

DISCIPLINARY News

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THE COMPLAINT PROCESS

The Nova Scotia Real Estate Commission (the Commission) is responsible for the administration of the Real Estate Trading Act and our Bylaw, part of which includes receiving complaints about a brokerage or an industry member and administering penalties when necessary.

You will notice as you read on that while two industry members may be charged with the same violation, the penalties may be different. This is because the Commission deals with each case individually as each investigation is distinct and often complicated in its own way.

Each case also goes through several levels of procedure. When a complaint is made that warrants a full investigation, the following steps are taken:

1. The Registrar initiates an investigation. He may also do so on his own should he deem it necessary.
2. Notification that an investigation has been initiated is sent to the respondent industry member and corresponding broker, if applicable, along with a copy of the complaint and directions on how to reply.
3. The Commission's Compliance Investigator requests statements and supporting evidence from all parties involved. Other parties involved with the case, including other industry members, may also be contacted for statements or information if required.
4. Upon its completion, the investigation report is turned over to the Registrar for his decision.
5. The Registrar's decision is reviewed by the Complaints Review Committee (CRC), who may accept, reject or make recommendations to amend the decision to:
 - a. recommend no charges;
 - b. recommend charges through a settlement agreement. If the industry member accepts the proposed settlement agreement, the industry member must satisfy the imposed penalty. If the industry member does not agree with the proposed settlement agreement, the matter is referred to the Discipline Committee.
 - c. refer the matter to the Discipline Committee.

The CRC or the Registrar may refer the matter to the Discipline Committee, where a panel is appointed and a formal hearing will make a final decision on the matter.

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WHAT IS THE COMPLAINTS REVIEW COMMITTEE?

The Complaints Review Committee (CRC) is comprised of industry and public volunteers from across the province.

The role of the CRC is to:

- review all of the Registrar's complaint decisions
- accept, reject or make recommendations to amend the decisions
- make recommendations to the Commission Board of Directors on conduct, trade practices and standards of business practice
- hear requests for review of the Registrar's decision to dismiss a complaint

BROKERAGE INSPECTIONS

Every year, the Commission's Compliance Inspectors conduct trust account inspections (formerly known as 'audits') at each brokerage in Nova Scotia. In addition to the trust inspections, each brokerage is subject to a full brokerage inspection every three years. Inspection results fall into one of three categories: 'very good', 'good', and 'needs improvement'. Any brokerage that receives three consecutive ratings of 'needs improvement' is subject to a \$500 fine and the penalty increases if the brokerage receives a fourth or fifth consecutive rating of 'needs improvement'.

Three consecutive needs-improvement inspections:

Two brokers were fined \$500 for three consecutive 'needs improvement' on trust inspections and were required to take the trust account portion of the broker's licensing course.

One managing associate broker was fined \$500 for three consecutive 'needs improvement' on trust inspections and was required to take the trust account portion of the broker's licensing course. The broker received a warning letter.

One broker was fined \$500 for three consecutive 'needs improvement' on brokerage inspections.

Four consecutive needs-improvement inspections:

In January 2015, a broker was fined \$1000 for four consecutive 'needs improvement' results on trust inspections.

Five consecutive needs-improvement inspections:

In May 2015, a broker licence was restricted to a salesperson licence as a result of the brokerage receiving five consecutive 'Needs Improvement' results on trust and brokerage inspections. The broker is required to re-take the broker licensing course, pass the corresponding licensing exam and receive approval from the Registrar, should they wish to regain a broker level licence.

In July 2015, the a broker's licence was restricted to a salesperson licence as a result of receiving five consecutive 'Needs Improvement' results on brokerage audits. The broker is required to re-take the broker licensing course, pass the corresponding licensing exam and receive approval from the Registrar, should he wish to regain a broker level licence.

INSPECTION TRENDS

Electronic Signatures (E-Signatures)

Electronic signature software may be used on any service contracts or purchase agreements, however, the Commission does not promote, prefer or endorse a particular brand of e-signature software. The broker is responsible to verify that the e-signature software used, creates legally binding service agreements and agreements of purchase and sale. The Commission recommends that brokers seek independent legal advice in this verification process.

When brokerages make e-signature software available to clients/customers, they must keep printed copies of all signed agreements and e-signature acknowledgements (i.e. *Certificate of Authenticity*) which includes the e-signature of the brokerage's client or customer. It is not necessary for the brokerage to retain certificates from cooperating brokerages so long as it is agreed that it represents a legal signature. These documents must be retained in the brokerage transaction file as per the Commission's document retention requirements in Bylaw **621, 707** and the **Electronic Document Storage Policy**.

Vague Clauses (Article 11)

Written clauses in agreements that are vague can damage the outcome of your client's transaction. Our Compliance Inspectors read a wide variety of clauses when reviewing transaction files and vague or unclear clauses are becoming much more common.

