Case 009277.001

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF an Appeal by Complainant [N.H] under Part 3, section 40 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 VINCENT (DAVID) PELLETTIER, Real Estate Associate, registered at all material times with 4th Street Holdings Ltd. o/a RE/MAX Real Estate (Central)

AND IN THE MATTER OF a Hearing regarding the conduct of DAVID GEORGE EGER, Real Estate Broker, registered at all material times with 4th Street Holdings Ltd. o/a RE/MAX Real Estate (Central)

AND IN THE MATTER OF a Hearing regarding the conduct of 4TH STREET HOLDINGS LTD. O/A RE/MAX REAL ESTATE (CENTRAL), Real Estate Brokerage

Hearing Panel Members:	[R.A], Chair [G.P] [G.R]
Date of Decision:	December 8, 2020
Hearing Dates:	October 28, 2020 and October 30, 2020

DECISION

A. BACKGROUND

This is an appeal by the complainant, [N.H], regarding a decision of the Executive Director (ED) of the Real Estate Council of Alberta (RECA). For the reasons that follow, the appeal is allowed with respect to industry members Vincent Pellettier and David Eger.

[N.H] made a complaint to RECA in May of 2019, following an incomplete real estate transaction. The transaction involved Mr. Vincent Pellettier, a real estate associate registered with 4th Street Holdings, o/a RE/MAX Real Estate (Central) ("ReMax Central"). Mr. David Eger was and is the broker registered with ReMax Central. Mr. Pellettier was representing the buyer in the transaction. [N.H] daughter, [M.K], was the seller. She was also represented.

After receiving [N.H] complaint, the ED initiated an investigation (also known as a professional conduct review) into the conduct complained of. The allegations included a failure by Mr. Pellettier and ReMax Central to provide information about deposit payments to the seller's agent in a timely manner. [N.H] also alleged that Mr. Pellettier intentionally or recklessly misled the seller's representative to believe that deposits had been received and deposited when in fact they had not. [N.H] also alleged that Mr. Pellettier and ReMax Central were complicit in the buyer's fraudulent activities, albeit perhaps unintentionally.

In March 2020, after the investigation was completed, the ED determined that there was insufficient evidence of conduct deserving of sanction to warrant any further action, including letters of reprimand, administrative sanctions or referrals to conduct hearings. Mr. Hill is appealing that decision to this Hearing Panel (the "Panel").

The issue to be determined by this Panel is whether there is sufficient evidence of conduct deserving of sanction in the investigation file to warrant referral of the matter to a hearing. The decision turns on the interpretation of section 40(2) of the Act, namely the interpretation of "…sufficient evidence of conduct deserving of sanction to warrant a hearing…."

The Panel finds that in this case, and on a proper interpretation of section 40(2) of the Act, there is sufficient evidence of conduct deserving of sanction to warrant a hearing. The matter is, accordingly, referred to a conduct hearing in regard to the conduct of both Mr. Pellettier and Mr. Eger. In making its decision, the Panel has carefully reviewed the contents of the investigation file and the submissions of [N.H] and the ED. The Panel thanks both [N.H] and the ED for their helpful submissions

B. PRELIMINARY ISSUES

Relevant Legislation

Between the oral Hearing of this matter on October 30, 2020 and the issuing of this decision, the *Real Estate Act*,[1] *Real Estate (Ministerial) Regulation,*[2] *Real Estate Act Rules,*[3] and *Real Estate Act, Bylaws*[4] were amended. Section 25.5 of the amended Regulation (the "Regulation") directs this Panel to continue with its decision as if Part 3 of the Act had not been amended by the *Real Estate Amendment Act, 2020*. Therefore, in this decision, any references to sections 36 to 56 of the Act refer to those sections as they were written in the October 30, 2019 version of the Act, which was in force until November 30, 2020.

Section 25.7 of the Regulation provides for continuity of the by-laws and rules, insofar as they are not inconsistent with the Act as amended. The rules applicable to this matter are those that were in affect at the time of the impugned conduct, namely, the *Real Estate Act Rules*, effective from January

23, 2019 to November 30, 2020 (the "Rules"). Section 25.8 of the amended Regulation provides for the continuity of licenses and authorizations.

[N.H] is the Complainant

Prior to the scheduled hearing of the complainant appeal, the parties sought to clarify who was permitted to make representations at the hearing, [N.H] or daughter, [M.K]. The Panel informed the ED and [N.H] that its understanding based on the materials before it, including the appeal documents submitted by [N.H] and the Notice of Hearing, was that [N.H] was the sole complainant and would therefore be the one making submissions, personally or through counsel. Neither party took issue with the Panel's understanding, and the Hearing proceeded accordingly. [N.H] represented himself and the ED was represented by counsel.

