

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF Section 41 of the *REAL ESTATE ACT*, R.S.A. 2000, c.R-5 (the
"Act")

AND IN THE MATTER OF a Hearing regarding the conduct of
RICHARD JAMES HORB, Real Estate Associate registered at all material times hereto
to Re/Max Real Estate (Edmonton) Ltd. o/a Re/Max Real Estate

Hearing Panel Members: William Kirk (Chair)
Helen Ang
David Hicks

Appearances: Andrew Bone, for Executive Director of the Real Estate
Council of Alberta
Richard Horb, unrepresented

Hearing Date: November 20, 2018

DECISION OF HEARING PANEL

I. BACKGROUND:

On August 28, 2018, following an investigation by the Real Estate Council of Alberta ("RECA"), Richard Horb entered into an agreement with the Executive Director of RECA (the "Executive Director") detailing an Admission of Conduct Deserving of Sanction.

Also on August 28, 2018, Mr. Horb and the Executive Director agreed to a Joint Submission on Sanction arising out of the above noted Admission of Conduct.

On September 24, 2018 the Executive Director issued a Notice of Hearing alleging that Richard Horb breached sections 42(a), 41(a) and 43(2)(c) of the *Real Estate Act Rules* (the "Rules")

This Hearing proceeded pursuant to section 46 of the *Real Estate Act*, and took place by telephone conference on November 20, 2018. Representations were made by counsel for the Executive Director and by Mr. Horb.

We have reviewed and considered the material referred to above, as well as the submissions made during the Hearing, and our decision is set out below.

II. FINDINGS:

Conduct Deserving of Sanction:

The Notice of Hearing alleges breaches of sections 42(a), 41(a) and 43(2)(c) of the Rules. Those sections state as follows:

41 Industry members must:

(a) act honestly;

42 Industry Members must not:

(a) make representations or carry on conduct that is reckless or intentional and that misleads or deceives any person or is likely to do so;

43(2) Every written service agreement shall:

....

(c) provide that any amendment or addition to the terms of the agreement shall be in writing and signed by the relevant parties.

Rather than repeat here the details of the conduct deserving of sanction and the parties' submissions on sanction, we have instead attached as schedule "A" and "B" respectively to this Decision, the signed Admission of Conduct (marked as Exhibit 2 in the Hearing), and the Joint Submission on Sanction (excluding attachments).

We accept the Admission of Conduct (Schedule A) as agreed by the parties.

Therefore, pursuant to s. 47 of the *Real Estate Act*, the conduct outlined in Schedule A is deemed to be this Panel's findings on Conduct Deserving of Sanction.

Sanction:

With respect to the appropriate sanction in this case, we have reviewed the Joint Submission (Schedule B).

In *Jaswal v Newfoundland (Medical Board) 1996 NLSCTD*, the court outlined factors that may be relevant to consider when assessing sanction in a professional discipline context. In our view, the parties have properly identified and given appropriate weight to the relevant factors, including the aggravating and mitigating factors. Since

these are outlined in detail in Schedule B, we will not review them in detail. However, we note two matters in particular.

First, Mr. Horb's disciplinary history includes a 2003 Consent Agreement involving a matter that is strikingly similar to the matter we are dealing with here. In both matters Mr. Horb told his clients that he would reduce commissions to zero, but in both cases he could not do that because he had taken a loan against, or otherwise dealt with, the commissions in a manner that prevented him from following through on his zero-commission commitment to his clients.

The fact that Mr. Horb has already been disciplined for essentially the same conduct we are dealing with here is a serious aggravating factor when it comes to sanction.

Second, Mr. Horb has already been assessed and paid a fine in the amount of \$2,500 to the Realtors Association of Edmonton. This fine is for the same conduct we are dealing with in this Hearing. As outlined in the attached Schedules, this fine has been considered by the parties in arriving at the penalty that has been proposed. This Panel has similarly considered this fine in assessing the appropriate sanction in this case.

In the end, having consideration for all of the circumstances, and for the representations and agreements of the parties, we accept and agree with the proposed sanction summarized in paragraph 9 of the Joint Submission (Schedule B).

