

THE REAL ESTATE COUNCIL OF ONTARIO -(RECO) New Disciplinary Procedures

As a lawyer who has been involved with the discipline procedures of professional bodies such as the Ontario Land Surveyors, the Association of Professional Engineers of Ontario the Law Society of Upper Canada and the Ontario Architects Association for more than twenty-five years, I note with interest that the Real Estate Association of Ontario has formed a new body referred to as the Real Estate Council of Ontario (RECO) wherein the Ministry of Consumer and Commercial Relations ("MCCR") has transferred authority for the regulation of the Real Estates.

Specifically in June of 1996 the Ontario Provincial Government passed the Safety and Consumer Statute Administration Act and Business Brokers Act (the "Act") and disciplinary matters to RECO effective May 5th, 1997 which permitted in effect self government for real estate agents and brokers as a profession. On March 1st, 1997 MCCR agreed to allow the newly created RECO to assume authority for the regulation of the Act to RECO effective May 5th, 1997.

Because the Act remains intact, registration and de-registration issues will continue to be handled by the Commercial Registration Appeal Tribunal (the "Tribunal") pursuant to the provisions of the Act. What is now contemplated is that, in addition, real estate agents and brokers will be obliged to comply with a code of ethics and standards of conduct in their dealings with each other, and the public, with the rights to impose sanctions if they fail to live up to these standards.

In other words, real estate agents and brokers will be compelled to adhere to certain ethical criteria, standards of conduct and educational standards failing which either fellow members, or the public can bring a complaint leading to formal discipline proceedings against that member, which will be disposed of at a hearing by RECO in a Tribunal setting.

This procedure is effective as of January 1st, 2000. It is anticipated the procedure for disciplinary hearings and pre-hearing remedies will be much more comprehensive and sophisticated in its administration and operation than has been the case in the past.

Mr. Albert Teichner, a former member of the real estate industry for some 35 years who resides in British Columbia, has written on more than one occasion about the discipline procedure that has hitherto been the practice with the Real Estate Association; in doing so he has enumerated numerous horror stories and other anecdotic tales about the absence of justice in such disciplinary and other proceedings.

In articles written by Mr. Teichner such as "The Lords of Discipline" and "The Horseman of the Apocalypse", Mr. Teichner has set off numerous alarm bells about prosecutorial misconduct over such things as the absence of confidentiality, the lack of due process, the

apprehension of bias and the general absence of the appearance of justice at hearings involving real estate agents and brokers that result from complaints from the public.

This paper deals therefore with the following issue:

Will the new by-law #10 that has been implemented by the Ministry of Consumer and Commercial Relations, setting out the procedures of the Tribunal that will be hearing disciplinary matters, together with the specific code of ethics that has been implemented, bring about any change in the procedures and the outcome of hearings that take place when real estate agents and brokers are brought to discipline in the future?

Having acted in the field of professional disciplinary hearings for the past 25 years, I am extremely familiar with the rights and procedures to which persons being disciplined for a code of ethics or standards of conduct violations are entitled. I have had the opportunity to review the aforesaid by-law provisions in detail and the procedures that are being adopted by RECO. It is an attempt to implement a quasi-judicial procedure that will ensure the orderly processing of complaints while attempting to uphold the rights of every agent or broker that is singled out for complaint either by a fellow member or by a member of the public.

It cannot be emphasized too strongly that this decision to elevate real estate agents and brokers to a legitimized professional status, will come at a certain price regarding standards of ethical conduct, but in the last analysis, the process will benefit both the agents and brokers themselves, regarding their public image, and the public that use the services of agents and brokers.

The Real Estate Association of Ontario has attained the status of self government through RECO, with the freedom to discipline and sanction its own membership. With this rights will come the obligation and responsibility to ensure that disciplinary procedures are carried out in a fair manner, utilizing all the proper criteria of natural justice, to ensure that these important proceedings are credible and fair to all concerned.

It is not the purpose of this article to comment on the specific content of the Code of Ethics or RECO's mandate, but rather to awaken the membership to its implementation and to alert the members to the fact that when a complaint is received by RECO, either from a fellow member or from a member of the public, that such complaint must be taken seriously, because it is going to be reviewed in detail by RECO as a statutory body with a comprehensive statutory mandate. Indeed RECO will make a determination as to whether the matter can be resolved through correspondence or consensual action, or whether an adversarial process will have to be utilized in order to determine the merit of the complaint and the guilt or innocence of the agent or broker in question.

Now that the Code of Ethics (referred to as membership by-law #10), has been adopted, it requires all Ontario Real Estate professionals to adhere to a universal code of ethics and standards for continuing education. This is whether or not the Real Estate professional belongs to a local Real Estate Board or not.

At the present time RECO provides complaint mediation for consumer member disputes, but effective January 1st, 2000 RECO will also mediate member to member disputes. RECO's jurisdiction was formerly limited to enforcing the provisions of the Real Estate

and Business Brokers Act, however, as of January 1st, 2000 the RECO can enforce a code of ethic that sets out the ethical duties of all of the members of council.

