



**INTRODUCTION**

On March 1, 2006, the Discipline Hearing Committee of the Real Estate Council ("Council") released its decision in the matter of Mr. Donald Tymchuk and New Way Realty Inc. ("New Way Realty"). The decision reached by Council was the result of four days of hearings including June 22, 2005, June 23, 2005, January 4, 2006 and January 5, 2006.

There were a number of issues before the Discipline Hearing Committee including whether:

- a) New Way Realty failed to keep a transaction record sheet for each real estate transaction where trust monies are held, contrary to section 15(1) of the *Real Estate Act*;
- b) New Way Realty failed to pay into trust monies received on behalf of a client, in that property management activities were being conducted separate and apart from the brokerage, and funds were being placed into a separate non-trust account, contrary to section 16(1) of the *Real Estate Act*;
- c) New Way Realty failed to deposit funds received from a client on behalf of a real estate transaction within a reasonable time into trust, contrary to section 16(1) of the *Real Estate Act*;
- d) New Way Realty permitted the commingling of trust funds with non-trust funds, contrary to section 16 of the *Real Estate Act*;
- e) New Way Realty failed to maintain proper books, up-to-date records and accounts, contrary to section 12.01 of Regulation 75/61 under the *Real Estate Act*;
- f) New Way Realty failed to maintain proper books, accounts and other records, contrary to section 25 of the *Real Estate Services Act* and Section 8-9 of the Council Rules;
- g) New Way Realty failed to deposit all monies received on behalf of a client with respect to a real estate transaction into trust, contrary to section 27(2) of the *Real Estate Services Act*;
- h) Donald Lawrence Tymchuk, as managing broker of New Way Realty, failed to ensure that the brokerage kept proper and up-to-date books, records and accounts, contrary to section 15(1) of the *Real Estate Act* and section 12.01 of Regulation 75/61 under the Act;
- i) Mr. Tymchuk failed to ensure that all monies held and received on behalf of the property management clients were deposited into the trust account in the name of the brokerage, contrary to section 16(1) of the *Real Estate Act*;
- j) Mr. Tymchuk failed to ensure that all monies held and received on behalf of clients in respect of a real estate transaction were deposited into trust within a reasonable time, contrary to section 16(1) of the *Real Estate Act*;
- k) Mr. Tymchuk commingled in the trust account non-trust funds, contrary to section 16 of the *Real Estate Act*;
- l) Mr. Tymchuk permitted Olive Jeanette Gorringer to hold herself out as a managing broker without being a holder of a valid and subsisting managing broker's license, contrary to section 3(1) of the *Real Estate Act*, in that she conducted property management services independent of her employing brokerage;

- m) Mr. Tymchuk withdrew funds from the brokerage's trust account and paid such funds directly to the licensee, contrary to section 17 of the *Real Estate Act*;
- n) Mr. Tymchuk failed to be in active charge of the business of the brokerage being conducted in the brokerage's office, both with respect to the transactions that resulted in the complaint and in the general course of business of the brokerage, contrary to section 9.16 of Regulation 75/61 and was negligent in that regard, contrary to section 9.12 of Regulation 75/61 under the *Real Estate Act*;
- o) Mr. Tymchuk failed to ensure that the brokerage kept proper books, accounts and other records in accordance with the statutory provisions, contrary to section 25 of the *Real Estate Services Act* and sections 3-1 (3) and 8-9 of the Council Rules;
- p) Mr. Tymchuk failed to ensure that the brokerage paid trust funds received on behalf of a principle in relation to real estate services promptly into trust, contrary to section 27(2) of the *Real Estate Services Act*;
- q) Mr. Tymchuk permitted the commingling of trust funds and non trust funds in the brokerage trust account, contrary to section 27(1) of the *Real Estate Services Act*;
- r) Mr. Tymchuk failed to ensure that Olive Jeanette Gorringer, in providing property management services on behalf of the brokerage, immediately delivered all trust monies received on behalf of the principal in relation to real estate services to the brokerage trust account, contrary to section 27(1) of the *Real Estate Services Act*;
- s) Mr. Tymchuk failed to fulfill his responsibility as managing broker for the performance of the duties imposed on the brokerage by his license in the meaning of section 6(2)(b) of the *Real Estate Services Act* and section 3-1(1) of the Council Rules;
- t) Mr. Tymchuk failed to take reasonable steps to ensure that the property management services provided by Olive Jeanette Gorringer, on behalf of New Way Realty Inc., complied with the provisions of the *Real Estate Services Act* and Council Rules, contrary to section 3-1(2) of the Council Rules; and
- u) Mr. Tymchuk failed to adequately and promptly respond to requests for a response by the Council, contrary to section 2-19 of the Council Rules.

