

**DECISION OF  
THE SASKATCHEWAN REAL ESTATE COMMISSION**

*Fenske (Re)*, 2016 SKREC 3

Date: April 20, 2016  
Commission File: 2014-44

**IN THE MATTER OF  
THE REAL ESTATE ACT, C.R-1.3  
AND  
IN THE MATTER OF STEVE FENSKE**

Before: A Saskatchewan Real Estate Commission Hearing Committee  
comprised of the following:  
Randal C. Touet - Chairperson  
Al Myers  
Dave Hepburn

Appearances: Reché McKeague and Nina Criddle, on behalf of the Investigation  
Committee  
and Steve Fenske, Registrant

Hearing Date: March 24, 2016  
Saskatoon, Saskatchewan

Written Decision: April 20, 2016

The Formal Hearing was held on March 24, 2016, at the Alberta Room, at the Saskatoon Inn, 2002 Airport Dr, Saskatoon, Saskatchewan, S7L 6M4, before a hearing committee (The Committee) of the Commission. This hearing was held jointly with a hearing for Patrick Krawec, with consent of Steve Fenske, Patrick Krawec, and the Investigation Committee representative.

## **CHARGES**

The registrant was charged with professional misconduct, contrary to Section 39(1)(C) of The Real Estate Act as follows:

It is alleged that Mr. Fenske breached the following:

- Section 61(1)(b) of the *Act* by authorizing or permitting Patrick Krawec to trade in farm real estate when he was not registered to do so;
- Section 62 of the *Act* by paying commission to a person who was required to be registered but who was not registered;
- Commission Bylaw 701(a) by making or permitting to be made an offer to purchase that inaccurately identified him as the salesperson representing the buyer; and
- Commission Bylaw 701(c) by failing to ensure that his brokerage only utilized registered personnel to perform the duties of registrants on behalf of the brokerage.

## **LEGISLATION**

Section 39(1)(c) of the *Act* states:

“Professional misconduct is a question of fact, but any matter, conduct or thing, whether or not disgraceful or dishonourable, is professional misconduct within the meaning of this Act, if it is a breach of this Act, the regulations or the bylaws or any terms or restrictions to which the registration is subject.”

Section 61(1)(b) of The Real Estate Act states:

“No brokerage shall employ, appoint, authorize or permit... a person to trade in real estate who is not registered.”

Section 72 of The Real Estate Act states: “No registrant shall pay commission or other remuneration to a person who is required to be registered but who is not registered.”

Bylaw 701(a) states: “No registrant shall make or permit to be made, whether orally or otherwise, a statement, record, report, notice or other document required by this Act, the regulations or the bylaws that...contains an untrue statement of a material fact.”

Bylaw 712(c) states: “A broker or branch manager shall be responsible for... ensuring that the brokerage utilizes only registered personnel to perform the duties of registrants on behalf of the brokerage.”

## **FACTS**

The Hearing Committee heard from two witnesses: the Registrant Broker, Steve Fenske and the Registrant, Patrick Krawec. In addition, a statement of facts was filed by both Mr. Fenske and Mr. Krawec. The statement of facts as filed and as accepted by all parties, clearly set out the factual basis for the hearing. There was no disagreement as to what actually took place, the ultimate decision regarding whether the charges were justified depends on the interpretation of the facts to the Legislation.

Mr. Fenske has been registered as a salesperson and a broker under the provisions of the Real Estate Act since October 2007. He is presently registered as a broker with Re/Max P.A. Realty, and was so at all times related to these transactions.

On February 22, 2010, Mr. and Mrs. B signed an exclusive seller’s brokerage contract with [another brokerage] listing [the property], and four other quarter sections. Two other registrants acted as agents of the sellers. The property was listed on the MLS system as part of a farm property.

On May 13, 2010, F. and C. S. wrote an offer to purchase the property on a residential contract of purchase and sale, with Mr. Krawec listed as the salesperson representing the buyers. Later that day, I. and B. B. signed acceptance of the residential offer.

On May 21, 2010, F. and C. S. signed an amendment to residential contract extending the conditions to June 4, and moving the possession date to June 15, 2010, and stating that the buyers would self-assess for GST. The amendment was not signed by the sellers. The agents for the sellers indicated that the sellers would not sign the amendment to the residential contract of purchase and sale, and they required a new farm contract of purchase and sale. As Mr. Krawec was not registered to trade in farm real estate in May of 2010, he discussed the situation with his broker. The broker

suggested that the farm offer be written with the broker's name as sales representative, and that he would supervise Mr. Krawec as he conducted the trade.

On May 25, 2010, F. and C. S. wrote an offer to purchase property. This was written on a contract and a purchase and sales form for farms and Steve Fenske was listed as the salesperson representing the buyers. Mr. Krawec signed as witness to the buyers' signature.

On May 26, 2010, I. and B. B. wrote a counter-offer to farm/ranch contract of purchase and sale, excluding certain items and stipulating the division of rental payment, requiring the buyers to pay the 2010 Taxes. Later that day, F. and C. S. signed acceptance to the counter-offer and Patrick Krawec witnessed their signatures.

