

IN THE MATTER OF
THE REAL ESTATE ACT, C. R-1.3
AND
IN THE MATTER OF BARRY CHILLIAK

DECISION OF THE
SASKATCHEWAN REAL ESTATE COMMISSION

Commission File: #2009-54

Before: A Saskatchewan Real Estate Commission Hearing Committee
comprised of the following:
Randal C. Touet - Chairperson
Larry Gingerich
John Puderak

Appearances: Ed Miller, on behalf of the Investigation Committee
Barry Chilliak, registrant

Hearing Date: December 14, 2010

Written Decision: January 14, 2011

The Mitigation Hearing was held December 14, 2010 at the Saskatoon Club, Saskatoon, Saskatchewan before a Hearing Committee (“the Committee”) of the Commission. The Statement of Facts and Admissions dated November 23, 2010 provided particulars of Barry Chilliak’s violation and admissions. Mr. Miller and Mr. Chilliak were both advised of the Chairperson’s law firm having acted in the past for Mr. Chilliak and both parties consented to Mr. Touet continuing to act as Chairperson of the Hearing.

CHARGE and ADMISSION OF MISCONDUCT

The registrant was charged with and has admitted, in the Statement of Facts and Admissions, to professional misconduct as follows:

Mr. Chilliak plead guilty to professional misconduct contrary to Section 39(1)(a) of *The Real Estate Act* when between August 7 and August 26, 2006 (both dates inclusive) he failed to provide a copy of his sellers’ accepted offer to purchase to the person with the first right-of-refusal on his seller’s property.

LEGISLATION

Section 39(1)(a) 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 harmful to the best interests of the public, the registrants or the Commission.”

FACTS

In accordance with subsection 9(4) of *The Real Estate Regulations* (“the Regulations”), the Committee accepted Barry Chilliak’s Statement of Facts and Admissions, which include the following relevant points:

1. Mr. Chilliak has been continuously registered under the provisions of *The Real Estate Brokers Act, 1987* and *The Real Estate Act* in the Province of Saskatchewan with the Saskatchewan Real Estate Commission since April 13, 1977.
2. He completed the following real estate courses:
 - Real Estate 100;
 - Real Estate 200;
 - Real Estate 300; and
 - all continuing professional development seminars each registration year since 2001-2002.

3. Mr. Chilliak is presently registered under the provisions of *The Real Estate Act* as a broker with Barry Chilliak Realty Inc.
4. In the early part of March 2006, Mr. Chilliak spoke with the Sellers to possibly market the Property. That same month he met with the Sellers at the Property to confirm the Property's dimensions and learned that the Sellers did not have a parking stall for sale as an attachment to the specific unit.
5. The Sellers provided him with copies of older letters wherein they had unsuccessfully offered to sell the property to the Third Party for \$90,000. Based on his knowledge of the market place, Mr. Chilliak's marketing proposal suggested a list price of \$99,900.
6. On or about April 13, 2006 the Sellers signed an MLS® Exclusive Seller's Brokerage Contract with Barry Chilliak Realty Inc. to market the Property with an asking price of \$99,900. The Sellers directed that the successful buying and listing brokerages equally share the Seller's brokerage commission. Mr. Chilliak received from the Sellers and retained on file for his records, a copy of the Sellers Exclusive Use Agreement with the Third Party.
7. Paragraph eight of the Exclusive Use Agreement states in part:

“In consideration of the covenants and agreements had and made in this Agreement between the Owner and (the Third Party) and other good and valuable consideration made by the Third Party to the Owner (the receipt of which is acknowledged) the Third Party shall have the FIRST RIGHT OF REFUSAL to purchase the Property hereinbefore described upon the terms and conditions as follows:

