THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF section 39 (1)(b) and section 41 of the *Real Estate Act*, R.S.A. 2000, c. R-5

AND IN THE MATTER OF a Hearing regarding the conduct of:

LARRY VAVREK, Agent, formerly registered to J.R. Beattie Realty Ltd. o/a Exit Realty Guarantee and currently registered to 1st Grande Prairie Realty Ltd. o/a Coldwell Banker 1st Grande Prairie Realty at all material times hereto; and

Hearing Panel members: Bev Andre, Chair
Barry Gogal
Tom Shields

Appearing: Ms. Leela Ramaswamy, legal counsel on behalf of the Executive Director
A.C. , legal counsel on behalf of Larry Vavrek

Hearing Date: October 17, 2006

DECISION

I) INTRODUCTION

This matter arises out of a joint Notice of Hearing dated December 16, 2005 and issued to Larry Vavrek and S.S. On August 4, 2006, this Panel issued a decision severing the two matters, and retaining jurisdiction over the Vavrek matter only.

The allegations against Mr. Vavrek are as set out in the joint Notice of Hearing; no new Notice of Hearing was issued following the severance decision.

The hearing proceeded by telephone conference call on October 17, 2006. Our decision is set out below.

II) BACKGROUND FACTS

Just prior to the scheduled hearing, the parties informed the Panel that they had reached an agreement on the facts. The signed Agreed Statement of Facts is attached as schedule 'A' to this decision.

The Panel accepts the facts as set out in schedule 'A'.

In light of the agreement on facts, no evidence was called and the hearing was restricted to legal argument by both parties.

III) PRELIMINARY COMMENTS

The Notice of Hearing sets out thirteen separate charges against Mr. Vavrek, all of which include detailed factual particulars set out beneath each of the charges.

All of the charges arise out of Mr. Vavrek's representation of L.S. in relation to the listing and attempted sale of properties that were owned by L.S. and/or her then husband, W.S.

Below we have set out our findings in relation to each of the specific charges in the Notice of Hearing (See heading "Discussion and Findings", immediately below). However, for contextual purposes, a few preliminary comments are appropriate.

Although the charges are numerous, it became clear during the legal argument that this matter substantially arises out of the following circumstances:

- L.S. and W.S. were in the midst of divorce proceedings and the accompanying split of their matrimonial property. This property included a number of parcels of land, some of which were registered in the names of both L.S. and W.S. , and some of which were registered in the name of W.S. only.
- L.S. wanted to sell the properties as part of the matrimonial property split, but W.S. did not.
- L.S. believed that she had the legal right to sell at least her interest in all the properties; in some cases based on the fact that she was one of the registered owners, and in other cases because she had an unregistered legal interest in the properties by virtue of her status as spouse of the registered owner, W.S. .
- In light of the above, L.S. retained Larry Vavrek to assist her in selling the properties. Mr. Vavrek was retained only by L.S. . Both counsel made it clear during the hearing that Mr. Vavrek did not represent, and in fact had no dealings at all with, W.S. .
- W.S. was living on the properties at the relevant time, and he was not consenting to sell them. Although the agreed facts do not indicate whether Mr. Vavrek was actually aware of this, he was aware that a court order would ultimately be required in order to finalize any sale of the properties.
- At one point L.S. made application to the Court of Queen's Bench for an Order for partition and sale, dividing the legal ownership of the properties and directing that they be sold. However, she failed to file a required affidavit and attend in court on the scheduled date and as such her application was dismissed. A copy of the court Order was entered as exhibit 'C' at the Hearing. It is clear from that Order that the Court did not deal with the merits of the partition and sale application. The matter was simply dismissed because L.S. failed to file the affidavit and attend in court for the application.
- On three occasions purchase contracts were entered in respect of the properties. All of the contracts were subject to court approval of the sale. This "subject to" condition was not met and none of the sales proceeded.

- At some point during his representation of L.S. , Mr. Vavrek switched brokerages. This necessitated new listing agreements.
- W.S. was not a party to the listing agreements, and he was not provided with copies of them.

As indicated, there are thirteen separate allegations in the Notice of Hearing. There is a great deal of duplication in that the same few alleged actions give rise to a variety of different alleged contraventions. The thirteen allegations stem largely from the following actions:

- Entering listing the agreements and listing the properties without the knowledge or consent of W.S. , the sole or part owner of the properties.
- Failing to clearly indicate in the listing and sale agreements that L.S. was not the sole owner of the properties.
- Violating an Order of the Alberta Court of Queen's Bench in entering the listing agreements, advertising and attempting to sell the properties.

