

**IN THE MATTER OF**  
***THE REAL ESTATE ACT c.R-2.1***  
**AND**  
**IN THE MATTER OF KEVIN WOUTERS**

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**DECISION OF THE DEPUTY SUPERINTENDENT OF REAL ESTATE**

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Before: C.E. Thompson, Deputy Superintendent of Real Estate

Appearances: Kevin Wouters, Rod Spence on behalf of Kevin Wouters  
Chris Mason and Ed Miller, on behalf of the  
Saskatchewan Real Estate Commission

Hearing Date: April 27, 2009

Decision Date: September 9, 2009

## DECISION OF THE DEPUTY SUPERINTENDENT OF REAL ESTATE

This decision addresses the appeal by Kevin Wouters, as allowed pursuant to section 43 of *The Real Estate Act* (the Act), of the decision of the Saskatchewan Real Estate Commission (the "Commission") in the Matter of Kevin Wouters, dated December 19, 2008.

Wouters is currently and was at all times in 2008 registered as a salesperson and branch manager with Century 21 Conexus Realty Ltd. in Prince Albert, Saskatchewan.

### **I. Statement of Facts and Admissions and Commission Findings**

Mr. Wouters was charged with and admitted to two acts of misconduct, as described pursuant to section 39(1)(c) of the Act, when he:

1. breached Bylaw 711 of the Commission in that he did not adequately supervise the activities of the registrant Garry Schriml, for whom he was responsible, by:
  - a. failing to undertake reasonable steps to ensure compliance by a salesperson, and
  - b. failing to take corrective and remedial action when a violation by a salesperson was discovered; and
2. breached Bylaws 712(b) and (e) of the Commission by:
  - a. failing to review and approve all of Mr. Schriml's advertising to ensure compliance with the Act, the regulations and the bylaws on 51 occasions, and
  - b. failing to take reasonable steps to ensure that the brokerage and its registrants were in compliance with the Act, the regulations and the bylaws.

For convenience, I will summarize the relevant facts admitted to by Mr. Wouters from the Statement of Facts and Admissions.

Mr. Wouters was registered as a salesperson pursuant to *The Real Estate Brokers Act, 1987*, now *The Real Estate Act*, from May 19, 2004 to March 13, 2007 and as a Branch Manager from March 13, 2007 to date. At all relevant times, Mr. Wouters was Branch Manager with Century 21 Conexus Realty Ltd. in Prince Albert Saskatchewan.

At all relevant times, Garry Schriml was registered as a salesperson with Century 21 Conexus Realty Ltd.

Mr. Wouters and Mr. Schriml met in May of 2008 to discuss the requirement for brokerage identification in all advertising after Mr. Wouters was notified by another registrant that Mr. Schriml's advertising sometimes did not identify the brokerage name. In the Statement of Facts and Admissions, Mr. Wouters stated "it was my understanding

that Mr. Schriml and I would more closely monitor his advertising before it [advertisements] went to press”.

On July 13, 2008, the Commission received a complaint identifying twenty four (24) examples of advertising associated with Mr. Schriml that failed to identify the brokerage name. This advertising appeared over the course of 4 days, over a 6 week period, in the Prince Albert Daily Herald.

The Commission accepted that Mr. Schriml placed at least 51 advertisements between the dates of May 10, 2008 and July 26, 2008, over 9 days.

According to the Statement of Facts and Admissions, invoices from the *Prince Albert Daily Herald* provided by Mr. Schriml to the investigator were addressed to Mr. Wouters at Century 21 Conexus in Prince Albert and paid by Mr. Schriml by cheque.

After the complaint, Mr. Wouters explained the requirement to identify the brokerage name in all advertising to Mr. Schriml’s assistant.

Upon reviewing the evidence, Mr. Wouters admitted that he could not say that he had exercised all reasonable steps to supervise Mr. Schriml and ensure that Mr. Schriml was complying with the Act.