III. DECISION ON SANCTION & COSTS

Based on the foregoing, we hereby order and direct as follows:

- Mr. Horb shall pay a fine of \$10,000, broken down as follows:
 - \$7,000 in respect of the breach of Rule 42(a);
 - \$2,000 in respect of the breach of Rule 41(a);
 - \$1,000 in respect of the breach of Rule 43(2)(a)
- Mr. Horb's authorization to trade in real estate shall be suspended for a period of one month, starting forthwith, or as otherwise directed by the Executive Director;
- Mr. Horb shall, within six months, complete the educational course: Unit 12 of the Real Estate Associates Program, at his own cost;
- Mr. Horb shall pay costs of this matter in the amount of \$1,000.

Dated at the City of Calgary in the Province of Alberta, this 23rd day of November, 2018.

Hearing Panel of the
Real Estate Council of Alberta

William Kirk, Hearing Panel Chair

THE REAL ESTATE COUNCIL OF ALBERTA

Case: 005290
Process: A Hearing under Part 3 of the *Real Estate Act*
Industry Member: Richard James Horb
Class of License: Real Estate Associate
Registration: Re/Max Real Estate (Edmonton) Ltd. O/A Re/Max
Real Estate
Document: JOINT SUBMISSION ON SANCTION

Introduction

1. The Industry Member has agreed to an Admission of Conduct Deserving of Sanction under section 46 of the *Real Estate Act*.
2. The Admission is accepted by the Executive Director and has been entered as an exhibit in the hearing.
3. Under s.47 of the Real Estate Act the Admission is deemed to be a finding of this Panel and concludes Phase 1 of the hearing.
4. Phase 2 of the hearing concerns sanction.
5. The Executive Director and Industry Member propose the following sanction:
6. Based on all of the below criteria, the parties agree that a suspension of 1 month and a fine of \$7000 for the breach of section 42(a) of the Rules is appropriate in the circumstances.
7. For the breach of rule 41(a) of the Rules we agree that a fine of \$2,000 is appropriate.
8. For the breach of rule 43(2)(c) of the Rules we agree that a fine of \$1,000 is appropriate.

9. The Executive Director and Industry Member submit that the following sanction is warranted taking into account the relevant factors:

Breach	Fine
Rule 41(a)	\$2000
Rule 43(2)(c)	\$1000
Rule 42(a)	\$7,000 & 1 months suspension

Education: Complete Unit 12 of the Real Estate Associates Program

Costs: \$1000

Panel Authority on Sanction

10. The Hearing Panel's authority to impose sanction on an industry member whose conduct has been found deserving of sanction is described at section 43 of the *Real Estate Act*:

Decision of Hearing Panel

- 43(1) If a Hearing Panel finds that the conduct of an industry member was conduct deserving of sanction, the Hearing Panel may make any one or more of the following orders:*
- (a) an order cancelling or suspending any authorization issued to the industry member by the Council;*
 - (b) an order reprimanding the industry member;*
 - (c) an order imposing any conditions or restrictions on the industry member and on that industry member's carrying on of the business of an industry member that the Hearing Panel, in its discretion, determines appropriate;*
 - (d) an order requiring the industry member to pay to the Council a fine, not exceeding \$25,000, for each finding of conduct deserving of sanction;*
 - (d.1) an order prohibiting the industry member from applying for a new authorization for a specified period of time or until one or more*

- conditions are fulfilled by the industry member;*
- (e) *any other order agreed to by the parties.*

Factors on Sanction

11. A RECA Panel must consider whether a number of factors are relevant when assessing sanction. *Jaswal v Newfoundland (Medical Board)*[TAB 1], lists a number of factors that may be relevant:
- the **nature and gravity** of the proven allegations
 - the **age and experience** of the industry member
 - the **previous character** of the offender and, in particular, the presence or absence of prior complaints or convictions
 - the **number of times the offence was proven** to have occurred;
 - the **role of the industry** member in acknowledging what occurred
 - whether the industry member had already suffered serious financial or **other penalties** as a result of the allegations having been made
 - **impact of the incident on the victim**, if any
 - **mitigating** circumstances
 - **aggravating** circumstances
 - the need to promote **specific and general deterrence** and thereby protect the public and ensure the safe and proper conduct of the profession
 - the **need to maintain the public's confidence** in the integrity of the profession
 - the **degree** to which the offensive conduct that was found to have occurred was clearly regarded, by consensus, as being the type of conduct that would fall outside the range of permitted conduct and
 - the **range of sentence in other similar cases**.
12. General deterrence refers to the effect a sanction issued in one case will have dissuading others to become involved in the same conduct. Specific deterrence refers to the effect a sanction has to correct the conduct of the person who is sanctioned.
13. Specific deterrence can also be achieved by punishment and by corrective or education conditions.
14. The Hearing Panel must consider each relevant factor, give weight to the factor in terms of how it should influence the sanction, consider the mandate of RECA under the *Real Estate Act* and then make an order which complies with section 43.

