

THE REAL ESTATE COUNCIL OF ALBERTA

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

AND IN THE MATTER OF a Hearing concerning the conduct of Mark Wilson, real estate associate registered with Re/Max Advantage at all material times

Hearing Panel Members: Robert Telford, Chair
 Pat Cooper
 Doug Singleton

Appearing: Gregory Sim, counsel on behalf of the Executive Director
 Mark Wilson on his own behalf

Witnesses: B.P.
 K.L.

Hearing Date: July 13, 2010

DECISION OF A HEARING PANEL OF THE REAL ESTATE COUNCIL OF ALBERTA

I) INTRODUCTION

A hearing concerning the conduct of Mark Wilson, real estate associate registered with Re/Max Advantage at all material times, was held at the offices of the Real Estate Council of Alberta on July, 5, 2010. The Hearing Panel consisted of Robert Telford, Pat Cooper and Doug Singleton. Gregory Sim acted as counsel on behalf of the Executive Director and Mark Wilson acted on his own behalf.

II) ALLEGATIONS

Mr. Wilson was called to appear to hear the following allegations:

1. **THAT** in or around the dates of May 8, 2006 to August 30, 2006, contrary to section 4 of the *Code of Conduct* (as it then was, in force from October 1, 1999 to September 30, 2006) made pursuant to the *Real Estate Act*, R.S.A. 2000, c. R-5, you made representations and/or carried on conduct that was reckless or intentional and that misled or deceived any person or was likely to do so. This

conduct is conduct deserving of sanction, the particulars of which may include but are not limited to the following:

- a. On or about May 8, 2006, you began representing A.P. and his wife B.P. [the "P.'s"]. in the sale of their mobile home located at 5312 – 52A Street in Tofield, Alberta (hereinafter the "mobile home property").
 - b. The P.'s advised you that when they purchased their mobile home property, they were advised that it was a 1972 mobile home.
 - c. The P.'s showed you the bill of sale obtained by them when they purchased the mobile home. The bill of sale indicated the property was a 1972 mobile home.
 - d. The listing for the mobile home property was put on the Multiple Listing Service ® system (hereinafter "MLS®"). The MLS® listing showed the mobile home property as being a 1976 mobile home
 - e. After the property was listed on MLS®, the P.'s told you that the mobile home property was a 1972 property.
 - f. You continued to have the mobile home property listed on MLS® as being built in 1976.
 - g. On or about July 18, 2006, K.L. and her husband A.L. (hereinafter the "L.'s") submitted an Offer to Purchase for the mobile home property. You were representing the L.'s as well in this transaction.
 - h. The P.'s and the L.'s entered into a REPC for the mobile home property and this transaction closed.
 - i. You never advised the L.'s that the P.'s were of the belief that the mobile home was a 1972 mobile home and that the bill of sale obtained by the P.'s at their time of purchase showed the property as being built in 1972.
2. THAT in or around the dates of July 8, 2006 – July 18, 2006, you failed to render a competent service, contrary to section 6(c) of the *Code of Conduct* (as it then was, in force from October 1, 1999 to September 30, 2006) made pursuant to the *Real Estate Act*, R.S.A. 2000, c. R-5. This conduct is conduct deserving of sanction, the particulars of which may include but are not limited to the following:
- a. On or about July 8, 2006, you were representing A.B. (hereinafter "A.B.") in his attempt to purchase the P.'s' mobile home property (and as such were acting in a dual agency representation).
 - b. On or about July 8, 2006, you completed on A.B.'s behalf an Offer to Purchase (by way of a Residential Real Estate Purchase Contract) for the mobile home property. Under 1.1 of the Residential Real Estate Purchase Contract, the mobile home property being sold was described as:
The Property is the Land, Buildings, Attached Goods (unless excluded) and including Unattached Goods located at (municipal address): 5312 52 A Street.
 - c. The P.'s were selling their mobile home property only, which at the time of the sale was situated at the Tofield Manufactured Housing Community located at 5312 – 52 A Street, Tofield.

- d. The P.'s were leasing the land on which the mobile home property was situated from the Tofield Manufactured Housing Community.
- e. The P.'s had no legal authority to sell the land on which the mobile home property was situated.
- f. On or about July 18, 2006, you were representing the L.'s in their attempt to purchase (and their eventual purchase) of the P.'s' mobile home property.
- g. On or about July 18, 2006, you completed on the L.'s' behalf an Offer to Purchase (by way of a Residential Real Estate Purchase Contract) for the mobile home property. Under 1.1 of the Residential Real Estate Purchase Contract, the property being sold was described as:
The Property is the Land, Buildings, Attached Goods (unless excluded) and including Unattached Goods located at (municipal address): 5312 52 A Street.

