

COMMISSION OF INQUIRY INTO MONEY LAUNDERING IN BRITISH COLUMBIA  
The Honourable Mr. Austin F. Cullen, Commissioner

**SUBMISSIONS ON BEHALF OF THE REAL ESTATE COUNCIL OF BRITISH COLUMBIA  
(as it existed on July 31, 2021)**

1. These submissions are provided on behalf of the Real Estate Council of British Columbia (“**RECBC**”) as it existed on July 31, 2021. On August 1, 2021, RECBC was dissolved and its mandate and operations, along with the Office of the Superintendent of Real Estate’s (“**OSRE**”) operations and mandate, moved to and were integrated into the B.C. Financial Services Authority (“**BCFSA**”).<sup>1</sup> RECBC is not a participant in the Commission of Inquiry into Money Laundering in British Columbia (the “**Commission**”), but provides these submissions to assist the Commissioner in the preparation of his final report, to the extent that the Commissioner expects to comment on the matters below, and in particular, the handling of certain files referred to the RECBC related to Mr. Chaudhary.

2. Under the *Real Estate Services Act* (“**RESA**”) prior to August 1, 2021, RECBC and the OSRE shared regulatory oversight of the real estate industry, as co-regulators, with the OSRE having some oversight mandate and powers.<sup>2</sup> As one example of the shared responsibilities of RECBC and the OSRE, the OSRE may oversee and direct the operations and activities of the real estate council, including by requiring RECBC to investigate a particular matter or issue a notice of discipline hearing.<sup>3</sup> The OSRE provided high level, strategic direction to RECBC that matters involving consumer harm or conflicts of interest be given priority. OSRE had knowledge of RECBC’s mandate, activities, resources and priorities.<sup>4</sup>

3. RECBC was established by the provincial government in 1958, originally with responsibility for licensing and education of real estate representatives and brokers, later receiving full self-regulatory status and additional authority for disciplining licensee misconduct.<sup>5</sup> From 2005, RECBC was responsible for licensing individuals and brokerages engaged in real estate sales and rental and strata property management. RECBC enforced entry qualifications and continuing education requirements, investigated complaints against real estate professionals

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<sup>1</sup> Affidavit of Michael Scott made September 13, 2021 (“**Scott Affidavit**”), para. 2.

<sup>2</sup> Scott Affidavit, para. 3.

<sup>3</sup> Scott Affidavit, para. 3; [Real Estate Services Act](#), [SBC 2004] c. 42, s. 89.1.

<sup>4</sup> Scott Affidavit, para. 3 and Exhibit A.

<sup>5</sup> Scott Affidavit, para. 2.

and imposed disciplinary sanctions under the RESA.<sup>6</sup> RECBC was positioned to determine how to carry out its statutory mandates, including the objective of upholding and protecting the public interest in relation to the conduct and integrity of licensees.<sup>7</sup>

4. In carrying out its mandate, RECBC balanced a number of factors in exercising discretion in the prosecution of its files. The 26 files related to Mr. Chaudhary discussed by Mr. Michael Scott in his February 25, 2021 testimony before the Commission (the “**Chaudhary Matters**”) were handled appropriately.

### **The Relevance of Discretion and Deference**

5. In handling its files, RECBC exercised discretion as to its resources and regulatory priorities. While such discretion is not absolute, there is a role for deference in examining the steps taken by regulators in their investigations.

6. It is a principle in administrative law that administrative bodies are experts on their statutes, their industries and their objectives. An administrative decision maker is presumed to be an expert in matters regarding the application of its home statute.<sup>8</sup> This expertise arises from a number of sources and “inheres in a tribunal itself as an institution” as it accumulates “a measure of relative institutional expertise”.<sup>9</sup> This is underscored by volumes of authorities commenting on the deference owed to administrative decision makers in the context of judicial review.<sup>10</sup> As the Supreme Court of Canada commented in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, in the context of statutory interpretation, administrative decision-makers should “be permitted to be guided by their expertise and knowledge of the practical realities of their administrative regime”.<sup>11</sup>

7. It is also a principle in Canadian common law that public bodies have a sphere of prosecutorial discretion to exercise their judgment. What is common to the various elements of

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<sup>6</sup> Scott Affidavit, para. 2.

<sup>7</sup> See: [Real Estate Services Act](#), [SBC 2004] c. 42, s. 73(2)(c).

<sup>8</sup> *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016 SCC 47](#), para. 33.

<sup>9</sup> *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016 SCC 47](#), para. 33 and the dissent of Côté and Brown JJ., para. 83.

<sup>10</sup> See: *Dunsmuir v. New Brunswick*, [2008 SCC 9](#); *Canada (Citizenship and Immigration) v. Khosa*, [2009 SCC 12](#); *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019 SCC 65](#).

<sup>11</sup> *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019 SCC 65](#), concurrence of Abella and Karakatsanis JJ., para. 309.

prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for.<sup>12</sup>

8. While there are constitutional issues that underly the robust sphere of prosecutorial discretion in the criminal law that are not equally applicable in the regulatory sphere, the principles of prosecutorial discretion are relevant context to examinations of regulatory conduct. Courts have, at times, considered the discretion exercised by a professional regulator to be analogous to prosecutorial discretion in the criminal process.<sup>13</sup>

9. The principles of prosecutorial discretion have been examined in the context of commissions established under the *Public Inquiry Act*. As held by the Court of Appeal for British Columbia, such a commission may review decisions falling within the scope of prosecutorial discretion if “such inquiries are strictly within the tribunal’s statutory jurisdiction, and do not interfere with constitutionally protected prosecutorial independence [...by placing] undue pressure on the Attorney General or on Crown counsel such that their independence may be compromised.”<sup>14</sup> In that case, the commission of inquiry was permitted to explore issues surrounding the exercise of the Crown’s prosecutorial discretion and decisions not to lay charges in connection with the death of an individual by hypothermia shortly after leaving police custody since that exploration was specifically the purpose and mandate of the commission. The Court commented that:

This is not a case in which a tribunal is relying on broad, general powers of investigation to support a foray into issues touching on prosecutorial discretion. Rather, this is a case where a fact-finding and advisory body has been established for the express purpose (among others) of inquiring into the exercise of prosecutorial discretion by the Criminal Justice Branch.<sup>15</sup>

10. The role of deference to prosecutorial discretion should be considered when reviewing and investigating regulators such as RECBC. RECBC could not pursue every matter

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<sup>12</sup> *Krieger v. Law Society of Alberta*, [2002 SCC 65](#), para. 47.

<sup>13</sup> *Friends of the Old Man River Society v. Association of Professional Engineers, Geologists and Geophysicists of Alberta*, [2001 ABCA 107](#), para. 42; see also: *Re Paul Azeff et al*, [2012 ONSEC 16](#), para. 209; *Re Parhar*, [2017 BCSECCOM 286](#), paras. 82-83.

<sup>14</sup> *British Columbia (Attorney General) v. Davies*, [2009 BCCA 337](#), paras. 59-60, leave to appeal to SCC refused, [2010 CanLII 17152](#).

<sup>15</sup> *British Columbia (Attorney General) v. Davies*, [2009 BCCA 337](#), para. 69, leave to appeal to SCC refused, [2010 CanLII 17152](#).

arguably within its jurisdiction and needed to prioritize based on its resources and institutional expertise.

### **The Chaudhary Matters Were Handled Appropriately**

11. The Chaudhary Matters were reviewed and triaged by RECBC's compliance department.<sup>16</sup> The information provided to RECBC was reviewed and files were opened. Some matters were prioritized based on the information and resources available and each were monitored.<sup>17</sup>

12. The Chaudhary Matters were individually evaluated and categorized based on RECBC's assessment of their severity. The evidence against the licensees varies and ongoing investigations may yet yield different discipline outcomes.<sup>18</sup> As of July 31, 2021, all of the Chaudhary Matters have been referred to a third-party investigator.<sup>19</sup> RECBC reviewed the Chaudhary Matters, its strategic priorities, its available resources and determined an effective and efficient way to advance its investigations.

13. The OSRE was aware of the referral of the Chaudhary Matters to RECBC.<sup>20</sup> RECBC did not refer any matters related to Mr. Chaudhary to the OSRE, nor did RECBC receive any strategic direction from OSRE regarding the investigation or priority of the matters related to Mr. Chaudhary.<sup>21</sup>

14. The Chaudhary Matters were referred at a time where RECBC's resources were strained. The Chaudhary Matters are among hundreds of complaints and investigations RECBC was then and was subsequently pursuing. To do more on the Chaudhary Matters would have meant doing less on other files, including files that RECBC considered to be more serious and more urgent.<sup>22</sup> At the time, the Chaudhary Matters were referred, RECBC was adjusting to a newly implemented two-stage complaint assessment process.<sup>23</sup> At the time RECBC was referred

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<sup>16</sup> Scott Affidavit, para. 22.

<sup>17</sup> Scott Affidavit, paras. 22 and 25.

<sup>18</sup> Scott Affidavit, para. 28.

<sup>19</sup> Scott Affidavit, para. 27.

<sup>20</sup> Scott Affidavit, para. 4.

<sup>21</sup> Scott Affidavit, para. 4; [Real Estate Services Act](#), [SBC 2004] c. 42, s. 89.1.

<sup>22</sup> Scott Affidavit, para. 23.

<sup>23</sup> Scott Affidavit, para. 24.

the Chaudhary Matters, it had an inventory of approximately 150 matters that had been evaluated through the triage process as serious and worthy of investigation.<sup>24</sup>

15. Ultimately, resources became available allowing to RECBC hire, at considerable expense, a third party to assist in the investigations.<sup>25</sup> These resources were not available at the time the Chaudhary Matters were first referred to RECBC.<sup>26</sup>

### **RECBC's Limited Pool of Resources**

16. RECBC had limited resources available to carry out its mandates. RECBC did not receive taxpayer funding.<sup>27</sup> Rather, RECBC's operations were funded through licensing assessment fees and a small amount of enforcement sanctions (which are required under the RESA to be directed to an In-Trust Education Fund).<sup>28</sup> As of April 1, 2021 RECBC implemented a 30% licence fee increase in part to cover growing investigative expenditures and systems investments.<sup>29</sup>

17. The real estate industry in British Columbia has changed considerably in recent years in response to market conditions. It has also changed in response to contemporary social issues. RECBC adapted in response to these changes, including through legislative changes to RECBC's organization.

18. Qualified investigators, particularly with financial crimes or real estate experience, are highly skilled and highly in demand.<sup>30</sup> At times, RECBC had limited qualified investigative resources to pursue the high volumes of complaints or pursue complex investigative matters.<sup>31</sup> In early 2018, for example, RECBC's compliance department had approximately ten staff responsible for reviewing and investigating complaints.<sup>32</sup> As of July 31, 2021, RECBC's

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<sup>24</sup> Scott Affidavit, para. 24.

<sup>25</sup> Scott Affidavit, para. 26.

<sup>26</sup> Scott Affidavit, para. 26.

<sup>27</sup> Scott Affidavit, para. 9.

<sup>28</sup> Scott Affidavit, para. 9.

<sup>29</sup> Scott Affidavit, para. 10.

<sup>30</sup> Scott Affidavit, para. 12.

<sup>31</sup> Scott Affidavit, para. 12.

<sup>32</sup> Scott Affidavit, para. 13.

compliance department had approximately 25 staff and was continuing to hire temporary staff to deal with increased complaint volumes.<sup>33</sup>

19. RECBC accumulated an inventory of complaint files for several years, largely due to increasing activity in the real estate industry in British Columbia.<sup>34</sup> This increase was contributed to by RECBC implementing an anonymous tip-line and making outreach efforts to raise public awareness of RECBC's role as a consumer protection regulator.<sup>35</sup> Complaint numbers are at record highs and continuing to grow.<sup>36</sup> The numbers of complaints received annually by RECBC have nearly doubled in the past five years, from 536 in 2015 to 1028 complaints and anonymous tips received in 2020.<sup>37</sup> There is no indication that this growth will be slowing down.

20. RECBC was managing historic complaint volumes and caseloads in recent years while at the same time grappling with limited funding and strained staffing resources. RECBC's management of complaints and investigatory processes are affected by these economic and administrative realities.

### **RECBC Reasonably Allocated its Resources**

21. Resources given to one file are often resources taken from another. RECBC made decisions based on its interpretation of its statutory mandates. RECBC could not have "tunnel vision" to any one issue. Financial misconduct such as money laundering, while the focus of this Commission, were one of many issues RECBC was attentive to.

22. RECBC specifically adapted its file management process to address changes and growth in its complaint volume. In particular, in mid-2019, RECBC adopted a two-step process for reviewing complaints to accelerate resolution of low priority matters and divert resources to high priority matters.<sup>38</sup> At the first stage, complaints were assessed in an "intake" process where the complaints are reviewed on a preliminary basis to determine if there is a sufficient basis to pursue regulatory action.<sup>39</sup> At the second stage, complaints were reviewed in greater detail to determine

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<sup>33</sup> Scott Affidavit, para. 13.

<sup>34</sup> Scott Affidavit, para. 14.

<sup>35</sup> Scott Affidavit, para. 14.

<sup>36</sup> Scott Affidavit, para. 14.

<sup>37</sup> Scott Affidavit, para. 14.

<sup>38</sup> Scott Affidavit, para. 16.

<sup>39</sup> Scott Affidavit, para. 17.

if they will be referred to the investigations group or whether an alternative means of resolution is more appropriate.<sup>40</sup>

23. Nevertheless, it can take time before a compliance officer has the capacity to take on the file. There were occasions where complaints were received and held before being assigned to an investigator.<sup>41</sup> This was because RECBC needed to manage its staff resources effectively by ensuring that compliance officers had a reasonable workload. It is not effective nor productive to immediately assign complaints to compliance officers when they do not have effective capacity to handle those matters.<sup>42</sup> Overburdening compliance officers is counterproductive to the goals of efficiency and effectively pursuing investigations of all degrees of severity. Overburdened compliance officers lose morale and motivation. This contributes to staff attrition.<sup>43</sup>

24. RECBC was actively improving and adapting to its high complaint volume and make incremental changes. Some of the measures implemented to reduce the inventory of complaint files include:

- (a) recruitment and training of additional investigators to expand the capacity of RECBC's compliance department;
- (b) implementing process improvements to streamline file review and increase the efficiency of investigations;
- (c) creating initiatives to enhance the timeliness of RECBC's response to consumer complaints;
- (d) increasing training for investigation staff;
- (e) restructuring the compliance department into intake and investigations groups with a new management structure;
- (f) improving reporting, and quantitative analysis of complaints handling and output;

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<sup>40</sup> Scott Affidavit, para. 18.

<sup>41</sup> Scott Affidavit, para. 19.

<sup>42</sup> Scott Affidavit, para. 20.

<sup>43</sup> Scott Affidavit, para. 20.

- (g) involving the legal group in review of older files to determine merit and recommend direction of further investigation;
- (h) pursuing a revised administrative penalty regime through discussions and collaboration with the OSRE;
- (i) creating penalty guidelines with OSRE to enhance the administrative monetary penalty regime and to enable more efficient disposition of less serious misconduct;
- (j) collaboration with the OSRE pursuant to the above-said MOU with a view to potentially referring a small volume of complaints to its investigative staff;
- (k) collaboration with the OSRE on alternative approaches to early complaint file review and resolution;
- (l) ending the role of an internal Council committee, the Complaints Committee, in reviewing and approving matters moving from investigation to discipline;
- (m) selecting and implementing an electronic complaint and case management system for document and matter management; and
- (n) moving consent order processes to written applications rather than oral hearings, and adopting a virtual hearing process in response to the COVID-19 pandemic.<sup>44</sup>

### **RECBC Was Integrated into the BCFSA in Part to Address Resource Limitations**

25. In November 2019, the Ministry of Finance announced its intention to create a single regulator for the financial services sector, including real estate, by integrating RECBC and the OSRE within the BCFSA.<sup>45</sup> On August 1, 2021, RECBC and OSRE were integrated into the BCFSA. The integration is expected to produce efficiencies and increase capacity in the investigative realm. RECBC no longer exists following the amalgamation.<sup>46</sup>

26. The Ministry of Finance's News Release dated November 12, 2019 announcing the amalgamation specifically commented that the amalgamation would help combat money

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<sup>44</sup> Scott Affidavit, para. 15.

<sup>45</sup> Scott Affidavit, para. 32.

<sup>46</sup> Scott Affidavit, para. 32 and Exhibit C.

laundering.<sup>47</sup> The current RESA does not confer any specific authority for RECBC to investigate or prosecute money laundering other than general rules such as the prohibition on “professional misconduct or conduct unbecoming”, the prohibition on “wrongful taking or deceptive dealing” and the requirement that an applicant for a licence be of “good reputation and suitable to be licensed”.<sup>48</sup>

27. By including real estate regulation within the responsibility of the BCFSA, the Ministry of Finance stated that it was “simplifying and integrating regulation of the B.C. financial services sector, resulting in increased consumer confidence and opportunities to streamline investigations and enforcement.<sup>49</sup> The Minister also noted that “[t]hrough legislation, we are giving people the assurance they deserve, while continuing to create world-leading protections against money laundering and other criminal activity in our real estate sector.”<sup>50</sup>

28. Establishing a single regulator had been recommended in two earlier government reports, the Real Estate Regulatory Structure Review in September 2018 (Exhibit 607 before the Commission) and the Expert Panel on Money Laundering in B.C. Real Estate Report in May 2019 (Exhibit 330 before the Commission).

29. Effective August 1, 2021, BCFSA has brought together the investigative, audit, financial, prosecutorial, and other teams and resources of multiple organizations. RECBC understood that the intention was to provide greater capacity, efficiency, and effectiveness in real estate disciplinary regulation than existed for the organizations individually before the integration.<sup>51</sup>

30. RECBC also understood that the integration would simplify and clarify responsibilities in real estate disciplinary regulation, with authorities now centralized under the CEO, who is also the Superintendent of Real Estate.<sup>52</sup> This would reduce the complexity which existed in the former co-regulator model, when RECBC and OSRE shared responsibility.<sup>53</sup>

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<sup>47</sup> Scott Affidavit, Exhibit C.

<sup>48</sup> [Real Estate Services Act](#), [SBC 2004] c. 42, ss. 10(a), 35(1) and 43(1).

<sup>49</sup> Affidavit of Blair Morrison made September 13, 2021 (“**Morrison Affidavit**”), para. 3 and Exhibit A.

<sup>50</sup> Morrison Affidavit, para. 3 and Exhibit A.

<sup>51</sup> Morrison Affidavit, para. 7.

<sup>52</sup> Morrison Affidavit, para. 9.

<sup>53</sup> Morrison Affidavit, para. 9.

31. RECBC had long been committed to collaborating with the OSRE, BCFSA and the Ministry of Finance to identify potential future mandate direction as it relates to anti-money laundering for real estate professionals to enhance the effectiveness of B.C.'s Anti-Money Laundering Regime.<sup>54</sup> RECBC understood that it is BCFSA's firm intention to apply these aggregated resources and implement new procedures and practices in order to: expedite complaint intake, handling, and prosecution and reduce complaint inventory and time to final complaint and disciplinary resolution.<sup>55</sup>

### **Conclusion**

32. The Chaudhary Matters were among hundreds of matters RECBC was reviewing and investigating. In considering its mandate and the issues before it, the Commission must balance its duties with the underlying principles of prosecutorial discretion and administrative deference.



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<sup>54</sup> Scott Affidavit, para. 33.

<sup>55</sup> Morrison Affidavit, para. 10.