Analysis of the *Jaswal* Factors

15. Age and Experience of the Industry Member

- Mr. Horb is currently 70 years and has been authorized to trade in real estate since 1991.

16. The Previous Character of the Member

- Mr. Horb has a disciplinary history.
- 2003 Consent agreement [**Tab 2**]
Mr. Horb signed a consent agreement relating to 3 real estate transactions he was involved in. The agreed breaches included:

Making representations or carrying on conduct that is reckless or intentional and that mislead or deceived persons or is likely to do so; and

Failure to provide competent service.

Both of the above Breaches are breaches in the current matter.

The breaches surrounding the condominium townhouse in Edmonton are particularly concerning as the conduct is very similar to the current matter. There was an amendment to make Mr. Horb's commissions on the sale of the condo \$0. He did not submit the amendment in a timely manner and did not have brokerage approval for the amendment. Further by the time the amendment was submitted the commissions had already been assigned to a factoring company so could not be paid back to the clients.

The consent agreement stipulated a fine of \$7000, costs of \$1000 and education.

- 2012 Administrative Penalty [**Tab 3**]
Mr. Horb failed to fulfill his fiduciary obligation to a client by failing to inform the client that a proper deposit had not been collected in relation to a purchase and sale agreement. He was fined \$2500.
- 2017 Administrative Penalty [**Tab 4**]
Mr. Horb traded in real estate on several occasions without a license as he had failed to renew his license in September 2016. He was fined \$3000.

17. The Number of Times the Offence was Proven to have Occurred.

- There was one incident that breached section of 42(a), 43(2)c and 41(a) of the Rules.

18. The Nature and Gravity of the Proven Allegations

- Mr. Horb's behavior negatively effects professionalism and trust with clients which is at the core of the real estate industry. His conduct is serious in both nature and gravity as it goes to industry credibility and trust.

19. The Need to Maintain Public Confidence in the Industry

- Real estate associates must practice in strict compliance with the Act and the Real Estate Act Rules (the "Rules") in order to maintain the integrity of the industry. Public confidence in the industry is compromised when an associate refuses to follow the Act or the Rules.
- In *Adams* [TAB 5] the Alberta Court of Appeal noted on page three that public confidence in a profession should be of utmost importance to disciplinary bodies:

A professional misconduct hearing involves not only the individual and all the factors that relate to that individual, both favorably and unfavorably, but also the effect of the individual's misconduct on both the individual client and generally on the profession in question. This public dimension is of critical significance to the mandate of professional disciplinary bodies.

- In *Lambert* [Tab 6] at paragraph 17 a hearing panel for the Law Society of Upper Canada added that a profession's most valuable asset is its collective reputation and this must be considered in determining an appropriate sanction. In *Lambert* the hearing panel writes:

*When determining the appropriate penalty for this misconduct, the panel is guided by the reasons or purposes for a penalty order in discipline matters set out in *Law Society of Upper Canada v. Strug* and in *Bolton*, supra, in which Sir Thomas Bingham M.R. stated at p. 519, "A profession's most valuable asset is its collective reputation and the confidence which that inspires".*

- Mr. Horb's conduct undermines the trust the public puts in real estate professionals when they make agreements with their clients that they do not follow.
- A fine and a suspension are required in this matter to maintain and protect public confidence in the Alberta real estate industry.

20. The Role of the Member in Acknowledging What Occurred

- Mr. Horb has taken responsibility and shown remorse for his actions. He has signed a section 46 agreement on the facts of this matter.

21. The Impact of the Incident on the Complainant

- The complainant was out of pocket over \$8000 for 2 years and was forced to take Mr. Horb to court to be compensated.

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22. Specific and General Deterrence

- Given Mr. Horb has conduct in the past similar to the current matter and, taking into account Mr. Horb's overall disciplinary history, specific deterrence is a factor in this matter.
- There is a need for general deterrence. Industry members must recognize that harm to public confidence of the Alberta real estate industry comes with sanctions.

23. Mitigating Circumstances

- Mr. Horb has already paid a fine of \$2500 to the REALTORS Association of Edmonton for the conduct in this matter.

