



Real Estate Council of Ontario

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**IN THE MATTER OF A DISCIPLINE HEARING HELD PURSUANT TO THE  
*REAL ESTATE AND BUSINESS BROKERS ACT, 2002, S.O. 2002, c. 30, Sch. C***

**BETWEEN:**

**REAL ESTATE COUNCIL OF ONTARIO**

**- AND -**

**DEBRA JEAN TOSH**

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**DISCIPLINE DECISION AND REASONS FOR DECISION**

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Subject to Rule 4.02 of the Discipline and Appeals Committee Rules of Practice (*REBBA 2002*), I, the Chair of the Discipline Committee (*REBBA 2002*) have reviewed and considered the Agreed Statement of Facts and Penalty together with the Waiver of Hearing submitted by the Parties to this proceeding and provide the following Order:

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**FINDINGS:** In violation of Sections 3, 4, 5, 17, 25(1), 37(1), 38 and 39 of the *REBBA 2002* Code of Ethics.

**ORDER:** Fine of \$12,000.00 payable to RECO on or before September 30, 2020.

Successful completion of “REIC 2600 Ethics and Business Practice” course and provide RECO with confirmation of successful completion on or before September 30, 2020.

**WRITTEN REASONS:**

**REASONS FOR DECISION**

**INTRODUCTION**

This matter proceeded on the basis of an Agreed Statement of Facts and Penalty and Waiver of Hearing, pursuant to Rule 4.02 of the Rules of Practice (*REBBA 2002*).

The Agreed Statement of Facts and Penalty read:

**AGREED STATEMENT OF FACTS AND PENALTY**

It is agreed as follows:

1. Debra Tosh ("Tosh") is registered as a salesperson under the Real Estate and Business Brokers Act, 2002. Tosh is and was at all relevant times employed by Brokerage A.
2. Seller A (the "Seller") was the owner of a property at 1-A Street, City Ae (the "Property"). On April 14, 2017, he entered into a listing agreement with the Brokerage to sell the Property, with Tosh acting as the listing representative.

#### FIRST FAILED TRANSACTION

3. Buyer A and Buyer B (the "First Buyers") entered into a Buyer Representation Agreement with the Brokerage, with Tosh acting as the buyers' representative.
4. The First Buyers made a conditional offer to purchase the Property which was accepted by the Seller on June 1, 2017 (the "First APS").
5. The First Buyers brought a home inspector to the Property, who advised that the Property needed significant work. The First Buyers decided not to proceed with the agreement. A Mutual Release was signed by the First Buyers on June 4 and was then signed by the Seller on June 5, 2017.
6. Although the First Buyers requested Tosh to show them other houses, they remained interested in purchasing the Property if the Seller would complete, or undertake to complete, certain repairs. This was made known to Tosh.
7. On or around June 11, 2017, Tosh brought in an offer to purchase the Property from another purchaser, Buyer C (the "Second Buyer"). The Second Buyer was also represented by the Brokerage with Tosh acting as the buyer representative.
8. Although she advised the First Buyers on June 11, 2017 that other showings were occurring on that day, she did not advise them that an offer was being submitted from her other client, the Second Buyer.
9. The Buyer Complainants were distraught when they learned that the Property had been sold conditionally to the Second Buyer on June 11, 2017.

#### COMMISSION DISPUTE

10. The listing agreement between the Brokerage and the Seller set a commission payable of 5% upon a sale, or 3.25% "if double ended by Debra Tosh."
11. During the negotiation of the First APS, the Seller requested a commission reduction from 3.25% to 3%. Tosh agreed by email.
12. The Seller requested the change to be reflected in the listing agreement. Tosh refused, on the basis that she did not wish the First Buyers to know about the reduction in her commission.
13. Although the First APS was not concluded, upon closing of the Second APS, the Seller's lawyer received an invoice from the Brokerage for commission payment of 3.25%. When questioned, Tosh took the position that the reduction to 3% was only applicable to the First APS, and that it was inapplicable to the Second APS. However, through her own conduct,

the applicability of the commission reduction had never been properly clarified or documented.

#### MOCK SCHEDULE FOR FINANCING

14. A number of concerns pertaining to the state of the Property had been identified, including the existence of asbestos, knob and tube wiring, and a roof which leaked in multiple places.
15. The Second APS, as agreed upon by the parties, contained a "Schedule A2". It stated that, prior to closing, the Seller would remove the knob and tube wiring, remove the asbestos wrap on the pipes, and repair the roof where it was leaking in three places.
16. Shortly thereafter, concerned that the provisions of Schedule A2 may complicate the Second Buyer's ability to obtain insurance and financing, Tosh created a "modified" Schedule A2 "for financing purposes only" which was not intended to actually form part of the Second APS. This modified schedule eliminated mention of the leaky roof, the asbestos, and the knob and tube wiring.
17. Tosh then created a "Dummy Schedule B" which the parties signed pertaining to the Seller's requirement to remedy the knob and tube wiring, asbestos, and leaky roof; the intention being to have a 'side agreement' which would not be provided to a lender or form part of the Second APS (despite the Dummy Schedule B indicating that it was in fact a schedule to the APS).

