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CHAPTER 2

THE REAL ESTATE SERVICES ACT

Learning Objectives

After studying this chapter, a student should be able to:

- Discuss the purpose and the scope of the *Real Estate Services Act* ("RESA")
- Describe the licensing system, including the requirements for licensing, exemptions from licensing, levels of licences, and categories of licences
- Describe the roles and responsibilities of BC Financial Services Authority (BCFSA), the Superintendent of Real Estate, the Real Estate Foundation, the Real Estate Errors and Omissions Insurance Corporation, and the Real Estate Compensation Fund Corporation
- List the major voluntary or member real estate organizations in British Columbia
- Explain how RESA provides protection to the public
- Summarize the key trust account obligations on licensees
- Provide examples of some of the issues discussed within the *Real Estate Services Rules*
- Describe the consequences of a licensee's breach of RESA
- Describe RESA's discipline and enforcement procedures
- Discuss the purpose and the scope of the *Real Estate Development Marketing Act* ("REDMA")
- Describe which types of developments require a disclosure statement when units are sold
- Explain the various rescission rights contained in REDMA

INTRODUCTION

In May 2004, the provincial government introduced two new statutes to govern the sale of real estate in British Columbia: the *Real Estate Services Act* (“RESA”) and the *Real Estate Development Marketing Act* (“REDMA”). These statutes came into force early in 2005, and replaced the *Real Estate Act*. RESA imposes licensing requirements on persons who provide real estate services related to trading services, rental property management services, and strata management services. REDMA imposes requirements related to marketing on developers who sell various forms of real estate developments, such as strata lots, cooperatives, time shares, and shared interests. This chapter is primarily concerned with RESA; however, REDMA, as it relates to real estate licensee practices, will also be discussed.

In 2016, the provincial government amended RESA to increase oversight of the real estate industry and enhance consumer protection. The amendments transferred rule-making powers from the primary regulator at that time, the Real Estate Council of British Columbia (RECBC) to the Superintendent of Real Estate (the “Superintendent”), and enabled an enhanced oversight role for the Superintendent. These changes effectively empowered the Superintendent to act as a regulator of real estate licensees, along with RECBC, in a dual regulator system. In the amendments to RESA in 2016, maximum penalties for real estate licensee misconduct were also increased by 25 times (from \$10,000 to \$250,000 for individuals).

In 2021, RESA was amended substantially once again to integrate RECBC and the Office of the Superintendent of Real Estate (OSRE) with BC Financial Services Authority (BCFSA). These amendments add the regulation of real estate services to the scope of BCFSA’s regulatory functions, which include oversight of credit unions, trust companies, insurance companies, mortgage brokers, and pension plans. The overall intention of these amendments to RESA was to create a single, modern, efficient, and integrated regulator of British Columbia’s financial services sector. Creating a single regulator was one of the central recommendations from the Real Estate Regulatory Structure Review in September 2018 and was echoed in the Expert Panel on Money Laundering Report in May 2019. Many of the amendments to RESA transfer authority for various matters from RECBC to BCFSA and the Superintendent, who is the chief executive officer of BCFSA. Aside from the integration of RECBC and OSRE with BCFSA, the amendments to RESA included two other major changes. First, the authority to create and amend the *Real Estate Services Rules* was transferred to BCFSA, which resulted in a more formal process in creating or amending rules. Second, changes were made to licensee discipline procedures under RESA, the details of which will be addressed later in this chapter.

RESA references regulations and rules. Along with RESA, they make up the regulatory framework for licensees in British Columbia.

- **The *Real Estate Services Regulation* (the “Regulation”):** Under section 130(1) of RESA, the Lieutenant Governor in Council may make regulations dealing with a variety of matters. The Regulation has the force of law. Currently, the Regulation deals with a number of matters, including exemptions from licensing, fees payable by licensees, trust account issues, disciplinary proceedings, administrative penalties, required standard terms in certain contracts, and personal real estate corporations.
- **The *Real Estate Services Rules* (the “Rules”):** Under section 89.2 of RESA, BCFSA may make rules that it considers necessary or advisable respecting licensing, or regulating licensees in relation to the provision of real estate services. Currently, the Rules deal with a number of matters, including licensing, general responsibilities of licensees, business practices, relationships with principals and parties, dealing with other licensees and unlicensed persons, brokerage accounts and financial requirements, brokerage records, and licensee exemptions.

In this chapter and those that follow, the section numbers of statutes, regulations, etc. will be given. Students are not expected to memorize these section numbers; instead, students should concentrate on the provisions themselves. To access the most current versions of RESA and the Regulation, students can visit www.bclaws.ca. To access the most current versions of the Rules, students can visit BCFSA’s website at www.bcfsa.ca.

REQUIREMENTS FOR LICENSING

Purpose

The purpose of RESA is to protect the public by:

- ensuring that those offering real estate services meet certain minimum reasonable competency requirements in order to obtain a licence;
- setting out certain standards to ensure that licensees conduct themselves appropriately while licensed; and
- appointing a regulator, BCFSA, and empowering the Superintendent (from within BCFSA), to perform key regulatory functions under RESA.

real estate services

defined in the *Real Estate Services Act* as rental property management services, strata management services, or trading services, none of which can be provided to or on behalf of another, for or in expectation of remuneration, unless the person is licensed or exempt from the requirement to be licensed

Activities Requiring a Licence

At the core of real estate licensing in British Columbia is section 3 of RESA, which requires that a person who provides “real estate services” to or on behalf of another for or in expectation of remuneration must be licensed (or exempt from the requirement to be licensed). *Real estate services* is defined in RESA to mean:

- (a) rental property management services;
- (b) strata management services; or
- (c) trading services.

Rental Property Management Services

RESA defines “rental property management services” to mean any of the following services provided to or on behalf of an owner of rental real estate:

- (a) trading services in relation to the rental of the real estate;
- (b) collecting rents or security deposits for the use of the real estate;
- (c) managing the real estate on behalf of the owner by:
 - (i) making payments to third parties;
 - (ii) negotiating or entering into contracts;
 - (iii) supervising employees or contractors hired or engaged by the owner; or
 - (iv) managing landlord and tenant matters.

Strata Management Services

RESA defines “strata management services” to mean any of the following services provided to or on behalf of a strata corporation:

strata corporation

a legal entity created by the deposit of a strata plan in the land title office. The corporation's responsibilities are set out in the *Strata Property Act* and include the duty to manage, repair, maintain, and insure common property and common assets

- (a) collecting or holding strata fees, contributions, levies or other amounts levied by, or due to, the *strata corporation* under the *Strata Property Act*;
- (b) exercising delegated powers and duties of a strata corporation or strata council, including:
 - (i) making payments to third parties on behalf of the strata corporation;
 - (ii) negotiating or entering into contracts on behalf of the strata corporation;
 - (iii) supervising employees or contractors hired or engaged by the strata corporation; or
 - (iv) enforcing bylaws or rules of the strata corporation.

Trading Services

Trading services is the term that has been used to refer to the activities related to the purchase and sale of real estate. Trading services is an unfamiliar term to most members of the public, who will simply know trading services licensees as “real estate agents” or “real estate brokers”. RESA defines “trading services” to mean any of the following services provided to or on behalf of a party to a trade in real estate:

- (a) advising on the appropriate price for the real estate;
- (b) making representations about the real estate;
- (c) finding the real estate for a party to acquire;
- (d) finding a party to acquire the real estate;
- (e) showing the real estate;
- (f) negotiating the price of the real estate or the terms of the trade in real estate;
- (g) presenting offers to dispose of or acquire the real estate; or
- (h) receiving deposit money paid in respect of the real estate.

trading services

activities related to purchase and sale transactions, lease transactions, and assignment of lease and contract of purchase and sale transactions

RESA defines “real estate” to mean:

- (a) real property;
- (b) regardless of whether it is or is not an interest in real property, a cooperative interest, shared interest in land or time share interest, as these are defined in REDMA; and
- (c) a right in relation to real property that is defined by regulation to be real estate.

RESA defines “trade in real estate” to mean:

- (a) a transaction for the purchase or sale of real estate, for the leasing of real estate or for any other form of acquisition or disposition of real estate;
- (b) an assignment of a contract for purchase, sale or lease of real estate, or a transaction in relation to such an assignment; or
- (c) a prospective trade in real estate within the meaning of paragraph (a) or (b).

As you can see, “trading services” is not limited to the purchase and sale of real estate; rather, it includes transactions for the leasing of real estate and assignments of contracts for purchase, sale, and lease of real estate. Furthermore, it is important to note that a licence can be required even though a person is not involved in the selling of real property or an interest in land. Sales of time shares and cooperatives, if conducted on behalf of another, require a licence even though the transaction involves the sale of shares or a contractual right to use property.

All Real Estate Services by a Licensee are Subject to RESA

Once an individual is licensed, RESA holds the licensee to a higher standard in every real estate transaction in which they are involved, not just the transactions for which a licence is required. The general rule of thumb is, “once a licensee, always a licensee”, meaning that RESA applies to all of a licensee’s activities in providing real estate services (subject to the Rules), even if the licensee:

- provides real estate services on their own behalf;
- provides real estate services to or on behalf of another but not for or in expectation of remuneration; or
- would otherwise be exempted by RESA or the Regulation from the requirement to be licensed in relation to the provision of those real estate services.

A common infraction of the above by licensees involved in trading services relates to dealings with their own property (e.g., selling, buying, leasing, or renting).

Example

Annette is an experienced trading services licensee who would like to sell her house. Rather than hiring another licensee to act as the listing agent, she would like to list the property herself. However, Annette must remember that the definition of “trading services” is broad and includes activities such as showing the house to prospective buyers and providing information to prospective buyers. Section 7 of RESA states that a licensee must not provide real estate services other than on behalf of the brokerage in relation to which they are licensed. Therefore, if Annette were to list the property herself, it must be done through her brokerage. To do otherwise would be a breach of RESA, as Annette would be providing trading services outside of her brokerage. In addition, the listing must comply with RESA, just like any other listing. For example, all advertisements of a licensee’s own property must include the name of their brokerage.

Listing one’s own property for sale creates a substantial professional risk for the licensee. Firstly, transactions in which the licensee has an ownership interest are not covered by the Indemnity Plan, the mandatory errors and omissions insurance coverage for all licensees in British Columbia. Secondly, particularly when the buyer is not being represented by another licensee, there is the risk that the buyer will make allegations that the licensee abused their position and experience as a licensee and took advantage of the buyer. The buyer, if they felt unfairly treated, could allege that the licensee’s actions or representations were improper, in which case the licensee’s conduct as both the seller and the listing agent would come under scrutiny. As a final point, licensees in this situation must also provide the buyer with a disclosure of their personal interest in the trade (as the seller), which will be discussed in greater detail in Chapter 12: “Law of Agency”.

Mixing one’s personal endeavours as a property owner with one’s professional career in real estate introduces a level of complexity and risk that ought to be avoided. The recommended course of action for licensees who wish to sell their own property is to either have another licensee in their brokerage act as the listing agent, or hire a different brokerage to list the property. In these cases, it is important for the seller licensee to avoid all communication directly with the buyer and the buyer’s agent. That work should be left to the listing agent so that the seller licensee is not deemed to be providing any trading services in the transaction.

Another common infraction relates to providing real estate services to friends and family members at no fee or at a reduced fee. As stated earlier, licensees must provide all real estate services through their brokerage and in the brokerage’s name. This means that the licensee must treat the client and file like any other client or file, and provide complete records and files to the licensee’s brokerage.



As a Licensee...

Licensees must be very cautious when assisting friends or family members with real estate services, even if they are acting in a non-official capacity. A failure to be properly licensed when providing real estate services can lead to professional discipline by BCFSA.

In one case (2019 CanLII 110045 (BC REC)), a trading services licensee assisted a friend who was living overseas to rent out a residential property in British Columbia. The licensee was not licensed to provide rental property management services. The licensee received remuneration directly from her friend for providing these services, and her brokerage was not involved.

The tenant provided their rent cheques to the licensee instead of to the landlord. After several months, a dispute arose regarding the safety of some trees near the property, followed by some plumbing issues. The tenant complained to the licensee and tried to arrange for repair services themselves. Eventually, a licensed property manager brokerage was hired and the licensee stopped providing services. The tenant, upset at the way the tree and plumbing issues had been dealt with, reported the licensee to RECBC, the former body responsible for licensee discipline.

While the licensee may have felt that she was only helping out a friend until that friend hired a professional, she had actually provided rental property management services without being properly licensed. She was also found to have provided real estate services outside of her brokerage. The licensee was fined \$7,500 and was ordered to pay \$1,500 for enforcement expense, and enroll in a remedial education course.



As a Licensee...

While licensees can have other jobs or sources of income, they can only provide real estate services on behalf of the brokerage they are licensed with. The general rule of thumb is once a licensee, always a licensee. This means, for example, that a licensee cannot work directly for a developer or as an appraiser or caretaker independently of their brokerage. Additionally, licensees cannot be paid directly by a company or corporation for any services they provided that meet the definition of real estate services.

Licensees must ensure that payments they receive for providing real estate services are paid directly to their brokerage and that contracts and other records are turned into their brokerage in accordance with the *Real Estate Services Rules*.

If a person who is applying for a new RESA licence has other employment that conflicts or may conflict with these rules, then the person should:

- review their application thoroughly with their managing broker, to help avoid licensing delays; and
- discuss any questionable employment issues with their managing broker before they submit the licence application.

If you have questions about other employment and whether it would hinder a new licensing application, you may speak in confidence with one of BCFSAs Practice Standards Advisors. For more guidance regarding other employment issues, please review BCFSAs Knowledge Base entries dealing with “Licensing Exemptions”.

RESA, the Regulation, and the Rules contain exemptions from the requirement to be licensed when providing real estate services to others, for or in expectation of remuneration. In these cases, the exempted individuals may provide rental property management services, strata management services, or trading services for a fee without the need to possess a licence.

Exemptions within RESA

Section 3 of RESA exempts the following from the requirement to be licensed under RESA:

- (a) a person acting under the authority of a court;
- (b) a trustee in bankruptcy, custodian, receiver, receiver manager or liquidator who is appointed under a provincial or federal enactment, in respect of real estate services undertaken by the person in that capacity;
- (c) an executor or administrator of an estate, in respect of real estate services provided in relation to real estate owned or held by the estate;
- (d) a trustee, in respect of real estate services provided under the terms of a will, marriage settlement or deed of trust;
- (e) a financial institution that has a trust business authorization under the *Financial Institutions Act*, in respect of real estate services provided in relation to real estate that it owns, holds or administers; and
- (f) a practising lawyer as defined in section 1 of the *Legal Profession Act*, in respect of real estate services provided in the course of the person’s practice.

Exemptions within the Regulation

In addition to the exemptions contained in RESA, Part 2 of the Regulation contains a number of exemptions from the requirement to be licensed. There are both general and specific exemptions for each of rental property management services, strata management services, and trading services. The general exemptions from the requirement to be licensed under RESA fall into the following four categories:

- employees of a principal who are providing real estate services to or on behalf of that principal;
- collection agents acting in the course of their business;
- individuals involved in various mining and oil and gas activities; and
- governments and government corporations.

The categories of exemptions available for rental property management services include caretakers or managers employed by the owners of different residential real estate properties, caretakers or managers employed by a brokerage if they only perform a number of limited tasks, individuals and non-profit organiza-

tions who are providing services in relation to rental real estate that is administered by the British Columbia Housing Management Commission, and savings institutions and mortgage brokers acting in accordance with an assignment of rents.

The categories of exemptions available for strata management services include strata lot owners themselves who provide services by reason of being the strata lot owner, caretakers or managers acting on behalf of a strata corporation, and owner developers.

Those exempted from needing a licence with respect to trading services fall into the following eight categories:

- employees of developers;
- notaries;
- accountants in relation to purchase and sale of a business;
- appraisers and property inspectors;
- auctioneers;
- individuals who provide information of a general nature to assist owners to sell or otherwise dispose of their own real estate or who publish information contained in an advertisement of specific real estate;
- individuals who refer others to a licensee or exempt party; and
- agents of expropriating authorities.

