

File # 13-120 and 14-122

**IN THE MATTER OF THE *REAL ESTATE SERVICES ACT***  
**S.B.C. 2004, c. 42**  
**AND**

**IN THE MATTER OF**

**RODERICK ALEXANDER MACKAY**  
**(009037)**

**AND**

**MAUDE, MACKAY & COMPANY LIMITED**  
**(X009826)**

**CONSENT ORDER**

RESPONDENTS:	Roderick Alexander MacKay, Managing Broker, Maude, MacKay & Company Limited
	Maude, MacKay & Company Limited, Brokerage
DATE OF REVIEW MEETING:	August 31, 2016
DATE OF CONSENT ORDER:	September 6, 2016
CONSENT ORDER REVIEW COMMITTEE:	D. Fimrite, Chair T. O'Grady
ALSO PRESENT:	R.O. Fawcett, Executive Officer G. Thiele, Director, Legal Services J. Gossen, Legal Counsel for the Real Estate Council
PROCEEDINGS:	

On August 31, 2016 the Consent Order Review Committee (the "Committee") resolved to accept the Agreed Statement of Facts, Proposed Acceptance of Findings and Waiver ("ASF") submitted by Roderick Alexander MacKay and Maude, MacKay & Company Limited.

WHEREAS the ASF, a copy of which is attached hereto, has been executed by Roderick Alexander MacKay, Maude, MacKay & Company Limited and on behalf of the Council;

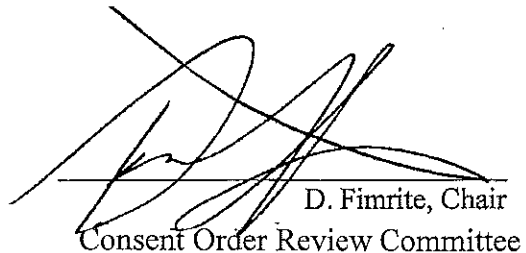
NOW THEREFORE, the Committee having made the findings proposed in the attached ASF, and in particular having found that Roderick Alexander MacKay and Maude, MacKay & Company Limited committed professional misconduct within the meaning of section 35(1)(a) of the *Real Estate Services Act*, orders that:

1. Maude, MacKay & Company Limited and Roderick Alexander MacKay each be reprimanded;
2. Roderick Alexander MacKay pay a discipline penalty to the Council in the amount of \$10,000.00 within ninety (90) days of the date of this Order;
3. Roderick Alexander MacKay register for and successfully complete the Broker's Remedial Education Course, as provided by the Real Estate Division, Sauder School of Business at the University of British Columbia in the time period as directed by the Council;
4. Maude, MacKay & Company Limited and Roderick Alexander MacKay be jointly and severally liable to pay enforcement expenses of this Consent Order to the Council in the amount of \$1,500.00 within sixty (60) days from the date of this Order.

If Maude, MacKay & Company Limited or Roderick Alexander MacKay fail to comply with any term of this Order, the Council may suspend or cancel their licences without further notice to them, pursuant to sections 43(3) and 43(4) of the *Real Estate Services Act*.

Dated this 6<sup>th</sup> day of September, 2016 at the City of Vancouver, British Columbia.

ON BEHALF OF THE CONSENT ORDER REVIEW COMMITTEE

  
D. Fimrite, Chair  
Consent Order Review Committee

Attch.

**IN THE MATTER OF THE REAL ESTATE SERVICES ACT  
S.B.C. 2004, c. 42**

**IN THE MATTER OF**

**RODERICK ALEXANDER MACKAY  
(009037)**

**AND**

**MAUDE, MACKAY & COMPANY LIMITED  
(X009826)**

**AGREED STATEMENT OF FACTS,  
PROPOSED ACCEPTANCE OF FINDINGS AND WAIVER**

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The following agreement has been reached between Roderick Alexander MacKay ("Mr. MacKay"), Maude, MacKay & Company Limited ("Maude, MacKay") and the Real Estate Council of British Columbia (the "Council").