There are some other charges related to more specific matters, but the above actions are primarily behind the bulk of the charges.

To be clear, the above factual points are not intended to alter the facts as agreed to by the parties. They are either contained in the Agreed Statement of Facts or were non-contentious explanatory comments raised by counsel during the Hearing. Similarly the above summary of allegations is not intended to alter or limit the specific charges contained in the Notice of Hearing. All of the above is provided simply to give context to this matter.

IV) DISCUSSION AND FINDINGS

General:

Many of the allegations in the Notice of Hearing could be interpreted as suggesting that Mr. Vavrek may have been trying to secretly sell the properties without W.S.'s knowledge, or that he may have been trying to conceal the fact that W.S. was an owner/co-owner of the properties and that W.S. would oppose any attempted sale of the properties.

At the Hearing, Ms. Ramaswamy did not specifically argue that there was any intentional wrongdoing, but given the nature of the charges, we feel it is important to point out that there is absolutely no evidence of intentional wrongdoing on Mr. Vavrek's part. In fact, at the risk of oversimplifying, the differences between the parties might be summarized generally as follows:

- A.C. takes the position that Mr. Vavrek did the best that could have been done in the circumstances. He knew that the properties were the subject of a divorce dispute and because of this no single realtor would realistically be able represent both the husband and the wife. He believed that as part owner or as spouse of the owner, L.S. had a legal ownership interest in all of the properties and that she should be able to sell her interest regardless of any opposition by W.S. . He agreed to represent L.S. on this basis. He was well aware that a court order would be required to finalize any sale,

and he did what was necessary by making the potential sales subject to this condition. On this basis, no one was misled or confused about the true state of ownership or the ability to sell, and no one was harmed by anything that was done by Mr. Vavrek.

- Ms. Ramaswamy, on the other hand, takes the position that Mr. Vavrek should not have listed or tried to sell the properties without first either obtaining consent from W.S. , or obtaining a Court Order permitting the sale. By doing neither, Mr. Vavrek was acting improperly towards W.S. . Moreover, she takes the position that the dismissed Court Application should be interpreted as a Court Order prohibiting the listing and sale of the properties, and that by continuing the listings Mr. Vavrek was acting illegally. Also, by not involving W.S. , the listing and purchase agreements prepared by Mr. Vavrek and signed only by L.S. , were not legally binding. Further, by indicating in the MLS listings that "immediate possession" was available, Mr. Vavrek was potentially misleading the public and other industry members.

Given the nature of the allegations in the Notice of Hearing, and given the general positions of the parties, we make the following general findings:

- Since there is a complete absence of any evidence on the point, we find that there was no intent to mislead or conceal anything.
- There is no evidence that anyone, whether a member of the public or another industry member, was actually misled or confused about the ownership or right to sell the property.
- Beyond what is contained in the Court Order itself (exhibit 'C'), there is no evidence about what occurred, what was said, or what was ordered at the dismissed partition and sale application.

Our specific findings in relation to the specific charges are set out below.

Specific Charges:

We will deal with the charges in the order set out in the Notice of Hearing.

1. **Failing to act fairly, honestly and with integrity towards** W.S. **contrary to s. 7(b) of the *Code of Conduct*.**

The particulars in the Notice of Hearing relate to Mr. Vavrek's listing of the properties without W.S.'s consent.

A.C.'s argument is that Mr. Vavrek was representing L.S. only. He had no dealings with W.S. . The wording of section 7(b) specifically relates to "dealing" with non-clients. To be in violation of the section, an industry member must first be found to have had dealings with the non-client in question. Since Mr. Vavrek had no dealings with W.S. , section 7(b) cannot apply.

Ms. Ramaswamy argues that "dealings" do not require direct contact or interaction. In this case, Mr. Vavrek's actions (i.e. listing the properties without W.S.'s consent) had an impact on W.S. and therefore the spirit of section 7(b) has been violated.

In this case, there is no evidence about any impact on W.S. . In fact, the evidence suggests the opposite; by incorporating the "subject to court order" provision in the sale agreements, W.S. interests were protected. Absent any evidence establishing an adverse impact, it is impossible to conclude that Mr. Vavrek lacked fairness, honesty or integrity, at least as it relates to any impact on his non-client, W.S. .

