certain conflicts faced by real estate brokerages. Designated agency allows a brokerage to designate one or more of its licensees as the exclusive agent to provide trading services for a client. In this situation, only the designated agent(s) owe fiduciary duties to the client and other licensees licensed in relation to the brokerage are free to represent other clients. Designated agency permits two licensees from the same brokerage to represent different parties in the same real estate transaction without a conflict of interest. Section 32 of the Real Estate Services Rules sets out the requirements for establishing a designated agency relationship with a client.

Section 31 of the Real Estate Services Rules also permits a licensee and their client to mutually agree to modify or make inapplicable one or more of the duties set out in section 30. Such an agreement must be set out in a written service agreement that clearly indicates which duties have been modified and how they have been modified and which duties have been made inapplicable (if any). If there is no written service agreement, then the licensee must ensure that they have properly disclosed to the relevant party whether the licensee will represent the party as a client in accordance with section 54(1) of the Real Estate Services Rules. The licensee must also clearly disclose, in writing, which duties have been modified and how they have been modified and which duties have been made inapplicable (if any).

Additionally, certain duties cannot be modified. For example, despite section 31 of the Real Estate Services Rules, a brokerage must not disclose any confidential information concerning a client to any other person without the client's authorization, unless required by law.

CONFLICTS OF INTEREST RELATED TO REMUNERATION

Some conflicts of interest are unavoidable in a real estate practice. For example, real estate licensees providing trading services are typically compensated by earning commissions on successful transactions. These arrangements give rise to the risk that a real estate licensee may earn a commission or bonus from a transaction, even if that transaction would not serve their client's best interests. Rental property managers may also find themselves in a conflict of interest when taking on new clients and deciding to manage additional properties. While this would increase the total compensation earned by the rental property manager, it might not be in the best interest of their existing clients if it could negatively impact the quality of service provided to those clients. To address this inherent conflict of interest, the Real Estate Services Rules impose certain disclosure requirements relating to remuneration, such as section 56 of the Real Estate Services Rules (Disclosure of Remuneration) and section 57 (Disclosure to Sellers of Expected Remuneration), the purpose of which are to ensure that clients fully understand how their agent is being compensated and appreciate the financial incentives that could influence their licensee.

For example, section 57 of the Real Estate Services Rules includes a requirement to disclose any remuneration that will be paid to a cooperating brokerage. In addition, the listing agreement also provides for disclosure of the remuneration that is to be paid to a cooperating brokerage. Consider a situation where a listing agent has received two offers to purchase a property owned by their client. The first offer was made by an unrepresented buyer (i.e., there is no cooperating brokerage). The second offer was made by a buyer who is represented by a licensee. A conflict of interest arises here because the listing agent may be inclined to encourage their client to accept the offer made by the unrepresented buyer because it may allow the listing brokerage to retain the full commission on the sale. A real estate licensee's obligations relating to disclosure of remuneration are discussed in greater detail in the Agency Law module.

A conflict of interest arises where a buyer's agent receives remuneration from a seller, as the buyer's agent's commission will often be higher if the buyer pays a higher purchase price for a property. Disclosure of remuneration in these situations gives buyer clients the information they need to ensure that they understand how their agent is being compensated and can identify potential conflicts of interest that could influence their agent.

Scenario—Bonuses

While there is nothing in *RESA*, the Regulation, or the Real Estate Services Rules that prohibits real estate licensees from receiving bonuses, you should be aware that accepting compensation in addition to the compensation that was originally agreed to with your client may give rise to a further conflict of interest.

Consider the following:

> To try to attract more interest in the unsold townhouses, Company D suggests offering a bonus to buyers' agents on the following terms:
>
> - If a unit is sold for a price between $900,000 and $950,000, the buyer's agent will receive an additional $2,500 bonus; and
> - If a unit is sold for over $950,000 the buyer's agent will receive an additional $5,000 bonus.
>
> The developer tells you that their lawyer has approved of this bonus structure.
>
> Rasmeet is a real estate licensee and has been helping Belinda and Beth look for a new townhouse to purchase. While Belinda and Beth had previously been looking in Vancouver, they recently decided to expand their search to Burnaby to be close to Beth's office. Belinda and Beth have told Rasmeet that their budget is $875,000. Rasmeet sees your listing and thinks this would be a perfect townhouse for Belinda and Beth. It has everything on their wish list and is only a ten minute drive from Beth's office.

What conflict issues do you see arising for Rasmeet?

Rasmeet would only be able to claim the bonus offered by Company D if her clients agreed to purchase a townhouse for $900,000 or more (which is above their stated budget). Therefore, there is a risk that Rasmeet could be incentivized to work against her buyer clients' best interests (namely, to purchase a suitable townhouse at the lowest possible price) and try to have them make an offer at a price that exceeds their budget. Alternatively, Rasmeet may be motivated to focus her clients' attention on Company D's townhouses instead of other good potential townhouses for which she could not earn a bonus.

It is important to note that the conflicts described above arise regardless of whether we think Rasmeet would actually compromise her duty to her clients in order to take advantage of the bonus. In this situation, a prudent real estate licensee would disclose the bonus structure to their clients to ensure that they are fully informed of any additional remuneration that Rasmeet might earn if they were to purchase one of Company D's townhouses. Specifically, the Real Estate Services Rules require that Rasmeet disclose all remuneration her brokerage anticipates receiving that is not paid directly by Belinda and Beth. She may do so using the Disclosure of Remuneration Form or any other form, provided that it discloses all of the information that must be disclosed under section 56 of the Real Estate Services Rules. Remember, sellers agents must also disclose remuneration to their clients under section 57 of the Real Estate Services Rules and must do so using the Disclosure to Sellers of Expected Remuneration form.

Case Study

A disciplinary decision, Behroyan (Re), 2017 CanLII 144378 (BC REC), provides an example of a conflict of interest relating to remuneration. In this case, the seller's representative was disciplined for pressuring the seller to pay an additional $75,000 bonus to the buyer's representative in addition to the remuneration called for in the listing agreement. As described below, the RECBC Hearing Committee found that the seller's representative failed to advise his client that paying a bonus could create a conflict of interest, contrary to section 30 of the Real Estate Services Rules.

In this case, the seller's property had been on the market for a few months and had not received any offers. After lowering the asking price, the seller's representative told the seller that a purchaser was willing to make a full price offer, but that the buyer's representative wanted a $100,000 bonus to present the offer. Unbeknownst to the seller, the buyer's representative agreed to split one-half of the bonus with the seller's representative. The seller's representative told the seller that a bonus was typical where a property was difficult to sell and that the effect of the bonus was essentially the same as having an offer of $100,000 less than the asking price. The seller ultimately accepted the offer, but later disputed its obligation to pay the bonus (which had been reduced to $75,000).

After reviewing the facts of this case, the RECBC Hearing Committee stated the following:

> [82] We had little difficulty accepting that [the seller's representative's] demand for a bonus created a conflict of interest between himself and [the seller]. This is because the amount of the commission had previously been agreed upon and the payment of a bonus would benefit [the seller's representative] at the expense of [the seller].

The RECBC Hearing Committee also found that the seller's representative failed to disclose that he had acted for the buyers in the recent sale of their home, failed to disclose that the buyer's agent had agreed to split her commission with him, and failed to adequately advise the seller to obtain independent legal advice. Although the seller signed the contract of purchase and sale, which included a term that said, "Buyers and Sellers have been advised to seek independent legal advise (sic)...", the RECBC Hearing Committee stated the following:

> [83] [Counsel for the representative] argued that the evidence shows that [the seller] was advised to obtain legal advice, stressing that he had initialed term #7 of the contract of purchase and sale. However, at this stage [the seller] had not been provided with any other information that might have alerted him to the nature of the problem created by the bonus. The term was part of a number of documents that were initialed in the context of a perfunctory review. In the circumstances the term looked more like standard boilerplate as oppose to meaningful advice.
>
> [84] Furthermore the offer was only open for acceptance until 9 p.m. that evening. November 14, 2014 was a holiday. Even if [the seller] had been alerted to the need to obtain advice, it would have been impractical to do so.

This decision serves to remind real estate licensees of the need to properly inform and advise their clients of conflicts that arise, particularly when bonuses are involved. In this case, a prudent real estate licensee acting for the seller would have advised their client of the following:

- That the bonus created a conflict of interest between themselves and their client;
- That they had previously acted for the buyers in the recent sale of their home;
- That the buyer's agent had agreed to split the bonus with them; and
- That their client should obtain independent legal advice with respect to the proposed bonus structure and would have ensured that their client had a reasonable opportunity to seek such advice.

Scenario—Referral Fees

A common conflict of interest that can arise when providing rental property management or strata management services occurs where a rental property manager or strata manager receives a referral fee for recommending a product or service to a client.

Consider the following:

You are a strata manager for a residential strata building. The strata council notifies you that the roof of the building needs to be repaired and asks you to find a company to complete the repair work. Your good friend from high school has recently started his own roofing company and has offered to pay you a referral fee for any new business that you can generate for his company. You consider whether you should recommend your friend's company to the strata council.

If you choose to recommend your friend's company to the strata council, you should ensure that the strata council is fully informed of all material information relating to the conflict of interest prior to selecting your friend's company to perform the repair work. For example, you should ensure that the strata council is fully informed about your relationship with your friend and about the referral fee that you would receive if the strata council engaged his company to perform the repair work. It would also be prudent to obtain multiple quotes from other roofing companies to ensure that you fulfil your duty to act in the best interests of the strata council.

Often, in evaluating bids from contractors for repair and maintenance work, a strata council will ask the strata manager for advice and guidance. If the strata manager has a relationship with one of the contractors that submitted a bid, the strata manager should promptly disclose this to the strata council and may need to refrain from providing advice regarding the competing bids.

COMMERCIAL TRADING SERVICES

Commercial real estate transactions differ in many respects from residential transactions. For example, the parties are often more sophisticated and have professional advisors such as lawyers and accountants to assist them during a transaction. Further, business interests can differ from individual interests (e.g., an individual looking to purchase a home may be more willing to pay above market value for their "dream" home). Real estate licensees are not relieved of their fiduciary duties merely because their clients are sophisticated business entities with legal representation. However, the sophistication of a real estate licensee's clients might make them more aware of conflicts of interest. Keep this in mind as you consider the scenarios in this section.

Dual Agency

As discussed in the Agency Law module, a real estate licensee engages in dual agency when they represent two or more clients with competing interests in the same real estate transaction. This is an inherent conflict of interest. Dual agency is restricted under section 63 of the Real Estate Services Rules. Section 64 of the Real Estate Services Rules provides for a very limited exception which allows a real estate licensee to engage in dual agency despite the resulting conflict of interest if the property is in a remote location that is underserved by licensees and where it is impractical for parties to be represented by different real estate licensees. This is a limited exception that is only available in exceptional circumstances.

As a real estate licensee providing trading services, you will often act for multiple clients (e.g., buyers and sellers or landlords and tenants) in unrelated transactions. In most cases this will not give rise to a conflict of interest or dual agency. However, you must always ensure that you are not providing trading services to multiple clients in respect of the same trade in real estate, unless the very limited exception set out in section 64 of the Real Estate Services Rules applies. Please note that if you are licensed to provide rental property management services, these services must be provided to "an owner of real estate": the landlord. You cannot provide other rental property management services to tenants.

Subsection 65(1) of the Real Estate Services Rules deals with handling conflicts of interest involving multiple clients. Subsection 65(1) provides that if the provision of trading services by a licensee to or on behalf of multiple clients in respect of a trade in real estate would constitute dual agency, other than under section 64 *(dual agency in under-served remote location)*, the licensee must either:

- Not provide trading services to any client in respect of that trade in real estate; or
- Represent only one of the clients, as a client, in respect of that trade in real estate.

Additionally, a licensee must not represent a client under subsection 65(1) of the Real Estate Services Rules unless the licensee has obtained written agreement from all clients in respect of the trade in real estate that meets the requirements of subsection 65(3).

The Dealing with Conflicts of Interests Between Clients flow chart is a useful tool to help you determine how to proceed when a potential dual agency conflict arises and to manage your licensee risk.

Now, consider the following:

> Bailey is a former client of yours and you have represented Bailey on a number of residential property purchases. However, you have recently shifted your work away from residential properties to focus on commercial properties. Bailey has just informed you that he wants to expand his investment portfolio and start investing in commercial spaces. He would like to work with you. He tells you that he has reviewed the listings on your website and tells you that one listing looks like it would be a great property for him. You know that the seller of this property, Sally ("one of your clients"), is in financial trouble and would be willing to accept an offer well below the current listing price. Sally would be very happy if you could introduce a serious prospective buyer, as the listing has not generated much interest so far.

What steps should you take?

You cannot represent both Bailey and Sally in this transaction, as you would be engaging in dual agency, which is restricted by the Real Estate Services Rules (subject to a very limited exception). As a real estate licensee you must always act in your client's best interests, which, in this case, means trying to get the highest price for Sally for her warehouse, while also addressing her goal of achieving a quick sale. While assisting Bailey, your former client, in pursuing Sally's property might appear to be a "win-win" situation, doing so would place you in a conflict of interest. You would be unable to fully perform your duties to Sally while also acting in Bailey's best interest by helping him to purchase a property at the lowest possible price. You should also consider whether you can continue acting for Sally and what duties you owe to her, as your client.

Whenever a potential conflict of interest arises, it is important to have transparent discussions with your clients early and often. In addition, you must remember that you have an ongoing duty of confidentiality towards your former clients. At the same time, you are required to disclose any material information to your current clients. Therefore, in the situation described above, you should ask yourself whether you can still effectively represent Sally while upholding your duty of confidentiality owed to Bailey. You should consider whether you received any confidential information from Bailey while he was your client (e.g., information about his finances or motivations

as an investor) that would be relevant to Sally. If your previous relationship with Bailey would impair your duty of loyalty to Sally, you should not act for either Bailey or Sally in this transaction.

As soon as Bailey contacts you about your listing, you should promptly and fully disclose the potential conflict of interest to Sally. Specifically, you should inform Sally that Bailey is your former client and that you cannot disclose to Sally any confidential information you received from Bailey while acting as his agent. Only once you have disclosed this information to Sally can she make an informed decision regarding whether she is comfortable having you continue to represent her. If Sally would like you to continue to represent her and you are confident that you can continue to act in her best interests, it would be prudent to document your disclosure of the potential conflict of interest and to obtain Sally's written consent.

If Bailey wishes to make an offer to purchase Sally's property and chooses to continue unrepresented, you should provide him first with the Disclosure of Representation in Trading Services form, followed by the Disclosure of Risks to Unrepresented Parties form which is required under section 55 of the Real Estate Services Rules. This form discloses the following:

- The risks to an unrepresented party of receiving assistance from the licensee due to the licensee's duties and responsibilities to the client of the licensee;
- The limited assistance that the licensee may provide to the unrepresented party; and
- A recommendation that the unrepresented party seek independent professional advice in respect of the trade in real estate.

In these situations, ask yourself:

- Does my brokerage have policies and procedures in place on how conflicts of interest are to be addressed?
- Am I acting in the best interests of my client?

Am I able to act in my current client's best interests while also upholding my duty of confidentiality owed to my former client? Even if Bailey chose to be represented by another licensee, you would still be required to uphold your duty of confidentiality to him. Every case is different and there is no single answer to address these scenarios and ensure you are not acting in conflict of interest. Ultimately, the most important thing is that you are acting in Sally's best interests because she is your client.

Conflicts of interest occur all the time. Remember, the best thing you can do is to communicate clearly, early and often.

Subsequent Transactions

You are helping Bob purchase a warehouse in Kelowna from Soo-Hyun. Bob's business has had some financial difficulty recently and is unable to get a large enough mortgage loan from the bank to finance the purchase of the warehouse. Soo-Hyun has been trying to sell her warehouse for a while and is growing impatient. Soo-Hyun's agent contacts you and tells you that Soo-Hyun will agree to lend Bob the additional funds he requires to complete the purchase by way of a vendor-take back mortgage. The parties agree and the transaction completes.

One year later, Bob defaults on the loan and Soo-Hyun commences foreclosure proceedings. Another six months later, Bob calls you to explain that Soo-Hyun has been granted conduct of sale. He explains that Soo-Hyun should be able to sell the property for more than the debt he owes to Soo-Hyun, meaning that he should be entitled to the excess sale proceeds. He asks if you can help him find a smaller, less expensive warehouse once the warehouse is sold. You agree to help Bob.

The next week, Soo-Hyun contacts you and explains that her agent has gone on paternity leave and asks if you can help her market the warehouse now that she has been granted conduct of sale.

What issues do you see arising if you agree to represent Soo-Hyun?

In a foreclosure proceeding, if the property is sold for more than the amount of the outstanding debt of the owner, the owner is typically entitled to the excess sale proceeds. It is worth noting that even if a property is sold for more than the amount of the outstanding debt, there may not be any excess sale proceeds once expenses such as commissions and legal fees have been taken into account. Since Bob is still your client, a conflict of interest arises here because Soo-Hyun's primary interest is to sell the warehouse quickly in order to recover the debt that Bob owes to her. Meanwhile, Bob's primary interest is to have the warehouse sold for the highest possible sale price to preserve as much of his equity in the property as possible. Accordingly, Soo-Hyun will likely want you to list the warehouse for a competitive sale price which may even be below market value, in order to generate interest in the property and sell it quickly. This would be detrimental to Bob, who would prefer that the property be listed for a higher price, even if doing so delayed the sale process. Therefore, a prudent real estate licensee would not agree to market the warehouse for Soo-Hyun, to ensure they do not breach their duties owed to Bob.

Real estate licensees also have an ongoing duty of confidentiality towards their former clients and cannot share any confidential information they learned while acting as an agent for their former client (such as their motivations, needs, or financial information). In the scenario described above, even if Bob was no longer your client, a prudent real estate licensee would carefully consider whether they could properly represent Soo-Hyun without disclosing any of Bob's confidential information.

Interest in Trade

Ryan is a real estate licensee engaged in trading services and also a shareholder of ABC Corporation. ABC Corporation is a private company in the business of providing construction loans to local real estate developers to finance their development projects. Ryan receives 5% of ABC Corporation's profits. Recently, ABC Corporation loaned Steve funds to purchase a property in Langley and a mortgage to secure the loan was registered against the property in favour of ABC Corporation. Steve was planning on constructing a strip-mall on the lot, but was unable to secure the proper redevelopment permits. He decides to sell the property and asks if Ryan can help him.

If Ryan agrees to help Steve market and sell the property, is Ryan in a conflict of interest?

Initially it seems like a good idea to help Steve. If Ryan is able to find a buyer for the property, it is more likely that ABC Corporation's loan will be paid back. However, because there is a mortgage in favour of ABC Corporation, Ryan is faced with a potential conflict of interest. Namely, as a shareholder of ABC Corporation, Ryan may be motivated to ensure a quick sale of the property (perhaps at discounted sale price), provided that the sale price is enough to pay out the mortgage granted to ABC Corporation. This would conflict with the interests of his client, Steve, to obtain the highest possible sale price for the property. Before agreeing to act for Steve, a prudent real estate licensee would fully disclose this conflict of interest and would advise Steve to seek independent legal advice.

CO-LISTING

A co-listing agreement involves two or more real estate brokerages both working to market and sell a property. Co-listing agreements can arise for several reasons: there may be two owners of a property and each may want to use their own preferred brokerage, or the owners may want the expertise and exposure provided by multiple brokerages.

One form of co-listing agreement occurs where there are multiple owners of a property, each of whom engages a separate real estate brokerage to represent their interests in the sale of the property. This can occur where two spouses are separating and wish to sell jointly owned property. This is sometimes referred to as "separate representation." Where you are engaged in a separate representation co-listing arrangement, you only owe fiduciary duties and obligations to your own client. Whenever you are involved in a co-listing arrangement, it is important to always remember who your client is and to ensure that you are always acting in their best interests. While this may seem obvious, these lines can become blurred where instructions are coming from a non-client or their representative in a separate representation arrangement. Both real estate licensees in a co-listing arrangement will often act reasonably and cooperate with each other in connection with the co-listing and promptly share material information with each other. However, where the clients are separately represented, a real estate licensee must remember that they cannot disclose any confidential information about their own client and their client's interests to the other real estate licensee without the prior consent of their client.

If you and another real estate licensee at a separate brokerage are providing representation to all owners, commonly called "joint representation," you and the other real estate licensee jointly owe all fiduciary and other obligations to the client. This also means that where a conflict arises with one agent, both agents could be in a conflict of interest.

BROKERAGES REPRESENTING STRATA PROPERTY AND RENTAL UNITS

While conflicts of interest may be more likely to occur in the context of providing real estate trading services, they can still occur in other real estate practices. For example, a real estate brokerage that provides strata management services to a strata corporation can be in a conflict of interest where the brokerage also provides rental property management services to an owner of a strata lot in that strata development. The conflict arises if the interests of the strata corporation conflict with the interests of the strata lot owner, preventing the brokerage from acting in the best interests of at least one of their clients.

Consider the following:

> Your brokerage has been engaged by ABC Strata Corporation to provide strata management services. You act as the strata manager for ABC Strata Corporation. Olivia owns one of the strata lots in the building that you manage. Olivia is planning to move to the Australian office of her company for a year and would like to rent out her strata lot while she is away. She approaches a rental property manager who is licensed with your brokerage and asks if they can help her find a tenant and manage her strata lot while she is away.

Where do you see a potential conflict of interest arising? In the situation described above, your brokerage has been engaged by the strata corporation to provide strata management services. Therefore, your brokerage must act in the best interests of the strata corporation. If your brokerage were to start providing rental property management services to Olivia, there is a risk that its duty to act in the best interests of Olivia would conflict with its duties to the strata corporation. For example, ABC Strata Corporation could have bylaws restricting the number of permanent occupants in the strata lots to two individuals. But, perhaps Olivia could maximize her rental income if she rented her strata lot to three roommates. If Olivia chose to rent her unit to three roommates a conflict of interest would arise because your brokerage would owe a duty of confidentiality to Olivia but would also be required to disclose all material information to ABC Strata Corporation. Therefore, your brokerage would have a duty to disclose Olivia's bylaw infraction to ABC Strata Corporation. However, disclosing this information would breach your brokerage's duty of confidentiality owed to Olivia.

Below, we discuss one of the ways you can address these types of conflicts by modifying your duties to your clients. If a brokerage modifies a service agreement with an owner to limit the services they will provide, the company must still disclose to the strata corporation that it manages rental properties within the strata corporation. The brokerage must not disclose each client's confidential information without their consent and must also act impartially and not favour the interests of one client over the other.

Similar issues can arise where a real estate brokerage acts for multiple sections of a strata corporation.

Consider the following:

> Your brokerage is providing strata management services to a strata corporation for a mixed-use building with both a commercial section and a residential section. Your brokerage is also providing strata management services to the commercial section and the residential section of the strata corporation. Under the *Strata Property Act*, each section has the same powers and duties as the strata corporation regarding the matters that relate solely to that section. Therefore, your brokerage must treat the strata corporation, the commercial section and the residential section as three separate clients.

The elevator in the building is common property of the strata corporation and is shared by both the occupants of the residential and commercial strata lots. One morning, the council of the strata corporation tells you that the elevator has been damaged and is in need of repairs. You find a company to repair the elevator and the strata council approves of their quote for the repair work. The repairs are completed the following week. Shortly after you submit the invoice for the repair work to the strata corporation, a member of the executive of the residential section calls you and explains that the elevator was damaged by a tenant of one of the commercial strata lots. He explains that the commercial occupants cause far more wear and tear to the elevator than the residential occupants and tells you that the residential owners will not contribute to the costs of the repair work. The executive of the commercial section later calls you to remind you that the invoice should be paid by the strata corporation, not the commercial section, since the elevator is common property of the strata corporation.

In the situation above, a conflict of interest has arisen because your brokerage has multiple clients (the strata corporation, the residential section, and the commercial section) who are in a disagreement and are giving you conflicting instructions regarding the payment of the invoice.

It is important for licensees to be proactive in anticipating and avoiding conflicts of interest such as the one described above. For example, a prudent strata manager would have anticipated the potential for a conflict of interest to arise when acting for multiple sections of a strata corporation. This conflict could have been addressed by modifying your brokerage's duties to its clients in advance. Specifically, your brokerage could have entered into separate written services agreements with the strata corporation and each of the sections which designated the strata corporation as your brokerage's primary client and the two sections as its secondary clients. To do so, your brokerage would need the two sections to consent to being secondary clients, understanding that your brokerage's duties to act in their best interests would be limited in the event of a conflict. For more information regarding this topic, please refer to BCFSA Conflict of Interest (Rental Property & Strata Management) Guidelines.

If you had done this when your brokerage first agreed to provide strata management services to the strata corporation and both sections, you would still be required to inform all three clients of the conflict when it arose, but your brokerage's duties would have been more clearly defined from the outset and you would likely have been able to follow the instructions of the strata corporation regarding the payment of the invoice. In any case, a prudent real estate licensee would advise the strata corporation and the two sections to obtain legal advice regarding the appropriate allocation of the repair expenses.

CONCLUSION

Real estate licensees are required to take reasonable steps to avoid any conflicts of interest. However, conflicts of interest will still arise throughout the course of your practice and it is important that you take the proper steps to address them. We hope that this module has helped you identify some common conflicts of interest and better understand how to deal with them while upholding your duties to your clients.

Module Five: Agency

Module Five: Agency

This module provides an overview of the law of agency for real estate licensees. Agency is the defining feature of all relationships between a client and a real estate licensee. For that reason, all real estate licensees, including trading services licensees, must understand the legal and ethical duties that flow from an agency relationship.

LEARNING OBJECTIVES

After completing this module, you will be able to:

- Identify the types of agency relationships that may arise in your practice;
- Describe what it means to act in a client's best interest;
- Identify how and when your disclosure obligations arise; and
- Describe to whom a duty of confidentiality belongs, and for how long.

INTRODUCTION

What is Agency?

Agency is a legal relationship between a principal and an agent. Simply put, an agent has authority to act on behalf of and represent a principal. In the real estate profession, when a consumer deals with a real estate licensee, an agency relationship arises if the consumer agrees to enter into a client relationship with the real estate licensee. A client relationship arises when a consumer wants a real estate licensee to represent them, do things on their behalf, and provide guidance and advice. The client becomes the real estate licensee's principal. When the real estate licensee engages with a third party on behalf of the client, the real estate licensee essentially promises to the third party that their principal has authorized them to do and say certain things as if those things were being said or done by the client.

An agent can legally bind a principal to take certain actions. If a principal has authorized an agent to sign a contract with a third party on their behalf, the parties to the contract will be the principal and the third party, not the agent. An agent's ability to bind a principal to a contract and to make promises on a principal's behalf are powerful abilities that the law takes very seriously. Please note that real estate licensees cannot bind their principals to a contract unless they have written authorization. This is a key difference from a typical agency relationship.

Team Tip:

Did you know an agency relationship is also established when a consumer engages the services of your real estate team? If you are part of a team, it is your responsibility to be aware of consumers who are in a client-relationship with your team.

Why does Agency matter?

If you or your team are acting as an agent for a principal you are also acting as a fiduciary. In other words, you are in a position of utmost trust. As a fiduciary, you have important obligations and duties to follow. You must always act in the best interest of your client.

You must understand and adhere to the four main legal duties that flow from an agency relationship. When you are acting as an agent, you owe your clients a duty:

- Of loyalty;
- To avoid conflicts of interest;
- Of full disclosure; and
- Of confidentiality.

The Disclosure of Representation in Trading Services form contains information for your clients about your obligations to them, including the four main legal duties of a real estate licensee.

Real Estate Services Rules section 30 also sets out the duties typically associated with being an agent.

Real Estate Services Rules section 30 refers to specific obligations such as acting in accordance with the client's lawful instructions, advising a client to seek independent advice in appropriate circumstances, and using reasonable efforts to discover relevant facts respecting any real estate that a client is considering acquiring.

Members of the public place trust in real estate licensees. As agents, real estate licensees must always be thinking about loyalty, conflicts, disclosure, and confidentiality so they can represent their clients and the real estate profession in the best way possible in order to honour that trust.

CATEGORIES OF AGENCY

As a real estate licensee, you must be aware of the different categories of agency that may arise in real estate transactions.

Brokerage Agency

Brokerage agency is created when the client engages the brokerage as the agent of the client. This is typically done through a service agreement. All of the brokerage's real estate licensees may provide real estate services to the client. This means every real estate licensee in the brokerage assumes the same agency obligations as the brokerage in relation to that client. Brokerage agency is the only type of agency used in rental property management and strata management.

Designated Agency

In trading services, designated agency is the most common type of agency. Designated agency is created in a service agreement between a consumer and a brokerage. The brokerage then designates one or more real estate licensees of that brokerage to act on behalf of the consumer. The British Columbia Real Estate Association Multiple Listing Contract in common use in British Columbia provides that an agency relationship exists only with the designated agent. The only "agency" duty of the brokerage is to list the property for sale.

Designated agency helps prevent conflicts of interest in situations where a buyer and seller are represented by two real estate licensees authorized to trade in real estate within the same brokerage.

The Real Estate Services Rules require an agreement for designated agency to be in a written service agreement.

A prospective client may waive the requirement for a written service agreement. However, even where there is no written service agreement, an agreement for designated agency must be preceded by written disclosure through a Disclosure of Representation in Trading Services form. It is important to remember that the Disclosure of Representation in Trading Services form is merely a disclosure form, and not a contract.