An ideal clause has criteria so clear all parties can easily understand whether the clause is fulfilled. The more specific the criteria, the easier that is to determine.

Clauses are intended to be tailored to meet the needs of the parties while clearly and accurately reflecting the intentions of the parties. No clause should be used without consideration of its meaning and effect.

When drafting clauses for agreements, consider whether the clause is contradictory to another clause or altogether redundant (i.e. using a different condition day than what the APS states). Also consider the wording you use, i.e. *upon closing* vs. *before closing*. While you may understand the full intentions of your clause, the clients may not. Always consider whether the clause can be made more objective by using specific criteria.

An example of frequently used clause is:

"There shall be no leased equipment."

This clause says and does very little. Is the buyer to pay out the leases? Or is it the seller's responsibility? What if the seller takes the leased equipment with them? Technically, the seller would have satisfied the terms of that clause, but if it's a furnace and it's January, the buyer has a real problem.

A well written clause addresses the following questions:

What is to be done? Who is to do it?

Who is to pay for it? In what time frame is it to be done?

What happens in the event it is not done?

INVESTIGATIONS

The following cases are provided as learning opportunities for the industry. The following cases do not cover all the complaints investigated by the Commission, but are representative of the more serious and consistent issues. Disciplinary actions are distributed to industry members in accordance with Commission Bylaw 839.

CASE #1 • FAILING TO PROTECT THE CLIENT

A buyer's salesperson verbally agreed to remediate water damage to a portion of the seller's property's floorboards for his buyer upon learning that the sellers were refusing to do so themselves. The buyer's salesperson did not provide this promise in writing to the buyers. Upon closing, the floorboards were not replaced and the salesperson stopped returning the buyer's telephone calls. Following closing, the buyer contacted the salesperson's broker to remediate the situation, who agreed to pay a contractor to replace the damaged floorboards. Through this work, mould was discovered that extended into another room. The broker advised the buyer that he would not pay for the complete replacement, as it was much more than the salesperson had initially agreed to replace.

As a result of the Commission's investigation, the evidence supported that:

- the buyer's salesperson failed to protect their client's best interests; advising the buyers not to address the floorboards with the sellers limited their knowledge on this matter;
- the buyer's salesperson made a promise without documenting it in writing;
- the industry member did not discover all facts about the property, as they are obligated to do, and failed to provide skilled and conscientious service, as is reasonably expected; and
- when the inspection revealed the water damage, the buyer's industry member did not request an updated *PCDS* from the seller.

In addition, the evidence supported other Bylaw infractions, including:

- the buyer's salesperson did not have a *Buyer Designated Brokerage Agreement* or an *Agency brochure* signed until weeks after the offer was written;
- the buyer's salesperson back-dated both the *Agency brochure* and the *Buyer Designated Brokerage Agreement*;
- discrepancies were discovered in the seller's industry member's paperwork, particularly the *Seller Brokerage Agreement*; and
- the seller's salesperson did not advise the seller to update the *PCDS* after becoming aware of the water infiltration and property damage.

LESSONS LEARNED

In this case, it is probable that had the damaged floorboards been removed before closing, the buyer would have seen the extent of the damage and would have been in a position to seek compensation from the seller, terminate the sale or move ahead with the closing having been fully informed of the condition of the property. The buyer's salesperson's refusal to formally document the buyer's request (or to even seek an updated *PCDS*) was not in his clients best interests. The buyer's salesperson's promise to pay to have the floorboards replaced needed to be documented so that the expectation was clear for everyone.

The *PCDS* is a statement made by the seller on the current condition of the property. If a property condition changes, the *PCDS* must be updated to reflect that change. Further, when representing a buyer, it is important to ensure that your client receives a current *PCDS*, as stated in Clause 3 of the Agreement of Purchase and Sale. If the seller refuses to update the *PCDS*, it is important that the industry member document that in the brokerage transaction file.

A salesperson was charged in July 2014 with three violations of the Commission Bylaw: Bylaw 702, Article 2 (\$750); Bylaw 702, Article 3 (\$400); and Bylaw 702, Article 4 (\$400) for a total of \$1,550 in fines.

The seller's industry member received one charge for violating Commission Bylaw 702, Article 11 (\$500) and received a warning for failing to advise their sellers to update the *PCDS*.

CASE #2 • VERBAL PROMISES & POOR PAPERWORK

An salesperson represented sellers who were out of town and verbally agreed to periodically check on the property so the sellers wouldn't need to hire a property manager. In early January, the sellers requested that the house be checked on, knowing it had been roughly two weeks since the last time the industry member had been there. The salesperson visited the house two days after the date requested and discovered a cast-iron radiator had burst and created approximately \$3,500 in damages to the home.

The salesperson allegedly granted access to the property without their client's knowledge or consent by giving a key to a plumber and negotiating the radiator replacement.