#### SUMMARY OF AGREEMENTS

It is agreed that Tosh failed to comply with the Code of Ethics as follows:

18. Tosh did not give the First Buyers an opportunity to submit a second offer on the Property when she knew of the forthcoming offer from the Second Buyer contrary to sections 3, 4, 5, 17, and 39 of the Code of Ethics.
19. Tosh did not properly document the commission reduction agreement and withheld the fact of the commission reduction agreement from the First Buyers, contrary to sections 3, 4, 5, 25(1), 38 and 39 of the Code of Ethics.
20. Tosh created a separate schedule to the APS for financing which did not reflect the true APS, contrary to sections 3, 37(1) and 38 of the Code of Ethics.

It is agreed that Tosh failed to comply with the following sections of the Code of Ethics:

#### Fairness, honesty, etc.

3. A Registrant shall treat every person the registrant deals with in the course of a trade in real estate fairly, honestly and with integrity.

#### Best interests

4. A registrant shall promote and protect the best interests of the registrant's clients.

#### Conscientious and competent service, etc.

5. A registrant shall provide conscientious service to the registrant's clients and customers and shall demonstrate reasonable knowledge, skill, judgment and competence in providing those services.

Nature of relationship

17. If a registrant represents or provides service to more than one buyer or seller in respect of the same trade in real estate, the registrant shall, in writing, at the earliest practicable opportunity and before any offer is made, inform all buyers and sellers involved in that trade of the nature of the registrant's relationship to each buyer and seller.

Agreements relating to commission

25. (1) If a brokerage has a seller as a client and an agreement between the brokerage and the seller contains terms that relate to a commission or other remuneration and that may affect whether an offer to buy is accepted, the brokerage shall disclose the existence of and the details of those terms to any person who makes a written offer to buy, at the earliest practicable opportunity and before any offer is accepted.

Inaccurate representations

37. (1) A registrant shall not knowingly make an inaccurate representation in respect of a trade in real estate.

Error, misrepresentation, fraud, etc.

38. A registrant shall use the registrant's best efforts to prevent error, misrepresentation, fraud or any unethical practice in respect of a trade in real estate.

Unprofessional conduct, etc.

39. A registrant shall not, in the course of trading in real estate, engage in any act or omission that, having regard to all of the circumstances, would reasonably be regarded as disgraceful, dishonourable, unprofessional or unbecoming a registrant.

AGREED PENALTY

DEBRA JEAN TOSH, the Respondent, be ordered to pay a penalty of \$12,000.00 on or before September 30, 2020.

In addition to the above penalty, Respondent must enroll in the Ethics and Business Practice Course provided by the Real Estate Institute of Canada (REIC) and provide proof of successful completion of the course on or before September 30, 2020.

*[Respondent's Initials]*

By initials below, I, DEBRA JEAN TOSH, acknowledge that I have read and understand the penalty outlined herein and agree to the said terms and/or conditions.

*[Respondent's Initials]*

By initials below, I, DEBRA JEAN TOSH, agree, understand, acknowledge and consent to waive the requirement for a hearing and to request an Order from the Chair of the Discipline Committee that includes this Agreed Statement of Facts and Penalty as a final settlement of this matter.

*[Respondent's Initials]*

By initials below, I, DEBRA JEAN TOSH, acknowledge that I was aware of my right to be represented by Counsel or agent in this matter.

*[Respondent's Initials]*

By signature below, the Parties agree, acknowledge, understand and consent to the final settlement of this matter by way of this Agreed Statement of Facts and Penalty.

[The Agreed Statement was duly signed by the Parties.]

### **DECISION OF THE CHAIR**

Having reviewed and considered the Agreed Statement of Facts, the Chair of the Discipline Committee (*REBBA 2002*) concluded that the Respondent breached Sections 3, 4, 5, 17, 25(1), 37(1), 38 and 39 of the *REBBA 2002* Code of Ethics. The Chair of the Discipline Committee (*REBBA 2002*) is also in agreement with the joint submission of the Parties as to penalty and accordingly makes the following order:

1. DEBRA JEAN TOSH is Ordered a Fine of \$12,000.00 payable to RECO on or before September 30, 2020.
2. DEBRA JEAN TOSH is Ordered to successfully complete "REIC 2600 Ethics and Business Practice" course on or before September 30, 2020.

*[Released: January 15, 2020]*