Mr. Pellettier, Mr. Eger and ReMax Central are subjects of the complainant appeal

The original Notice of Hearing for this complainant appeal listed only Mr. Pellettier under "Industry Member." However, Mr. Eger, ReMax Central and other industry members were referred to in submissions for this appeal and in various investigation documents.

The Panel sought submissions as to which industry members were the subjects of this appeal. Both parties' understanding was that the scope of the investigation and of the ED's decision included the conduct of Mr. Pellettier, Mr. Eger and ReMax Central, notwithstanding that it was only Mr. Pellettier who was named under "Industry Member" in the original Notice of Hearing.

The ED argues that Mr. Eger and therefore ReMax Central were notified and kept apprised of the investigation and of the ED's decision, and that investigations of this kind routinely expand to include industry members other than those initially named. Furthermore, Mr. Eger and ReMax Central should reasonably have expected that their conduct would be reviewed as part of the investigation, given a broker is ultimately responsible for the conduct of both its associates and the brokerage as a whole. The ED confirmed that he was proceeding with the complainant appeal on the understanding that all three industry members were included in the ED's decision to take no further action.

[N.H] states that his original complaint clearly named Mr. Pellettier and ReMax Central, and that over the course of the investigation, if additional industry members were identified as having engaged in conduct deserving of sanction in connection with the conduct complained of, they ought to have been identified and included in the investigation.

The Panel is required to follow the legislation which empowers it. It is also required to ensure that procedural fairness is observed in conducting its

hearings. In this case, the question that arises for the Panel is whether the conduct of Mr. Eger and ReMax Central ought to be considered in this appeal; and if so, whether Mr. Eger and ReMax Central were entitled to formal notice that their conduct was being considered in this appeal; and if they were not entitled to formal notice under any enactment, whether procedural fairness nevertheless required that certain processes be observed regarding notice. The Panel notes that it is not tasked with determining whether the preceding portions of the investigation were conducted fairly and with proper notice. Rather, it is concerned with procedural fairness as it pertains to this complainant appeal.

For the following reasons, the Panel finds that the conduct of Mr. Pellettier, Mr. Eger and ReMax Central are all properly considered during this appeal; that the legislation does not require any form of formal notice regarding the appeal; and that procedural fairness does not require additional notice in order for this Panel to consider the conduct of all three industry members in this complainant appeal. Nonetheless, the Panel adjourned the Hearing in order to allow the ED to add Mr. Eger and ReMax Central to the Notice of Hearing for this complainant appeal and to notify all three industry members of this Hearing and that their conduct would be considered.

The Act is silent regarding whether notice of a complainant appeal must be provided to any industry members, including those whose names are mentioned in the ED's decision or the original complaint. The parties to a complainant appeal are the complainant and the ED, and not the industry members. That said, RECA has issued a guidance on complainant appeals which indicates that industry members will be notified of a complainant appeal.[5] Although guidance bulletins and policies do not have legal force, administrative bodies are permitted to provide more process than what is required under legislation. As explained by the Supreme Court of Canada, "When a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty."[6] The question for this Panel, then, is whether, in the context of both the legislation and RECA's guidance documents, the procedure that was followed and that resulted in the inclusion of Mr. Pellettier, Mr. Eger and ReMax Central in the scope of this appeal was fair.

In this case, it is not clear whether Mr. Pellettier or Mr. Eger, in his own capacity and as representative of ReMax Central, received notice of the complainant appeal. In the Panel's view, this did not render the complainant appeal procedurally unfair. In fact, in the Panel's view, despite RECA's guidance on complainant appeals indicating that industry members will be notified, no notice to any industry member was required for procedural fairness to be observed. This is because the Panel is directed by section 40 of the Act to determine, based on the record, whether there is sufficient evidence of conduct

deserving of sanction with respect to any industry member, whether or not they are named in the notice of complainant appeal.

Section 40(2) of the Act states,

> On an appeal under subsection (1), the Hearing Panel shall determine whether
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> (a) the complaint is frivolous or vexatious or there is insufficient evidence of conduct deserving of sanction, or
> (b) there is sufficient evidence of conduct deserving of sanction to warrant a hearing by the Hearing Panel
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> and shall notify the complainant and the industry member in writing of its decision.

Notably, no industry member is required to be notified before the complainant appeal. In contrast, the legislation specifically requires advance notice to be provided to an industry member whose conduct is referred to a hearing panel.[7] This is sensible, since the Panel may identify conduct deserving of sanction with respect to any industry member during a complainant appeal. The legislation does not constrain the Panel to consider the conduct of only certain industry members. It is only after the complainant appeal is completed that those industry members identified will be notified.

Additionally, as mentioned above, industry members are not participants in a complainant appeal and are not permitted to make submissions to this Panel. If the Panel finds there is sufficient evidence of conduct deserving of sanction to warrant a hearing, the hearing process is triggered, and industry members are entitled to all of the procedural protections of a hearing, including advance notice. Facts must be proven through documentary and testimonial evidence adduced at the hearing. The investigation file does not automatically become part of the evidence at the hearing, and therefore any participatory rights afforded to industry members during the investigation are moot. In short, there is nothing industry members would have been able to add to the record before this Panel to affect their rights, had they been provided notice of this complainant appeal.