It is noted that certain allegations were levied against New Way Realty, as the corporate entity, while others were levied against Mr. Tymchuk in his capacity as the managing broker of the corporate entity. The Discipline Hearing Committee also grouped the specific allegations into five general allegations. Table 1 summarizes the seven specific allegations that have been levied against New Way Realty and the 14 specific allegations that have been levied against Mr. Tymchuk. (Please see Table at the end of the decision.)

The Discipline Hearing Committee found that New Way Realty and Mr. Tymchuk were in contravention of numerous sections of the *Real Estate Act*, *Real Estate Services Act* and Regulations regarding the failure to keep proper books and records, improper property management, the lack of timeliness in placing funds into trust, and the failure to adequately perform the duties of a managing broker.

The Discipline Committee assessed all allegations regarding the co-mingling of trust funds and non trust funds in the trust account. The evidence indicated that some of the funds held in the trust account were not public funds but rather the funds of New Way Realty. Although the Committee was not satisfied with the manner in which the accounting for these funds was undertaken, it was noted that there is no statutory duty for a brokerage to immediately withdraw earned remuneration from the trust account.

The Discipline Hearing Committee ordered the following sanctions and remedial measures:

1. An independent accountant, other than the current accountant, is to provide a written opinion to the Council of the brokerage's compliance with the trust accounting and other requirements of the *Real Estate Services Act* as at January 1, 2006 within three months of the date of the decision. The cost of the engagement is to be paid by New Way Realty.
2. New Way Realty is to provide the Council with proper monthly reconciliations of its trust account and general account for a period of twelve months commencing November 2005. The reconciliation is to be provided within one month of the month in question.
3. Mr. Tymchuk's managing broker's license is to be cancelled 30 days from the date of the decision and as a condition of re-licensing as a managing broker that he successfully complete the Broker's Licensing Course and Examination and enroll in and attend the Accelerated Residential Trading Services Applied Practice Course. He is, however, eligible to be licensed as a representative provided he has complied with all of the other terms of the decision of the Discipline Hearing Committee.
4. As a condition of continuing licensing as a representative, Mr. Tymchuk is to enroll in and attend the CPE Course on Agency within 6 months of the decision and the Legal Update Course within 12 months of the decision.
5. New Way Realty and Mr. Tymchuk are to be fined a sum of \$10,000 jointly and severally to be paid within 60 days of the date of the decision.
6. New Way Realty and Mr. Tymchuk are to be assessed enforcement expenses of \$12,457.90 jointly and severally to be paid within 60 days of the date of the decision.

## **THE CHRONOLOGY OF EVENTS FOR THE APPEAL PROCESS**

### **Notice of Appeal**

A Notice of Appeal of the Council's decision was initially filed by Mr. Tymchuk on March 31, 2006. However, the notice application did not include a sufficient fee amount to proceed with the appeal. The correct amount was received by the Financial Services Tribunal on April 19, 2006.

I was assigned to consider the appeal on April 19, 2006, and all persons were informed that the appeals of Mr. Tymchuk and New Way Realty would be combined into one appeal. No objection was received regarding this course of action.

As per Section 242.2 (7) of the *Financial Institutions Act*, the Council was requested to provide the record on April 19, 2006. This record was due to be received on May 3, 2006. However, the Council did not have a copy of the hearing transcript in their possession and as a result the record was not filed until May 12, 2006. The record was forwarded to New Way Realty and Mr.