The exemption from licensing for employees of developers permits such employees to provide trading services to or on behalf of a developer with respect to a development unit (as defined in REDMA). The employee is only permitted to provide trading services on behalf of their developer employer. Additionally, the employee must disclose in writing to any other principal, like a potential buyer, that the employee is not licensed under RESA, is employed by the developer, and is acting on the developer's behalf and not on behalf of the principal. This disclosure must be made promptly, but in any case before any agreement for the acquisition or disposition of real estate is entered into. The disclosure must also be separate from any agreement for the acquisition or disposition of the real estate and from any disclosure statement required under REDMA.



As a Licensee...

If you would like to serve as a strata council member in a building where you own a unit, you are required to disclose that you are a licensed real estate professional.

RESA considers sitting on a strata council to be a strata management service, which is a type of real estate service. As a real estate professional, you can only provide real estate services through your brokerage, and you can only provide the real estate services for which you are licensed.

However, section 96 of the Rules permits a licensee who is a strata lot owner to serve as a strata council member, or otherwise provide strata management services to the strata corporation on a volunteer capacity, without RESA applying to the licensee in relation to these services.

Section 96 of the Rules provides that you must disclose in writing to the strata corporation that even though you are licensed under RESA, you are not acting as a licensee by being a strata council member. You must also disclose that you are not regulated under RESA in relation to the strata management services, and that the strata corporation is not entitled to the same protections applicable under RESA to persons who deal with licensees who are not acting under section 96 of the Rules. A copy of this written disclosure must be provided to the managing broker of your brokerage. BCFSA's Disclosure of Management of Strata Corporation by Licensee Who Is an Owner form can be downloaded and used in such situations.

Furthermore, a licensee who acts under section 96 of the Rules does not have sole signing authority for withdrawals of any funds of the strata corporation, and does not otherwise have sole authority for expenditures of any funds of the strata corporation. Additionally, the licensee's strata management services cannot be provided for or in expectation of remuneration.

Exemptions within the Rules

Finally, the Rules provide for exemptions from RESA and the Rules for certain activities performed by licensees. Part 9 of the Rules provides additional licensing exemptions for rental property management services and strata management services. Sections 94 and 95 provide exemptions for licensees who provide rental property management services on their own behalf in relation to their own real estate, or on a family member's behalf in relation to their real estate, but only if the licensee satisfies certain requirements. Section 96 contains an

exemption from RESA and the Rules for licensees providing strata management services to or on behalf of a strata corporation of which they are a member by reason of being a strata lot owner.

A licensee should always refer to the exact wording of RESA, the Regulation, and the Rules when considering the available exemptions, as an exemption may require an individual or organization to fulfill a number of conditions. Furthermore, a licensee may contact BCFSA for guidance with respect to exemptions, if necessary.

Unlicensed Assistants

Section 66 of the Rules states that 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. However, licensees can employ unlicensed persons to assist them with certain activities in the performance of real estate services. In fact, many successful licensees effectively use the services of *unlicensed assistants*.

Licensees who provide trading services may employ unlicensed assistants, but must be diligent in ensuring that an assistant is not performing any tasks that fall within the definition of “trading services”. Activities that an unlicensed assistant may not perform include:

- hosting an open house or soliciting sellers or buyers in any manner;
- showing a property to a client or a prospective buyer (but note that unlicensed assistants of property management licensees are permitted to show rental properties to prospective tenants);
- providing advice or guidance to a consumer with regard to any real estate contract;
- presenting or negotiating an offer; and
- communicating with consumers about any real estate transaction.

However, an unlicensed assistant may:

- complete contracts forms with information at the direction of and with approval by a licensee;
- answer the telephone, take messages, and forward calls to a licensee;
- perform office filing and bookkeeping;
- draft documents and correspondence for approval and signature by the licensee;
- place or remove signs on property;
- witness signatures; and
- arrange for repairs on a rental property.

While the brokerage's managing broker has the majority of the responsibilities relating to the brokerage's business and conduct of licensees, section 29 of the Rules states that associate brokers and representatives must ensure that there is an adequate level of supervision for their employees and others who perform duties on their behalf, including their unlicensed assistants.

The Unlicensed Assistants Guidelines, which can be found on BCFSA's Knowledge Base, contains a wealth of information about the use of unlicensed assistants.



As a Licensee...

While it may be tempting to use an unlicensed assistant to help you with some of your duties as a licensee, remember that unlicensed assistants cannot perform real estate services on your behalf. Permitting this conduct could expose you to professional discipline. For example, in 2018 CanLII 48898 (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 licensee allowed the unlicensed assistant to attend 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. As a result of the above, and combined with other infractions that were found to have been committed by the licensee, her licence was suspended, and she was ordered to pay a substantial discipline penalty and complete a remedial education course.

unlicensed assistant

a person who is not licensed under the *Real Estate Services Act* but who is nevertheless permitted to provide certain support and administrative services to licensees

IMPORTANCE OF AGENCY LAW IN PROVIDING REAL ESTATE SERVICES

agency

a relationship in which one person (the “agent”) is authorized by another person (the “principal”) to act on their behalf in dealing with third parties

As stated above, at the very core of real estate licensing in British Columbia is section 3 of RESA, which requires a person to be licensed under RESA (or fall within an exemption) if they provide real estate services “to or on behalf of another..” The legal concept that involves acting on behalf of another is known as *agency*. Crucial to your success in the real estate services industry is an understanding of what it means to be an agent.

Simply put, agency is defined as a relationship in which one person (the “agent”) is authorized by another person (the “principal”) to act on their behalf in dealing with third parties.

The law of agency will be discussed in detail in a later chapter in this course; however, because your conduct as a licensee must always be consistent with your duties as an agent, it is important to have an understanding of the basics of agency law early in this course. Furthermore, thinking about the concepts and topics within this course with your basic agency duties in mind is an important part of your licensing education. Therefore, keep agency law in mind when reading through the rest of this Course Manual.

Reasons to Use an Agent

There are a variety of reasons why a principal would seek the services of an agent. For example, the principal may need someone to sign documents on their behalf while they are out of the country. Alternatively, someone may not have the time to perform a certain activity without the assistance of an agent. However, the key reason why people hire agents is to benefit from the agent’s knowledge, skills, and abilities.

In the real estate sales context, purchasing, selling, or leasing real estate is a complex, stressful, and time-consuming process. There are a variety of issues to consider, such as physical defects with the property, financing the property, drafting the appropriate legal documents to effect the sale, local government issues, taxes, etc., many of which are overwhelming to the average consumer. Real estate licensees offer value by assisting consumers through the process and ensuring that the consumer’s goals are efficiently achieved.

The law recognizes that principals often place a great deal of trust and confidence in their agents. In other words, agents generally possess a great deal of power over their principals’ well-being. This power can be abused. As such, the law classifies many agency relationships as “fiduciary relationships”. The agent is known as the “fiduciary” while the principal is known as the “beneficiary”. Common fiduciary relationships include the relationship between a doctor and a patient, a lawyer and a client, a teacher and a student, and the board of directors of a corporation and the corporation itself. When acting on behalf of another in an agency relationship to provide real estate services, you are also a fiduciary.

The Role of the Fiduciary

fiduciary

a person who holds a position of trust with respect to someone else and is obliged, by virtue of the relationship of trust, to act solely in the other person’s benefit

Because a *fiduciary* has the trust and confidence of the beneficiary and can exercise their power to affect the beneficiary’s legal or practical interests, the law imposes strict “fiduciary duties” upon the fiduciary. The overarching duty is the duty of loyalty – the fiduciary must act solely for the beneficiary’s benefit (even to the fiduciary’s detriment) for all matters within their relationship. A breach of your fiduciary duties is taken very seriously by both your regulator and the courts of law.

While a more in-depth discussion of fiduciary duties will follow in a later chapter of this course, the following is a list of the key fiduciary duties:

- The duty of loyalty
- The duty to avoid conflicts of interest
- The duty of full disclosure
- The duty of confidentiality
- The duty to obey lawful instructions

As you make your way through the remainder of this course, remember that the central purpose of regulating and licensing real estate services in British Columbia is to ensure that individuals offering real estate services fulfil their agency/fiduciary duties in accordance with the public interest. When acting in an agency relationship, always ask yourself: is this action or decision in the best interests of my principal?

THE REGULATORY AND LICENSING BODY – BC FINANCIAL SERVICES AUTHORITY

BCFSA is a crown regulatory agency of the British Columbia government. BCFSA has the regulatory responsibility for:

- licensed real estate professionals;
- unlicensed real estate activity;
- real estate development marketing;
- mortgage brokers;
- credit unions;
- pension plans;
- trust companies;
- insurance companies; and
- the Credit Union Deposit Insurance Corporation of B.C.

BC Financial Services Authority (BCFSA)

a Crown regulatory agency that has the regulatory responsibility over British Columbia's financial services sector, including real estate services, real estate development marketing, mortgage brokerage, credit unions, pension plans, and trust and insurance companies

As noted earlier, in 2021, BCFSA integrated with RECBC and OSRE, the former regulators under RESA, to create a single regulator of British Columbia's financial services sector.

BCFSA's main objective is to strengthen consumer protection in the real estate services industry to ensure that members of the public can have confidence in the standards of practice provided by licensed real estate professionals. Carrying out this objective also includes ensuring that real estate services are not being performed by unlicensed persons.

RESA places in the *Superintendent* a number of key powers and duties. For example, all licensing applications must be made to the Superintendent, and the Superintendent will carry out investigations and disciplinary functions in relation to licensees. The Superintendent is the chief executive officer of BCFSA who is appointed to this role by BCFSA's board of directors. The chief executive officer of BCFSA is also given the position of the Superintendent of Financial Institutions, the Registrar of Mortgage Brokers, and other similar positions.

Superintendent of Real Estate

the chief executive officer of BC Financial Services Authority who possesses certain powers, and must fulfill specific duties, under the *Real Estate Services Act*



ALERT

The Superintendent is permitted to delegate, in writing, any of their powers or duties under RESA. Since the distinction between the Superintendent and BCFSA has little practical impact on licensees, and because the Superintendent will use the power to delegate extensively to employees and contractors of BCFSA in order to effectively exercise the Superintendent's regulatory powers in relation to the more than 25,000 real estate licensees in British Columbia, this Course Manual's use of the term "BCFSA" will include the role, duties, and responsibilities of the Superintendent. As such, you will see few, if any, specific references to the Superintendent.

THE REAL ESTATE FOUNDATION, THE ERRORS AND OMISSIONS INSURANCE CORPORATION, AND THE COMPENSATION FUND CORPORATION

The Real Estate Foundation and the Real Estate Errors and Omissions Insurance Corporation, both created under a predecessor statute to RESA, are continued under RESA. RESA also establishes the Real Estate Compensation Fund Corporation.

Real Estate Foundation of British Columbia

The Real Estate Foundation of British Columbia was established by a 1985 amendment to the *Real Estate Act*, and it has been continued under RESA as the Real Estate Foundation of British Columbia (the "Foundation"). The Foundation is a non-profit corporation consisting of, and administered by, a Board of Governors. Each governor is appointed for a three-year term and may not serve for more than six consecutive years. Although the Foundation is a corporation, it is not currently subject to the *Business Corporations Act*.

The Foundation receives the interest payable on all brokerage trust accounts, except separate trust accounts maintained by brokerages for specific clients, and deposits it, together with any other money it receives, in an account or accounts controlled by the Foundation (referred to in RESA as the Foundation Fund). In short, the Foundation receives trust account revenue, invests it, and uses it to fund the Foundation's business: both its own operations and the real estate related initiatives of non-profit organizations.

Section 93(1) of RESA outlines the purposes of the Foundation as being:

- (a) to undertake and carry out real estate public and professional education, real estate law reform, real estate research and other projects intended for the public or professional good in relation to real estate activities.

In 1988, the Foundation launched its grants program, whereby the Foundation receives applications for funding, which are evaluated based on certain criteria. The program gives grants to support sustainable practices in one or more of the Foundation's five interest areas: Land Use, Built Environments, Fresh Sustainability, Food Lands, and the Real Estate Profession. The Foundation's current mission statement, which expresses the Foundation's goal, is to "fund projects, connect people, and share knowledge to advance sustainable land use and real estate practices in BC".

Real Estate Errors and Omissions Insurance Corporation

In 1988, by amendment to the *Real Estate Act*, the Real Estate Errors and Omissions Insurance Corporation was created. RESA continues the Real Estate Errors and Omissions Insurance Corporation (the "E&O Insurance Corporation").

The E&O Insurance Corporation was created as an affordable method of protecting licensees from financial loss due to errors and omissions. The compulsory program provides protection to the public as it reduces the chance that someone will be left with an empty judgment (i.e., a judgment for the payment of money from someone who does not have the ability or means to pay it) after having successfully sued a licensee.

The E&O Insurance Corporation has seven directors, one appointed by the Lieutenant Governor in Council, three appointed by the British Columbia Real Estate Association, and three appointed by the other four directors. The board of directors is responsible for administering the E&O Insurance Corporation. The E&O Insurance Corporation must make arrangements for insurance and/or establish its own indemnity plan to indemnify licensees against their liability arising out of negligently performing, or negligently failing to perform, their duties in relation to the provision of real estate services. The E&O Insurance Corporation may levy premium assessments on licensees, and these premiums, which are actually collected by BCFSFA on behalf of the E&O Insurance Corporation as part of a licensee's licensing fees, constitute a fund known as the Real Estate Errors & Omissions Insurance Fund.

It is now a condition of licensing that every real estate licensee be insured against errors and omissions under the Indemnity Plan, which provides a limit per licence of \$1 million. The coverage is on a claims made basis, which means that a claim must be reported during the policy term in order to be covered. This differs from an occurrence type policy, under which claims arising during the term of the policy are covered regardless of when they are reported. In practice, many real estate brokerages have arranged excess insurance for themselves and their licensees, which is not available through the E&O Insurance Corporation, but which provides them with both higher limits and prior acts coverage. Figure 2.1 summarizes the main features of the Indemnity Plan.

FIGURE 2.1: Errors and Omissions Indemnity Plan Features

- 1. Limits of Liability:** Subject to the terms and conditions of the Indemnity Plan, the E&O Insurance Corporation will pay all sums, up to a limit of \$1 million, which a licensee becomes legally obligated to pay as the result of an error, omission, or negligent act in the provision of real estate services under RESA.
- 2. Defence Costs:** The E&O Insurance Corporation will pay the licensee's defence costs, but has the right to settle a claim without the consent of the licensee. Defence costs are included within the \$1 million limit.
- 3. Deductible:** Where damages are paid, a \$2,000 deductible is payable by each licensee. For example, in a situation where a licensee and their brokerage employer were sued successfully, each would pay a deductible of \$2,000, for a total of \$4,000. The Indemnity Plan features first dollar defence costs, which means that there is no deductible payable if defence costs are incurred by the E&O Insurance Corporation, but no amount for indemnification is paid to the claimant. Therefore, if a claim was dismissed at trial, the licensee would not pay a deductible, even though the E&O Insurance Corporation had incurred legal costs in defending the matter.

continued next page

FIGURE 2.1: Errors and Omissions Indemnity Plan Features, continued

4. **Premium:** The annual premium is \$315 per licensee, or \$630 for the two-year licensing period. In the event the licensee surrenders their licence during the first year of the two-year period, the second year's premium is refundable. Licensees with a Personal Real Estate Corporation licence are not required to pay Indemnity Plan fees for their Personal Real Estate Corporation.
5. **Policy Territory:** This coverage applies to claims arising anywhere, provided the claims are first made and proceedings are instituted and remain in Canada.

As with all insurance plans, there are exclusions to coverage. With respect to errors and omissions coverage, some of the more important exclusions are listed below:

1. acting as an insurance agent or broker, builder, contractor, property developer, mortgagee, notary public, property appraiser, or court appointed administrator;
2. claims arising from providing real estate services in a transaction where an insured has or may acquire an ownership interest;
3. disputes concerning commissions or fees;
4. bodily injury to or sickness, disease, or death of any person;
5. dishonest, fraudulent, criminal, or malicious acts or omissions;
6. claims for discrimination arising from complaints of breaches of the *Human Rights Code*; and
7. claims pursuant to the *Residential Tenancy Act*.

