

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF Sections 39, 41, 46 and 47 of the *REAL ESTATE ACT*, R.S.A. 2000, c.R-5 (the "*Real Estate Act*")

AND IN THE MATTER OF a Hearing regarding the conduct of JOHN WILLIAM OSBORNE, Real Estate Associate registered at all material times to J.W. Osborne and Associates Ltd.

Hearing Panel Members: Brian Klingspon, Chair
Michael Brodrick
Kathryn Oviatt

Appearances: Leanne R. Monsma, legal counsel for the Executive Director of the Real Estate Council of Alberta
Kalen L. Lumsden, legal counsel for John William Osborne

Hearing Date: February 25, 2019, via telephone

DECISION ON CONDUCT DESERVING OF SANCTION
AND
DECISION ON SANCTION AND COSTS

A. Introduction

The parties did not object to the composition of the Hearing Panel.

The parties jointly submitted an Admission of Conduct Deserving of Sanction document to the Hearing Panel, dated February 8, 2019 (the "Admission of Conduct"). Portions of the Admission of Conduct are attached to this Decision as Schedule "A". The parties also submitted a Joint Submission on Sanction, dated February 8, 2019, the text of which is attached, as Schedule "B".

John William Osborne signed the Admission of Conduct, which included an acknowledgment that he was given an opportunity to seek legal advice prior to signing the Admission of Conduct, a statement that he agreed to the Admission of Conduct voluntarily, an admission of the facts and breaches set out in the Admission of Conduct, and an admission that his conduct was deserving of sanction. At the hearing, Mr. Osborne verbally confirmed that he was in agreement with the Admission of Conduct.

Mr. Osborne was first licensed as a real estate broker with the Real Estate Council of Alberta ("RECA") in March 2003. However, Mr. Osborne first began

working in real estate in the 1970's (before RECA was established). The conduct deserving of sanction occurred in the summer of 2014 and is as follows:

1. Between approximately June and August, 2014, Mr. Osborne failed to practice in strict accordance with section 59 of the Real Estate Act Rules, particulars of which include:
 - a. Mr. Osborne failed to do one or more of the following:
 - i. enter into a standalone written transaction brokerage agreement with SO and the Church;
 - ii. provide SO or the Church with an opportunity to review any such agreement or request further information concerning the agreement or the relationship described in it; and/or
 - iii. make an offer to the Church to treat them as a customer or recommend it to another brokerage.
2. Between approximately June and July, 2014, Mr. Osborne failed to ensure that his role was clearly understood by the Church, contrary to section 41(e) of the Real Estate Act Rules, particulars of which include:
 - a. Mr. Osborne failed to do one or more of the following:
 - i. explain to the Church that they were his customer;
 - ii. explain to the Church that he did not owe the Church any agency obligations and, in particular, any fiduciary obligations;
 - iii. explain to the Church that he would not provide them with any services that required the exercise of discretion or judgment, the giving of confidential advice, or advocating on their behalf; and/or
 - iv. advise the Church that his obligations to them were limited to the exercise of reasonable care and skill, not negligently or knowingly providing them with false or misleading information, holding all monies received from in accordance with the Act and complying with the provisions of the Act, Regulations, Rules and Bylaws.

B. Issues

The following issues arise in this hearing:

1. Does the conduct admitted by Mr. Osborne constitute conduct deserving of sanction?

2. If so, are the proposed sanctions in the Joint Submission on Sanction appropriate in the circumstances?

C. Applicable sections of the *Real Estate Act* and *REA Rules*

Sections 46 and 47 of the *Real Estate Act* refer to situations where the Industry Member admits to conduct deserving of sanction.

Section 46(1) permits an industry member to submit a statement of admission of conduct deserving of sanction at any time prior to the Hearing Panel making its findings:

46(1) An industry member may, at any time after the commencement of proceedings under this Part and before a Hearing Panel makes its findings in respect of the industry member's conduct, submit to the executive director a statement of admission of conduct deserving of sanction in respect of all or any of the matters that are the subject matter of the proceedings.

...

Section 47 sets out the effect of an accepted admission entered at a hearing:

47(1) If a statement of admission of conduct is accepted, the executive director shall immediately refer the matter to a Hearing Panel, and in that case the Hearing Panel shall deal with the matter as if it had been referred to it under section 39(1)(b).