Mr. Wouters also admitted that he did not review and approve all of Mr. Schriml’s advertising during the period in question and that he did not take satisfactory immediate remedial action upon becoming aware that Mr. Schriml’s activities were non-compliant.

## **II. The Commission’s Decision**

A mitigation hearing took place on November 28, 2008. The Commission accepted the Statement of Facts and Admissions wherein Mr. Wouters acknowledged both violations and heard representations as to the appropriate sanctions.

On December 19, 2008, the Commission rendered its Decision (the “Decision”) wherein it stated:

In accordance with clause 9(4)(a) of the Regulations and clauses 38(1)(f), 38(2)(b) and sub clause 38(2)(a)(i) of the *Act*, the Committee made the following orders:

### Count 1

- a) Pursuant to clause 38(1)(f) of the *Act*, that Kevin Wouters receive an order of reprimand for the violation of Bylaw 711 of the *Act*;
- b) Pursuant to sub clause 38(2)(a)(i) of the *Act*, that Kevin Wouters, prior to February 27, 2009, pay to the Saskatchewan Real Estate Commission, a \$1,500 fine for the said violation of the *Act*;
- c) Pursuant to clause 38(2)(b) of the *Act*, that Kevin Wouters’ registration shall be suspended if he fails to pay any portion of the fine within the said period of time.

Count 2

- d) Pursuant to clause 38(1)(f) of the *Act*, that Kevin Wouters receive an order of reprimand for the violation of Bylaw 712 of the *Act*;
- e) Pursuant to sub clause 38(2)(a)(i) of the *Act*, that Kevin Wouters, prior to February 27, 2009, pay to the Saskatchewan Real Estate Commission, a \$1,000.00 fine for the said violation of the *Act*; and
- f) Pursuant to clause 38(2)(b) of the *Act*, that Kevin Wouters's registration shall be suspended if he fails to pay any portion of the fine within the said period of time.

The Commission's rationale for these penalties is as follows:

The Committee, in considering the disciplinary action, considered Kevin Wouters' lack of previous sanction history and the length of time he has been in the real estate industry.

The Hearing Committee felt that given Kevin Wouters' previous knowledge of the advertising issues with Gary Schriml; he had not taken any reasonable efforts to stop the wrong advertising from taking place. While it is difficult to deal with advertising not being provided to you, there must be procedures and policies to minimize the occurrence of such breaches. A simple review of the newspaper advertising by the brokerage staff would have brought the incident to light after the first time and the matter could have been dealt with quickly.

The Committee is aware that Kevin Wouters is a new Branch Manager and knew that this has provided him with a steep learning curve in managing awkward and difficult situations. However, that is the lesson in this matter for all brokers and managers. Brokers and branch managers are responsible for the actions of their agents pursuant to the Real Estate Act. Neither the number of agents nor having a difficult agent is an excuse for a lack of supervision. There must be some procedures to deal with difficult situations. It is not sufficient to say that it is hard to deal with. There has to be an effort to manage and supervise your agents and to remind them of the need to comply with the Act and Bylaws. It is simply the improved situation by Kevin Wouters that kept the fines low in this matter.

### **III. Appeal**

Mr. Wouters' appeal hearing took place at the office of the Superintendent of Real Estate on April 27, 2009. Mr. Wouters and Rod Spence, vice president of Century 21 Conexus Realty Ltd., Prince Albert, spoke on Mr. Wouters' behalf. Chris Mason and Ed Miller were attendance on behalf of the Commission.

At the hearing, Mr. Wouters and Mr. Spence explained that Mr. Wouters was appealing the quantum of the penalties imposed by the Commission because he viewed the penalties as excessive and disproportionately high when compared with previous Commission penalty decisions.

Mr. Wouters explained that he had relied upon Mr. Schriml to ensure that advertising bore the brokerage name, especially after he had met with Mr. Schriml to address the issue. Both Mr. Schriml's time in the industry and Mr. Schriml's personal assurances at that meeting convinced Mr. Wouters that Mr. Schriml would not continue advertising without the brokerage name and would take steps to prevent such advertising.

