nova scotia real estate COMMISSION

Discipline Newsletter

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Inside this issue

About this newsletter

The Commission Discipline Newsletter is published twice a year and contains a selection of discipline cases the Commission investigated and presented to the Complaint Review Committee for review, discussion and decisions.

About the Commission's discipline process

The Nova Scotia Real Estate Commission is responsible for the administration of the Real Estate Trading Act and the Commission By-Law. Part of that responsibility is dealing with complaints from the public concerning a brokerage or an Industry Member.

The Commission investigates these complaints and if there are grounds to support that a breach of the Act or By-Law has occurred, then charges are laid against the Industry Member. At this point the Industry Member may agree to a Settlement Agreement, which includes specific charges and penalties. If they do, this Agreement is signed off by the Industry Member and the Registrar. It then goes to the Complaint Review Committee for review and approval.

If the Industry Member does not agree with a Settlement Agreement then the matter is referred to a full discipline hearing. After the Commission's and witnesses' evidence has been examined and cross examined at a hearing, the Hearing Panel will decide whether or not the Industry Member is guilty of any of the charges. If they are found guilty of any of the charges there is then an opportunity for both the Commission and the Industry Member to speak to appropriate penalties.

An Industry Member has the right to appeal the decision of the Hearing Panel to the Supreme Court of Nova Scotia and further to the Nova Scotia Court of Appeal, should they wish to and if there are grounds to do so.

Types of complaints

These cases are provided as learning opportunities for the industry and to highlight the consequences when a consumer's best interests are not protected. The complaints fall into the following categories:

- Failure to discover facts pertinent to the property
- Failure to properly document cash backs
- Failure to treat all parties fairly
- Failure to disclose information

These cases do not cover all the issues involving complaints investigated by the Commission, but they are representative of the more serious issues.

nova scotia real estate COMMISSION

Failure to discover facts

Duty of care

Real estate brokerages owe a duty of care to clients as well as a limited duty of care to customers. Industry Members must conduct themselves in accordance with a standard of care expected of knowledgeable practitioners. Failure to do so exposes brokerages and Industry members to liability for professional negligence as well as the Commission discipline process.

The standard of care is based on how ordinary and prudent members of the industry would conduct themselves under similar circumstances. The standard expected is not of perfection, but of reasonableness according to how knowledgeable, well-trained practitioners would act.

It is expected that all Industry Members know how to accurately measure a property. It is also expected that all Industry Members exercise due diligence in discovering the zoning of the properties they list.

By-Law 702, Article 10—The Industry Member has an obligation to discover facts pertaining to every property for which the Industry Member accepts an agency which a reasonably prudent Industry Member would discover in order to fulfill the obligation to avoid error, misrepresentation, or concealment of pertinent facts. The Industry Member shall disclose, in writing whenever possible, any known material latent defects to their clients or other Industry Members involved in a transaction.

First case overview

An Industry Member listed a property as a duplex. The advertisements suggested that the owner could live in one unit and rent the other. After an offer was accepted and the building inspection was complete, the buyer's lawyer checked with the municipality and discovered that only a single-unit dwelling was authorized for the property. After the seller was not able to have the property rezoned by the closing date, the transaction collapsed and a complaint was filed with the Commission.

Results

The Complaint Review Committee found the Industry Member breached By-Law 702, Article 10 for failing to verify that there were two legal units in the building.

Penalty

The Industry Member was fined $400.

Second case overview

An Industry Member listed a condo that they had previously listed and sold when the property changed hands eight years earlier. When the Industry Member completed the listing cut, they relied on both measurements from the listing cut eight years earlier and measurements the sellers used when they advertised the property as a private sale prior to listing with the Industry Member. A couple months after the property closed, the buyers discovered that the square footage was less than the listing cut had advertised and filed a complaint with the Commission.

Results

The Complaint Review Committee found the Industry Member breached By-Law 702, Article 10 for failing to take prudent steps to verify the square footage of the property when completing the listing documents.