Consumers may submit complaints to RECO by telephone, fax, mail or e-mail, and the procedures of RECO upon receiving such a complaint are as follows:

1. RECO advises the consumer in respect of their rights and responsibilities and encourages the consumers to first resort to resolution of the dispute directly with the member.
2. If resolution with the member is not possible, RECO will assist the consumer in fully documenting the nature of the complaint and inquiring as to how the consumer would like the complaints to be resolved. RECO then contacts the member directly with that information.
3. RECO also provides the consumer complaint documentation, to the principal broker, asking for a written response and appropriate documentation within 14 days. When information has been received from the parties, and providing RECO has jurisdiction to assist the consumer, RECO works towards an agreement that addresses the rights and obligations of both parties is acceptable to both, failing which a hearing is held before a Tribunal, constituted by members of RECO.

The Code of Ethics itself attempts to set out the conduct expected of members of the Real Estate Association of Ontario and to help members understand the principals upon which professional conduct is based.

It is also designed to assist the public in understanding and appreciating the duties and obligations of real estate agents and brokers in carrying out their activities.

The Code of Ethics is intended to apply to all members of the real estate agent community, and to deal with particular issues and concerns faced by agents and brokers in dealing with the public in accordance with a high standard of ethical conduct. Every member of the Real Estate Association should have a copy of the code of ethics which is available upon request at the offices of RECO for both professionals and the public at large.

The purpose of RECO and the formation of a Code of Ethics is to inform, educate and work with the real estate profession, government and the public to provide high standards of compliance and business ethics by adopting high standards of personal conduct and promoting consumer education and public information.

The Code of Ethics sets out the minimum requirements members are expected to adhere to in their day to day behavior. Many members will wish to and in many instances, will attempt to exceed these minimum standards.

The legal effect of the Code of Ethics is to guide members as to the generally accepted standard of conduct and the legal requirements required of membership, with a view to sanctioning any member who disregards these rules. The essence of the Code of Ethics is found in twenty four (24) rules that set out the types of behavior expected of real estate professionals in the carrying out of their duties to the public in real estate transactions. It deals with ethical behavior, primary duties to the client, disclosure

requirements, representation agreements, financial disclosure, written transaction agreements, professional advise, confidentiality, abuse of a client or customer, misrepresentation, advertising, discrimination, co-operation with counsel, maintain of current knowledge and standards, competence, record keeping, financial responsibility and general professional conduct.

A review of by-law #10 regarding the complaints and compliance requirements in the discipline procedure, indicates that membership in the Real Estate Association of Ontario is a very important membership to retain; therefore, any complaints or compliance procedures must be carefully reviewed by the member if and when such a complaint is ever filed.

The council of RECO appoints a manager of Complaints, Compliance and Discipline known as the “Manager of CCD” who is in charge of the complaints inquiries procedure, and who is responsible for screening all matters which may lead to discipline.

The “Manager of CCD” can appoint a researcher (ie: an investigator) who inquires into the conduct of a member when there has been a written complaint made or the Manager of CCD has reasonable and probable grounds to believe that a member has breached a term of membership.

When such investigator is appointed, and before the Manager of CCD embarks upon an inquiry, the investigator is permitted access to all records of the member that may touch upon the matter under inquiry. He is entitled to be provided with originals or copies of all relevant documents. In addition, he is entitled to remove relevant documentation from the premises upon giving a receipt for same. This is the same procedure, generally, for all self governing professional bodies in Ontario.

In addition, the investigator is entitled, to make inquiries of the member and direct all employees and persons acting under the direction of the member to cooperate with him, and provide oral and written consents to assist the investigator in obtaining information from third parties.

Subsequent to this inspection and its completion, a report of the results of this inquiry is forwarded to the Manager of CCD.

After the report to the Manager of CCD there is a screening process implemented, but before such screening is entertained, the Manager of CCD shall notify the member in writing of the matter and give the member 15 days to respond in writing to the complaint.

Where the member is a sales person or a broker other than a principal broker the Manager of CCD shall also notify the responsible principal broker regarding the complaint.

The Manager of CCD after considering the matter has several options to follow:

1. Take no action on the complaint.
2. Make recommendations to the member regarding a resolution of the complaint.

3. Require the member to complete, successfully, educational or upgrading measures specified by the Manager of CCD at the members expense, or advise, caution or warn the member in writing.
4. Require the member to appear before the Manager of CCD or a person designated by the Manager of CCD at a time and place specified, to be cautioned in person.
5. Refer the matter to another body who can appropriately deal with the matter (such as an arbitrator).
6. Refer the matter to the Discipline Committee for a hearing.
7. Take such action as the Manager of CCD considers appropriate that it is not inconsistent with RECO or its by-laws.

Where a member disputes the disposition of the Manager of CCD, the member shall file with the Manager of CCD a written notice of dispute within 30 days, and the Manager of CCD shall refer the matter to the Discipline Committee for a hearing. It is the proceedings before the Discipline Committee that will form the heart of the new sanctions implemented by the Code of Ethics, standards of conduct and educational requirements.