Lacking any evidence on point, we are compelled to find that the Executive Director has failed to prove this allegation.

2. Participating in unlawful activities contrary to section 7(c) of the *Code of Conduct.*

The particulars in the Notice of Hearing relate to Mr. Vavrek's continued listing of the properties despite the Court of Queen's Bench Order dismissing the partition and sale application.

This is a serious charge. In order to succeed, the Executive Director must produce evidence establishing clearly that there has been some unlawful activity. In the context of this case, minimally, this would require evidence that the continued listing was expressly contrary to some law or court order.

The difficulty here is that there is absolutely no evidence to support the allegation. We have a copy of the Court Order (exhibit C). The Order is extremely short. Paraphrased, it indicates that L.S.'s application is dismissed because she failed to file an affidavit and failed to show up at the application. There is nothing in the Order or in the Agreed Facts to suggest that the Court actually reviewed the merits of the partition and sale application and directed or even suggested that the properties were not to be listed for sale. No one has brought anything to our attention to indicate that it would be otherwise unlawful to list properties for sale before obtaining the partition and sale Order. Indeed, in argument, Ms. Ramaswamy relied exclusively on the Court Order marked as exhibit C. She seemed to be asking us to infer that simple dismissal of the partition and sale application is tantamount to an order prohibiting further advertising. We simply cannot draw this conclusion without some evidence to support it.

Without some specific direction in the Order prohibiting further listing, or without some evidence indicating that the Court dealt with the merits of the application and decided that the property could not be sold, we cannot possibly conclude that Mr. Vavrek has acted "unlawfully".

As a result, we are compelled to find that the Executive Director has failed to prove this allegation.

3. Advertising and marketing the properties without W.S.'s **knowledge and consent contrary to section 4(b) of the *Code of Conduct.***

The particulars in the Notice of Hearing refer back to those in paragraph number 1 above (listing the properties without W.S.'s consent).

Section 4(b) specifically provides that an industry member must not advertise or market a property without the "seller's" knowledge and consent.

There is no dispute about the relevant facts; Mr. Vavrek had L.S. , but not W.S. , knowledge and consent to market and advertise the properties. Both were owners (or at least had an ownership interest in the properties). The issue, therefore, is who is the "seller"?

A.C. argues that there is a distinction between the seller and the owner. A person can sell property without necessarily being the owner of it. If RECA wanted to require the knowledge and consent of the owner, the section would be worded this way. Here, both W.S. and L.S. were owners, but because W.S. was not consenting, only L.S. was the seller. Therefore, since L.S. knew of and consented to the listing, there is no violation of section 4(b).

Ms. Ramaswamy argues that the provision should be interpreted such that the knowledge of both the seller and the owner is required. If property is sold, then, at that point at least, all owners become sellers. As such, it makes sense to require the knowledge and consent of all owners.

We agree with A.C.'s interpretation. Viewing the legislation as a whole and as applied to real estate practice in Alberta, it only makes sense to do so. First, other legislative provisions recognize a meaningful distinction between owners and sellers. For example, section 26 of the *Real Estate Act Rules* indicates that a listing agreement must be delivered to "the owner of that real estate or to the person entering into that agreement on behalf of that owner". It is apparent from this wording that RECA has contemplated that a person can enter an agreement to sell a property even though they may not be the owner. This distinction then becomes important when the different terms are used in different sections. By contemplating that someone other than the owner can enter agreements to sell, and then by indicating in section 4(b) that industry members must have the knowledge and consent of the "seller", it is a clear indication of RECA's intent; that knowledge and consent of the "owner" is not required.

Second, if the legislative requirements are adhered to, there is little danger that the "owners" will be deceived or that their properties will be listed for sale without their knowledge, since section 26 requires the brokerage to deliver a copy of the listing agreement to the owners.

Third, the above interpretation only makes sense from a practical perspective. If we were to accept Ms. Ramaswamy's interpretation and read "seller" as "seller and owner", then an industry member could never list a property for sale if one of the owners withheld consent. Applied literally, even a court order for sale would not be sufficient if the owner withheld consent. This could cause significant difficulty in matrimonial disputes such as this one, or in foreclosure proceedings.