Tymchuk on May 12, 2006. As per the January 2006 Practice Guidelines of the Financial Services Tribunal, Mr. Tymchuk and New Way Realty had 30 days to file a submission. T his submission was, thus, due on June 11, 2006.

### **Application to Lift Stay**

A decision of the Council is normally stayed pending the outcome of the appeal, as per Section 55 of the *Real Estate Services Act*. Council filed an application to lift the stay with respect the decisions of this case on May 3, 2006. A submission in support of Council's application was received from the Superintendent of Real Estate on May 5, 2006. A response from Mr. Tymchuk and New Way Realty was received on May 10, 2006. A final response from Council was received on May 15, 2006.

In a decision dated June 6, 2006, I ruled on the May 3, 2006 application of the Council as follows:

1. Effective June 6, 2006, the stay be lifted with respect to an independent accountant, other than the current accountant, providing a written opinion to the Council of the brokerage's compliance with the trust accounting and other requirements of the Real Estate Services Act, as at January 1, 2006, within three months of the date of the decision.
2. Effective June 6, 2006, the stay be lifted with respect to New Way Realty providing the Council with proper monthly reconciliations of its trust account and general account for a period of twelve months commencing November 2005, within one month after the end of the month in question.
3. Effective June 6, 2006, the stay be lifted with respect to the cancellation of Mr. Tymchuk's managing broker's license 30 days from the date of the decision and, as a condition of re-licensing as a managing broker, he must successfully complete the Broker's Licensing Course and Examination and enroll in and attend the Accelerated Residential Trading Services Applied Practice Course. He is, however, eligible to be licensed as a representative provided he has complied with all of the other terms of the decision of the Discipline Hearing Committee.
4. The stay be continued with respect to the requirement that Mr. Tymchuk enroll in and attend the CPE Course on Agency within 6 months of the decision, and the Legal Update Course within 12 months of the decision.
5. The stay be continued with respect to the Committee's decision to impose a fine of \$10,000 jointly and severally on New Way Realty and Mr. Tymchuk - to be paid within 60 days of the date of the decision.
6. The stay be continued with respect to the Committee's decision to assess New Way Realty and Mr. Tymchuk enforcement expenses of \$12,457.90 jointly and severally - to be paid within 60 days of the date of the decision.

On July 4, 2006, a letter was received from Mr. Tymchuk indicating that it was not possible for New Way Realty to put a new managing broker in place by July 6, 2006. This requirement was the result of the lifting of the stay and the cancellation of the managing broker's license of Mr. Tymchuk. Mr. Tymchuk requested that the July 6, 2006 date be postponed to July 20, 2006. After receiving submissions from the Council and the Superintendent of Real Estate, Mr. Tymchuk's request was granted on July 6, 2006.

**Filing of Submissions**

Mr. Tymchuk's appeal submission was not received on the due date of June 11, 2006. On June 16, 2006 he was advised that he had 7 days to forward his submission or his appeal would be considered abandoned. Mr. Tymchuk responded with a submission on June 22, 2006, which was forwarded to the Council and the Superintendent of Real Estate on June 26, 2006.

Final submissions were received from both the Council and Superintendent of Real Estate and forwarded to Mr. Tymchuk on July 16, 2006. The final submission of Mr. Tymchuk was due on July 31, 2006. On July 31, 2006, Mr. Tymchuk requested an extension for the filing of his submission until August 4, 2006. He indicated that he was awaiting documentation that would give substance to a claim of a conspiracy to fix real estate commissions. The Superintendent of Real Estate and the Real Estate Council were given until August 1, 2006 to file a response to this submission. Both the Superintendent of Real Estate and the Real Estate Council, in letters dated July 31, 2006, argued against granting the extension on the grounds of the questionable relevance of the price fixing conspiracy claim.

Mr. Tymchuk did, however, file his final submission on August 1, 2006. Although this submission was late by one day, I have accepted it as filed.