Detailed information about the Disclosure of Representation in Trading Services form is provided later in this module.

Dual Agency

In British Columbia, the Real Estate Services Rules restrict dual agency to rare circumstances. In a dual agency relationship, a real estate licensee represents two or more parties with competing interests in a real estate transaction. This can include representing:

- Both the buyer and the seller;
- Both the landlord and the tenant;
- Both the assignor and the assignee; or
- Two or more buyers, tenants or assignees.

Real estate licensees must be loyal to anyone with whom they are in a client-relationship and they must avoid conflicts of interest. When a real estate licensee represents more than one client in the same real estate transaction, it is not possible to avoid conflicts of interest and to maintain the duty of loyalty to both clients. When the dual agency exemption applies, each party having limited representation is better than a party not being able to have any representation at all, and mitigating steps are applied to reduce risks and protect both clients.

For more information about dual agency relationships, see the Guideline relating to the dual agency exemption and the Conflicts of Interest Module.

Implied Agency

Implied agency arises when a real estate licensee has acted in a way that would cause a reasonable person to think the real estate licensee is an agent for them. This type of agency relationship usually arises by accident and involves unrepresented consumers. When dealing with an unrepresented party, you should recommend they seek independent professional advice. This helps to ensure that the unrepresented party is fully aware of the fact that the real estate licensee is providing them with trading services outside of an agency relationship.

When you are communicating with an unrepresented buyer or an unrepresented seller, remember that you can only provide limited assistance to them, such as:

- Sharing real estate statistics and general market information;
- Providing standard real estate contracts and other relevant documents;
- Helping fill out a standard real estate contract without giving advice on what to include in an offer;
- Communicating messages between your client and the unrepresented party; and
- Presenting offers and counters between your client and the unrepresented party.

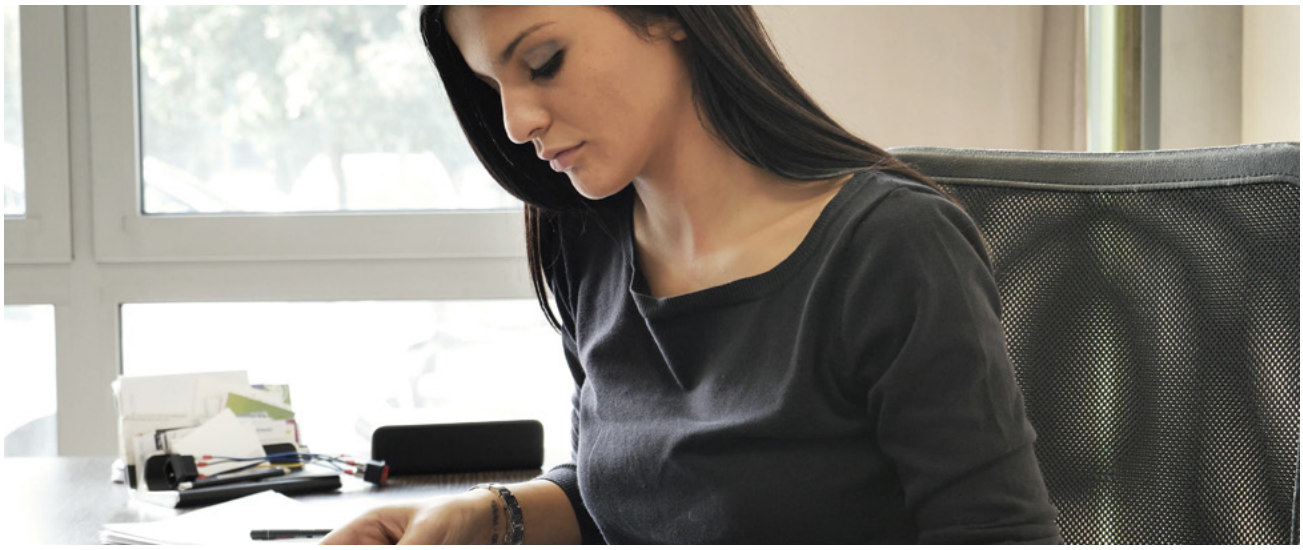
Some questions to ask yourself when interacting with an unrepresented party:

- Are you providing advice instead of limiting information to facts?
- Are you sharing confidential information?
- Are you letting the unrepresented consumer share confidential information with you or your team?

If you answer "yes" to any of these questions you are at risk of becoming an implied agent. An implied agent has all the duties of a regular agent. This can put you in a difficult situation if you or your team are already representing a party in that transaction. You might end up being a dual agent in contravention of the Real Estate Services Rules.

Think about this scenario:

> Regina is acting as the designated agent for Shomari. Shomari is selling a large property, where nine-tenths of the property fall within the Agricultural Land Reserve ("ALR") and the remaining one-tenth is outside the ALR. Because of COVID-19, Regina has been communicating a lot by e-mail with interested buyers.
>
> One day, Bernadette contacts Regina by e-mail inquiring about Shomari's property. Regina and Bernadette communicate by e-mail and telephone for more than six months. On several occasions, Regina makes inquiries on Bernadette's behalf and helps Bernadette research information about buying property in the ALR. One day, Bernadette e-mails Regina and says:
>
> > *I want to make an offer this week. I really appreciate working with you and I want you to get commission. I want you to act for me moving forward.*
>
> Regina is grateful for Bernadette's appreciation. She writes back:
>
> > *Thank you! Let me put those documents together for you and send them over. You should get your lawyer to insert any comments after that.*



What do you think? Does Bernadette have any reason to believe Regina is acting as her agent in respect of Shomari's property? Yes! When Regina performed research for Bernadette, made inquiries on Bernadette's behalf and did not reject Bernadette's e-mail proposal that she represent both Bernadette and Shomari, she put herself in an implied agency relationship and therefore she was acting as a dual agent. All of these activities went above and beyond the limited assistance a real estate licensee can provide an unrepresented party.

What should have happened right after Bernadette sent her very first e-mail? If you get an e-mail like the one Regina received from Bernadette, you should pause to consider the potential for an implied agency relationship. Regina already represents Shomari. To ensure that Regina made it clear she was not acting or could not act for Bernadette, Regina should have immediately given Bernadette the Disclosure of Representation in Trading Services form and the Disclosure of Risks to Unrepresented Parties form. These forms are also available in multiple different languages. A prudent real estate licensee would have recommended Bernadette seek advice and representation from another real estate licensee early in the process.

Remember, you do not have to be face to face with a person for an implied agency relationship to arise.

Now consider another situation with Regina:

> Regina is good friends with Bernice. In fact, she helped Bernice purchase her first home. Currently, she is representing Samir, a seller, in a designated agency relationship. One day, Bernice calls her on Zoom to catch up and they start chatting about the real estate market in Vancouver. Bernice tells her that she is thinking of making an offer on a property, and from the information Bernice provided, Regina knows that it is Samir's property that Bernice is considering.

What should Regina do? A prudent real estate licensee would realize there is a risk that an implied agency relationship will arise. She would immediately stop Bernice, explaining that she would be in a conflict of interest with respect to Samir's listing. Bernice may be operating under the assumption that Regina will represent her again. However, Regina already represents Samir in this instance. Again, Regina should give Bernice the Disclosure of Representation in Trading Services form and the Disclosure of Risks to Unrepresented Parties form and review them with her. Being proactive will help prevent potential conflict situations, which could lead to an implied agency relationship.

DUTIES OF AN AGENT

Loyalty

Real estate licensees owe their clients a duty of loyalty. Did you know the duty of loyalty is an underlying consideration for many, if not all, the Real Estate Services Rules? For example, Real Estate Services Rules section 30 requires real estate licensees to act only in the best interest of their clients, which means they must act for the client's benefit above all else, including their own interests.

Consider this:

> You are a newly licensed real estate licensee, and you are eager to meet new clients. You joined the Sally Smith Team because Sally has 15 years of experience as a real estate licensee. This morning, Sally asked you for a favour: she wants you to host an open house in Fort Langley on Sunday so she can go to Whistler with her kids. She told you it would be a great opportunity for you to meet potential clients. You know the seller has a designated agency relationship with the Sally Smith Team but you have never personally met the seller. As part of the Sally Smith Team, you are on the listing agreement. So far, the seller has dealt with Sally exclusively.

Can you help Sally out? Yes. You are part of the Sally Smith Team and you are on the listing agreement as part of the Sally Smith Team. The Sally Smith Team is in a designated agency relationship with the seller. As a member of the Sally Smith Team, you owe the seller the same duties as Sally.

Can you use the open house as an opportunity to meet clients? A prudent real estate licensee is mindful of their duty of loyalty at open houses. Remember, you are part of the Sally Smith Team. As part of the team, you are in a designated agency relationship with the seller, which means you must be loyal to the seller. Your job at the open house is to sell the house to potential buyers. If you use the open house to meet future clients, you will be in a conflict of interest with the seller because your interests are best served if potential buyers do not buy the seller's house. You can review the Conflicts of Interest Module to learn more about your duty to avoid conflicts of interest in these types of situations.

Consider Sally's open house again:

> You told Sally you would rather not host the open house without her because you are not confident you can properly represent the seller's interests without her guidance. She said she would take care of it and you said you would see her there. On Sunday, you show up at the open house and Sally is nowhere to be found. Rafael, a real estate licensee who works at the same brokerage as you but is not a member of the Sally Smith Team is hosting the open house. Rafael told you he agreed to help Sally because he is struggling to find clients and thinks this will be a great opportunity for him to meet clients. While you are at the open house, you hear Rafael tell several potential buyers he is there to answer questions but that he does not act for the seller. You also hear Rafael tell a few potential buyers about other properties he is selling.

What is wrong with the situation?

Sally has failed to act in the seller's best interests. Sally should have found another Sally Smith Team member to host the open house or she should have hosted it herself. Think about it this way.

What would the seller think if she found out Rafael was telling potential buyers about other houses at her open house? Would she think Sally and/or Rafael were acting in her best interests? If no one was available, Sally should have fully explained to her client what having Rafael there meant and if her client gave informed consent to his participation in the open house only then could he have helped Sally with the open house.

When in doubt, ask yourself these questions:

- Who is my client?
- What is my client's goal?
- How will this help my client reach their goal?
- Am I being motivated by anything other than reaching my client's goal?

Conflicts of Interest

A conflict of interest occurs when there is a substantial risk an agent's representation of a client would be negatively affected by an agent's own interest or by an agent's duties to another client, former client, or third party. Real Estate Services Rules section 30(i) and (j) codify a real estate licensee's duty to avoid conflicts of interest in real estate transactions. A full discussion of this section of the Real Estate Services Rules is found in the Conflicts of Interest Module. We will discuss the duty to avoid conflicts of interest in the context of disclosure below.

Disclosure

A key component of agency under Part 5-Division 2 of the Real Estate Services Rules is the duty to make full disclosure about the scope of representation to be provided by a real estate licensee; the remuneration, commissions, and bonuses that may be earned; and, any potential conflicts of interest that may arise in a real estate transaction. Disclosures must be:

- In writing;
- Generally separate from a service agreement or any other agreement under which real estate services are provided; and
- Generally separate from any agreement giving effect to a trade in real estate.

Next, we will go through a real estate licensee's disclosure obligations.

Representation

The Real Estate Services Rules require real estate licensees to present consumers with a Disclosure of Representation in Trading Services form before engaging in trading services. A competent real estate licensee will carefully explain to the consumer what each of the duties means and will answer any questions the consumer has about each duty. Consumers are not required to fill in their name or initials on the Disclosure of Representation in Trading Services form. A prudent real estate licensee will ask for the consumer to fill in their name and initial the form. If they do not agree, you can make your own written note about the consumer on the form and in your file notes.

Consider the following:

> Bruce is a long-time but not current client of yours. You helped him buy his first condo in Yaletown about five years ago. Yesterday, Bruce showed up at an-open house you were hosting in Coquitlam for another client, Sam. Bruce told you he and his partner are looking for a bigger house because their two-bedroom Yaletown condo is too small for their soon-to-be family of five. This morning, Bruce called you and told you the house in Coquitlam is exactly what he and his partner are looking for but that he has concerns about the age of the house. Bruce asked you if you think it's a good investment for him. He also asked you if there was anything wrong with the house. You know Sam is selling the house because of repair issues.

What should you do in this situation?

You should have stopped Bruce as soon as he started telling you about the reasons why he was looking for a bigger house. Remember, you are Sam's designated agent and owe a duty of loyalty to him. You cannot represent both Bruce and Sam in this transaction as you would be engaging in dual agency. You should have told Bruce you are acting as Sam's designated agent in respect of the house and taken him through the Disclosure of Representation in Trading Services form followed by the Disclosure of Risks to Unrepresented Parties form. You need to think about whether you can really act for Sam in this situation. Do you have so much confidential information about Bruce that you could not properly represent Sam? In any event, a prudent real estate licensee would have encouraged Bruce to find another real estate licensee to represent his interests for the transaction from the moment he started talking about his reasons for buying a new property at the open house. A prudent real estate licensee would have also informed Sam that Bruce is a former client. A fuller discussion of the issues raised by the situation is set out in the Conflicts of Interest Module.

Remuneration, Commissions, and Bonuses

All remuneration, commissions, and bonuses paid to a real estate licensee in respect of a real estate transaction must be promptly disclosed to the client in writing. There are two specific provisions in the Real Estate Services Rules you should be aware of: Real Estate Services Rules section 56 and Real Estate Services Rules section 57.

Real Estate Services Rule section 56

Real Estate Services Rule section 56 deals with disclosure about remuneration, commissions, referral fees, and bonuses received from someone other than your client flowing from your services to your client. A commonly used form for documenting this type of disclosure is the Disclosure of Remuneration: Trading Services form. Disclosure must always include:

- The source of the remuneration;
- The amount; and
- All other relevant facts related to the remuneration.

If you are providing trading services to a client, you have an obligation to disclose any remuneration your brokerage will receive in relation to real estate services in accordance with the Real Estate Services Rules.

Remember, remuneration, commissions, and bonuses aren't always money. Think about gifts you might receive in exchange for a referral; for example, shortly after you recommended a real estate lawyer to a client the lawyer gifted you a really expensive fountain pen. Do you have to disclose the gift to your client? Yes. You must disclose it promptly.

Think back to Bruce:

> Bruce and his partner are looking for a bigger house because their two-bedroom Yaletown condo is too small for their soon-to-be family of five. They are interested in your client Sam's house in Coquitlam. Originally, Bruce was unrepresented. Bruce changes his mind and asks you to refer him to a real estate licensee. You know it is likely you will get a referral fee. What should you tell Sam?

A prudent real estate licensee must remember their disclosure obligations. When you receive or are anticipating receiving a referral fee, you must promptly disclose the referral fee pursuant to Real Estate Services Rules section 56.

Real Estate Services Rules section 57

Section 57 of the Real Estate Services Rules sets out a real estate licensee's disclosure obligations to a seller regarding expected remuneration from a transaction. Real estate licensees representing sellers must disclose the following information:

- The remuneration to be paid by the seller to the licensee's listing brokerage;
- The remuneration to be paid by the listing brokerage to the cooperating brokerage (if any);
- The remuneration to be retained by the listing brokerage; and
- Any remuneration a licensee will receive under Real Estate Services Rules section 56.

Remember, real estate licensees must disclose the remuneration payable for every offer and counter-offer that is presented to the seller using the Disclosure to Sellers of Expected Remuneration (Payment) form each time.

Think about the disclosure obligations you have in the following situation:

> Seonyu is selling his Surrey warehouse. The Vancouver market is red hot and offers seem to be flying in the door. Of the eight offers you will present to Seonyu, two are from unrepresented buyers. In other words, there is no cooperating brokerage.

What do you have to tell Seonyu about the offers in terms of remuneration? Real Estate Services Rules section 57 requires you to disclose the commission payable to your brokerage for each offer made. That means, for all of the offers, you will go through the Disclosure to Sellers of Expected Remuneration (Payment) form with Seonyu. For the two offers without a cooperating brokerage you will clearly explain that in accordance with the listing agreement, your brokerage will expect to earn the entire commission payable for the transaction.

Finally, think about this example based on recent Real Estate Council discipline decisions:

> Sango, a seller, is in a designated agency relationship with Ren, a real estate licensee, under a listing agreement. Ren has promised Sango he will be able to sell her house for at least $1,000,000. Unfortunately, weeks have gone by without any interest. One day, Sango and Ren are chatting over the phone and Ren suggests lowering the listing price to $850,000 to attract offers. Sango is hesitant to lower the price because she wants as much money as possible to make her next purchase but ends up agreeing. Without obtaining his brokerage's consent, Ren says he will waive his commission entirely so Sango can keep a larger share of the proceeds of the sale. Ren does not document this agreement anywhere. Bediako makes an offer the next day and once Ren tells his brokerage about what transpired, Ren's brokerage refuses to waive the commission.

What should Ren have done instead? Ren should have documented his waiver of commission in an amendment to the listing agreement. He should also have made sure he had his brokerage's consent before entering into a waiver agreement. Remember, whether there is an increase or decrease in commission payable, you must disclose the change.

Bonuses

In addition to commission, a real estate licensee may receive a bonus in connection with a real estate transaction. When thinking about bonuses, a prudent real estate licensee will consider their disclosure obligations. In these situations, you should:

- Make full disclosure of all remuneration pursuant to Real Estate Services Rules section 56; and
- Advise the client to seek independent legal advice in relation to the bonus.
- If you are a listing agent:
- Ensure you have clearly drafted the bonus payments in the listing agreement.

Now consider this situation:

> In the listing contract your client Sahar signed with your brokerage a few months ago, she agreed to pay a $20,000 bonus over and above the agreed commission amount on the assumption the bonus would be paid to a cooperating brokerage. You know Sahar agreed to pay the bonus as an incentive for real estate licensees representing potential buyers to bring their clients to view your listing. Now Sahar wants to accept an offer from an unrepresented buyer. In other words, there is no cooperating brokerage. Sahar seems confused about whether she still has to pay the bonus to your brokerage. What should you tell Sahar about the bonus?

Remember that you have a duty to make full disclosure to Sahar concerning remuneration under Real Estate Services Rules section 56. Before Sahar signed the listing agreement, a prudent real estate licensee would have explained to Sahar that pursuant to the terms of the listing agreement, she would be required to pay the bonus to the listing brokerage even if the transaction were to proceed without a cooperating brokerage. To ensure your disclosure is documented effectively, consider using the Disclosure of Remuneration: Trading Services form. This might also be a situation where you should consider if the listing contract should have clearly stated that if there were no cooperating brokerage, the bonus would not be paid.

Conflicts of Interest

What disclosure obligations do you have when conflicts of interest arise?

Real Estate Services Rules section 65 deals with managing conflicts of interest between current clients. An in-depth conversation about this section of the Real Estate Services Rules and the issues surrounding dual agency is found in the Conflicts of Interest Module.

Unrepresented Parties

Certain situations should immediately prompt you to think about your disclosure obligations to unrepresented parties. For example, when a consumer you are not representing starts telling you their reasons for buying, selling, or leasing a property; minimum or maximum prices; or, any terms and conditions they might want to include in a contract, you should immediately stop them and make sure they understand who you represent as well as the risks of proceeding as an unrepresented party.

Blake is looking to buy a new condo and he is adamant he does not need independent representation. He wants to work with you as an unrepresented buyer in a non-client relationship. What disclosure obligations do you have to Blake?

Blake must be presented the Disclosure of Representation in Trading Services form. There are optional spaces for his name, initials, and signatures on these forms. When you go through the forms and consumer information pages, it is important to make sure the consumer fully understands so that they are providing informed consent.

Remember, before dealing with Blake as a non-client, you must:

- Recommend that he seek independent representation from another real estate licensee; and
- Consider the substantial risks of working with non-clients.

Practice Tip:

As the real estate licensee, it is your obligation to make sure Blake understands the information set out in the forms. It is a good idea to keep a detailed record of your conversation with Blake, including notes of what you told him and any reasons he gave you for agreeing to enter into a non-client relationship with you rather than choosing another real estate licensee to assist with the real estate transaction.

Now think about this situation:

> You are hosting an open house for your client, Sayuri who really wants to sell her house. At the open house, you see Bairavi, a past client of yours. Bairavi is very interested in the house and asks you if you can talk to Sayuri to lower the asking price as a favour to him. You know a lot of people have been interested in the house and have put in offers. Bairavi tells you he has not hired anyone to represent him with respect to the transaction. What do you need to tell Bairavi?

Bairavi is an unrepresented buyer even though he has previously been your client. You can give Bairavi facts about the house, but that is all. As soon as someone in Bairavi's position starts asking you about lowering the asking price, you must disclose the risks of proceeding without representation as well as the limited nature of the assistance you can provide him in respect of the real estate transaction. You must recommend he seek independent professional advice and you must present him the Disclosure of Risks to Unrepresented Parties form and the Disclosure of Representation in Trading Services form.

Past clients like Bairavi can create a conflict of interest and/or impact your ability to represent Sayuri. Remember you must promptly disclose conflicts, including perceived or potential conflicts to your current client, who in this case is Sayuri. You should tell Sayuri that Bairavi was your past client and that you did not and will not assist him in this transaction. For a full discussion on the risks of dealing with former clients please refer to BCFSA's Knowledge Base.

Think about the Coquitlam house again:

> You are at the open house in Coquitlam for your seller client, Sam, when a couple you have never met before approaches you. You show them around the home and go through the listing information for the house. After you have answered their questions about the house, they ask you for advice about buying the house. They start telling why they are looking to buy and ask you to recommend a mortgage broker. They also want you to help them figure out how to make sure the portable bowling alley in the basement is included in the sale price.

What can you tell the couple? A prudent real estate licensee would have stopped the couple as soon as they started asking for advice about buying the house. Remember that you can only give limited assistance to unrepresented buyers.

Can you give them advice about the bowling alley? A prudent real estate licensee would not give the couple any advice about the terms of the contract of purchase and sale for the house. Why not? If you provide advice about terms or conditions in a contract of purchase and sale, a potential conflict of interest arises and you risk breaching your duty of loyalty to Sam. More importantly, the couple may think you are acting on their behalf in respect of the transaction and you are at risk of establishing an implied agency relationship. You can avoid these issues by making full disclosure using BCFSA's forms.

Confidentiality

Any information about a client that is not available to the public is confidential information. This includes information about a client's finances, personal situation, motivation, or needs. As a real estate licensee, you have a duty to maintain client confidentiality when you are providing real estate services.

> Remember Bruce and Sam? Bruce just made an offer on the Coquitlam house. As you were presenting the offer, Sam said to you: "Didn't you say this guy is an old client of yours? Is this the best he can do? Doesn't he have a ton of money? What is the value of his current property?"

What can you tell Sam about Bruce's finances? A prudent real estate licensee would be mindful that the duty of confidentiality to Bruce continues even after an agency relationship ends. In this situation, you must keep any information about him that is not publicly available confidential.

What about Sayuri?

> Just before the open house, Sayuri told you she would take $50,000 less than the asking price just to get rid of her house. She said she is desperate to sell because she had to close her restaurant during the COVID-19 pandemic. That being said, she wants you to try to get as much as you can for the house. Can you tell Bairavi that Sayuri would take $50,000 less than the asking price?

A real estate licensee would think about their duty of confidentiality to Sayuri. The duty of confidentiality includes any information about her current financial situation and her motivations to sell her property. However, you may want to clarify your instructions from Sayuri. Remember, she told you she is eager to sell her house. You may want to find out what you can tell Bairavi about Sayuri's bottom line. If your client instructs you reveal confidential/motivational information, it would be prudent to record the instructions in writing.

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Think about this situation:

> Beckett is a long-time client of yours. You have helped him purchase a number of small shopping malls over the years. He called you this morning because he saw your Instagram post about a property your team is selling for a client named Sarah. He told you he is really interested in the property but that he is looking for a really good deal. He said he probably would not be willing to pay the asking price. Vicky, your team leader, has taken the lead on the listing and you have not really been involved with marketing the property. You have never met the seller but you know there has not been much interest in the property because of the neighbourhood. You put the listing on your Instagram.

Can you tell Beckett about the lack in interest in the property? What you have to remember here is that, as part of Vicky's team, you are in a designated agency relationship with Sarah. You owe the same duties Vicky owes to Sarah.

Managing Broker Considerations

Brokerages should be alert to potential breaches in confidentiality. Implement policies and procedures which effectively place information barriers to protect clients. For example:

- Secure online and physical confidential client files from unauthorised access;
- Ensure licensees engaged by their brokerage to represent clients with conflicting interests do not communicate with or to their colleagues, directly or indirectly, intentionally or inadvertently, any confidential information; and
- Ensure that licensees and staff understand why information barrier policies are in place, and the possible legal and employment-related ramification for non-compliance.

What a good system will look like will be different in each brokerage. However, it is of utmost importance that confidentiality is maintained, and to remember that this obligation does not end when your services to a client end.

CONCLUSION

As a real estate licensee, you act as an agent for your clients. As an agent, you have important duties and obligations. Your key duties as a fiduciary are your duty of loyalty, duty to avoid conflicts of interest, duty to make full disclosure, and duty of confidentiality. If you are unsure about what to do in a situation, it helps to think about things from your client's perspective. You should always be able to answer the following questions:

- Who is my client?
- What is my client's goal?
- How will this help my client reach their goal?
- Am I being motivated by anything other than reaching my client's goal?

Remember, your managing broker, colleagues, advisors, and BCFSA's Practice Standards Advisors are always available to provide you with guidance when you have questions about the duties that arise from an agency relationship.

Module Six: Terminations and Transfers

Module Six: Terminations and Transfers

MODULE DESCRIPTOR:

In this module, we discuss how, when, and why real estate service agreements may terminate when used in the context of providing strata management services, rental property management services, and trading services to clients. We will discuss the role and responsibilities of the licensee and the brokerage when a client is making a decision whether to terminate a service agreement and after notice of termination is given, as well as the responsibility to former clients after the service agreement has been terminated.

We examine how licensees may transfer their licence to another brokerage or surrender their licence. We also consider the potential effects on real estate service agreements when a licensee transfers to another brokerage or surrenders their licence.

LEARNING OBJECTIVES

After completing this module, you will be able to:

- Understand the different ways that service agreements may terminate;
- Identify potential conflict of interest scenarios that may arise in termination situations and how to best avoid them;
- Understand the obligations on licensees and brokerages after a real estate service agreement terminates; and
- Recognize how to manage client files proactively to be prepared for terminations of service agreements and transfers of licensees.

INTRODUCTION TO TERMINATIONS

When we refer to "terminations," we are referring to the process of ending real estate service agreements. We will consider the following topics regarding terminations:

- Reasons for termination;
- Methods of termination, including:
    - Termination provisions,
    - Mutual agreement, and
    - Methods unique to a type of real estate service.
- Disciplinary orders made by BCFSA;
- Transition period and facilitating change over after termination; and
- Special considerations after termination.

REASONS FOR TERMINATION

There are many other reasons why a real estate service agreement may terminate, besides upon expiration of the service agreement. For example, relationships may break down, a representative providing real estate services to a client may transfer to a different brokerage, or the client may no longer require real estate services. In some cases, particularly in strata management agreements, the agreement may not contain an expiration date at all.

Here are some examples of why a strata management agreement may be terminated:

- The strata corporation wants to manage the strata by themselves;
- The strata corporation wants another brokerage to manage their strata;
- The strata manager is transferring to a new brokerage and the strata corporation wants to continue to work with the same strata manager;
- The strata corporation is winding up; and
- The brokerage terminates the agreement because the strata council is not providing lawful instructions.

Here are some examples of why a rental property management agreement may be terminated:

- The owner of the rental property sells the property;
- The owner wants to self-manage the rental property;
- The owner wants another brokerage to manage the rental property;
- The rental property manager for the property is transferring to a new brokerage and the owner wants to continue to work with the same rental property manager; and
- The owner decides that they will occupy the property.

Here are some examples of why a trading services agreement may be terminated:

- The sale of the owner's property has completed;
- The owner decides they no longer want to sell the property, and the brokerage approves termination of the agreement;
- The owner wants to use a different trading services representative, subject to brokerage approval;
- The owner wants to use the same trading services representative that has transferred to a new brokerage, subject to brokerage approval; and
- A conflict of interest has arisen as a result of dual agency.

In other cases, a service agreement may terminate because a brokerage has become bankrupt or insolvent.

METHODS OF TERMINATION

Service agreements can be terminated in a number of ways, for example, by termination provisions contained in the service agreement, or by mutual agreement between the brokerage and the client in a manner not originally provided for in the agreement. In addition to these methods, there are also methods of termination that are unique to each type of real estate service. We will discuss each method in the sections below.

Termination by provisions in service agreements

Sections 43(5) and 43(6) of the Real Estate Services Rules require rental property management agreements and strata management agreements, respectively, to include terms that address when the agreement may be terminated by either or both the client and the brokerage. There is no such requirement to include these terms in trading services agreements, however, most trading services agreements do contain termination provisions.

The brokerage and licensee should be aware of the termination provisions set out in the specific service agreement. A prudent real estate licensee will review the service agreements that they are operating under, including all attached schedules, for termination provisions. Although brokerages may use standard form service agreements, clients may have negotiated different termination provisions and modifications to the standard service agreement or attached schedules.