Considering the Act more broadly, in the Panel's view, section 39 of the Act similarly directs the ED to review the investigation file and to determine whether there is sufficient evidence of conduct deserving of sanction by any industry member, and if so to proceed in one of the three ways listed in section 39(1)(b), namely referral to a hearing panel, a letter of reprimand, or an administrative penalty. It may be that the industry member has not specifically been named in a complaint or has not been directly sent a letter notifying them of the investigation. The Act does not require this. The Act does not require any

specific advance notice to any industry member at any point in the investigation process. It does, however, require the ED to investigate the conduct of any industry member where he believes there may be conduct deserving of sanction, whether or not a complaint is made.[8]

With this backdrop, it is evident that the Act, which pertains to a self-regulating industry and purports to protect the public and promote the integrity of the industry, aims to allow the ED broad scope to discover and sanction any violations. If the ED, on completion of an investigation, finds sufficient evidence of conduct deserving of sanction for any industry member, regardless of the notice they have received to date, he is directed to take some action under section 39(1)(b) of the Act. The Panel notes that where the ED decides to proceed with a sanction under section 39(1)(b), meaning a letter of reprimand or an administrative penalty, additional issues of procedural fairness may arise. Various guidance documents issued by RECA regarding investigations may be intended to address these issues,[9] but none of them are relevant in this complainant appeal. This Panel has no authority to issue any sanctions.

Given the legislative direction described above, the ED was empowered under section 39 of the Act to address the conduct of Mr. Pellettier, Mr. Eger, ReMax Central or any other industry member where there was sufficient evidence of conduct deserving of sanction arising from the investigation. Similarly, this Panel is empowered under section 40 of the Act to refer the conduct of any industry member to a conduct hearing where the Panel determines on the investigation record that there is sufficient evidence of conduct deserving of sanction, whether or not the industry member is named in the notice of hearing. No procedural or substantive rights are compromised where an industry member is not provided notice of a complainant appeal.

In the interests of clarity and transparency, on October 28, 2020, the Panel directed the ED to amend the Notice of Hearing to include Mr. Eger and ReMax Central, and to serve the amended notice to Mr. Pellettier, Mr. Eger and ReMax Central. The Panel directed the ED to carry out these steps in short order and before the Hearing resumed on October 30, 2020. On October 30, the ED's counsel confirmed that he had communicated with both Mr. Eger and Mr. Pellettier and that they were aware that the complainant appeal was taking place, and that the conduct of Mr. Pellettier, Mr. Eger and ReMax Central would be considered. Since in any case, as explained above, procedural fairness does not require notice to be provided to industry members, the Panel is satisfied that it can proceed to consider [N.H]'s appeal regarding the conduct of any industry member, including Mr. Pellettier, Mr. Eger and ReMax Central.

C. THE NATURE OF THE APPEAL IS A *DE NOVO* CONSIDERATION ON A LIMITED RECORD

A complainant appeal is termed an "appeal" in the legislation. At first glance, this suggests that the Panel must determine a standard of review to apply to the ED's decision. On a closer examination of the legislation and the context of a complainant appeal, it is the Panel's opinion that this is not an appeal in the traditional sense. Rather, the Panel's task under section 40 of the Act, which parallels the ED's task under section 39 of the Act, is to consider the matter *de novo*, based on the record of investigation.

The Panel is directed under section 40 of the Act to determine whether:

> (a) the complaint is frivolous or vexatious or there is insufficient evidence of conduct deserving of sanction, or
> (b) there is sufficient evidence of conduct deserving of sanction to warrant a hearing by the Hearing Panel.

Similarly, the ED is tasked under section 39 of the Act to determine whether:

> (a) ...(i) the complaint is frivolous or vexatious, or
> (ii) there is insufficient evidence of conduct deserving of sanction,
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> or
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> (b) ...there is sufficient evidence of conduct deserving of sanction....

The striking similarity of these provisions, along with the nature of complainant appeals as discussed below, indicates that the Panel in a complainant appeal is directed by the legislature to make its determination *de novo* and without regard to the decision of the ED.