Mr. Krawec faxed a copy of the acceptance counter-offer to the Financer on May 26, 2010. On May 27, he e-mailed the sellers' lawyer to request another copy of their property condition disclosure statement and additional information. The other realtor replied directly to Mr. Krawec. Between May 26 and June 1, 2010, a home inspection was completed on the property. Mr. Krawec e-mailed the other realtor to get information on issues that had been raised by the home inspection, which was provided.

On June 2, 2010, Mr. Krawec faxed documents to the vendor to sign, which were returned by fax to him. On June 3, 2010, Mr. Krawec faxed a further amendment to the farm and ranch contract of purchase and sale to the vendors Solicitor. He witnessed C. S.'s signature on the document.

On June 4, 2010, Mr. Krawec faxed a notice to remove conditions form, removing certain conditions. He witnessed C. S.'s signature on the notice to remove conditions. On that date, the seller's agent e-mailed Mr. Krawec to advise him that one condition had yet to be removed and to request the name of the lawyer. Mr. Krawec replied on that date.

On June 7, 2010, Mr. Krawec continued to communicate directly with the seller's agent. He also faxed particulars to the purchaser's lawyer with some documents for the transaction and on the cover page of the facts "I Am Acting as Buyer's Agent."

On June 11, 2010, the Conveyancer's Instruction Report was faxed indicating Mr. Krawec as the selling sales agent.

Subsequent to the possession date, an issue arose with regard to water in the basement of the property. Mr. Krawec dealt with the issues on behalf of the buyers, communicating with the various parties.

Upon the brokerage closing of the transaction file on July 6, 2010, the closing documentation showed Mr. Krawec as the sales agent acting on behalf of the buyer's brokerage, and he received his full sales commission.

It should be noted that the sellers had previously listed the property with Mr. Krawec in November of 2008, as an acreage property. Mr. Fenske took the stand in this matter, and gave evidence that the property is essentially a residential property. At that time, it was his practice to use either a farm or residential listing form. In such a circumstance, during this transaction the listing agent had requested that a farm form be used, and it was clear that Mr. Krawec and Mr. Fenske, in trying to accommodate the sellers, were prepared to change the purchase offer form to the farm form. Mr. Fenske felt this was a teaching opportunity for him with Mr. Krawec in dealing with this type of property.

Mr. Fenske felt that everything that Patrick Krawec did regarding the transaction could have been done by an unlicensed assistant.

Mr. Fenske acknowledged that, although he met the purchaser once or twice, he cannot remember reviewing documents or otherwise directly advising the purchasers. Mr. Krawec in his testimony made it clear that he felt this transaction was for a residential property with a few acres of land around it. The evaluation he gave the purchaser did not include any value for the land, essentially just for the house.

## **DECISION**

The Hearing Committee in accordance with *The Real Estate Act* and Regulations made the following decision:

Mr. Fenske is found not to be in violation of The Real Estate Act for breaching the following:

- Section 61(1)(b)
- Section 62
- Bylaw 712(c)

Mr. Fenske is found to be in violation of The Real Estate Act for breaching the following:

- Bylaw 701(a)

In accordance with The Real Estate Act and Regulations, the Committee made the following orders:

- a) Pursuant to Clause 38(1)(f) of the *Act*, that the Registrant, Mr. Fenske, received an Order of Reprimand for a violation of Bylaw 701(a) of the *Act*;

- b) Pursuant to Sub-Clause 38(2)(a)(i) of the *Act*, that the Registrant, prior to June 15, 2016, pay the Saskatchewan Real Estate Commission a \$1,500.00 fine for the said violation of the *Act*.
- c) Pursuant to Clause 38(2)(b) of the *Act*, that the Registrants registration shall be suspended if he fails to pay partial hearing costs of \$1,250.00, within the said period of time.

## **ARGUMENT**

Having heard all of the evidence from both registrants, and having reviewed both statements of facts, the Investigation Committee representative, Ms. McKeague, said the conduct was clear that this was trading in farm real estate. A specialty licensing program was in place at that time, and was in reliance of the definition of "Farm Real Estate," as was in place at that time. The definition of "Farm Real Estate" was set out in Bylaw 302.6 which reads as follows:

"(c) "farm real estate" means real property that is located outside of city, town, village, hamlet, or resort village and that is used or will be used for the purpose of farming... and (d) for the purpose of defining Farm Real Estate, "Farming", includes livestock raising, poultry raising, dairying, tillage of the soil, bee keeping, fur farming, or other activities undertaken to produce primary agricultural produce and animals."

It is acknowledged that in the past there had been some grain farming on other portions of this property. She states that it is clear that all of the actions on behalf of the buyers were done by Mr. Krawec, and it was clear that he was acting in the position as the representative for the purchasers. She further says that he did everything for the trade, except sign as realtor. He was paid and everything shows him as agent for the buyer's brokerage. Her further point is simply that Mr. Krawec, as acknowledged, was not registered to trade in farm real estate at the time of this transaction. She noted the distinction between the old and new sections defining farm real estate. It is the Investigation Committee's position that the sections were intended to protect the public. We cannot pick and choose which portions of sections to rely on.