As a result, viewing the legislation as a whole and taking a practical approach, we are of the view that in using the term "seller" RECA was intentionally limiting section 4(b) to sellers. If the intent were to extend the consent requirement to owners, RECA would have used this term, as it did in section 26 of the Rules. Taken together, the legislative scheme makes sense. It permits industry members the freedom to list properties for sale as long as the "seller" knows and consents, and it requires the brokerage to deliver the listing agreement to the "owners" so that all owners will be aware of what is taking place. This practical approach permits industry members to deal with potentially difficult situations like this one in which only some of the owners may want to sell.

4. Failing to render a competent service contrary to section 6 of the *Code of Conduct* by listing the properties without W.S.'s consent and contrary to the Court Order.

The particulars here again refer back to those particulars set out under paragraphs 1 and 2 (listing the properties without W.S.'s consent and in the face of the Court Order).

We have already dealt with specific charges arising out of lack of consent from W.S. and the Court Order. However, section 6 is much more general in its application. It merely states that an industry member must render a "competent service".

In applying this section it is important to remember that it merely requires competence. It does not require that industry members subscribe to the practices of the most skilled or careful industry members. This distinction is important. It means that all industry members are required to demonstrate a base level of competency in rendering their service, but they are not going to be judged against the standards set by the most careful and skilled practitioners.

In our view, incompetence as contemplated by section 6, requires a marked departure from the standards and practices of an ordinary industry member.

In this case, it may be argued that a careful and prudent industry member would likely have tried to avoid later problems by having L.S. go back to court in advance to obtain the partition and sale order before listing the properties, rather than waiting and relying on the "subject to court order" clause in the sale agreements. However, we cannot conclude that one would be "incompetent" for failing to follow the more careful and prudent procedure. Our finding would very likely be different if the "subject to" provision had not been used in the sale agreements.

In this case, we have already determined that Mr. Vavrek was not in violation of the Court Order by continuing to list the properties. Since he did not violate the Court Order, it follows that he cannot be found to be incompetent on this ground.

With respect to the other basis for the charge (listing the properties without W.S. consent), we have already determined that the relevant provisions in the *Code* did not strictly require consent from W.S. . Therefore, he cannot be held to be incompetent for failing to get consent from someone he was not required to get consent from.

Again, the standard is competence, not careful prudence. As such, we conclude that there has been no violation of section 6.

5. Making representations or carrying on conduct that was reckless or intentional and that did, or was likely to, mislead or deceive someone in listing the properties for sale, contrary to section 4 of the *Code of Conduct*.

The particulars here again refer back to those particulars set out under paragraphs 1 and 2 (listing the properties without W.S.'s consent and in the face of the Court Order).

The initial Notice of Hearing neglected to include the section number. During the hearing Ms. Ramaswamy applied for leave to amend the Notice of Hearing to include the reference. Mr. Vavrek did not oppose the application, so it was granted.

Some of the items above refer to specific subsections of section 4. In this paragraph, we are dealing with the preamble sentence of the section that is far more general in scope. The allegation here appears to be that the by not highlighting the fact that one owner was withholding consent and that a prior court application had been dismissed, the listing could misleadingly suggest that L.S. was the only owner, or that all owners were agreeing to the sale, or that there were generally no problems behind the scenes.

The difficulty here is that there is no evidence to support the charge. To establish a breach of this section, minimally, we would have to have seen a copy of the advertising or the MLS listing. None of this information was entered into evidence. We do know from the Agreed Statement of Facts that the listing agreements wrongly indicated that L.S. was the registered owner of all the properties. The Agreed Statement of Facts also tells us that generally that "listing information" was entered into the MLS system. However, we do not know exactly what listing information was entered into the system or whether the information was restricted to just what was in the listing agreement. For example, was the incorrect registered owner information from the listing agreement part of what was entered into the MLS system, or was it corrected when entered into MLS? We know that the court approval condition was part of the sale agreements, so was it also included in the advertising? Was there some other similar comments included that would tell a reader that there may be problems behind the scenes? We know none of this because the MLS listing information was not entered into evidence.

We can speculate that if the advertising indicated that L.S. was the sole registered owner without indicating the need for a court approval, or without some other similar explanatory information, then it would probably have been found misleading contrary to section 4. However, absent the evidence, we are not able to make such a finding. We are not prepared to find that Mr. Vavrek has violated the *Code of Conduct* based on mere speculation.

As a result, we conclude that the Executive Director has not established a breach of section 4.