Additional support for this view is provided in *Friends of the Old Man River*,[10] where the Alberta Court of Appeal considers the ability of a complainant to request judicial review of the decision of a body similar to this Panel. The Court explains the role of complainant appeal bodies in professional disciplinary matters. The relevant legislative provisions around complainant appeals in that case, which dealt with a professional engineering tribunal, were similar to the legislative provisions in the Act. The Court explains,

> Although called an "appeal", the right conferred on a complainant by s. 49(3) is no more than a right to have the decision of the Discipline Committee terminating an investigation reviewed by Council. It is, in our view, simply an extension of the investigative process. The Act

> does not expressly or impliedly require a formal or even an informal hearing...[11]

Similarly, the complainant appeal here is not a review of the ED's decision in the sense of a traditional appeal, where substantive rights have been determined by the ED. It is simply an extension of the investigative process through a review by the Panel of the ED's decision not to take further action. RECA has determined the process to be a review on the investigation record, with the benefit of additional submissions from [N.H] and the ED.[12] The legislature has specified that the Panel is to make the decision in essentially the same way as the ED, not to defer to the ED's decision. The Panel cannot make any decisions about the substantive rights of any party, and it is not reviewing the ED's final decision of the substantive rights of any party. The only final decisions the ED can make under section 39 of the Act are the decisions to issue a letter of reprimand or an administrative penalty. These have separate avenues of appeal under the Act. In view of all of the above, it is the Panel's opinion that it is directed by the legislation to conduct a *de novo* hearing under section 40(2) of the Act. RECA's choice of procedure with respect to complainant appeals is that the hearing is conducted on a limited record, specifically the investigation file.

Even if the Panel is wrong and the complainant appeal is an appeal to which a standard of review analysis applies, the standard of review to be applied would be the correctness standard. The Alberta Court of Appeal, in *Newton v. Criminal Trial Lawyers' Association*[13] provides the framework for determining the proper standard of review for an appellate administrative body reviewing the decision of an administrative decision maker of the first instance. The Panel must consider a number of factors, the most important being the intent of the legislature in enacting the complainant appeal provisions. The factors are enumerated in *Newton* at para. 43:

a) The respective roles of the tribunal of first instance and the appellate tribunal, as determined by interpreting the enabling legislation;
b) The nature of the question in issue;
c) The interpretation of the statute as a whole;
d) The expertise and advantageous position of the tribunal of first instance, compared to that of the appellate tribunal;
e) The need to limit the number, length and cost of appeals;
f) Preserving the economy and integrity of the proceedings in the tribunal of first instance; and
g) Other factors that are relevant in the particular context.

The primary factor is the respective roles of the ED and the Panel. This is, first and foremost, a question of statutory interpretation.[14]

The ED provided brief submissions on the standard of review to be applied to the Panel's decision. The ED submitted the Panel must look at all of the evidence in the investigation file and determine if there is sufficient evidence of conduct deserving of sanction to warrant a hearing. If the Panel sees anything in the investigation file warranting a hearing on the conduct of Mr. Eger, Mr. Pellettier or ReMax Central, the Panel must send the matter to a hearing. This suggests a standard of correctness. [N.H] did not make submissions on this issue, however his submissions as a whole indicate that he expects the Panel to put itself in the ED's shoes, that is, to apply a standard of correctness.

As explained above, the Panel is given the same task under section 40(2) of the Act and has the same options as the ED in section 39, except that the Panel is not able to issue any sanctions, specifically a letter of reprimand or an administrative penalty. Section 40(2) appears to require the Panel to conduct a review of the evidence gathered during an investigation in essentially the same way as the ED does, and to come to its own conclusion in respect of whether the complaint is frivolous or vexatious; whether there is insufficient evidence of conduct deserving of sanction; or whether there is sufficient evidence of conduct deserving of sanction to proceed. The above analysis of these sections of the Act suggests a review on the standard of correctness.

Additionally, although the ED exercises prosecutorial power in its role, the ED has limited ability under the legislation to exercise discretion based on "public interest" factors, such as efficiency and distribution of resources, when it comes to deciding not to take action in connection with an investigation, particularly when there is sufficient evidence that there has been conduct deserving of sanction. The ED is required under section 38 of the Act to commence an investigation when a complaint is made, unless one of the circumstances listed in section 21 of the Regulation apply, in which case the ED has discretion to refuse to investigate or to discontinue an investigation. These circumstances are:

(a) the industry member complained of is not clearly identified,
(b) the conduct complained of is not a breach of the Act, regulations, rules or bylaws or there is insufficient evidence of a breach of the Act, regulations, rules or bylaws,
(c) the conduct complained of was the subject of a prior complaint,
(d) the complaint is frivolous or vexatious,
(e) the breach complained of is minor in nature and an advisory note is sent to the industry member complained of,
(f) the complainant fails or refuses to cooperate with an investigator, or
(g) the complainant asks not to proceed with the complaint.

None of these circumstances allow the ED to refuse to investigate or discontinue an investigation based on policy concerns such as the efficient allocation of resources, particularly where there is sufficient evidence of

conduct deserving of sanction. The Panel notes that reference to an "advisory note" in Rule 21(e) is explained on RECA's website. Advisory notes are "educational in nature and provide industry professionals with guidance on what steps they can take to ensure they do not end up with disciplinary action in the future."[15] Such notes are not considered sanctions,[16] and may therefore be issued where there is insufficient evidence of conduct deserving of sanction, but where it appears to the ED that education may be required.