III) EVIDENCE

Fourteen exhibits were entered including the Code of Conduct (as it was then), exhibit 1 and the Notice of Hearing, exhibit 2.

Counsel on behalf of the Executive Director called two witnesses. B.P. testified that she and her husband owned a trailer (mobile home) which they purchased in 2004. In 2006, after trying to sell the trailer on their own, they contacted Mark Wilson to help them. They knew Mr. Wilson through a business he owned. B.P. identified a Residential Listing Contract (exhibit 3) that she and her husband signed. After entering into the listing agreement, Mr. Wilson came and inspected the property and filled out the listing data sheet. During this inspection Mr. Wilson looked at the furnace in the trailer and the general layout and condition of the trailer and concluded that the trailer was built in 1976, rather than 1972 as indicated by the owners. After the P.'s saw the MLS listing (exhibit 4), they noticed that it stated the age of the trailer as being 1976. This did not correspond with the date that they believed the trailer to have been built which was 1972, a date that was on their original bill of sale. They contacted Mr. Wilson and requested that the date be changed to 1972. Mr. Wilson did not change the date on the MLS listing. The trailer was eventually bought by A.L. and K.L.. B.P. recalled Mr. Wilson generally summarizing the Residential Real Estate Purchase Contract for them but did not remember that he specifically mentioned that they were signing a contract to sell land as stated in section 1 subsection 1.1. B.P. identified the bill of sale (exhibit 8), which was prepared by the same lawyer who did the conveyancing when they bought the trailer. This bill of sale listed the trailer as being a 1972 model. B.P. also stated that she signed a dual agency consent form but did not remember any specific discussion regarding any defects. When presented with the Residential Real Estate Purchase Contract for the sale that did close, B.P. informed Mr. Wilson that the roof had started to leak. Upon cross examination by Mr. Wilson, B.P. stated that she did not have the original bill of sale with her. She also stated that she always understood that they were only selling the trailer and not the land, even though Mr. Wilson had not explained that

in detail when he reviewed the Residential Real Estate Purchase Contract with her and her husband.

K.L. was called as the second witness. K.L. testified that she and her husband were renting in Sherwood Park and wanted to buy a home. She looked on different websites and came across the listing for the mobile home in Tofield. She remembers the year of the trailer and the size but not much else that was on the listing. K.L. printed off the listing and kept it in a file. When K.L. called Mr. Wilson, she was informed that a deal was pending on the trailer and she asked to be called if the deal fell through. Several days later she received a telephone call from Mr. Wilson informing her that the deal did not go through. A.L. and K.L. went through the trailer and made an offer to purchase and signed a dual agent consent form with Mr. Wilson. K.L. understood this to mean that the realtor was working for both sides and would disclose all known defects. K.L. stated that she and her husband were not experienced at buying properties and she wished she had known more at the time. The information she relied upon regarding the trailer's age was on the listing sheet which stated it was a 1976 mobile home. It was not until they received the lease agreement from the mobile home park (exhibit 9), did they realize there was another date of 1972 regarding the age of the trailer. When they made the offer to purchase, Mr. Wilson filled in all the sections of the Residential Real Estate Purchase Contract and K.L. signed and initialed in the correct places. She does not remember that Mr. Wilson went through each section of the contract with them but thought it was more of a summary. She did not remember being told through section 1 subsection 1.1 that they were buying land, but did always believe it was just the trailer. After discovering the trailer date of 1972, K.L. tried unsuccessfully to contact Mr. Wilson. She then went to speak to Mr. Wilson's broker who told her he would look into the matter of the dates and get back to her, but was unavailable when she later went to see him. K.L. was told by the lawyer that if they backed out of the deal, the owners could sue them and based on this information they went ahead with the purchase. After moving into the trailer, they experienced many problems. It began to rain and the ceiling poured with water; the porch fell off; a lot of electrical work had to be done; all the floors were replaced; the pipes froze in the bathroom; the roof needed repair and many other repairs were necessary. K.L. and her husband borrowed the money to buy the trailer from her mother and although admitting they were naïve, do not believe they would have bought it had they known the trailer was built in 1972.