6. Making representations in the course of advertising or marketing property that were untrue in a material respect contrary to section 4(a) of the *Code of Conduct.*

The particulars here allege that the advertising on the MLS system indicated that "immediate possession" was available for the properties.

Ms. Ramaswamy argues that by indicating in the advertising "immediate possession" Mr. Vavrek made an untrue statement because W.S. was not consenting to the sale, he was living on the properties, and a court order for sale would have been required. Obtaining the court order and the removal of W.S. could not possibly have been done immediately.

A.C. argues that "immediate" is a relative term that must be judged on the basis of the circumstances of each transaction and situation. If immediate were to be taken literally as being

instantaneous, then nothing would qualify because there is always some measure of delay, even if only hours, in transferring possession.

We agree with A.C.'s interpretation. The phrase "immediate possession" in a real estate transaction is intended to mean that there will be no significant delays in transferring possession to the seller. It does not mean instantaneous possession the moment the sale contract is signed. To ascribe such a literal definition would be to put virtually every industry member in violation of section 4(a) any time they included this commonly used phrase. In our view, industry members and the public are well aware that "immediate possession" simply means "without significant delay". Depending on the circumstances of each case, possession may be hours, days or even weeks after the contract is signed and might still be considered "immediate". Again, each case will depend on the circumstances.

Applying the above to this case, did use of the phrase "immediate possession" constitute false advertising contrary to section 4(a)? For two reasons we conclude that there has been no violation of section 4(a).

First, we again face a difficulty arising out of a lack of evidence. In this case the Agreed Statement of Facts does confirm that "immediate possession" was included in the MLS system, and so failure to enter a copy of the advertising is not by itself fatal. However, we have no evidence regarding how long, if at all, possession may have been delayed. The Agreed Statement of Facts indicates that Wilson was living on the properties, that he was not consenting to the sale, and that a court order would be required. However, we have no information about how long it may have taken to accomplish this. Surely, to establish a violation, the Executive Director would need to enter some evidence of delay. Could the Court Order have been obtained within hours of the sale agreement, or would it have taken weeks? Was W.S. essentially packed and ready to move, or was he going to need weeks to get out? He was living on "the properties" but it was farm land and surely most of the parcels did not require any physical moving, so could some parcels be transferred quickly while one might have been delayed? Would delayed transfer of only one parcel result in untrue advertising?

Lack of evidence precludes an answer to any of these questions.

Second, and more importantly, legal possession is not necessarily the same as physical possession. For example, the court order may have been obtained and title may have been transferred within hours of the sale agreement, but with a provision that W.S. remained as a tenant on one parcel. Surely, this would constitute immediate possession, even though W.S. may have remained as a tenant by court order or by agreement with the purchaser.

As a result, given the different arrangements that may have been made with a purchaser, and without any evidence to suggest that such arrangements could not be made in this case, we are not in a position to find that "immediate possession" was an untrue statement in this case. In short, we cannot speculate or assume that there would have been significant delays in possession. We require some evidence.

7. Creation of a contract that was not legally binding, specifically, the listing agreement between and Exit Realty, contrary to section 6(c) of the *Code of Conduct*.

The particulars here relate to the fact that the listing agreement indicated that L.S. was the registered owner of all of the properties, and had legal authority to sell them, when, in fact, she was at best only one of two registered owners (and in some cases she was not on title at all) and therefore did not have sole legal authority to sell.

Ms. Ramaswamy's argument is that because L.S. was not the registered owner of all of the properties that were included in the listing agreement, the agreement was not legally binding. We were not provided with any legal authority for this proposition. However, as indicated above, the legislative scheme recognizes that a seller and an owner are different and that an owner may not be a party to the listing agreement. Given this, we cannot possibly conclude that the listing agreement is "not legally binding" simply because L.S. was not the registered owner of all the properties. Since he did not sign it, the agreement would not have been legally binding as against W.S. , but certainly it was binding as against the party that signed it. We have no doubt, for example, that if there were a subsequent dispute, both L.S. and Mr. Vavrek would have been in a position to enforce the listing agreement as against one another.

The situation may have been different if the agreement in question were a sale agreement.