(2) If a statement of admission of conduct is accepted, each admission of conduct in the statement in respect of any act or matter regarding the industry member's conduct is deemed for all purposes to be a finding of the Hearing Panel that the conduct of the industry member is conduct deserving of sanction.

Section 39(1)(b)(i) of the *Real Estate Act* permits the Executive Director to refer a matter to a Hearing Panel on completion of an investigation or upon receipt of an investigation report.

This hearing is held in accordance with s. 41(1)(a) of the *Real Estate Act*:

41(1) A Hearing Panel shall hold a hearing

- (a) on referral of a matter to it under section 39(1)(b);

Mr. Osborne admitted that he breached ss. 59 and 41(e) of the *Real Estate Act Rules* ("*REA Rules*"). Section 59 of the *REA Rules* establishes the requirements of transaction brokerage for common law. Section 59 provides in part:

59(1) If the situation arises where a brokerage represents a seller with whom it has an agency relationship and a buyer with whom

it has an agency relationship is interested in the seller's property, in order to facilitate the purchase and sale of the property, the buyer and the seller and the brokerage may enter into a written transaction brokerage agreement with respect to that property.

(2) The brokerage will provide both the buyer and seller with the opportunity to review the transaction brokerage agreement and to request further information concerning the transaction brokerage agreement and transaction brokerage relationship described in it before signing the agreement.

(3) If the parties do not agree to enter into a transaction brokerage agreement, unless otherwise agreed to by the parties the brokerage will continue to represent the party, be it the seller or the buyer, with whom it first entered into an agency relationship and the brokerage will offer the option either:

- (a) to treat the other party as a customer; or
- (b) to recommend the other party to another brokerage.

...

Section 41(e) of the *REA Rules* addresses standards of conduct for industry members, including industry member responsibilities:

41 Industry members must:

...

- (e) ensure the role of the industry member is clearly understood by their clients and third parties;

....

Once conduct deserving of sanction has been established, section 43 of the *Real Estate Act* sets out the authority of the Hearing Panel to fashion a remedy:

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.
- (2) The Hearing Panel may, in addition to or instead of dealing with the conduct of an industry member under subsection (1), order the industry member to pay all or part of the costs associated with the investigation and hearing determined in accordance with the bylaws.

D. Exhibits

The following exhibits were entered at the Hearing:

1. Amended Notice of Hearing dated February 25, 2019;
2. Affidavit of Service dated February 11, 2019;
3. Admission of Conduct Deserving of Sanction dated February 8, 2019;
4. Joint Submission on Sanction dated February 8, 2019 and case law to support:

TAB A *Jaswal v. Medical Board (Nfld.)*, 1996 CANLII 11630

TAB B *Krochmal, Kenneth Allan*, RECA December 2016

TAB C *Kelly, Manson Reginald*, RECA May 2016

TAB D *Dawson-McIver, Florence Fern*, RECA November 2012

TAB E *Johnson, Dennis*, RECA January 2013

E. Facts

The Hearing Panel accepts the Admission of Conduct, including the agreed facts set out therein. A copy of the Admission of Conduct, which contains the agreed facts, is attached at Schedule "B".

F. Decision on Conduct Deserving of Sanction

Pursuant to s. 47(2) of the *Real Estate Act*, Mr. Osborne's admissions in the Admission of Conduct are deemed findings of the Hearing Panel that Mr. Osborne's conduct is deserving of sanction.

G. Submissions on Sanction

The parties submitted a Joint Submission on Sanction, which is attached as Schedule "B". Counsel for the Executive Director presented an oral summary of the Joint Submission on Sanction, including a review of the authorities provided. Counsel for Mr. Osborne indicated Mr. Osborne's agreement with the Executive Director's submissions.

In addition, counsel for the Executive Director reviewed the factors set out in the seminal case of *Jaswal v. Medical Board (Nfld.)*, 1996 CANLII 11630 ("*Jaswal*") and addressed the relevant factors applicable in these circumstances.