Under cross examination by Mr. Wilson, K.L. did not remember a discussion with him when he suggested putting in condition to have an inspection done. She did not remember a conversation where Mr. Wilson told them they should have a proper inspection done but where her husband said that it was not necessary as he was going to gut the trailer. The trailer is up for sale again with the date of the trailer listed as 1972 as she was informed by her realtor that that date had to be on the listing.

Mr. Wilson testified on his own behalf. He noted that the photocopy of the mobile home specification nameplate from the back of the door brought in by K.L. (exhibit 2), does not indicate a date when the trailer was built. Mr. Wilson placed the age of the trailer at

1976 based on a serial number on the furnace, the layout of the trailer and his own experience and knowledge as he had lived in three trailers himself and was familiar with different layouts. The original bill of sale had not been presented during the hearing. It was evident the trailer needed a lot of work; one didn't need to be an inspector to see it. A.L. and K.L. were cautioned to have an inspection done but did not want one. The Residential Real Estate Purchase Contract is a common one used for all sales. Mr. Wilson didn't cross out the word 'land' in section 1 subsection 1.1 but at no time during anyone's testimony was there ever an issue that they weren't talking about a mobile home.

On cross examination, Mr. Wilson stated that at the time he signed the listing contract he had not seen the inside of the trailer. He had also not seen the original bill of sale but the owners told him it was a 1972 trailer. Mr. Wilson listened to a recording of an interview where he stated the date was 1972 from the bill of sale. Mr. Wilson clarified that he had information from the bill of sale given to him by the P.'s but never had the actual bill of sale. He knew there was a possibility the date was 1972 but favoured his own determination by the serial number on the furnace and his experience with other trailers. Mr. Wilson admitted that he could have made enquiries at the trailer park as to the age but did not do so. After the trailer was listed as being built in 1976, Mr. Wilson does not remember the P.'s telling him the date was incorrect and requesting him to change it. He thinks he would have remembered something like that because it would have been an instruction for him to change it. He thought they agreed to leave it at 1976. When asked if he thought it would have been prudent to inform the L.'s that it might have been a 1972 trailer, Mr. Wilson responded by saying that it would not have been prudent as he was convinced it was a 1976 trailer and there was no information one way or the other to determine the age of the trailer.

When asked if he had disclosed to the seller that there was a water leakage issue with the property, Mr. Wilson stated that B.P. had indicated to him that they hoped to have it fixed and furthermore that it was evident throughout the trailer that there was water damage.

IV) SUBMISSIONS

Counsel on behalf of the executive director submitted that Mr. Wilson contravened s.4 of the Code of Conduct. The age of the trailer was in question. Mr. Wilson was acknowledged as a dual agent in both transactions and had a fiduciary obligation to disclose all known information. B.P. and her husband raised the issue of the age of the trailer on more than one occasion requesting that Mr. Wilson change it on the MLS listing so as not to mislead anyone. This was never done. Mr. Wilson had information that there was confusion as to the age of the trailer and did not disclose this to K.L., who may have had second thoughts about buying it if she had known it was older than originally listed. Mr. Wilson preferred his own assessment of the trailer to the hard evidence to determine it was a 1976 and proceeded on that basis. He relied on the serial number of the furnace and the layout of the trailer to determine that it was not a 1972 but a 1976. At the very least it was reckless to ignore the information provided by

his client and to proceed. This is not about the actual year of the mobile home but that fact that Mr. Wilson had information he did not disclose. Mr. Wilson has acknowledged that he probably should have disclosed that information.

Mr. Wilson contravened s.6(c) of the Code of Conduct by failing to ensure the contracts reflected the agreements in place. Both Residential Real Estate Purchase contracts state that the transactions involved land as described in section 1 subsection 1.1. Mr. Wilson failed to amend the contracts in any way to indicate that land was not included in the transactions. Both B.P. and K.L. testified that they recall Mr. Wilson summarizing the contracts but not going over each clause in detail. There is no dispute they were selling and buying a trailer but the contract says they were selling and buying land. Regardless of how common it was to use these forms for the purpose, commonality did not make it okay.

Mr. Wilson submitted that he did not act in a reckless manner with respect to s.4 of the Code of Conduct. At the time he believed that the trailer was a 1976 and could not counsel someone otherwise. If it was wrong it was not intentional. With respect to s.6 of the Code of Conduct, Mr. Wilson submitted that what he put in the contract was pertinent to the deal with the terms and conditions of the deal. Neither the lawyer on the transaction nor his office indicated that the contract was not binding or that there was something wrong with it.