**ANALYSIS**

Mr. Tymchuk has made three submissions to the Tribunal. The first of these was his Notice of Appeal dated March 31, 2006. The second was his submission dated June 22, 2006. A final response was received from Mr. Tymchuk on August 1, 2006.

In each of these submissions, the primary ground for appeal, as presented by Mr. Tymchuk, was his view that the Council was party to a conspiracy to fix prices in the real industry. In fact, in Mr. Tymchuk's submission of June 22, 2006 he states: *"The heart of the appeal was to have an independent recognized body – the Tribunal review the history of the Real Estate Council of B.C. being used to harass and intimidate New Way Realty Inc. and to consider whether there is the appearance of a conspiracy escalating to the highest level of the powerful real estate industry to fix real estate commissions."*

With due respect to Mr. Tymchuk, the heart of the appeal **is not** related to his allegation that the Council is involved in a price fixing conspiracy within the real estate industry. Rather the heart of the appeal relates to the five general allegations and the 21 specific allegations outlined in Table 1. If Mr. Tymchuk has evidence to suggest that the Council is inappropriately using its regulatory authority to promulgate price fixing in the real estate industry, he should provide this evidence to the government agency that deals with enforcing competition statutes or the Ombudsman of British Columbia.

**General Allegation 1 - Failure to Keep Proper Books and Records (specific allegations a, e, f, h and o)**

In his notice of appeal, Mr. Tymchuk argued that acceptable accounting reports have consistently been filed with Council and that as a result, there is no basis for any allegation of failure to keep proper books and records. Mr. Tymchuk's submission of June 22, 2006 did not provide any further evidence or argument to support his contention. In his submission of August 1, 2006, he refers to letter dated April 12, 2005 from his accountant to the Real Estate Council and argues that this letter indicates that proper books and records were in place at New Way Realty.

In my opinion, this letter does not indicate that proper books and records were in place. In fact, the letter indicates that the transaction sheets were not sequentially numbered because in Mr. Tymchuk's opinion "*the deal files are too few to bother and he is personally familiar with all the addresses of the properties*". In addition, no response was provided as to whether transaction record sheets included dates and receipts of trust funds. Moreover, the letter from the accountant made no mention of whether records had been kept up-to-date. Finally, it is noted that the accountant's report for the period ending October 31, 2004 does, in fact, contain several qualifications contradicting Mr. Tymchuk's claim that acceptable accounting reports have always been filed with the Council.

**General Allegation 2 - Improper Property Management (specific allegations b, i, l, r and t)**

In this Notice of Appeal, Mr. Tymchuk argues that he was given improper advice by Council with respect to the required responsibilities regarding the property management business being conducted by Ms. Gorringer and therefore was not responsible for any contraventions of the statute or Regulations. His submission of June 22, 2006 did not provide any further evidence or argument to support his contention.

Mr. Tymchuk's submission of August 1 does not contain much in the way of new evidence. He alleges that Carol Taylor of the Real Estate Council provided erroneous information. His evidence consists of a letter from Ms. Gorringer to the Real Estate Council. This evidence is very weak. At best it is Ms. Gorringer's interpretation of what was communicated from the Council. The more compelling evidence is a letter from Council to Mr. Tymchuk dated November 26, 2004. In that letter, the Council indicates that New Way Realty is not in compliance with its property management obligations and refers Mr. Tymchuk to the appropriate sections of the Office Practice Manual for guidance.

**General Allegation 3 - Lack of Timeliness in Placing Deposits in Trust (specific allegations c, g, j and p)**

Mr. Tymchuk did not raise this issue in his Notice of Appeal. Nor did he provide any evidence or argument with respect to this issue in his submission dated June 22, 2006. In his submission of August 1, 2006, he refers to the April 12, 2005 letter from his auditor to the Council. That letter indicates that there were, in fact, delays of from one to four days in the placement of funds into trust. Moreover, that the auditor reports that this conclusion was based on a sample of only eight deal files. The evidence indicates that the sample selected by the Council during their examination indicated more serious delays.