Before leaving this section, we need to point out a discrepancy between the wording in the Notice of Hearing and the wording in section 6(c). Section 6(c) prohibits creation of contracts that are not legally binding, *or that are confusing*. The Notice of Hearing, however, is restricted to a contract that is not legally binding. It is not clear why the Notice of Hearing omitted reference to "confusing" contracts. Since the agreement indicated that L.S. was the registered owner of all the properties, it certainly appears clear that the Executive Director would have been successful if the "confusing" portion of the section was included. However, since it is not included in the charge, the rules of natural justice and procedural fairness preclude us finding that Mr. Vavrek has violated the section on this basis. It would not be appropriate to find Mr. Vavrek guilty of an allegation he did not even know he had to defend.

8. Creation of a contract that was not legally binding, specifically, the listing agreement between L.S. and Coldwell Banker, contrary to section 6(c) of the *Code of Conduct*

The reason for this separate charge is that when Mr. Vavrek changed brokerages, a new listing agreement was entered into. The particulars of this charge are the same as for paragraph 7 above, and our finding is also the same.

We would add one caveat, however. Unlike the Exit Realty agreement, the Coldwell Banker listing agreement included a clause specifically recognizing that L.S. was a co-owner of the property only, and that she was selling her share only or the whole of the property as approved by the court. We add this note only because, even if the Notice of Hearing had included the "confusing" component of section 6(c), in this case, unlike in the Exit Realty agreement, the clause above would have eliminated any confusion.

9. **Creation of a contract that was not legally binding, specifically, the sale agreement between Atkins and** L.S. **, contrary to section 6(c) of the *Code of Conduct.***

10. **Creation of a contract that was not legally binding, specifically, the sale agreement between Tel-Ty and** L.S. **, contrary to section 6(c) of the *Code of Conduct.***

11. **Creation of a contract that was not legally binding, specifically, the sale agreement between Woodward and** L.S. **, contrary to section 6(c) of the *Code of Conduct.***

We will deal with these three allegations together because the particulars, evidence and arguments for each are the same.

The particulars here relate to the fact that the sale agreements each contained a term indicating that the seller, L.S. , had the right to sell the properties, when, in fact, she did not.

None of the actual purchase agreements was entered into evidence. However, the Agreed Statement of Facts indicates that only L.S. was listed as the seller, and clause 10.1.a of each agreement indicated that the seller had the legal right to sell the property.

Ms. Ramaswamy's argument is that since L.S. was not the sole owner of the properties, she did not have had the legal right to sell them. As such, clause 10.1.a of each contract is incorrect and each of the three contracts is "not legally binding" contrary to section 6(c).

The problem with Ms. Ramaswamy's argument is that it ignores the fact that each of the three contracts also contained a clause indicating that each contract was subject to court approval. Obviously, these "subject to" clauses were inserted in recognition of the fact that L.S. did not have the legal right to sell on her own; she needed court approval to sell. In other words, these clauses were inserted specifically so as to avoid the very problem Mr. Vavrek is now being accused of; creating sale agreements that were not legally binding. In each case the "subject to" clauses worked exactly as intended, since court approval was not obtained and so the sales did not proceed.

We agree with Ms. Ramaswamy that the clause 10.1.a of each contract contains an incorrect statement. However, we are also well aware that this is a standard form sale contract that includes 10.1.a as a pre-printed clause that is not easy to change. In our view, in the circumstances, Mr. Vavrek did a reasonable job of dealing with the situation by inserting the subject to court approval clause. This had the effect of ensuring that the sale was not binding until the court approval was obtained.

Moreover, it is important to remember that, as with the issue related to the listing agreements in items 7 and 8 above, the allegation in the Notice of Hearing is merely that the contracts are not legally binding. There is no allegation that the contracts are "confusing" as contemplated by section 6(c). Given the incorrect statements in clause 10.1.a it may have been possible to successfully argue that the contracts were "confusing" (although, to conclusively rule on this point we would have needed to see the entire purchase contracts to determine if there were any other clarifying clauses added). However, this allegation was not contained in the Notice of Hearing, and

we are not prepared to find that Mr. Vavrek has breached something he was not even aware he had to respond to.

As a result, given the inclusion of the "subject to" clauses, we cannot conclude that the contracts were not legally binding as alleged.

12. Failure to deliver the Exit Realty listing agreement to W.S. **, an owner of the properties, contrary to section 26(1) of the *Real Estate Act Rules*.**

13. Failure to deliver the Coldwell Banker listing agreement to W.S. **, an owner of the properties, contrary to section 26(1) of the *Real Estate Act Rules*.**

We will deal with these two allegations together because the particulars, evidence and arguments for each are the same.