(V) FINDINGS

Mr. Wilson could have done any number of things to prevent the age of the trailer from becoming an issue. He could have changed the date on the MLS listing as requested by the buyers or more simply added the words 'exact age unknown'. At the very least a conversation with the buyers would have been appropriate. Instead he insisted it was a certain date and marketed it as such. Mr. Wilson does not seem to realize that acting in a dual agency capacity means disclosing all pertinent information. The age of the trailer may or may not have impacted the L.'s decision to purchase it, but the fact that there was a discrepancy regarding the age most certainly should have been disclosed.

Because of this, the Panel finds that Mr. Wilson contravened s.4 of the Code of Conduct (as it was then), and that this is conduct deserving of sanction.

Mr. Wilson could also have prevented an issue with the contracts by explaining the clauses in the contract one by one to both the buyer and seller. By doing so, he may have noticed that he had not crossed out the word land. As an alternative, Mr. Wilson could have written in the space provided 'mobile home', or attached an amendment to the contract. The use of a Property Schedule could have resolved the age issue and clarified whether the land was leased or owned. Any of these actions would have reflected the agreement in place which was the sale and purchase of a mobile home and not the land. Mr. Wilson is responsible to ensure that the contracts in his transactions are filled in correctly and with care. Mr. Wilson stated he shouldn't be held accountable for this oversight as this was a legally binding document used at the time in

question and at no time was he informed by the lawyer, his brokerage or the Edmonton Real Estate Board that he was not using the contract correctly.

Mr. Wilson must understand that it is his sole responsibility to understand the correct use of the standard contracts and appropriate schedules that are intended to assist and clarify the purchase agreement when selling a particular type of property. It is not the responsibility of the Real Estate Council, The Edmonton Real Estate Board, the Alberta Real Estate Association nor the lawyers involved in the transaction to correct his oversights or lack of education when dealing with contracts. It is the responsibility of his Brokerage to ensure that he has the necessary skills and training to properly sell real estate, but not to correct an existing executed contract.

The Panel therefore finds Mr. Wilson contravened s.6(c) of the Code of Conduct (as it was then) and that it is conduct deserving of sanction.

Having found that Mr. Wilson has undertaken conduct deserving of sanction we invite the parties to supply written submissions on the issue of sanction and costs of the Hearing as follows:

- Counsel on behalf of the executive director will have 14 days from service of this decision to provide any written submissions he has regarding sanction and costs. Any such submission shall be delivered to both the Hearings Coordinator and to Mr. Wilson within the 14 day deadline. This may be done via electronic mail.
- Mr. Wilson shall provide any written submissions he may have regarding sanction and costs within 14 days of receiving the executive director's submission. Any such submission shall be delivered to both the Hearings Coordinator and to the Executive Director within the 14 day deadline. This may be done via electronic mail.

The Hearing Panel will then issue a written decision on sanction and costs after considering the written submissions. If no response is heard from either the executive director or Mr. Wilson within the allocated timeframes, we will make and issue a decision on sanction and costs without the benefit of any such submissions.

This decision was made on 23rd July, 2010

Robert Telford, Chair

Pat Cooper

Doug Singleton

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

AND IN THE MATTER OF a Hearing concerning the conduct of Mark Wilson, real estate associate registered with Re/Max Advantage at all material times

Amendment to Hearing Panel Decision on Conduct

The Panel would like to make a correction with regards to the Part 1 Decision on Conduct. In that decision, the hearing date was incorrectly stated as July 13, 2010 when it was in fact July 5, 2010.

DECISION OF A HEARING PANEL OF THE REAL ESTATE COUNCIL OF ALBERTA ON SANCTION

I) INTRODUCTION

The members of this Hearing Panel are Rob Telford (Chair), Pat Cooper and Doug Singleton. The Hearing into this matter took place on July 5, 2010. The Hearing Panel issued a written decision on their findings in respect to the Executive Director's allegations of conduct deserving of sanction in this matter on July 23, 2010. Following the issuance of that decision, the Panel requested submissions on sanction from counsel on behalf of the Executive Director of the Real Estate Council of Alberta, and Mr. Mr. Wilson.

II) SUBMISSIONS ON SANCTION

Counsel on behalf of the Executive Director submitted that appropriate sanction in this matter would be a fine of \$1,000; successful completion of the Ethical Practice in Real Estate course and payment of all or some portion of the hearing costs of \$7,977.10 as outlined in the Schedule of Hearing Costs which was presented to the Panel.

Mr. Wilson was in a dual agency relationship with each of his clients and thereby owed them a fiduciary duty. It was imperative that Mr. Wilson disclose all pertinent information to his clients, including that the age of the mobile home was in question. Mr. Wilson was also obliged to ensure his clients understood the contracts they were signing. Mr. Wilson's failure to ensure the contracts reflected the true nature of the transaction placed his clients at risk and breached his fiduciary duty. Mr. Wilson maintains that he did nothing wrong although he did acknowledge during the hearing that he probably should have made the disclosure about the age of the mobile home.

As a mitigating factor, the Panel could consider the fact that the misrepresentation as to the age of the mobile home was minor, being 1972 versus 1976 and the transaction took place in 2006. As well, none of the parties were actually misled into thinking they were buying or selling land. Counsel on behalf of the Executive Director noted that the public is reliant upon Industry Members to protect their interests in real estate transactions. It is therefore

important that the sanctions imposed upon Mr. Wilson send a message to the public that RECA takes seriously its job to protect the public.

Mr. Wilson submitted that with respect to the contravention of s.4 of the Code this complaint should have been treated as vexatious in nature as the age of the trailer not proven became a focal point of the complaint. The concerns which led to the investigation of s.6 of the Code were not the result of a complaint but rather the result of the investigation. He believes an advisory note would have been a more constructive and educational method of handling conduct that is not in accordance with the Act or Rules. A letter is sent to the broker and associate alerting them of the issue and providing an opportunity for the conduct to be rectified. Mr. Wilson submitted that his inability to make an appearance at his office to meet with the L.'s, for which he did not apologize, was the impetus for the complaint and not the age of the trailer. This lack of response was what sent their relationship into opposite corners. He and the L.'s were able to reconcile that fact at the hearing. The documents in this matter were filled out in 2006 and since then great strides have been made with respect to Mr. Wilson's own awareness with how he executes documents as well as how these matters is dealt with at the brokerage.

II) ORDERS AND REASONS

While the Panel agrees with the Executive Director that the breach of s.4 and s.6 of the Code of Conduct are serious matters, the Panel also believes that the sanction in this matter should be more educational than punitive. They took into consideration that the transaction occurred in 2006; the age discrepancy in the trailer was only 4 years and neither party was actually misled into thinking they were selling or buying land. Therefore, the Panel orders that Mr. Wilson pay a fine of \$500

Based on Mr. Wilson's testimony at the hearing and his submissions on sanction, the Panel believes that Mr. Wilson did not and does not understand the relationship an associate has with his clients, particularly in a dual agency situation. The important issue at hand is not the age of the trailer; rather it is his failure to advise the buyers that the age was in question. As one of the current mandatory courses deals with agency, the Panel believes that Mr. Wilson should now have this knowledge.

Although Mr. Wilson has indicated his practices with regards to completing contracts have improved since 2006, the Panel believes that further education is necessary here as well. Mr. Wilson is insistent in his belief that because errors in the contract were not pointed out to him by his brokerage, he did nothing wrong. Therefore the Panel orders that Mr. Wilson complete the course Ethical Practices in Real Estate as suggested by the Executive Director **and** the Contract Law portion of REAP (part 3 of Phase 2).

Mr. Wilson's inability to admit any wrongdoing precipitated a contested hearing where witnesses were called who had to travel to Calgary to attend and a panel found conduct deserving for both allegations. The Panel therefore orders costs in the amount of \$5,000.

The Hearing Panel thereby orders that Mark Wilson:

- a) pay a fine of \$500
- b) take the following courses within 6 months of this decision
 - i) Ethical Practices in Real Estate
 - ii) Contract Law - Phase 2, part 3 of REAP

Should either of these courses not be available within the time frame, different courses shall be substituted at the sole discretion of the Executive Director or the Executive Director can extend the deadline for completion of the courses. It is Mr. Wilson's responsibility to advise the Executive Director if these courses are not available.

- c) pay hearing costs in the amount of \$5,000

This Decision was made on the 23rd day of August 2010

Robert Telford, Chair

Pat Cooper

Doug Singleton