(a) If the Owner receives during the term of the within Agreement, or at any time hereafter which the Owner remains as the title holder of the Property, a bona fide arm's length offer to purchase which the Owner is willing to accept, the Owner shall provide the Third Party with a copy of the offer to purchase, and the Third Party shall have SEVEN (7) days following receipt to purchase the property by delivering to the Owner a signed offer to purchase with the same deposit and purchase price, which the Owner shall accept immediately.”
8. Mr. Chilliak marketed the property for the Sellers with the following Third Party imposed limitations:
 - a) The Third Party required a 24-hour notice for any showings and the presence of a Third Party employee at all showings;
 - b) All showings would occur during Monday to Friday business hours; and
 - c) D. S. – legal administrator for the Third Party remained Mr. Chilliak's main contact person.
9. Despite the above mentioned marketing challenges, the Sellers and Mr. Chilliak received an acceptable offer from another brokerage on June 22, 2006 for \$90,000. In

compliance with the Third Party's first right of refusal, Mr. Chilliak first spoke with D. S. and thereafter forwarded a copy of the offer to her for the Third Party's attention. D. S. told Mr. Chilliak that the Third Party was not in a position to purchase this unit.

10. Mr. Chilliak prepared a short letter which he forwarded to the Third Party, care of D. S., seeking written confirmation that the Third Party was not prepared to exercise its right-of-first-refusal. On or about July 12, 2006 Mr. Chilliak received by return fax with the Third Party's signed acknowledgement confirming that it was not exercising its right of first refusal on that offer. The prospective buyer's offer collapsed and the Sellers directed Mr. Chilliak to continue marketing the Property.
11. During the months of June and July 2006 leading up to the collapse of the conditionally accepted offer, Mr. Chilliak had several telephone conversations with D. S. She told Mr. Chilliak that the Third Party was not in the position to buy any units.
12. On August 7, 2006 another brokerage submitted a \$90,000 Residential Contract of Purchase and Sale form to Mr. Chilliak on behalf of the Sellers that was acceptable to the Sellers. Mr. Chilliak's recollection of the events is that during a telephone conversation sometime before 9:30am on August 10, 2006, D. S. told him that the Third Party would not be exercising its right-of-first-refusal with respect to the new offer to purchase.
13. Mr. Chilliak acknowledges that he did not provide a written copy of the acceptable new offer to D. S. on behalf of the Third Party. At the direction of the Sellers on August 10, 2006 Mr. Chilliak faxed their \$88,000 Counter-Offer to Residential Contract of Purchase and Sale to the other brokerage and that the buyers accepted the counter-offer.
14. Mr. Chilliak acknowledges that not until August 28, 2006 did he send a copy of the accepted \$88,000 new Counter Offer to Residential Contract of Purchase and Sale form to the Third Party care of D. S. Some days thereafter D. S. on behalf of the Third Party sent Mr. Chilliak for presentation to the Sellers, a \$88,000 Residential Contract of Purchase and Sale form for the Property written by a numbered company on behalf of the Third Party. The Sellers never signed acceptance to the numbered company offer.
15. Sometime in late August or early September 2006 the Third Party registered a caveat against the Property and the various participants sought legal advice. The dispute proceeded through Queen's Bench Court in Saskatoon and the parties agreed to a settlement in December 2009. As part of Mr. Chilliak's portion of the settlement agreement, he paid \$12,000 to the Sellers and waived his listing portion of any commissions resulting from the purchase of the Property.
16. Mr. Chilliak has operated as a salesperson and broker/owner in the real estate industry for 33 years and has never been before the Saskatchewan Real Estate Commission on a disciplinary matter.

17. Mr. Chilliak states that he learned from this transaction that notwithstanding what he believed the Third Party representatives may have verbally told him he should have immediately provided written documents to the Third Party as required by the first right of refusal. Rather than trust the word of the Third Party representative had he provided to and requested from the Third Party, written notification and then confirmation of the Third Party's intentions, this problem could have been averted.

REPRESENTATIONS

The Investigation Committee representative, Ed Miller, stated that Mr. Chilliak is a first time offender and that the failure to notify the party with the Right of First Refusal was an oversight and, to his understanding, it was an isolated incident. Mr. Miller acknowledged there was no intent on behalf of Mr. Chilliak to harm any party to the transaction. He said it was not a purposeful action or inaction on behalf of Mr. Chilliak.