The particulars here simply indicate that W.S. was an owner of the properties, and that Mr. Vavrek failed to deliver copies of the listing agreements to him. The Agreed Statement of Facts confirms these particulars.

Given the restrictive application of section 4(b) of the *Code of Conduct* (i.e. that an industry member only needs the seller's consent to list a property, not the owner's consent), section 26 is an important provision. It is the safety mechanism that ensures all owners will become aware of the fact that their property has been listed for sale by some seller. However, we have to remember that the duty in section 26 is imposed on the brokerage, not on the individual agent. Perhaps the reason for imposing the duty on the brokerage is that it provides a further layer of protection to the public in case of a rogue agent.

In any event, whatever the reason, the duty in section 26 is clearly on the brokerage, not the agent. In this case Mr. Vavrek was the agent, and Exit Realty and Coldwell Banker were the brokerages. Although there was a breach of the duty in section 26, Mr. Vavrek cannot be held in breach of a duty he did not owe. This is a matter for the brokerages to respond to.

Ms. Ramaswamy argues that since Mr. Vavrek was the agent in the transactions, any failure to deliver the listing agreements as required is his responsibility. Although we agree that a brokerage may appoint an agent to fulfill its section 26 obligation for it, in this case we have no evidence to suggest that such a delegation to Mr. Vavrek occurred in this case. Absent any evidence on this point, we cannot conclude that Mr. Vavrek was in breach of section 26.

Summary and Conclusions:

Based on all of the foregoing, we conclude that the Executive Director has not established that Mr. Vavrek is guilty of any of the allegations as outlined in the Notice of Hearing.

Sanction and Costs:

Given our conclusions above, no sanction is imposed against Mr. Vavrek and no costs are awarded.

V) ORDERS:

As a result of the above, we hereby order as follows:

- All allegations and charges as against Mr. Vavrek set out in the Notice of Hearing are hereby dismissed.

This decision was made on December 22, 2006.

Bev Andre, Chair

"Barry Gogal"

Barry Gogal, Panel Member

"Tom Shields"

Tom Shields, Panel Member

THE REAL ESTATE COUNCIL OF ALBERTA

SCHEDULE 'A'

AGREED STATEMENT OF FACTS

1. THAT in November 2002, L.S. contacted Larry Vavrek about listing the following properties for sale: SE 36 71 12 W6, SE 35 71 12 W6, NW 25 71 12 W6, SW 25 71 12 W6, NW 24 71 12 W6 and W1/2 36 71 12 W6, E1/2 26 71 12 W6, E1/2 25 71 12 W6, E1/2 24 71 12 W6, SW 24 71 12 W6 and SE 23 71 12 W6 [hereinafter "the properties"].

2. THAT W.S. was the sole title holder for the SE 35 71 12 W6 property and for the W1/2 36 71 12 W6, E1/2 26 71 12 W6, E1/2 25 71 12 W6, E1/2 24 71 12 W6, SW 24 71 12 W6 and SE 23 71 12 W6 properties and that W.S. and L.S. were the joint tenant title holders for the SE 36 71 12 W6, NW 25 71 12 W6, SW 25 71 12 W6 and NW 24 71 12 W6 properties.

3. THAT on November 26, 2002, L.S. entered into a listing agreement for the sale of the properties with the Exit Realty Discovery brokerage, the brokerage with which Larry Vavrek, was registered to at the time, by way of a Listing Contract For the Sale of Rural Property form dated November 26, 2002.

4. THAT on November 26, 2002, Larry Vavrek, acting as agent on behalf of L.S. , listed the properties for sale by way of an MLS Farm Property Data Entry Form dated November 26, 2002.

5. THAT prior to listing the properties for sale or at anytime during the listing, Larry Vavrek did not obtain W.S.'s consent to do so.

6. THAT after the listing agreement set out in paragraph 4 was entered into, Exit Realty entered listing information into the MLS system on November 26, 2002.

7. THAT when the listing agreement was entered into the MLS system, the possession date for the properties was listed as immediate based on the information in the listing agreement which was drawn by Larry Vavrek.

8. THAT W.S. was living on the on the properties on November 26, 2002.

9. THAT W.S. was not consenting to the sale of the properties.

10. THAT Larry Vavrek knew that if the sale of the properties took place to a third party, this would have to be decided by the courts.

11. THAT the listing agreement mentioned in paragraph 4 set out that L.S. was the owner registered on title for all of the properties to be sold.