Penalty

The Industry Member was fined $400.

nova scotia real estate COMMISSION

Failure to discover facts (continued)

Disclaimers don't hold up

Including a disclaimer on listing cuts stating that all measurements are to be confirmed by the buyer, or something to that effect, is very common. However, just because Industry Members use a disclaimer, it does not absolve them of their responsibilities to comply with the Real Estate Trading Act, the Commission By-Law and the obligation to provide duty of care. If you are charged with breaching By-Law 702, Article 10, and it is proven that you failed to verify the accuracy of information on a listing cut; you will be found guilty and fined, regardless of any disclaimers.

Protect your buyers' interests

There is an important lesson to be learned from this case by purchasers of houses or condominiums, whether resale or purchased from plans and to be built in future:

Make it clear in the purchase offer that the stated size is warranted to be correct, or insert a provision in the offer that the purchase price will be reduced in the event the size of the house or the land beneath it turns out, before or after closing, to be overstated.

Case 3 overview

An Industry Member listed a property as being 2951 square feet of living space. The statement "all information is to be verified by the purchaser" was included on the listing cut. After the property was purchased, the new owners discovered the square footage was actually 2486, some 465 square feet smaller than advertised. The new owners filed a complaint with the Commission. During the investigation, it was discovered that the Industry Member's assistant made a calculation error when adding up the square footage for the listing cut.

Results

The Complaint Review Committee found the Industry Member breached By-Law 702, Article 10 for failing to take prudent steps to verify the square footage of the property when completing the listing documents. That it was the assistant's error was considered irrelevant because as the listing Industry Member, the onus is on the Industry Member to ensure the accuracy of the listing. The disclaimer also had no bearing on the decision because a disclaimer does not relieve an Industry Member of their responsibility to ensure that all the information is accurate.

Penalty

The Industry Member was fined $400.

What were they thinking?

The following statements are Industry Member responses to Commission investigations. Some have been paraphrased to ensure anonymity.

"When asked to describe their knowledge of material latent defects, the Industry Member (licensed for 20+ years) said that they were not familiar with that term."

"The floor from above seemed solid. I think we all jumped on it at one point or another."

"I did originally measure the unit, although not from "stem to stern", i.e. the halls, closets, baths, laundry, foyer, etc."

"When the seller commented that they could have easily been robbed during the four hours that the house was unlocked, the Industry Member (who left the house unlocked after a viewing) remarked 'that's why we pay home owners insurance.'"

nova scotia real estate COMMISSION

Failure to properly document cash backs

About cash backs

The October 15, 2008, change to government-backed (CMHC insured) mortgages that limits the loan-to-value ratio to 95 per cent resulted in the elimination of most if not all lender supplied cash backs. In the two years since then, the Commission has seen a large increase in seller-to-buyer cash backs. Seller-to-buyer cash backs are an acceptable practice, as long as full disclosure is made to the lender and it is clearly documented in the Agreement of Purchase and Sale.

Regardless of the Industry Members' actual intentions, the perception of fraudulent activity among the other parties to the transaction led to complaints filed with the Commission and subsequent investigations. To avoid this type of issue, Industry Members who wish to facilitate seller-to-buyer cash backs must ensure that the cash back addendum is presented with, and recorded on, the Agreement of Purchase and Sale. This makes the cash back transparent to all parties to the transaction, including the lender.

First case overview

A broker contacted the Commission regarding concerns about a couple of offers that were submitted to the brokerage by another brokerage. The broker questioned whether the offers were an attempt to conceal large cash backs from the lender by intentionally keeping the cash back out of the body of the Agreement of Purchase and Sale by using amendments that would not be seen by the lender. The offers were prepared and submitted by a broker that was representing the same buyers for two different income properties.

Results

The Complaint Review Committee found that the Industry Member sought to obtain large cash backs for their buyer clients in their attempted purchase of income properties. The Committee believes that the Industry Member sought to conceal this from lenders by intentionally keeping the cash back out of the body of the Agreement of Purchase and Sale by using simultaneous amendments that would not be provided and therefore not be reviewed by lenders. The Industry Member was charged with violating Commission By-law 702, Article 11.

Penalty

The Industry Member was fined $2000.