It is an important practice for managing brokers to ensure that their brokerages' service agreements clearly provide that the obligation to return documents, possessions, and funds to the client is a process that may not necessarily occur exactly upon termination of the agreement. For instance, an agreement that provides that "documents, possessions, and funds will be returned when the agreement terminates" may place undue time pressure on the brokerage.

Termination by mutual agreement

Service agreements may also be terminated by mutual agreement of the parties in a manner not anticipated by the service agreement. Mutual agreements may result in an amendment to the agreement, which should be documented in writing and properly signed by the parties in accordance with section 43(7) of the Real Estate Services Rules:

> **43** (7) *Changes to agreement* – Any amendment of or addition to the terms of a service agreement required under subsection (1) must be in writing and signed by the client and an authorized signatory of the brokerage.

If a licensee is faced with a potential termination by mutual agreement, they should discuss the matter with their managing broker. If difficulties arise in documenting a termination by mutual agreement, then the client should be advised to seek legal advice. The brokerage may also decide to seek its own legal advice.

Cornerstone Properties Ltd (Re), 2013 CanLII 69918 (BC REC) and *King (Re)*, 2013 CanLII 69919 (BC REC) are two separate disciplinary orders made that concern the same incident with a client.

In *Cornerstone,* the Council considered disciplinary action against the brokerage and the managing broker. In King, the Council considered disciplinary action against the representative who was the strata manager for the client. These cases demonstrate consequences that can result from confusion and misunderstandings between the brokerage and the client regarding the termination date of a service agreement.

An oral agreement was made between the brokerage and strata corporation to terminate their strata management agreement without the need for a ¾ vote of the owners. The brokerage and strata corporation also agreed that there was to be a two-month transition period.

Later, there was confusion concerning the end date for strata management services. The strata corporation understood that there would be a two-month transition period. This was also reflected in the notice of special general meeting, which set out when the new brokerage would begin managing the strata corporation. The managing broker prepared a letter of termination providing that the brokerage would cease to provide strata management services to the strata corporation one month earlier than the agreed upon date. The managing broker's letter was not received by the strata corporation until two days before the end date provided in the letter.

In *Cornerstone,* the managing broker and the brokerage were both reprimanded with respect to the oral agreement, which resulted in an improper amendment made to the strata management agreement. The managing broker was also reprimanded for the late delivery of the letter of termination to the strata corporation.

In *King,* the strata manager was reprimanded for:

- Not informing the strata corporation about the amended terms of termination of the brokerage's strata management services in a timely manner; and
- Not advising the strata corporation that the date indicated on the notice of special general meeting for when the new brokerage would begin providing strata management services to the strata was incorrect.

Strata management services—termination by statute

Irrespective of what is written in strata management agreements, the *Strata Property Act* ("*SPA*") requires that certain methods of termination are available under certain conditions. We will review these conditions below.

Section 39 of *SPA*

The standard provision for termination of a strata management agreement is set out in section 39 of *SPA*:

> **Cancellation of strata management contracts**
>
> **39** (1) A contract entered into by or on behalf of the strata corporation for the provision of strata management services to the strata corporation may be cancelled, without liability or penalty, despite any provision of the contract to the contrary,
>
> (a) by the strata corporation on 2 months' notice if the cancellation is first approved by a resolution passed by a 3/4 vote at an annual or special general meeting, or
>
> (b) by the other party to the contract on 2 months' notice.
>
> (2) The strata corporation does not need any prior approval to cancel the contract in accordance with its terms or to refuse to renew the contract when it expires.

If the strata council has provided the strata management company with instructions to include a resolution to terminate the agreement in the notice of an annual or special general meeting, then the brokerage and the strata manager should carefully consider their role in preparing for and participating in the annual or special general meeting.

Although it is an awkward discussion to have, obtaining detailed instructions from the strata council is important. Consider obtaining instructions from strata council on whether the brokerage and strata manager will be:

- Preparing and sending out the notice of annual or special general meeting;
- Attending the annual or special general meeting; and
- Providing support during the annual or special general meeting, including performing check-in and counting votes.

It is preferable that these instructions are provided by way of a majority vote of the strata council at a strata council meeting that is duly held prior to the time that the notice of the annual or special general meeting is prepared and sent to the owners. The instructions from the strata council should be documented in the minutes of the strata council meeting.

The strata manager should ask the strata council to pre-approve any communication that the strata manager proposes to have with one or more owners regarding whether termination of the strata management agreement should take place. For example, if an owner calls, emails, or otherwise contacts the strata manager, it is not appropriate for the strata manager to explain the brokerage's side of the story about a potential or actual termination of the strata management agreement.

It is inappropriate for a strata manager to attempt to garner the support of individuals to continue to manage the strata corporation by lobbying owners outside proper communication with the strata council. Communication from the brokerage to the owners about termination should only take place if pre-approved by strata council.

Strata managers may want to work under the guidance of their managing broker during the entire termination process. The strata manager and the managing broker should work together to establish which tasks the strata manager will perform and if other individuals at the brokerage are needed to perform tasks as well, and to ensure that resources are allocated appropriately.

Section 24 of *SPA*

Prior to the first annual general meeting, the owner developer of the strata corporation may retain a brokerage to provide strata management services to the strata corporation. Section 24 of the *SPA* recognizes that the new owners of strata lots in the complex may not want to continue working with the same brokerage that was retained by the owner developer to provide strata management services:

Strata management contracts

24 (1) A contract entered into before the first annual general meeting by or on behalf of the strata corporation for the provision of strata management services to the strata corporation ends, regardless of any provision of the contract to the contrary, on the earlier of

(a) the date that is 4 weeks after the date of the second annual general meeting,

(b) the termination date contained in the contract or agreed to by the parties, and

(c) the cancellation date established in accordance with section 39.

(2) The strata corporation may, by a resolution passed by a majority vote at the second annual general meeting, continue a contract which would otherwise end under subsection (1) (a).

(3) A resolution under subsection (2) does not require notice under section 45 (3).

Pursuant to this section, agreements for strata management services entered into prior to the strata corporation's first annual general meeting will terminate on the earlier of:

- Four weeks after the date of the second annual general meeting;
- The date agreed to in the contract or by the parties; or
- Pursuant to section 39 of *SPA*, unless the contract (the strata management agreement) is approved to continue by a majority vote of the owners during the second annual general meeting of the strata corporation.

A prudent strata manager will ask for instructions from the strata council to include a resolution in the notice package for the second annual general meeting to notify the owners of the upcoming majority vote.

Section 24(3) of *SPA* provides the strata corporation with a mechanism to vote on a majority vote resolution to continue under the same strata management agreement, even if owners do not receive notice of the resolution. However, failure to include this resolution on the agenda sent in the notice package can result in a number of complications for the strata manager and for the brokerage, including potential conflict of interest situations.

For example, if it is discovered at the second annual general meeting that the majority vote resolution to continue with the strata management agreement was not included on the agenda in the notice package for the meeting, the strata manager may be placed in the awkward position of explaining to the owners during the second annual general meeting that the owners should vote on the majority resolution to continue with the strata management agreement. This may result in the strata manager appearing to be advocating for the brokerage, as opposed to attending the second annual general meeting for the sole purpose of acting in the best interests of the strata corporation. As a result, the strata manager and the brokerage may be criticized by one or more owners for acting in a conflict of interest.

Another example of when a potential conflict of interest situation may arise is if proper plans are not made regarding who will count the votes at the meeting, including the votes on the majority vote resolution to continue with the strata management agreement, as well as regarding who will chair the meeting.

A strata manager who counts the votes may be considered by strata lot owners to be in a conflict of interest, since the brokerage will financially benefit from the owners' approval to continue with the strata management agreement (see section 30(i) of the Real Estate Services Rules). It is especially important for the strata manager to make arrangements with the strata council prior to the meeting about who will count the votes if there is an electronic meeting, because it may be very difficult to make last minute changes in those circumstances.

In addition, the strata manager will want to discuss with strata council prior to the second annual general meeting what role the strata manager should play at the second annual general meeting and particularly, what role the strata manager should play with respect to the majority vote resolution to continue with the strata management contract. If the strata manager chairs or facilitates the portion of the second annual general meeting when this majority vote resolution is discussed, they may be criticized by participants for acting in a conflict of interest by facilitating the discussion in a manner that prevents individuals from speaking against continuing to retain the brokerage.

Strata management services—termination by service agreement

If a strata manager learns that termination of the strata management agreement is being considered by the brokerage, the strata council, or a group of owners, then a prudent strata manager will review the provisions of the strata management agreement with the managing broker to ensure that they understand and agree with how the termination provisions will be interpreted by the brokerage.

The termination provisions in the strata management agreement may deal with various issues, including:

- When the strata management agreement automatically terminates;
- When the strata management agreement terminates based on the actions of one of the parties;
- When and how fees for strata management services will be paid;
- How to deal with holdbacks to pay outstanding accounts incurred by the brokerage on behalf of the strata corporation; and
- When the handover of documents, possessions and funds to the strata council of the strata corporation, or to the brokerage that will be taking over providing strata management services to the strata corporation, will take place.

Even though there are often standard form agreements used in the industry, it is important to review each strata management agreement and the schedule for unique provisions. For instance, the strata management agreement may contain unique provisions under which the strata corporation can terminate the strata management agreement that are easier to meet than the ¾ vote resolution threshold required by section 39 of *SPA*. For example, a negotiated termination provision may include termination approved by the strata corporation based on a majority vote of the strata council at a strata council meeting, or termination approved by a majority vote at an annual or special general meeting of the owners.

Strata management services—termination by winding up

The strata management agreement will be terminated if the strata corporation winds up. Wind-ups of strata corporations are complicated. When a strata corporation is wound up, the strata corporation is no longer a legal entity and the strata plan is cancelled.

A court can force a strata corporation to wind up, or it can be voluntary. Strata managers involved in managing a strata corporation that is winding up should review the strata management agreement and speak to their managing brokers about who they can take instructions from during the winding up process. The client should be advised to seek legal advice to clarify who can provide instructions to the brokerage during the wind-up process, including whether or not the strata manager can take instructions from the liquidator.

Strata management services—terminations and disciplinary actions

The elected strata council exercises the powers and performs the duties of the strata corporation. Even though strata management agreements are between a brokerage and the strata corporation, the strata council provides instructions to the brokerage on behalf of the strata corporation.

The brokerage must act in accordance with the strata council's instructions. Communicating directly with all or some owners regarding the possible termination of a strata management agreement without the strata council's instructions to do so is not consistent with the duty to act in the best interest of the client and to act only within the scope of authority given by the client (see section 30(a) and section 30(c) of the Real Estate Services Rules).

In Hackett (Re), 2014 CanLII 80381 (BC REC), the strata council members decided that they wanted to terminate the strata management agreement with the brokerage and advised the brokerage of the strata corporation's intention to do so.

A special general meeting was held to adopt the strata council's decision and the strata manager was specifically advised not to attend the meeting. The strata manager attended the meeting against the strata council's instructions. The meeting ended before the resolution to adopt the strata council's decision to terminate the strata management agreement was voted on. Later, the strata manager prepared a notice of special general meeting for the owners to elect a new council, without the strata council's consent.

The strata manager was reprimanded for interfering with the termination of a strata management agreement, as well as acting outside of the scope of authority given by the client by sending out a notice of special general meeting without the strata council's consent.

The disciplinary order in Floris (Re), 2017 CanLII 62615 (BC REC), demonstrates another example of interference with the termination of a strata management agreement, however in this case the managing broker was reprimanded, rather than the strata manager. The strata council had advised the managing broker that they were going to recommend at the next annual general meeting that the strata management agreement with the brokerage be terminated.

The managing broker wrote a resignation letter on behalf of the brokerage to the strata council and advised the strata council that they should read the letter to the owners at the annual general meeting. The resignation letter included accusations against the strata council of impropriety, illegal conduct, incompetence, and personal misconduct. The managing broker also advised in the letter that the brokerage might reconsider its resignation if at least some of the current members of the strata council were replaced.

The managing broker was reprimanded for "adopting a course of action designed both to circumvent and to undermine in the eyes of the Strata Corporation's owners the authority of the Strata Council," for the allegations made in her letter against the strata council, and for the offer to reconsider the brokerage's resignation.

Rental property management services

Pursuant to section 48(a) of the Real Estate Services Rules, the circumstances under which the rental property management agreement can be terminated between the client and the brokerage must be set out in the agreement. No methods of termination for rental property management agreements are legislated by statute.

The parties can look to the rental property management agreement for termination provisions. If those termination provisions are not suitable in the circumstances, then the parties can negotiate the termination of the rental property management agreement by amending the agreement. It is important to properly document the termination amendment.

If there is an upcoming termination, the rental property manager should seek consensus with the client on who will notify the tenants and when the tenants will be notified of the transition to a new brokerage or to self-management. The tenants will need to be provided with the information that they require for the transition, including new contact information and banking information.

If the brokerage is representing the owner in a dispute before the Residential Tenancy Branch ("RTB") at the time of a termination of a rental property management agreement, the proper documentation will need to be filed with the RTB to reflect the change of contact person to a new rental property manager, or the owner. However, changing representation while proceedings are imminent or ongoing may cause prejudice to the client.

In these types of situations, it is proper for a rental property manager to speak to their managing broker if they have any concerns about how to act in the best interest of the client, and the managing broker can decide if the brokerage should seek legal advice. Legal advice can be sought regarding whether the brokerage should offer to continue to provide limited services to the client to complete the proceedings and how the rental property management agreement can be amended to provide these limited services.

Trading services

The Real Estate Services Rules do not require service agreements that are not rental property management agreements or strata management agreements to include provisions regarding termination. The BC Real Estate Association's Multiple Listing Contract ("Multiple Listing Contract") is commonly used for residential trading services and includes provisions concerning termination (see section 14 of the Multiple Listing Contract).

The basic termination clause in the Multiple Listing Contract provides that the agreement will terminate:

- Immediately if a brokerage's licence is suspended, cancelled or rendered inoperative under *RESA*;
- Upon the expiry of the term of the contract;
- Upon an earlier date if the seller and brokerage mutually agree in writing;
- Upon a completed sale of the property prior to the expiration of the listing contract;
- Upon the bankruptcy or insolvency of the brokerage or if the brokerage is in receivership; or
- If the brokerage and designated agent are no longer able to provide trading services to the seller due to Part 5 of the Real Estate Services Rules (i.e. conflicts of interest such as dual agency).

The Multiple Listing Contract also sets out what must happen immediately upon the termination of the agreement. The brokerage and designated agent(s) must stop all marketing activities that they are performing on behalf of the client, remove all signage from the property that is the subject of the agreement, and return all documents and other materials provided by the client, to the client if requested.

Unlike for rental property management agreements or strata management agreements, the Real Estate Services Rules do not specify a required timeframe to return records upon the termination of a trading services agreement. However, section 82 of the Real Estate Services Rules applies to trading services agreements, so the brokerage must continue to prepare all financial records required under Part 8 of the Real Estate Services Rules that relate to the services provided by the brokerage to the client.

While termination of a trading services agreement has been anticipated to some extent in the Multiple Listing Contract, brokerages and trading services representatives should be cognizant that if they do not use the Multiple Listing Contract, termination of the agreement may not be dealt with. For example, in commercial real estate transactions that do not typically use Multiple Listing Contracts, there may be different termination provisions or no termination provisions in the governing contract.

By way of the attached Schedule "A" to the Multiple Listing Contract, the standard termination provisions in the Multiple Listing Contract may have been modified, or additional termination clauses may have been negotiated and added to the Multiple Listing Contract, so trading services representatives must make sure to refer to the schedules in all agreements.

TRANSITION PERIODS AND FACILITATING CHANGE OVER AFTER TERMINATION

RESA, the Real Estate Services Rules, and the *SPA* have requirements that brokerages and licensees must comply with for the transfer of records and other client property, including funds after termination of service agreements. There are also requirements under *RESA* for the brokerage and licensee to maintain records after the termination of the service agreement. As demonstrated in Cornerstone and King, there will likely be time between the notice of termination and the date that the termination is effective. After notice has been provided, the brokerage and licensee should create and execute an action plan to ensure that the client's documents, possessions, and funds are delivered on time to the client or the new brokerage as required by *SPA*, *RESA*, the Real Estate Services Rules and the written service agreement, as applicable. One or more individuals from the brokerage will have to dedicate time to get the file organized, so a prudent licensee will consult with their managing broker to confirm who will perform this task.

For example, pursuant to section 89 of the Real Estate Services Rules, real estate clients can require that all records must be provided physically. Brokerages and licensees would do well to clarify with the client at the earliest opportunity after notice is provided whether electronic records will be satisfactory, or whether physical records will be required. Providing physical copies of years' worth of electronic records is time consuming. Having performed proper file management over the years will make the task of providing documents to the client easier. For instance, carefully saving emails to an electronic file will mean that they will be organized when it is time to provide them to the client.

The obligation to retain certain records for a certain amount of time under section 92 of the Real Estate Services Rules prevails even after a real estate services agreement is terminated.

Strata management services

The *SPA* sets out timeframes for those managing strata properties to perform certain tasks after the termination, which will allow the strata corporation to continue to manage its affairs without interruption.

In accordance with section 37 of the *SPA*, within four weeks of the strata management agreement ending, the person providing the strata management services must give the strata corporation any records referred to in section 35 of the *SPA* that are in the person's possession or control. Providing only current records is not enough. The brokerage must provide all of the required records that are in its possession or control.

The fine against a person providing strata management services who fails to give the strata corporation the records under section 35 within the time provided for in section 37 of the *SPA* is $1,000.

In addition, a licensee may be reprimanded by the Council for failing to provide the above-noted records within the requisite amount of time contrary to section 88(3) and 88(4) of the Real Estate Services Rules (see Ullrich (Re), 2015 CanLII 90649 (BC REC)).

We refer you to sections 88(3) and 88(4) of the Real Estate Services Rules that require a brokerage to transfer financial records that relate to trust accounts maintained on behalf of the former client and, unless otherwise provided, accounting statements, invoices for expenditures and monthly statements. The deadline to provide these records is by the later of two weeks following the date of the request, or four weeks following the date of the termination.

It is necessary to comply with the obligations to provide records under both the *SPA* and the Real Estate Services Rules (see section 88(5)(b)). Even after a brokerage has transferred the financial records, the brokerage must still retain certain records for a specified period under section 92 of the Real Estate Services Rules (see Section 88(5)(a)).

The actions taken to terminate a strata management agreement are best anticipated in the strata management agreement itself. Strata corporations should continue to be managed in a manner that allows for a smooth transition between the notice of termination and the actual termination date, and to provide all documents, possessions, and funds to the strata corporation or to the new brokerage.

If the brokerage is listed as the mailing address in the land title office for a strata corporation that it will no longer be managing, the brokerage should request that the strata council or the new brokerage on behalf of the strata corporation file a Form D – Strata Corporation Change of Mailing Address (Form D) with the land title office.

The new brokerage managing the strata corporation should ensure that any obligation it has to file a Form D is performed in a timely manner so that the strata corporation receives the notices or records given to the strata corporation under sections 63 and 64 of the *SPA*.

Rental property management services

A prudent rental property manager should consider the amount of time that will likely be required to respond to record requests if the rental property management agreement is terminated, and manage the records so that this timeframe can be met if there is a termination.

Pursuant to section 87(3) of the Real Estate Services Rules, if requested by a former client, the brokerage must provide to the former client or the new brokerage the financial records referred to in section 80 of the Real Estate Services Rules as well as the tenancy agreement and invoices and deposit information.

The deadline to provide the above records is the later of two weeks following the date of the request and four weeks following the date of termination (see section 87(4) of the Real Estate Services Rules). Being able to provide documentation within the allotted time will be more challenging when the brokerage has managed multiple rental units or properties for the client for many years.

A licensee may be reprimanded by the Council for failing to provide the above-noted records within the requisite amount of time. The disciplinary decision for Kwong (Re), 2017 CanLII 47682 (BC REC), concerns a brokerage that provided rental property management services to a client for just under five years. After just over three years, a different rental property manager at the same brokerage began managing the rental property. After the rental property management agreement was terminated, the brokerage only provided two years' worth of records to the owner.

The brokerage could not locate the records from the period that the first rental property manager was managing the rental property. According to the managing broker, the first rental property manager had "kept some records at her home without his permission," and that "although he tried to contact her ... to have the records returned, he was unsuccessful."

The managing broker and the brokerage were both reprimanded for failing to provide the missing

documents to the owner, and because they could not locate the rental property management records for the period that the first rental property manager was managing the rental property.

Pursuant to section 29(1)(c) of the Real Estate Services Rules, an associate broker or representative must promptly provide an original or copy of all rental property management records to the managing broker. Similar obligations apply to associate brokers and representatives providing trading services and strata management services.

Keep in mind that if you are working from home, records must be kept confidential from those with whom you live. Consider keeping electronic documents secure by using unique passwords only known to you, and possibly the brokerage. If it is necessary to keep physical copies of documents at your home, consider how you will keep these documents secure, including using a locked file cabinet and shredding copies that are no longer required. The physical copy of a document at your home should not be the only copy of the document in existence. Ensure that you save a copy of physical documents kept only at your home to your brokerage's electronic file to make sure that the brokerage's records are complete.

Trading services

For trading services, the documents that have been obtained on behalf of the client will need to be provided to the client. There could be various documents that the trading services licensee obtained on behalf of a seller, including a survey, an oil tank scan for a single-family dwelling, or a strata plan and a Form B with documents for a strata lot. A trading services licensee, acting in the best interests of their client, will provide their client with all documents obtained on their behalf so that the client can make decisions about their property in an informed manner.

SPECIAL CONSIDERATIONS FOR AFTER TERMINATION

In the sections below, we will review three topics that require special consideration after the real estate services agreement terminates:

- Transfer of funds;
- Holdback of certain funds; and
- Continuing to work with one client after a service agreement with multiple related clients terminates.

Transfer of Funds

In addressing the transfer of funds after a real estate services agreement terminates, licensees must follow the provisions of the real estate services agreement, the Real Estate Services Rules, and statutory provisions.

For example, after the termination of a strata management agreement, section 77(10) of the Real Estate Services Rules requires the brokerage to "promptly transfer control of the strata corporation's money to the strata corporation or, if the strata corporation engages another brokerage to provide strata management services, to the other brokerage." The brokerage cannot contract out of its obligation to comply with the Real Estate Services Rules.

With respect to rental property management services, the rental property management agreement and a tenancy agreement may both terminate at approximately the same time. Section 38 of the *Residential Tenancy Act* requires, generally, that a tenant's security deposit and pet deposit be returned within 15 days after the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing. The rental property manager must work with their managing broker and the owner to ensure that these funds are transferred back to the tenant within the required timeframe.

Holdbacks

Service agreements may also contain holdback provisions that require or enable the brokerage to hold back client funds to pay for the real estate services provided to the client, and invoices that the brokerage has agreed to pay on behalf of the client. Licensees must review the service agreements and comply with them regarding whether funds will be held back at the termination of a service agreement. For instance, the strata management agreement may allow for a holdback for a thirty-day period after termination so that the brokerage can use the strata corporation's funds to pay accounts incurred by the brokerage on behalf of the client with the authority of the client.

With respect to strata management services, despite section 77(10) of the Real Estate Services Rules, section 77(11) of the Real Estate Services Rules permits a brokerage to "retain sufficient funds to pay outstanding and anticipated invoices related to expenses incurred on behalf of the strata corporation before the termination of the service agreement." The Real Estate Services Rules do not provide for similar provisions concerning other real estate services.

Multiple clients

Special considerations apply when the brokerage has multiple related clients and the service agreement with one of them will be terminated.

For example, a brokerage may act for the strata corporation and the residential section. The service agreement with the strata corporation may be terminated, and the residential section may continue to be managed by the brokerage. The possibility of a conflict of interest will continue even when the brokerage ceases to manage the strata corporation. The brokerage and its licensees have a duty to keep information from its former client confidential from its present clients. For instance, the licensee may have gained confidential information at a council meeting involving a legal opinion concerning the allocation of costs between the section and the strata corporation. The service agreements may have anticipated how confidentiality will be dealt with between these clients. If the service agreements do not deal with this, it is important for the strata manager to discuss how to proceed with their managing broker, and for the managing broker to consider whether the brokerage should seek legal advice.

In cases dealing with related clients, the agreements may specify a “primary client” and a “secondary client” when the duties owed to one or both of the clients have been modified per section 31 of the Real Estate Services Rules. For instance, the strata management agreements with both the strata corporation and the residential section may provide that the strata corporation is the primary client and the residential section is the secondary client. Brokerages wanting to enter into such relationships should consider obtaining legal advice and properly document in the agreements with both clients how conflicts will be addressed.

Ultimately, if the interests of the clients are in conflict, it may be necessary to terminate the agreement with the secondary client, while keeping the information about each client confidential from the other. In certain situations involving a conflict, it may be more appropriate to terminate both agreements. For instance, if the strata corporation and the section are involved in litigation regarding cost allocation between them, the brokerage may have a difficult time fulfilling their obligation to either client regarding supporting the litigation without disclosing confidential information about the other client.

TRANSFERRING LICENCES AND SUSPENSIONS

In these materials, when we refer to a "transfer", we are referring to when a licensee transfers their licence from one brokerage to another. Licensees may wish to transfer to a new brokerage for many reasons. For example, perhaps the licensee moved to another part of the province and is looking for a brokerage closer to home. Issues regarding remuneration paid by the brokerage to licensees after termination for services provided while they were engaged by that brokerage are beyond the scope of this module. When a licensee wants to transfer to a new brokerage, the licensee must first complete and submit to BCFSA an Application for Representative, Associate Broker or Managing Licence form. After the application has been processed, the managing broker of the current brokerage must surrender the licensee's licence via the BCFSA Portal. The managing broker should also return the licensee's paper licences, if any, by mail to BCFSA.

The new brokerage must be prepared to process the transfer as soon as the old brokerage surrenders the licensee's licence. Without being engaged by a brokerage, a person is no longer licensed with that brokerage, and the person's licence becomes inoperative (section 22(1), *RESA*).

If the licensee's licence becomes inoperative, even for a day, this can have a number of serious implications for the licensee. An unlicensed person must cease to hold themselves out as a licensee (see section 21(1) of the *RESA*). This includes removing all advertising on their website and removing all signage. In addition, the person must not provide real estate services during the time that they are unlicensed during a transfer, or at any time while unlicensed.

In the disciplinary case of Fugle (Re), 2015 CanLII 90653 (BC REC), a licensee remained on the website of the brokerage after they had transferred. The managing broker was reprimanded for permitting this to occur. As such, it is important that the brokerage that the licensee is transferring from and the brokerage that the licensee is transferring to are both prepared to complete the transfer in a timely manner.

Strata management services

Both managing brokers and strata managers should consider the implications of a contract for strata management services terminating around the same time the strata manager leaves the brokerage.

Consider what will happen if a strata manager, who has managed a strata corporation for thirty years, retires the same month that notice of termination of the agreement for strata management services is given by the client. Does the brokerage have access to all of the documents in a manner so that they can be provided to the strata corporation in a timely fashion? It is prudent that both the strata manager and the brokerage consider the possibility of such situations happening and arrange a smooth transition.

Rental property management services

A prudent rental property manager and brokerage must be very careful to ensure continuity when a rental property manager transfers or surrenders their licence. Unlike in the strata context, there will be no strata council minutes, or annual or special general meeting minutes, tracking ongoing matters. Best practice is for the rental property manager and brokerage to work together to ensure that the records are kept in a fashion so that another rental property manager can take over the file. If possible, the rental property manager should help the new rental property manager on the file get up to speed. One way to do this is to prepare a client memorandum of ongoing matters.

Trading services

A listing agreement between a brokerage and a client generally will not end when the designated agent transfers their license to a new brokerage. When the designated agent transfers their licence to a new brokerage, the brokerage can designate another licensee to act as the sole agent of the seller. This is because the trading services agreement is between the brokerage and the client, not between the trading services representative and the client. If the client wishes to work with the same trading services representative and the brokerage agrees, the matter of termination will need to be negotiated.

With trading services, the client will typically have a more personal relationship with the trading services representative rather than with the brokerage that has engaged the trading services representative. This may or may not be the case with strata managers or rental property managers. This is due to the nature of the relationship between the trading services representative and the client.

Typically, trading services representatives advertise themselves as individuals that belong to a specific brokerage, often within a particular real estate franchise. Most often, sellers or buyers approach the trading services representative directly, rather than the brokerage generally. Trading services representatives are typically the individuals giving listing presentations and attending interviews with prospective clients, as well as drafting and presenting the listing contract to the client.

This direct relationship typically does not occur between clients and their rental property manager or strata manager at the beginning of the relationship. Often in those cases, the managing broker or another experienced strata manager will be the individual who first meets with a potential client, prepares a presentation of the services offered by the brokerage to the prospective client, and presents a service agreement to the client. Rather than seeking out a specific manager, rental property managers and strata managers are often assigned to clients by the brokerage.