12. THAT the properties listed to be sold were those set out in paragraph 1.

13. THAT the listing agreement mentioned in paragraph 4 set out that L.S. was warranting that she had the legal authority to sell the properties.

14. THAT on December 4, 2002, L.S.'s lawyer at the time, Morris Golden, filed a Notice of Motion in the Alberta Court of

Queen's Bench for an application for an order for partition and sale of the properties and for an immediate listing of these properties.

15. THAT the matter outlined in paragraph 14 was heard in the Alberta Court of Queen's Bench by Justice Mason on January 29, 2003.

16. THAT on January 29, 2003, Justice Mason dismissed L.S.'s Notice of Motion set out in paragraph 14 and awarded costs to W.S. . A copy of the Order is attached and marked as Exhibit 1.

17. THAT the properties continued to be listed for sale after January 29, 2003.

18. THAT when these properties were advertised and/or marketed, this was done through MLS only (and by virtue of this fact, the properties were advertised on internet websites and the Grande Prairie Real Estate Board's biweekly publication). Larry Vavrek did not inform W.S. that the properties were being advertised on MLS and did not obtain W.S.'s consent to do so.

19. THAT on or about November 1, 2003, L.S. and the Coldwell Banker 1st Grande Prairie Realty brokerage entered into a listing contract for the listing for sale of the properties.

20. THAT Larry Vavrek, executed this listing contract between L.S. and the Coldwell Banker 1st Grande Prairie Realty brokerage.

21. THAT on this listing contract, only L.S. is set out as the owner of the properties and it also sets out that

L.S. was warranting that she had the authority to sell the properties.

22. THAT on this listing contract under special terms, it is indicated that " L.S. , co-owner of property hereby selling her share of prop "or" the whole so approved by lawyers or the courts. This listing is subject to court approval."

23. THAT on January 3, 2003, Larry Vavrek participated in the creation of a purchase contract between L.S. and H.P. , and J.A. by way of an Agricultural Real Estate Purchase Contract dated January 3, 2003.

24. THAT L.S. only was listed as the Seller on this Agricultural Real Estate Purchase Contract.

25. THAT term 10.1.a. of this Agricultural Real Estate Purchase Contract sets out that the Seller has the legal right to sell the property.

26. THAT subject to court approval was listed as a seller's condition.

27. THAT the seller's condition in the January 3, 2003 contract was not met.

28. THAT on December 3, 2003, Larry Vavrek, participated in the creation of a purchase contract for the properties between L.S. and Tel-Ty Ltd. or Nominee by way of an Agricultural Real Estate Purchase Contract dated December 3, 2003.

29. THAT L.S. only was listed as the Seller of the properties on this Agricultural Real Estate Purchase Contract.

30. THAT term 10.1.a. of this Agricultural Real Estate Purchase Contract set out that the Seller has the legal right to sell the property.

31. THAT subject to court approval was listed as a seller's condition.

32. THAT the seller's condition in the December 3, 2003 contract was not met.

33. THAT on February 18, 2004, Larry Vavrek participated in the creation of a purchase contract for the properties between L.S. and D.W. by way of an Agricultural Real Estate Purchase Contract dated February 17, 2004, where final acceptance was achieved on February 18, 2004.

34. THAT L.S. only was listed as the Seller of the properties on this Agricultural Real Estate Purchase Contract.

35. THAT term 10.1.a. of this Agricultural Real Estate Purchase Contract sets out that the Seller has the legal right to sell the property.

36. THAT subject to court approval was listed as a seller's condition.

37. THAT the seller's condition in the February 18, 2004 contract was not met.

38. THAT Larry Vavrek, on behalf of the Exit Realty Guarantee brokerage, did not deliver a true copy of the listing agreement outlined in paragraph 9(a) to W.S. .

39. THAT L.S. entered into the listing agreement solely on her behalf.

40. THAT Larry Vavrek, on behalf of the Coldwell Banker 1st Grande Prairie Realty brokerage did not deliver a true copy of the listing agreement outlined in paragraph 10(a) to W.S.

41. THAT L.S. entered into the listing agreement solely on her behalf.

Consented to by

"Leela Ramaswamy"

Leela Ramaswamy on behalf

of the Executive Director of the

Real Estate Council of Alberta

Consented to by

"A.C."

Lewis & Chrenek LLP

On behalf of Larry Vavrek