This is a brief summary and does not in any way amend the terms and conditions of the Indemnity Plan's actual wording, which should be referred to whenever there is any question as to coverage.



As a Licensee...

While the Indemnity Plan may be sufficient for the majority of licensees, those who participate in high-risk or high-value transactions may want to obtain additional private insurance. Examples of high-risk transactions include the sale of commercial or expensive waterfront properties, or transactions dealing with multiple similar properties, such as the sale of multiple units in a new condominium. If a licensee is engaged in presales, for example, and is marketing a number of similar units in a property at the same time, any claims arising from these units may be related claims and therefore subject to one limit of coverage under the Indemnity Plan.

For high-risk transactions, both the degree and the scope of the Indemnity Plan's coverage may be insufficient to meet the licensee's needs. The Indemnity Plan only provides \$1,000,000 in coverage, which may be insufficient where the licensee risks facing claims greater than that limit. The licensee's legal defence costs are also deducted from the \$1,000,000 limit, so the amount remaining to pay damages may not be enough to cover the losses.

The Indemnity Plan only insures against negligent errors and omissions made by licensees while providing real estate services. Private insurance policies can extend the scope of protection to cover risks that are excluded from the Indemnity Plan. For example, cyber insurance policies may provide coverage for losses sustained due to online security breaches. Such losses might include claims by third parties for data breaches, or the costs of restoring a licensee's work-related computer system. Private insurance can also insure against defence costs for disciplinary proceedings and for fines, sanctions, or penalties imposed by BCFSA (which is not covered by the Indemnity Plan).

Commercial general liability insurance can protect licensees against third party personal injury or property damage claims relating to property that the licensee has listed. As an example, the *Occupiers Liability Act* provides that licensees may be responsible for injury sustained at an open house if the licensee failed to take reasonable care. Finally, licensees may want to obtain property insurance to ensure their physical assets, such as personal office equipment, are insured against perils such as fire, theft, and vandalism. Property insurance can also provide coverage for losses due to business interruption resulting from these events (for those licensees who are independent contractors).

There are many options available to licensees for private insurance relating to the provision of real estate services. Licensees should consult an experienced insurance broker to help them assess their needs and ensure that they have adequate insurance for their practice.



ALERT

There is no coverage under the Errors and Omissions Indemnity Plan for any fines, sanctions, or penalties imposed on a licensee by BCFSA. For example, a licensee, acting as a seller's agent, was disciplined by RECBC, the former body responsible for licensee discipline, for acting in a sale transaction without proper authority. While the licensee did order a title search to verify that the client was a registered owner of the property, the licensee only looked at the first page. By not reading further pages of the title, the licensee failed to discover that half of the interest in the property was held by an insolvency trustee. The licensee was required to pay a discipline penalty of \$8,500 and enforcement expenses of \$1,250. While this disciplinary action was imposed as a result of an error or omission, there is no coverage under the Indemnity Plan. Accordingly, the licensee would have been required to pay out-of-pocket for the penalties and expenses associated with the error.

(2020 CanLII 36930 (BC REC))

Real Estate Compensation Fund Corporation

RESA establishes the Real Estate Compensation Fund Corporation (the “Compensation Fund Corporation”) as a corporation. The board of directors of the Compensation Fund Corporation is to be made up of three directors appointed by BCFSA and two directors appointed by the British Columbia Real Estate Association. The board of directors is responsible for administering the Compensation Fund Corporation.

RESA requires the Compensation Fund Corporation to establish a fund known as the Real Estate Special Compensation Fund (the “Special Compensation Fund”). The Special Compensation Fund is intended to provide compensation to persons in relation to a real estate transaction for funds that were misappropriated, or intentionally not paid or accounted for by a licensee, officers or directors of a brokerage, or employees or independent contractors of the brokerage. The Special Compensation Fund is funded by assessments from licensees, paid as part of licensing fees paid to BCFSA.

Persons who have suffered a loss as a result of money held or received by a licensee, an officer, director, controlling shareholder, or partner of the responsible brokerage, or an employee or person in an independent contractor relationship with a licensee or brokerage, may apply for compensation. The loss must have occurred as a result of the misappropriation of funds, the intentional failure to pay or account for funds, or because the funds were obtained by fraud. A claim against the Special Compensation Fund cannot be made by a licensee or former licensee for remuneration to the licensee or former licensee.

Persons who have suffered a loss must apply to BCFSA in writing, providing the particulars of the loss, including a court decision if one is available. RESA provides time limits in which claims for compensation must be made.

BCFSA may conduct a hearing, or decline to make an assessment on the basis that it considers that a court would more effectively deal with the matter. If BCFSA determines that a loss has occurred and has assessed the amount of the loss, BCFSA will issue a certificate specifying the amount of the compensable loss.

If the matter of the claim is also the subject of a court proceeding, and the court has made a final order assessing the claimant’s compensable loss, the court decision is binding on BCFSA for the purposes of the Special Compensation Fund assessment. Similarly, if a disciplinary decision made by BCFSA had found that the licensee has misappropriated or wrongfully converted money received in relation to real estate services, or has intentionally failed to account for or pay over money that belongs to principals in relation to real estate services, such a decision is also binding on BCFSA for the purposes of the Special Compensation Fund assessment.

A licensee who receives notice of a court proceeding, or a notice of a discipline hearing that could result in a decision in which the court finds that the person making the claim has suffered a compensable loss, or in which BCFSA finds that the licensee committed a wrongful taking, must immediately provide written notice to BCFSA and the Compensation Fund Corporation.

RESA provides that the maximum amounts that will be paid out for a claim will be specified in the Regulation (which is currently \$200,000 for a single claimant and \$100,000 for a single trade in real estate).

2019 CanLII 31580 (BC REC)

In a hearing before a RECBC Compensation Hearing Committee (which would now be handled by BCFSA, instead), the complainant made a claim against the Real Estate Special Compensation Fund after her licensee misappropriated her and her husband's deposit funds for the purchase of two properties in Vancouver. The licensee hired by the complainant and her husband to help them purchase a home fraudulently requested numerous deposits, stating that they would be applied to the down payment if the transactions completed. When the purchases fell through, the licensee only partially returned the funds. The Committee determined that, because the licensee misappropriated deposit funds provided by the complainant in relation to real estate services, the complainant suffered a compensable loss and was therefore entitled to compensation under the Special Compensation Fund. Their loss was assessed at \$95,000. The licensee was also convicted of fraud, ordered to pay restitution to the complainant and her husband in the amount of \$172,352, and had his licence suspended by RECBC, the former body responsible for licensee discipline under RESA. This case serves as an example of how, in addition to pursuing criminal charges and obtaining restitution from the licensee, people who suffer financial loss due to their licensee's misappropriation of funds may seek compensation through the Special Compensation Fund. As such, consumers who hire real estate licensees and trust them with many thousands of dollars have confidence knowing that their money, if misappropriated, can be replaced through the Special Compensation Fund.

OTHER REAL ESTATE RELATED ORGANIZATIONS

The real estate organizations discussed thus far make up the regulatory structure that is set up by RESA. There are, however, other real estate organizations that licensees may interact with in the course of their practice. These organizations are member organizations, with membership being voluntary. These organizations do not participate in a formal way in the regulation of real estate services. Rather, each organization aims to fulfill its mission, which may include delivering valuable services in order to grow its member base.

Canadian Real Estate Association

The Canadian Real Estate Association (CREA) is a national organization comprised of licensees and real estate boards across the country, as well as all of the provincial real estate associations. CREA's primary mission is to represent its members at the federal level of government and to act as a watchdog on national legislation pertaining to the real estate industry.

In an effort to cultivate and enforce fair dealings, CREA developed a code of ethics in 1913. The code is now known as the REALTOR® Code, which is a collection of rules of conduct that is voluntarily imposed by CREA on all its members (i.e., licensees that are members of their provincial real estate association and local real estate board). According to CREA, its membership includes approximately 99% of all real estate licensees across Canada. As a condition of membership, all members, known as REALTORS®, must abide by the REALTOR® Code.

The REALTOR® Code is made up of three distinct parts. First is the Preamble, which provides the history and purpose of the REALTOR® Code. Second is the REALTOR® Code of Ethics, which is a one-page document that states that REALTORS® are committed to professional competent service, absolute honesty and integrity in business dealings, utmost civility, co-operation with and fairness to all, and personal accountability through compliance with the REALTOR® Code. It concludes with the guiding principle for all REALTORS®, which is the golden rule: Do unto others as you would have them do unto you. The final part of the REALTOR® Code is the Standards of Business Practice, which is made up of 29 articles, with corresponding interpretations. CREA amends the REALTOR® Code from time to time in accordance with the needs of the changing real estate marketplace.

British Columbia Real Estate Association

The British Columbia Real Estate Association (BCREA) represents the interests of its eight real estate member boards (organized by geographic area) and their more than 23,000 REALTORS® on all provincial issues, providing an extensive communications network, continuing education courses, standard forms, and government relations.

BCREA develops and provides a variety of continuing professional education courses to help all REALTORS® stay on top of the latest developments in the areas of residential and commercial real estate, ethics, property management, legal issues, office management, and professional skills. BCREA has developed the Professional Development Program (PDP), a continuing education program required for membership in a real estate board.

In addition to its educational initiatives, BCREA provides many services to its member boards and to REALTORS®, for example:

- BCREA creates and publishes several newsletters (*Legally Speaking*, *The Bulletin*, and *Connections*) to keep REALTORS® informed about a variety of real estate and practice issues;
- BCREA produces a number of economics forecasts and presentations on topics such as housing and mortgage rate forecasts, and quarterly and yearly sales activities, to name a few; and
- BCREA's Government Relations Committee, comprised of REALTORS® from across the province, identifies emerging issues and recommends actions to address them.

Real Estate Boards

Each licensee has an option to become a member of one of the eight local real estate boards, which include the following:

- Association of Interior REALTORS®
- BC Northern Real Estate Board
- Chilliwack and District Real Estate Board
- Fraser Valley Real Estate Board
- Powell River Sunshine Coast Real Estate Board
- Real Estate Board of Greater Vancouver
- Vancouver Island Real Estate Board
- Victoria Real Estate Board

Each real estate board is incorporated as a society under the *Societies Act* of British Columbia. Although the constitution and bylaws of each board may differ somewhat, there are similarities in their objects and procedures. Generally, the objects of the real estate boards include:

- promotion and development of continuing professional education;
- enhancement of the reputation of the members of the real estate industry as professionals in the mind of the public;
- adoption and maintenance of the REALTOR® Code; and
- active participation in legislative changes affecting the real estate industry.

In addition to these general objectives, the real estate boards manage listings of real estate through the Multiple Listing Service® (MLS®). The MLS® is an online, cooperative selling system operated by real estate boards and associations in Canada. They are accessible to REALTOR® members of those boards and associations and contain detailed information and numerous search tools, all designed to match consumers with the properties that fit their requirements. While the public has access to some information contained in the MLS® through www.realtor.ca, this website is not the MLS®. It is an advertising website that CREA created to give REALTORS® across Canada greater listing exposure to a national and international audience. The listing content advertised comes from the MLS® and is paid for by REALTORS®.

Just as the bylaws may differ from one board to another, the rules and regulations which govern the operation of the MLS® for each board may vary. At present, however, it is a condition that any user of the MLS® be a member of that particular real estate board. The funds collected by the real estate boards through the fees charged by each MLS® listing represent a significant portion of the boards' total revenues, which are used to operate the boards' programs and fund the boards' administration.

In addition, real estate boards oversee the conduct of their licensed members and arbitrate disputes between members. The principal areas of dispute between licensees relate to the allocation of, and entitlement to, real estate commissions and may also involve complaints by licensees regarding the professional practices of other licensees.

Although membership in a real estate board is not a mandatory requirement of licensing, membership is necessary in order to access the MLS® system and use the REALTOR® trademark.

Real Estate Institute of British Columbia

The Real Estate Institute of British Columbia (REIBC) is an organization made up of members from a variety of sectors of the real estate industry. REIBC is focused on advancing the standards of education and professional development of its members. REIBC offers a professional designation, the “RI”, indicating professional members who meet the educational and experience standards set by the REIBC, and appoints one of the Governors of the Real Estate Foundation.

Real Estate Institute of Canada

The Real Estate Institute of Canada (REIC) is one of the major national professional bodies for the real estate brokerage industry. It is a member of CREA on the same basis as BCREA. REIC’s mission is to advance opportunities for persons involved in real estate. REIC pursues its mission through providing lifelong learning, maintaining a relevant resource centre, awarding professional designations, creating networking opportunities, and representing and promoting the real estate industry and profession.

REIC offers and grants a variety of designations, such as the FRI (Fellow of Real Estate Institute), the CLO (Certified Leasing Officer), the CPM (Certified Property Manager), the ARM (Accredited Residential Manager), the ACoM (Accredited Commercial Manager), and the CRP (Certified Reserve Planner) designations. These designations have both educational and experience components.

Related Organizations Serving the Real Estate Industry

There are a number of other associations whose membership is primarily real estate related. Examples are the Appraisal Institute of Canada (AIC), the Building Owners and Managers Association (BOMA), the Canadian Home Builders Association (CHBA), the Professional Association of Managing Agents (PAMA), the Urban Development Institute (UDI), the Institute of Real Estate Management (IREM), the Canadian Mortgage Brokers Association - British Columbia (CMBA-BC), and Mortgage Professionals Canada. Each organization offers differing benefits to its members, and membership is voluntary.

LICENSING SYSTEM

As mentioned earlier, section 3 of RESA states that a person must not provide real estate services to or on behalf of another, for or in expectation of remuneration, unless the person is licensed or exempt from the requirement to be licensed. BCFSA, as the regulator of real estate services in British Columbia, administers the licensing system.

Issue of Licences

RESA prescribes four levels of licences: brokerage, managing broker, associate broker, and representative. An individual may be licensed at any level; however, a partnership or corporation other than a personal real estate corporation (discussed later in this chapter) may only be licensed as a brokerage.

Under section 7 of RESA, managing brokers, associate brokers, and representatives must be licensed in relation to, and engaged by, a single brokerage only, except in certain circumstances where a managing broker may be licensed in respect of multiple affiliated brokerages, as discussed later. Furthermore, managing brokers, associate brokers, and representatives must not provide real estate services other than on behalf of the brokerage in relation to which they are licensed, and are not entitled to and must not accept remuneration (i.e., compensation) in relation to real estate services from any person other than their brokerage.

Brokerage

Under RESA, a *brokerage* licence is a licence that authorizes a brokerage to provide real estate services through a managing broker, associate broker, or representative. In other words, all real estate transactions are performed through the brokerage, meaning that services agreements will be between the client and the brokerage (not between the client and an individual licensee of the brokerage). Under section 7 of RESA, a brokerage must not provide real estate services unless the services are provided on behalf of the brokerage by a managing broker, associate broker, or representative who is licensed in relation to and engaged by the brokerage.

Brokerage

a licensee (often corporate) on behalf of which other licensees must provide real estate services

Aside from a rare and temporary exception, a brokerage must have a managing broker, and the brokerage may only provide real estate services that are permitted by the licence of a managing broker who is licensed to the brokerage. For example, if the managing broker's licence allows them to practice both trading and rental property management services, the brokerage (and its related licensees, if they have the appropriate licences) can provide trading and rental property management services, but not strata management services. Any restrictions or conditions imposed on a brokerage licence apply to the licences of all individuals licensed to and engaged by the brokerage.

All branch offices of a brokerage must have a brokerage licence and each branch office must have a managing broker. A brokerage may engage more than one managing broker. Generally, a managing broker may only be licensed in relation to one brokerage; however, there is an exception in the Rules to permit a managing broker to be licensed to brokerages that are affiliated.

Partnerships or corporations that apply for a brokerage licence must identify the person proposed to act as the managing broker. An individual, acting through a sole proprietorship, may also obtain a licence as a brokerage. If the individual is also qualified as a managing broker, they are deemed to be the managing broker for that brokerage. Alternatively, the application for the brokerage may indicate that the applicant will not be acting in that capacity and name another person to act as the managing broker for the brokerage.

As a Licensee...