The age and experience of the Industry Member

Mr. Osborne is a senior industry member, having been involved in real estate since the 1970's, and having been licensed with RECA since at least 2003. This factor is both in favour of Mr. Osborne and against him. It is favourable because it shows a long-term dedication to the industry without previous sanction. However, because of his experience, Mr. Osborne should also have known better.

The previous character of the Industry Member

Mr. Osborne has no disciplinary history.

The number of times the offence was proven to have occurred

There were two separate breaches of the *REA Rules*, pertaining to the same transaction, which occurred over the summer of 2014.

The nature and gravity of the of the proven allegations

The nature of the allegations in this instance is not of the highest gravity. However, it is still important for industry members to strictly comply with the requirements of s. 59 of the *REA Rules* as these are important safe guards to the public.

Mr. Osborne's conduct can be characterized as reckless or careless rather than intentional or malicious. In particular, Mr. Osborne was under the honest but mistaken belief that he had complied with Rule 59.

The impact of the incident on the victim, if any

There was no evidence of any negative impact on the Church or the seller as a result of Mr. Osborne's breach of the *REA Rules*.

The need to maintain the public's confidence in the integrity of the real estate industry

Counsel for the Executive Director submitted that real estate associates must practice in strict compliance with the Real Estate Act and the Real Estate Act Rules in order to maintain the integrity of the industry. Mr. Osborne's conduct potentially harms the reputation of the real estate industry.

The role of the industry member in acknowledging what occurred

Mr. Osborne took responsibility for his actions and signed an admission of conduct deserving of sanction pursuant to section 46 of the *Real Estate Act*.

Mr. Osborne cooperated with the investigation of this matter.

Mr. Osborne worked with conduct counsel for RECA to reach a resolution by agreement, which saved RECA the time and expense of a contested hearing and saved witnesses the inconvenience and stress of having to attend and testify at a hearing.

General and specific deterrence

There is a need to promote specific and general deterrence to ensure that Mr. Osborne and other real estate professionals realize that such conduct will be met with consequences.

Whether the industry member has already suffered serious financial or other penalties

While the Executive Director did not have evidence as to any impact on Mr. Osborne as a result of the conduct related to the allegations, counsel for Mr. Osborne indicated that there was ongoing litigation surrounding the circumstances, which was financially significant for Mr. Osborne. Counsel indicated that this had an impact on Mr. Osborne and that he was ready to move forward from the situation.

Previous Sanctions in similar circumstances

The parties submitted the following analogous cases on sanction:

1. *Krochmal, Kenneth Allan*, RECA December 2016

Mr. Krochmal entered into an exclusive seller representation agreement with a seller for the sale of her property. He eventually presented the seller with an offer to purchase from a buyer that he was also representing. The offer was then signed by the seller. The next day, after he had already written the offer for the buyer and presented the offer to the seller, Mr. Krochmal presented the buyer and the seller with an agreement to represent both seller and buyer. He was found to have breached Rule 41(e) as a result of his failure to ensure that his role was clearly understood and documented. He received an administrative penalty of \$1,500.00.

2. *Kelly, Manson Reginald*, RECA May 2016

Mr. Kelly entered into an exclusive seller representation agreement with a seller. A few months later, he entered into an exclusive buyer representation agreement with a buyer who was interested in purchasing the seller's property. Mr. Kelly failed to inform the seller and the buyer of the need to transition into a transaction brokerage agreement. He also failed to provide the seller and the buyer with an opportunity to review a transaction brokerage agreement and make an informed decision about whether or not to continue in their relationships with him in light of his modified duties. Mr. Kelly was found to have breached Rule 59.1 as a result of these failures. He received an administrative penalty of \$1,500.00.

3. *Dawson-Maclver, Florence Fern*, RECA November 2012

Ms. Dawson-Maclver entered into an exclusive seller representation agreement with a seller. She then entered into an agency relationship acknowledgment form with an interested buyer and eventually created a contract to purchase the property between the seller and the buyer. The contract listed her as the representative of both the seller and the buyer. Ms. Dawson-Maclver, the buyers and the sellers never signed a written transaction brokerage agreement. Ms. Dawson-Maclver was found to have breached Rule 59(1) and was fined \$2,000.00.