Where an investigation is refused or discontinued based on one of the circumstances in s.21 of the Regulation, the ED proceeds under Section 38.1 of the Act (Refusing to Investigate Complaint or Discontinuing Investigation), and the decision is appealable by the complainant under section 40(2). In this case, the ED did not proceed under section 38.1, but under section 39, that is, an investigation was completed and a report provided to the ED. Under section 39, the ED is directed by the legislation to proceed based on the evidence alone, and again has very limited discretion to consider other policy issues. As discussed later in these reasons, under section 39 of the Act, where there is sufficient evidence of conduct deserving of sanction, even if the breach is relatively minor, the ED must address the conduct in some way. Proceeding by way of letter of reprimand or administrative penalty are options open to the ED, when those options are appropriate. The Panel's job under section 40 of the Act in terms of assessing the sufficiency of the evidence is the same as the ED's job under section 39 of the Act in terms of assessing the sufficiency of the evidence. However, the Panel is not able to issue a letter of reprimand or administrative penalty. In the Panel's view, the limited options open to the ED when there is sufficient evidence of conduct deserving of sanction, and in particular the absence of discretion with respect to public interest and policy concerns that might come into play, for example, in the decision of a criminal prosecutor to pursue a charge, suggests that the ED's decision should be reviewed on a correctness standard.

Regarding the relative expertise of the ED versus the Panel, although the ED has more expertise in gathering and presenting evidence, both decision makers have expertise in assessing the sufficiency of evidence in light of industry standards. This factor does not weigh heavily one way or the other.

Finally, as discussed extensively in *Broers v. Real Estate Council of Alberta,*[17] which considered an appeal of a sanctioning decision of the ED, the real estate profession is a self-governing profession. The purpose of the Act includes serving and protecting the public and to maintaining the integrity of the real estate profession. The legislative intent in comprising the Council (and now also Industry Councils and the Board) of mainly industry members and requiring that the majority of decision makers on hearing panels (including this complainant panel) be industry members is to provide for peer review. Hearing panels consist of an industry member's peers, whereas the ED (and now the registrar) is not permitted to be an industry member. Here, since the Panel "is comprised

largely of industry members, it will possess a certain level of expertise in understanding the nature of the industry and therefore in defining misconduct as against industry standards."[18] These members of the Panel are "uniquely positioned to identify professional misconduct and to appreciate its severity."[19] Although this Panel is not making any findings with respect to misconduct, this aspect of the peer composition of the Panel, considered together with the purposes of the Act, suggests the legislature considers the Panel to be in a better position than the ED to make a decision as to the sufficiency of evidence regarding professional misconduct, and suggests less deference is owed to the ED's decision.

For the above reasons, considering the factors in *Newton* and particularly the wording and legislative scheme of the Act, a standard of correctness would be applied by this Panel to the decision of the ED to take no further action with respect to [N.H]'s complaint, if the complainant appeal was in the nature of an appeal to which a standard of review analysis applied. In practical terms, conducting a *de novo* hearing on the investigation record and reviewing the ED's decision based on the investigation record on a standard of correctness amount to the same exercise. The Panel will, accordingly, give the ED's decision no deference in determining this complainant appeal.

D. THERE IS SUFFICIENT EVIDENCE OF CONDUCT DESERVING OF SANCTION TO WARRANT A HEARING

The Panel must be careful not to disclose the content of documents from the investigation file in discussing the merits of the appeal. This is because [N.H], as a complainant, is not permitted to view the investigation file. Information in the investigation file is compelled from witnesses, and must be kept confidential. The Panel will therefore only describe documents submitted by [N.H], or documents that were described by the ED in his submissions. Where a document was not submitted by [N.H] or was not described by the ED, it will not be described in these reasons and will simply be referred to by investigation file number.

[N.H] expressed some frustration that he was not permitted to view the investigation file or to otherwise be involved in the investigation. He also argued that the investigation was not properly conducted. The investigation itself is conducted by the ED or his appointee, and focuses on the industry members involved in the transaction. The ED directs the investigation, and will seek input from the complainant, if required, in the ED's discretion. This is a common practice for professional regulatory bodies. In regard to discipline of professionals by their governing bodies, complainants are in largely the same position as other members of the public.[20] Although the Panel understands [N.H]'s frustrations, the Panel has no jurisdiction to direct the ED with respect to his investigation. To that end, the Act, which is the source of the Panel's authority, does not permit the Panel to order the ED to re-open or continue his

investigation. The Panel can assure the parties to this complainant appeal that, as an independent decision maker, it has considered this matter independently, without being influenced by any of the parties involved.