While you will be personally liable for any wrongs you commit while acting as a real estate licensee, under the common law principle of vicarious liability, your brokerage may also be held liable if those wrongs were committed while acting on the brokerage's behalf. For example, if a licensee fraudulently misrepresents a property to a buyer during the course of employment and causes the buyer damage, the buyer can sue not only the licensee, but also the brokerage. This is true even if the brokerage was not aware of the misrepresentation. Because of this potential for liability, and in addition to the obligations under the Rules for managing brokers to supervise the brokerage's licensees and for licensees to report their own improper conduct to their managing broker, brokerages may have policies in place whereby licensees are required to report problems, incidents, etc. as soon as possible. This will allow the brokerage to take steps to minimize the damages resulting from the licensee's misconduct.

Under section 12 of the Rules, in order to be licensed, a brokerage must satisfy BCFSA that it is in "sound financial circumstances". Brokerage applications must include current financial statements and an estimate of brokerage expenditures for the first three months of operation.

Section 25 of RESA states that a brokerage must maintain proper books, accounts, and other records in accordance with the Rules, and must keep these records in British Columbia. If a brokerage is required to file or submit records to BCFSA, the records must be submitted in the manner required by BCFSA, along with any required information. Part 8 of the Rules specifies a number of financial and non-financial records that must be kept. A major component of the financial records that must be kept by the brokerage relates to brokerage trust accounts. Non-financial records of the brokerage include general records (e.g., written disclosures and written service agreements), trading records (e.g., contracts of purchase and sale and trade record sheets), records relating to referral fees paid and received, and specific rental property and strata management records. Generally speaking, the brokerage must retain these records for at least seven years after their creation (section 92 of the Rules).

As a Licensee...

Some of the records that a brokerage is required to keep are made up of documents that are created or produced by individual licensees; therefore, you need to ensure that you provide these records promptly to your brokerage. Remember, that the obligation to provide records "promptly" means without delay. Your brokerage should have established policies and procedures for how documents and other records relating to a trade in real estate are collected, filed, and stored. Ensure that you understand these policies and procedures, and when in doubt, speak with your managing broker. Brokerages are audited by BCFSA, whereby BCFSA checks to ensure that brokerages have adequate policies and procedures in place to comply with all of their legislative requirements, and that all licensees at the brokerage are following them.

Finally, mistakes can occur when things get busy and crucial steps are missed. As a new licensee, seek to establish standardized processes and checklists to minimize the chance of mistakes.

Under section 75 of the Rules, brokerages are also required to make an annual filing with BCFSA. Within 120 days after the end of each fiscal year of the brokerage, the brokerage must file:

1. financial statements for that fiscal year;
2. an accountant's report respecting that fiscal year; and
3. a brokerage activity report respecting that fiscal year.

Finally, section 7.1 of RESA states that the training and supervision of managing brokers, associate brokers, and representatives, with respect to real estate services or the provision of real estate services, cannot be performed by anyone within the brokerage (including owners, partners, directors, and officers) unless the individual providing the training or supervision is a licensee of the brokerage.

Managing Broker

Individuals who meet the education and experience requirements established by the Rules may apply for a *managing broker* licence. A managing broker is employed by or contracts with a brokerage. Under section 6 of RESA, a managing broker acts for the brokerage for all purposes under RESA and is responsible for:

1. the exercise of the rights conferred on the brokerage by its licence;
2. the performance of the duties imposed on the brokerage by its licence; and
3. the control and conduct of the brokerage's real estate business, including supervision of the associate brokers and representatives who are licensed in relation to the brokerage.

managing broker

the licensee responsible for a brokerage, and who is responsible for exercising the rights conferred on the brokerage, as well as for the performance of the duties imposed on the brokerage by its licence. In addition, the managing broker is responsible for the control and conduct of the brokerage's real estate business, including the supervision of its related licensees

Section 28 of the Rules sets out more detail with respect to the responsibilities of managing brokers:

- **Supervision:** Managing brokers have a duty to be actively engaged in the management of the brokerage, ensure that the business of the brokerage is carried out competently and in accordance with RESA and Rules, and ensure that all licensees and employees of the brokerage have adequate supervision.
- **Knowledge of improper conduct:** If the managing broker has knowledge of conduct that may constitute professional misconduct or improper or negligent conduct by a licensee or other employee of the brokerage, the managing broker must take reasonable steps to deal with the matter.
- **Accounts and records:** A managing broker must ensure the trust accounts and records of the brokerage are maintained in accordance with RESA and Rules and ensure proper management and control of documents and other records related to licensing and regulatory requirements.
- **Notice to parties respecting deposits:** A managing broker must ensure that all parties involved in a real estate transaction are immediately notified if a deposit has not been received or a deposit cheque has not been honoured by a financial institution. This notice must be given or confirmed in writing.

Finally, section 6 of RESA states that a brokerage may only provide real estate services that are permitted by the licence of a managing broker who is licensed in relation to the brokerage. Therefore, the types of real estate services (i.e., trading, rental property management, or strata management services) that can be provided by the licensees of the brokerage depend upon the types of real estate services the managing broker is licensed to provide.

Associate Broker

A licensee who meets the educational and experience requirements to be a managing broker, but is providing real estate services under the supervision of a managing broker, is referred to as an *associate broker*. Brokerages often have a number of associate brokers employed in the event that the managing broker of the brokerage ceases to be able to act as such. In this case, an associate broker could step into the managing broker role in short order.

associate broker

a licensee who meets the educational and experience requirements to be a managing broker, but who is providing real estate services under the supervision of a managing broker

Representative

representative

a licensee providing real estate services under the supervision of a managing broker

A *representative* is a licensee providing real estate services under the supervision of a managing broker. The vast majority of individuals licensed under RESA are licensed as representatives.

Section 29 of the Rules sets out the responsibilities of associate brokers and representatives:

- **Records:** An associate broker or representative has a duty to provide their managing broker with a copy of all records referred to in sections 83 and 84 of the Rules that were prepared by or on behalf of the associate broker or representative, or received from or on behalf of a principal. Records referred to in sections 83 and 84 include disclosures, service agreements, accounting statements, and contracts for real estate transactions.
- **Keeping managing broker informed:** An associate broker or representative must keep their managing broker informed of the business activities being performed by the associate broker or representative on behalf of the brokerage, and must immediately notify their managing broker if a deposit has not been received.
- **Response to managing broker:** An associate broker or representative must promptly respond to any inquiry that is addressed to the licensee by their managing broker.
- **Supervision of employees:** An associate broker or representative must ensure that there is an adequate level of supervision for their employees and others who perform duties on the associate broker or representative's behalf.
- **Knowledge of improper conduct:** An associate broker or representative has a duty to promptly notify their managing broker of improper conduct. This includes the licensee's own misconduct, as well as misconduct of the licensee's employees and other licensees and employees of the brokerage.



ALERT

Under Section 29 of the Rules, associate brokers and representatives have a duty to report misconduct by other licensees within their brokerage. This duty is crucial to the protection of the public interest. Serious matters that must be reported include deceptive dealing, misappropriation of funds, unauthorized signing of documents, and secret commissions. However, less serious examples of misconduct should also be reported, as investigations by BCFSA into “trivial” misconduct have often revealed more severe instances of misconduct by licensees.

To report misconduct, a licensee should contact their managing broker to discuss the situation. The managing broker will then contact the accused licensee or employee directly. If the managing broker believes the misconduct is serious enough, they will make a report to BCFSA. BCFSA will then open an investigation to review the evidence.

It is not always clear whether someone's actions constitute misconduct. BCFSA has published the following list of questions to help licensees determine if another licensee's behavior ought to be reported to their managing broker:

- Have the conduct requirements in this situation been breached?
- Have a consumer's interests been harmed by the licensee's actions?
- Does it seem likely that someone's interests may be harmed in the future by the licensee's actions, if repeated?
- Does the licensee stand to obtain a direct or indirect benefit from their actions, and has this been adequately disclosed to the client?
- Does the licensee seem unaware of or unwilling to correct their actions?

If the answer to any of the above questions is “yes” licensees are encouraged to report the alleged misconduct to their managing broker. Licensees may also make an anonymous report to BCFSA (through its anonymous tipline), as long as the report contains enough information for BCFSA to begin an investigation.

BCFSA's Anonymous Tipline allows members of the public and licensees to report suspicious real estate practices by phone or online. BCFSA will then determine whether to undertake an audit, launch an investigation, or take other regulatory actions. At a minimum, tips should include:

- the nature of the wrongdoing;
- the date and location of the incident; and
- the name of the person alleged to have committed the wrongdoing.

Personal Real Estate Corporations

Under Part 10 of the Regulation, a *personal real estate corporation* can be licensed as a managing broker, associate broker, or representative. The primary objective of Part 10 is to allow a licensee to take advantage of incorporation, which may permit better planning of income and tax streams. A personal real estate corporation can only have one director, one voting shareholder, and one president, all of which must be fulfilled by the “controlling individual” (i.e., the licensee operating through the personal real estate corporation). A detailed discussion of personal real estate corporations is outside of the scope of this course; however, it is important to note that the use of a personal real estate corporation does not shield the controlling individual from liability from third parties (which is generally the case in other corporations). Furthermore, if a personal real estate corporation commits professional misconduct or conduct unbecoming a licensee, the controlling individual will be subject to disciplinary proceedings as if the controlling individual had committed the conduct, and vice versa if it is the controlling individual who initially commits the professional misconduct or conduct unbecoming a licensee.

personal real estate corporation
a corporation licensed under the *Real Estate Services Act* that may be used by a licensee through which they provide real estate services

Teams

Some licensees within a single brokerage operate as a team, where the team, as a collective, provides real estate services to clients. Teams are a popular option for BC consumers who are buying, selling or leasing real estate because they offer consumers the expertise of a group of real estate licensees working together. Teams can be made up of only licensees or of a combination of licensees and non-licensees (e.g., unlicensed assistants). New licensees without an established client base or referral network are often attracted to join a team because they are able to work closely with the more experienced licensees on their team and become involved in transactions that they would likely not be exposed to as a new licensee working alone.

RESA contains no reference to or special licence type for teams. However, the regulation of teams is set out in the Rules. The regulation is intended to ensure that teams operate transparently, so that consumers understand which licensees are part of a team and what it means to work with a team. The regulation is also intended to ensure that the managing broker for the brokerage engaging licensees on a team is aware of the team and its members because this awareness assists managing brokers in exercising effective supervision over team members.

The Rules define “real estate team” as “a group of two or more licensees that is registered as a real estate team ...” with BCFSA. The requirement for a group of two or more licensees to register as a team with BCFSA is triggered if, in providing trading services other than rental property management services, the licensees in the group do any of the following:

- (a) represent (including, but not limited to, advertise) themselves to the public as a single entity, excluding a brokerage;
- (b) are regularly engaged as designated agents of the same client; or
- (c) regularly work together in a way that is consistent with the licensees being implied agents of the same party.

Therefore, even if a group of two or more licensees does not represent themselves to the public as a team, if they regularly work together in providing trading services in a way that would lead a party to believe that the licensees are collectively acting as the party’s agent, then the licensees must register as a team and are subject to the requirements of a team.

To register as a team or change a team’s name or membership, a completed application must be submitted to BCFSA. A fee must also be submitted to BCFSA to register or join a team or change a team’s name, but no fee is required to leave or disband a team. A managing broker must approve an application by the licensee(s) engaged by their brokerage to change a team’s name or register or join a team before BCFSA will process and approve the application. While a managing broker does not approve or deny a licensee leaving their team or the disbanding of a team of licensees engaged by their brokerage, they will be informed when these events occur. Although non-licensees, such as unlicensed assistants, may be part of a team, they do not count towards a team’s membership and cannot be registered as part of or apply to join a team. If an application to register as a team includes an unlicensed member, the application will be rejected.

Licensees who are part of a team must always include their team’s name when they advertise their trading services to the public, since they cannot provide trading services outside of their team. A team must identify the

team's name in all published real estate advertising, including, for clarity, rental property management services. All advertising that includes the names of unlicensed team members must identify them as being unlicensed.

A licensee on a team may be licensed to provide rental property management services in addition to trading services. If all licensees on a team are similarly licensed to provide rental property management services, the team can provide rental property management services and advertise this fact, provided the advertising identifies the team's name. In this case, an individual licensee on the team can provide rental property management services through the team and/or outside of the team. However, if not all of the licensees on a team are licensed to provide rental property management services, the team cannot provide rental property management services or advertise that it does or that a team member does. In this case, for licensees on the team that are licensed to provide rental property management services, they must provide those services outside of the team. In any of their advertisements relating to rental property management services, they must not identify their team's name.

Additional restrictions on and requirements of licensees and brokerages in relation to teams are as follows:

- A licensee can only be a member of one team at a time.
- A team member must provide trading services (excluding rental property management services) only through their team.
- A licensee must not provide trading services through a team unless the licensee is a member of the team.
- All team members must be related to the same brokerage.
- The brokerage of the members of a team must designate all the team members as designated agents to provide trading services to or on behalf of any client of any team member.
- A team must ensure that the team's name is clearly indicated in the course of providing trading services.



As a Licensee...

Many licensees choose to join teams. Joining a team may be especially useful for new licensees, for several reasons:

- New licensees often enter the industry without a well-established network of referral sources and clients. By joining a team that is already well established in a particular market, a new licensee can leverage the team's existing network of business and "hit the ground running" early in their career.
- New licensees may also benefit from the combined experience and knowledge of their more experienced team members. The value of good mentorship, training, and support from experienced licensees cannot be overstated for new licensees.
- Newer licensees may also benefit from the marketing efforts and administrative resources of their team. For example, the Rules allow team names to appear on real estate advertising without needing to list the name of each individual team member. If a real estate team strongly markets its team's name in its target market, a new licensee who joins that team may benefit from the pre-existing marketing exposure that has taken place with respect to the team's name.

While these benefits can certainly be significant for some licensees, ultimately, it is up to the licensee themselves to decide whether or not joining a team is a sensible business decision. For example, many teams require their team members to split their commission with the overall team. After careful consideration, some licensees may believe that the benefits of joining a team simply do not outweigh the accompanying costs.

All licensed team members need to be aware that, as individual licensees, they have an obligation to comply with all of the provisions of RESA, the Regulation, and the Rules. The fact that one licensed member of the team may be the "lead" licensee of the team in no way diminishes the other team members' regulatory responsibilities and obligations.

With respect to business practices, teams are not able to separate their agency relationships. For example, if John Smith and Wendy Chang are a team, John cannot act as the sole agent for the seller and Wendy as the sole agent for the buyer in relation to the same transaction. All the team members' names must appear on contracts because the team is deemed to collectively be the agent for the client. The team's name cannot be used on these documents because that name exists only for advertising purposes. However, any team member can execute the documents. The signature of every team member is not required.

Contraventions of the various restrictions on and requirements of teams are subject to administrative penalties as set out in subsection 26(2) of the Rules. Licensee discipline, including administrative penalties, is discussed later in this chapter.

Categories of Licence

RESA provides for different categories of licences under the Rules. Section 5 of RESA provides that within each level of licence (i.e., brokerage, managing broker, associate broker, and representative), a person may be licensed within a category of licence. The categories are based on the real estate services (i.e., trading, rental property management, and strata management services) that can be provided under the licence. In other words, the services that the licensee is permitted or chooses to provide will determine the category of licence. There are a total of seven licence categories: trading, rental property management, strata management, trading/rental property management, trading/strata management, rental property management/strata management, and trading/rental property management/strata management.

The licence category of the managing broker dictates which real estate services may be provided by the brokerage and its licensees. For example, if the managing broker's licence category is trading/rental property management, the brokerage and its licensees can provide trading services and rental property management services if they hold a licence to do so, but not strata management services.

Applying for a Licence

In order to obtain a licence, an application must be submitted to BCFSA. An application for a managing broker, associate broker, or representative licence must identify the brokerage to which the applicant intends to be licensed. Generally, a managing broker, associate broker, or representative may only be licensed in relation to one brokerage and may only provide real estate services on behalf of the brokerage to which they are licensed. However, if permitted by the Rules, a managing broker may be licensed to more than one brokerage (to a maximum of four brokerages) if the brokerages are affiliated. The information and documents that must be provided in order to apply for a licence will be set out by BCFSA.