4. *Johnson, Dennis*, RECA January 2013

An associate at the same brokerage as Mr. Johnson entered into an exclusive seller agreement with a seller. On behalf of a buyer, Mr. Johnson submitted an offer on the seller's property. Mr. Johnson then

had the buyer sign a written dual agency agreement (as transaction brokerage then was). However, the seller was never provided with the agreement. Dual agency was also never explained to the seller and the seller did not understand that the buyer was represented by the same brokerage. Mr. Johnson agreed that he failed to ensure that his role was clearly understood, in breach of Rule 41(e). For this, he was fined \$1,500.00. He also agreed that he failed to ensure that the business of the brokerage was carried out competently and in accordance with the Rules because of his failure to ensure that a dual agency agreement was signed by both the seller and the buyer in violation of Rule 51(1)(d). For this, Mr. Johnson was fined \$1,000.00. Mr. Johnson was also required to pay costs in the amount of \$500.00 and agreed to complete the following courses: the Contract Law Unit; and the Consumer Relationships Unit.

The parties jointly submitted that an appropriate sanction in the circumstances is as follows:

- a. Mr. Osborne should pay, in full, within six months of the date that the Hearing Panel's order is issued fines totalling \$3,000 as follows:

Breach	Fine
Rule 59	\$1,500
Rule 41(e)	\$1,500

- b. Mr. Osborne should be required to successfully complete the following education within six months of the date that the Hearing Panel's order is issued:
 - i. Understanding Designated Agency and Transaction Brokerage –Session 2;
 - ii. Real Estate Update 2009-2010 – Unit 2, Session 2; and
 - iii. Real Estate Update 2009-2010 – Unit 3, Session 1.
- c. Costs
 - i. Mr. Osborne should be ordered to pay costs of \$500.00 for the investigation and proceedings.

H. Decision on Sanction

The Hearing Panel agrees with the parties that the *Jaswal* factors described above are the appropriate considerations in this matter. In particular, the

Hearing Panel agrees with and adopts the Joint Submission on Sanction that the aggravating factors in this matter are as follows:

- a. Mr. Osborne's conduct potentially harms the reputation of the real estate industry; and
- b. there is a need to promote specific and general deterrence to ensure that Mr. Osborne and other real estate professionals realize that such conduct will be met with consequences.

Similarly, the Hearing Panel agrees with and adopts the Joint Submission on Sanction that the mitigating factors in this matter are as follows:

- a. Mr. Osborne cooperated with the investigation of this matter;
- b. Mr. Osborne acknowledged the facts and that he engaged in conduct deserving of sanction;
- c. Mr. Osborne has no disciplinary history and has been a member in good standing with RECA since at least 2003;
- d. Mr. Osborne worked with conduct counsel for RECA to reach a resolution by agreement, which saved RECA the time and expense of a contested hearing and saved witnesses the inconvenience and stress of having to attend and testify at a hearing; and
- e. Mr. Osborne's conduct can be characterized as reckless or careless rather than intentional and malicious. In particular, Mr. Osborne was under the honest but mistaken belief that he had complied with Rule 59.

The Hearing Panel agrees that the proposed sanction is appropriate in the circumstances and is consistent with previous decisions in similar circumstances. In particular, the Hearing Panel notes the similarity with the *Dennis Johnson* matter referred to above.

The Hearing Panel finds that \$1,500 in fines for each breach of the *REA Rules* is appropriate. Similarly, the three courses proposed are rationally connected to the conduct and will assist Mr. Osborne in improving his expertise and knowledge going forward. Lastly, we find that the proposal for costs is appropriate. It is appropriate for Mr. Osborne to bear some of the costs of this matter. However, given his cooperation and participation in proceeding by admission, the costs are appropriately limited to an amount less than the actual investigation and hearing costs.

The Hearing Panel is satisfied that the parties have carefully considered the relevant factors with a view to protection of the public and rehabilitation of Mr. Osborne. The Hearing Panel gives significant deference to their Joint Submission on Sanction.

I. Conclusion and Order

Mr. Osborne is deemed to have engaged in conduct deserving of sanction for two breaches of the *REA Rules*, rule 59 and rule 41(e).