Second case overview

The Commission received a complaint from a buyer who claimed that the broker who represented them was fraudulent in preparing purchase agreements. The broker represented both the seller and the buyer in the transaction, which eventually terminated. During the course of the investigation, it was discovered that the buyer's broker prepared two separate amendments to the original Agreement of Purchase and Sale. One amendment was to increase the purchase price by $20,000 and a second amendment was to give $20,000 cash back at closing. Both amendments were signed at the same time and expired at the same time, which raised the question of why weren't they both included as one amendment?

Results

The Complaint Review Committee found that the broker sought to obtain a large cash back for the buyer clients in their attempted purchase of a property. The Committee also took the position that the broker sought to conceal this from the lender by using simultaneous amendments that would not be seen by the lender. The Industry Member was charged with violating Commission By-law 702, Article 11.

Penalty

The Industry Member was fined $2000.

nova scotia real estate COMMISSION

Failure to treat all parties to the transaction fairly

When transaction brokerage is inappropriate

Transaction brokerage is not an agency relationship, it is one of being a facilitator. Under transaction brokerage, buyers and sellers are customers of the brokerage, not clients, and are entitled to impartiality, reasonable care and skill in carrying out services, providing accurate information and following strict procedures regarding disclosure and non-disclosure. It is highly inappropriate for Industry Members to enter into transaction brokerage under the following circumstances.

Family, colleagues, and self

If you represent a family member or a business associate, the personal relationship you have with that person may cause others to question your ability to be impartial. Likewise, you cannot represent yourself impartially. Regardless of how well you handle a transaction brokerage situation, a personal relationship with one party of the transaction or self representation leaves you and your conduct open to speculation by the other party.

Ongoing agency relationship

Any time you have an ongoing agency relationship with a client; do not enter into a transaction brokerage relationship with them. For example, if you have an agency relationship with a builder, a developer, or a repeat seller, you cannot be perceived to act impartially towards opposing parties to a transaction.

Novice seller or buyer

When representing an inexperienced seller or a first-time home buyer, entering into a transaction brokerage agreement is doing a huge disservice to that person. Novice sellers and buyers need unencumbered representation—they need your help, advice and support—services that cannot be provided under transaction brokerage.

First case overview

During a yearly brokerage audit, the Compliance Auditor identified that a brokerage improperly engaged in transaction brokerage for the third consecutive year. The brokerage has an ongoing agency relationship with a builder, representing them on large building developments. The brokerage received reprimand letters for the previous two years, and in response, had acknowledged in writing that they had addressed the issue of improper transaction brokerage and put policies in place to ensure that it didn't happen again.

Results

As a result of the third audit, the brokerage was charged with violating By-Law 702, Article 2 for failing to deal fairly with all parties to the transaction.

Penalty

The brokerage was fined $500.

Second case overview

The Commission received a complaint from a buyer who claimed an Industry Member had misrepresented aspects of the property they listed and which the buyer subsequently purchased. The Industry Member represented both the buyer and the seller in the transaction. The buyer was a first-time home buyer who was planning on flipping the property and relied on the Industry Member's expertise. The buyer asked the Industry Member if a property inspection was needed. The Industry Member told the buyer that they had a right to an inspection, but that the inspectors in that county weren't very good and wouldn't discover anything that the Industry Member hadn't already told them. The buyer took this advice and did not obtain a building inspection. Several months of renovations later, the buyer discovered that the house was structurally deteriorated and estimates to fix the foundation ranged from $25,000-$35,000. It was at this time that the buyer submitted the complaint.

Results

The Complaint Review Committee found the evidence did not support that the Industry Member was aware of the structural deterioration. However, they did find that the Industry Member influenced the buyer not to obtain a building inspection. In transaction brokerage, the Industry Member is to be an impartial facilitator and as such, cannot provide advice to either party in the transaction. As well, the Industry Member never should have entered into transaction brokerage with a first time home buyer. The Industry Member was charged with violating By-Law 702, Article 2 for failing to deal fairly with all parties to the transaction.