Mr. Fenske argued that there was a delay in this matter being pursued for a period of six years. It made it somewhat difficult to precisely remember all the facts. He indicated that Patrick Krawec had done what Mr. Fenske had indicated he should do, because Mr. Fenske felt they were dealing with a residential property. He stressed that the primary purpose of the property and in fact the only purpose for the property in the buyer's mind was to be used as a residential property.

Mr. Fenske further felt there was no chance of harm and the ultimate removal of specialty licenses occurred with the commission as in his estimation it did not work properly. He acknowledged that Mr. Krawec was not at the time registered to trade in farm real property.

## CONCLUSION

The Hearing Committee found the registrant guilty of the breach of Bylaw 701(a) before the Committee in this matter.

While it was very clear that Mr. Krawec was not registered to deal in farm real estate, the Committee felt that it was equally clear that the property being dealt with was essentially that of an acreage property, and not farming property. The vendor may have seen it as a farm; however, the buyer certainly saw it as an acreage. The purchaser only wanted to buy a house, not any farming property. It is submitted that although the property was initially listed as part of a large project including other sections or other farm quarters, the property being sold was that of a house on an acreage.

In reviewing the bylaw, the Committee felt Section 302.6 (c) defining farm real estate, is not determinative without looking at the full transaction; the property was not used and would not be used by the buyers for the purpose of farming. This seems to be clear from all evidence that was before the parties. The Hearing Committee finds that with all the circumstances, this property is not farm real estate and therefore Mr. Krawec was not in breach of the *Act*. The Committee does note that the form being used is not determinative of the transaction that is actually taking place. It has more to do with what actually was being sold. The definition set out in the *Act* allowed enough flexibility for the decision to be made that Mr. Krawec was not dealing with farm real property.

Therefore, as Mr. Krawec was not in breach of the *Act*, it was the position of The Hearing Committee that Mr. Fenske could not be found guilty of breaching Section(61)(1)(b), Section(62), nor Bylaw 712(c), as Mr. Krawec was registered to trade in residential real estate.

However, it is clear that on the offer to purchase that was drafted and presented, Mr. Fenske admits, and it is clear to the Committee, that he held himself out as the salesperson for the purchaser. This is clearly a violation of Bylaw 701(a) as the document, an offer to purchase, contains an untrue statement of a material fact. The Committee finds this is definitely a material fact when Mr. Fenske set himself out as a salesperson, when he in fact were not so acting. In the circumstances, The Committee understands the rationale Mr. Fenske felt applied to the situation; however, it is simply inappropriate for a registrant to put incorrect and untrue statements in a document. These documents are for the reliance of the public and for other registrants within the Province of Saskatchewan.

In determining the amount of the fine, we heard representation from Ms. McKeague on sentencing regarding Commission Bylaw 701(a). Ms. McKeague referred us to her brief of law and briefly went over the cases which are referred to in her brief. Mr. Fenske had a previous sanction history with the commission going back to 1998, which breach was not similar to the current alleged misconduct. That was the only sanction history Mr. Fenske has had in his close to 40 years as a registrant. As a mitigating factor, Ms. McKeague acknowledges that there is no evidence of consumer harm.

Ms. McKeague reviewed the principles of sentencing and she noted that the previous cases, including the Randhawa Case 2011-48, was the most similar in facts. As in the case at hand, the inaccurate statement of material fact in Randhawa related to the identity of one of the people participating in the transaction. She was clear that the Randhawa was more serious than the case at hand, as there was ample evidence of consumer harm in the Randhawa decision.

Ms. McKeague indicates that an appropriate sanction would be a letter of reprimand, together with a \$1,500.00 fine, and costs in accordance with the draft costs filed with the Hearing Committee.

Mr. Fenske, in speaking to the matter of sanctions, did not agree that costs should be awarded. He also felt that most brokers could well be guilty of Bylaw 701(a) from time to time. However, he accepts the suggestion for the fine.

Therefore, in the circumstances, The Committee felt a letter of reprimand, together with a \$1,500.00 fine and half costs were appropriate. With regard to the matter of the fine, it is important that all registrants recognize the importance of not allowing improper and untrue statements to be in the documents they are preparing. This can lead to confusion, misunderstanding, and potential harm to the public and all registrants. It is also important that Mr. Fenske personally realizes that this cannot continue to occur and it is felt that the sanction in the circumstance is satisfactory to ensure this does not occur again.

With regard to the matter of costs, there was somewhat of a mixed result in this matter which allows a partial awarding of costs for the hearing. It is important that registrants realize there is a cost to all registrants through The Real Estate Commission in dealing with these matters. While it is important that the facts all come out, there are appropriate times when costs will be awarded against the registrant found in breach of the *Act*.

Dated at Saskatoon, Saskatchewan, this 20<sup>th</sup> day of April, 2016.

“Randal C. Touet”,  
Randal C. Touet, Chairperson