Mr. Miller did note that Mr. Chilliak is a senior registrant and broker and should have realized he could not simply rely on verbal representations without a proper paper trail. He stated that Mr. Chilliak knew that the proper protocol should have been followed.

Mr. Miller, on behalf of the Investigation Committee, recommended a letter of reprimand and a fine of \$2,000.00 for the breach of Bylaw.

Mr. Miller referred to the Rich Miron case (2009-40) where Mr. Miron was fined \$3,500.00 for failure to notify the parties of a lack of a deposit; the Jane Smith case (2008-79) where she was fined \$3,000.00 for an early, unauthorized release of keys; and the Terry Hincks case (2007-38) where he was fined \$3,500.00 for failure to deliver all offers to the seller. Mr. Miller did not believe the circumstances of this case justified a fine in that range, but it still must reflect the need to protect the parties with a proper paper trail.

Mr. Chilliak confirmed he has been in the real estate industry for thirty-three years and bases his practice on honesty and integrity. This has been a very costly process for him, with the loss of commissions, settlement and time spent. The error was not to his benefit as it would have been better for him personally to have sold to the Third Party as he could have had commissions from both parties. Mr. Chilliak stated that the Sellers were not naive as they had purchased the Property from the Third Party and had previously tried to sell back to them.

Mr. Chilliak said that all communication with the Third Party was through D.S. since March 2006. She made decisions, to his understanding, on behalf of the Third Party. He said he was told by her that the Third Party was not in a position to purchase anything at that time. It is his position that the referenced cases were different as they did not involve the legal process.

Mr. Chilliak felt there were no winners in this matter.

DECISION

In accordance with the *Act* and Regulations, the Committee made the following orders:

- a) That Barry Chilliak receive an order of reprimand for the violation of Section 39(1)(a) of the Act;
- b) That Barry Chilliak, prior to March 28, 2011, pay to the Saskatchewan Real Estate Commission, a \$2,000.00 fine for the said violation of the bylaw;
- c) That Barry Chilliak's registration shall be suspended if he fails to pay any portion of the fine within the said period of time.

RATIONALE

The Committee, in considering the disciplinary action, considered Barry Chilliak's lack of sanction history and the long length of time he has been in the real estate industry.

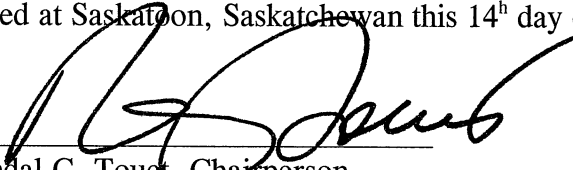
The Hearing Committee much appreciated the comments of Mr. Chilliak as they were well presented and helpful in the deliberation of the Committee. It must again be stressed, however, that the proper paper work must be followed and completed. For the benefit of all registrants, the protection of the public and the proper conduct of trades in real estate, all parties must ensure that where written documentation is required, it must be completed. The reliance of oral representations and comments leads to confusion, differing remembrances of the facts and, sometimes, litigation.

The Committee must stress the need for properly completing the paperwork, as not having it done has created many situations of problems between registrants and between registrants and their clients. The public relies on the registrants to have followed proper procedure and to have all documentation completed. It is imperative that this point be brought home to all registrants that the failure to do so will lead to complaints and significant disciplinary action.

This case is distinguishable from the referenced cases as this was not an intentional act by Mr. Chilliak. There was no personal benefit, rather a potential detriment to Mr. Chilliak in this circumstance. However, it is not excusable and a serious sanction was imposed. It was an error and there was no malice. Otherwise, the fine may have been significantly higher.

The Hearing Committee feels it is important to remind all registrants of the requirement and importance to comply with all elements of the trade in real estate. Failure to provide the proper paperwork will have consequences.

Dated at Saskatoon, Saskatchewan this 14th day of January, 2011.


Randal C. Touet, Chairperson