At any time the Manager of CCD may attempt to resolve complaints or compliance matters through some form of alternative dispute resolution using the services of a facilitator or a mediator. However the mediator's decision is not binding; rather, it is a summary of that mediator or facilitator's review of the facts and evidence disclosed at a hearing.

The core of the whole process of implementing the Code of Ethics and the standards of conduct is the Discipline Hearing itself and the sanctions that can be handed out by the Discipline Committee.

The Discipline Committee hears matters referred to it by the Manager of CCD and the Chair of the Discipline Committee shall appoint a panel of a minimum of five (5) individuals or more to the discipline committee, three (3) of whom constitute a quorum. Of the three (3) members of the Discipline Committee constituting a quorum at least one member should always be a member with expertise in the area in which the respondent (ie: the agent or broker under investigation) specializes. The member in question and the Manager of CCD shall be the official parties to the discipline hearing.

No evidence is admissible by the Manager of CCD unless at least 60 days notice is provided, to the member; and in the case of a member he or she must provide at least 30 days notice of documentary evidence upon which he or she will rely before the commencement of the hearing.

A party to a discipline hearing must provide copies of all written documentary evidence to be used, witness statements and the identity of witnesses, expert reports in the case of expert witnesses to be called and the opportunity to examine any real evidence or anything that may be tendered into evidence, pursuant to these notice and disclosure requirements.

The provisions of the Statutory Powers Procedures Act governing the procedures of public hearings is applicable to Discipline Committee hearings, although the Discipline Committee may allow inadmissible evidence and may exclude the public in appropriate circumstances depending on the facts.

Most importantly if the Discipline Committee concludes that a member has breached a term of membership set out in the Code of Ethics, the Discipline Committee by order carry out one or more of several sanctions to the member.

The following are the remedies available to the Discipline Committee;

1. Direct the member to appear at his or her own expense before the Committee or person designated by the Committee to be reprimanded.
2. Direct the member that the member comply with specified terms and conditions or limitations on the members practice.
3. Remove or transfer one or more classes of membership from the member.
4. Direct the member to pay an administrative penalty up to \$25,000.00 if the member is an individual.
5. Direct that the member pay an administrative penalty of up to \$50,000.00 if the member is a corporation.
6. Direct that the member be placed under probation for up two (2) years.
7. Suspend the member's membership for a stated period during which time the member shall cease trading in real estate.
8. Revoke the member's membership.

There are cost consequences if the complaint and discipline hearing are frivolously by RECO; in addition, there are also cost consequences if the member is found to be in breach of a provision of the Code of Ethics, necessitating a hearing.

The Discipline Committee is obliged to submit written reasons for its decision, deliver a copy of such decision to the member and to the Manager of CCD as relevant parties, and the Manager of CCD can publish a summary of the decision, because a finding against the member that amounts to contravention of the Code of Ethics, is public information.

Any party may appeal the disposition of the Discipline Committee to the Membership Appeals Committee (see sections 8 and 12 of the Membership By-law, for the procedure that such appeal follow with the necessary modifications).

The record before the Membership Appeals Committee is the same record as was before the Discipline Committee and both the Manager of CCD and the member shall be given the opportunity to appear before the Membership of Appeals Committee to make submissions.

That Committee may confirm, reverse or vary the disposition of the Discipline Committee and may make any disposition that the Discipline Committee had the power to make under its mandate.

There is no provision under the by-law with respect to an appeal from the Membership Appeals Committee ruling, but it is submitted that either party would have the right to appeal or review a decision of such Appeal Committee to the Divisional Court pursuant to the provisions of the Statutory Powers Procedures Act which permits a statutory decision to be appealed to that Court.

The issue as to whether or not the decision rendered by the Discipline Committee is a statutory decision has yet to be determined, but it is my opinion any decision of the Discipline Committee is a statutory decision, because of the severe and potentially adverse consequences that a such decision can invoke including suspension and revocation of memberships.

It is important therefore for members of the Real Estate Association of Ontario to understand the gravity of these types of proceedings and try and resolve these complaints at an early stage. It is also important that members ensure they have capable legal representation when a matter proceeds to a Discipline Committee hearing because their membership and therefore their livelihood are at issue. In those circumstances high standards of procedure, and adherence to natural justice must be met to by the Discipline Committee because the stakes to the member are substantial.

In my many years of acting for professionals before Discipline Committees, the Discipline Committees are required to adhere to higher and higher standards of fair and open procedure and disclosure; indeed such Committees will frequently have their own counsel to assist them in dealing with the Discipline process at the hearing and to provide the Committee with legal advice on various rulings that have to be made during the course of the hearing.

Given that the Manager of CCD will be represented by counsel and the Discipline Committee will be represented by counsel it would be sheer folly for any member to appear before a Discipline Committee without the benefit of counsel, given the high stakes and the substantial risk to the member, especially were the Discipline Committee to hand down an adverse decision.

In future articles I will be writing on various aspects of the specific qualifications and requirements of membership that must be adhered to by the members of the Real Estate Association of Ontario, and advise as to appropriate interpretations of various sections of the Code of Ethics that governs membership, by way of assisting members prior to Discipline Committee proceedings or during them should proceedings be commenced.