24. Previous Sanctions in Similar Circumstances

- Rule 42(a) Sanction

Brandon Antonini, RECA 2011 [TAB 7]

This was a Hearing Panel Decision from a hearing that took place in April 2011. Mr. Antonini was found to have breached Rule 42(a) by providing misleading information to the lender and intentionally not disclosing that the mortgagor intended to use the proceeds of the mortgage to tear down a property and build a new one. A fine of \$10,000 was issued.

Scott Lambert, RECA 2016 [TAB 8]

This was a Consent Agreement ratified by a Hearing Panel in March 2016. Mr. Lambert was found to have breached Rule 42(a) by making

representations that he failed to verify or were not accurate. A fine of \$3,000 was issued for that breach.

While Mr. Horb and Mr. Lambert both made misleading representations Mr. Horb's conduct was more serious as his representation to his clients to take no commissions on the sale of their property was breached directly by Mr. Horb when he took a loan against those commissions. His motivation for this conduct was self-interest and it came at the expense of his client's interests. Mr. Horb's conduct is less serious than Mr. Antonini as pursuant to various emails and his meeting with Mr. Pariseau we know it was his intention to make his client's financially whole. Mr. Antonini's conduct was meant to be permanently deceptive.

Given Mr. Horb's similar conduct in the past a strong sanction is required on this breach. It is submitted that an appropriate sanction for the breach of Rule 42(a) is a 1 month suspension and a \$7,000 fine.

In determining whether a suspension is warranted we look at the *Martin* factors at [Tab 9 see para 41] in addition to the *Jaswal* factors. The *Martin* factors have been used by professional societies to determine if a suspension is warranted. The factors are as follows:

- (a) *whether or not the misconduct included elements of dishonesty;*
- (b) *whether or not the misconduct involved repetitive acts of deceit or negligence; and*
- (c) *whether or not the misconduct involved significant personal or professional conduct issues.*

When we consider the full circumstances of this matter the test in this case is met (See paragraph 1 of the section 46 agreement in this matter).

- Rule 41(a) Sanction

Kevin Russell, RECA 2011 [TAB 10]

This was a Consent Agreement ratified by a Hearing Panel in August 2011. Mr. Russell was found to have breached Rule 41 (a) by claiming that he had seen a deposit cheque when in fact he had not seen it. A fine of \$2,000 was issued for that breach.

Mr. Horb and Mr. Russell both made false statements. Mr. Horb's conduct is similar to Mr. Russell's conduct. It is submitted that an appropriate sanction for the breaches of Rule 41(a) is a fine of \$2,000.

- Rule 43(2)(c) Sanction

Warren Phipps, RECA 2017 [TAB 11]

This was an Administrative Penalty issued in July of 2017. Mr. Phipps was found to have breached Rule 43(2)(c) for failing to ensure changes to the terms of a management agreement were in writing and signed by all the parties.. A fine of \$1,000 was issued for that breach.

Ms. Phipps breach is very similar to Mr. Horb's breach. In both cases no amended was drafted or signed by the parties. It is submitted that an appropriate sanction for the breaches of Rule 43(2)(c) is a fine of \$1,000.

The Agreement between the Executive Director and Industry Member

25. An additional factor is that the parties have reached an agreement on conduct and on sanction taking into account the relevant factors.

26. The Supreme Court of Canada addressed the "public interest" test that should be used when considering whether to depart from an agreed outcome in the case *R v. Anthony-Cook (2016)* [TAB 12]:

32 Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. But, what does this threshold mean? Two decisions from the Newfoundland and Labrador Court of Appeal are helpful in this regard.

33 In Druken, at para. 29, the court held that a joint submission will bring the administration of justice into disrepute or be contrary to the public interest if, despite the public interest considerations that support imposing it, it is so "markedly out of line with the expectations of reasonable persons aware of the

circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system". And, as stated by the same court in R. v. O. (B.J.), 2010 NLCA 19 (N.L. C.A.) (CanLII), at para. 56, when assessing a joint submission, trial judges should "avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts".

27. The Court in *Anthony-Cook* also outlines the procedure decision makers must follow if they are inclined to depart from a joint submission (Para 49 – 60).
28. The Executive Director and Industry Member have considered the factors for an appropriate sanction and submit that this sanction is within an appropriate range that the Panel can accept.
29. Please feel free to express your concerns about the sanction or to ask for further submissions or more information from either party.

All of which is respectfully submitted this ____ day of _____, 2018.

Sincerely,

Andrew Bone
Counsel for the Executive Director

Richard James Horb