

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 48 OF
THE *REAL ESTATE ACT* OF ALBERTA

BETWEEN:

HARPAL MANGAT

Appellant

- and –

REAL ESTATE COUNCIL OF ALBERTA

Respondent

APPEAL PANEL: Mark D. Tims, Q.C.

Kevin Clark

Connie Leclair

Ralph Salomons

DECISION

1. **INTRODUCTION**

Following a two day contested hearing, a Hearing Panel of the Real Estate Council of Alberta (“RECA”) found that the Appellant had engaged in conduct that was deserving of sanction by:

- i. Advertising or marketing a property without the seller’s knowledge and consent, contrary to section 4(b) of the *Code of Conduct* (as it then was);
- ii. Being a party to an agreement or conspiracy to conceal latent defects or pertinent facts in relation to any property or mortgage, contrary to section 4(c) of the *Code of Conduct* (as it then was); and
- iii. Failing to cooperate with a RECA investigator in the course of a RECA investigation, contrary to section 38(4) of the *Real Estate Act*.

The Hearing Panel heard submissions on the issues of sanction and costs, and following deliberations on quantum in the context of the relevant case authorities ordered that the Appellant:

- a) pay total fines in the amount of \$8,500.00;
- b) pay costs in the amount of \$15,585.00;
- c) have his licence to sell real estate suspended for a period of two (2) months; and
- d) complete Phase 2 Section 4 of a real estate educational program within six (6) months.

The order of the suspension was stayed pending the hearing of the within appeal.

This appeal came on before this Panel (the "Panel") by way of written submissions prepared by the parties respective counsel. The prerequisites for this Panel to assume jurisdiction over the matter were agreed to by both counsel.

Both counsel agreed that oral submissions were unnecessary, and the Panel therefore agreed to proceed to conclude the matter on this basis.

II. BACKGROUND FACTS

For the most part the background facts are not in issue.

At all material times, the Appellant was an industry member registered with RECA engaged in the business of listing and selling real estate in Calgary and surrounding areas in the Province of Alberta. He was subject to the regulatory regime and processes mandated by the *Real Estate Act* (the "Act" and the "Code of Conduct").

In 2006, while registered with Ashmond Realty Ltd., the Appellant listed a home for sale that was located in the Northeast part of Calgary. The property contained a basement suite that was described as a mother-in-law suite on the listing. The allegation against the Appellant was that he did not reveal that the suite was illegal, and that the suite was the subject of a removal order by the City of Calgary. Subsequent to receiving a complaint in that regard, a RECA investigation determined that the signatures of both registered owners were not present on the said agreement.

During the course of the investigation, the Appellant was requested to produce various documents and records pertaining to the investigation. The Appellant eventually provided the required information, but it required five letters and three interviews over a five month period to satisfactorily address the matter.

III. GROUNDS OF APPEAL

The Appellant restricted or limited his grounds of appeal before the Panel to two issues. He claimed that the Hearing Tribunal's decision respecting the quantum of financial sanctions was unreasonable, and that the Hearing Tribunal erred in the quantum of the award of costs.

All of the original grounds of appeal prepared by the Appellant were abandoned by the Appellant's Counsel approximately two weeks prior to the date set for the Appeal Hearing.

IV. STANDARD OF REVIEW

In the leading case of *Dunsmuir v New Brunswick*, 2008 SCC 9 ("*Dunsmuir*"), the Supreme Court of Canada set out a two step process for determining the applicable standard of review for administrative decisions. The first step is to ascertain whether the existing jurisprudence has determined the level of deference applicable to the type of questions in issue. If not, the next step involves having the appeal panel engage in a "Standard of review analysis" that is contextual, and includes a consideration of a number of relevant factors.

It is common ground between the parties that the appropriate standard of review applicable to issues relating to the imposition of sanctions and costs under the Act is reasonableness. Previous decisions of the Alberta Court of Appeal (*McLeod v Alberta Securities Commission* 2006 ABCA 231, *Maitland Capital Ltd. v Alberta Securities Commission* 2009 ABCA 186) have determined the matter in accordance with the first step of the *Dunsmuir* analysis.

The standard of reasonableness is described in *Dunsmuir* at para 47:

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

The Supreme Court of Canada in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), 2009 SCC 12, [2009] 1 S.C.R. 339, reiterated the reasonableness

standard as follows:

[59] Reasonableness is a single standard that takes its colour from the context ... Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within “a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a review court to substitute its own view of a preferable outcome.

The *Dunsmuir* analysis has been universally and consistently applied since 2008 to appeals of this nature, and was most recently applied by the Supreme Court of Canada in *Canada (Canadian Human Rights Commission) v Canada (Attorney General)* 2011 SCC 53.

The concept of deference which permeates the reasonableness standard of review implies “respect for the decision-making process of adjudicative bodies with regard to both the facts and the law” and to “the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system” (*Dunsmuir* at paras. 48-49).