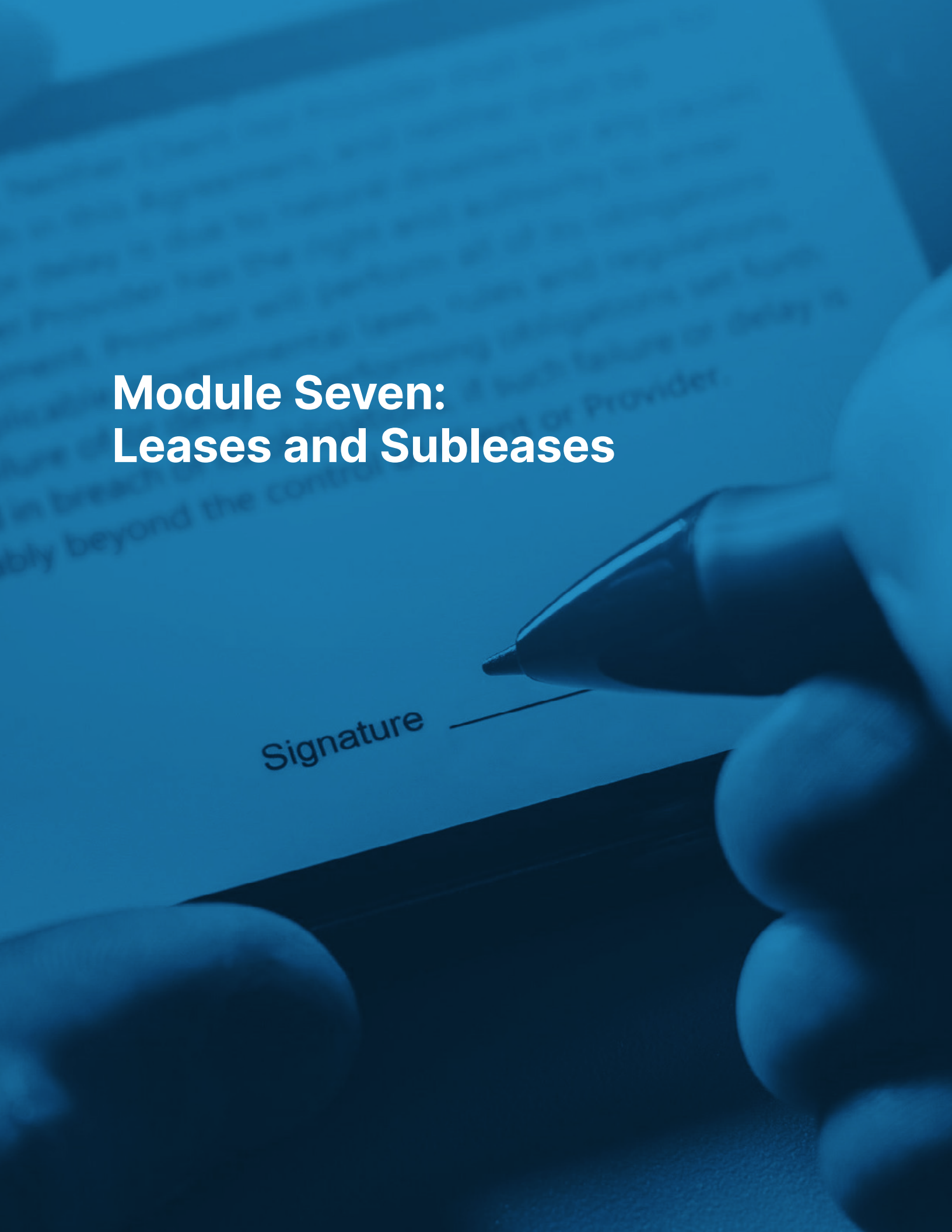
Designated agency exists in trading services relationships, not in rental property management or strata management relationships. Instead, for rental property management and strata management relationships, it is always a brokerage agency relationship. In brokerage agency, all of the licensees within the brokerage are agents for the client, whereas in designated agency, only the licensees in the brokerage that are appointed as designated agents in the services agreement are agents for the client.

CONCLUSION

- We have now reviewed how, when, and why real estate service agreements may terminate when used in the context of providing strata management services, rental property management services, and trading services to clients;
- How licensees may transfer their licence to another brokerage, or surrender their licence; and
- The potential effects on real estate service agreements when a licensee transfers to another brokerage.

In conclusion, when a brokerage takes on the obligations under any service agreement to act on behalf of a client, whether for the provision of strata management services, rental property management services, or trading services, it is important that the licensee reviews the service agreement so that they understand their obligations.

Module Seven:
Leases and Subleases



Module Seven: Leases and Subleases

MODULE DESCRIPTOR:

This module focuses on common issues arising in the context of commercial leasing and subleasing. These issues arise in all stages of the leasing relationship: from potential tenants and subtenants looking to enter into leases, or potential landlords looking to purchase tenanted property, to landlords and tenants looking to end their relationship on favourable (or less favourable) terms.

LEARNING OBJECTIVES

After completing this module, you will be able to:

- Identify key features of subleases, including the difference between a sublease and a lease assignment;
- Understand how a lease is surrendered and why a lease surrender agreement may be used;
- Understand how force majeure clauses apply to commercial leases; and
- Recognize available options for landlords and tenants when the other party breaches the lease.

SUBLEASING

Introduction

Commercial tenants will sometimes sublease all or part of their leased premises to a subtenant. As a real estate licensee, you may be involved in preparing a sublease or representing a potential subtenant looking to enter into a sublease.

A sublease occurs when a tenant enters into an agreement to rent all or part of its leased premises to another party. In that case, the existing tenant becomes the sublandlord and the new tenant is referred to as a subtenant. When a tenant enters into a sublease, the tenant is still responsible for all of its obligations to the landlord called the ("head landlord") under the original lease called the ("head lease").

In a typical subleasing arrangement, the head landlord is not a party to the sublease and the subtenant is not a party to the head lease. This means that there is no direct landlord-tenant relationship or privity of contract between the head landlord and the subtenant. As a result, neither the head landlord nor the subtenant can enforce their rights under those agreements against the other (but can do so against the tenant/sublandlord). This issue may be addressed by an agreement between the head landlord and the subtenant.

Real estate licensees should take care to avoid conflicts of interest when representing subtenants. A real estate licensee can only represent one party in a given transaction: either the head landlord, the tenant/sublandlord, or the subtenant.

Subleases vs. Lease Assignments

Note that a sublease is distinct from a lease assignment. In a typical lease assignment, a new tenant sometimes called ("the assignee") steps into the shoes of an existing tenant sometimes called ("the assignor") and assumes the existing tenant's obligations under the lease.

A lease assignment creates a direct landlord-tenant relationship between the landlord and the new tenant. Depending on the assignment arrangement, the existing tenant might be released by the landlord from any further obligations under the lease. Contrast this with a sublease, where the tenant always remains directly liable to the landlord for the tenant's obligations under the lease, even if those obligations are the responsibility of the subtenant under the sublease.

In a lease assignment scenario, the rights and obligations of the new tenant ("assignee") will be governed by the existing lease. However, it is important to note that at common law, a lease assignment does not necessarily transfer all of the rights and obligations under the existing lease. A common law lease assignment only transfers those obligations that can be said to "run with the land" or "touch and concern the land". Many key lease obligations do run with the land (for example, covenants to pay rent, pay taxes, repair, insure and restrict use of the premises), while others do not (for example, a tenant's covenant to pay accelerated rent in case of bankruptcy). Additionally, unless the lease provides otherwise, under a common law lease assignment the existing tenant ("assignor") will not automatically be released from its obligations under the lease. Both of these issues are addressed by the parties entering into a contractual arrangement usually called ("an assignment and assumption agreement") in which the landlord and new tenant ("assignee") each agree to be bound by all of terms of the existing lease and, optionally, the landlord agrees to release the existing tenant ("assignor") from its obligations under the lease.

In a subleasing scenario, the rights and obligations of the subtenant are only as provided in the sublease. The subtenant is not bound to the head lease and does not benefit from the sublease. For this reason, the subtenant and sublandlord will want to ensure that the terms of the sublease are consistent with and work in conjunction with the head lease.

Permission to Sublease

At common law, a tenant is permitted to sublease its premises unless the head lease says otherwise. Many, if not most, head leases prohibit subletting without the landlord's consent or impose conditions on sublets, such as the type of subtenant and permitted uses. The head lease may also entitle the head landlord to a fee for considering or consenting to a proposed sublease and reimbursement of the head landlord's related expenses. A real estate licensee representing potential subtenants should review the head lease to ensure that the tenant is allowed to sublease the premises, as well as to determine any conditions of the landlord's consent and that the subtenant's proposed use of the premises is permitted under the terms of the head lease.

Similarly, at common law a tenant is permitted to assign its interest in a lease unless the lease says otherwise (but subject to the issues discussed above). Where a lease prohibits subletting but is silent on assignment, a licensee representing a potential subtenant should consider whether a lease assignment is a viable alternative to a sublet.

Case: Trouble with a prohibited sublease

When entering into a sublease, it is important to ensure that the sublease itself is permitted, as well as the type of business the subtenant wishes to carry out in the premises.

In the recent case of Vancouver Fraser Port Authority vs. Mountain Premier Contracting & Demolition Ltd., 2021 BCSC 207, the tenant leased a water lot from the Vancouver Fraser Port Authority (the "Port Authority"). The tenant subleased the premises to a ship demolition company. The head lease did not allow subletting. Further, the subtenant's ship demolition business was not permitted under the Port Authority's regulations. Ultimately, the Port Authority commenced an action against both the tenant and the subtenant for damages for trespass and the costs of remediating the environmental damage to the water lot. The Port Authority also applied for an injunction to force the subtenant to vacate the water lot.

The court granted the injunction and ordered the subtenant to vacate the premises and remove their property from the water lot.

This case is a reminder that tenants and subtenants who enter into prohibited sublease agreements may find themselves in legal trouble with the landlord. A tenant who subleases the premises is not "off the hook" and may be liable for damages caused by a subtenant. It is always prudent to ensure that any sublease is permitted under the terms of the head lease and that the consent of the landlord is obtained if needed.

When representing landlords or sublandlords, real estate licensees should discuss the merits of including restrictions on subleasing and lease assignments in any leases or subleases to be entered into by their clients. It is generally to the advantage of the landlord or sublandlord to restrict subleasing and lease assignments in some manner, though the appropriate restrictions will vary from case to case. When in doubt, licensees should recommend that their clients seek legal advice to determine what specific restrictions will best protect their interests.

Key Terms of Subleases

Real estate licensee's reviewing subleases should be aware of the key terms of a sublease:

- **Term:** The term of a sublease must be for (at least) one day less than the term of the head lease. Otherwise, this is considered an assignment of the lease and not a sublease. In a lease assignment, the tenant gives up all of their rights in the lease and the assignee steps into the shoes of the tenant. A tenant might want to sublease rather than assign if it wants to remain in possession of part of the premises or to move back into the premises at the end of the sublease term.
- **Premises:** What premises are to be subleased? A sublease may be for the entire leased premises or only a portion.
- **Payment of rent and other expenses:** Draft or review these terms keeping the head lease in mind. Since the sublandlord remains responsible to pay all amounts owing to the head landlord under the head lease, the sublandlord will want to ensure that the sublease allows the sublandlord to pass on those expenses to the subtenant.
- **Covenants of the sublandlord:** A subtenant will want the sublandlord to agree to certain covenants in the sublease, including to:
    - Pay all amounts owing to the head landlord under the head lease; and
    - Enforce the tenant's rights under the head lease for the benefit of the subtenant (e.g., enforcing the landlord's duty to repair), since the subtenant cannot enforce these rights against the landlord directly.
- **Covenants of the subtenant:** A sublandlord will want the subtenant to agree to certain covenants in the sublease, including not to do anything that would cause a default on the part of the tenant under the head lease.
- **Indemnity:** The sublandlord may require an indemnity from the subtenant against any liabilities arising from the subtenant's breach of its covenants under the sublease. Since the sublandlord is still legally responsible for the tenant's obligations under the head lease, this indemnity may help to protect the sublandlord if the subtenant causes a breach of those obligations. The subtenant may also wish to obtain an indemnity from the sublandlord.
- **Head Landlord Consent:** If head landlord consent to the sublease is required, then the sublease should be subject to the sublandlord obtaining that consent. Alternatively, the sublease may confirm that the head landlord's consent has been obtained (and the head landlord may even be a signatory to the sublease for that purpose).

LEASE SURRENDER AGREEMENTS

Real estate licensees representing landlords and tenants may encounter situations where both the landlord and tenant want to end the lease relationship early. A surrender of the lease occurs when the landlord and tenant mutually agree to end their landlord-tenant relationship. Real estate licensees may be involved in representing parties looking to surrender a lease, or prepare a lease surrender agreement. This section will discuss how a lease can be surrendered by agreement, but also how surrender of a lease can be implied—sometimes unintentionally—by the conduct of the parties.

Surrender by Agreement

A lease surrender agreement is typically used where ending the lease early is beneficial to both parties. For example, consider a situation where a tenant's business is struggling, and the tenant wants to move to smaller premises to help their bottom line. The landlord might be willing to end the lease if the premises are in a prime location and the landlord knows they can re-let the premises quickly and easily to a new tenant for a higher rent. Alternatively, the tenant may agree to pay an amount to the landlord to compensate it for re-letting expenses and lost rental revenues.

The key terms of a lease surrender agreement include:

- **Date of surrender:** The surrender agreement must specify when it is effective (e.g. immediately or on a future date). In order for a lease surrender to take effect at a later date, there must be some consideration (e.g., payment of a termination fee) under the surrender agreement. If the parties want to agree to terminate the lease at a later date without requiring a termination fee or other consideration, a lease amendment shortening the term might be more appropriate. Licensees should advise their clients to seek legal advice in determining the appropriate type of agreement in the circumstances.
- **Release:** The parties may agree to release each other from all claims in respect of the lease. However, a landlord will usually want a tenant to comply with its end of term obligations under the lease (e.g., regarding the condition of the premises), particularly if the surrender will occur at a later date.

- **Condition of premises:** The lease may already specify that the tenant is required to leave the premises in a certain condition. If not, this issue can be addressed in the surrender agreement. The landlord may wish to require the tenant to remove its equipment, furniture or other property. The surrender agreement may state that anything left behind by a certain date becomes the landlord's property.
- **Early termination fees:** The landlord may require the tenant to pay a fee in order to get out of the lease early. The termination fee will be negotiated based on the specific circumstances and on market conditions, but could be as high as the balance of rent owing for the remainder of the lease term. At a minimum, the termination fee should usually compensate the landlord for any lost income resulting from the early termination. If the leasing market is slow, market rents for similar premises have decreased, or the premises are specialized or unique, the landlord's losses are likely to be higher, as is the termination fee.
- **Surrender of sublease (if needed):** This may be required where the tenant has sublet the premises and the landlord does not wish to take on the subtenant as a tenant. If the landlord accepts a surrender of the head lease without a corresponding surrender of the sublease, then the sublease may get "promoted" to the head lease with the subtenant becoming the direct tenant of the landlord. However, the sublease may state that it terminates automatically upon termination of the head lease. A real estate licensee representing a landlord in a surrender of a lease where a sublease is involved should recommend that their client obtain legal advice to avoid an inadvertent "promotion" of any subleases.

Surrender by Conduct

A surrender of a lease requires a "clear act" of both the tenant and the landlord to be effective. As described above, this commonly occurs when the parties execute a surrender agreement. However, it is possible for a surrender to occur by the parties' actions – even when the landlord does not actually intend to end the lease. This can be a serious issue for a landlord. If a tenant wants to break its lease and the landlord accidentally accepts the tenant's surrender, the landlord will only be entitled to claim rent until the date of the surrender and will forgo any other rights or remedies it would otherwise have for the tenant's breach.

A landlord may be found to accept a surrender if the tenant gives back the keys to the premises and the landlord re-enters the premises or changes the locks. In the case of Marathon Realty Co. v. Pogon Professional Services, 1994 CanLII 2383 (BC SC), the tenant vacated the premises and returned the keys and access cards. The landlord accepted the keys and took possession of the premises. The court found that this was sufficient to constitute surrender of the lease. However, the court noted that a landlord could accept keys for security reasons as long as it was made clear to the tenant that the landlord was not accepting surrender of the lease. A property manager or other real estate licensee representing a landlord and dealing with a surrendering tenant should be aware of the potential trap of inadvertently accepting a surrender on behalf of the landlord. If the landlord does not want to accept the surrender or wants to impose terms on the surrender, the real estate licensee should recommend that the landlord obtain legal advice.

FORCE MAJEURE CLAUSES

When a catastrophe occurs, landlords and tenants may wonder if and how their obligations under a lease are affected. A force majeure clause in a lease may shed some light on the situation. While this section primarily focuses on force majeure clauses in leases, property managers and other real estate licensees should note that their service contracts (for example, property management agreements, tenant placement agreements and listing agreements) may also contain force majeure clauses. The principles of force majeure are the same no matter the type of contract.

Force majeure clauses may be regarded as an extension of the common law doctrine of frustration of contracts. At common law, a contract is frustrated where a supervening event occurs that was not foreseeable and fundamentally changes the nature of the contract, so that it would be unjust to hold the parties to their original agreement.

The doctrine of frustration is of limited use for two primary reasons. First, it is very difficult to prove frustration and only extremely limited circumstances are likely to truly frustrate a contract (for example, a change of law that makes performance of the contract illegal and therefore impossible to perform). Second, the remedy for frustration is that the parties are discharged from all of their obligations under the contract, including payment obligations. The Frustrated Contract Act creates a limited exception to this, allowing courts to keep alive a discrete part of the contract that has already been fully performed. The result is that the doctrine of frustration cannot typically be used to excuse performance of a specific obligation under a contract while otherwise keeping the contract alive.

In many leases (and other contracts), the problems with the doctrine of frustration are addressed by a force majeure clause. Generally, a force majeure clause is a contractual provision that allows a contract party to delay performance of certain obligations under the contract if a supervening event beyond that party's control makes it impossible to perform those obligations on time. Leases often contain force majeure provisions that benefit both the landlord and the tenant, which may protect them from inadvertently breaching the lease as a result of circumstances outside their control.

While many force majeure clauses appear to be similar, these clauses often vary greatly from one to the next. As a result, an event that qualifies as a force majeure event under one lease may not qualify under another lease. Whether or not a specific event is a force majeure event will depend on whether the event meets the specific criteria set out in the applicable force majeure clause. This may be a list of specific events, or general criteria (e.g., the event must be outside of the party's reasonable control), or both. Typical force majeure events may include the following:

- Strikes, walkouts, labour disputes;
- Inability to obtain materials or services;
- Power failure;
- Restrictive laws or orders of government authorities;
- Riots, rebellions, wars, terrorism;
- Nuclear activity;
- Acts of God (e.g., floods, earthquakes, blizzards, hurricanes);
- Damage caused by aircraft (sometimes now included in response to the 9/11 terrorist attack on the World Trade Centre); and
- Pandemics and epidemics (sometimes now included in response to the Covid-19 pandemic).

Force majeure clauses may also impose different obligations on the parties and allow for different remedies from one lease to the next. The following are some other matters to consider when reviewing a force majeure clause:

- **Criteria for a force majeure event:** Usually an event must be outside of a party's reasonable control to qualify as a force majeure event. In some cases, the event will need to be unforeseeable, which is a higher standard. Other times, the party seeking to rely on the force majeure event will be required to have met a certain standard of conduct in preventing the event from occurring.
- **Exclusion of non-payment of rent and financial causes:** A force majeure clause may allow a tenant to delay payment of rent; however, many clauses specifically exclude this. Lack of funds is also often generally excluded as a force majeure event. A landlord will usually want non-payment of rent to be excluded from the force majeure clause.
- **Notice requirements:** A party seeking to delay its performance may need to give notice to the other party. The notice may need to specify the delayed obligation and the force majeure event. The notice may need to be given within a certain period and in a particular manner.
- **Mitigation:** The delayed party may be required to take positive action to remedy the force majeure event or resume performance of its obligations as soon as possible.
- **Termination:** Some force majeure clauses provide that the landlord, or the tenant, or both may become entitled to terminate the lease if the delay exceeds a certain time period.

It is important to remember that a force majeure clause usually only applies where a party is actually prevented from performing its obligation. It is usually not enough that the obligation becomes more difficult, expensive or even unsafe to perform.

Case: Force majeure in action

> The COVID-19 pandemic brought new interest in force majeure clauses and there were several cases dealing with force majeure clauses. A recent example is Durham Sports Barn Inc. Bankruptcy Proposal, 2020 ONSC 5938.
>
> A tenant who operated a sports training centre was prevented from operating due to provincial health orders related to COVID-19. The tenant argued that since the force majeure clause relieved the landlord from its obligation to provide quiet enjoyment, the tenant should also be relieved from its obligation to pay rent.
>
> The court found that while the particular force majeure clause in the lease did relieve the landlord from its obligation to provide quiet enjoyment, it did not specifically relieve the tenant from its obligation to pay rent. The key takeaway from this case is that force majeure clauses will be interpreted narrowly and courts will not provide relief that is not specifically set out in the force majeure clause. If your client is wondering if a force majeure clause applies to a specific situation, advise them to talk to their lawyer.

While the COVID-19 pandemic caused serious hardship to many landlords and tenants, many landlords and tenants were surprised to find out that the pandemic did not qualify as a force majeure event under their leases or excuse them from performing their lease obligations. In some cases, the pandemic did not meet the criteria set out in the lease for a force majeure event. In particular, voluntary compliance with public health recommendations would not likely fall within a force majeure clause, given that voluntary acts are within a party's control. In other cases, the effects of the pandemic were largely financial, and many force majeure clauses do not apply to non-payment of rent or non-performance of obligations for financial reasons. Indisputably, the pandemic created many operational challenges, but many lease obligations remained possible to perform despite the added difficulties, and accordingly were not excused by force majeure.

LEASE DEFAULTS AND OTHER BREACHES

Real estate licensees may encounter situations where either landlords or tenants fail to fulfil their obligations under the lease. Common examples include:

- Failure of the tenant to pay rent;
- Failure of the landlord to provide "quiet enjoyment" (i.e. the tenant's right to exclusive possession of the leased premises without interference by the landlord); and
- Failure to repair (may be either the landlord's or the tenant's responsibility, depending on the lease and the specific repair responsibility).

Any breach of a party's obligations under a lease is a default. However, the lease may also specifically define other events of default (for example, a tenant becoming insolvent or filing for bankruptcy protection). In some cases, a timeline will be set out within which the breaching party can cure the breach before it becomes a default (called a "cure period").

Leases may set out what remedies are available to landlords and tenants in specific situations. Some remedies are also available at common law, which means they do not have to be written into the lease for a party to take advantage of the remedy. Remedies set out in the lease may include specific processes to follow. For example, the default provisions may require one party to give notice of the other party's default and allow a certain amount of time for the defaulting party to remedy their default (i.e., a cure period). These processes must be followed exactly, or else the non-defaulting party may cease to be entitled to the remedy and may be liable for damages ("see the case comment below regarding improper distress by a landlord"). In addition, pursuing a particular remedy may preclude the party from pursuing other remedies under the law. When acting for a party seeking to exercise a remedy under a lease, real estate licensees should advise their clients to obtain legal advice prior to taking steps to exercise the remedy.

Real estate licensees helping a client to purchase a tenanted property should recommend that their client review the existing lease or leases as part of the pre-acquisition due diligence process. This review should include a careful evaluation of the remedies available to each of the landlord and the tenant in the case of a default by the other. Similarly, a real estate licensee acting for a potential tenant or subtenant should recommend that their client review the proposed lease or sublease with an eye to these same issues. While default remedies will typically be biased in favour of the landlord, they should nevertheless fall within an acceptable range consistent with market standards and afford a tenant or subtenant a reasonable opportunity to correct a default.

Some of the most common rights available to a landlord when a tenant defaults or breaches the lease include:

- **Terminating the lease and re-entering the premises (i.e., evicting the tenant):**
    - This remedy is only available if the landlord has the right to terminate under the lease. If not, the landlord may have to apply for a court order to re-enter the premises.
    - Usually combined with suing the tenant for damages for unpaid rent to date and future rent for the remaining term of the lease.
- **Suing for unpaid rent, but keeping the lease alive:**
    - A landlord might want to take advantage of this option if the landlord wants to sue the tenant's guarantor for the unpaid rent. The landlord is usually not able to sue the tenant's guarantor if the lease has been terminated.
- **Re-letting the premises on the tenant's account:**
    - The new tenant's rent payments are credited to the account of the former tenant (even if the new tenant is paying more rent than the former tenant).
    - The duration of the new lease cannot exceed the remaining term of the original lease.
- **Distress:**
    - This is when a landlord, under supervision of the court, seizes and sells a tenant's personal property.
    - There is a specific process that must be followed if the landlord exercises this remedy. If the process is not followed properly, the landlord may be liable for damages.

The lease may provide for additional contractual rights in the event of a tenant default. These contractual rights are only available if they are specifically included in the terms of the lease. Some examples of these additional contractual rights include:

- **"Self-help":**
  - The landlord may take action to correct the tenant's default and charge back to the tenant any expenses incurred by the landlord in doing so.
  - Often the landlord will charge an administration or supervisory fee on top of the expenses (e.g. 5%–20% of the amount of the expenses).
  - The landlord may be required to give the tenant notice of the default and allow the tenant an opportunity to fix it before the landlord can "self-help".
- **Accelerated Rent:**
  - The lease might provide that on default, future rent payable during the term becomes immediately due and payable.
  - Many leases provide for three months' rent to be accelerated on default, though often this remedy is specifically tied to a tenant becoming insolvent because it aligns with certain landlord rights under insolvency legislation.
  - Other leases may provide that all of the rent payable for the duration of the term becomes immediately due and payable on a tenant default.
- **Loss of Renewal or Extension Options:**
  - Oftentimes renewal or extension options are conditional upon the tenant not being in default under the lease at the time the renewal or extension option is to be exercised.
  - In other cases, the option is conditional upon the tenant having never defaulted under the lease, irrespective of whether or not the default has since been remedied. Tenants and real estate licensees representing them should be very wary of provisions of this nature, as they may cause the tenant to lose its negotiated renewal or extension rights due to a very minor or technical default (e.g. paying rent one day late due to a bank transfer issue, etc.)

Case: Improper distress by a landlord

Real estate licensees should be aware of the pitfalls of exercising the remedy of distress. This is illustrated in the recent case of *Fenske v MacLeod,* 2020 BCSC 532. This case involved a dispute between a landlord and tenant who planned to open a pizza restaurant in the leased premises. During the dispute, the landlord changed the locks, so the tenant stopped paying rent. The landlord then seized and sold the tenant's wood-fired pizza oven and other equipment from the premises.

The court found that the landlord was not entitled to seize the tenant's goods because the landlord had accepted the tenant's security deposit as the unpaid rent ("and so there was no rent owing under the lease"), and the landlord did not notify the tenant that the landlord was going to seize the goods, as was required under the lease. The tenant was awarded damages for the amount the landlord received from selling the equipment. The court then doubled the tenant's damage award under the Rent Distress Act because of the landlord's improper actions.

Landlords should exercise extreme caution when considering the distress remedy as specific procedures must be followed and there are steep penalties for improper conduct.

Some of a tenant's rights where the landlord breaches the lease include:

- **Legal action:**
  - A tenant may sue the landlord for damages. For example, if the tenant paid to replace a broken window but it should have been the landlord's responsibility under the lease.
  - A tenant may also apply to court for an injunction (a court order that requires a party to do some action or refrain from doing some action). This could be done, for example, to stop the landlord of a strip mall from renting another unit in the mall to a competing tenant because the lease has a non-competition clause.
- **Terminate the lease:**
  - This remedy is only available if the default is a fundamental breach of the lease (where the tenant is deprived of substantially the whole benefit of the lease).
  - If the tenant chooses this option but no fundamental breach has occurred, the tenant may be liable for damages equal to the rent for the remaining term of the lease (see case comment below).

A lease may include additional contractual rights available to the tenant in the case of a landlord's default (e.g. a tenant "self-help" remedy). However, special rights of this nature are often only available to tenants with substantial bargaining power.

A tenant may be tempted to withhold rent when a landlord is in breach of the lease. However, withholding rent may be extremely risky for a tenant and is not permitted under most leases. In some cases, withholding rent may entitle the landlord to terminate the lease for non-payment. A court could also find that the landlord's actions did not amount to a breach in the first place, and that the tenant is liable for the unpaid rent (similar to the case comment below) and other damages. If representing a tenant who is considering withholding rent, a real estate licensee should recommend that their client seek legal advice before withholding rent or any other amounts payable under the lease.

Case: Tenant tries to get out of the lease without success

Siddoo v OJJJ Enterprises Ltd., 2020 BCSC 297

The tenant, who operated a dry cleaning business, vacated the premises two years before the lease expired. The tenant claimed that the noise from the neighbouring property (a CrossFit gym) was intolerable. The tenant argued that the landlord's failure to resolve the noise issues breached the covenant of quiet enjoyment.

The court found that the noise issue was not the sole reason (or even the main reason) why the tenant left the premises. The landlord's failure to address the noise complaints did not amount to a fundamental breach of the lease entitling the tenant to vacate the premises. Accordingly, the tenant was liable for the amount of unpaid rent for the remaining term of the lease.

Real estate licensees should note that not all disputes or disturbances amount to a breach of the lease. Choosing to end a lease early can expose the tenants to significant liability if no breach of the lease is found.