Penalty

The Industry Member was fined $400.

nova scotia real estate COMMISSION

Failure to treat all parties to the transaction fairly (continued)

Disclose information

This obligation is fundamental to all agency relationships and underlies the basic responsibility to protect and promote the client's interest. Disclosure duties are found under general obligations and fiduciary obligations. Further, disclosure is also required under statutory obligations.

Industry Members must disclose:

Information pertinent to the relationship between the Industry Member and the principal.

Information pertinent to the transaction that the Industry Member has been engaged to negotiate.

A request to extend the closing date is a request that extends an Industry Member's payday. However, the choice to become an Industry Member comes with the responsibility to operate under the authority of the Act, By-Law, and Policies and Procedures. By signing a Seller or a Buyer Brokerage Agreement, an Industry Member commits to an agency relationship and all fiduciary duties that arise from that relationship. The fundamental principal of agency is to promote and protect the interests of the client and to treat all parties to the transaction fairly; when a commission cheque is received is always secondary.

Third case overview

The Commission received a complaint from sellers who claimed that the Industry Member representing the buyers in the sale of their house failed to pass on their request to extend the closing date on their property. The sellers experienced delays on the construction of their new house and wanted to extend the closing to give them time to have the house finished. When contacted by the seller's Industry Member over the phone, the buyer's Industry Member stated that the buyers would not extend the closing date. On the day of closing, the buyers and sellers met and the sellers told the buyers they were upset because they had nowhere to go. The buyers told the sellers that they would have moved the closing date because they weren't planning on moving in for several months, but they were never contacted about moving the closing date.

Results

The buyer's Industry Member had a duty to disclose the seller's request to the buyers. Whether they would have agreed or taken any further action is unknown, but they should have been notified. The buyer's Industry Member was charged with violating Commission By-Law 702, Article 2 for failing to treat all parties fairly.

To promote the best interests of their client, the seller's Industry Member should have followed through with the seller's request by submitting a written proposed amendment. The buyer's Industry Member was charged with violating Commission By-Law 702, Article 2 for failing to promote the interests of their client.

Penalty

Both Industry Members were fined $400.

Don't be a late Lucy!

Industry Members may not realize it as such, but when they don't complete their continuing professional education (CPE) credits, they incur severe disciplinary action, i.e. a licence suspension. License suspensions can be extremely costly. Your listings will belong to another Industry Member at your brokerage, as will any buyers you have under contract, and you cannot solicit new clients. Additional courses are provided for those who don't obtain their CPE credits within the licensing cycle, but they cost triple what they would normally. The worst-case scenario is for a broker, resulting in the brokerage shutting down. CPE credits take a maximum of three days to complete, is getting to do what you want for those three days worth the consequences?

nova scotia real estate COMMISSION

Failure to treat all parties to the transaction fairly (continued)

Raising the Bar course raises everyone's bar

In the 2009/2010 licensing cycle, the broker's mandatory course is entitled "Raising the Bar." This course is intended to inform the participants on what resources are available to them, as well as address the most common administration and supervision problems experienced in real estate brokerages. This course was implemented because of the diverse broker-education background of Industry Members with broker designations. Of the 212 brokers overseeing brokerages in the province, 113 have no formal broker-specific education. The goal of this course is to clearly communicate the Commission's expectations of broker-level Industry Members.

This will allow the Commission to raise the standards of practice in the industry to where they should be, as well as act as a cutoff to the many excuses often made when issues arise.

When the 2009/2010 licensing cycle ends on June 30th, all brokers in the province will have taken the Raising the Bar course and as a result, will be held to a higher standard. For example, brokerages engaging in inappropriate transaction brokerage relationships, like the one described in this newsletter, will no longer have three consecutive unsatisfactory audits before being fined. Starting with the 2010/2011 brokerage audit cycle, Industry Members who enter into transaction brokerage inappropriately, and their brokers, will face disciplinary action.