Mr. Wouters also claimed that he had no way to know that Mr. Schriml was placing advertisements during the time of Mr. Schriml's hospitalization.

Mr. Wouters noted that this was his first offence and that the fines levied are disproportionately excessive in the face of lesser fines levied by the Commission for acts of non-compliance that caused actual harm to individuals.

Mr. Wouters has also changed practices in his office to monitor items that are printed and personally reviews them. It is worth noting, however, that Mr. Wouters argued that it was not his responsibility to oversee the employees of salespeople in the brokerage.

Mr. Spence argued that branch managers should not be held responsible for advertising breaches committed by their registrants because, in his words, it would be “impossible” for branch managers to review all registrants’ advertisements. Mr. Spence suggested that the onus to ensure advertising compliance should more properly rest on registrants. In Mr. Spence’s view, registrants and not branch managers, should be held responsible for non-compliance with advertising rules. According to Mr. Spence if a registrant has a concern about compliance he or she should be able to consult a branch manager for the answer, but that is as far as the branch manager’s responsibility goes.

Mr. Spence also asserted that it would be impossible to run a cost effective business if all advertisements had to be pre-approved by branch managers. He provided a long list of examples of advertising breaches and insisted that the Commission would not have enough time to address each and every instance.

**a. Issues**

- a. What is the applicable standard of review?
- b. Was the Commission’s decision on quantum reasonable?

**b. Analysis**

**a. What is the applicable standard of review?**

The Supreme Court of Canada recently commented on the judicial review process in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (“*Dunsmuir*”), as follows:

In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review. (para 62)

In previous decisions the Deputy Superintendent of Real Estate determined that the appropriate degree of deference to be accorded to the Commission when reviewing the reasoning and quantum associated with a penalty is met by the reasonableness standard (see: *In the Matter of Ivan Toledo*, Decision of the Deputy Superintendent of Real Estate: 07-37 July 30, 2008; *In the Matter of Linda Boxall*, Decision of the Deputy Superintendent of Real Estate: 07-61, July 30, 2009; *In the Matter of Terry Hincks*,

Decision of the Deputy Superintendent of Real Estate Decision: 07-38, July 30, 2008, and, *In the Matter of Garry Schriml*, Decision of the Deputy Superintendent of Real Estate: July 30, 2009.)

**b. Was the Commission's decision on quantum reasonable?**

The Supreme Court of Canada explained the qualities to be considered in assessing the reasonableness of a decision as follows:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. (*New Brunswick (Board Management) v. Dunsmuir*, 2008 CarswellNB 124, at para 47)

Applying the qualities that make a decision reasonable, my analysis will assess whether the decision making process as expressed in the Decision reflects sufficient justification, transparency and intelligibility to meet the test for reasonableness. I will also assess whether the Decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

At the hearing, Mr. Wouters identified a number of factors that he thought should have been considered more carefully by the Commission when it determined his penalty. He explained that this was his first offence, that he had relied on Mr. Schriml's assurances from the May 2008 meeting, and that he was not aware that Mr. Schriml was advertising during the time when Mr. Schriml was in the hospital.

In my view, while the Commission could have been clearer in its explanation as to how it weighed the factor of this being Mr. Wouters' first sanction, its careful consideration and weighting of other factors renders the decision making process reasonable.

The Commission acknowledged Mr. Wouters' short time as a Branch Manager and explained that Mr. Wouters' inexperience did not excuse his failure to take control of a difficult agent. The Commission explained that the fact of Mr. Wouters' inexperience in this case granted it an opportunity to confirm and emphasize the Commission's view that brokers and branch managers are responsible for the actions of their agents and will be held to the same standard of accountability, notwithstanding personal experience.

Mr. Wouters' actions of educating Mr. Schriml's assistant and of reviewing all advertising, after the Commission charged Mr. Wouters, were viewed as mitigating factors by the Commission.