- A. Mr. MacKay hereby consents to an Order to be made pursuant to sections 41 and 43 of the *Real Estate Services Act* that he be reprimanded, that he pay a disciplinary penalty to the Council in the amount of \$10,000.00 within ninety (90) days of the date of this Order herein, and that he, at his own expense, register for and successfully complete the Broker's Remedial Education Course as provided by the Real Estate Division, Sauder School of Business at the University of British Columbia within the time period as directed by the Council.
- B. Mr. MacKay on behalf of Maude, MacKay, hereby consents to an Order to be made pursuant to sections 41 and 43 of the Real Estate Services Act that Maude, MacKay be reprimanded.
- C. Mr. MacKay and Mr. MacKay on behalf of Maude, MacKay agree to be jointly and severally liable to pay enforcement expenses of this Consent Order to the Council in the amount of \$1,500.00 within sixty (60) days from the date of the Order herein.
- D. Mr. MacKay and Mr. MacKay on behalf of Maude, MacKay further consents to an Order that if he fails to comply with any of the terms of the Order set out above, a Discipline Hearing Committee may suspend or cancel his licence and the licence of Maude, MacKay without further notice to him or it pursuant to section 43(3) and 43(4) of the *Real Estate Services Act*.
- E. As a basis for this Order, Mr. MacKay and Maude, MacKay acknowledges and agrees that the facts set forth herein are correct:

**AGREED STATEMENT OF FACTS, PROPOSED ACCEPTANCE OF FINDINGS AND WAIVER**

1. Mr. MacKay was at all relevant times licensed as managing broker with Maude, MacKay. Mr. MacKay's licensing history is as follows:

<u>Start Date</u>	<u>End Date</u>	<u>Licensing History</u>	<u>Licence Level</u>	<u>Licence Category</u>
2005/12/23	Present	Maude, MacKay & Company Limited (X009826)	Managing Broker	Trading, Rental, Strata
1995/06/30	2005/12/23	Maude, MacKay & Company Limited (X009826)	Managing Broker	Trading, Rental
1993/06/30	1995/06/29	Maude, MacKay & Company Limited (X009826)	Associate Broker	Trading, Rental
1982/05/26	1993/06/29	Maude, MacKay & Company Limited (X009826)	Managing Broker	Trading, Rental
1980/06/30	1982/05/26	Tourigny, Hall & Associates	Managing Broker	Trading, Rental
1978/06/01	1980/06/30	Tourigny, Hall & Associates	Representative	Trading, Rental

3. Maude, MacKay was at all relevant times licensed as a brokerage.
4. Maude, MacKay's licensing history is a follows:

<u>Start Date</u>	<u>End Date</u>	<u>Licensing History</u>	<u>Licence Level</u>	<u>Licence Category</u>
2005/12/23	Present	Maude, MacKay & Company Limited (X009826)	Brokerage	Trading, Rental, Strata
1982/05/26	2005/12/23	Maude, MacKay & Company Limited (X009826)	Brokerage	Trading, Rental

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5. Maude, MacKay (the "Brokerage") entered into a strata management service agreement dated January 1, 2008 with Strata Plan NW3XX ("NW3XX"). Mr. MacKay was the strata manager for this client.

## **AGREED STATEMENT OF FACTS, PROPOSED ACCEPTANCE OF FINDINGS AND WAIVER**

6. In July 2012, issues came to the attention of the strata council in relation to the reporting by the Brokerage of the balance in the contingency Reserve Fund.
7. Mr. MacKay provided a Form B dated November, 2011, to the owners of NW3XX, which stated that the amount of money being held in the Contingency Reserve Fund for NW3XX was "\$65,000 approx." The Balance Sheet for that same month noted that the amount of actual cash held in the Contingency Reserve Fund was only \$25,579.34. In November 2011, the amount of \$76,422.20 was a receivable on the account for uncollected strata fees.
8. Form B's provided by the brokerage for January, March, June, July, and August of 2012, also stated that the amount held in the Contingency Reserve Fund was "\$65,000 approx." The amount of cash actually held in the account for those months, as stated on the monthly Balance Sheet, was \$29,045.00, \$7,510.66, \$885.91, \$4,351.57, and \$7,817.23 respectively. In each of those months, the receivables if collected would have resulted in a balance greater than the stated amount.
9. Minutes from the December, 4<sup>th</sup>, 2012, Strata Council meeting note that the balance amount reported for the Contingency Reserve Fund on these Form B's was not the actual cash balance, but rather a "balance based on generally accepted accounting principles".