The Hearing Panel orders the following sanction:

1. Fines to be paid in full within six months of the date that this Decision is issued, as follows:
 - a. for the breach of rule 59 of the *REA Rules* \$1,500;
 - b. for the breach of rule 41(e) of the *REA Rules* \$1,500;
2. Courses to be completed within six months of the date that this Decision is issued, as follows:
 - a. Understanding Designated Agency and Transaction Brokerage – Session 2;
 - b. Real Estate Update 2009-2010 – Unit 2, Session 2; and
 - c. Real Estate Update 2009-2010 – Unit 3, Session 1;
3. Costs in the amount of \$500.

This decision is certified and dated at the City of Edmonton in the Province of Alberta, this 5th day of March, 2019.

Brian Klingspon, Hearing Chair

Schedule "A" Admission of Conduct Deserving of Sanction

1. John William Osborne and the Executive Director agree to the following:

Agreed Facts

2. Mr. Osborne first became licensed as a real estate broker with the Real Estate Council of Alberta ("RECA") in March, 2003. However, Mr. Osborne first began working in real estate in the 1970s (before RECA was established). At all relevant and material times, he was registered to J.W. Osborne and Associates Ltd. and J.W. Osborne and Associates Ltd. was registered as a common law brokerage [TAB A].

3. In or around January, 2014, J.W. Osborne and Associates Ltd. entered into an exclusive seller representation agreement with [{"company"}] (the "Listing Agreement") [TAB B]. The Listing Agreement was signed by SO (on behalf of [{"company"}]) and Mr. Osborne and provided the terms and conditions on which Mr. Osborne would attempt to sell or lease property belonging to [{"company"}] and located at [{"address"}] (the "Property").

4. It was a term of the Listing Agreement that "on those occasions where [J.W. Osborne and Associates Ltd.] offers the Property ... to a potential purchaser and/or lessee who is not represented by a Tenant's representative that with proper disclosure [J.W. Osborne and Associates Ltd.] shall be considered a transaction facilitator as per the October 1, 2008 amendment to the Real Estate Act" [TAB B].

5. When J.W. Osborne and Associates Ltd. And SO entered into the Listing Agreement, SO understood that Mr. Osborne was his sole agent. SO also understood that Mr. Osborne would provide SO with all of the services and responsibilities that go along with sole agency, including undivided loyalty, confidentiality, full disclosure and reasonable care and skill.

6. In June or July, 2014, Mr. Osborne showed the property to JM. He eventually became aware that JM was looking at the Property for the "Church" and that the Church was interested in leasing the Property for use as a church, school and daycare. Mr. Osborne never showed JM or the Church any other properties.

7. From June to on or about July 9, 2014, the relationship between Mr. Osborne and the Church was that of a brokerage and a customer, but Mr. Osborne failed to explain to the Church that they had developed this or any type of relationship. As a result, JM and the Church did not understand what

Mr. Osborne's role was. JM and the Church also did not understand that, as Mr. Osborne's customer:

- a. Mr. Osborne did not owe the Church any agency obligations or fiduciary obligations;
- b. Mr. Osborne would not provide them with any services that required the exercise of discretion or judgment, the giving of confidential advice or advocating on their behalf; and/or
- c. Mr. Osborne's obligations to them were limited.

8. On July 2, 2014, Mr. Osborne advised SO that Mr. Osborne had found an interested tenant for the Property [TAB C].

9. On July 9, 2014, Mr. Osborne emailed SO to ask: "Would you object to me assuming the role as a brokerage facilitator in this instance?" Mr. Osborne went on to explain the following to SO: "Under this arrangement, I am required to keep each parties critical information as confidential, but can facilitate the deal by working fairly with both of the parties. Alternatively, we could advise them to obtain their own representation. Either way they will require legal advice, but under facilitation brokerage, they will not require a second agent" [TAB D].

10. Also on July 9, 2014, Mr. Osborne emailed JM to advise her that he had requested that SO consider Mr. Osborne's role as transaction facilitator [TAB E].

11. On July 11, 2014, SO emailed Mr. Osborne that it was a "good idea" for Mr. Osborne to represent both SO and the Church [TAB D].

12. Mr. Osborne never provided SO or the Church with a standalone written transaction brokerage agreement that:

- a. provided SO or the Church with an opportunity to request further information concerning any written transaction brokerage agreement or the relationship described in it; and/or
- b. offered to treat the Church as a customer or refer the Church to another brokerage.