With respect to the arguments from Mr. Spence that registrants, only, should be held accountable for non-compliance, this view is inconsistent with the Commission's bylaws and I do not share it. Holding both registrants and management accountable for compliance is a more effective way to ensure that compliance is addressed, than holding

only registrants accountable. The principle behind holding management accountable, along with individuals is that all parties profiting from the activity of a business should be held responsible for the obligations and costs associated with the business of making that profit.

Mr. Spence argued that the cost of reviewing advertisements in branch would outweigh the benefit. I respectfully disagree with Mr. Spence. The Commission summed the issue up when it stated: “a simple review of the newspaper advertising by the brokerage staff would have brought the incident to light after the first time and the matter could have been dealt with quickly.”

Mr. Spence also claimed that non-compliance with advertising requirements is so widespread in the real estate industry that the Commission would be hard pressed to find the resources to address each and every case. In my view this argument strongly supports heavier penalties as a means of deterring common non-compliant behaviour. One way to effectively manage non-compliance without overusing resources is to send a strong message reflecting that non-compliant behaviour is not going to be tolerated.

For the foregoing reasons, I do not find that the Commission’s consideration of the issues was so far outside the realm of reasonableness as to support an appeal.

Mr. Wouters also expressed concerns that the Commission’s penalties in this case were out of proportion to other penalties leveled by the Commission within the last year. In the last year the Commission decided four cases respecting advertising and one case respecting Bylaw 711. I will summarize the facts of each case in order to explain my rationale for concluding that the Commission’s Decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Judy Forster received a \$1,500 fine for one instance of advertising listings from other brokerages in a brochure in Commission decision #2007-100. In this case the Commission did not find intention on the part of the registrant, but were influenced in the quantum assessment by the fact that the brochure could have been confusing to buyers because the listings may have been wrongly attributed to the registrant’s broker. The Commission also noted concerns about advertising property without the owner’s permission.

Martin Blonski received a \$2,500 fine for advertising that a property’s boiler was replaced in 2006 when the original boiler from 1959 was still being used on the property and it needed to be replaced. In determining the quantum of the fine, the Commission considered the following factors as relevant: the reliance the public places on registrants with respect to information in advertisements, the failure of the registrant to make sufficient inquiries to ensure that the representation was true and the reflection of that failure on the industry as a whole and the fact that the registrant took quick corrective action by correcting the misinformation in advertisements associated with this condominium property. (See *In the Matter of Martin Blonski*, Commission Decision: 08-75, June 11, 2009.)

Slade Desroschers was fined \$500 for identifying underground parking as a feature of a condominium property advertisement, where that feature was not included with the property. Despite the incorrect advertising information Mr. Desroschers notified the buyer's agent and the buyer received disclosure that there was a dispute as to the inclusion of the underground parking. (*In the Matter of Slade Desroschers*, Commission Decision: 08-12, January 14, 2009)

Larry Stewart received a fine of \$1,000 for authorizing an inaccurate advertising. The Commission emphasized accuracy in advertising as important but acknowledged that the amount of the fine had been diminished because Mr. Stewart had not been given the opportunity to review the copy before it went to print. Mr. Stewart's high profile and the number of registrants under his brokerage were identified as relevant to ensuring that he set a proper example. (See *In the Matter of Larry Stewart*, Commission Decision: 08-65, June 11, 2009.)

Leonard Eva received a fine of \$3,000 for failing to adequately supervise the activities of the registrants and other personnel for whom he was responsible, as required pursuant to Bylaw 711. Mr. Eva was a registered broker when his property management company was audited in October of 2004 and directed by the Commission to change its trust account management practices. Approximately 3.5 years later, the property management company was audited again. The audit revealed that Mr. Leonard had not adjusted trust account management practices and that he had delegated the responsibility to address the trust account compliance issue to another registrant. Mr. Leonard had not taken an active role in ensuring compliance with this directive. In its rationale, the Commission stressed that it views the lack of supervision by brokers as a serious matter and that the fine was high to ensure that the industry received a strong message that proper trust account supervision and procedures must be in place. The facts of this case being one involving property management was viewed as creating a more serious issue also, in that increased frequency and size of financial transactions flowed through this organization. On the side of mitigation, the Commission considered: the fact that rapid expansion may not have allowed for appropriate procedures to be set up; the satisfaction of the company's clientele; and, no allegation of fraud. (See *In the Matter of Leonard Eva*, Commission Decision: 08-38A, June 11, 2009.)