Module Eight: Cybersecurity

Module Eight: Cybersecurity

ABOUT THIS MODULE:

This module is designed to help real estate licensees safely navigate the complex world of cybersecurity. The content of this module will reveal some of the hidden dangers you face every day when using computers, smartphones, and the internet. With this knowledge you will be better able to avoid or minimize harm to yourself and your clients while taking advantage of all the benefits that technology has to offer.

LEARNING OBJECTIVES

After completing this module, you will be able to:

- Understand how to better protect your own privacy and the privacy of clients, colleagues and third parties;
- Understand the most common social engineering techniques used to commit fraud;
- Identify and respond to the risks associated with electronic money transfers and cryptocurrency; and
- Know how to minimize cyber risks inherent in dealings with co-workers, clients, and others.

WHY CYBERSECURITY?

For real estate licensees a solid understanding of cybersecurity will help you to:

- Protect sensitive and confidential data;
- Recover from computer virus attacks;
- Prevent damage to computers and smartphones;
- Reduce the risk of becoming involved in fraud;
- Train staff on safe computing habits;
- Prevent the misuse of private information;
- Choose the right software and systems to deter criminal attacks;
- Make sure that the important data stored in your systems is accurate and up to date;
- Conduct your business safely and responsibly; and
- For brokerages, to have cybersecurity risk mitigation plans in place.

As reported by *Fortune* magazine in 2015 cybercrime is now the world's most profitable criminal activity, having exceeded illegal drugs in 2014. As one of the fastest growing global industries, cybercrime goes beyond national borders and can challenge the security of you, your brokerage and even our government. Up to now the police and governments have not been able to measure cybercrime's full impact or to stop it. Avoiding the damage is made harder because too often we are not fully aware of the threat. In part this is because too many victims fail to prepare for attacks and then are unwilling to admit their losses publicly.

Cybercriminals look to the real estate sector as both an easy target and a safe place for parking their stolen wealth gained by a variety of fraudulent activities. They are attracted to high-net-worth individuals and the large value transactions that are common to the real estate industry. As a result, real estate licensees have a duty to be knowledgeable and remain vigilant to all the various methods used by cybercriminals.

The risks of cybersecurity have increased as we increase our use of technology for communications and conducting business. These threats include:

- Ransomware;
- Breaches of personal privacy;
- Misrepresentation;
- Forgery, counterfeiting, and the falsification of documents;
- Impersonation and identity theft;
- Employee embezzlement;
- Tax evasion and money laundering; and
- Terrorist financing.

Most of these threats are not new but with our greater use of technology criminals have more ways to cheat and steal. They can now do this with much less effort and much bigger rewards.

PHISHING

Like everyone else using the internet, you have probably received your share of spam emails. A lot of spam contains dangerous links and attachments that can cause serious damage. This is why email providers will try to block all emails they think may be dangerous. This criminal practice is known as phishing and it is used by attackers seeking to access computer systems.

Phishing emails come in many forms. They often cause emotional responses such as fear or joy. They may announce special offers, contest results, or make urgent requests for password updates.

When a phishing e-mail arrives from what appears to be someone you should trust, the message will direct you to perform an action such as downloading a file or clicking on a link. Agreeing to these instructions allows malware to be loaded that can expose critical information such as:

- Secret contract details;
- Confidential client information;
- Private passwords;
- Credit card data; and
- Banking information.

In less serious phishing attacks, the clicking of a link triggers a broadcast to other spammers that your email address is valid, exposing you to even more unwanted emails.

Very often the damage caused by accidently loading malware is not immediately visible. You might be totally unaware of the attack. Once this malware is stored on your phone or computer it may begin to silently infect all the other computers you connect with, even those belonging to your clients. Eventually and without your knowledge it will connect to a remote server. At this point the program will send all the confidential data it has harvested to the attackers.

In another form the malware operates silently in the background, taking instructions from the attacker. Working by remote control the infected computer becomes part the attacker's network sending malware on to everyone that you regularly do business with. These malicious attacks can appear to be directed by you, causing unsuspecting third parties to lower their defenses and then blame you when they discover the damage.

In a similar way hackers can use a simple phone call to break into your systems and steal your data. This is called vishing, please find an example on Youtube.

SOCIAL ENGINEERING FRAUD

It turns out to be much easier to manipulate people than well-fortified systems. As a result, cyber criminals frequently resort to social engineering to gain access to critical systems. Social engineering is the use of psychological techniques to manipulate people. In the context of fraud, it could cause you to break the rules, perform criminal actions or reveal confidential information.

Social engineering takes many forms. It might be a friendly request to bend the rules a little. It could start with a panicked phone call from a stranger with an urgent request for help. It might be a personal email containing an attractive offer. It could be in the form of a message with a request that appears to be from a senior person in your brokerage.

In many cases what can start the attack is your innocent response that somehow breaks the defenses put in place by your brokerage. It might be as simple as clicking on an email link or downloading an attachment that activates malware. It could also be that you are persuaded to share a secret password or change an electronic record. This then leads to the unauthorized use of systems or the exposure of sensitive information to criminals. The damage caused may be immediately obvious, such as a computer crashing, or a bank account suddenly being emptied. In other cases, the damage can remain unexposed for weeks or months.

Social engineering is probably the most difficult threat to manage. To fight it requires comprehensive and continuous education, training, and awareness for everyone working in the brokerage. It also requires careful consideration of the people most likely to be hit and the critical tasks most vulnerable to attack. This can be particularly hard when your corporate culture is designed to be customer friendly and provide outstanding service to your real estate clients. It is also more likely to happen when personal information such as e-mail addresses, phone numbers and photos are readily available on the web.

AUTHENTICATION

We spend a lot of time entering passwords. To access secure systems on the internet or within your brokerage you have to be able to prove who you are. Providing this proof is referred to as authentication and the most common ways used in the past have relied on the use of secret passwords. Newer methods include:

- Multiple passwords;
- Challenge questions;
- Electronic keys;
- Fingerprints;
- Voice recognition; and
- Iris scans.

Because so many secure systems have been broken by criminals, chances are high that at least one of your passwords has become public. For this reason, people who use the same password for all their accounts are the most at risk. This is the biggest reason why many single password systems force you to change your passwords regularly and why they will not allow the re-use of old passwords.

Today stronger methods of authentication have been developed. These require multiple identity markers. These methods are known as Multi Factor Authentication ("MFA"). Enabling MFA is the single most effective way to protect yourself. Typically, MFA includes some mixture of:

- **Email address:** users enter their own email address, which is compared to the email address used in the invitation;
- **Access code**: a one-time passcode that users must enter;
- **Phone call:** signers must call a phone number and enter their name and access code;
- **Texting:** a one-time passcode sent via SMS text message;
- **Knowledge-based:** personal information, such as past addresses, pet names or vehicles owned;
- **ID verification:** government-issued account numbers or identity codes; or
- **Biometrics:** fingerprints, voiceprints, or iris scans.

If you need to improve your system security the following actions are recommended:

- Always enable multi-factor authentication when it is offered;
- Use strong passwords that cannot be easily guessed;
- Immediately change the default password on any new account or device;
- Employ a different and unique password for every account; and
- Change all of your passwords at least every six months.

You can also use a password manager application to create strong passwords and keep them secure. Many password control systems require a minimum number of characters and a mix of upper case, lower case, and special characters. Even so, it is best to make your passwords tough to guess that even a close friend or family member would be unable to figure it out. One valuable feature of most password management applications is the ability to automatically generate extremely strong passwords, instead of having to dream each one up yourself.

KNOW YOUR CLIENT

It is important to validate the identity of the parties involved in a real estate transaction. This is required for FINTRAC purposes. Placing reliance on documents provided in digital format such as official documents from foreign jurisdictions carries significant risks. Since unauthorized changes can be hard to detect it is good practice to supplement such documents using more reliable methods such as a physical inspection of original documents.

Real estate licensees can be drawn into attempts to fraudulently transfer the title to a property, which can be costly and damaging to your reputation. This makes it important to validate the identity of all parties to every real estate transaction as soon as reasonably possible. Requesting to meet with the individual and see photo identification, such as a B.C. Driver's Licence, is one good way to do this. The following case provides a recent example of the risks involved:

Case: Identity theft used to falsely list property for sale

> In an incident widely reported in early 2021 an unidentified person assumed the identity of a property owner and was able to list a residence for sale in a suburb of Victoria.Before the fraud was uncovered the house was advertised for sale and there were showings of the residence to potential buyers. An alert neighbor was suspicious and contacted the true owner. The owner reported the circumstances to the police before a property transaction could take place. According to police reports no one including the real estate licensee had ever met the fraudster in person. Instead, they had relied on images of a fraudulent passport in the name of the owner and a fake B.C. health care card.

ELECTRONIC SIGNATURES

In real estate work many documents need to be signed. An e-signature or electronic signature is now a legal way to show consent or approval on an electronic document or form. They are used in place of providing a handwritten signature. Being quick and easy, they can avoid the need for a face to face meeting.

The level of e-signature security varies by the software provider. It is important to choose an e-signature system with robust security, where safety is central to their business. Those security measures should include:

- **Physical security:** protecting the systems and buildings where the systems reside;
- **Platform security:** safeguarding the data and processes that are stored in the systems; and
- **Security certifications/processes:** ensuring the provider's employees and partners follow security and privacy best practices.

Protection of the software and system used to generate an electronic signature is the responsibility of each user, which includes both you and your clients. Maintaining continuous control over the ability to apply an e-signature is required. Allowing someone else to apply your electronic signature can have serious consequences.

Case: Improper use of an e-signature

The facts in the recent Real Estate Council of British Columbia ("RECBC") case of Marwaha (Re), 2019 CanLII 122341 (BCREC) illustrate how the careless use or sharing of an e-signature can have negative consequences for a real estate licensee.

In this case the subject, Mr. Marwaha, was licensed as a representative for trading services but was not an active real estate licensee, as he was living in Alberta at the time of the incident. Another real estate licensee was involved in an Assignment of an Agreement of Purchase and Sale and the assignee was the mother of Mr. Marwaha. Mr. Marwaha's electronic signature was attached to the Commission Agreement Form, allowing him to receive the commission for the assignment of the property, although he was not involved in the transaction.

It was not determined whether Mr. Marwaha signed the Commission Agreement Form or allowed another licensed professional to use his signature. In either case he failed to act honestly and with reasonable care. This action created risks including the potential to confuse the principals about the representation by the real estate licensee, to create defects in the related brokerage's records and to facilitate tax evasion.

It was determined that even though the sale of the property was not completed, and Mr. Marwaha received no commission, the subject's conduct constituted professional misconduct and demonstrated incompetence within the meaning of sections 35(1)(a) and (d) of the *Real Estate Services Act* ("*RESA*").

The subject of the case agreed to receive a reprimand, pay enforcement expenses to the RECBC and be prohibited for applying for re-licensing until successfully completing multiple remedial education courses.

VIRTUAL MEETINGS

Real estate licensee are always in meetings. Virtual meetings, also known as virtual conferences, have become the norm for many meetings. These involve the hosting of an on-line meeting in a virtual environment rather than conducting face-to-face meetings in person. These meetings are delivered through services such as Zoom, Microsoft Teams, WebEx, and other similar offerings. As a real estate licensee you need to understand how to balance the convenience of doing business in virtual meetings with the new risks that include:

- Impersonation;
- Intrusion of uninvited persons, visible or hidden to others; and
- Recording and sharing without permission.

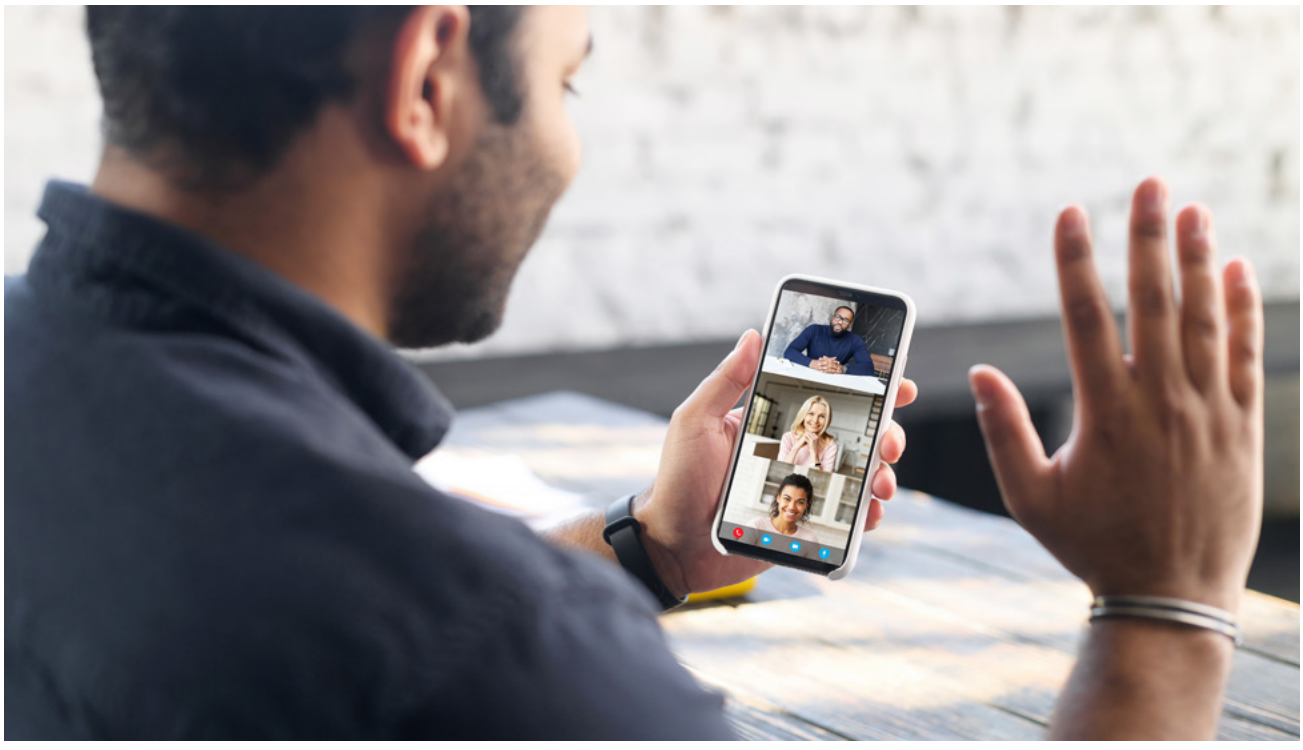
In cases where the individuals have never met previously, the parties in a virtual meeting are assumed to have the identities they claim, but this can be difficult to verify. The nature of a real time on-line meeting where the participants see each other can create a false sense of intimacy and authenticity. This can be exploited by individuals who are intent on deception.

Virtual meetings are also subject to intrusion by uninvited participants who may be motivated to spy on confidential meetings, interrupt discussions or cause other forms of disruption. Such activities can lead to more serious consequences such as failed negotiations, false representations, or the loss of client trust.

In addition, the proceedings of a virtual meeting might be recorded by one of the attendees and later shared with others, without the consent of everyone involved. This can lead to the unauthorized sharing of privileged information that may disrupt a deal in progress or lead to legal disputes. These are potentially serious consequences for you and your brokerage.

Managing the risks associated with virtual meetings can be achieved by:

- Authenticating the identity of all participants prior to the meeting;
- Requiring all participants to use video cameras and share their image with all participants;
- Excluding voice-only attendees;
- Setting system controls to prevent uninvited attendees;
- Encrypting meeting invitations to avoid interception;
- Requiring attendees to use passwords to gain access to the meeting; and
- Enabling all of the security controls offered by the meeting service provider.



RANSOMWARE

Ransomware is a relatively new and highly dangerous threat to company data systems. A successful ransomware attack can inflict serious and sometimes permanent damage. This can mean that all of your information is no longer available to you, and you may be locked out of your phone and computer.

Today ransomware is a threat to brokerages of all sizes. When a ransomware attack is successful all files are encrypted rendering systems unusable and data unreadable. Ransomware attackers then demand payments that can run into the thousands or even millions of dollars. Once a ransom is paid the attackers promise to deliver software keys to unencrypt the frozen files. If payment is refused the attackers may increase their demands by threatening to reveal the brokerage's confidential data or send damaging emails to clients.

Should the ransom be paid, the attackers will often, given the chance, return a second time. Sometimes after the ransom is paid the decryption keys are never delivered. Tracking payments is often impossible because the attackers almost always demand cryptocurrency that is untraceable.

Paying ransomware attackers can be avoided if the brokerage has followed all the recommended steps for properly backing up and recovering its systems. Even with the best preparation, recovering from an attack in most cases requires considerable time and effort. It is common for the outage of computer services to last for days or even weeks as the IT department struggles to return all systems to normal service levels. Meanwhile closing deals and finding new business gets much harder, if not impossible.

Most ransomware attacks gain access to secure computer systems by way of seemingly innocent email messages carrying malware. So-called phishing emails are sent by attackers to unsuspecting brokerage personnel. These are usually made to look like emails that are commonly sent from trusted sources such as banks or government agencies. In more than a few instances the attackers will forge an email that appears to come from the managing broker with an urgent request. It only takes one click for the recipient to unleash an attack that can spread malware across the entire enterprise.

The insurance industry has responded to the ransomware threat by offering specific coverage for losses caused by ransomware attacks. This may result in a false sense of security for an organization. Making a successful insurance claim will likely not offset the resulting inconvenience and reputation damage of a breach. Moreover, cybercriminals have used their considerable skills to penetrate the defenses of insurance companies in search of the names of clients who may have purchased cyber insurance. Firms with this coverage are considered more likely to comply with ransom demands and hence may be targeted more often.

Well-run real estate brokerages are diligent about backing up their systems and data. Managed properly, back-ups may offer an escape route from paying a ransom in those cases where it can be confirmed that sensitive information has not been compromised. However, in too many cases back-up efforts are wasted because the storage and system restoration processes have not been adequately tested. Under-resourced IT teams are often challenged to perform the critical task of confirming recovery procedures as it is not revenue generating and not given high priority. Failure to test recovery can be easily overlooked when senior executives are unaware of the attendant risk. But in the event of an attack the eventual losses can be many times the cost of being fully prepared.

The threat of ransomware is serious. Everyone in the brokerage will be impacted if a ransomware attack is successful. Anyone in the brokerage with system access can, with a single click, bring everyone's work to a halt.

SECURITY TRAINING

The risks associated with cybersecurity can never be eliminated altogether but through appropriate training everyone can learn how to reduce their exposure to adverse events and minimize the damage caused by bad actors. Real estate brokerages have a responsibility to organize their systems and processes in ways that protect themselves, their licensees and employees, clients and other connected third parties. This extends to providing appropriate levels of training to licensees, managing brokers, and support staff.

Real estate licensees and their brokerages can take the following steps to reduce risk:

- Educate all licensees and staff regularly on safe computing practices and the range of risks associated with cybersecurity;
- Authorize regular third-party security reviews to confirm security procedures in place, discover new vulnerabilities and propose appropriate responses;
- Assign specific job responsibilities related to cybersecurity to individuals with the appropriate training, experience, and credentials;
- Recognize when IT staff and third-party providers with responsibility for security require the support of third-party specialists in cybersecurity;
- Instruct IT system administrators on how to set and manage least access privileges; and
- Require that IT staff implement safe back-up processes and regularly test the system recovery procedures that would be initiated in the event of a successful attack.

Many of the above steps and related safe computing practices require continuous attention to ensure that procedures do not fall into disuse or become compromised by a lack of understanding or training of those responsible. The environment of cyber threats continues to evolve with advances in technology and the endless ingenuity of cybercriminals who continually find new ways to subvert established security procedures. Staying safe requires a vigilant mindset on the part of everyone in the brokerage and a willingness to stay abreast of ever evolving threats.

PRIVACY

All brokerages operating in British Columbia are subject to the provisions of the *Personal Information Protection Act* ("*PIPA*"), a British Columbia statute. Under this legislation all personal information lawfully collected must be protected from "unauthorized access, collection, use, disclosure, copying, modification or disposal or similar risks".

Contravening this duty can occur when a breach of personal information occurs, for example as the result of a cyber-attack. If the Privacy Commissioner subsequently obtains a conviction under *PIPA* for such a breach of privacy, then any individual "affected by the conduct that gave rise to the offence has a cause of action against the organization convicted of the offence for damages for actual harm that the person has suffered." Harm to the individual claiming damages may include humiliation, damage to reputation or relationships, and identity theft. In addition to any damages that may be awarded, the defendant in the action is likely to bear all related legal costs and suffer reputational damage.

In the course of their work real estate licensees will amass numerous records containing personal information. These records may end up being stored on company systems, on personal computers and on smartphones, making comprehensive security solutions both complex and expensive.

Since they are frequently moving from place to place, real estate licensees depend on mobile applications. Mobile devices pose threats that are particularly challenging to manage. Some of the measures that can reduce the risk of exposure of personal information include:

- Keep all your devices up to date and apply all security patches when offered;
- Use the blind copy ("bcc") option for all recipients when sending broadcast emails;
- Only download applications from official and trusted sources;
- Delete all programs when no longer needed or not in use;
- Use the automatic lock and password protect features, when available;
- When posting to social media sites set your preferences so that information is shared only with the intended parties;
- Carefully control mobile application permissions that grant access to contacts, location, camera, device ID and media files; and
- Reject location tracking and applications that can access the microphone without notification.

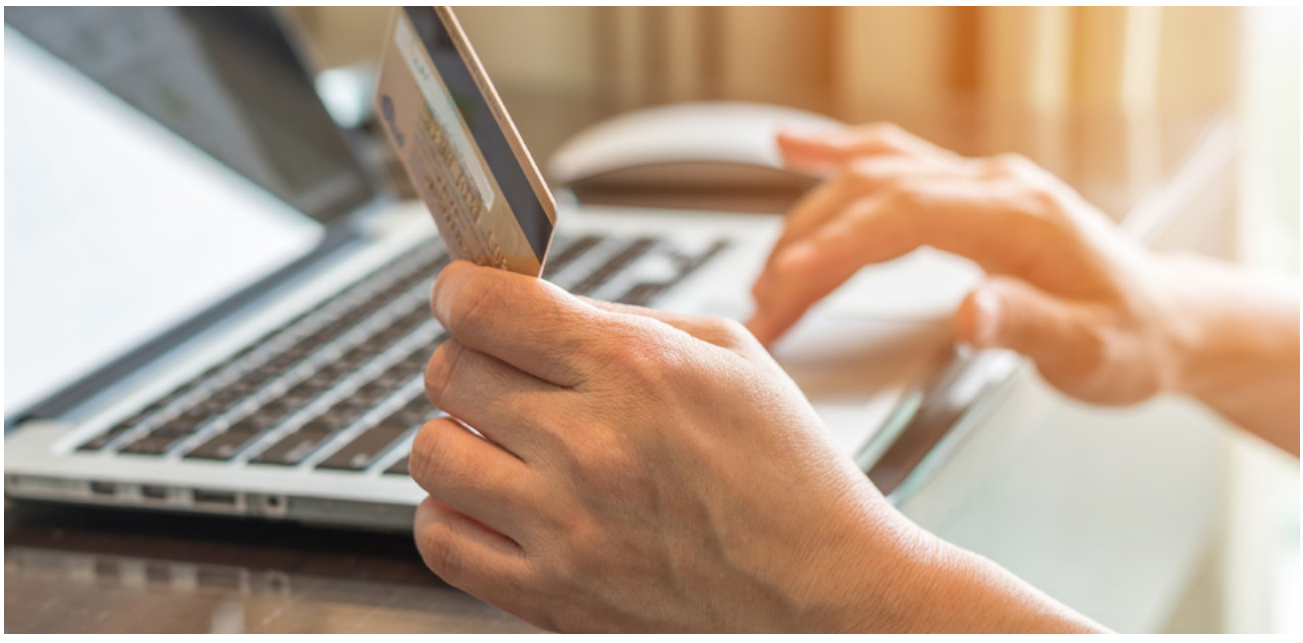
MONEY TRANSFERS

Electronic money transfers are now a prominent aspect of many real estate transactions. The speed and convenience of these services has enabled their widespread adoption. In particular, prospective and new immigrants to Canada and Canadian residents with business and family ties in other countries are regular users of commercial money transfer services. These transfers do however pose risks for real estate licensees if not managed properly. In particular real estate licensees are not permitted to receive wire transfer funds from clients into their personal bank account. Instead, all money transfers must be deposited directly to their brokerage's trust account. The penalties of not complying can be severe as illustrated in the following case.

Case: Licensee accepts offshore money transfer into personal bank account

> The recent RECBC case of Zhang (Re), 2021 CanLII 9223 (BCREC) shows how violating strict trust fund rules to accommodate the wishes of a client can result in repercussions for a real estate licensee. The real estate licensee in question was dealing with a buyer in China. The client was obligated under contract to make a payment for the real estate licensee's commission but insisted that China's foreign currency restrictions and regulations had caused his bank in Nanjing to reject a request to wire funds to the brokerage's trust account. Instead, against the advice of the managing broker, the real estate licensee provided private banking details to the client in China who thereupon wired funds directly to that account. Subsequently the real estate licensee paid the amount received into the brokerage's trust account and the managing broker reported this to the RECBC.

By accommodating the wishes of the client, it was determined that the real estate licensee committed professional misconduct within the meaning of section 35(1)(a) of *RESA* by accepting a direct deposit into a personal bank account, which was contrary to section 7(3)(b) of *RESA*. The real estate licensee was forthcoming and accepted full responsibility but was ordered to pay a discipline penalty of $4,000, enforcement expenses of $1,500 and complete a remedial education program.



SECURING A BROKERAGE

Managers of brokerages have a responsibility to maintain a secure computing environment for the protection of all employees, associates, clients and third parties. They need to assign this responsibility to properly trained and qualified employees or to third parties. In either case it is their responsibility to ensure that all reasonable efforts are made to protect the integrity of their systems including all data managed and stored in systems under their control, no matter if they are located on secure servers, office workstations, in the cloud or on mobile devices. This responsibility extends to the personal devices of employees and associates who may be granted permission to access and store brokerage data.

In addition, managing brokers need to develop and publish policies and procedures that address the risks of cybercrime. To be effective everyone associated with the brokerage should be provided with regular training on how to maintain compliance with these policies. Given the importance of this subject and to underline the seriousness of the threat the brokerage could choose to require everyone to acknowledge these policies in writing.

Enterprise security measures that are commonly employed include:

- The adoption and enforcement of comprehensive security policies and procedures;
- Enforcement of strict authentication measures including multi-factor authentication;
- Implementation and regular testing of backup and recovery systems;
- Regular archiving and off-site storage of old and seldom accessed reports and records;
- Destruction of records containing personal information no longer needed by the business;
- Limitations on user access to the lowest level required for their duties;
- The installation and maintenance of firewalls and malware detection systems;
- Real-time systems to detect and report security incidents;
- Automated encryption of sensitive documents;
- Regular application of security patches to all software hosted by the brokerage; and
- Blocking of unapproved cloud services and blocking the installation of any software not approved for the business.

The adoption of all of these recommended security practices is not enough. The most frequent threat to computer system security is human error.

INSURANCE

With even the strongest defenses in place the odds are high that some attacks will be successful. With the right defenses in place the likelihood of damage is low but never entirely eliminated. Losses caused by a failure in cybersecurity can be significant to a real estate brokerage and potentially devastating. A common option chosen to mitigate these losses is provided by cyber insurance. However cyber insurance should be considered as just one element in an array of defenses.

For real estate licensees, particularly managing brokers, some basic advice may help orient you as to the kinds of insurance that you should consider. The Real Estate Errors and Omissions Insurance Corporation ("REEOIC") Indemnity Plan which covers many of the ordinary errors and omissions involved in real estate transactions was not designed to provide cyber coverage. Although it may provide coverage for some cyber claims many kinds of these claims would fall outside coverage. For the detailed planning of your insurance coverage you should consult an experienced insurance broker. This article at REEOIC Risk Report will help you in making the right choices for insurance coverage.