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10. On March 1<sup>st</sup>, 2012, a loan for \$25,000 was transferred from the Contingency Reserve Fund to the Operating Account of NW3XX to pay for insurance. There was no written authority from the Strata Council authorizing this transfer of funds from the Contingency Reserve Fund.
11. On May 1<sup>st</sup>, 2012, a loan for \$5,000 was transferred from the Contingency Reserve Fund to the Operating Account of NW3XX to pay for insurance. There was no written authority from the Strata Council authorizing this transfer of funds from the Contingency Reserve Fund.
12. On June 13<sup>th</sup>, 2012, a loan for \$12,000 was transferred from the Contingency Reserve Fund to the Operating Account of NW3XX to pay for "general expenses". There was no written authority from the Strata Council authorizing this transfer of funds from the Contingency Reserve Fund.
13. For each of the payments on March 1, 2012, May 1, 2012, and June 13, 2012, the transfer of the funds was by cheque co-signed by the then Strata Council President.
14. Between January 1<sup>st</sup>, 2012, and July 18<sup>th</sup>, 2012, Mr. MacKay used his personal Visa to pay for NW3XX expenses on six occasions. These transactions totaled \$23,635.45 for which Mr. MacKay was reimbursed. Mr. MacKay did not have written authorization from the Strata Council to use his personal Visa to pay for

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strata related expenses. Mr. MacKay noted that he did receive a benefit for using his own personal Visa in the form of travel reward points.

- 15. On October 10<sup>th</sup>, 2013, Mr. MacKay was asked by the Strata Council to remove a sentence in his manager’s report for the Annual General Meeting that stated: “We have been instructed by Council to reduce the Wages-Caretaker, Wage-Assistant and Wages- Casual but have not had any input in this regard”. While this sentence was removed from the report, a similar sentence was added in its place without the approval of the Strata Council. This sentence stated: “In the budget Council is proposing a reduction in the Wages-Caretaker, Wages- Assistant and Wages-Casual Categories.”
- 16. The Brokerage did not prepare and retain monthly reconciliations of the Contingency Reserve Fund relating to the books and records of NW3XX.

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- 14. On January 1, 2008 Maude, MacKay entered into a strata management service agreement (“**Version 1**”) with NW3XX. Mr. MacKay was the strata manager for NW3XX.
- 15. In November, 2012 the Council conducted Office and Records Inspection of the brokerage. Item #5 of the Office and Records Inspection Report sent to Mr. MacKay stated “*Section 5-1(6) of the Council Rules states that any amendment of or addition to the terms of a service agreement must be in writing and signed by the client and an authorized signatory of the brokerage.*” Mr. MacKay was made aware of this requirement of the Council Rules in relation to service agreements and any additions or changes.
- 16. On August 21, 2013 K.V. the Strata Council President for NW3XX signed a strata management service agreement (“**Version 2**”) with Maude, MacKay back dated to January 1, 2013, but signed and published in the Strata Council Minutes. This was the first written amendment to the service agreement originally signed on January 1, 2008.
- 17. In August of 2014 a Council member asked Mr. MacKay to provide him with a current copy of the contract, which Mr. MacKay provided (“**Version 3**”). This version differed in significant ways from both Version 1 and Version 2.
- 18. On September 16, 2014, V.S., the treasurer for the Council provided to the Council both copies of the service agreements he had in his possession. Included were the copy from August 2013, back dated to January 1, 2013, Version 2, and the copy recently provided by Mr. MacKay, Version 3, also back dated to January 1, 2013.

The following are the differences between the three services agreements;

Service	Agreement	Version 1	Version 2	Version 3
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Version			
Management fee Payable	\$1,797.75	\$1,917.60	\$1,797.75
Clause 4(p) (the Agent will retain and hire, at the Strata's expense the Resident Manager)	Not included	Not included	Included
5(h) Schedules	Not Included	Includes A, B	Includes A, B, C and D
Strata Council Signatures of Execution of Agreement	B.B. and L.G.	B.B. and K.V.	B.B. and C.C.
Schedule A	Dated Jan 1/08	Dated Jan 1/08	Dated Jan 1/13
Schedule A Signatures on every page	No Signatures	No Signatures	3 initials on every page
Schedule B Signatures	No Signatures	No Signatures	3 initials on every page
Schedule C Signatures	No Signatures	No Signatures	3 initials on every page

19. On September 30, 2014 V.S. asked again for a copy of the current service agreement; Mr. MacKay provided a copy of **Version 2**.