Interpretation of "sufficient evidence of conduct deserving of sanction" in section 39 of the Act and "sufficient evidence of conduct deserving of sanction to warrant a hearing" in section 40 of the Act

The Panel's authority to make a decision in this complainant appeal is found in section 40(2) of the Act, which we will repeat here:

> On an appeal under subsection (1), the Hearing Panel shall determine whether
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> (c) the complaint is frivolous or vexatious or there is insufficient evidence of conduct deserving of sanction, or
> (d) there is sufficient evidence of conduct deserving of sanction to warrant a hearing by the Hearing Panel
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> and shall notify the complainant and the industry member in writing of its decision.

The ED concedes, and the Panel agrees, that [N.H]'s complaint is not frivolous or vexatious. Therefore, the Panel must decide whether there is insufficient evidence of conduct deserving of sanction or whether there is "sufficient evidence of conduct deserving of sanction to warrant a hearing."

"Conduct deserving of sanction" is not defined in the Act, Rules, Regulation or Bylaws (the "Legislation"). However, RECA's various bulletins and guidelines consistently state that any breach of the Legislation constitutes conduct deserving of sanction.[21] This aspect of the definition of conduct deserving of sanction is sufficient to address this complainant appeal.

The ED argues that even if there is sufficient evidence of conduct deserving of sanction, the nature of any breach is technical or minor in nature, and does not warrant a hearing. The Panel disagrees with this interpretation. In the Panel's view, it is not for the Panel to decide whether a potential breach of the legislation is minor in nature. The Panel is not directed to look at the sufficiency of the *conduct* to warrant a hearing, rather the Panel must consider the sufficiency of the *evidence* to warrant a hearing. In the Panel's view, sufficient evidence to warrant a hearing in the context of the Act and the ED's prosecutorial role means evidence that is cumulatively strong enough that there is a reasonable likelihood that a subsequent hearing panel would find conduct deserving of sanction when the evidence is considered in the context of a hearing. The severity of the conduct is for the subsequent hearing panel to assess. If conduct deserving of sanction is found, that panel will have a range of

sanctioning options available to it, from issuing a letter of reprimand for technical or minor breaches, to cancellation of authorization (now license) for much more serious breaches. Section 40(2) directs the Panel to assess only the sufficiency of the evidence, not the severity of the conduct.

As noted above, under section 39 of the Act, the ED is required to address any situation in which there is sufficient evidence of conduct deserving of sanction, even if the breach is minor. Section 39 reads as follows:

> (1) On completion of an investigation or on receipt of a report under section 38(5), as the case may be, the executive director shall
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> (a) direct that no further action be taken, if the executive director is of the opinion that
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> (i) the complaint is frivolous or vexatious, or
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> (ii) there is insufficient evidence of conduct deserving of sanction,
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> or
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> (b) if the executive director determines that there is sufficient evidence of conduct deserving of sanction,
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> (i) refer the matter to a Hearing Panel,
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> (i.1) issue a letter reprimanding the industry member, or
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> (ii) impose an administrative penalty on the industry member in accordance with section 83 and the bylaws, where the matter involves a contravention by the industry member of a provision referred to in section 83(1).
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> (2) The executive director shall cause notice of a decision under subsection (1) to be served on the industry member and the complainant, if any.

The ED is only permitted to direct no further action be taken where he determines the complaint is frivolous or vexatious, or where there is insufficient evidence that there is conduct deserving of sanction, or in this case, insufficient evidence that there is any breach of the Legislation. As soon as there is sufficient evidence that any breach has occurred, the ED must either refer the matter to a hearing panel, issue a letter of reprimand, or impose an administrative penalty.

In the Panel's view, a proper interpretation of sections 39 and 40(2) of the Act is that even in cases where the ED issues a letter of reprimand or imposes an administrative penalty, there is still sufficient evidence to warrant a hearing, that is, the evidence is cumulatively strong enough that there is a reasonable likelihood that a hearing panel would find conduct deserving of sanction in the context of a hearing. However, the ED is not required to refer the matter to a hearing and may instead issue a letter of reprimand or an administrative penalty. This decision is likely informed by factors such as the severity of the

breach and the clarity of the evidence. The Panel is not given these two sanctioning options.

Although they are only guidances, RECA's explanations of when letters of reprimand or administrative penalties are issued are informative. RECA states that letters of reprimand, the least severe forms of discipline, are issued when sufficient evidence of conduct deserving of sanction exists, but the resulting breaches are technical or minor in nature. Administrative Penalties are issued when sufficient evidence of conduct deserving of sanction exists with respect to one or two straight-forward issues. [22] In other instances where there is sufficient evidence of conduct deserving of sanction, the matter is referred to a hearing. An industry member who is issued a letter of reprimand or administrative penalty may appeal the decision and is entitled to a hearing, complete with *viva voce* evidence, in those cases. This suggests hearings are not intended to be reserved only to instances where a minimum level of conduct is at issue.