**General Allegation 4 - Co-mingling of trust and non trust funds (specific allegations d, k and q)**

In his Notice of Appeal, Mr. Tymchuk argues that holding thousands of dollars of their own funds in the trust account was of benefit to the public and therefore the appellants should not be penalized. However, the Disciplinary Hearing Committee found there were no contraventions to the statutes or Regulations with respect to this general allegation. Thus, there is no matter to be appealed with respect to the co-mingling of trust and non trust funds.

**General Allegation 5 - Failure to adequately perform general duties of managing broker (specific allegations m, n, s and u)**

Mr. Tymchuk did not raise this issue in his Notice of Appeal. Nor did he provide any evidence or argument with respect to this issue in his submission dated June 22, 2006.

In his submission dated August 1, 2006, Mr. Tymchuk argues that the letter from his auditor to Council dated April 12, 2005 "*answered positively*" the allegation that withdrawals were made from the trust account for purposes other than allowed (specific allegation m). As a point of fact, the letter from the auditor indicates the opposite. It states "*the agent began depositing virtually*

*all receipts, trust and general, into the trust account, and also began disbursing funds for all purposes from the trust account. For all intents and purposes the agent was using this account as if it were a general account.”*

In his submission dated August 1, 2006, Mr. Tymchuk indicates that there is no evidence to suggest that he was not in active charge of the business and failed to fulfill his duties as managing broker. Yet, the evidence indicates that he did not keep proper books and records, conducted property management activities in contravention of the statutes and Regulations and used the trust account as a general account.

Finally, Mr. Tymchuk argues that he did respond to requests of information from Council. It is noteworthy that the evidence presented to the Discipline Hearing Committee indicates many instances of letters, meetings and telephone calls between Council staff and Mr. Tymchuk commencing in November 2004 regarding the provision of financial information. The evidence also indicates that Council staff was persistent with follow up steps to obtain this information, but that it was not provided by Mr. Tymchuk.

### **APPEAL DECISION**

It is my opinion that the Discipline Hearing Committee of Council has made reasonable findings with respect to all the allegations levied against New Way Realty and Mr. Tymchuk and has applied the proper principles in its imposition of penalties and costs against New Way Realty and Mr. Tymchuk. Therefore, the disciplinary decision of Council is upheld in its entirety.

1. The Council ordered that an independent accountant other than the current accountant is to provide a written opinion to Council of the brokerage's compliance with the trust accounting and other requirements of the *Real Estate Services Act* as at January 1, 2006 within three months of the date of the Council's decision. The cost of the engagement is to be paid by New Way Realty. Given that the stay on this decision was lifted June 6, 2006, the accountant's opinion must be filed by September 6, 2006.
2. The Council ordered that New Way Realty provide it with proper monthly reconciliations of its trust account and general account for a period of twelve months commencing November 2005 within one month after the end of the month in question. The stay was lifted on this decision effective June 6, 2006.
3. The Council ordered that Mr. Tymchuk's managing broker's license be cancelled 30 days from the date of the Council's decision and that as a condition of re-licensing as a managing broker he successfully complete the Broker's Licensing Course and Examination and enroll in and attend the Accelerated Residential Trading Services Applied Practice Course. Mr. Tymchuk is, however, eligible to be licensed as a representative provided he has complied with all of the other terms of the decision of the Discipline Hearing Committee. The stay on this decision was lifted effective June 6, 2006, indicating a cancellation date of July 6, 2006 for the managing broker license. However, based on an application from Mr. Tymchuk the Financial Services Tribunal postponed the managing broker's license cancellation until July 20, 2006.
4. As a condition of continuing licensing as a representative the Council ordered Mr. Tymchuk to enroll in and attend the CPE Course on Agency within 6 months of the decision and attend the Legal Update Course within 12 months of the decision. The stay was not lifted on this decision of Council and therefore takes effect as of the date of this appeal decision.

5. The Council ordered that New Way Realty and Mr. Tymchuk be fined a sum of \$10,000 jointly and severally to be paid within 60 days of the date of the decision. The stay was not lifted on this decision of Council and therefore takes effect as of the date of this appeal decision.
6. The Council ordered that New Way Realty and Mr. Tymchuk be assessed a sum of \$12,457.90 in enforcement expenses jointly and severally to be paid within 60 days of the date of the decision. The stay was not lifted on this decision of Council and therefore takes effect as of the date of this appeal decision.

