

STAFF REPORT: PLANNING & BUILDING SERVICES (BUILDING & BY-LAW)



REPORT TO: Council  
 MEETING DATE: October 13, 2010  
 REPORT NO.: SRB.10.27  
 SUBJECT: Real Estate Council of Ontario  
 News Release – Trading in Real  
 Estate while Unregistered  
 PREPARED BY: David Finbow, Director,  
 Planning & Building Services

### A. Recommendations

**THAT Council** receive Staff Report SRB.10.27 respecting “Real Estate of Ontario News Release – Trading in Real Estate while Unregistered” and provide direction to staff as to what, if any, action Council desires staff to pursue of suspected violations of the Real Estate and Business Brokers Act, 2002.

### B. Background

In light of a recent Judgment on Appeal related to a violation of the *Real Estate and Business Brokers Act, 2002*, a registered entity/individual has requested that the Town become proactive in terms of notifying the Real Estate Council of Ontario (RECO) of suspected violations of the *Act* with the thinking being that RECO would pay particular attention to same. With respect to this request, Town Staff are seeking direction from Council.

As Council will note, the Judgment is specific but it has fairly broad implications with respect to what constitutes “trading” by a “broker” in “real estate” in violation of the *Act*. As noted in the Judgment “The learned Justice of the Peace continued by commenting that the type of activity carried on by the defendants has become widespread and “grown into a large industry in Ontario””.

Attached for Councils information are copies of a News Release from the Real Estate Council of Ontario (RECO) entitled “Chalet rental required registration, court rules” and the related Judgment on Appeal.

In summary, Town Staff are seeking direction from Council as to whether the Town should take a proactive role in reporting suspected violations of *Act*.

### C. The Blue Mountains’ Strategic Plan

*“Providing a strong, well managed municipal government.”*

**D. Budget Impact**

N/A

**E. Addendums**

1. RECO News Release
2. Reasons for Judgment on Appeal

Respectfully submitted,

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David Finbow  
Director, Planning & Building Services

# RECO News Release

Published by the Real Estate Council of Ontario



The Real Estate Council of Ontario (RECO) is responsible for administering the Real Estate and Business Brokers Act, 2002 and associated regulations on behalf of the provincial government.

In order to trade in real estate in Ontario, brokers and salespersons must be registered under the Real Estate and Business Brokers Act, 2002.

RECO's mission is to regulate the activity of trading in real estate in the public interest.

For more information about the Real Estate Council of Ontario, visit [www.reco.on.ca](http://www.reco.on.ca).

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## Chalet rental required registration, court rules Real Estate Council of Ontario successful in its appeal

Sept. 16, 2010 (Barrie) - A Collingwood business and its owner have been found guilty of trading in real estate while unregistered after an appeals court overturned an acquittal from two years ago.

Harvey Goldmintz and Blue Mountain Chalets will be sentenced on Oct. 5, 2010 in Barrie Provincial Court for contravening the *Real Estate and Business Brokers Act, 2002* (REBBA 2002) by trading without being registered. In Ontario, in order to trade in real estate, brokers and salespersons must be registered under REBBA 2002.

The charges against Mr. Goldmintz resulted from a RECO investigation that determined he had rented a Blue Mountain condo in early 2003 on behalf of the unit's owner on two separate occasions. Neither Blue Mountain Chalets nor Mr. Goldmintz was registered under REBBA 2002 at the time of the trade.

In his decision, Justice Glenn Krelove stated the Justice of the Peace in the 2008 trial made "significant errors of law" when he found Collingwood businessman Harvey Goldmintz and Blue Mountain Chalets not guilty.

Justice Krelove noted that Mr. Goldmintz operates a numbered company that carries on business as Blue Mountain Chalets (BMC).

"Among other things, BMC offers a service whereby it will rent a chalet in the Collingwood area on behalf of the owner of the chalet to a third party who wishes to use the chalet on a short term basis. BMC takes a fee from funds paid by the third party renter," the judgement states.

During the original trial, the Justice of the Peace stated he was satisfied that there was a trade in real estate by the defendant, and that the defendant acted as a broker on the trade. Despite these findings, he still found the accused not guilty.

However, in his reasons for overturning the acquittal, Justice Krelove stated "The learned Justice of the Peace erred in law by admitting and relying upon irrelevant and otherwise inadmissible evidence."