When evaluating an application, RESA permits BCFSA to conduct an investigation or to require that applicants provide additional information. This investigation may, in some cases, be initiated after a licence has been issued. If, during the course of a licence application investigation, it is discovered that the application contains inaccurate, misleading, or incomplete information, BCFSA may convene a hearing known as a qualification hearing, which could result in a licence refusal, suspension, or cancellation.

Finally, when issuing a licence, BCFSA can impose conditions or restrictions on the licence, such as a time period during which the licensee's conduct is subject to enhanced supervision by their managing broker.

Qualifications for a Licence

Section 10 of RESA states that an applicant for a new licence must satisfy BCFSA that they meet the following applicable requirements:

1. The applicant must be of good reputation and be suitable to be licensed at the level and in the category for which the applicant is applying.
2. If the applicant is an individual, the applicant must:
 - a. be at least 19 years of age; and
 - b. meet the educational and experience requirements established in the Rules.
3. If the applicant is a partnership or corporation, its partners or directors and officers, as the case may be, must be of good reputation.
4. The applicant must not have been:
 - a. refused a licence or have been disciplined under real estate, insurance, mortgage broker, or securities legislation in British Columbia or another jurisdiction;
 - b. disciplined by a professional body; or
 - c. convicted of an offence,for a reason that reveals the applicant as unfit to be a licensee.

Good Reputation

To establish “good reputation”, BCFSA requires applicants to submit an original criminal record check from the police agency responsible for the area in which they reside. The record check must be an original copy and must be dated within 90 days of the date BCFSA receives an applicant's application. Applicants may also obtain an online criminal record check using Triton Canada, a background checking service. If the record

check reveals that an applicant has a criminal conviction, BCFSA will consider whether that applicant is unfit to be licensed. BCFSA will consider the circumstances of each case (e.g., when the offence was committed, the nature of the crime, and the length of the sentence). Under RESA, BCFSA has the authority to investigate and require that an applicant for licensing provide additional information to BCFSA in order for BCFSA to evaluate the application. Another way in which BCFSA evaluates “good reputation” is by including questions on the licence application form relating to criminal charges and convictions, bankruptcy and insolvency, court orders and judgments, refusal of a licence in a related industry, and discipline history in a related industry. If applicants conceal adverse information by providing false or incomplete information in their applications, the presumption as to their “good reputation” is compromised. The most common “criminal charges” involve offences such as impaired driving. Old convictions may be problematic for the applicant to recall with precise detail; however, inaccurate disclosure or missing details can cause lengthy delays in the application process. Finally, there are a number of Canadian pardon services that may resolve the issue of a criminal record.



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When there is doubt about whether an applicant is of good reputation, BCFSA may hold a qualification hearing, where the applicant will be required to satisfy BCFSA that they are suitable to be a licensee.

In 2020 *CanLII 118732* (BC REC), an applicant had a prior disciplinary record with the Registrar of Mortgage Brokers. The applicant's mortgage broker licence had been cancelled because he submitted mortgage applications containing falsified tax documents. On his application for a representative licence, the applicant truthfully answered that he had previously been subject to professional discipline. At the hearing, he expressed remorse for his mistakes and testified that he was a naïve and untrained mortgage broker at the time of his misconduct, during which he processed applications for another mortgage broker without conducting his own due diligence.

The Hearing Committee noted in its decision that rehabilitation factors, including a change in attitude, may be considered. They were satisfied, based on the testimony and reference letters from the applicant, his friends, and his employers, that the applicant was currently of good reputation. The Committee decided that, subject to a number of additional supervision requirements, the applicant would be suitable for licensing.

Educational Requirements

Representatives. Applicants for a representative licence must meet the educational requirement by completing the licensing courses and passing the appropriate examinations. There is a unique and separate licensing course for each of trading services, rental property management services, and strata management services. Furthermore, applicants seeking a trading services licence are required to complete one of two post-licensing courses offered by BCFSA, the *Residential Trading Services Applied Practice Course* or the *Commercial Trading Services Applied Practice Course*, within a specified time after obtaining a licence. The Applied Practice Courses are designed to take the knowledge obtained in the licensing course and apply them to real-life, common, and practical situations. The Applied Practice Courses take approximately five months to complete. There are four components to each course, beginning with an online component, followed by classroom sessions and online field assignments. As soon as an applicant has begun one of the Applied Practice Courses, they should complete and submit a licence application to BCFSA. A temporary licence will be issued to the applicant after the first two to three weeks in the Applied Practice Course, meaning that they may begin providing real estate services while completing the remaining components of the course. Once all of the components have been successfully completed, a full licence will be issued. If an applicant does not complete an Applied Practice Course within the required timeframe, their temporary licence will be terminated.

The Rules state that an applicant for a new licence who is an individual must achieve a level 7 or higher on each of the parts applicable to reading, writing, speaking, and listening, as tested by the Canadian English Language Proficiency Index Program – General Test. However, an applicant is deemed to have satisfied this requirement if the applicant:

- has graduated with a bachelor’s degree or higher from a degree program at an accredited university, college, or technical institute where English is the primary language of instruction; or
- has been licensed to engage in real estate services in another Canadian jurisdiction with an English language proficiency requirement after satisfying that jurisdiction’s requirement for English language proficiency.

Associate Brokers and Managing Brokers. Generally, applicants for a licence as an associate broker or managing broker must meet the educational requirements for a representative licence before they are able to undertake the educational requirements for a licence as an associate or managing broker. Furthermore, applicants must complete the Broker's Licensing Course and pass the applicable examination.

The Rules allow for the above educational requirements (for representatives, associate brokers, and managing brokers) to be waived on the basis of an applicant's previous knowledge or training. BCFSA's Regulatory Statements provide for a number of such exceptions.

Experience Requirements

There are no experience requirements for applicants seeking a representative licence; however, in order for an individual to be licensed for the first time as a managing broker or an associate broker, the applicant must have been providing real estate services as a licensee for at least two years during the five years before the date of the application in British Columbia, or in an equivalent jurisdiction. Similar to the Rules regarding waiving educational requirements, the Rules allow for these experience requirements to be waived on the basis of an applicant's previous experience and training. Also, in the case of an applicant for a managing broker licence, the Rules allow for these experience requirements to be waived if there is an immediate need for a managing broker in the location where the applicant proposes to carry on business.

Term of Licence

The term of a licence, as set out in the Rules, is two years. RESA also permits BCFSA to issue a temporary licence. A temporary licence, such as the one issued to new licensees enrolled in an Applied Practice Course, will require the licensee to meet specific conditions within a specified period of time. If the conditions are not met within the time frame provided for on the temporary licence, the temporary licence is automatically cancelled.



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While licensed, licensees must keep BCFSA informed of various discipline, bankruptcy, and criminal proceedings in which they are involved. Section 23 of the Rules states that licensees must promptly notify BCFSA, in writing, if they are subject to a disciplinary or regulatory proceeding in a related industry; if a business that the licensee owns (or of which the licensee has been a director, officer, or partner at any time during the past two years) has been subject to a court order or judgment in a related industry or has been involved in bankruptcy, insolvency, or receivership proceedings; if the licensee has been charged with or convicted of an offence under a federal or provincial enactment or under a law of any foreign jurisdiction (with some exceptions); or if the licensee has been subject to any bankruptcy, insolvency, or receivership proceedings. Further information and documentation must be provided, if requested by BCFSA. Finally, the written notice must also be provided to the licensee's managing broker.

In 2015 CanLII 90436 (BC REC), a licensee was disciplined for breaching section 23 because he failed to notify RECBC, the former body responsible for administering licensing, and his managing broker that he had been charged with a criminal offence. Despite the fact that the licensee had genuinely believed that he only had to notify the Council and his managing broker about criminal convictions, and not about criminal charges, he was reprimanded and ordered to pay enforcement expenses of \$1,500.

Licensee Names

With respect to brokerages, the brokerage's licensed name must be either the legal name of the brokerage or the trade name of the brokerage, if it has been approved by BCFSA. Individual licensee names must be either the legal name (or a recognizable short form) of the licensee, or a name approved by BCFSA.

Under section 39 of the Rules, a licensee must ensure that their licensee name and the name of their related brokerage are clearly indicated in the course of providing real estate services. More specifically, section 40 states that any real estate advertising published by a licensee must identify the licensee by their licensee name and must also display the licensee name of the brokerage in a prominent and easily readable way.

Renewal of a Licence

Prior to the expiry of a licence, each licensee is required to apply to BCFSA for renewal. Section 14 of the Rules states that a licensee must apply for licence renewal no later than 30 days before the end of their

current licence term. RESA provides that if a licensee has applied to renew a licence prior to the end of the licence term, the licence will continue in effect beyond the end of its term until BCFSA notifies the licensee of its decision with respect to the application (section 12 of RESA).

Before applying to renew a licence, every licensee must complete the mandatory continuing education courses set out by BCFSA. This continuing education helps ensure that all licensees stay up-to-date with the skills and knowledge to continue providing a high level of service to real estate consumers. The courses required by BCFSA depend upon the type of real estate service(s) the licensee is licensed to provide. In addition to the continuing education required by BCFSA, membership in a professional association may require the completion of further ongoing professional education. For example, members of BCREA must successfully meet the requirements of its Professional Development Program within their two-year licensing cycle.

Refusal to Issue or Renew a Licence

If BCFSA determines that a licensee or prospective licensee is not suitable to be licensed, has not met the appropriate education and experience requirements, or, as a result of a criminal conviction or other disciplinary action, BCFSA determines that the individual is unfit to be a licensee, BCFSA can refuse to issue or renew a licence. BCFSA may also refuse to issue a brokerage licence if BCFSA considers that the applicant has a legal name or trade name that is likely to confuse or mislead the public. Before refusing to issue or renew the licence, BCFSA must advise the applicant and allow the applicant an opportunity to be heard. If, after hearing the applicant, BCFSA refuses to issue or renew the licence, it must provide written reasons for the refusal and it must advise the applicant of their right to appeal to the Financial Services Tribunal.

Inoperative Licence

Under section 19 of RESA, a licence may automatically become inoperative. If a managing broker, associate broker, or representative ceases to be engaged by a brokerage, that person's licence automatically becomes inoperative. The licence can be reinstated if that person is re-engaged by the same brokerage or is engaged by another brokerage.

A brokerage licence will automatically become inoperative if the licence of the managing broker becomes inoperative, or is suspended or cancelled. If the brokerage licence becomes inoperative or is suspended or cancelled, the licences of the managing broker, associate brokers, and representatives will automatically become inoperative at the time the brokerage licence becomes inoperative, suspended, or cancelled. Therefore, most brokerages have multiple managing brokers or associate brokers (who could fulfill the role of a managing broker in short order). If the brokerage licence is reinstated, the related licensees who are licensed to and engaged by the brokerage at the time of reinstatement are automatically reinstated.

Voluntary Surrender of a Licence

The Rules allow a licensee to voluntarily surrender their licence to BCFSA, in which case it becomes inoperative unless and until reinstated by BCFSA before the end of its term (section 17 of the Rules).

Employee vs. Independent Contractor

Under RESA, a managing broker, associate broker, or representative must only be licensed in relation to, and engaged by, a single brokerage. Being "engaged" by a brokerage means being either an employee or an independent contractor of that brokerage. Some brokerages prefer to engage licensees as employees, while others prefer independent contractor relationships. Some brokerages use a combination of the two. There are a number of factors that determine which business model a brokerage utilizes to engage licensees, many of which are beyond the scope of this course.

Generally, an employee is a person receiving or entitled to wages for work performed for another, or a person an employer allows, directly or indirectly, to perform work normally performed by an employee. Employers will deduct income tax, employment insurance, and CPP contributions from their employees' income. On the other hand, a person who is an independent contractor is considered to be self-employed. Amounts paid to the independent contractor will not be subject to income tax, employment insurance, and

CPP deductions. Various tests, beyond the scope of this course, have been developed by the courts to decide whether a person is an employee or independent contractor.

For the purposes of this course, it is important to know that, whether a licensee is an employee or an independent contractor, the duties and obligations of the licensee do not change. In other words, the obligations of a representative apply to every licensee licensed as a representative regardless of the manner in which they are engaged by the brokerage. The significance of the difference between an employee and an independent contractor is perhaps limited to its tax implications, and to the applicability of employment legislation, such as the *Employment Standards Act* and the *Workers Compensation Act*.



As a Licensee...

It has become more common for real estate licensees to be engaged by brokerages as independent contractors. Furthermore, with the advancement and increased sophistication of technology, it is becoming much easier to complete work (e.g., printing, photocopying, and filing) and to meet with others remotely rather than needing to attend the brokerage office. As such, many licensees maintain personal offices in their homes or other locations. Section 37 of the Rules sets out three requirements when providing real estate services from a personal office:

1. No sign may be placed outside the office or the building in which the office is located, or from where it is visible from outside the office or building, that indicates real estate services are provided from the office.
2. The phone for the office must not be answered in the name of the related brokerage of the licensee.
3. The licensee must not indicate the personal office address on any real estate advertising or on any other records relating to the provision of real estate services.

PROPERTY MANAGEMENT CONDUCTED BY TRADING SERVICES LICENSEES

Trading services licensees may be asked by consumers to provide property management services. Often times, this request arises when a trading services licensee has assisted a client in the purchase of a property that the client intends to use as a rental property. This scenario highlights the importance of understanding the extent to which trading services licensees may provide services in the context of rental properties.

As explained earlier in this chapter, the Rules create different categories of licences, based on the type of real estate services that may be provided by licensees. Section 3(1) of RESA prohibits providing real estate services to or on behalf of another, for or in expectation of remuneration, unless the person is licensed to provide those services or is exempted from the requirement to be licensed. Therefore, a licensee only licensed in trading services is limited to the provision of “trading services” as defined in RESA and cannot provide real estate services that do not come within the scope of this definition.

In RESA, trading services is defined as:

- “trading services” means any of the following services provided to or on behalf of a party to a trade in real estate:
- (a) advising on the appropriate price for the real estate;
 - (b) making representations about the real estate;
 - (c) finding the real estate for a party to acquire;
 - (d) finding a party to acquire the real estate;
 - (e) showing the real estate;
 - (f) negotiating the price of the real estate or the terms of the trade in real estate;
 - (g) presenting offers to dispose of or acquire the real estate;
 - (h) receiving deposit money paid in respect of the real estate

As the definition of a “trade in real estate” in RESA includes a transaction for the purchase or sale of real estate, for the leasing of real estate, or for any other form of acquisition or disposition of real estate, trading services licensees are permitted to provide any of these trading services to, or on behalf of, a party to a lease transaction.

This means that trading services licensees may help clients advertise rental property, show rental property, receive tenant applications, prepare the lease document, negotiate lease terms, collect a tenant's signature on the lease, and collect a security deposit from a tenant, as these activities fall within the scope of "trading services".

Conversely, a trading services licensee cannot collect rent from tenants, sign a tenancy agreement on behalf of the property owner, negotiate contracts on behalf of the owner other than the lease agreement, conduct a move-in inspection, supervise contractors hired by the owner, or manage landlord or tenant matters. These functions are not within the scope of "trading services".

Trading services licensees may collect remuneration for the provision of services within the scope of "trading services". If a written services agreement exists, the agreement should be drafted or amended to reflect the additional services to be provided and the remuneration to be paid in exchange. Given that continuing property management services are not permitted, trading services licensees must not charge a monthly management fee. Instead, it is more appropriate to charge an upfront lump sum fee for assisting the client in finding a tenant and facilitating the relevant trade in real estate.

Example

Jasbir is looking to purchase a residential condominium unit that can be rented to long-term tenants. Jasbir hires ABC Brokerage ("ABC") to help him locate and purchase a suitable property. Faizel, a trading services licensee with ABC, is appointed as the designated agent for Jasbir. Faizel first helps Jasbir negotiate and close on a perfect rental unit. Next, Faizel assists Jasbir in advertising the unit for rent and in finding a suitable tenant. Both of these activities fall within the definition of trading services under RESA; therefore, Faizel is permitted to provide these services to Jasbir.

Once a suitable tenant is found and a tenancy agreement is finalized, Jasbir asks Faizel if he could manage the unit by collecting the monthly rent, organizing repairs, and generally managing the tenancy relationship. As Faizel and Jasbir have developed a strong relationship and Faizel wants to continue acting as Jasbir's agent for future investment purchases, Faizel agrees to manage Jasbir's rental unit.