Fourth case overview

The Commission received a complaint from a member of the public who was concerned that an elderly lady had been taken advantage of in a real estate transaction on the sale of her house. The investigation revealed that the elderly lady in question listed her house with a selling team made up of two Industry Members. Before the property was listed on MLS®, one of the Industry Members from the selling team placed an offer on the property. The offer indicated that the buyer and the seller consented to a transaction brokerage relationship. Clause 5 of the Residential Schedule contained a disclosure that one of the purchasers was also the listing Industry Member for the property and that the intended use for the property was as a primary residence.

Results

The Complaint Review Committee found there was insufficient evidence to support that the Industry Member took advantage of the seller. Concerns remain however, due to the fact that the offer was made prior to the property being activated on MLS®. The offer was also low and there was no commission reduction.

On the matter of agency, the buying Industry Member was clearly in conflict of interest and never should have entered into a transaction brokerage agreement. As a buyer, the Industry Member could not act, or be perceived to act, as an impartial facilitator in the transaction. When The Industry Member made a decision to offer on the property, the seller should have been immediately informed that the brokerage could no longer represent her. Both Industry Members on the selling team should have recommended that the seller obtain independent representation.

Penalty

Both Industry Members were fined $1000.

nova scotia real estate COMMISSION

Seller wronged on right-of-way

Case overview

A seller hired a brokerage to sell a piece of land and obtained legal representation. The sale was to include an 80-foot right-of-way, which was explicitly and repeatedly requested by the seller. The seller's lawyer later informed her that he would be representing both parties because it was a simple "as is" sale. All documentation pertaining to the transaction was handled between the Industry Member and the lawyer, with the assumption that the lawyer would perform all due diligence necessary on the seller's behalf and the seller would just sign documents as directed. The transaction completed.

When the listing was prepared, the salesperson, who had never dealt with a right-of-way, before, asked the broker for advice. The broker told him to include it on the listing. The broker represented the buyer in an offer to purchase. The salesperson asked the broker if the right-of-way should be included on the Agreement of Purchase and Sale. The broker said it wasn't necessary because everyone involved was aware of it and the lawyer the one responsible for dealing with it.

After contacting the lawyer and the salesperson numerous times over the following six months, the seller still did not have paperwork confirming the right-of-way. Because the seller was preparing to sell off another plot of land, the seller requested the paperwork on the right-of-way from the lawyer. The lawyer replied that there was a problem because the buyers had dug a well near the right-of-way and refused to sign the documents.

When the salesperson was contacted about it, the salesperson replied that it was everybody's fault. The brokerage missed it in the submitted documents, the seller signed the documents, the buyers put a well near where they knew the right-of-way was supposed to be, and the lawyer didn't pick up on it.

Results

The broker and the salesperson both acknowledge that the seller wanted an right-of-way as part of the deal. The salesperson claims that the broker was asked if it should be addressed in the Agreement of Purchase and sale. The broker denies that this conversation occurred. However, knowing that the seller wanted a right-of-way, the broker should have ensured that it was addressed properly by the salesperson. The broker did not do so. This was a violation of By-Law 704 (c) *"ensuring there is an adequate level of supervision for associate brokers and salespeople within the brokerage and for employees who perform duties on behalf of the brokerage."* The Industry Member should have covered this issue with the seller's lawyer to ensure it was addressed. The Industry Member did not do so. This was a violation of By-Law 702, Article 2, *"The Industry Member shall protect and promote the interests of their client…"*

Penalty

The broker was fined $1000. The salesperson was fined $400.

Rights-of-way

Rights-of-way can be grouped into two broad categories:

A right of passage over servient land as in the case of a cottager accessing their property by travelling over a right-of-way through another person's property.

A right to place utilities across servient land as in the case of a sewer easement that could cross private lands to reach a new subdivision.

Industry Members should exercise caution regarding transactions that involve rights-of-way, particularly access issues (as in this case) and private roads. Legal counsel should be sought on such matters.

An Industry Member typically encounters detailed wording about a right-of-way on a deed of the dominant tenant (the property that requires the the right-of-way for access) describing the scope of the right over the servient tenant (the property that is travelled over). The right to pass over the land of another to gain access to the owned property should be definite and clear. A reference to a right-of-way in a deed does not convey ownership, but rather is a grant of an easement.