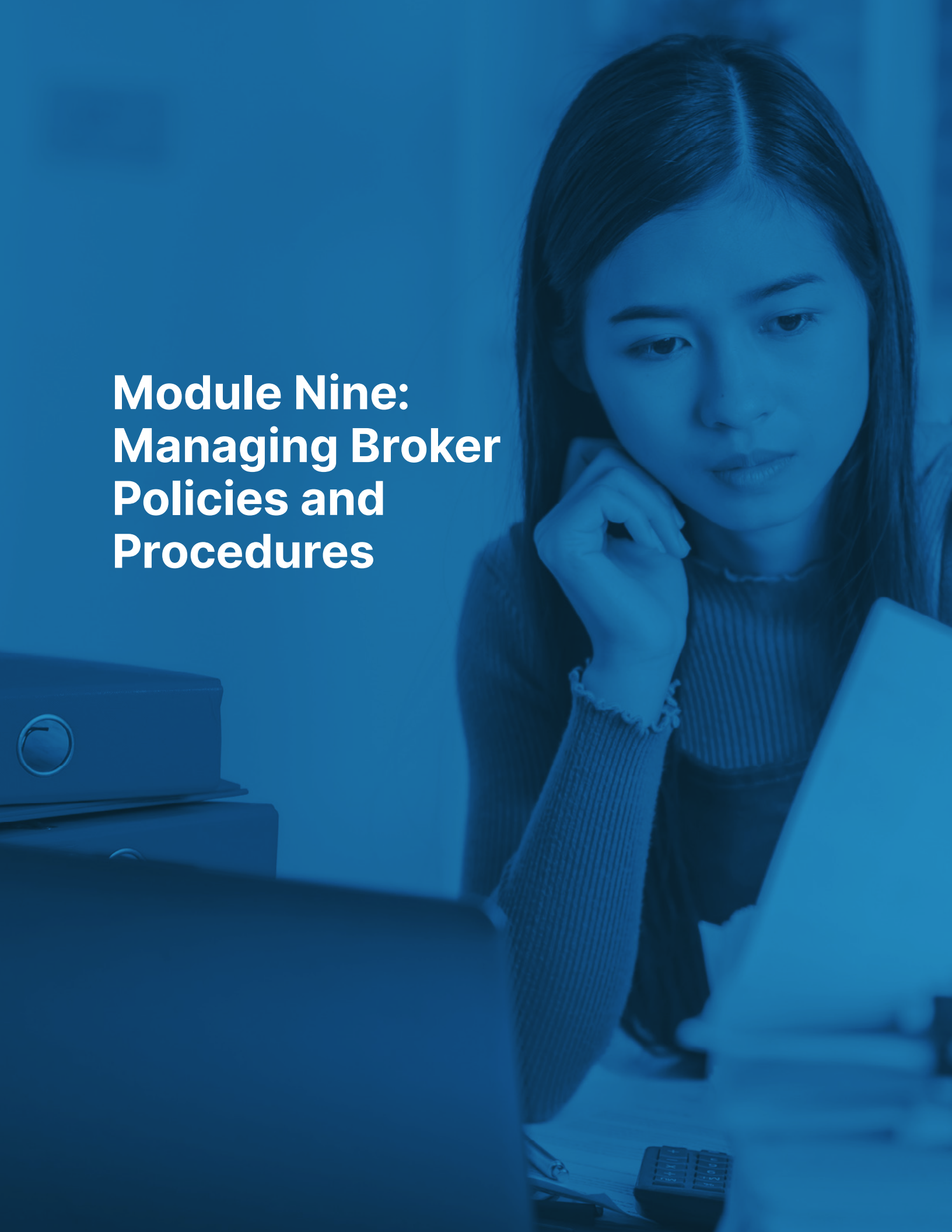
TERMINOLOGY

Common terminology related to cybersecurity includes:

- **Cybersecurity:** the prevention of damage to, protection of, and restoration of computers, electronic communications systems, electronic communications services, wire communication, and electronic communication, including information contained therein, to ensure its availability, integrity, authentication, confidentiality, and nonrepudiation. ("National Institute of Standards and Technology").
- **Cryptocurrency:** also known as crypto, is a digital currency in which transactions are verified and records maintained by a decentralized system using cryptography, rather than by a centralized authority.
- **Data Encryption:** a process for translating data into another form, or code, so that only people with access to a secret key or password can read it. Encrypted data is commonly referred to as ciphertext, while unencrypted data is called plaintext.
- **Electronic Signature:** Also known as an e-signature, refers to data in electronic form, which is logically associated with other data in electronic form, and which is used by the signatory to sign. This type of signature provides the same legal standing as a handwritten signature provided that it adheres to the requirements of the specific regulation under which it was created.

- **Malware:** computer software that is specifically designed to disrupt, damage, or gain unauthorized access to a computer system.
- **Phishing:** a type of social engineering attack often used to steal user data, including login credentials and credit card numbers. It occurs when an attacker, masquerading as a trusted entity, dupes a victim into opening an email, instant message, or text message.
- **Social Engineering:** the use of deception to manipulate individuals into divulging confidential or personal information that may be used for fraudulent purposes.
- **Vishing:** attacks that involve the use of voice calls, using either conventional phone systems or Voice over Internet Procotol ("VoIP") systems.

Module Nine: Managing Broker Policies and Procedures



Module Nine: Managing Broker Policies and Procedures

ABOUT THIS MODULE:

Managing brokers must ensure that the brokerage's policies and procedures are:

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

The starting point is the brokerage policy manual, which is a key tool in the management of risk. Risk management, such as Enterprise Risk Management, should be practiced by all brokerages. Brokerage policy manuals also play an important role in the training of brokerage personnel.

LEARNING OBJECTIVES

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

- Describe the importance of a comprehensive brokerage policy manual;
- Identify some advantages for the inclusion of checklists in a brokerage policy manual;
- Define Enterprise Risk Management and its key feature, risk registers; and
- Identify the key obligations on licensees and brokerages when handling deposit monies.

INTRODUCTION

The expectations that are placed on you, as a managing broker, are substantial. You are expected to be a leader, a mentor, a boss, an advisor, and a confidant. While your brokerage's business model and corporate culture will shape the unique role that you play as the brokerage's managing broker, in all cases, and at a minimum, you must observe and comply with your duties under the *Real Estate Services Act* ("*RESA*") and the Real Estate Services Rules.

Under *RESA*, managing brokers act for their brokerage and are responsible for:

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

Under section 28 of the Real Estate Services Rules, further responsibilities of a managing broker include:

- Being actively engaged in the supervision and management of those within their brokerage;
- Ensuring the brokerage business is being carried out competently and lawfully;
- Taking reasonable steps to deal with improper or negligent conduct of those within their brokerage;
- Ensuring that trust accounts and records, and all other required documents and records, are maintained and managed; and
- Ensuring that all parties to an agreement for a trade in real estate are notified if a deposit cheque (or other negotiable instrument use to pay a deposit) is not received or has not been honoured.

Two central themes arise out of the specific duties set out above:

- Policies and procedures; and
- Oversight and supervision.

This module will focus on select topics relating to policies and procedures, while another module will focus on oversight and supervision. The overall objective of these modules is to stress the important compliance obligations of managing brokers in these areas.

POLICIES AND PROCEDURES

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

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

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

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

BROKERAGE POLICY MANUAL

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

The Content of a Brokerage Policy Manual

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

- The types of real estate service(s) provided;
- The size of the brokerage;
- The area of the province the brokerage serves;
- The management structure of the brokerage; and
- The brokerage's business model and corporate culture.[1]

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

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

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

A failure to develop such mandatory policies and procedures can carry significant penalties. For example, on January 25, 2021, the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC") imposed an administrative monetary penalty of $66,743 on a Vancouver brokerage for committing five violations of the regulations of *PCMLTFA,* one of which was a failure to develop and apply written compliance policies and procedures that are kept up to date and, in the case of an entity, are approved by a senior officer.[2] Furthermore, on June 11, 2021, a brokerage in the Fraser Valley was issued an administrative monetary penalty of $59,235 for similar violations of the regulations of *PCMLTFA*.

1 "Supervision", Knowledge Base | BCFSA

2 www.fintrac-canafe.gc.ca/pen/pen-2021-03-22-eng.

A BPM should be:

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

The Use of Checklists

A checklist is a standardized list of required tasks or steps, typically created to aid in repetitive tasks. Checklists are used extensively in the legal profession, not because lawyers do not have the knowledge to perform certain tasks, but because the demands of the profession can make the application of their knowledge difficult to apply consistently and correctly. The Law Society of British Columbia's training for new lawyers states that checklists serve three main purposes:

- They identify required procedures and ensure they are performed consistently, systematically and completely;
- They promote maximum efficiency in handling routine functions; and
- They confirm for the lawyer that work delegated has been performed.[3]

As you can see, the use of checklists is about being thorough and avoiding mistakes. They can have incredible value in the real estate profession. Checklists can be created by managing brokers as part of the policies and procedures established for associate brokers, representatives, and unlicensed employees to follow, and can be included in a BPM. However, checklists can also be created by managing brokers to standardize and be more efficient in completing their own job functions (e.g., checklists for new licensee/employee orientation and training, checklists for periodic review of trust accounts, and checklists for annual performance reviews of licensees/employees).

The creation and use of checklists is a valuable risk management practice. It is also a strategy to maximize efficiency, which can lead to greater business success. The collection of relevant checklists in the BPM enhances the value of the BPM and ensures that brokerage personnel view the BPM as a practice resource rather than a collection of boilerplate information. Checklists can also be used as a training tool with brokerage personnel, where the items on a checklist are discussed in a group setting. These discussions can facilitate feedback that improves the checklist's usability.

BCFSA has created a number of checklists for licensees to use. For example, there is a New Listing Checklist, which covers items such as title issues, property issues, strata properties, and tenant-occupied properties. Furthermore, BCFSA has created radon checklists for buyer's agents, seller's agents, and rental property managers.

3 www.lawsociety.bc.ca/Website/media/Shared/docs/becoming/material/PracticeManagement.pdf.

Here are a few other tips in the use of checklists:

- Checklists should be easy to read and review;
- Checklists should contain designated areas for the initials, dates, and other data for the user to complete;
- If possible, the tasks or steps within checklists should be listed in the order of occurrence;
- You can increase the versatility of a checklist by including additional space at appropriate places for additions, notes, and explanations; and
- Since the real estate industry is in a constant state of evolution, checklists should be monitored, adapted, and improved at regular intervals.

Finally, while checklists offer numerous benefits, they should not be used at the expense of exercising professional judgment. Consumers expect, and pay for, professional advice and guidance rather than simple order takers. Every file, transaction, and relationship is unique, and checklists cannot cover every possible scenario. Blindly following a checklist without understanding the reasons behind the tasks within it is a dangerous practice.

RISK MANAGEMENT[4]

Risk management is the process of identifying, analyzing, and ranking risks and either accepting, mitigating, or responding to those risks. Taking the time out of one's day to systematically think about risk may be expensive. However, the costs of ignoring risks are far greater. Today's marketplace magnifies the potential harm from ineffective risk management. Clients expect seamless and instantaneous results, transactions are growing ever-more complex, and social media has the power to amplify errors and spread misinformation.

At its most basic level, risk management involves asking the following five questions:

1. What are the brokerage's key objectives?
2. What are the risks that apply to these objectives (i.e., what would prevent the brokerage from meeting its objectives)?
3. How likely is each risk to occur?
4. What is the potential impact, should the risk occur?
5. What can/should the brokerage do to mitigate or eliminate the risk?

4 Brokers: Business Planning and Financial Management Licensing Course Manual (Vancouver: UBC Real Estate Division, Sauder School of Business, 2021) at Chapter 20.

Enterprise Risk Management[5]

Given the importance of risk management in today's business environment, businesses often need a more structured approach to risk management. One such approach is Enterprise Risk Management ("ERM"), which is a systematic, comprehensive, and ongoing approach to identifying and managing all types of risks of an organization. One benefit of ERM is that, while it helps identify and manage the risk of a business, its framework can also lead to the identification and pursuit of potential opportunities.

The central feature of ERM is the creation and ongoing maintenance of a comprehensive risk database, called a risk register, which tracks all of the key risks of the business. In the context of a real estate brokerage, the brokerage's risk register will likely be created by the managing broker, with executive and associate broker support. However, input should be sought from representatives and unlicensed employees, as these individuals can provide valuable perspectives and insights that may not be apparent to the managing broker. It can also empower them by enabling them to contribute to the management of the brokerage.

It is important that the creation of a brokerage risk register is not treated as a one-time event. Once established, the risk register should be revisited and updated regularly (and at least on an annual basis).

The following is a sample template for a risk register.

Risk Identification	Risk ID	1.	2.
	Unit		
	Risk Statement		
Risk Rating	Probability of Occurrence (1-5)		
	Severity of Impact (1-5)		
	Overall Rating (max. 25)		
Risk Controls	Existing Controls and Mitigation Measures		
	Risk Tolerance/Acceptance (M = Monitor, T = Treat, A = Avoid)		
	Additional Risk Mitigation Strategies		
	Person Responsible		
	Target Completion Date		

5 Brokers: Business Planning and Financial Management Licensing Course Manual (Vancouver: UBC Real Estate Division, Sauder School of Business, 2021) at Chapter 20.

Risk Identification

Each risk should be given a unique identifying number (i.e., Risk ID) and a risk statement that sets out the cause and effect of the risk occurring. A risk statement should only address one risk at a time. Risks can be internal or external.

It may also be helpful to identify the unit within the brokerage that experiences the risk. For example, if the brokerage engages in both trading services and rental property management, specifying which risks impact which unit is helpful. The Unit field can also be used to classify the risks into categories, such as operational, financial, reputational, regulatory, etc.

Risk Rating

The overall risk rating is calculated by multiplying the probability of the risk by the severity of the impact if the risk occurs. Both probability and severity can be given a score of 1 to 5, so that the maximum risk rating of any one risk is 25. As a general rule, the higher the overall risk rating, the greater the priority assigned to mitigating the risk.

Probability examines how likely the risk will occur, with 1 meaning that the risk is very unlikely to occur, and 5 meaning that the risk is almost certain to occur, or is already occurring. The organization can select what time frame to use in this analysis; however, a three- or five-year timeframe is common.

Severity examines the magnitude of impact if the risk were to materialize. Identifying only the financial impact is not always appropriate. For example, reputational impact may be a key impact of the risk. A score of 1 means that the impact to the brokerage would be minimal, while a score of 5 means that the impact to the brokerage would be catastrophic.

Risk Controls

Once a risk is identified and quantified, the analysis should then shift to how that risk may be controlled. First, a brokerage should examine what is already being done to manage that risk. Next, the brokerage should determine its risk tolerance for that risk, and classify it into one of three categories:

- **Monitor:** Risk is tolerable; existing controls are adequate or better; risk is inconsequential; risk tolerance is high—therefore only monitoring of the risk is required.
- **Treat:** Risk is tolerable but existing controls are insufficient and/or the overall risk rating is high; additional mitigation (treatment) is required.
- **Avoid:** Cannot live with this risk; need to develop new operating plans or strategy to avoid it altogether; do not do the action which would trigger this risk.

Essentially, tolerance focuses on whether enough is being currently done, and if more needs to be done, to manage the risk. If more needs to be done, the additional measures to be taken should be documented within the risk register. A final aspect to controlling the risk is to identify the primary people within the brokerage to be accountable for the new and existing risk controls. A timeline for the implementation of these controls should also be included in the risk register.

Conclusion to ERM

There are many approaches to risk management, and British Columbia Financial Services Authority ("BCFSA") does not necessarily endorse one approach over another. What is important, however, is to ensure that you, as the managing broker, specifically put your mind to identifying and managing and mitigating risk. Not only will this serve as a way to avoid lawsuits and professional discipline, but it will provide a lens through which to focus the brokerage's business strategy and enhance its reputation.

If you would like to do further reading on ERM, helpful texts include:

- Fraser, John, and Simkins, Betty J., *Enterprise Risk Management*: *Today's Leading Research and Best Practices for Tomorrow's Executives*;
- Hampton, John J., *Fundamentals of Enterprise Risk Management*: *How Top Companies Assess Risk, Manage Exposure, and Seize Opportunity;* and
- Lam, James:
    - *Enterprise Risk Management*: *From Incentives to Controls;* and
    - *Implementing Enterprise Risk Management*: *From Methods to Applications*.

Cybercrime Risk

The risk of harm from cybercrime is growing as brokerages increasingly adopt technology into everything they do as a business, whether it be record-keeping, marketing, or meeting and communicating with clients and others within or outside of the brokerage.

A recent example of this risk was reported by the Land Title and Survey Authority of British Columbia ("LTSA") on March 23, 2021. The LTSA issued a notice that it became aware of two

attempts at title fraud, one of which was successful, and both involving fraudsters impersonating registered owners who live abroad.[6] In both cases, the property managers responsible for renting the homes took instructions from the fraudster from different phone numbers and email addresses than those authorized by the owners, and shared documents that enabled the fraudster to better impersonate the owners. Both properties were listed for sale by licensees who accepted a scanned copy of a forged passport to verify the identity of the supposed owner.

This course includes a module dedicated to cybersecurity, which contains a vast amount of helpful information. However, it is important to highlight in this module that cybercrime is a specific type of risk that must be contemplated in the management of a brokerage. Brokerages have the responsibility for maintaining a secure computing environment that protects both brokerage personnel and its clients. This environment includes the personal devices used by brokerage personnel if they are granted permission to access and store brokerage data.

Ultimately, the sources of cybercrime should be identified and the impacts of cybercrime should be considered. This analysis should lead to appropriate policies and procedures being developed to mitigate this risk. For example, does your brokerage have policies in place to deal with clients living abroad? What about if the brokerage is contacted from these owners with different phone numbers or email addresses than is on file with the brokerage?

TRAINING

For new personnel to a brokerage, training is critical. Training programs can be developed at the brokerage level or by the franchisor network. For some brokerages, training of new personnel can be as simple as directing them to read through a comprehensive BPM that contains a list of recommended or required courses or education programs. For other brokerages, training is a well-developed aspect of the brokerage business that helps to set it apart from the competition. Every training program will be unique and must serve the business objectives of the brokerage. A deeper discussion of training programs is beyond the scope of this module, however, managing brokers are reminded that their brokerage's training program is a critical tool in communicating the brokerage's policies and procedures to its personnel.

As mentioned earlier in this module, cybercrime risk is increasing for brokerages. The risks associated with cybercrime can never be eliminated altogether. However, through appropriate training, all brokerage personnel can learn how to reduce their exposure to the adverse effects and minimize the damage caused by cybercriminals. Training programs should be much broader than focusing only on real estate related conduct.

Section 7.1 was added to *RESA* in 2016 and states that brokerages must not allow proprietors, partners, directors, officers, and shareholders of a brokerage to train or supervise the brokerage's licensees unless they are licensed in relation to that brokerage. The intention behind this section is to ensure that unlicensed individuals are not performing key functions that managing brokers should either be doing themselves or appropriately delegating. This addition to *RESA* signals the government's appreciation of the highly specialized nature of the real estate profession by limiting how non-licensees train and supervise licensees.

6 https://ltsa.ca/notice-title-fraud-involving-owners-living-abroad.

THE HANDLING OF DEPOSITS

The regulatory requirements regarding the handling of deposits are relatively simple, yet numerous licensees, including managing brokers, are disciplined each year for non-compliance. Most of the non-compliance is rooted in honest mistakes made in high pressure and high work volume environments, rather than bad intentions. However, this cannot be an excuse, as the mishandling of consumers' funds in the context of a major transaction presents a significant threat to consumer confidence in real estate licensees.

In the following section, you will read and see numerous references to recent disciplinary cases relating to the handling of deposits. More work needs to be done by some brokerages to ensure there are clear brokerage policies in place to ensure compliance with *RESA* and the Real Estate Services Rules, appropriate education for brokerage personnel, and adequate supervision and monitoring, all to ensure that the legislative provisions of *RESA* are followed.

The Requirement to Promptly Pay into Trust—Subsections 27(1) and (2)

Section 27 of *RESA* states that a licensee engaged by a brokerage must promptly pay or deliver to the brokerage all money held or received from, for or on behalf of a principal in relation to real estate services. In turn, the brokerage must promptly pay this money into a brokerage trust account.

There are heightened controls and record-keeping obligations for trust accounts. Furthermore, when money is placed in a trust account, it lessens the risk of it being misplaced or it being co-mingled with other money to be used for other purposes. The requirement for "prompt" deposit into a brokerage trust account also minimizes the risk of the deposit instrument being misplaced. In the fast-paced world of real estate sales, physical documents can easily be misplaced, if one is not being careful. The Real Estate Errors and Omissions Insurance's March 2021 Risk Report[7] reported on instances of licensees misplacing deposit cheques. The article further reinforces the point that misplaced bank drafts can wreak havoc on a real estate transaction because they can be difficult and time-consuming to replace within a short time period.

Thus, the requirement to place money promptly in trust ensures that consumers can feel safe and trust that their money is being handled with care.

"Promptly" is generally defined as "at once or without delay".[8] This means that, if a deposit cheque accompanies an offer to purchase property and is received during banking hours, that cheque must be deposited immediately, even though the offer is just being made and may ultimately be rejected. The fact that a contract of purchase and sale has not yet been reached does not permit the brokerage to hold the deposit cheque at the brokerage or elsewhere. If a deposit cheque is received after banking hours, and it is not possible to deposit the cheque that day, it must be deposited the following business day. Until its deposit, the cheque must be stored in a secure location. If the offer is rejected before the cheque could be deposited, it can be returned to the buyer without first having to be deposited into the brokerage's trust account.

7 Chow, June, "Bank drafts: don't let the dog eat them".

8 www.dictionary.com/browse/promptly.

Anti-Money Laundering Consideration: Be aware that money launderers have been known to use the trust accounts of lawyers and real estate brokerages to clean their dirty money. For example, a criminal may pose as a serious buyer and make an offer on a property that is accompanied by a deposit. When the offer is not accepted, the criminal may ask for their deposit back, and the funds used to return it will be cleaner since those funds originated from the brokerage's trust account. As such, ensure that all licensees within your brokerage remain alert for suspicious activities relating to deposits and follow brokerage-specific guidelines as set out in the brokerage policy manual.

Managing Broker Reflection:

What policies do you have in place in your brokerage to ensure that money received from clients is promptly paid into the brokerage's trust account?

The disciplinary case of 2020 CanLII 50483 (BC REC) provides an example of a scenario that led to a breach of section 27 of *RESA*. Here, the licensee was acting for a buyer in the sale of a manufactured home. The contract of purchase and sale stated that a deposit would be paid within 48 hours of final subject removal. The subjects were removed, and on the same day, the licensee sent a proposed amendment to the contract of purchase and sale to the seller to deal primarily with desired repairs. The next day, the buyer hand-delivered a bank draft for the deposit to the licensee, and the licensee confirmed to the seller's licensee that the deposit had been received. On her client buyer's instructions, the licensee directed her brokerage's conveyance department not to deposit the bank draft, as the buyer wanted to ensure that the amendment would be accepted by the sellers first. The sellers did not initially agree to all of the terms in the proposed amendment, and the buyer threatened to walk away from the transaction. Eventually, the transaction completed, however, the seller's licensee complained to RECBC. The licensee was found guilty of breaching section 27 of *RESA*.

While offers can be made with accompanying deposits, it is also acceptable to draft a delay of the obligation to pay a deposit until after acceptance of the offer (or counter-offer) or upon removal of conditions precedent. Doing this may relieve some of the obligations and difficulties in handling deposits for offers that never get accepted. However, it is unacceptable for a deposit cheque to be received and held by the licensee or brokerage, and not deposited into the brokerage trust account, pending acceptance or removal of conditions, except when using the exception provided for in subsection 27(4) of *RESA*, which will be discussed shortly.

Holding and Releasing Deposits as a Stakeholder

Deposits held in brokerage trust accounts, unless the parties agree otherwise, are held by the brokerage as a stakeholder and not as agent for one of the parties to the trade in real estate. As a stakeholder, the brokerage must remain impartial in cases where there is disagreement over who is entitled to the deposit. Therefore, the brokerage cannot pay out the deposit to either party unless:

- Both parties consent, in writing, to a pay out ("with the required consent often taking the form of a release");
- The deposit is paid into court pending the outcome of a dispute between the parties; or
- The deposit is paid in accordance with a court order.

This simple requirement helps the brokerage avoid disputes in a collapsing sale ("and avoid conflicts with their clients"), if both parties claim to be entitled to a deposit. It is not always clear which party is entitled to the deposit, and it is not the brokerage's responsibility to determine who should receive the deposit. The brokerage can simply instruct the parties that, without their mutual agreement, they cannot, by law, release the deposit. While the brokerage can try to facilitate an agreement between the buyer and seller, these negotiations can be time-consuming. In some cases, such as when the brokerage is representing both parties through different designated agents, this type of involvement can put the brokerage in a conflict of interest if they advocate for one of the parties over the other.

Important: It is BCFSA's view that the requirement to obtain both parties' consent to withdraw deposit monies from a brokerage trust account applies even if the contract of purchase and sale classifies the deposit as "non-refundable". BCFSA believes that the intent of this requirement is to ensure that the parties have agreed about the withdrawal at the time the deposit is to be released. Much can change between when two parties enter into a contract of purchase and sale and when the contract collapses. From the brokerage's perspective, if one of the parties will not sign the agreement or release, that should serve as a red flag that there may be a difference of opinion as to who is entitled to the deposit. Even if the terms of the contract seem clear, there may be adverse claims that require legal interpretation.

The following is an example of a case where a managing broker and licensee were disciplined for failing to fulfill their stakeholder obligations under *RESA* for deposit monies held in trust.

In 2017 CanLII 86875 (BC REC), a licensee acted for a buyer in the purchase of a condominium unit. The contract of purchase and sale (the "First Contract") contained a financing condition. In accordance with the First Contract, a deposit was paid within 24 hours of acceptance. The buyers were unable to find financing due to issues with repairs of the strata complex. Shortly after advising the seller's licensee about this, the buyers entered into a contract of purchase and sale for another condominium unit (the "Second Contract"). The licensee then attempted to secure the mutual release of the deposit from the sellers in the First Contract. In the meantime, the licensee advised the conveyance staff to use the deposit in trust for the First Contract to pay the deposit for the Second Contract. The brokerage's managing broker reiterated these instructions to the brokerage's conveyance staff. The sellers in the First Contract eventually claimed entitlement to all, or a portion of, the deposit. When they learned that the deposit had already been disbursed (as part of the "Second Contract"), the respective brokerages' managing brokers were involved and RECBC was notified. In the end, the managing broker was disciplined for failing to ensure that the trust accounts and the records of the brokerage were maintained in accordance with the applicable laws, as he authorized the deposit which was held in accordance with the First Contract to be released from trust without a written agreement of the parties, and he allowed the funds to be used as deposit for the Second Contract. The licensee and brokerage were also disciplined.

Written Agreement to Waive Subsections 27(1) and (2)

Licensees who are provided with a deposit where the principals in the transaction have agreed that the deposit is to be held by someone other than a brokerage must ensure that the parties enter into a separate written agreement providing for this fact. For example, if a licensee receives cash from a client to deliver to the third party, a separate written agreement relieving the licensee and their brokerage of their obligation to deposit the funds into the brokerage trust account is needed.

However, the requirement of a separate agreement does not apply if the deposit is in the form of a cheque, bank draft or money order payable to a third party other than the brokerage. In this case, the licensee may deliver the deposit to the third party in the absence of a separate written agreement. The third party may not be holding the funds as stakeholder so all parties should verify how the funds are being held and be advised to obtain legal advice if necessary.

To protect their clients, licensees must explain the risks associated with those not governed under *RESA* holding deposits, as those parties may not be holding the funds as a stakeholder. Such risks may include that if a party to the trade holds the funds, there are few protections outside of litigation. However, there are still protections available to buyers when lawyers or some developers hold deposit funds. Lawyers will usually hold deposit funds in trust, while developers subject to the Real Estate Development Marketing Act must hold the funds in accordance with that *Act*.

BCFSA recommends that licensees advise their clients to obtain legal advice when a deposit is going to be held by a party other than a real estate brokerage, including by one of the parties to the transaction. That advice should be documented by inserting a clause into the contract of purchase and sale.

Deposits Not Received or Not Honoured

Subsection 29(2) of the Real Estate Services Rules states that associate brokers and representatives must immediately notify their managing broker if a deposit to be deposited into the brokerage's trust account has not been received. This obligation under the Real Estate Services Rules can be forgotten about, or it may not be fully understood. Therefore, it can be something to include in the BPM, and it can be repeated at periodic brokerage meetings. Doing so can avoid situations such as in 2019 CanLII 37502 (BC REC), where a licensee acting for a buyer was disciplined for failing to immediately notify his managing broker that a deposit from his client had not been received within the time required under the contract of purchase and sale.

A more complex disciplinary case involving deposits being wired by the buyer client to their licensee's personal bank account, whereby the licensee then purchased bank drafts for these deposit monies, can be seen in 2019 CanLII 45456 (BC REC). Due to these breaches, and others, the licensee was suspended for 270 days, ordered to pay a discipline penalty of $7,500 and enforcement expenses of $1,500, and ordered to take an ethics course. It was also ordered that her licence include a condition requiring enhanced supervision by a managing broker for a period of not less than 12 months following the end of her suspension period. This case also attracted attention due to the fact that the licensee's activities were wholly or partly motivated by the desire to help her client avoid anti-money laundering reporting requirements, and the disciplinary penalties imposed reflected this additional level of blameworthiness.

Managing brokers have the responsibility under subsections 28(5) and 28(6) of the Real Estate Services Rules to ensure that all parties to an agreement giving effect to a trade in real estate are immediately notified in writing (or confirmed in writing) of this fact. This managing broker obligation makes it even more important that representatives and associate brokers notify their managing broker when a deposit is not received. Managing brokers may also want to ensure appropriate trade tracking systems are in place to ensure key dates in a real estate transaction are brought to the attention of the brokerage.

In 2019 CanLII 67656 (BC REC), a managing broker was disciplined for a breach of subsections 28(5) and 28(6) in two separate transactions. In both cases, the brokerage had acted for buyers and deposits had not been paid to the brokerage, as contemplated in the contracts of purchase and sale. In the first case, the managing broker was informed shortly after the deposit was not paid, and claimed that the failure to notify was due to oversight and carelessness. In the second case, the managing broker did not become aware of the unpaid deposit until weeks later, and she claimed the oversight was due to a heavy workload at the brokerage. In addition to breaching subsections 28(5) and 28(6), the managing broker was found to have breached section 6(2) of *RESA* and section 28(1) of the Real Estate Services Rules by failing to ensure that the business of the brokerage was carried out competently and in accordance with *RESA* and the Real Estate Services Rules.