Managing rental real estate falls outside the definition of trading services and fits squarely into the definition of rental property management services under RESA. Since Faizel is not licensed to provide rental property management services, he is breaching RESA and may be disciplined by BCFSA.

In this case, Faizel should have informed Jasbir that he is not licensed to provide rental property management services. Furthermore, Faizel could provide a referral to someone within his brokerage (if his brokerage is licensed to provide rental property management services) or another brokerage that is able to assist Jasbir. Finally, Faizel may decide that he would like to be able to offer rental property management services to clients; to do so, he would need to become licensed to provide rental property management services by enrolling in and passing the Rental Property Management Supplemental Course.

The provision of unlicensed property management services will not be tolerated by BCFSA and it is imperative that licensees not licensed for rental property management ensure that they do not engage in any improper property management activities. If a licensee is licensed to provide trading services and rental property management services and is part of a real estate team, then the licensee needs to be careful in providing rental property management services, as they can only provide such services through their team if all licensees on the team are similarly licensed to provide rental property management services. Licensees on a team who provide trading services and rental property management services are discussed further in the "Teams" section earlier in this chapter.



ALERT

Despite the simple rule that licensees may only perform the real estate services for which they are licensed, trading services licensees are frequently subject to professional discipline for providing rental property management services when they are not licensed to do so. In 2018, a licensee who provided rental property management services when she was not licensed to do so was required to pay a \$7,500 discipline penalty and \$1,500 in enforcement expenses (2018 CanLII 59402 (BC REC)). In 2017, several licensees were also disciplined for providing rental property management services while not licensed to do so. One licensee was ordered to pay a discipline penalty of \$6,000 and \$1,500 in enforcement expenses (2017 CanLII 54696 (BC REC)). Another was ordered to pay a discipline penalty of \$3,500 and \$1,500 in enforcement expenses (2017 CanLII 49590 (BC REC)). The licensees in both of these 2017 cases were also ordered to complete a remedial education course.

The following chart has been provided by BCFSA to summarize the services that can and cannot be provided under either a trading services licence or a rental property management services licence. Trading services licensees should note that while negotiation of contracts on behalf of the property owner is generally prohibited, an exception exists with respect to the preparation of a lease agreement with a prospective tenant. Trading services licensees may not, however, enter into this contract or any other contract on behalf of the property owner.

Service	Trading Services Licence	Rental Property Management Licence
Assist a landlord to find tenants	Thumbs up	Thumbs up
Assist a prospective tenant to find a property to rent	Thumbs up	Thumbs down
Collect rents from tenants on behalf of a property owner	Thumbs down	Thumbs up
Collect security deposits from tenants on behalf of a property owner	Thumbs up	Thumbs up
Make payments on behalf of the property owner to third parties	Thumbs down	Thumbs up
Negotiate or enter into contracts on behalf of the property owner	Thumbs down	Thumbs up
Supervise employees or contractors hired by the owner	Thumbs down	Thumbs up
Manage landlord and tenant matters	Thumbs down	Thumbs up

Source: www.bcfsa.ca/industry-resources/real-estate-professional-resources/knowledge-base/report-council/report-council-newsletter-augustseptember-2017

As a final point, it is important to note that sections 94 and 95 of the Rules provide exemptions from licensing when a licensee manages rental real estate owned by either the licensee themselves, or by the licensee's family.



As a Licensee...

The Rules permit licensees to manage rental property outside of their brokerage in certain circumstances. Under the Rules, a licensee is permitted to manage rental property owned by themselves or by their spouse, family partner, children, or parents if they follow certain conditions.

If you are renting out your own property or property owned by a family member, you must:

- provide the services in your own name and not in the name of your brokerage;
- disclose to each potential tenant before entering a tenancy agreement that although you are licensed to provide real estate services, you are not regulated under RESA in this particular transaction;
- disclose in writing to the family member you are representing that although you are licensed, you are not acting as a licensee and you are not regulated under RESA in relation to the rental real estate;
- disclose in writing to the managing broker of your brokerage that you will be providing rental property management services on your own behalf or for a family member; and
- provide the rental management services without remuneration (i.e., for free).

TRUST ACCOUNTS

According to section 26 of RESA, a brokerage must maintain one or more interest bearing *trust accounts* with one or more savings institutions in British Columbia. A trust account is a type of account maintained by one party where the money within the account is held for the benefit of another (the beneficiary). The account holder must use the money for its intended purpose only. The most typical example of

trust account

an account where money is deposited by one for the benefit of another. The money is devoted to a particular purpose and cannot or should not be diverted for other purposes

a use of a trust account in the real estate sales context is when a brokerage holds the deposit monies for a buyer or seller client involved in a real estate transaction. The deposit is intended to form part of the purchase price; therefore, a brokerage cannot use this money for its own purposes (e.g., paying office bills or paying commissions) unless permitted to do so under the Rules.

The party whose money the brokerage holds within its trust account is referred to in RESA and the Rules as the “principal”. The general rule under RESA is that a licensee 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; or
- held or received on account of remuneration for real estate services.

Upon receipt of this money from a licensee, the brokerage must promptly pay it into a brokerage trust account. However, RESA allows licensees and brokerages to hold cheques, drafts, or money orders payable to third parties without paying them into a trust account, so long as the licensee or brokerage delivers the money to the person to whom it is payable.

As a Licensee...

BCFSA wants licensees to understand that “promptly pay” means immediately. BCFSA’s auditors frequently have found that cheques have been held and not deposited until either certification or acceptance of the relevant offer. The brokerage must promptly pay this money into a brokerage trust account. Money that is received should not be held by a licensee or a brokerage pending some future event.

Money within a brokerage trust account will earn interest. RESA states that the interest earned on money held in a brokerage trust account is payable to the Real Estate Foundation. However, a principal can request that the brokerage hold their money within a separate brokerage trust account, in which case the interest earned can be paid to whomever the client wishes.

Once money is in the trust account, a brokerage is permitted to withdraw it from the account if it is:

- a. money paid into the trust account by mistake;
- b. interest paid to the Real Estate Foundation;
- c. money intended as remuneration for a licensee (section 31 of RESA) and that has been earned in accordance with the Rules (specifically, section 61 of the Rules);
- d. unclaimed money transferred under section 32 of RESA;
- e. money paid into court under section 33 of RESA, where a dispute has arisen between the parties over the right to it;
- f. money paid in accordance with a court order; or
- g. money paid to or in accordance with the instructions of the principal to whose credit the money was deposited.

When a brokerage holds or receives money relating to a trade in real estate where there is an agreement between the parties for the acquisition and disposition of the real estate, section 28 of RESA states that this money, held in the brokerage trust account, is held by the brokerage as a stakeholder and not as agent for one of the parties to the trade in real estate. This generally means that the money for a trade in real estate that is being held in a brokerage’s trust account may only be withdrawn if:

1. the circumstances in (a) to (f) from the list above apply;
2. the parties to the trade in real estate agree, in writing to the withdrawal; or
3. the money is deposit money and it is being withdrawn (1) to pay the seller the fee payable by a buyer who exercises their right to rescind a contract of purchase and sale within the Home Buyer Rescission Period under section 42 of the *Property Law Act*, and (2) to return the balance of the deposit back to the buyer.

The stakeholder provisions within RESA and the right to rescind under the *Property Law Act* during the Home Buyer Rescission Period will be explored in greater detail in later chapters.



As a Licensee...

The trust account obligations on brokerages can be detailed and complex; therefore, you should ensure that you are familiar with your brokerage's policies on handling money received from clients and other parties. Brokerages are subject to audits, and BCFSA pays particular attention to ensuring that brokerages appropriately deal with trust monies.



As a Licensee...

As cryptocurrencies (also known as digital currencies) continue to evolve, it is important for licensees to understand and monitor the risks that real estate transactions involving cryptocurrencies may pose to their clients, brokerages, and industry.

Currently, cryptocurrencies such as Bitcoin cannot be held in trust. For that reason, if a deposit for a purchase and sale of real estate is in a cryptocurrency, a third party will have to hold it. This introduces increased risks for the client. Because funds held outside a brokerage trust account do not enjoy the protections provided under *RESA* (e.g., the stakeholder provisions and the restrictions on when trust monies can be withdrawn), they can easily be misappropriated by a third party despite what is provided in the contract. There may also be significant volatility of cryptocurrency's value, which can impact the transaction if the purchase contract is not drafted in a way that adequately protects the parties. Clients who are considering the use of cryptocurrency in a transaction should also understand that there may be limits to how cryptocurrencies can be used in a transaction.

It is important that licensees review and understand their brokerage's policies and procedures (if any) regarding cryptocurrencies. If a client is contemplating the use of cryptocurrencies in a real estate transaction, the licensee should advise the client of the types of risks involved with cryptocurrencies and should strongly recommend the client to seek legal advice. Documenting this advice and recommendation is also prudent.



ALERT

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, remain alert for suspicious activities relating to deposits and speak with your managing broker whenever you have concerns.

A CLOSER LOOK AT THE RULES

As mentioned at the beginning of this chapter, the Rules are designed to deal with licensing issues and the regulation of licensees in relation to the provision of real estate services. As you read through this Course Manual, you will notice a great deal of references to the Rules. Rather than reviewing the Rules in detail now, without any context, this chapter will discuss the general organization of the Rules, as a foundation.



As a Licensee...

You should ensure that you are deeply familiar with the Rules and the types of issues dealt with in the Rules. Many of the day-to-day issues encountered by licensees are covered in the Rules. Most disciplinary cases with BCFSA deal with an allegation of a breach of one or more sections of the Rules. Sadly, in some of these cases, the licensee could have avoided being disciplined if they had simply read the Rules before taking part in the act that led to disciplinary action.

The Rules are broken down into nine Parts.

Part 1 – General

Part 1 contains only the definitions section. This section provides definitions for a number of important terms and phrases that are referred to in the Rules. Whenever one reads a specific section in the Rules, they should always check to see whether any of the words or phrases used in that section are defined in Part 1.

Definitions can also be found within the substantive sections themselves. For example, Part 5, Division 2 of the Rules begins with section 51, which contains a number of definitions that are important to the interpretation of all of the other sections within Division 2 (sections 52 to 59).

Part 2 – Licensing

Part 2 deals with a variety of administrative aspects related to acting as a licensee. It is divided into 6 Divisions that deal with licence categories; brokerage relationships and offices (including affiliated and branch offices); licence qualification requirements; general licence matters (certificates, licence terms, etc.); communications with BCFSA; and discipline and enforcement.

Part 3 – General Responsibilities of Licensees

Part 3 lays out the core responsibilities of licensees. Section 28 sets out managing brokers' responsibilities and section 29 sets out associate brokers' and representatives' responsibilities, both of which were discussed earlier in this chapter. Section 30 provides for the key duties owed by brokerages and their related licensees (e.g., acting in the best interests of the client, taking reasonable steps to avoid conflicts of interest, and acting only within the scope of authority given), and sections 31 and 32 permit the duties within section 30 to be limited or varied in certain situations. Section 33 provides for the general duty of licensees to act honestly and section 34 provides for the general duty to act with reasonable care and skill. The duties owed to clients and others will be discussed in greater detail in Chapter 9: "Professionalism and Ethics" and Chapter 12: "Law of Agency".

Part 4 – Business Practices

Part 4 is broken down into 3 Divisions that deal with general business practices; licensee names; and advertising matters.

Part 5 – Relationships with Principals and Parties

Part 5 is broken down into 4 Divisions that deal with general contractual matters between licensees and consumers; disclosure requirements on licensees; commission and other remuneration matters; and dual agency and conflicts of interest.

Part 6 – Dealing with Other Licensees and Unlicensed Persons

Part 6 prohibits paying unlicensed persons for providing real estate services and acting for unlicensed persons unless they are a principal (e.g., the owner of property or someone who is seeking to purchase property for themselves).

Part 7 – Brokerage Accounts and Financial Requirements

Part 7 deals with a variety of brokerage accounting and financial issues, such as trust accounting, account monitoring, and key brokerage documents (e.g., annual financial statements, accountant's reports, and brokerage activity reports).

Part 8 – Brokerage Records

Part 8 contains 3 Divisions that deal with the financial records requirements of the brokerage; other records requirements of the brokerage; and general recordkeeping matters.

Part 9 – Licensee Exemptions

Part 9 deals with a variety of exemptions from RESA and the Rules in certain situations (all of which apply to either rental property management or strata management scenarios).

DISCIPLINE AND ENFORCEMENT

Categories of Complaints

Section 35 of RESA sets out two broad categories of improper conduct by licensees, namely, professional misconduct and conduct unbecoming a licensee. RESA states that a licensee commits professional misconduct if they:

- contravene RESA, the Regulation, the *Home Buyer Rescission Period Regulation*, or the Rules;
- breach a restriction or condition of the licence;
- do anything that constitutes wrongful taking or deceptive dealing;
- demonstrate incompetence in performing any activity for which a licence is required;
- fail or refuse to cooperate with an investigation by BCFSA;
- fail to comply with an order of BCFSA;
- fail to comply with an undertaking given by them under RESA; or
- make or allow to be made any false or misleading statement in a document that is required or authorized to be produced or submitted under RESA.

RESA defines conduct unbecoming a licensee as conduct that:

- is contrary to the best interests of the public;
- undermines public confidence in the real estate industry; or
- brings the real estate industry into disrepute.

A person, whether they are a licensee or not, may make a complaint to BCFSA if the person believes that a licensee may have committed professional misconduct or conduct unbecoming a licensee.

Licensee and Unlicensed Person Undertakings

BCFSA has a variety of options available when there is reason to believe that a licensee or unlicensed person has committed professional misconduct. BCFSA may investigate the matter, which may lead to a formal disciplinary process; however, BCFSA may also utilize undertakings to address misconduct and ensure further compliance from a licensee or unlicensed person. Under section 53.1 of RESA, BCFSA may, with or without an investigation or hearing:

- give notice to the licensee or the unlicensed person of BCFSA's reason for believing that misconduct has occurred; and
- accept a written undertaking from the licensee or the unlicensed person that they will comply with specific terms, conditions, or requirements of BCFSA.

The undertaking may include the payment by the licensee or unlicensed person of the expenses, or part of the expenses, incurred by BCFSA in handling the undertaking.

Undertakings fall outside of the more formal discipline process under RESA (discussed shortly), as they do not form part of the licensee's public record and are not published. They are typically utilized by BCFSA where the misconduct is readily apparent or is of a minor nature. Undertakings given by a licensee or an unlicensed person under this section are binding on them, and a failure to comply constitutes professional misconduct under RESA, which may lead to further investigation and professional discipline.

Investigations

Whether or not BCFSA has received a complaint, BCFSA can conduct an investigation to determine whether a licensee has committed professional misconduct or conduct unbecoming a licensee (section 37 of RESA). The individuals that may be subject to an investigation include:

- licensees;
- former licensees; and
- officers, directors, controlling shareholders, or partners of a licensee or former licensee.

BCFSA may (during business hours) inspect, remove, and copy records that are located on the business premises of the person subject to an investigation, and may require that they answer questions or meet with BCFSA and produce information and other records in the person's possession. Persons subject to an investigation are prohibited by RESA from withholding, concealing, destroying, or refusing to provide any information reasonably required for the purpose of the investigation. BCFSA may also apply to a justice for an order authorizing the seizure of records or other evidence, wherever located, if BCFSA has reasonable grounds to believe that the licensee committed professional misconduct or conduct unbecoming a licensee (section 38 of RESA).



As a Licensee...

You should be aware that, under section 21 of the Rules, a licensee is required to respond promptly to any inquiry addressed to the licensee by BCFSA. Furthermore, the licensee's response must be in writing (unless BCFSA allows it to be provided otherwise) and within the time limit set for response. Therefore, take all inquiries from BCFSA seriously, addressing them in a prompt and timely manner.