13. The reason that Mr. Osborne failed to provide SO and the Church with a written transaction brokerage agreement is that he did not understand that he needed to provide SO and the Church with a standalone written transaction

brokerage agreement. Instead, Mr. Osborne believed that he had satisfied the requirements set out in Rule 59 by virtue of the following:

a. the Listing Agreement contemplated that: "on those occasions where [J.W. Osborne and Associates Ltd.] offers the Property ... to a potential purchaser and/or lessee who is not represented by a Tenant's representative that with proper disclosure [J.W. Osborne and Associates Ltd.] shall be considered a transaction facilitator as per the October 1, 2008 amendment to the Real Estate Act" **[TAB B]**;

b. on July 9, 2014, Mr. Osborne emailed SO to ask: "Would you object to me assuming the role as a brokerage facilitator in this instance?" Mr. Osborne went on to explain the following to SO: "Under this arrangement, I am required to keep each parties critical information as confidential, but can facilitate the deal by working fairly with both of the parties. Alternatively, we could advise them to obtain their own representation. Either way they will require legal advice, but under facilitation brokerage, they will not require a second agent" and on July 11, 2014, SO responded that it was a "good idea" for Mr. Osborne to represent both SO and the Church **[TAB D]**;

c. on July 9, 2014, Mr. Osborne emailed JM to advise her that he had requested that SO consider Mr. Osborne's role as transaction facilitator **[TAB E]**; and

d. Mr. Osborne and SO had previously discussed transaction facilitation and Mr. Osborne had acted as a transaction facilitator for SO on previous occasions and so Mr. Osborne believed that SO fully understood transaction brokerage.

14. Additionally, between August 6, 2014 and August 17, 2014, Mr. Osborne, SO and the Church were involved in negotiating a letter of intent with respect to a lease of the Property and it was a term of the letter of intent that "J.W. Osborne & Associates Ltd. is acting as a transaction facilitator under the RECA guidelines" **[TAB F]**.

15. Mr. Osborne continued to assist SO and the Church in negotiating and drafting an agreement for the Church to lease the Property from SO into August, 2014. Both SO and the Church had the benefit of consulting independent legal advice prior to signing the final form of the lease and neither SO nor the Church raised any concerns with Mr. Osborne about his conduct as a transaction facilitator.

Agreed Breaches

16. It is agreed that the above conduct is deserving of sanction for the following breaches.

1. Between approximately June and August, 2014, Mr. Osborne failed to practice in strict accordance with section 59 of the Real Estate Act Rules [TAB G], particulars of which include:

a. Mr. Osborne failed to do one or more of the following:

i. enter into a standalone written transaction brokerage agreement with SO and the Church;

ii. provide SO or the Church with an opportunity to review any such agreement or request further information concerning the agreement or the relationship described in it; and/or

iii. make an offer to the Church to treat them as a customer or recommend it to another brokerage.

2. Between approximately June and July, 2014, Mr. Osborne failed to ensure that his role was clearly understood by the Church, contrary to section 41(e) of the Real Estate Act Rules [TAB H], particulars of which include:

a. Mr. Osborne failed to do one or more of the following:

i. explain to the Church that they were his customer;

ii. explain to the Church that he did not owe the Church any agency obligations and, in particular, any fiduciary obligations;

iii. explain to the Church that he would not provide them with any services that required the exercise of discretion or judgment, the giving of confidential advice, or advocating on their behalf; and/or

iv. advise the Church that his obligations to them were limited to the exercise of reasonable care and skill, not negligently or knowingly providing them with false or misleading information, holding all monies received

from in accordance with the Act and complying with the provisions of the Act, Regulations, Rules and Bylaws.

Agreed Factors on Sanction

17. It is agreed that the following facts are relevant as mitigating factors:

- a. Mr. Osborne cooperated with the investigation of this matter;
- b. Mr. Osborne acknowledges the facts and that he engaged in conduct deserving of sanction;
- c. Mr. Osborne has no disciplinary history and has been a member in good standing with the Real Estate Council of Alberta since October, 1999 [TAB A];
- d. Mr. Osborne worked with conduct counsel for RECA to reach a resolution by agreement, which saved RECA the time and expense of a contested hearing and saved witnesses the inconvenience and stress of having to attend and testify at a hearing; and
- e. Mr. Osborne's conduct can be characterized as reckless or careless rather than intentional and malicious. In particular, Mr. Osborne was under the honest but mistaken belief that he had complied with Rule 59 for the reasons set out in paragraphs 16 and 17.