Managing brokers have a similar notification obligation under subsections 28(5) and 28(6) of the Real Estate Services Rules if a deposit cheque or other negotiable instrument to pay a deposit has not been honoured. In the event that a buyer's deposit cheque is returned N.S.F. ("Non-Sufficient Funds") or is otherwise dishonoured, there are generally two possible explanations. The first is that there has been an honest mistake by either the buyer or the buyer's bank. The second possibility is that the buyer has insufficient funds or is engaged in some improper scheme. In both cases, the Real Estate Services Rules require the seller to be notified.

Practice Tip:

In the case of honest mistakes, the situation can often be rectified through negotiation so that the transaction can proceed to closing. Furthermore, provided the seller agrees, it is permissible to contact the buyer and to allow the buyer a very short period of time within which to provide a certified cheque, a bank draft, or money order. If the deposit money is not replaced, the seller must be informed of the situation and advised to obtain legal advice as to their position with respect to the buyer and the contract of purchase and sale.

CONCLUSION

There is a clear connection between brokerage policy manuals and the overall process of risk management—the former should be the product of the latter. While Enterprise Risk Management is a useful risk management tool, what is more important is for managing brokers to specifically think about the risks of the brokerage. Doing so will help the brokerage create more effective policies and procedures. The policies and procedures should be introduced during training and reinforced with brokerage personnel. In an earlier section of this module, you learned that a particular compliance concern from BCFSA is the mishandling of deposits. As a managing broker, you should reflect on whether the policies and procedures in your office relating to the handling of deposits are adequate.

The module for managing brokers entitled "Oversight and Supervision at the Brokerage Level" will discuss the second major theme that arises out of the specific duties set out in section 6 of *RESA* and section 28 of the Real Estate Services Rules: oversight and supervision. It is helpful to think of policies and procedures, and oversight and supervision, not as separate and distinct topics, but interrelated and overlapping themes.

Appendix A
Sample List of Brokerage Policy Manual Topics

- **General:** the overall purpose of the BPM, establishment of certain defined terms, etc.
- **Brokerage Information:** the history of the brokerage, vision/mission/strategy, core values, services offered, etc.
- **New Licensee/Employee Orientation:** required training, key things to know, the importance of adhering to one's professional responsibilities as a licensee under *RESA*, key regulatory resources (such as BCFSA's Knowledge Base), etc.
- **General Licensee Conduct:** expectations on dress codes, time within the office, attendance to meetings, and availability by email; a code of conduct (respect, collegiality, freedom from harassment or discrimination, etc.); handling absences from work (e.g., medical, vacation, etc.); managing unlicensed assistants; personally trading in real estate; teams
- **Technology:** key hardware and software requirements (e.g., data encryption, hard drive backups, anti-virus software)
- **Advertising and Marketing:** use of the brokerage name, signage requirements, social media use, etc.
- **Privacy and Confidentiality:** handling hard-copy and electronic files appropriately
- **Dispute Resolution:** how to deal with disputes within the brokerage, with clients, with licensees at other brokerages, and with third parties
- **Record Keeping:** required records and documents, policies for transmission to the brokerage, etc.
- **Handling Money:** trust accounting, handling deposits, regulatory requirements, types of payments, etc.
- **Compensation/Remuneration:** commission splits, handling referral fees, bonuses, source deductions, etc.
- **Service-Specific Requirements:** handling listings, MLS usage, key disclosures, lockboxes, open houses, co-listings, managing conflicts of interest, etc.
- **Skills/Professional Development:** licensee expectations

Module Ten: Managing Broker Oversight and Supervision

Module Ten: Managing Broker Oversight and Supervision

MODULE DESCRIPTOR:

Oversight and supervision is a core duty of managing brokers. Managing brokers retain ultimate responsibility for the control and conduct of the business of the brokerage, and the only way to effectively do this is through adequate oversight and supervision. Perhaps the most important aspect of oversight and supervision is ensuring that licensees of the brokerage follow the policies and procedures that are established by the brokerage. Other key aspects of oversight and supervision include:

- Ensuring that the brokerage, and all of its licensees, are appropriately licensed;
- Managing licensee suspensions;
- Supporting the professional development of brokerage personnel;
- Advising, assisting, and guiding brokerage personnel; and
- Effective delegation.

LEARNING OBJECTIVES:

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

- Recognize key aspects of ensuring that your brokerage, and all of its licensees, are appropriately licensed;
- Identify three key obligations that arise for managing brokers when licensees within their brokerage are suspended;
- Discuss how managing brokers can play a role in fostering the professional development of their brokerage's personnel;
- Identify some challenges that managing brokers may face when advising, assisting, and guiding brokerage personnel; and
- Describe the limitations in delegating a managing broker's duties.

INTRODUCTION

Section 28 of the Real Estate Services Rules places supervisory duties upon managing brokers. Managing brokers must be actively engaged in the management of their related brokerage, ensuring that the brokerage is compliant with all legal and regulatory obligations and that there is an adequate level of supervision for all of the brokerage's personnel, whether they be licensees or unlicensed individuals.

Perhaps the most important aspect of oversight and supervision is ensuring that the licensees of a brokerage follow the policies and procedures that are established by the brokerage. This major topic is explored in detail in another module.

There is a misconception that, because many licensees are considered "independent contractors" for taxation and other purposes, this has somehow reduced or eliminated a managing broker's supervisory responsibilities. A managing broker's duties under *RESA* and the Real Estate Services Rules apply regardless of the contractual relationship between the brokerage and the licensees engaged by that brokerage.

Section 7.1 of *RESA* provides that proprietors, partners, directors, officers, and shareholders of a brokerage may not train or supervise the brokerage's licensees unless they are licensed in relation to the brokerage. Thus, the key supervisory duties under *RESA* are meant to be discharged by the managing broker.

Clearly, some of the day-to-day specifics of how managing brokers actively manage and supervise will depend upon factors such as the business model of the brokerage, the size of the brokerage, and the types of real estate services that the brokerage offers. However, there are some basic aspects of supervision that BCFSA expects of all brokerages, regardless of size or types of services offered.

APPROPRIATE LICENSING OF BROKERAGE PERSONNEL

Managing brokers must ensure that the brokerage, and all of its licensees, are appropriately licensed.

Providing Real Estate Services Outside of Licensed Categories

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

2019 CanLII 110045 (BC REC)

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

2020 CanLII 103120 (BC REC)

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

Providing Real Estate Services as an Unlicensed Assistant

Another aspect of appropriate licensing is ensuring that all brokerage personnel understand and abide by the limitations of services that can be provided by unlicensed assistants. No one who is unlicensed may provide services for which a licence is required. Section 1 of *RESA* defines "trading services", "rental property management services", and "strata management services" by setting out lists of activities that fall within each type of service. Managing brokers should reference these definitions when evaluating the work of unlicensed assistants within their brokerage. The following are some activities that cannot be performed by unlicensed assistants:

- Hosting open houses, kiosks, or home show booths;
- Soliciting buyers, sellers, landlords, tenants, or strata corporations/councils;
- Showing property;
- Explaining or interpreting a contract of purchase and sale, a tenancy agreement or lease, or any form of service agreement with or to anyone outside of the related brokerage; and
- Negotiating or agreeing to any commission, commission split, management fee or referral fee on behalf of a licensee.

BCFSA's Unlicensed Assistants Guidelines (which can be found on the Knowledge Base) contains further information on this topic, including managing broker considerations.[1]

1 Unlicensed Assistants Guidelines | BCFSA

2018 CanLII 123784 (BC REC)

While it may not be possible to closely scrutinize every licensee's day-to-day interactions and arrangements, the managing broker cannot be complicit in circumstances that may suggest unlicensed individuals at a brokerage are performing activities that require a licence. For example, in 2018 CanLII 123784 (BC REC), a licensee acted as a buyer's agent in relation to the sale of a property. The licensee allowed her unlicensed assistant to schedule two appointments for the buyer to view the property. The unlicensed assistant attended both viewings with the buyer. When the sale of the property completed, the licensee directed the brokerage to pay the entire portion of the commission payable to her on the sale of the property to the unlicensed assistant. In another transaction, the same licensee allowed the unlicensed assistant to attend at the property with the buyer, to provide advice to the buyer regarding the purchase of the property, to communicate with the seller's agent regarding the buyer's offer, and to arrange further showings of the property to the buyer. The managing broker was found to have failed to have active control over the conduct of the brokerage's real estate business and failed to ensure there was an adequate level of supervision for employees who performed duties on behalf of the brokerage, as he allowed the brokerage to pay an unlicensed assistant commission in relation to a sale of a property. It should also be noted that the licensee who improperly authorized her unlicensed assistant to act in these transactions was also disciplined by RECBC (see 2018 CanLII 48898 [BC REC]).

Payment of Remuneration to Unlicensed Entities

Appropriate licensing also includes the obligation for managing brokers to ensure compliance with section 66(1) of the Real Estate Services Rules: "a licensee must not pay, offer to pay or agree or allow to be paid, remuneration to a person in relation to real estate services if the person is required to be licensed in relation to those services but is not licensed." In some cases, managing brokers have faced discipline for a breach of section 66(1) for simple oversights with respect to maintaining current records and appropriate checks of the licensing statuses of the licensees of a brokerage.

2020 CanLII 36929 (BC REC)

In the recent case of 2020 CanLII 36929 (BC REC), a licensee advised his managing broker that he was seeking to operate through a personal real estate corporation. The licensee then incorporated the personal real estate corporation and prepared the necessary documentation to license the personal real estate corporation with RECBC. The managing broker signed off on the licensing application for the personal real estate corporation. Unfortunately, the licensee forgot to send the application to RECBC, but began operating through his unlicensed personal real estate corporation. Over the next two and a half years, the brokerage issued approximately 115 cheques to the personal real estate corporation. The managing broker then realized that she had not signed a licensing renewal application for the personal real estate corporation and discovered that the personal real estate corporation had never been licensed with RECBC. She then notified RECBC about the unauthorized payments that were made from the brokerage to the personal real estate corporation. As a result, the managing broker and her brokerage were found to be jointly and severally liable to pay a discipline penalty of $2,500 and enforcement expenses of $1,500.

The fact that the personal real estate corporation had not been licensed could have been caught earlier if the brokerage had implemented a licence tracking solution, similar to what can be found in Appendix A, to keep track of licences and renewal dates.

Licence Renewal Dates and Requirements

Managing brokers should ensure that the brokerage's licensees are aware and managing their licence renewal dates and relicensing requirements, the key requirement being the completion of BCFSA's mandatory continuing education courses. Far too many licensees leave their licence renewal and required courses to the "last minute." Doing so could potentially distract them from properly fulfilling their duties and providing competent services to the brokerage's clients, as they frantically rush to relicense.

One of the most simple and effective ways to ensure that the brokerage's licensees are staying current with their licensing is by creating a spreadsheet to track important information in this area. A sample of such a spreadsheet can be found in Appendix A. Managing brokers can populate this spreadsheet by using BCFSA's licensee portal, where they can see the education history and licence renewal information for the licensees at their brokerage.

As the leader of the brokerage, managing brokers have a role to play in encouraging timely completion of mandatory education by the brokerage's licensees. While many managing brokers likely send reminders to their licensees when their relicensing dates approach, think about some alternative (and even creative) strategies to encourage this behavior.

It is important to remember that completion of continuing education is not just something that has to be done for licence renewal – keeping up to date on knowledge and skills is part of any professional's commitment to their profession.

LICENCE SUSPENSIONS

One of the orders available to BCFSA in disciplinary proceedings is licence suspension. In recent years, most licence suspensions have ranged from fourteen days to one year in length. BCFSA recognizes that suspensions can have serious repercussions for a licensee's practice:

> Many professions consider suspensions a categorically more severe form of sanction than fines, as suspensions may, in addition to having immediate financial impacts through lost revenues, also interfere with client relationships, and "blight" a licensee's reputation.[2]

Given that this section falls within the general discussion on supervision, it will focus on representative and associate broker licence suspensions, and the managing broker's role in ensuring that licence suspensions are appropriately observed. Managing broker and brokerage licence suspensions will have a substantial impact on the brokerage's activities. For more information about these types of suspensions, see: Suspended: Brokerage Licence Suspensions and What They Mean to You (Report from Council, October 2014).

When the licence of a representative or associate broker has been suspended, BCFSA will send a letter to both the licensee and their managing broker with instructions on how to comply with the suspension. Managing brokers play a critical role in ensuring licensees comply with the terms of their suspension. BCFSA relies on managing brokers to oversee and monitor any penalty term relating to a licensee's ability to offer real estate services. Failure to ensure compliance in this regard can result in further disciplinary action against the licensee, including further suspension or cancellation of their licence. It can also result in disciplinary action against a managing broker who knew or ought to have known that a licensee was in breach of a disciplinary order and did not take appropriate action in response and immediately report the breach to BCFSA.

As mentioned, while the suspension letter addressed to the managing broker will specify the exact details of the suspension, you must generally ensure that:

1. All impacted clients are informed of the suspension.
2. All impacted clients continue to be appropriately served by the brokerage.
3. The suspended licensee complies with the requirements of their suspension.

Client Communication

Under *RESA*, all licensees provide their services on behalf of their brokerage. As such, first and foremost, clients are the brokerage's clients. When a licensee is suspended, the managing broker should immediately contact all of the licensee's clients to let them know about the suspension and how the brokerage intends on fulfilling its legal (contractual and regulatory) duties to them. There may be circumstances when non-clients may also need to be contacted, for example when a listing licensee who has been dealing with an unrepresented buyer has been suspended.

2 "Sanction Guidelines," Real Estate Council of British Columbia, sanctionguidelinesjanuary212019.pdf (bcfsa.ca)

In the trading services context, most listing contracts and buyer agency contracts will specify the consequences of the designated agent being suspended. In most cases, the client has agreed, in these contracts, for the brokerage to appoint another designated agent to act as the sole agent of the client (e.g., see section 7 "Designated Agency" of the BCREA standard form Multiple Listing Contract). Managing brokers of rental property management and strata management brokerages should consider whether the brokerage's service agreements similarly address how licensee suspensions are handled. Although rental property and strata management brokerages practice brokerage agency, a managing broker is still well-advised to contact any clients and tenants who customarily deal with the suspended licensee to advise them of the suspension and any alternate arrangements, even if this information is not included in service agreements.

The primary goal of the brokerage at this stage should be to display transparency to, and maintain the trust of, impacted consumers by reassuring them that the brokerage has a plan for continued service.

Continued Service

Unless the service agreement with the client dictates that a certain licensee's suspension terminates the agreement, the managing broker must ensure that the suspension of a particular licensee does not hinder the ability of the brokerage to fulfil the legal duties owed to its clients. Other licensees within the brokerage must be appointed to, and briefed on, the particular client, file, or transaction. The managing broker should ensure that the client is satisfied with the replacement licensee taking over, and meetings for this purpose may need to be arranged. BCFSA generally requires that, before the start of the suspension, the licensee must provide a letter to BCFSA with a list of all active listings held by them at the start of the suspension, including a disposition for each listing (i.e., was it transferred to another licensee and to whom, or was it cancelled). Managing brokers are required to confirm to BCFSA, in writing, that this letter is sent to BCFSA.

Depending on the nature of the work being transferred to the replacement licensee, the suspended licensee may need to be consulted at the outset of the transition for relevant information and documents. This can help to ensure that there will be a seamless transition to the replacement licensee. In the course of their work, replacement licensees need to keep complete and thorough records and notes, so that the client, file, or transaction can be handed back to the suspended licensee at the end of their suspension, without any service interruptions for the client.

Finally, there may be internal brokerage issues that managing brokers must contemplate when multiple licensees provide services to the client in the event of a licensee suspension. For example, what if the client wishes to continue working with the replacement licensee, even after the suspended licensee returns to practice at the brokerage?

Compliance While Suspended

While suspended, a licensee must cease all licensed activity for the period of the suspension. Further, in many situations, discipline orders specifically prohibit suspended licensees from working as unlicensed assistants for the duration of the licence suspension. Failing to do so is a breach of section 20 of *RESA*. Inevitably, in the course of a specific transaction or file, the suspended licensee may need to be consulted to provide additional information, context, and documents. In fact, it may be difficult and even against the client's interests not to seek relevant information from the suspended licensee, if doing so would ensure that the client continues to receive the appropriate level of service. While the suspended licensee may attend the brokerage's office during the suspension, he or she must not perform actions such as:

- Meeting or providing advice to clients or consumers;
- Negotiating with or on behalf of clients; and
- Entering into contracts.

The suspended licensee must also cease and remove all advertising during the term of the suspension. This includes but is not limited to the following: real estate lawn signs, TV ads and/or channels, radio ads, bus shelters/benches, newspaper/magazine ads, sponsorship materials and signs, billboards, stadium/arena signs, and automobile signs. In addition, all websites, web pages, and any other online representation, promotion, or solicitation must be disabled during the term of the suspension. For example, during a suspension, the licensee should not be posting on their social media accounts that are related to their practice as a licensee. In fact, these accounts should be temporarily disabled. Managing brokers are required to confirm to BCFSA, in writing, that the suspended licensee's name will be removed from all forms of advertising.

Finally, suspended licensees should not be interacting with clients or potential clients, in person or electronically, except to inform them of their suspension and how their brokerage is managing their suspension.

The managing broker should have processes in place to monitor compliance with these requirements. As stated earlier, a managing broker who does not ensure that a licence suspension has been appropriately observed can be subject to disciplinary action. BCFSA will perform a "suspension audit" during the suspension period to confirm compliance. In 2019 CanLII 7894 (BC REC), a managing broker was disciplined for failing to ensure that a licensee at his brokerage did not provide real estate services during the term of her suspension. The managing broker provided incorrect guidance on what the licensee could do during her suspension, and failed to effectively oversee the work the licensee was doing during her suspension to ensure it did not consist of real estate services for which a licence was required. The licensee showed a rental property through an open house, communicated with prospective tenants, and signed a residential tenancy agreement on behalf of the brokerage, among other things.

Are you also aware that, if a licensee does not renew their licence because they have not completed their mandatory continuing education, even if for just one day, these same requirements relating to licence suspension must be applied?

PROFESSIONAL DEVELOPMENT

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

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

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

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

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

Approaching Professional Development as Lifelong Learning

To foster continuous development and improvement of the knowledge and skills needed for employment and personal fulfillment, professional development can be approached through the lens of lifelong learning, which is defined as the provision or use of both formal and informal learning opportunities throughout one's life.[3] To maintain a high level of professionalism, improvement of knowledge and skills is an ongoing commitment professionals make to their careers. In other words, education and training is not something that is only done to gain entrance into an industry, nor is it only a once per licence-cycle activity.

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

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

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

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

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

Setting the Tone for Professional Development Early

Managing brokers have the power to set the appropriate tone of the brokerage in the area of professional development. This can be done at the training and orientation phases for new brokerage personnel. However, it can also be done at the recruitment phase as a strategy to attract quality individuals to the brokerage. Which new licensee would not want to join a brokerage where professional development and continuous learning is valued? Further, think about professional development as a marketing tool and as a way to build trust from clients and potential clients.

A simple spreadsheet for tracking licence renewal dates and professional development was introduced in an earlier section, and can be found in Appendix A.

ADVISING, ASSISTING, AND GUIDING BROKERAGE PERSONNEL

Regardless of the quality of training or professional development undertaken by those within the brokerage, managing brokers must be able and available to assist and advise brokerage personnel on issues that arise in their day-to-day activities. Four important points are worth emphasizing.

Managing Broker Expertise and Education

Managing brokers should ensure that their expertise and education is at least as good as, if not better than, the licensees in their brokerage. Another valuable use of a licensee professional development spreadsheet (found in Appendix A) is to identify potential professional development opportunities for yourself, as the managing broker. Talking to your licensees about their experiences in various courses or educational programs can also help to identify valuable professional development for yourself.

2019 CanLII 35325 (BC REC)

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

Beware of Conflicts of Interest

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

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

Under the provisions respecting designated agency in the Real Estate Services Rules,[5] the brokerage is expected to treat the interests of all clients in an even handed, objective, and impartial manner. The managing broker must ensure that the brokerage remains neutral throughout these transactions. Giving advice to one designated agent puts their client's interests ahead of the other client's interests and is not permissible. In these situations, further information is provided on the following guidance for managing brokers:

- You may review contracts according to a standard brokerage due diligence checklist that licensees at the brokerage work from to ensure their contracts are free of common problems or issues, and ask questions of the licensees to clarify issues.

4 "Contract Clauses", Knowledge Base | BCFSA

5 Section 32.

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

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

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

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

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

Staying Connected While Out of the Office

Managing brokers must ensure that, when they are not at the office, they are still connected to the office by other electronic means. How you, as a managing broker, choose to stay connected to your brokerage is likely dependent on a number of factors including:

- How long you will be away from the office;
- Whether there are other managing brokers or associate brokers that are available to assist;
- The overall size of the brokerage; and
- The technology available to you while absent from the office.

If you will be away from the office and cannot stay connected or otherwise oversee the activities of your brokerage, you must delegate your duties to another licensee at your brokerage.

Reviewing Contracts of Purchase and Sale

It has come to the attention of BCFSA that some managing brokers do not make it their practice to review the contracts of purchase and sale that their licensees prepare or work with in their transactions. In the "Policies and Procedures at the Brokerage Level" module, and thus far in this module, you have read about topics such as brokerage policy manuals, risk management, training, checklists, and professional development. The oversight and supervision of the preparation and use of contracts of purchase and sale intersect with all of these topics, in one form or another.

Negligent drafting of contracts of purchase and sale is a major risk to the brokerage because of the damage it can cause to the consumers involved in the affected real estate transaction. Thus, a key risk management strategy is to have the managing broker review all contracts of purchase and sale. As stated earlier in this module, managing brokers should ensure that their expertise and education is at least as good as, if not better than, the licensees in their brokerage. To aid in their review, managing brokers can develop and use checklists to confirm that key aspects of these contracts are appropriately handled and common pitfalls are avoided. These can be shared with all licensees in the brokerage and incorporated into the brokerage policy manual. By reviewing contracts of purchase and sale, managing brokers will get a sense of the common mistakes or misunderstandings of the licensees within the brokerage, and can address these in training and professional development activities, and generally in the brokerage policy manual.

While the above is focused on trading services activities, this also serves as a reminder for managing brokers for rental property management and strata management services that they should similarly be reviewing key contracts and documents that are prepared by the licensees of their brokerage.

DELEGATION

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

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

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

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

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

Fundamental to delegation under *RESA* is that, regardless of the delegation, the managing broker retains ultimate responsibility for the control and conduct of the business of the brokerage. This means that the managing broker should regularly review the work of the person to whom the work has been delegated. In other words, managing brokers must still exercise effective supervision over those who have been delegated responsibilities by the managing broker.

Practice Tip:

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

Delegation During Absences

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

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

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

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

Delegation for the Creation and Maintenance of Books and Records

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

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

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

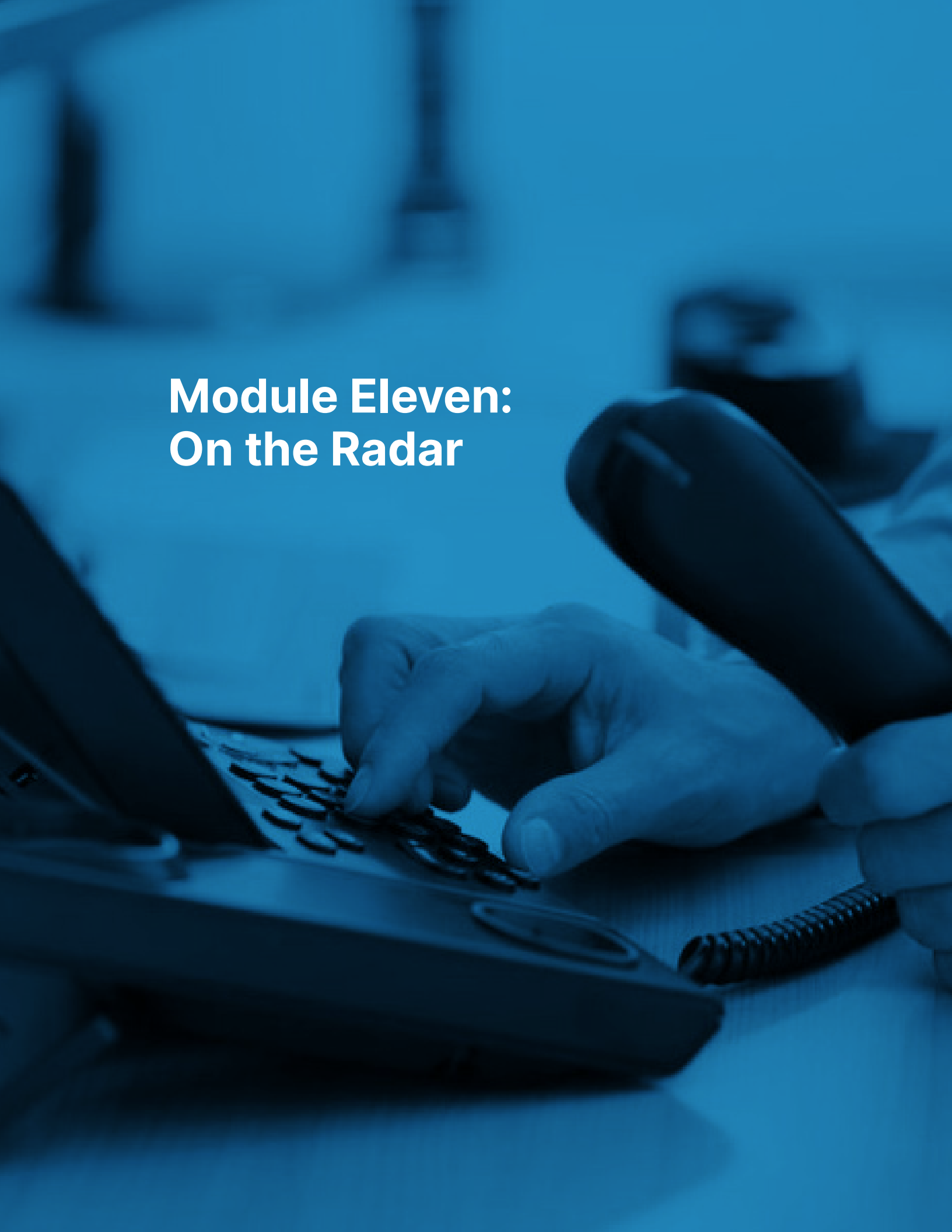
CONCLUSION

It is often said that a team is only as strong as its weakest member. However, a team member who is weak due to things such as a lack of training or direction, incomplete policies, and inadequate supervision suggest that there may be leadership challenges within the team. This module, along with the module entitled "Policies and Procedures at the Brokerage Level", discussed a number of fundamental aspects of effective managing broker practice. However, in many ways, this is only scratching the surface. The role of the managing broker is challenging but it can also be extremely rewarding.

While managing brokers have been charged with a tremendous amount of responsibility under *RESA* and the Real Estate Services Rules, they also have an immense amount of power to effect great change in their brokerages. By creating and implementing comprehensive brokerage policies and procedures, and by diligently exercising their powers of oversight and supervision, managing brokers truly possess the "key" to an efficient, safe, and respected real estate industry where consumers are well-protected.

Appendix A
Spreadsheet to Track Licensee Renewal Dates and Professional Development

Licensee Name	Date Licensee Joined Brokerage	Licence Expiry Date	Category of Licence	Level of Licence	Training Courses Completed	Continuing Education Courses Completed
Armin	2020	March 23, 2022	Rental	Represent-ative		
Bethany	2015	July 10, 2023	Trading and Rental	Associate Broker		
Cheng	2010	August 22, 2023	Trading	Represent-ative		
Diego	2018	October 25, 2022	Trading	Represent-ative		



Module Eleven: On the Radar

Module Eleven: On the Radar

Tax Issues in Real Estate

This article will provide you with a basic understanding of four important taxes that may apply in real estate transactions.

LEARNING OBJECTIVES

After completing this article, you will be able to:

- Explain how the Goods and Services Tax may apply to real estate transactions;
- Identify when Property Transfer Tax is applicable and the additional issues to consider when foreign buyers are involved;
- Understand the Speculation and Vacancy Tax and how it may be relevant to owners of real estate; and
- Understand non-resident withholding tax and its application in the sale or lease of Canadian property.

INTRODUCTION

Tax is complicated. In real estate, there are taxes that apply upon the purchase of real estate, such as the Goods and Services Tax ("GST") and Property Transfer Tax ("PTT"). There are also holding taxes to consider, such as Property Tax and the Speculation and Vacancy Tax ("SVT"). There are also taxes that apply on the disposition of real estate, such as capital gains taxes, where non-resident withholding tax may apply.

It is not necessary for you as a real estate licensee to be an expert in all of these taxes, but it is important for you to know when issues may arise and when to refer a client to a tax professional.

This article focuses on GST, PTT, SVT, and non-resident withholding tax, and their applications in various real estate transactions.

Goods and Services Tax

Did you know that some of the most common claims against real estate licensees relate to whether GST is included in the purchase price or who pays the GST?[1] In 2015 CanLII 90106 (BC REC), the buyers thought they were paying $407,900 with no GST but the licensee failed to ascertain the actual purchase price the buyers would be paying prior to them signing the contract of purchase and sale. There was confusion with respect to the amount and payer of the GST, which the licensee did not confirm for his clients. The real estate licensee was fined and reprimanded, determining that the licensee should have recommended the buyers obtain independent GST advice before they signed the contract of purchase and sale.