ALERT

As a licensee, you have both a legal and ethical duty to report misconduct. Under section 29 of the Rules, associate brokers and representatives are required to promptly notify their managing broker of their own misconduct and of misconduct within their brokerage. Managing brokers have the duty to take reasonable steps to deal with the matter, which may include notifying BCFSA. From an ethical standpoint, even misconduct observed outside of one's brokerage should be reported, and possibly directly to BCFSA. BCFSA cannot investigate problematic behaviour that it does not know about, and licensees play an important role in that regard. The duty to report misconduct is explored in detail in Chapter 9: "Professionalism and Ethics".

Discipline Process

Following an investigation or cancellation of an administrative penalty (discussed later), BCFSA may issue a notice of discipline hearing (section 40 of RESA) against a licensee. The notice must be given at least 21 days in advance of the hearing and:

- describe the nature of the complaint or other matter that is to be the subject of the discipline hearing;
- specify the time and place set for commencement of the hearing; and
- advise the licensee that BCFSA is entitled to proceed with the hearing in the absence of the licensee.

Once a licensee receives a notice of hearing, the licensee may choose not to dispute the allegations set out in the notice. RESA permits licensees who are the subject of a notice of a disciplinary hearing to enter into an agreement with BCFSA regarding a disciplinary order without the need for a hearing (section 41 of RESA). This is done by the licensee delivering a proposal to BCFSA that includes the licensee's consent to BCFSA making a specific order. In such a circumstance, the order made by BCFSA is called a *consent order*.

RESA provides that the proposal, whether or not BCFSA accepts it, can be used for the purposes of considering a claim from the Special Compensation Fund, but that the proposal cannot be used for civil proceedings or other proceedings under RESA.

If the licensee does not offer or is not willing to consent to the discipline order as proposed by BCFSA, a discipline hearing will be held. Once a hearing has been scheduled, BCFSA may order a pre-hearing conference with the licensee to help make sure that all parties are fully prepared, and to clarify any issues so that the hearing can proceed smoothly.

Discipline hearings may be conducted by BCFSA by way of written submissions or oral hearing, or a combination of both (section 42). These hearings may proceed despite the fact that the licensee may not appear in person or may not be represented by legal counsel.

At a discipline hearing, lawyers employed by BCFSA present the evidence that has been gathered regarding the complaint. A lawyer generally represents the licensee, although a licensee may conduct their

consent order

an order made by BCFSA against a licensee in cases of professional misconduct or conduct unbecoming a licensee where the licensee has consented to the order rather than disputed the notice of hearing

own defence. BCFSA and the licensee are each permitted to call witnesses to provide evidence relating to the events in dispute. The licensee can also appear as a witness in the proceedings. The witnesses at the hearing present their testimony under oath and the proceedings are recorded by a court reporter.

At the conclusion of the hearing, BCFSA must determine whether the licensee has committed professional misconduct or conduct unbecoming a licensee. If BCFSA finds that neither offence has been committed, it must dismiss the matter. However, if it finds that either offence has occurred, BCFSA has a range of available sanctions that it can impose.

Urgent Orders

In cases where there has been professional misconduct or conduct unbecoming a licensee, and the length of time that would be required to complete an investigation or hold a discipline hearing, or both, in order to make such an order would be detrimental to the public interest, BCFSA may make an order suspending a licence, imposing restrictions or conditions on a licence, or requiring a licensee to cease or to carry out a specified activity without holding a hearing (section 45 of RESA). This order can be made whether or not a notice of discipline hearing has already been issued, without giving notice to the licensee, and without providing the licensee an opportunity to be heard. An order by BCFSA of this nature is called an “order in urgent circumstances” or an *urgent order*.

Once an urgent order has been made, BCFSA must give the affected licensee a copy of the order and written reasons for it, and a written notice that a discipline hearing may be held. A licensee who is the subject of an urgent order may require that a discipline hearing be held by delivering a written notice to BCFSA. If a hearing is requested, at the conclusion of the hearing, BCFSA must either rescind the urgent order or, if BCFSA determines that the licensee committed professional misconduct or conduct unbecoming a licensee, rescind the urgent order and make a disciplinary order in its place.

urgent order

an order made by BCFSA against a licensee in cases of professional misconduct or conduct unbecoming a licensee in situations where it would be detrimental to the public interest to proceed through the traditional route of completing a full investigation or holding a discipline hearing

Case Study

In a case in 2017, RECBC, the former body responsible for licensee discipline, received complaints that a brokerage and its managing broker were running a “rent to own” scheme which targeted home owners experiencing financial distress. Within the program, vulnerable sellers facing foreclosure were induced to sell their properties to the licensee at well below assessed values. In conjunction, the sellers signed option agreements granting them, in theory, a right to repurchase their homes later on, at a price significantly higher than what the licensee had paid. The sellers also signed lease agreements allowing them to remain in their homes, at above-market rental prices. The terms were advertised through unclear and misleading brochures, and the conditions were oppressive in nature. For example, the contracts set out that any default of the lease, however minor, would result in an automatic revocation of the options. In all of these transactions, the sellers were unrepresented.

RECBC’s staff investigators presented evidence of numerous transactions the licensee had concluded under this program, as well as one pending transaction. The staff submitted that, by targeting financially distressed sellers and inducing them to sign complex legal documents without independent legal advice, the licensee committed professional misconduct.

RECBC’s Discipline Committee characterized the licensee’s alleged conduct as aggressive, predatory, and inconsistent with the professional standards required of a licensee. The Discipline Committee considered that it would take a year or more to prepare the case for a hearing, and that without an interim measure, the licensee would continue to use his status as a licensee to engage in unprofessional conduct. As a result, the Discipline Committee made an order immediately suspending the licences of the licensee and the brokerage.

Available Sanctions

Section 43 of RESA states that, if BCFSA determines that a licensee has committed professional misconduct or conduct unbecoming a licensee, BCFSA must do one or more of the following:

1. reprimand (i.e., formally warn) the licensee;
2. suspend the licensee’s licence for the period of time that BCFSA considers appropriate or until specified conditions are fulfilled;
3. cancel the licensee’s licence;
4. impose restrictions or conditions on the licensee’s licence or vary any restrictions or conditions applicable to the licence;

5. require the licensee to cease or to carry out any specified activity related to the licensee's real estate business;
6. require the licensee to enrol in and complete a course of studies or training specified in the order;
7. prohibit the licensee from applying for a licence for a specified period of time or until specified conditions are fulfilled;
8. require the licensee to pay enforcement expenses incurred by BCFSA in relation to either or both of the investigation and the discipline hearing (with maximum amounts set out by regulation);
9. require the licensee to pay a discipline penalty in an amount of:
 - a. not more than \$500,000, in the case of a brokerage or former brokerage; or
 - b. not more than \$250,000, in any other case; or
10. require the licensee to pay an additional penalty up to the amount of the remuneration accepted by the licensee for the real estate services in respect of which the contravention occurred.

Discipline penalties can be imposed for each contravention by a licensee. For example, if an individual licensee failed to provide the applicable one of the Disclosure of Interest in Trade forms to each of three clients, they could be subject to three separate discipline penalties of up to \$250,000 each. The tenth sanction listed previously is known as the return of compensation penalty and allows BCFSA to order that the amount of remuneration (or compensation) that a licensee generated from the professional misconduct or conduct unbecoming a licensee be paid as an additional penalty to BCFSA. The money received by BCFSA on account of a discipline penalty or a return of compensation penalty may be expended by BCFSA only for the purpose of educating the public, licensees, and other participants in the real estate industry in British Columbia, about:

- a. the operation and regulation of the industry, and
- b. issues related to real estate and real estate services.

If it considers it to be in the public interest, BCFSA may also make an order freezing funds on deposit in a financial institution or being held by a third party. The order will prevent the licensee from withdrawing any of the licensee's funds. Additionally, BCFSA may order the licensee to hold all property in trust for a receiver, custodian, trustee, or liquidator. Typically, BCFSA only makes this order when an urgent order has been made.

Under section 47 of RESA, BCFSA must publish all orders (i.e., consent orders, discipline orders, urgent orders), and provide copies to any person upon request. The Regulation further states that orders must be posted on BCFSA's website. BCFSA links these orders to a licensee's search results available from BCFSA's online licensee search page. This means that members of the public who search for a licensee on BCFSA's webpage will be able to see the licensee's disciplinary history. Finally, discipline orders can also be found on The Canadian Legal Information Institute's webpage at www.canlii.org.

Discipline Against Unlicensed Persons

Unlicensed persons, meaning persons providing real estate services without a licence or an exemption from the requirement for licensing, or licensees providing real estate services that they are not licensed to provide, pose a risk to the public and harm the public's perception and trust in the real estate profession. As such, RESA allows BCFSA to investigate and discipline unlicensed persons. BCFSA's authority under RESA in this area is similar to BCFSA's disciplinary powers over licensees, in that BCFSA can undertake investigations, apply to obtain an order from a justice for the search and seizure of records and other evidence, issue a notice of discipline hearing, accept a proposal for a consent order, make an order in urgent circumstances, and make an order to freeze property. BCFSA has the power to order that the unlicensed person:

- cease the unlicensed activity;
- carry out specific actions necessary to remedy the situation;
- require the person to pay enforcement expenses;
- pay a penalty of no more than \$500,000 for corporations and partnerships, or \$250,000 for individuals; and
- pay an additional penalty up to the amount of the remuneration accepted by the person for the real estate services they provided.

Appointment of a Receiver

BCFSA can apply to a court for an order for the appointment of a receiver or receiver manager of the property of the licensee (section 59 of RESA). As in the case of an order freezing funds, BCFSA typically only makes this order when an order in urgent circumstances has been made. A court can authorize the receiver to wind up or manage the business and affairs of the licensee. The receiver is authorized to exercise all the powers necessary for the wind up or management of the business and affairs of the licensee.

Appeals to Financial Services Tribunal

In most circumstances in which a licensee is the subject of a decision or order from BCFSA, the licensee may appeal the decision. The appeal is made to the Financial Services Tribunal (section 54 of RESA), which will hear appeals under a variety of legislation, including RESA. An appeal to the Financial Services Tribunal can only be submitted by way of a written appeal, unless specific permission is received from the Tribunal, and notice of the appeal must be filed with the Chair of the Financial Services Tribunal within 30 days of BCFSA's decision.

A decision or order from BCFSA will remain effective even if a licensee submits an appeal to the Financial Services Tribunal, unless it is overturned by the Financial Services Tribunal. For example, if BCFSA suspends a particular licensee's licence, the licence will remain suspended if the licensee chooses to appeal the decision, unless and until the Financial Services Tribunal reverses the order of BCFSA.

10 Things to Know About Complaints, Investigations, and Licensee Discipline

1. Complaints and Investigations are Confidential

BCFSA protects privacy by keeping all complaints confidential unless disclosing the complaint is necessary to obtain information for an investigation.

2. Licensees Have a Voice

If a licensee is the subject of a complaint, BCFSA will contact that licensee so that they can respond to the allegations.

3. Communication to Resolve Misunderstandings is Encouraged

BCFSA encourages licensees to resolve misunderstandings with consumers before they become complaints.

4. Investigations are Carefully Reviewed

Investigations may have multiple steps. At each stage, the file may be closed if there is insufficient evidence to support the complaint.

5. Licensees Have Choices

If BCFSA decides a disciplinary hearing is necessary, the licensee has two options. The licensee may either argue the allegations at the hearing, or admit to the allegations and agree to the proposed penalty through a consent order.

6. Consent Orders and Disciplinary Decisions are Public

Consent orders (signed by a licensee if they admit to the allegations) and decisions from disciplinary hearings are published online and are available to the public.

7. BCFSA Hearings are Public

Hearings are open to the public unless BCFSA determines that a hearing or a portion of a hearing must be held in camera (i.e., in private) to prevent the unauthorized disclosure of financial or personal matters, or other confidential information that would be damaging to any of the parties.

8. You'll Be Kept Informed

BCFSA notifies licensees when they are the subject of an investigation. If BCFSA is going to hold a disciplinary hearing, BCFSA will notify the licensee approximately six months before the hearing date.

9. A Licensee's Role at a Hearing

A licensee has a right to attend their disciplinary hearing. The licensee is permitted to hire a lawyer, and may be questioned or asked to give evidence.

10. Private Matters Remain Private

BCFSA does not publish information about a licensee or a complainant that could be considered an unreasonable invasion of privacy.

Administrative Penalties

RESA allows BCFSA, in its Rules, to designate contraventions of specific provisions of RESA, the Regulation, or the Rules as being subject to administrative penalties and to establish the amount of administrative penalty that may be imposed in respect of each contravention, up to a maximum of \$100,000. Administrative penalties may also require the licensee to complete specific courses or training, and may involve restrictions or conditions on one's licence. In 2021, amendments to the 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.

Administrative penalties are intended to promote compliance with legislative requirements. They 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.

Section 26 of the Rules sets out the four categories of contraventions that may be subject to administrative penalties.

1. **Category A** contraventions are mostly characterized as business management infractions with a low risk of harm to consumers.
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.
3. **Category C** contraventions relate to substantial duties licensees owe to clients and are subject to the highest administrative penalty amounts.
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, so the administrative penalty for Category D contraventions are applied until compliance is achieved.

To issue an administrative penalty, BCFSA will deliver a notice of administrative penalty to the licensee. That licensee then has 30 days, or a longer period allowed by BCFSA, to either pay the penalty or deliver a written notice to BCFSA stating that they would like an opportunity to be heard. After the licensee has had an opportunity to be heard, BCFSA may either cancel or confirm the penalty. Decisions for administrative penalties and decisions to either confirm or cancel an administrative penalty may be published by BCFSA.

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:

1. the operation and regulation of the industry; and
2. issues related to real estate and real estate services.

Offences

RESA provides that certain conduct is an offence for which a person, including a corporation, may be convicted. The following actions are specified as offences under section 118 of RESA:

- failing to hold a real estate licence (section 3);
- failing to pay funds into a trust account (section 27);
- improperly withdrawing money from the trust account (section 30);
- interfering with an investigation (section 37(4));
- failing to comply with an order of BCFSA; and
- making a false statement in a record required by RESA.

RESA provides that the maximum fine on a first conviction for a corporation is \$1.25 million and that the maximum fine for each subsequent conviction is \$2.5 million. The maximum fine for an individual on a first conviction is \$1.25 million or imprisonment for not more than two years, or both, and on each subsequent conviction the maximum fine is \$2.5 million or imprisonment for not more than two years, or both (section 119 of RESA).

THE REAL ESTATE DEVELOPMENT MARKETING ACT

The *Real Estate Development Marketing Act* (“REDMA”) regulates the marketing within British Columbia of “development units” in a “development property”.

REDMA is directed at developers who develop and market various types of real estate developments, called the “development property”. Development properties include subdivisions, strata properties, cooperatives, time shares, and other shared interests in land or residential leasehold complexes. REDMA applies to the marketing of all real estate development properties, whether located in British Columbia or not. REDMA aims to protect purchasers by requiring developers who market or intend to market development units in development properties to:

1. meet any preliminary requirements or approvals applicable to the type of property to be marketed (requirements are found in sections 4 to 10 of REDMA for the different types of developments covered by REDMA);
2. ensure appropriate steps are taken to pay the cost of utilities or other related services and to assure the purchaser’s title (or other interest) upon purchase (section 3); and
3. prepare and file a disclosure statement in the form required by BCFSA (section 3).

A “developer” is defined in REDMA as a person who, directly or indirectly, owns, leases, or has a right to acquire or dispose of development property, subject to exclusion by regulation. Because developers often retain and rely on real estate licensees to market developments on their behalf, it is important that licensees understand the different types of development units and the applicable regulatory requirements. It is also important that a licensee market under the developer’s name and not under the name of another entity.

BCFSA has published a number of Policy Statements in relation to REDMA and the *Real Estate Marketing Act Regulation* (the “REDMA Regulation”), which are available on the website of BCFSA. These Policy Statements provide further particulars regarding the form and content of disclosure statements filed under REDMA, and the circumstances in which BCFSA deems actions or arrangements to be in accordance with REDMA. Disclosure statements that do not comply with the Policy Statements will be returned to the developers.



As a Licensee...