The ED has options once he determines that there is sufficient evidence of conduct deserving of sanction, but the Panel does not. It is at the stage of exercising the ED's options that the severity of the conduct comes into play in section 39, but there are no such options open to the Panel in section 40, and therefore no assessment of the severity of the conduct. The Panel is required to order a hearing any time there is sufficient evidence of conduct deserving of sanction to warrant a hearing, but the ED is not. On our interpretation, "sufficient evidence of conduct deserving of sanction" in section 39 of the Act, where referral to a hearing is an option open to the ED, is necessarily the same as "sufficient evidence of conduct deserving of sanction to warrant a hearing" in section 40(2) of the Act. Any other interpretation would imply that there are three categories of sufficient evidence:

- sufficient evidence of conduct deserving of sanction to warrant a hearing
- sufficient evidence of conduct deserving of sanction to warrant a letter of reprimand; and
- sufficient evidence of conduct deserving of sanction to warrant an administrative penalty.

The consequence of this interpretation is that when the evidence falls into either of the latter two categories but is not characterized by the ED as such, the Panel is unable to send it to a hearing and as a result, the conduct will not be addressed at all. This could not be the intention of the legislature. The Act does not describe three categories of sufficient evidence. In section 39, the ED determines if "there is sufficient evidence of conduct deserving of sanction." The same level of sufficiency applies to all three options available to the ED, one of which is referral to a hearing.

The Panel realizes that under its interpretation, the legislature has potentially used two phrases to refer to the same thing: "sufficient evidence of conduct deserving of sanction" in section 39 and "sufficient evidence of conduct deserving of sanction to warrant a hearing" in section 40. This may be seen as contrary to principles of statutory drafting and interpretation. Although the Panel agrees that the drafting is not as clear as it could be, the alternative interpretation is that "insufficient evidence of conduct deserving of sanction" in section 39, means something different from "insufficient evidence of conduct deserving of sanction" in section 40, where it would mean "insufficient evidence of conduct deserving of sanction to warrant a hearing" in the sense argued by the ED. This is also contrary to the principles of statutory drafting. In the Panel's view, considering the Act as a whole and the intent of the legislature, as illustrated by the Legislation, to address all conduct deserving of sanction, the Panel's interpretation is the correct one: sufficient evidence to warrant a hearing in section 40 means evidence that is cumulatively strong enough that there is a reasonable likelihood that a subsequent hearing panel would find conduct deserving of sanction when the evidence is considered in the context of a hearing.

It is clear that the intention of the legislature is that any breach of the legislation must be addressed. Minor breaches are addressed with minor sanctions. Depending upon where in the process the decision regarding sufficiency of evidence occurs, the deciding entity is either the ED or a hearing panel. If the ED incorrectly decides that there is insufficient evidence of conduct deserving of sanction, the opportunity that the ED had to issue a letter of reprimand or an administrative penalty is lost. In that case, a proper interpretation is that the Panel is directed by section 40(2) of the Act to refer the matter to a hearing, rather than allowing the matter to pass without the possibility of a sanction.

For these reasons, it is the Panel's view that its role is to consider the sufficiency of the evidence, not the sufficiency or severity of the conduct. If the evidence in the investigation file, taken together, is cumulatively strong enough that a subsequent hearing panel has a reasonable likelihood of finding conduct deserving of sanction at a hearing, then there is sufficient evidence of conduct deserving of sanction to warrant a hearing and the matter must be referred to a hearing under section 40(2). At a hearing, more evidence will likely be adduced and the issues explored further, such that an informed decision can be made as to the whether there is a breach, and if so, the severity of the breach and the appropriate sanction.

Potential breaches

The Panel finds that there is sufficient evidence of breaches of Rules 51(1)(l)(i) and (ii) by Mr. Eger to warrant a hearing into his conduct. Additionally, there is sufficient evidence of breaches of Rules 42(a) and 53(f) by Mr. Pellettier to warrant a hearing into his conduct. Identification of these sections of the Rules

is sufficient for the purposes of this complainant appeal. The ED may identify additional breaches in preparing for the hearing, however the Panel is tasked with determining if there is sufficient evidence of some breach, and is not required to canvas all possible breaches of the Legislation or all possible conduct deserving of sanction.

Evidence of possible breaches of Rule 51(1)(l) by Mr. Eger

Rule 51(1)(l) requires a real estate broker to

> ensure that all parties to an agreement giving effect to a trade in real estate are immediately notified if:
>
> (i) a deposit contemplated by the agreement that, if received, would be held by the related brokerage under the Act has not been received; or
>
> (ii) a deposit cheque or other negotiable instrument that the brokerage received in respect of a deposit referred to in (i) above has not been honoured…

The evidence in the investigation file is that under the terms of the real estate purchase contract entered into on April 23, 2019, a deposit cheque from the buyer was due on May 1, 2019, in the form of a bank draft. The buyer's brokerage was appointed to hold deposit funds under the contract. No deposit cheque was received on May 1, 2019 or for several days following that. However, Mr. Eger, either directly or through his associate, did not inform the seller's representative that the deposit had not been received for a number of days. To the contrary, his associate, Mr. Pellettier, informed the seller's representative early in the morning on May 2, 2019 that the cheque was in the office.