The foregoing cases are of limited assistance in determining Mr. Wouters' penalty. All of the advertising cases involve only one instance of non-compliance. Corrective action was taken in two of the cases. The case of Leonard Eva provides a consideration of Bylaw 711 and a failure to supervise, but the facts of the case are so different from the present situation, it is of limited value. What is of assistance for the purpose of assessing whether the penalty falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law, is the ranges of penalties. The range of fines for advertising are: \$500 to \$2,500. The range of fines under bylaw 711 is not as helpful in that there has, to date, only been one fine of \$3,000.

In assessing the appropriateness of the fine, it is important to remember that Mr. Wouters knew that Mr. Schriml had a history of engaging in non-compliant activity and chose not to monitor Mr. Schriml. Only 2 weeks after their discussion on Mr. Schriml's non-compliant advertising practices, Mr. Schriml started placing non-compliant advertisements. Due to Mr. Wouters' decision not to monitor Mr. Schriml's activity, this non-compliance continued on 42 occasions, over a 5 week period.

While I appreciate that Mr. Schriml may not have been in the office for a month after June 19, 2008, his employee was his representative while conducting activities allowed by his licence and Mr. Wouters should not have assumed that Mr. Schriml's business would cease entirely due to his hospitalization.

I agree with the Commission that public protection is important and that it is also important to ensure that the public can have confidence in the transparency of real estate advertisements. I further support the Commission's view that registrants must understand that breaches will be dealt with seriously and that the Commission will impose significant sanctions against registrants who fail to adhere to advertising rules.

For the foregoing reasons I find that the aggregate fine of \$2,500 is reasonable and falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

**Count #1 (violation of Bylaw 711)**

In my view, the Commission's Order that Mr. Wouters receive an order of reprimand and a fine of \$1,500 is reasonable on the facts. Mr. Wouters was aware of Mr. Schriml's history of non-compliance and did not take any measures, other than meeting with Mr. Schriml at this time, to ensure that there was some way to effectively monitor Mr. Schriml's activities and ensure his compliance.

**Count #2 (violation of Commission Bylaw 712)**

In my view the Commission's Order that Mr. Wouters receive an order of reprimand and a fine of \$1,000 is reasonable based on the facts. The Commission found that Mr. Wouters did not demonstrate that he had taken responsibility for reviewing and approving all advertising to ensure compliance with the bylaws and it found that he had failed to take reasonable steps to ensure that the brokerage and its registrants were in compliance with the bylaws. Simple monitoring of the newspaper by brokerage staff would have identified the issue with Mr. Schriml's advertising practices.

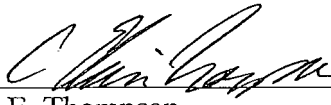
**VI. Decision**

Having reviewed the records, the Commission's Decision and Mr. Wouters' representations at appeal, I find that the Commission's decision making process was reasonable in that it reflected sufficient justification, transparency and intelligibility. I also find that the Commission's decision on quantum, on both counts, is reasonable and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

For the foregoing reasons, I hereby dismiss Mr. Wouters' appeal and confirm the Commission's Decision. As the Order was stayed pending the outcome of the appeal, Mr. Wouters shall pay the fines of \$1,500 and \$1,000 to the Commission by November 9, 2009.

In the event that Mr. Wouters should fail to comply with payment of the fines, I hereby order that Mr. Wouters' registration be suspended until such time as Mr. Wouters pays the full amount of the fines to the Commission.

Dated at Regina, Saskatchewan, this 9<sup>th</sup> day of September, 2009.



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C.E. Thompson  
Deputy Superintendent of Real Estate