**COSTS**

The Council has argued that the appeal be dismissed with costs awarded to the Council. Section 47 of the *Administrative Tribunals Act* provides the authority for the Financial Services Tribunal to order a party or an intervener to pay a “portion” of the costs of another party or intervener in connection with an appeal application. In considering the exercise of its discretion under this section, the Financial Services Tribunal considers whether a party’s conduct has been improper, vexatious, frivolous or abusive.

It is my opinion that the appeal application of Mr. Tymchuk is improper in that it has attempted to use this proceeding for an ulterior purpose unrelated to the *Real Estate Services Act*. In particular, Mr. Tymchuk has inappropriately attempted to use this appeal to allege that the Real Estate Council is party to a price fixing conspiracy within the real estate industry. This is clearly not the appropriate forum to address such allegations.

Therefore, the Real Estate Council and Superintendent of Real Estate are invited to make submissions regarding costs within 14 days of the date of this decision. The submissions should clearly outline the nature and magnitude of the costs resulting from this appeal including the application to lift the stay and present arguments as to the appropriate “portion” of the costs that should be paid by Mr. Tymchuk and New Way Realty. Mr. Tymchuk and New Way Realty will be provided an opportunity to respond to these submissions before an award is granted by the Financial Services Tribunal.

DATED AT VANCOUVER, BRITISH COLUMBIA, THE 6<sup>th</sup> DAY OF SEPTEMBER, 2006.  
FOR THE FINANCIAL SERVICES TRIBUNAL



ROBERT J. HOBART  
PRESIDING MEMBER

**TABLE 1: SUMMARY OF ALLEGATIONS**

<b>General Allegation</b>	<b>Specific Allegation against New Way Realty</b>	<b>Specific Allegation against Mr. Tymchuk</b>
1. Failure to keep proper books and records	(a) improper transaction sheets (e) records not proper or up-to-date contrary to <i>Real Estate Act</i> (f) records not proper or up-to-date contrary to <i>Real Estate Services Act</i>	(h) records not proper or up-to-date contrary to <i>Real Estate Act</i> (o) records not proper or up-to-date contrary to <i>Real Estate Services Act</i>
2. Improper property management	(b) funds of property management clients not placed in trust	(i) funds of property management clients not placed in trust (l) permitted Ms. Gorrington to hold herself out as a managing broker (r) failed to ensure Ms. Gorrington placed client funds in trust (t) failed to ensure that property management activities were conducted in accordance with provisions of the <i>Real Estate Services Act</i> .
3. Lack of timeliness of placing deposits in trust	(c) failed to deposit funds into trust in a timely manner contrary to provisions of the <i>Real Estate Act</i> (g) failed to deposit funds into trust in a timely manner contrary to provisions of the <i>Real Estate Services Act</i>	(j) failed to ensure that all monies held on behalf of clients were placed into trust account in the name of the brokerage contrary to the <i>Real Estate Act</i> (p) failed to ensure that all monies held on behalf of clients were placed into trust account in the name of the brokerage contrary to the <i>Real Estate Services Act</i>
4. Co-mingling of trust and non trust funds	(d) co-mingled trust funds with non trust funds contrary to the <i>Real Estate Act</i>	(k) co-mingled trust funds with non trust funds contrary to the <i>Real Estate Act</i> (q) co-mingled trust funds with non trust funds contrary to the <i>Real Estate Services Act</i>
5. Failure to adequately perform general duties of a managing broker		(m) withdrew funds from trust account and paid such funds directly to a licensee contrary to the <i>Real Estate Act</i> (n) failed to be in active charge of the business being conducted contrary to Regulations of the <i>Real Estate Act</i> (s) failed to fulfill responsibilities of a managing broker under the <i>Real Estate Services Act</i> and Council rules (u) failed to respond promptly to Council enquiries