The ED argues that the five-day time delay in receiving a bank draft for the deposit, without informing the seller's representative, was justified because Mr. Pellettier was reasonably relying on his client's good word that the deposit would be delivered, and a bank draft was eventually delivered. Additionally, the ED argues that because the draft was eventually received, section 51(1)(l)(i) does not apply and Mr. Eger was not required to notify the seller's representative that the deposit was not received.

The Panel finds this line of argument to be completely at odds with the clear wording and intent of Rule 51(1)(l)(i). The Rule is clear: where a deposit that is to be held in a brokerage's trust account is not received, immediate notification (in writing) that the deposit has not been received is required. The Rule does not state that notification is only required when a deposit is not expected. The fact that a client is promising to come up with the deposit after the due date of the deposit, and making excuses about his tardiness, is not relevant, whether or not those statements are believed by the buyer's representative, unless that information is relayed to and accepted by the seller. The Rule is in place, at least

in part, to protect the rights of parties under contracts. Unless it is strictly adhered to, those rights are at risk. Absent any evidence that the seller was kept apprised of the buyer's excuses and accepted the lengthy delay, thereby waiving her rights under the contract, the Panel finds there is sufficient evidence of a breach of section 51(1)(l)(i) to warrant a hearing.

With regard to section 51(1)(l)(ii) of the Act, further evidence on the investigation file is that when a deposit cheque was finally received, it was not honoured. Mr. Eger did not inform the seller's representative that the bank draft had not been honoured for a number of days. As a result of both failures, the seller was left unaware of her option to void the contract between May 2 and May 13, 2019.

The ED argues that the seller's representative was immediately notified when the bank draft that was ultimately received was returned as untraceable. The Panel finds that the evidence in the investigation file suggests that the notification was not immediate. Mr. Pellettier informed the seller's representative of the returned bank draft on May 13, 2019. The Panel directs the ED to page 6 of investigation document 222327 for further evidence regarding the timeline. The Panel finds there is sufficient evidence of a breach of section 51(1)(1)(ii) to warrant a hearing.

Additional potential breaches may be identified by the ED, for example, Rules 51(1)(l)(m) and 41(g). For the purposes of this complainant appeal, it is sufficient for the Panel to find that there is sufficient evidence that Mr. Eger breached Rules 51(1)(l)(i) or (ii) to warrant a hearing.

Evidence of possible breaches of Rules 42(a) and 53(f) by Mr. Pellettier

Rule 42(a) states that industry members must not "make representations or carry on conduct that is reckless or intentional and that misleads or deceives any person or is likely to do so."

[N.H] argues that the seller's representative was intentionally misled on numerous occasions by Mr. Pellettier or his assistant. It is sufficient for the purposes of this complainant appeal for the Panel to find sufficient evidence relating to one such instance, namely evidence around Mr. Pellettier's representation to the seller's representative that a deposit cheque had been received on the evening of May 1, 2019.

The evidence in the investigation file is that Mr. Pellettier informed the seller's representative early on the morning on May 2, 2019 by text that the deposit had been physically received by his office the previous day, which was the due date for the deposit under the purchase contract. His assistant had earlier sent a picture of the cheque, which picture she had received from the buyer, to the seller's representative. Mr. Pellettier proceeded, in the absence of the cheque, to make efforts to obtain the cheque from his client for several days. He did not at

any point between May 2 and May 13 disabuse the seller's representative of his statement and her understanding that the cheque was in his office's possession. The seller assumed the cheque was deposited and safely in the ReMax Central brokerage trust account within 3 business days, as stipulated in the purchase contract.

The ED argues that the evidence indicates that Mr. Pellettier's efforts to obtain a deposit cheque were sincere and reasonable, and that because he reasonably believed his client would come up with the funds, there was no evidence of a breach of Rule 42(a). The Panel disagrees that the evidence of Mr. Pellettier's efforts with his client inform his duties under Rule 42(a) regarding statements he made to the seller's representative. The evidence is that Mr. Pellettier made a statement on May 2, 2019 which he realized shortly thereafter was false. There is no evidence that he made any efforts to correct that mis-statement. According to the evidence in the investigation file, the consequence of his failure to correct his statement was that he allowed the seller to continue to believe the deposit was received and in trust, and the seller was deprived of her option to void the contract. The ED was emphatic, in arguing that Mr. Pellettier was not a party to the contract and could therefore not be held responsible for the buyer's breaches under the contract, that the seller's remedy for the buyer's breaches under the contract was to void the contract, not to impugn Mr. Pellettier. However, the evidence suggests that because of Mr. