

November 13, 2020

Micheal Noseworthy
Superintendent of Real Estate
2800 – 555 West Hastings Street
Vancouver, BC V6B 4N6
Submitted by email: Micheal.Noseworthy@gov.bc.ca

Dear Mr. Noseworthy,

RE: Proposed changes to administrative penalties

The British Columbia Real Estate Association's (BCREA) has already documented our concerns with the current disciplinary process, and we welcome measures that improve efficiency. We also expect that any changes to the current system are fair, proportional and clear, and consistent with the principles of natural justice. While the proposals put forward in your consultation documents may achieve those ends, we have several questions, comments and recommendations intended to enhance your proposals.

This response is the result of consultations with real estate boards and REALTORS®. We respectfully submit this feedback on behalf of BCREA and all BC real estate boards. Given the significant amount of information included in your consultation, we have organized our response into several categories.

Support for licensees

The consultation backgrounder states that the proposed changes to the administrative penalty (AP) regime will encourage greater compliance, expedite relatively minor complaints and disciplinary matters and maintain the Real Estate Council of British Columbia's (RECBC) discretion to refer matters to full discipline and hearing proceedings.

What seems to be missing is a focus on support for licensees to help them correct unintentional mistakes and to prevent contraventions from occurring. Instead, many perceive APs as a licensee being presumed guilty until proven innocent.

We have several recommendations to support licensees, which will also benefit consumers:

- Provide more resources to help ensure awareness of the rules and how to comply. Managing brokers are a key audience for these resources.
- Improve the search function of RECBC's website to help licensees easily and quickly find the guidance they need.
- Continue the use of letters of advisement for APs. Warnings are powerful, especially for contraventions that are unintentional, which is one of the requirements for AP eligibility.

- Use AP notices and non-compliance warning letters as opportunities to direct licensees to published guidance and educational opportunities to help them avoid future contraventions.
- If these rule changes are implemented, then make a concerted effort to educate licensees about expanded APs and how they fit with RECBC's overall discipline and compliance process.

Evidence of effectiveness

We recognize that APs are used by a wide range of professions, but what evidence can you present that expanding and increasing APs will achieve your stated objectives? Was there a measurable benefit when APs were introduced in 2005? How many matters in RECBC's current backlog could be resolved through the proposed expansion?

We strongly recommend that RECBC establish a clear, comprehensive process to assess the effectiveness of APs and that they publish the results.

Category C

The AP process limits a licensee's opportunities to be heard and to defend themselves. The higher the fines, the more problematic the lack of procedural fairness. This raises concerns, especially regarding Category C contraventions. The Administrative Penalty Eligibility Test (APET) lists 11 assessment criteria for RECBC to consider in making a decision about whether to levy an AP. By definition, AP eligibility means that a contravention is minor and inconsequential.

Therefore, for Category C, we recommend the following to strike a fair balance between penalties that will act as deterrents but not be so onerous as to invalidate the AP regime on natural justice grounds:

- Reduce the penalty amounts to \$2,500 for an initial contravention and \$5,000 for a subsequent contravention.
- Limit RECBC's ability to allege contravention of several rules based on one instance of conduct for the purpose of imposing APs.
- Limit the cumulative penalty that can be imposed regarding a single real estate transaction.

Reconsiderations

As discussed in the Community of Practice session you recently participated in, there is significant sector concern around opportunity for appeal and defense.

As currently proposed, a licensee has no substantive opportunity to present information in their defense in the AP regime or to fulsomely appeal the imposition of an AP. The process only allows a licensee to request an opportunity to be heard after an AP is imposed, and it limits the review process to consideration of whether the licensee can prove they exercised due diligence to prevent contravention of a rule – not whether the contravention should be subject to APs.

We recommend reviewing the approach used in Alberta, where a licensee has 30 days to appeal the imposition of an AP. That appeal process involves an oral hearing before three panel members and the licensee is entitled to a written explanation of the decision. We also recommend that the Administrative Penalty Guidelines clearly state whether complainants always receive the written documentation of reconsideration decisions.

In addition, we suggest either the use of a form or a checklist for licensees to request reconsiderations. This will help ensure all required information is included at the outset.

Category D

We recommend lower base penalties in this category, especially for very minor infractions, such as email address for licensees (s. 2-18.1) and mailing address for delivery (s. 2-17). While we expect licensees to comply with the rules, these penalties do not seem proportionate. We understand that no other profession in BC is subject to initial penalties of over \$1,000, so we recommend the Office of the Superintendent of Real Estate (OSRE) and RECBC undertake a careful examination of the AP regimes of other regulators and propose more appropriate penalties for Category D contraventions.

We also recommend reasonableness regarding matters that are beyond the control of the licensee, such as correcting billboards, bus benches and advertising on the internet or social media. That is, in these circumstances, we expect RECBC staff to give licensees additional time to ensure the corrections are made.

Several aspects of the process for Category D contraventions are unclear from our reading of the draft guidelines. Please clarify the following:

- If imposed, when will the daily penalty start to accumulate?
- Regarding the imposition of daily penalties, is “daily” limited to business days?
- Does RECBC have to wait until the expiry of the compliance warning period before referring the matter to formal discipline?
- What is the length of an extension of a compliance warning period?
- Who can grant an extension?

Implementation

We appreciate the opportunity to review the Draft Administrative Penalty Guidelines. Transparency is important for licensees and consumers to understand the process. We request that you ensure the guidelines present information as clearly as possible, perhaps including a graphical depiction of the process, and more examples and scenarios.

A fine balance is required between applying discretion to specific circumstances and providing certainty by levying APs consistently. In addition to the guidelines, we recommend RECBC staff use a manual to ensure consistency, as much as possible.

Levying penalties

In levying penalties, we expect a tempered, reasonable approach. Otherwise, APs could be seen as a revenue source instead of a tool to encourage greater compliance. We would also like to confirm that additional costs will not be levied on top of the posted fines. We acknowledge that s. 57(6) of the *Real Estate Services Act* restricts the use of AP funds for educational purposes. Can you explain your interpretation of “educational purposes”?

What evidence can you provide that increasing the amounts of APs “reflects changing licensee, public and government expectations,” as stated in your FAQ? In addressing the entire disciplinary process,

BCREA has asked the regulators to ensure that penalties levied are appropriate to the offences. Is that part of your evidence?

We assume that multiple contraventions that are dealt with at the same time will not be considered “subsequent” contraventions for the purpose of imposing increased fines, even where the contraventions happen sequentially. We believe “subsequent” should be determined by a prior discipline history with the same contravention.

We support the five-year reset for initial contraventions, and we assume that penalties imposed for initial and subsequent contraventions are applied per section of the rules rather than per category of designated contraventions.

Please answer the following questions regarding how APs will be applied:

- What specific guidance would RECBC staff use in deciding to levy a single AP or one per contravention? We see considerations on page ten of the draft guidelines, but they are quite general.
- Could a single infraction result in APs for multiple licensees, such as the brokerage, managing broker and representative?
- What kind of accommodation would be made for a managing broker who was unaware of a contravention until after it occurred?

Terminology

With procedures like these, clarity around each step is absolutely critical. Thank you for defining “extenuating circumstances,” “promptly” and “subsequent contravention” in the draft guidelines.

We make the following assumptions regarding other terms:

- that “delivered” has the same meaning as in s. 2-18 of the rules: notices are “effectively delivered to the licensee if mailed to the licensee at the licensee’s latest mailing address for delivery,” and
- that “written” can mean a letter and also an email.

We recommend clarity regarding the word “immediate,” which appears in ten rules.

Managing brokers

We recommend that RECBC copy managing brokers on all AP notices and non-compliance warning letters. Managing brokers should also be notified any time RECBC contacts a licensee affiliated with their brokerage.

Publication

By definition, contraventions subject to APs are minor and do not cause material harm. In addition, the Complaint & Discipline Procedures on RECBC’s website note that “administrative penalties . . . are not considered disciplinary sanctions and, as such, do not form part of a licensee’s public disciplinary record.” Therefore, we do not support publishing individual APs that identify the licensee. We believe the potential damage to a licensee’s reputation would outweigh the consumer protection benefit of

publishing APs. However, we fully recognize the value in publishing aggregated statistics that can help inform the development of education and guidance for licensees.

Retroactive application

Where appropriate, licensees should have the option to consent to using APs for contraventions that occurred before the rules change.

If that option is not available, and a licensee has to go through the formal discipline process, then the penalty imposed through a consent order for an existing contravention that meets AP eligibility should not exceed the penalties under the AP regime.

Next steps

Considering the number of questions we pose in this response, we urge you not to rush to implement your proposed rule changes. Please take your time and fully consider the impacts, answer all questions and create the certainty that licensees and consumers need. BCREA will provide any support you need, and Realtors have demonstrated an outstanding willingness to share their expertise.

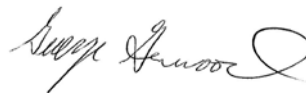
Above all, BCREA, real estate boards and Realtors want to ensure quality in their profession. I look forward to speaking with you about our response to your consultation.

BCREA is the professional association for about 23,000 Realtors in BC, focusing on provincial issues that impact real estate. Working with the province's 11 real estate boards, BCREA provides continuing professional education, advocacy, economic research and standard forms to help Realtors provide value for their clients.

Sincerely,



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British Columbia Real Estate Association



George Greenwood
Chief Executive Officer
Okanagan Mainline Real Estate Board



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