The evidence supported that the industry member made verbal promises to check on the property without documenting those promises in writing.

Upon reviewing the paperwork, among other paperwork infractions, there was evidence that the salesperson amended the *Seller Designated Brokerage Agreement* three times based on email instructions from the seller, without amending the *Seller Designated Brokerage Agreement* in writing.

The investigation further revealed that another salesperson at the brokerage was performing broker-level duties in giving advice to the subject of the investigation. The broker had knowledge of this, despite the salesperson not having the necessary licence to perform these duties.

LESSONS LEARNED

Property management is not regulated in Nova Scotia and holding a real estate licence does not qualify industry members to be property managers. More importantly, the E&O coverage required for all industry members in Nova Scotia may not cover duties that are outside the scope of a real estate industry member. If an industry member agrees to informally check on a seller's property, this is considered a promise and must be documented in writing.

Supervisory roles over other industry members including offering advice to industry members on trades/real estate, reviewing transaction files and approving advertising are restricted to licensees with either a broker licence or a managing associate broker's licence.

CASE #3 • UNREGISTERED BRANCH OFFICE

The Commission initiated an investigation into two unregistered brokerage branch offices after noticing brokerage office signage outside the units. When inquiring about the unregistered branch offices, the broker insisted that both offices were simply for advertising purposes.

The evidence supported that the first location was not operating as a branch office. The second location was determined to be a branch office, and this location had subleased retail space open to the public, displayed brokerage and listing advertisements and the broker had posted on Facebook several months prior that he was working from the location.

Evidence also supported that the brokerage was advertising an expired listing on their website and that their website was misleading in that it was representing office locations where they were not fully operational or registered with the Commission.

The salesperson was charged in May 2014 with three violations of the Commission Bylaw: one violation of Bylaw 702, Article 4 (\$400); and two violations of Bylaw 702, Article 11 (\$400 each) for a total of \$1,200 in fines.

The salesperson acting in this case as a broker/managing associate broker capacity, was charged in May 2014 with one violation of Section 4(1) of the Real Estate Trading Act (\$1,000).

The broker was charged in May 2014 with one violation of Bylaw 704(c) for enabling a salesperson to perform broker-level functions (\$1,000). They were also cautioned about the paperwork errors found in the transaction file.

A broker was charged in July 2014 with one violation of Commission Bylaw 310 (\$500), and one violation of Bylaw 702, Article 34 (\$750) for a total of \$1,250 in fines.

They were also cautioned for not cooperating with an investigation, for advertising a property that had expired and for misleading advertising.

CASE #4 • IMPROPER DISCLOSURE

A salesperson listed a property and presented an offer to the sellers from a buyer-client of the brokerage, entering into transaction brokerage. The buyer was a company owned by the salesperson's father, who is also the brokerage owner. The sellers alleged that the salesperson did not act impartially and favored the buyer, his father.

As a result of the Commission's investigation, the evidence supported that the salesperson:

- disclosed a "relationship with the purchaser", although the disclosure was vague;
- inappropriately entered into a *Transaction Brokerage Agreement*, as entering into a *Transaction Brokerage Agreement* with a family member is not in the best interests of the seller-client and presents serious challenges in fulfilling their obligations of impartiality required in transaction brokerage; and
- gave advice to the benefit of the buyer, despite being in transaction brokerage.

The transaction file for this property was reviewed in the course of the investigation and there were many discrepancies, including:

- vague clauses;
- witnessed faxed signatures;
- struck clauses without both parties initialing the changes; and
- advertising details of the property that were contrary to the signed addendum.

LESSONS LEARNED

Industry members cannot act or seem to act impartially when entering into a *Transaction Brokerage Agreement* when one party is a family member. Further, when an industry member is acquiring real estate on behalf of themselves or an immediate family member, they must disclose in writing their licence status and the intent of the purchase. The expectation is that the disclosure be clear and precise. For example: "The seller acknowledges that John Doe is the brother of the buyer Mary Doe, and is a licensed associate broker with the ABC Realty. Mary Doe is purchasing the property for investment purposes."

A broker (salesperson at the time of the events) was charged in October 2014 with three violations of the Commission Bylaw: Bylaw 702, Article 2 (\$1,000); Bylaw 702, Article 11 (\$500); and Bylaw 721(d) (\$500), for a total of \$2,000 in fines.

The former broker's response to the decision is outstanding.

CASE #5 • IMPROPERLY ASSIGNING BROKER DUTIES

The Commission initiated an investigation after learning that a broker was assigning her duties to a broker at another brokerage while on vacation, despite having been told specifically not to do this by the Commission one year prior. The broker did not have their clients' written consent for another brokerage to be involved with their transactions, as were the instructions previously given by the Commission.

The evidence in this case supported the allegations.