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### Real Estate Council of Ontario

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COURT FILE No.: Barrie 04277101-02  
DATE: 2010 09 14

## ONTARIO COURT OF JUSTICE

IN THE MATTER OF an appeal under Section 121 of the *Provincial Offences Act*, R.S.O. 1990, c. P.33, as amended;

**B E T W E E N :**

**HER MAJESTY THE QUEEN**  
*Appellant*

— AND —

**HARVEY GOLDMINTZ and**  
**1560719 ONTARIO CORP.,**  
operated as **BLUE MOUNTAIN CHALETS**  
*Respondents*

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Before Justice G.D. Krelove  
Heard on January 5, 2010  
Reasons for Judgment on Appeal released on September 14, 2010

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Ian R. Smith .....for the Appellant Her Majesty the Queen  
Paul M. Cooper..... for the Respondent

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On appeal from conviction by Justice of the Peace B. Norton on April 18, 2008.

**KRELOVE J.:**

**Introduction**

[1] This is an appeal pursuant to s. 121 of the *Provincial Offences Act* from a decision of Justice of the Peace B. Norton wherein he acquitted the Respondents Harvey Goldmintz ("Goldmintz") and 1560719 Ontario Corporation operated as Blue Mountain Chalets ("BMC") of charges pursuant to the *Real Estate and Business Brokers Act* (the "Act").

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**OVERVIEW**

[2] The Respondent Goldmintz operates a numbered company (also a Respondent) that carries on business as Blue Mountain Chalets. Among other things, BMC offers a service whereby it will rent a chalet in the Collingwood area on behalf of the owner of the chalet to a third party who wishes to use the chalet on a short term basis. BMC takes a fee from the funds paid by the third party renter.

[3] The evidence presented in the trial was that on two occasions Karen Ciotti made arrangements with BMC to have others use her chalet for a few days. These two occasions were in February and March, 2003. On the first occasion, the user of the chalet paid \$1,000 out of which Ms. Ciotti received \$786.00 and BMC received \$200.00 (with the balance being tax). On the second occasion, Ms. Ciotti received \$393.00 and BMC received \$100.00. Marked as Exhibit "C" at the trial is an agreement with BMC entitled "Blue Mountain Chalets Rental Program" signed by Ms. Ciotti. This agreement provides in paragraph 22 that:

...I assign Blue Mount Chalets as my Primary Renter and grant full permission to Blue Mountain Chalets to rent my property from the period beginning May 1, 2003 and ending April 30, 2004.

[4] The respondents were each charged with two offences:

Trade in real estate as a broker without being registered as a broker, as required by The Real Estate and Business Brokers Act, in connection with a real estate transaction for the lease or rental of a property known as 126 Angus Drive, Collingwood, Ontario, contrary to section 3(1)(a) of the Real Estate and Business Brokers Act R.S.O. 1980, Chapter 431 as amended and thereby knowingly committed an offence under section 50(1)(c) of the said Act.

[5] The main issue in the trial was whether the activities involving BMC and Karen Ciotti constituted "trading" by a "broker" in "real estate" in violation of s. 3(1)(a) of the *Act*. It was conceded that neither of the Respondents were registered as "brokers" pursuant to the *Act*. The Respondents' key submission at trial was that they fell within the exception of s. 5(1)(h) of the *Act* which provides as follows:

5. Registration shall not be required in respect of any trade in real estate by,
  - (1)(h) a person, on the person's own account, in respect of the person's real estate, where such trade did not result from,
    - (i) an offer of such person to act, in connection with such trade or any

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other trade, for or on behalf of the other party or one of the other parties to the trade, or

(ii) a request that such person act, in connection with such trade or any other trade, for or on behalf of the other party or one of the other parties to the trade

and the interest of such person in the real estate was acquired prior to such offer or request.

[6] In essence, the Respondents asserted that s. 5(1)(h) was an exception to the requirement of registration as a broker due to the fact that they held possessory rights or had obtained a leasehold interest in Ms. Ciotti's chalet prior to renting or "licencing" it out on the two occasions.

[7] During the course of the trial, the Respondents brought motions for disclosure, a stay based upon an abuse of process and a stay based upon unreasonable delay (pursuant to s. 11(b) of the *Charter*). The first motion met with limited success while the latter two motions were not successful.

[8] Interestingly, the learned Justice of the Peace started his Reasons for Judgment as follows:

The court is satisfied that the Crown has made out all elements of the offence. Satisfied there was a trade in real estate by the defendant, satisfied the defendant acted as a broker on the trade. Neither of the defendants were registered at the time of the trade. The trade in real estate was knowingly conducted by the defendants. The trade was not on the defendants' own account in respect of their own real estate, but the trade resulted from an offer by the defendants that they act for the parties – sorry that they act for the other parties or parties to the trade before the defendants acquired interest in the real estate.

He went on to add:

The court rejects the position that a lease is in place given the defendants interest in the property and thus allowing the exception to the Act to apply.