It seems quite fundamental and is a surprise that GST may be overlooked in a real estate transaction, particularly since the consequences can be significant.

What is GST? GST is a tax that you pay on most goods and services sold or provided in Canada. In British Columbia, the tax rate is 5% and it can apply in many types of real estate transactions, not just new housing. This is important. Many real estate licensees believe that GST is not applicable to used residential housing and is only applicable to new housing. This is simply not the case.

Firstly, GST is applicable to commercial properties. The key factors to consider are the seller's GST status and use of property. Therefore, what one may think is a residential home may be considered a commercial property and thus subject to GST. Specifically, has the seller registered for GST and what was the property used for? Generally, if the seller is registered for GST and has claimed GST input tax credits in respect of the property, or the property was used for commercial purposes (e.g., short-term rentals), GST will apply upon the sale of the property.

Consider the following examples:

- Sue bought a 30 year old half duplex five years ago and has since run her accounting business out of the property. Does GST apply when she sells her property?
- Simon has rented out his property for nightly rentals on Airbnb for the past five years whenever he is out of town, which is quite often. Now his property is up for sale. Is GST applicable?

1 Risk Report December 2016 (Volume 29 November 2) and Risk Report September 2019 (Volume 32 Number).

In the above examples, a real estate licensee needs to make inquiries and alert clients about potential GST implications. In the first example, perhaps Sue registered for GST, clients visited the property on a regular basis for meetings, and Sue hardly ever slept there as she had another home in the suburbs. There could be GST implications upon the sale of her property. In the second example, according to Canada Revenue Agency ("CRA"), a vacation property is taxable if the property is not used primarily (more than 50%) as the seller's place of residence and all or substantially all (90% or more) of the rentals of the property are for periods of less than 60 days.[2]

Secondly, real estate licensees may not be fully aware that new housing includes properties that are "substantially renovated" and these types of properties are subject to GST upon sale. The Excise Tax Act defines a "substantial renovation" as a renovation where all or substantially all of the building, other than the foundation, external walls, interior supporting walls, floors, roof, and staircases, has been removed or replaced. CRA has issued guidance that a "substantial renovation" is generally interpreted as a renovation of 90% or more of the building.[3]

Consider the following example:

- Sasha has completely gutted his house "to the studs" and now the property is up for sale. Nobody lives in the house. Sasha's real estate licensee has listed the house for sale and advertised: "Brand new home. No GST." Is this a "substantially renovated" house that attracts GST? Is there anything of concern with respect to the description of the house in the listing?

In the above example, Sasha's real estate licensee should remove "Brand new home. No GST." from the listing as this is a misrepresentation: the home is not brand new and there is uncertainty as to whether GST applies. The real estate licensee should also advise Sasha to obtain tax advice as to whether the house will be subject to GST because it has been stripped to the studs, which is generally considered a "substantial renovation".

Be careful when including any information about GST in listings and when drafting GST-related clauses in contracts of purchase and sale. Contracts of purchase and sale should clearly identify whether GST is included in the purchase price and who is responsible for paying the GST. BCFSA has several recommended standard clauses relating to GST. The clauses include some recommended wording for a transaction that is subject to the buyer or seller obtaining professional tax advice regarding GST liability. This resource should be reviewed on a regular basis. At a minimum, where it is at all questionable if GST applies, the contract should clearly state whether the purchase price includes GST or does not include GST, and indicate who is responsible for paying the GST.

Finally, in rental property management situations, note that rent payments for commercial property leases are generally subject to GST and the landlord is required to collect GST from the tenant.

2 GI-025 – The GST/HST and the Purchase, Use and Sale of Vacation Properties by Individuals

3 GST/HST Technical Information Bulletin B-092 - Substantial Renovations and the GST/HST New Housing Rebate

Transfer Tax

PTT is a tax that generally applies to any transfer of an interest in real property that is registered at the Land Title Office ("LTO"). PTT also generally applies to a lease with a term of 30 years or more registered at the LTO. This would include scenarios where lease modification agreements result in a cumulative term of 30 years or more. The PTT tax rate depends on the fair market value of the property. Foreign buyers are subject to an additional 20% property transfer tax in certain regions in British Columbia (Foreign Buyers' Tax) . It is important to remember that the Financial Transactions and Reports Analysis Centre of Canada requires licensees to confirm the identity of clients. Clients may not think of themselves as foreign buyers, but if they do meet the definition of a foreign entity under the Property Transfer Tax Act, and they are buying a property in one of the specified districts of British Columbia where the Foreign Buyers' Tax is applicable, they will be subject to this additional tax. This can be a big surprise if they were not forewarned by the real estate licensees acting for them.

Speculation and Vacancy Tax

The SVT is an annual tax payable by any registered owner or co-owner of residential property located in designated taxable regions of British Columbia, unless the owner qualifies for an exemption. The intention of the SVT is to curb property speculation and help turn vacant and underutilized properties into homes for people who live and work in British Columbia's urban centres. Most homeowners in British Columbia will be able to claim the principal residence or rental exemption and thus not be subject to the SVT. It is important to note that residential properties located within Vancouver may be subject to both the SVT and Vancouver's Empty Homes Tax.

Non-Resident Withholding

Under Canadian income tax law, a non-resident of Canada selling Canadian real property is subject to Canadian income tax on any gain on the sale. If the seller is a resident of Canada, the buyer does not need to withhold part of the purchase amount to pay the tax. If the seller is not a resident of Canada, 25% of the gross proceeds is required to be withheld by the buyer. The funds are typically held in trust in the trust account of the seller's conveyancer and ultimately remitted by the seller to CRA. The 25% withholding, commonly referred to as "withholding tax", is not a final tax but a temporary withholding tax, as there may be applicable treaties that reduce the tax amount owed. When acting for non-resident sellers, real estate licensees should advise their clients that the initial proceeds from the sale of the property may be less than anticipated due to this temporary withholding tax.

Similarly, when a non-resident receives rental income from real estate in Canada, the tenant or rental property manager has to withhold non-resident tax at a rate of 25% on the gross rental income paid or credited to the non-resident. Rental property managers should be aware of this withholding tax and when it may apply. Managing brokers of rental property management brokerages should ensure that the brokerage's trust accounting policies take into consideration the necessity to withhold 25% of the rental income in lease situations where non-resident landlords are involved.

Conclusion

There are several different taxes and exemptions that may apply in real estate transactions. Educate yourself and do not hesitate to refer your client to a tax expert when cases are beyond your understanding.

Title Update

This article reviews recent Consent Orders published by the Real Estate Council of British Columbia ("RECBC") and a recent B.C. Supreme Court ("BCSC") decision concerning title issues.

LEARNING OBJECTIVES

- Understand the importance of ascertaining ownership and capacity to sell: *De Cotiis v. Hothi*[4] and Re Ireland[5]; and
- Understand the importance of obtaining a title search from a reliable source: Re Layden[6].

Reviewing title is a key part of a real estate transaction. Whether acting for a buyer or seller client, a real estate licensee must appreciate that failure to:

- Review title in a timely way;
- Understand title; and
- Recommend legal advice to the client or to obtain professional advice regarding title when required, may result in a collapsed sale exposing the real estate professional to legal and/or professional misconduct claims.

4 *De Cotiis v. Hothi et al,* 2018 BCSC 2271 (CanLII) aff'd 2019 BCCA 472 (CanLII)
5 Ireland (Re) 2020 CanLII 36930 (BC REC)
6 Layden (Re) 2016 CanLII 90921 (BC REC)

While there are many reasons to search title before listing a property or writing an offer for a buyer client[7], a main reason is to identify the owner(s) and to confirm who has the ability to convey title to the property.

Identifying the Owner and Capacity to Sell

The registered owner(s) on title may not always have the ability to convey title. A review of the title search is imperative to identify who may sell the property. Here are examples where a party other than the registered owner has the capacity to sell the property:

- A buyer with a right to purchase under an agreement for sale;
- A creditor who has obtained an order absolute or order for conduct of sale under foreclosure proceedings;
- An insolvency trustee who owns property in trust for a bankrupt owner;
- The Crown, where land has escheated to the Crown under *the Escheat Act*[8]; and
- An executor or administrator where the registered owner has died, and grant of probate or letters of administration have been received.

In addition to the title search a real estate licensee should be alert to other facts that may impact a registered owner's capacity to sell, such as the existence of an unregistered trust or the granting by the owner of a power of attorney.

A real estate licensee's failure to properly review or to understand title can embroil them in litigation and/or disciplinary proceedings before BCFSA.

De Cotiis v. Hothi et al

De Cotiis concerned the sale of a building lot in West Vancouver for $1.25 million. The real estate professional assumed his client, PH, was the owner of the subject property and listed the property with PH without reviewing title. Title was actually registered in the name of GH, PH's brother. A contract entered into by a buyer and PH, as seller, ultimately collapsed when GH refused to complete when the market rose. The buyer sued for specific performance contending that GH held title as bare trustee on behalf of his family, the beneficial owners, and that PH had the express and apparent authority to sell the property.

GH and PH brought third party claims against the real estate licensee and his brokerage. GH alleged the real estate licensee was negligent in preparing and executing an unenforceable contract. PH alleged that the real estate licensee breached his duty of care by signing and initialling documents in PH's name without his authority, and by misrepresenting his authority to do so to the buyer.

7 Other reasons to review title include to identify: the property being sold (legal description); notations, charges, liens and interests registered on title; and to determine any potential issues impacting transfer of title (e.g., Duplicate Indefeasible Title being issued or outstanding, pending charges, issues with a Power of Attorney or Death Certificate etc.)

8 *Escheat Act,* RSBC 1996, c. 120

The buyer obtained an order for specific performance. The court found that GH held legal title to the property as the bare trustee for his family and was subject to PH's direction and control as the representative of the family. In 2019, the BC Court of Appeal ("BCCA") dismissed the sellers' appeal.

Given the court's finding, the third party claims against the real estate licensee and his brokerage were dismissed. However, five years of litigation, a 50-day trial, and appeal proceedings in the BCCA could all have been avoided, had the real estate licensee simply:

- Obtained and reviewed title before listing the property for sale; and
- Sought advice from the managing broker or sought legal advice regarding PH's authority to sell the property and regarding the terms of any trust, before he listed the property for sale.

Re Ireland

The licensee listed a strata property for sale assuming that Mr. X, the person residing in the property, was the registered owner of the property. While Mr. X advised the licensee that his wife had passed away, the licensee did not investigate whether the wife's estate had any interest in the property. The licensee reviewed the first page of the title search provided by his Real Estate Board, which indicated Mr. X as the registered owner of the property. Had the licensee read the complete title search, he would have seen that an insolvency trustee owned half of the property in trust for Mr. X, a bankrupt, and the other half interest in the property in trust for the estate of the deceased wife, a bankrupt.

A buyer then contracted to purchase the property. Mr. X executed the contract as seller. Prior to the sale completing the insolvency trustee discovered the sale and notified the licensee that the property had been listed and sold without the trustee's consent. Fortunately, the sale completed after the buyer agreed to accept the property in "as is" condition.

By Consent Order dated August 14, 2020, the licensee and his personal real estate corporation were ordered to pay a discipline penalty of $8,500, take remedial education and to pay $1,500 in enforcement expenses for:

- Failing to take sufficient care to ensure they were dealing with either the registered owner of the property or a person who had the legal authority to sell the property;
- Failing to act in the best interests of Mr. X, or with reasonable care and skill, when they allowed Mr. X to list and enter into a contract to sell the property without the consent of the insolvency trustee or registered owner on title for the property;
- Failing to recommend that Mr. X obtain legal or independent professional advice about the interest in the property of an "estate" for his deceased spouse; and
- Advertising the property without the consent of both owners or their authorized agent.

ONLY ACCEPT RELIABLE TITLE SEARCHES

A real estate licensee should rely only upon a recent title search obtained from a reliable source such as the Land Title and Survey Authority of British Columbia ("LTSA"), or their brokerage or real estate board who would have obtained the title search from the LTSA. Real estate licensees who rely upon a copy of title provided by sellers risk receiving an incomplete or modified title. A real estate licensee should always carefully and thoroughly read a full copy of an up to date title search.

Re Layden

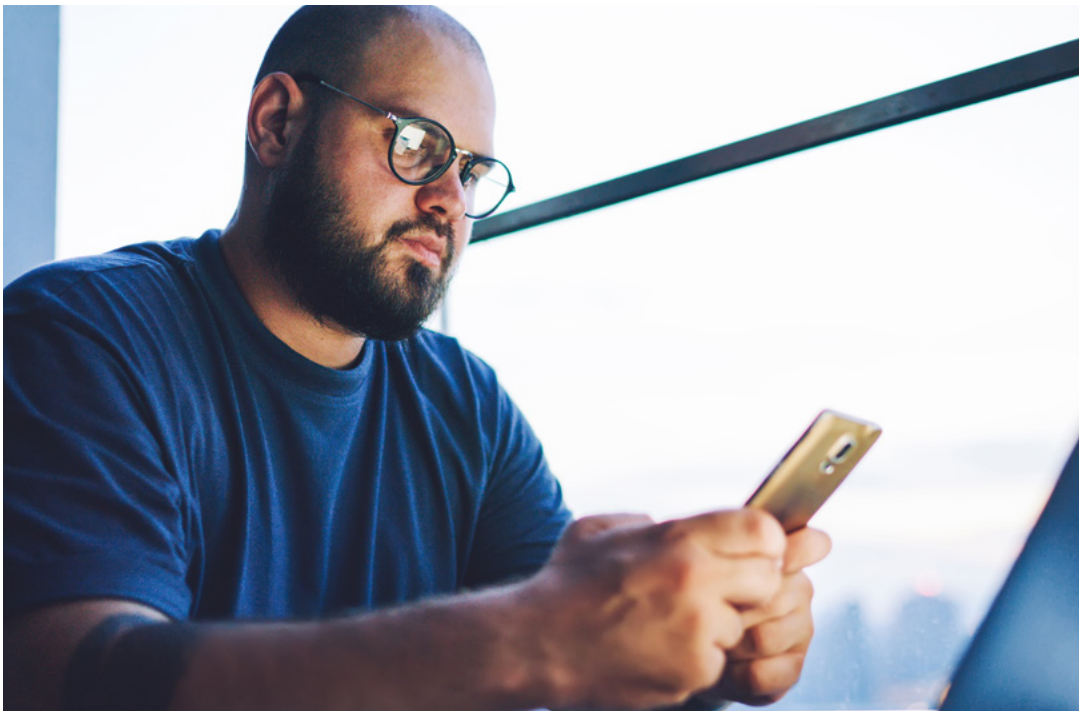
In Re Layden, the licensee acted as a limited dual agent for the buyers and seller in regard to the sale of a property in Clinton, B.C. Instead of obtaining a title search from the LTSA, or from her brokerage or real estate board, the licensee relied upon a title search provided to her by the seller, which was incomplete. The seller provided only one of the two pages of the title search.

The licensee attached the incomplete title search to the contract as page 9 of 9. After the sale completed, the buyers discovered that title to the property was encumbered by seven charges, liens and interests which restricted their ability to develop the property. The licensee had known that the buyers intended to build on the land. Had she obtained a complete title search, she would have seen that encumbrances on title that limited the buyers' ability to build on the land.

By Consent Order, the licensee's licence was suspended for 14 days, and the licensee was ordered to take remedial education and to pay enforcement expenses of $1,500, for failing to:

- Act with reasonable care and skill by not obtaining a current title search from her brokerage and for attaching an incomplete title search to the contract; and
- Take reasonable steps to discover relevant facts about the property, in particular, the charges, liens and interests on title limiting the buyers' ability to build on the property.

Reviewing title may be easy, or incredibly challenging. A real estate licensee ought to recognize the value of obtaining advice from the managing broker or, if necessary, legal advice regarding complex titles to avoid issues that could jeopardize a successful transaction and the ensuing litigation and/or professional misconduct complaints. When acting for a seller, a title report may be obtained from a conveyancing lawyer or notary or, in some parts of BC, from companies offering title review services. When acting for a buyer, the buyer's agent can protect their client by making their offer contingent on the buyer's satisfactory review of title.



Powers of Attorney: Best Practices

This article reviews common issues regarding powers of attorney, and best practices when working with a party acting under a power of attorney in real estate transactions.

LEARNING OBJECTIVES

- Identify common issues regarding powers of attorney; and
- Identify the importance of having a power of attorney validated by a qualified professional (notary or lawyer).

A power of attorney allows an individual, the donor, to grant to another, the attorney, authority to act for the donor in financial and legal matters. Powers of attorney may be general or enduring. 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 to 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. All powers of attorney terminate on the death of the donor.

In land transactions, an invalid power of attorney may frustrate a real estate transaction, resulting in significant financial or legal consequences for the parties to the transaction, and to their real estate licensees. This is especially true in purchase and sale transactions.

The B.C. Land Title Office ("LTO"), administered by the Land Title and Survey Authority of British Columbia ("LTSA"), may reject a power of attorney, even if previously filed at the LTO, for failing to:

- Comply with the provisions of the *Land Title Act*[9], the *Power of Attorney Act*[10] or other relevant legislation (e.g., not signed by the donor, not properly witnessed, not accompanied by a solicitor's certificate if executed outside of B.C., etc.); or
- Comply with LTO practice requirements.

Also, given the risk of fraud, many lenders will not accept powers of attorney that do not meet their specific requirements.

Common Issues

There are many reasons why a power of attorney may be rejected by the LTO. Some common reasons include:

- The donor's name does not exactly match the name on title[11];
- The power of attorney refers to the attorney by name and by an alternate name e.g., "aka"[12];
- The power of attorney has expired as per the instrument or by virtue of section 56 of the *Land Title Act*[13];
- The attorney is not 19 years of age or older[14];
- The power of attorney does not grant authority to the attorney to deal with the property[15];
- The power of attorney has been effectively revoked by the donor[16];
- The general power of attorney is invalid due to the donor's incapacity or death; or
- The event specified as triggering the attorney's authority in an enduring power of attorney is not supported by evidence, (for example incapacity of the donor) or it is not specified in the power of attorney how and by whom the event is to be confirmed.[17]

9 *Land Title Act,* RSBC 1996, c. 250, Part 6: Powers of Attorney

10 *Power of Attorney Act,* RSBC 1996, c. 370

11 www.ltsa.ca/professionals/land-title-practice/common-errors-leading-to-defect/

12 *Ibid*

13 *Supra* footnote 1, s. 56: a general power of attorney is deemed to expire three years after execution unless the power of attorney excludes s. 56

14 *Supra* footnote 1, s. 51(3)(3.1) and supra, footnote 2, section 10, definition of adult

15 *Supra* footnote 2, s. 7

16 *Supra* footnote 2, s. 28(1); supra footnote 1, section 57

17 *Supra* footnote 2, s. 26(2)

Importance of Having Power of Attorney Validated

Because of the risk of a power of attorney being rejected as being invalid, or for not meeting the LTO's practice requirements, British Columbia Financial Services Authority ("BCFSA") recommends that real estate licensees working with a person relying upon a power of attorney in a trade in real estate:

- Obtain a true copy of the power of attorney and read the document to ensure that they are dealing with the person who has the legal authority to deal with the property;
- Consider contacting family members to determine whether they or anybody else holds a power of attorney; and
- Advise their clients to seek the advice of their respective lawyers as soon as possible to ensure the form of power of attorney being used is valid and is acceptable for LTO purposes[18].

The following illustrates what may occur when a real estate licensee does not follow the above recommendations.

Re Hays[19]

In 2018, two licensees in the Okanagan listed property for sale owned by an elderly couple as joint tenants. The 80 year old wife maintained that she had a power of attorney to sell the property on behalf of her husband, who was in a care facility. The licensees viewed correspondence from the wife's lawyer and a power of attorney, both dated 2009. The licensees took pictures of the power of attorney but did not obtain a copy for their file. Neither licensee read the power of attorney, or alternatively, misread it. The licensees did not advise their client to obtain legal advice or independent professional advice regarding the power of attorney.

A contract was entered into with a completion date of April 19, 2018. Prior to completion, the wife's lawyer requested a copy of the power of attorney, which he received about nine days before the scheduled completion date. The lawyer then discovered that not only had the power of attorney expired, but that the husband held power of attorney for his wife, not the reverse. The lawyer attempted to obtain the husband's consent to the sale of the property, but the husband lacked capacity. Consequently, two sales collapsed: the sale of the property, and the wife's purchase of a smaller property. The buyer complained to the Real Estate Council of B.C.

The licensees entered a Consent Order in 2020 whereby the licensees were ordered jointly and severally liable to pay a disciplinary penalty of $20,000, take remedial education and pay enforcement expenses of $1,500 for failing to:

- Take sufficient care to ensure they were dealing with a person who had the legal authority to deal with the property;
- Recommend the wife obtain independent legal advice regarding the power of attorney; and
- Promptly provide all transaction documents to their brokerage and to keep their brokerage informed of the real estate services they were providing.

18 Visit RECBC website at www.recbc.ca

19 Hays (Re) 2020 CanLII 63613 (BC REC)

Administrative Penalties

LEARNING OBJECTIVES

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

- Describe the regulatory function of administrative penalties;
- Explain why the changes were made to the Real Estate Services Rules to expand the administrative penalty framework;
- Recall the four categories of contraventions that are subject to administrative penalties; and
- Describe the process for how administrative penalties are levied.

The Regulatory Function of Administrative Penalties

Administrative penalties are intended to promote compliance with the Real Estate Services Rules. The *Real Estate Services Act* ("*RESA*") states that contraventions of certain provisions of *RESA*, the Real Estate Services Regulation, and the Real Estate Services Rules may be designated as being subject to administrative penalties. Administrative penalties can consist of a monetary penalty, a requirement to complete a specified course of studies or training, or restrictions or conditions on one's licence. Administrative penalties serve as an option for a measured and proportionate response to certain non-compliance, and contribute to a progressive discipline system. Administrative penalties function as an intermediate step between a letter of advisement (warning) and disciplinary action initiated by a notice of discipline hearing. The administrative penalty framework in place is grounded on the principles of public interest focus, transparency, proportionality, consistency, and evidence-based decision-making.

Administrative penalties enhance the flexibility and efficiency process for responding to complaints and non-compliance, speeding up the investigation, and resolution of all kinds of complaints, including those that are not eligible for administrative penalties (e.g., serious, and unethical). Increasing efficiency allows British Columbia Financial Services Authority ("BCFSA") to focus more resources on serious, unethical conduct, thereby enhancing consumer protection and the reputation of the real estate industry.

Managing Broker Focus: Administrative penalties can signal problematic practices by licensees within their specific brokerage and can serve as an opportunity for further training or development of policies and procedures at the brokerage level. Furthermore, the levying of multiple administrative penalties to licensees within a single brokerage, particularly if they relate to the same type of issue, could signal inadequate oversight and supervision by the managing broker, and could form the basis for disciplinary measures against that managing broker. Therefore, managing brokers should pay close attention to the administrative penalties levied within their brokerage.

The Increased Use of Administrative Penalties

Administrative penalties have been an available enforcement option since the enactment of *RESA* in 2005. The maximum administrative penalty was set at $1,000 in 2005, was increased to $50,000 in 2016, and was further increased to $100,000 in 2021. Despite this increase, you will learn shortly that the highest single administrative penalty amount is currently $10,000. However, a total penalty amount could exceed that amount for Category D contraventions, discussed below, where the amount increases on a daily basis until compliance is achieved.

Despite its availability as a regulatory compliance tool, administrative penalties were relatively underutilized in the past. However, on February 1, 2021, following an extensive consultation process, changes were made to the Real Estate Services Rules to expand the administrative penalty framework.

Broadly speaking, the changes to the Real Estate Services Rules:

- Expanded the list of designated contraventions eligible for administrative penalties;
- Updated the administrative penalty amounts; and
- Created four categories of administrative penalties with penalty amounts that increase according to the level of risk of harm to the public.

BCFSA has released an Administrative Process: Administrative Penalties under the *Real Estate Services Act* (the "Process"), which details:

- BCFSA's process for issuing an administrative penalty;
- The criteria that BCFSA will consider when determining whether to issue an administrative penalty for a designated contravention; and
- The reconsideration process.

The process will help to ensure that administrative penalties are applied in the public interest and in a manner that is transparent, fair, and proportionate to the severity of specific contraventions.

The Four Categories of Contraventions

Section 26 of the Real Estate Services Rules sets out four categories of contraventions that may be subject to administrative penalties, which are based on the relative severity and risk of harm to consumers that the contravention would pose.

1. **Category A** contraventions are mostly characterized as business management infractions with a low risk of harm to consumers. Most of the requirements set out in the Real Estate Services Rules in Category A are the responsibility of the brokerage (e.g., record keeping obligations, and brokerage financial statements, accountant's reports, and activity reports). The administrative penalty amount in this category is $1,000 for a first contravention, and $2,000 for a subsequent contravention.

2. **Category B** contraventions are generally characterized as minor matters with no or immaterial harm to consumers, and where imposing an administrative penalty, rather than dismissing the file or disciplinary action initiated by a notice of discipline hearing, is in the public interest. Most of the Real Estate Services Rules in this category are licensee responsibilities to keep either BCFSA or their managing broker informed. The administrative penalty amount in this category is $2,500 for a first contravention, and $5,000 for a subsequent contravention.

3. **Category C** contraventions relate to sections 30 (duties to clients) and 34 (duty to act with reasonable care and skill) of the Real Estate Services Rules. These sections represent the more substantial duties that licensees owe to their clients and are subject to the highest administrative penalty amounts. The administrative penalty amount in this category is $5,000 for a first contravention, and $10,000 for a subsequent contravention.

4. **Category D** contraventions are mostly characterized as minor matters that present a low risk of harm to consumers, but there is an interest in ensuring timely compliance. Therefore, the administrative penalty will increase by $250 per day after the expiry of the Compliance Warning Period, until compliance is achieved. These contraventions relate to both brokerage and individual licensee requirements, with one example being the Part 4, Division 3 – Advertising (sections 40 to 42) requirements. The administrative penalty amount in this category is $1,000 for a first contravention, and $2,000 for a subsequent contravention.

How a Decision to Levy an Administrative Penalty is Made

To levy an administrative penalty, BCFSA will consider a variety of factors such as the public interest, the nature and gravity of the contravention, the licensee's intent and motivation, any attempts by the licensee to correct or remedy the contravention, and the principle of deterrence. Administrative penalties are generally not issued where BCFSA believes that there is evidence to support contraventions involving unethical conduct or indifference as to regulatory compliance. Examples of unethical conduct include dishonesty, threats of retaliation against a person for providing compliance information to BCFSA, fraud, deceptive dealing, and intentional non-compliance with the regulatory framework. Such matters are generally more appropriate for disciplinary action initiated by a notice of discipline hearing and are not eligible for administrative penalties primarily because of their seriousness, the high likelihood of harm to consumers, and the potential for harm to the reputation of the real estate industry.

How Administrative Penalties are Levied

To issue an administrative penalty, BCFSA will provide a notice of administrative penalty to the licensee. The licensee's managing broker will also be notified. The licensee then has 30 days, or a longer period if allowed by BCFSA, to either pay the penalty or deliver a written notice (known as a Reconsideration Request) to BFSA stating that they are disputing the penalty. Every licensee, subject to an administrative penalty, has the right to dispute the penalty through a Reconsideration Request. BCFSA has delegated the authority to reconsider the imposition of administrative penalties to BCFSA's Hearing Officers. When evaluating Reconsideration Requests, the Hearing Officer will consider whether the licensee exercised due diligence to prevent contravention of the Real Estate Services Rules, whether there were any extenuating circumstances, and any other relevant factors. In response to a Reconsideration Request, the Hearing Officer may either cancel the penalty, cancel the penalty and issue a notice of discipline hearing if the Hearing Officer is satisfied that issuing the notice is more appropriate than imposing the administrative penalty, or confirm the penalty.

The Use of Money Received Through Administrative Penalties

Money received by BCFSA on account of administrative penalties may be expended only for the purpose of educating the public, licensees, and other participants in the real estate industry in British Columbia about the operation and regulation of the industry and issues related to real estate and real estate services.

Publication of Administrative Penalties

Administrative penalty decisions are published on BCFSA's website. Where the penalty amount is for $1,000 or less, these decisions are anonymized and may be aggregated.

Conclusion

The expanded use of administrative penalties will help BCFSA meet its objective of enhancing the efficiency and timeliness of its compliance processes. A more efficient process for dealing with complaints will increase consumer confidence in the regulation of real estate licensees, but it can also increase the industry's confidence in the disciplinary system. It is possible that some licensees felt discouraged from reporting the misconduct of other licensees due to the length of time it took to deal with that complaint. Since a key aspect of professionalism is the holding of oneself and others in the profession accountable for their actions, the duty to report misconduct, both as a specific duty within the Real Estate Services Rules and general ethical duty, is an important tool to help build the trust of the profession.

One of the key expectations of the expanded administrative penalty framework is that it will encourage licensees of all licence levels and categories to adopt good risk management and business practices. Licensees should periodically take the time to reflect on their business practices, the key risks they face, and how those risks can be effectively managed, minimized, or eliminated.

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