A broker was charged in May 2014 with one violation of Commission Bylaw 704(c) (\$750).

LESSONS LEARNED

Industry members cannot assign their legal responsibilities/agency to other brokerages without the prior consent of the client(s). This can be done through a written agreement. Brokers have an obligation to supervise their industry members and all real estate activities conducted on behalf of the brokerage. If a broker cannot fulfill these obligations for any reasons (including vacation, illness, family tragedy, etc.) then those duties can only be assigned to a managing associate broker at the same brokerage. Exceptions to this in extraordinary circumstances may only be granted by the Registrar.

CASE #6 • UNPROFESSIONAL CONDUCT

A seller met to prepare a listing for his vacant and newly renovated property with a broker, but decided not to list the property until he returned from a vacation he was taking the following week. The broker received permission from the seller to contact Nova Scotia Power for consumption costs and the seller completed and signed the *PCDS*. They agreed that while the seller was away, the broker would arrange and pay for a home inspection and professional photographs, and would personally visit the property to take measurements. Neither the *Seller Brokerage Agreement* nor the *Working with an Industry Member Brochure* were signed at this time.

The property inspector had concerns with the home as some of the renovations may not have been up to code and contacted the broker to relay his findings. The broker immediately cancelled the appointment with a photographer and did not return to the property.

Upon returning from vacation, the seller met with the home inspector at the property to review his report. Upon arrival, significant water damage to the home was discovered, caused by a malfunctioning dishwasher which remained on following the inspection. The seller immediately contacted the broker, who suggested the seller contact his insurance provider and the appliance company to determine the nature of the issue. The seller alleged that it was the inspector who caused the damage by turning on the dishwasher and that it was the broker's responsibility to fix the problem. The seller did not have home insurance.

The following morning, the seller attempted to reach the broker several times, leaving increasingly irate messages with staff and on her voicemail. She refused to take his calls and contacted her lawyer, noting that the seller was becoming harassing. The following day her lawyer issued a cease & desist order to the seller.

The broker responded that she was not at fault as the seller had chosen not to carry home insurance. She claimed that the home inspector was "licensed, bonded and insured", and could for those reasons attend the home unaccompanied.

The evidence in this case supported that the broker:

- had created an implied agency relationship with the seller at the meeting when he agreed to hire her and she began offering advice;
- failed to protect and promote the best interests of her client by giving a key to the home inspector without the seller's consent and not attending the home inspection;
- failed to ask the seller if he carried home insurance;
- made promises to the seller that were not documented and did not have a written *Seller Brokerage Agreement*; and
- agreed to arrange for and pay for a pre-listing home inspection which ought to have been documented in a signed *Seller Brokerage Agreement*.

The evidence also supported that the broker acted in an unprofessional manner by: failing to take reasonable steps to ensure the property was secure; telling the seller that the home inspector was bonded and licensed, neither of which are accurate; and failing to be clear with the seller on what she would and would not do during their absence.

A broker was charged in April 2015 with three violations of the Commission Bylaw: Bylaw 702, Article 2 (\$1,000); Bylaw 702, Article 4 (\$500); and Bylaw 702, Article 35 (\$1,000) for a total of \$2,500 in fines.

The broker was also cautioned for failing to have the agency brochure signed at the onset of the relationship.

LESSONS LEARNED

Acting in implied agency even in the absence of written agreements creates fiduciary responsibilities. You must make promises in writing as the obligations and limitations of these promises need to be clearly understood to all parties.

PAYING AN UNLICENSED PERSON

The Commission became aware that a Broker had paid remuneration to an unlicensed person, which is a direct violation of the Commission Bylaw.

A Broker was charged in July 2014 with one violation of Commission Bylaw 715(c) (\$1,000).

COMPLIANCE TEAM

For information on investigations, contact:
Carolyn MacDonald, Compliance Manager
cmacdonald@nsrec.ns.ca
902-468-3511 x303

For information on inspections, contact:
Courtney LeBlanc, Compliance Inspector
cleblanc@nsrec.ns.ca
902-468-3511 x306

Mallory LeBlanc, Compliance Inspector
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902-468-3511 x308

Complaints must be in writing* and may be submitted by fax at 902-468-1016/800-390-1016 or by mail at:

Attention: Compliance
Nova Scotia Real Estate Commission
601-1595 Bedford Highway
Bedford, NS, B4A 3Y4
compliance@nsrec.ns.ca

*For information on our complaints requirement visit the [Complaints section](#) of our website.

DESIGNATED AGENCY FAQs AVAILABLE

Do you have questions about designated agency? For information on procedural matters on designated agency and teams, adding a designated agent, confidentiality, agreements and much more, view our recently updated Frequently Asked Questions on the topic at nsrec.ns.ca



Additional information on the complaint and discipline processes can be found on the Commission's website at www.nsrec.ns.ca