The Alberta Court of Appeal has provided appeal panels with guidance in applying the standard of review of reasonableness to issues relating to the appropriateness of sanctions. In the case of *Litchfield v. College of Physicians and Surgeons of Alberta*, 2008 ABCA 164 the Court held that it:

“Should not lightly interfere with penalty decisions made by Council. It has been said that the Court should only interfere where the disciplining body has erred in some principle of law, has misapprehended the evidence or has failed to give weight to significant factors, or has imposed a penalty totally disproportionate to the offence committed. ***MacDonald v. College of Physicians & Surgeons (New Brunswick)*** (1992), 91 D.L.R. 4th 190 at para. 16.)

In the *Litchfield* case, the named physician was handed the most severe penalty available in that he was struck from the register of the College and Physicians & Surgeons of Alberta. The consequences to the physician were extremely grave and effectively constituted a “professional death penalty” (*Henderson v. College of Physicians & Surgeons of Ontario*, (2003) O.J. 2213), but the Court of Appeal declined to interfere with the decision holding that the sanction was not totally disproportionate to the offence.

The jurisprudence, therefore, would seem to dictate that this Appeal Panel adopt a significant degree of deference to the disciplinary decisions of the Hearing Panel

concerning the imposition of sanctions on real estate industry members found guilty of sanctionable conduct.

V. THE DECISION OF THE HEARING PANEL

Subsequent to making the finding of sanctionable conduct against the Appellant, the Hearing Panel convened to hear submissions and argument, by Counsel for RECA and the Appellant in person, on the issues related to the imposition of an appropriate sanction. The Hearing Panel considered the material placed before it, and in particular, considered those submissions in light of the factors set out in the leading case authority on sanctions: *Jaswal v. Newfoundland Medical Board* (1996) 42 Admin.L.R. (2d) 233 (“*Jaswal*”). Detailed reasons were provided for the particular sanctions that were imposed upon the Appellant. The Hearing Panel felt that these sanctions satisfied the over reaching goal of public protection.

Following a careful review of the evidence, together with the application of that evidence to the case authorities presented, the Hearing Panel made the orders set out in the Introduction section of this decision.

VI. DISCUSSION AND ANALYSIS

The Appellant focused his appeal on the allegation of non-cooperation contrary to section 38(4) of the Act, and submits that the decision of the Hearing Panel was unreasonable in that the sanction for that particular allegation does not fall within “a range of possible acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir*, at paragraph 47).

In its decision, the Hearing Panel placed considerable reliance on previous decisions in this jurisdiction involving the issue of non-cooperation. In particular the Hearing Panel was referred to the comments of Macklin, J in the matter of *James v Real Estate Council of Alberta*, 2004 ABQB 860, who made the following comments in respect to the necessity for members to cooperate with the regulatory authority at para. 37:

Crucial to its ability to regulate is its ability to rely on the co-operation of its members in any investigation of behavior alleged to be contrary to the rules and code. That co-operation must be provided in all cases, regardless of the view the investigated member has of the merits of the complaint. Needless to say, if his or her view of the merits is right, the complaint will be dismissed, but that is not for the member to decide, nor is it to constitute a reason for the member not to co-operate.

The Appellant submits that the *James* case is distinguishable in the sense that the conduct of Mr. James was threatening and intimidating toward the investigator, and was

obstreperous to say the least. He suggests that the delay in providing the requested information was out of the Appellant's control, and that he was cooperative throughout the investigation.

On this issue, the Appellant submits that although he was tardy in providing the requested information, there was eventual compliance.

There were no other submissions made by the Appellant relative to the remaining two allegations with respect to the issue of sanction.

With respect to the issue of costs, the Appellant submits that the costs imposed were excessive in the circumstances and failed to take into account the "degree to which his financial position was already affected by other aspects of the sanction imposed." The Panel was again directed to the "*Jaswal* factors", and to the decision of Justice Rawlins of the Alberta Court of Queen's Bench in the *Goll* decision (*Murti Goll v Real Estate Council of Alberta*, April 5, 2006, unreported, Alberta Queen's Bench).

Counsel submitted that the Hearing Panel did not take into account the Appellant's financial circumstances and financial hardship that would be created by the award of costs. It is to be noted that much of the information relating to the Appellant's financial situation was not squarely placed before the Hearing Panel, and that when the totality of the matter is considered, the Appellant submits that the costs award is simply unreasonable.

Counsel for the Executive Director suggests that the Hearing Panel carefully reviewed the evidence of the investigator and the Appellant, and concluded that the acts of the Appellant were inconsistent with the obligations for cooperation referred to by Justice Macklin, and in its reasons specifically referred to the "five letters, three interviews, and a time period of five months before the information was received". The Hearing Panel considered the above circumstances with the mitigating circumstances presented by the Appellant and imposed a fine of \$3,000.00 and a period of suspension of two (2) months in relation to this allegation.

In its decision, the Hearing Panel addressed the issue of non-cooperation by sending a message to both the Appellant and to industry members that very serious consequences will flow when members fail to comply with their obligations to cooperate with the regulator.

Counsel for the Executive Director submits that the decision of the Hearing Panel on the non-cooperation issue was reasonable, and in accord with the principles in *Dunsmuir* that are hereinbefore set out.

With respect to the remaining allegations, Counsel submits that the Hearing Panel carefully reviewed the mitigating and aggravating factors and imposed sanctions which were reasonable in the circumstances.

Dealing with the issue of costs, Counsel for the Executive Director submits that the costs decision also meets the test of reasonableness. Counsel points out that the Appellant elected to proceed with a full hearing despite the fact that he admitted orally and in writing to much of the alleged unacceptable conduct. Counsel submits that to proceed in that manner with the full knowledge that there would be a request for costs generates certain consequences for an unsuccessful litigant. It is suggested that the costs of this decision should be the responsibility of the Appellant, and not of the membership as a whole.

Finally, Counsel for the Executive Director suggests that the Hearing Panel made a detailed review of the specific costs related to each stage of the proceedings, and reduced the requested amount of costs in specific areas for particular reasons.

VII. FINDINGS AND CONCLUSION

The Appeal Panel carefully reviewed the evidence, written submissions, and the relevant case law provided to it by the parties.

On the issue of sanctions, the Panel considered the fines that were awarded in respect to the three allegations of sanctionable conduct, and found that the fine associated with each respective allegation was reasonable, as that term is defined in *Dunsmuir*. The explanation and reasons provided by the Hearing Panel are compelling and meets the test of “justification, transparency and intelligibility”, and the Hearing Panel’s decision on the fine component “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir* at para. 47).

The Panel is sensitive to the concerns expressed by the Hearing Panel about sending the message to the membership about the necessity for members to provide complete and timely cooperation to investigators employed by RECA who conduct investigations on its behalf. However, having regard to the nature of the primary allegation ie the non-disclosure of the illegal mother-in-law suite, the substantial amount of resources that were expended to pursue the matter, and the particular circumstances related to the Appellant’s non-cooperation, the Panel is of the view that the imposition of the suspension is unreasonable and “totally disproportionate to the offence committed” (*MacDonald*, supra.). In particular, the Panel believes that a suspension is not justified in these circumstances having regard to the totality of the monetary sanctions that have been imposed. Further, the Panel believes that the facts in the within matter are markedly different than the facts and findings in *James*, supra.

For these reasons, the order of the suspension is hereby deleted from the Order of the Hearing Panel.

With respect to the issue of costs, the Panel considered the schedule of costs presented by the Executive Director, and makes the following observations:

1. The panel is mindful of the general principles regarding the imposition of costs articulated by Dea, J in the decision of *Hoff v Pharmaceutical Assn. (Alberta)* 18 Alta L.R. (3d) 387 when he dealt with the costs issue as it was applied to a disciplinary matter involving a pharmacist as follows:

“As a member of the pharmacy profession the Appellant enjoys many privileges. One of them is being part of a self-governing profession. Proceedings like this must be conducted by the respondent association as part of its public mandate to assure to the public competent and ethical pharmacists. Its costs in so doing may properly be borne by the Member whose conduct is at issue and has been found wanting”.
2. The Panel believes that costs must be awarded against parties who unduly prolong and complicate rather straight forward proceedings in a losing cause;
3. The costs awarded in this case by the Hearing Panel are substantial by any yardstick. However, a significant portion of the costs were directly attributable to the actions, and (in respect to the allegation of non cooperation) the inaction by the Appellant to provide the necessary information when requested, and to deal with overwhelming evidence by way of admissions or by an agreed Statement of Facts;
4. It should have been obvious to the Appellant that there was a direct relationship between the time and resources expended by the Executive Director and the eventual outcome relative to costs; and
5. There is clearly a limit to the amount of expense that can be borne by the membership to fulfill RECA’s regulatory mandate, and that the member whose conduct “has been found wanting” must bear his or her share of the costs of proving elements allegations that are either subsequently admitted by the member or are patently obvious.

The Hearing Panel considered the proposed costs and reduced the same for specific and clearly articulated reasons. This Panel owes some deference to those findings, and concludes that the specified award of costs is not unreasonable in all the circumstances. The Panel holds that the test set out in *Dunsmuir* has been met, and the costs award is hereby confirmed.

In summary, this Panel confirms the Order of the Hearing Panel, with the express exception of the two month suspension that was previously imposed. The requirement of the suspension is hereby deleted from the Order.

VIII. COSTS

The Panel was advised that in due course the parties would bring back to the Panel a proposal for the awarding of costs for this appeal based on the relative success thereof, and this agreement is acceptable to the Panel. The Panel expressly preserves its jurisdiction in this regard.

DATED at the City of Calgary, in the Province of Alberta, this 3rd day of November, 2011.

APPEAL PANEL OF THE REAL ESTATE
COUNCIL OF ALBERTA

MARK D. TIMS, Q.C.

KEVIN CLARK

CONNIE LECLAIR

RALPH SALOMONS