18. It is agreed that the following facts are relevant as aggravating factors:

- a. Mr. Osborne's conduct potentially harms the reputation of the real estate industry; and
- b. there is a need to promote specific and general deterrence to ensure that Mr. Osborne and other real estate professionals realize that such conduct will be met with consequences.

Schedule "B" Joint Submission on Sanction

Introduction

1. John William Osborne has agreed to an Admission of Conduct Deserving of Sanction (the "Admission") under section 46 of the *Real Estate Act*.
2. The Admission is accepted by the Executive Director of the Real Estate Council of Alberta ("RECA") and has been entered as an exhibit in this hearing.
3. Under section 47 of the *Real Estate Act*, the Admission is deemed to be a finding of this Hearing Panel and therefore concludes the first phase of the hearing on conduct.
4. The second phase of the hearing concerns sanction.
5. Mr. Osborne and the Executive Director make the following submission on sanction together.

Panel Authority on Sanction

6. 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

7. The Hearing Panel must consider whether a number of factors are relevant when assessing sanction. *Jaswal v Newfoundland (Medical Board)*[TAB A], lists a number of factors that may be relevant:

- a. the nature and gravity of the proven allegations;
- b. the age and experience of the industry member;
- c. the previous character of the offender and, in particular, the presence or absence of prior complaints or convictions;
- d. the number of times the offence was proven to have occurred;
- e. the role of the industry member in acknowledging what occurred;
- f. whether the industry member had already suffered serious financial or other penalties as a result of the allegations having been made;
- g. impact of the incident on the victim, if any;
- h. mitigating circumstances;
- i. aggravating circumstances;
- j. the need to promote specific and general deterrence and thereby protect the public and ensure the safe and proper conduct of the profession;

- k. the need to maintain the public's confidence in the integrity of the profession;
- l. 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
- m. the range of sentence in other similar cases.

8. 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.

9. Specific deterrence can also be achieved by punishment and by corrective or education conditions.

10. Mitigating and aggravating refers to facts which make the conduct less (mitigating) or more (aggravating) serious.

11. 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.

Proposed Sanction

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

- a. Fines: Mr. Osborne should pay, in full, within six months of the date that the Hearing Panel's order is issued, the following fines to RECA:

Admission Paragraph	Breach	Fine
15-17	Rule 59	\$1,500.00
9-10	Rule 41(e)	\$1,500.00

- b. Mr. Osborne should be required to successfully complete the following education within six months of the date that the Hearing Panel's order is issued:

- i. Understanding Designated Agency and Transaction Brokerage – Session 2;
 - ii Real Estate Update 2009-2010 – Unit 2, Session 2; and
 - iii. Real Estate Update 2009-2010 – Unit 3, Session 1.
- c. Costs
- i. Mr. Osborne should be ordered to pay costs of \$500.00 for the investigation and proceedings.

Factors Supporting this Sanction

Aggravating and Mitigating Factors

13. Aggravating factors are:

- a. Mr. Osborne’s conduct potentially harms the reputation of the real estate industry; and
- b. there is a need to promote specific and general deterrence to ensure that Mr. Osborne and other real estate professionals realize that such conduct will be met with consequences.

14. Mitigating factors are:

- a. Mr. Osborne cooperated with the investigation of this matter;
- b. Mr. Osborne acknowledges the facts and that he engaged in conduct deserving of sanction;
- c. Mr. Osborne has no disciplinary history and has been a member in good standing with RECA since October, 1999;
- d. Mr. Osborne worked with conduct counsel for RECA to reach a resolution by agreement, which saved RECA the time and expense of a contested hearing and saved witnesses the inconvenience and stress of having to attend and testify at a hearing; and

- e. Mr. Osborne's conduct can be characterized as reckless or careless rather than intentional and malicious. In particular, Mr. Osborne was under the honest but mistaken belief that he had complied with Rule 59.