He further added:

I thought about a conviction with a suspended sentence, but I decided the main issue was fairness.

[9] The learned Justice of the Peace went on to comment that the Real Estate Commis-

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sion of Ontario was aware of the defendants'<sup>1</sup> business practices for years and did not take any action. The learned Justice of the Peace continued by commenting that the type of activity carried on by the defendants has become widespread and "grown into a large industry in Ontario". The learned Justice of the Peace discussed his own experiences with this industry.

[10] The learned Justice of the Peace concluded his Reasons as follows:

Justice must be fair. The principle that punishment should in general not be inflicted on those without fault applies. I believe this practice in Ontario is so widespread and so accepted, a clear message must be sent out from the Real Estate Commission of Ontario explaining their position and their plan to bring the operators into compliance with this *Act*. The charge Mr. Goldmintz, or the company or the Ontario Corporation under this Act without some kind of notice to the industry of which he is a part of would be unfair and a miscarriage of justice. For that reason, this matter is dismissed. There will be a finding of non guilt.

### ISSUES UNDER APPEAL

[11] The Appellant sets out the grounds of appeal as follows:

- i. The learned Justice of the Peace erred in law in failing to enter a finding of guilt in circumstances where he was expressly satisfied that the prosecutor had made out all the elements of the offences and where he rejected the defences advanced by the Respondents at trial.
- ii. The learned Justice of the Peace erred in law by finding the Respondents not guilty on the basis of a defence that is unknown to law.
- iii. The learned Justice of the Peace erred in law by taking judicial notice of the prevalence of the type of business practices engaged in by the Respondents.
- iv. The learned Justice of the Peace erred in law by conducting and relying upon his own independent research respecting the prevalence of the type of business practices engaged in by the Respondents.
- v. The learned Justice of the Peace erred in law by failing to provide the parties with an opportunity to make submissions concerning the independent research undertaken by the Justice.
- vi. The learned Justice of the Peace erred in law by failing to provide the parties with an opportunity to make submissions concerning the appropriate disposition of this case in light of his finding the offences had been proved.
- vii. The learned Justice of the Peace erred in law by holding that a finding of guilt would have been unfair and a miscarriage of justice in circumstances where he was otherwise satisfied that all the elements of the offence had been made out and had rejected the defences advanced at trial.

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<sup>1</sup> The defendants are the Respondents in this appeal.

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- viii. The learned Justice of the Peace erred in law by holding that the regulator, the Real Estate Council of Ontario, was required to provide notice of its intention to enforce the *Real Estate and Business Brokers Act* and that a finding of guilt in the absence of such notice would be unfair and a miscarriage of justice.
  - ix. The learned Justice of the Peace erred in law by holding that a finding of guilt would have been unfair and a miscarriage of justice in circumstances where there was no evidence of unfairness and where the learned Justice had previously dismissed the Respondents' motion for a stay based on essentially the same allegations of unfairness.
  - x. Having found that the prosecutor had proved all of the elements of the offences, including that the Respondent acted "knowingly", and having rejected the defences advanced by the Respondents, the learned Justice of the Peace erred in law by holding that the prosecutor had not proved any fault on the part of the Respondent.
  - xi. The learned Justice of the Peace erred in law by admitting and relying upon irrelevant and otherwise inadmissible evidence.

[12] The Respondents assert that the learned Justice of the Peace was correct in finding them not guilty. The Respondents also point out the very high test (*Vezeau* test) relating to an appeal from an acquittal. The Respondents request that the appeal be dismissed.

### DISCUSSION

[13] The learned Justice of the Peace stated in his Reasons for Judgment that all elements of the offences had been made out and specifically found that:

1. there was a trade in real estate by the Respondents;
2. the Respondents acted as a broker in the trade and did so knowingly;
3. the Respondents were not registered under the *Act* at the time of the trade;
4. the trade was not on the Respondents' own account in respect of their own real estate and that the trade resulted from an offer by the Respondents that they act for the other party or parties to the trade before the Respondents acquired an interest in the real estate;
5. the lease between Ms. Ciotti and the Respondents did not give use to an interest property that qualified as a s. 5(1)(h) exception.

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[14] The learned Justice of the Peace had sufficient bases in the evidence to make these findings. The Reasons for Judgment in this regard are brief but in the context of this case are sufficient. The issues were straightforward and the evidence at trial not extensive. Both the Appellant and Respondents provided the learned Justice of the Peace with extensive and clear written submissions. It was clear that the learned Justice of the Peace was aware of the issues in the case and resolved them based on the evidence.