If you are a licensee acting on behalf of a developer, you should verify that the developer is in compliance with REDMA generally. Specifically, you should:

1. verify that a disclosure statement has been filed with BCFSA before offering for sale any property that meets the definition of a development unit;
2. provide the disclosure statement to the purchaser in accordance with section 15 of REDMA (i.e., before the purchase agreement is entered into) and obtain the written statement from the purchaser;
3. review the deposit provisions in any purchase agreement to see if they are consistent with the deposit provisions in the disclosure statement, and if they are not, recommend that the purchaser seek legal advice; and
4. know that REDMA applies to properties outside British Columbia if those properties are marketed and sold in British Columbia.

For a discussion of the potential liabilities of a licensee in relation to marketing development units, see the “Discipline Matters Relating to REDMA” section at the end of this chapter.

Real Estate Development Property

REDMA defines “development property” in relation to the number of development units created. The requirement for a disclosure statement, as discussed below, applies to the sale of development units in a development property, where no exemption applies.

Development property means any of the following:

- 5 or more subdivision lots in a subdivision, unless each lot is 64.7 ha or more;
- 5 or more bare land strata lots in a bare land strata plan;
- 5 or more strata lots in a stratified building;

- 2 or more cooperative interests in a cooperative association;
- 5 or more time share interests in a time share plan;
- 2 or more shared interests in land in the same parcel or parcels of land; or
- 5 or more leasehold units in a residential leasehold complex.

The REDMA Regulation sets out a number of exemptions from the requirements of REDMA, both in relation to certain types of development units and to development properties as a whole. Part 2 provides that a developer who markets a development property in a single transaction is exempt from the marketing requirements of Part 2 of REDMA (which includes the disclosure statement requirements) in respect of that marketing. This exemption is intended to allow the sale of development properties between developers without imposing the same disclosure requirements that would be expected in marketing those properties to the general public. Other exemptions apply to:

- the marketing of development units zoned and used for industrial or commercial purposes;
- leases of 3 years or less;
- sales or leases subject to *Securities Act* requirements, provided those requirements are met; and
- certain subdivision lots within municipalities (discussed below).

Real Estate Development Units

A “development unit” is defined in REDMA to mean a subdivision lot, bare land strata lot, strata lot, cooperative interest, time share interest, a shared interest in land, or a leasehold unit, provided they are located in a development property.

Subdivisions

REDMA defines a “subdivision” as land that is divided into lots or parcels, other than under the *Strata Property Act*. Therefore, a subdivided lot in a development property is a development unit. As a result, unless exempted from the requirements of REDMA, a developer must comply with all of the marketing requirements of REDMA before a subdivided lot can be marketed for sale or lease.

The REDMA Regulation provides that a developer who markets a subdivision lot is exempt from the marketing requirements of Part 2 of REDMA (including the disclosure statement requirements) if the subdivision lot is located in a municipality and the developer has complied with all of the requirements of the municipality’s subdivision bylaws, or deposited any security required by the municipality under the *Local Government Act*.

Strata Lots

A strata lot can be either a strata lot in a stratified building or a bare land strata lot. Strata lots are created under the *Strata Property Act* and fall under the requirements of REDMA. A developer must not market a strata lot unless either:

1. a strata plan (or a bare land strata plan) has been deposited in the land title office; or
2. a building permit (or an approving officer’s preliminary approval) has been issued in relation to the strata lot.

Policy Statements 5 and 6 allow for the early marketing of strata lots, in certain circumstances, as set out in section 10 of REDMA.

Cooperative Interests

A cooperative interest is an interest held in a cooperative association, either as a shareholder, partner or member, which includes a right to occupy land in which the cooperative association has an interest.

Cooperative associations are any corporation or limited liability company (as defined in the *Business Corporations Act*), or partnership.

The sale of shares that includes a right to occupy land is exempt from the registration requirements of the *Securities Act*. As a result, licensees can sell such shares.

Example

For example, suppose that a company owns a parcel of land and intends to build a fourplex. Each unit will be occupied by a different individual or family. Instead of creating four strata lots, the company chooses to sell a share to each of four different buyers. The sale of the share to each buyer is accompanied by a right to occupy one of the units. By selling a share, which is accompanied by a right to occupy land, the company has sold a cooperative interest.

Time Share Interest

A time share interest is an interest in a time share plan which grants a person a right of recurring use of land on a periodic basis. It is not necessary that the person acquire an interest in the land that is the subject of the plan.

Historically, the sale of time share interests permitted the use of the land on a week-by-week basis, without an ownership interest in land. More recently, a number of developments in British Columbia have offered a fractional interest in a property, such as a 1/5 interest. The purchaser is entitled to occupy the property for approximately 10 weeks per year. Such a development also qualifies as a time share interest, since the person is participating in a plan that allows the person to use the land in question on a periodic basis. However, in this case, the person is able to use the land for 10 weeks instead of the traditional 1 week, and also acquires an ownership interest in the land.

Shared Interest in Land

A development offering a shared interest in land is a development in which the purchaser buys or leases the land with at least one other person, and enters into an agreement, as part of the purchase or lease, that restricts the purchaser's use of the land to only a part of the land.

Example

Suppose that a developer wishes to build an eight unit apartment style building and sell the development to eight purchasers. Rather than file a strata plan, the developer sells a 1/8 interest in the title to eight different purchasers. The title is not subdivided. Instead, each purchaser obtains a 1/8 interest as tenant in common with the other seven owners. As part of the transaction, each purchaser enters into an agreement to occupy a different unit. In this case, each purchaser has purchased a shared interest in land.

Leasehold Unit

REDMA includes leasehold units in a residential leasehold complex as a development unit. A residential leasehold complex is a complex containing one or more buildings capable of being used for leasehold residential purposes. Buildings comprised of strata lots, cooperative interests, and shared interests in land are excluded from the definition of residential leasehold complex.

The sale of leasehold units in British Columbia has sometimes taken the form of the sale of life leases, which are generally marketed to seniors.

Marketing Requirements

REDMA contains a number of requirements that developers must satisfy before the developer can market a development unit (section 3). The developer must obtain the necessary approvals (or have permission to market prior to obtaining the necessary approvals), make adequate arrangements relating to the title or interest being sold or leased, and prepare and file a disclosure statement with BCFSAs.

Although marketing development units is prohibited until the relevant requirements have been met, the policy statements have clarified that some “pre-marketing” activities will be considered permissible even before a disclosure statement is filed and the other relevant criteria have been satisfied. According to BCFSAs’ policy statements:

Developers may advertise a proposed development and communicate with potential purchasers so long as potential purchasers do not gain the impression that they have a right to acquire a [development unit]. To avoid confusion, it is recommended that every advertisement contain the developer’s name and address, the telephone number of at least one representative from whom information and a copy of the disclosure statement (when available) may be obtained, and prominent disclaimer stating that the advertisement is not an offering for sale and that such an offering can only be made after filing a disclosure statement.



As a Licensee...

Many licensees specialize in the sale and purchase of development units that have yet to be constructed. These pre-construction units are often referred to as “presales”. While specializing in presale transactions may be a lucrative source of business for licensees, presales also carry unique risks and features that clients should be educated about before making any purchase decisions. Licensees who wish to take part in the presale market should develop their own understanding and knowledge of this area, so that they can effectively carry out their duties to their clients. If a licensee has a client who is considering purchasing a presale, some of the topics that the licensee should educate that client about include:

- **Development Problems:** Development of the project may be delayed, or may not proceed at all. This could be for a variety of reasons (e.g., inadequate sales, delays in obtaining financing or building permits, higher than expected costs for construction materials and an inability to hire skilled construction workers due to labour shortages). Presale contracts should be carefully reviewed to understand the implications for client if there is a development delay or the project does not complete. For example, the client should consider the best time to sell their current property, if they plan to do so before taking possession of the presale.
- **Changes in Property Value and Financing Issues:** A number of things can happen between the initial presale contract signing and the project completion date that can impact a buyer’s ability to finance their purchase. For example, the cost of the development unit might increase, interest rates can go up, property value can go down, and a purchaser’s employment status may change. If a property declines in value, buyers may not be able to finance as much of the purchase as previously anticipated, requiring the borrower to make up the difference.
- **Restrictions on Assignment:** Presale contracts are commonly assigned from one buyer to another prior to completion of the development. Once a contract is assigned to a new buyer, the new buyer has the right to receive title to the property once development is complete. While assignments are common with presales, some presale contracts restrict the ability to assign the contract to new persons. For example, assignments may be permitted under a contract subject to the payment of an assignment fee to a developer. When an assignment of a presale contract may occur, the parties should be recommended to obtain legal advice to ensure that the assignment occurs in the appropriate way.
- **Finished Product:** Additionally, clients should be advised that presale contracts normally allow developers to substitute materials and finishing; there is always a risk with a presale that the finished product may not align with what was marketed.

Licensees who wish to ensure that their clients have a full understanding of the presale process should consider providing their clients with BCFSAs “Understanding Pre-Sale Purchases” document, available on BCFSAs website.

Disclosure Statements and Rescission Rights

Disclosure Statements

As mentioned previously, REDMA requires developers to prepare and file a *disclosure statement* with BCFSAs. It also requires developers to provide potential purchasers with copies of the filed disclosure statement. One of the central objectives of REDMA is to ensure that material facts are provided to purchasers when development units are being marketed to them. Section 15(1) provides that a developer must not enter into an agreement for the sale or lease of a development unit with a purchaser unless a copy of the disclosure statement has been provided to the purchaser, and the purchaser has had the opportunity to read the disclosure statement and has provided the developer with a written statement acknowledging that the purchaser has an opportunity to read the disclosure statement.

**disclosure statement
(in development)**
a document prepared by the developer of a subdivision to ensure that investors or purchasers have adequate information upon which to base a purchasing decision



As a Licensee...

Licensees acting on behalf of developers should ensure that:

- they provide the purchaser with a copy of a disclosure statement;
- the purchaser has had ample opportunity to familiarize themselves with the disclosure statement provided; and
- the purchaser has provided the necessary confirmation in writing, before the developer and the purchaser enter into a purchase agreement.

Section 14(2) states that a disclosure statement must be in the form and include the content required by BCFSAs, and that it must plainly disclose all material facts related to the development property, without misrepresentation. Under section 22(3) of REDMA, a purchaser of a development unit is deemed to have relied on the contents of the disclosure statement and will have a statutory right to damages, subject to certain defences and limitations, if the disclosure statement contains a misrepresentation. However, it should be stressed that in order to give rise to a developer's liability, the information omitted or misrepresented must be material.



As a Licensee...

Licensees should keep in mind that the developer's disclosure obligations under REDMA are totally separate from a licensee's disclosure obligations, and that the licensee is still obligated to comply with all common law and statutory duties such as disclosure of latent defects of which a licensee is aware, and disclosure under section 59 of the Rules regarding material latent defects.

Material Changes

As soon as a developer becomes aware that a disclosure statement does not comply with REDMA or the REDMA Regulation or contains a misrepresentation, the developer must file and deliver a new or amended disclosure statement to both prospective purchasers and purchasers who have not yet received title to their development unit to rectify the issue. Section 16 of REDMA sets out the circumstances in which a developer must file a new disclosure statement and those in which filing an amendment is adequate. The amendment must clearly identify and correct any misrepresentations or defects in the original disclosure statement. Section 15.2 of REDMA provides for the filing of a consolidated disclosure statement by the developer if the developer is filing an amendment to a disclosure statement. A consolidated disclosure statement is the original disclosure statement that incorporates all of the filed amendments up to that point.

A new disclosure statement will be required when:

- the identity of the developer changes;
- the court appoints a receiver, liquidator or trustee in bankruptcy over the development property; or
- BCFSAs gives notice to the developer that a new disclosure statement must be filed.

The distinction between being required to file a new disclosure versus an amendment to the existing disclosure statement is important because a purchaser who receives a new disclosure statement gets another seven days (under section 21(2)) during which they may unequivocally rescind the contract, while a purchaser who receives an amendment does not. The rescission rights available to a purchaser are discussed next.

Rescission Rights

REDMA also provides that, regardless of whether title to the development unit has been transferred, a purchaser may have a right to rescind the purchase agreement by serving written notice of the *rescission* on the developer. Effectively, this powerful remedy allows the purchaser to "back out" of the purchase agreement, without penalty. These rescission rights cannot be contracted out of, and any attempt by the developer to have a purchaser waive them will be void.

The requirements necessary to exercise a rescission can be complex, and the following is only a general summary of the legislation; therefore, if a purchaser is seeking to rescind their purchase agreement, a licensee should not attempt to advise them on the rescission process. The purchaser should be told to seek legal advice.

There are a number of rescission rights available to purchasers, depending on the circumstances. Before discussing them, it is important to note that these rescission rights are completely separate from the right of rescission contained in the *Property Law Act*, which establishes a Home Buyer Rescission Period ("HBRP"). The HBRP applies to "residential real property" and allows a buyer to rescind their contract of purchase and sale with the seller within three business days, if they promptly pay to the seller a fee of 0.25% of the purchase price. The HBRP does not apply to contracts of purchase and sale under REDMA.

rescission

in the law of contracts, a rescission amounts to the unmaking, or an undoing of the contract from the beginning, as opposed to a termination

Seven Day Rescission Right

First, a purchaser may rescind the purchase agreement by serving written notice of the rescission on the developer within seven days after the later of:

1. the date that the purchase agreement was made; or
2. the date that the developer obtained a written statement from the purchaser, acknowledging that the purchaser has had an opportunity to read the disclosure statement.

For the purposes of obtaining the latter, it is not sufficient to have a receipt clause built directly into the purchase agreement, stating that, upon signing the agreement, the purchaser acknowledges having read the disclosure statement. BCFSA recommends acquiring a stand-alone receipt statement. This “seven day rescission right” can be exercised for any reason, regardless of a developer’s actions.

Failure to Deliver a Disclosure Statement to the Purchaser

The second rescission right arises if the developer fails to deliver a disclosure statement to the purchaser. The previous sections discussed when a disclosure statement is needed, and when a new disclosure statement must be provided to a purchaser. If the developer fails to deliver a disclosure statement to the purchaser, the purchaser may rescind the purchase agreement at any time by serving a written notice of rescission on the developer. It should also be noted that a failure to deliver a disclosure statement to a purchaser is a breach of REDMA, which, according to section 23, generally makes the purchase agreement unenforceable against the purchaser. Therefore, if the purchaser does not complete the transaction, the developer may not be able to bring a lawsuit against the purchaser for a failure to complete.

Failure to Deliver an Amendment to a Disclosure Statement to the Purchaser

The last rescission right arises if the developer fails to deliver an amendment to a disclosure statement; however, written notice of the rescission must be served on the developer, and the following must apply:

1. the amendment was “reasonably relevant” to the purchaser in deciding to enter into the purchase agreement; and
2. no more than one year has elapsed after the transfer of title.

As with the delivery of disclosure statements, a failure to deliver an amendment, in certain circumstances, can also constitute a breach of REDMA, which according to section 23, may make the purchase agreement unenforceable, if certain materiality and timing thresholds are met.

Offences and Penalties

Failure to comply with the disclosure requirements set out in REDMA is an offence. For a corporation, it can result in liability for a fine of up to \$1.25 million for a first offence and fines up to \$2.5 million for subsequent offences. For an individual, the first conviction can give rise to a fine not exceeding \$1.25 million or imprisonment for up to 2 years, or both. For subsequent offences, the fine can be as high as \$2.5 million and can be imposed instead of, or together with, imprisonment for up to 2 years. Additionally, BCFSA has the power to order a developer that did not comply with REDMA to cease marketing units or to pay an administrative penalty of up to \$500,000, in the case of a corporation, or up to \$250,000, in the case of an individual.

Discipline Matters Relating to REDMA

Real estate licensees who fail to comply with the requirement to provide a purchaser with a disclosure statement, as prescribed by REDMA, may be disciplined by BCFSA. In addition, licensees have been disciplined for the following:

1. accepting remuneration directly from the developer and not the brokerage in relation to which the licensee was licensed;
2. allowing or assisting the developer to breach REDMA by receiving, placing, and releasing deposits not in accordance with REDMA;

3. failing to recommend legal advice to purchasers where the amount of the deposit to be paid to the developer contravened REDMA;
4. marketing out of province development units in British Columbia without a disclosure statement being filed with BCFSAs; and
5. failing to act with reasonable care and skill on behalf of the developer when preparing the purchase agreement, which included a waiver of the purchaser's rescission rights under REDMA.