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20. On October 14, 2014 the Council requested a copy of the current service agreement; Mr. MacKay provided a copy of **Version 3**.
21. Mr. MacKay acknowledged that the January 1, 2013 service agreement, **Version 2**, was signed by the Council at the August 21, 2013 Strata Council meeting and back dated to January 1, 2013. It was discovered, following the execution of the service agreement, that it did not include the additional clauses; those being clause 4(p) and Schedule D.
22. Following the Annual General Meeting held on October 30, 2013, Mr. MacKay had the newly elected Strata Council sign another service agreement, still dated January 1, 2013, that included clause 4(p) and Schedule D. Mr. MacKay stated that the management fee was incorrectly recorded as \$1,797.75. Mr. MacKay stated that he consulted with legal counsel regarding the issue of back dating the service agreement. Mr. MacKay believed that in a situation where the budget for the amount had been approved, the service agreement could be amended to reflect that date.
23. At the Council meeting held November 17, 2014, Mr. MacKay had another service agreement signed by the Council, back dated to November 1, 2013, ("**Version 4**"), which incorporated a management fee of \$1,917.60.

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24. On December 22, 2014 Mr. MacKay provided a ledger for the management fees collected by the Brokerage for the period of September 1, 2007 to January 1, 2014, reporting management fees collected as follows;

Management Contract Version	Date	Management Fee Charged
Version 1	January 1/08 - December 31/08	\$1,797.75
Version 1	January 1/09 - December 31/09	\$1,809.52
Version 1	January 1/10 - December 31/10	\$1,816.96
Version 1	January 1/11 - December 31/11	\$1,816.96
Version 1	January 1/12 - December 31/12	\$1,917.18
Version 2	January 1/13 - December 31/13	\$2,137.82

25. Mr. MacKay advised the Real Estate Council that the management fee increases were approved with the annual budget being approved by the owners. He did not ensure that each increase in management fees was incorporated into a separate written addendum signed by the authorized Council signatories.
26. The current president of the NW3XX, Bridget Belliveau has confirmed that she was the strata president for NW3XX during the period of time when these matters arose and consulted with Mr. MacKay. She attributes some of the issues to her own "overfamiliarity with the procedure".

**F. Proposed Acceptance of Findings and Waiver**

1. Based on the Agreed Statement of Facts as outlined herein, and without making any admissions of liability, Roderick Alexander MacKay and Maude, MacKay & Company Limited is prepared to accept the following findings if made against him by the Council's Consent Order Review Committee:

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- (a) Mr. MacKay committed professional misconduct within the meaning of section 35(1)(a) of RESA in that he:
- (i) contravened section 25 of RESA and sections 3-1(3)(a) and 8-1(1) of the Council Rules when he, as managing broker, failed to ensure that his brokerage prepared and maintained proper financial records for Strata Plan NW3XX ("NW3XX") when it was reported that the balance for the Contingency Reserve Fund ("CRF") on the monthly financial statements and Form Bs was greater than the amount actually held in trust;
  - (ii) contravened sections 3-1(3)(a) and 8-2(c) of the Council Rules in that he, as managing broker, failed to ensure that his brokerage prepared and retained monthly reconciliations for the CRF of NW3XX in the monthly financial statements;



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- (iii) contravened section 3-3(b) of the Council Rules and section 30(1) of RESA by failing to act in accordance with the lawful instructions of his clients when, on three separate occasions, he transferred funds out of the CRF as a loan to the Strata's general account to pay for Strata insurance without first obtaining the written authority of the Strata Council approving such a withdrawal from the CRF;
  - (iv) contravened sections 3-3(c) of the Council rules in that he acted outside his scope of authority and failed to obtain written authorization from the Strata Council by paying Strata Corporation expenses from his personal Visa account, subsequently reimbursing himself from Strata Account funds; and
  - (v) contravened section 3-3(b) of the Council Rules by failing to act on the instructions of his client, the Strata Council of NW3XX, when NW3XX asked him to revise his manager's report for the Annual General Meeting Notice for October, 2012, but instead distributed the Notice without the requested revisions having been made.
- (b) Maude, MacKay & Company Limited committed professional misconduct within the meaning of section 35(1)(a) of RESA in that it:
- (i) contravened section 25 of RESA and section 8-1(1) of the Council Rules when it failed to prepare and maintain proper financial records for NW3XX when it was reported that the balance for the Contingency Reserve Fund on the monthly financial statements and Form Bs was greater than the amount actually held by the brokerage in trust; and
  - (ii) contravened section 8-2(c) of the Council Rules when it failed to prepare and retain monthly reconciliations for the CRF of NW3XX in the monthly financial statements.

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- (a) Mr. MacKay committed professional misconduct within the meaning of section 35(1)(a) and (d) of RESA in that he:
- (i) contravened section 5-1(6) and section 3-3(c) of the Council Rules in that he failed to put in writing and obtain signatures from his client, NW3XX, approving amendments to the service agreement when he charged NW3XX management fees that did not correspond with the fee structure set out in the Service Agreement;
  - (ii) contravened sections 30(1) and (2) of RESA in that he improperly withdrew money from the trust account for NW3XX when he withdrew increased amounts of remuneration for management fees

**AGREED STATEMENT OF FACTS, PROPOSED ACCEPTANCE OF FINDINGS AND WAIVER**

without a written agreement signed by the Strata Council authorizing those fee increases;

(iii) contravened section 35(1)(a) of RESA in that he charged NW3XX higher management fees than what was authorized in the Service Agreement, and then subsequently had members of the Strata Council for NW3XX sign amended versions of the Service Agreement that retroactively granted him the authority to charge those higher management fees; and

(iv) contravened section 35(1)(d) of RESA in that he demonstrated incompetence in carrying out his role as Strata manager for NW3XX when he had members of the Strata Council for NW3XX sign amended Service Agreements in 2013 and 2014, the first failing to include provisions recommended by a Council audit and containing an amount for management fees that did not reflect the amount the brokerage was charging, and the second and third also containing an amount for management fees that did not accurately reflect the amount that the brokerage was charging NW3XX.

(b) Maude, MacKay & Company Limited committed professional misconduct within the meaning of section 35(1)(a) of RESA in that it:

(i) contravened section 5-1(6) and section 3-3(c) of the Council Rules in that it failed to put in writing and obtain signatures from the client, NW3XX, approving amendments to the service agreement when it charged NW3XX management fees that did not correspond with the fee structure set out in the Service Agreement; and

(ii) contravened sections 30(1) and (2) of RESA in that it improperly withdrew money from the trust account for NW3XX when it withdrew higher amounts of remuneration for management fees without a written agreement signed by the Strata Council authorizing those fee increases.

2. Mr. MacKay and Maude, MacKay & Company Limited hereby waive their right to appeal pursuant to section 54 of the *Real Estate Services Act*.
3. Mr. MacKay and Maude, MacKay & Company Limited acknowledge that they have a right to seek independent legal advice before signing this Agreed Statement of Facts, Proposed Acceptance of Findings and Waiver.
4. Mr. MacKay and Maude, MacKay & Company Limited acknowledge and are aware that the Council will publish the Consent Order and penalty herein in its Report from Council newsletter, on the Council's website, and on CanLII, a website for legal research.

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5. Mr. MacKay and Maude, MacKay & Company Limited acknowledge and are aware that the Superintendent of Real Estate has the right, pursuant to section 54 of the *Real Estate Services Act*, to appeal any decision of the Council, including this Agreed Statement of Facts, Proposed Acceptance of Findings, and Waiver and Consent Order.
  
6. The Agreed Statement of Facts and Proposed Acceptance of Findings contained herein are made for the sole purpose of resolving a complaint being considered by the Council and for that purpose only. Such agreed statement of facts and proposed acceptance of findings cannot be used in any civil proceedings.

  
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Jessica S Gossen, Legal Counsel  
Real Estate Council of British Columbia

As to Part B only (Agreed Statement of Facts)

Dated 26 day of August, 2015

  
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Roderick Alexander MacKay

As to Parts A, B, C, D, E, and F (proposed penalty, Agreed Statement of Facts, Proposed Acceptance of Findings and Waiver)

Dated 25<sup>th</sup> day of August, 2016

  
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Roderick Alexander MacKay on behalf of  
Maude, MacKay & Company Limited

As to Parts B, C, D, E, and F (proposed penalty, Agreed Statement of Facts, Proposed Acceptance of Findings and Waiver)

Dated 25<sup>th</sup> day of August, 2016