[15] The learned Justice of the Peace was justified in his determination that the Respondents acted “knowingly”. The evidence of Harvey Goldmintz clearly indicated that he knew what he and the company were doing in their business. The fact that the Respondent believed that their scheme was legal does not detract from the fact that they acted knowingly. The mistake as to the law is not a defence. There was no air of reality to any type of officially induced erred defence.

[16] Unfortunately, after the learned Justice of the Peace made his findings, he fell into significant error. As part of his Reasons he appears to move on to deal with sentencing issues. He stated, “I thought about a conviction with a suspended sentence, but I decided the main issue was fairness”.

[17] The learned Justice of the Peace made reference to the Real Estate Commission of Ontario being aware of the Respondents’ practice but not taking any action and that this matter only came to court because of a change in policy that was not communicated to the industry. The learned Justice of the Peace found that this was unfair and that the entering of a conviction would constitute a miscarriage of justice. He, therefore, declined to enter the conviction.

[18] I agree with the submissions of the Appellant that the learned Justice of the Peace’s failure to enter convictions based on his findings was an error in law. He was not entitled to not enter convictions due to the Real Estate Commission’s failure to give notice of any change in policy or for failing to take action previously against the Respondents unless he determined that there was some form of abuse of process or a Charter remedy which gave

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rise to a stay. There had been an abuse of process application brought by the Respondents as part of this trial but was not successful. The learned Justice of the Peace should not have declined to enter convictions based upon the evidence before him. It is interesting to note that the evidence from the abuse of process application was not applied to the trial proper.

[19] I should add that the learned Justice of the Peace was in error to take judicial notice of how widespread practices like those used by the Respondents were in Ontario. The observations in this regard by the learned Justice of the Peace do not qualify as judicial notice. Even if they did, the learned Justice of the Peace should have given all parties an opportunity to make submissions as the applicability of those judicially noted facts.

[20] I find that the learned Justice of the Peace made significant errors of law which have affected the result in this matter.

[21] Having found that the learned Justice of the Peace made significant errors of law in this matter, I must now have regard to s. 121 of the *Provincial Offences Act*.

[22] Section 121 provides:

Where an appeal is from an acquittal, the court may by order,

- (a) dismiss the appeal; or
- (b) allow the appeal, set aside the finding and,
  - (i) order a new trial, or
  - (ii) enter a finding of guilt with respect to the offence of which, in its opinion, the person who has been accused of the offence should have been found guilty, and pass a sentence that is warranted by law.

[23] In analysing s. 121, I agree with the comments of Justice De Fillipis of the Ontario Court of Justice in *Her Majesty the Queen and Harvey R. Ambrose and Courtice Auto Wreckers Ltd.* [2003] O.J. No. 5218:

The *Provincial Offences Act* provides for appeals to a Provincial Judge from decisions of Justices of the Peace. Section 121 allows for appeals against acquittals and empowers the court to order a new trial or substitute a finding of guilt and proceed to sentence. The general rule is that the prosecutor can obtain appellate relief against a verdict of acquittal only where it is demonstrated that the verdict would not necessarily have been the same had the trial been properly conducted: *R. v. Verzeau* (1976) 28 C.C.C. (2d) 81 (SCC). A verdict will only be set aside as

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unreasonable when the reasons of the trial judge reveal that he or she was not alive to an applicable legal principle or entered a verdict inconsistent with the factual conclusions reached; *R. v. Binaiaris* (2000), 143 C.C.C. (3d) 1 (S.C.C.)

[24] In my view, the findings of not guilty made by the learned Justice of the Peace must be set aside and findings of guilt entered. It is clear that the learned Justice of the Peace entered a verdict inconsistent with the factual and legal conclusions he made.

[25] The issue of whether a new trial should be ordered or convictions entered has caused me some concern. However, after reflection, it is clear that the trial was properly conducted and the learned Justice of the Peace only fell into error in his Reasons for Judgment. It is clear that he found all of the essential elements of the offences had been made out. Convictions should be entered against the Respondents rather than sending this matter back for a new trial.

[26] It is my view that justice would be most fairly and efficiently served if the issue of sentencing was dealt with before me. This appeal has been extensively argued before me and the sentencing considerations are clear. However, I will give both the Appellant and the Respondents an opportunity to make sentencing submissions before me.

### Conclusion

[27] In the result, the appeals will be allowed and convictions on both counts will be entered against each of the Respondents. All matters will return before me in the Provincial Offences Appeal Court on Tuesday, October 5, 2010 at 9:30 a.m. at the Courthouse in Barrie for sentencing.

Released: September 14, 2010

  
Justice Glenn Krelove, O.C.J.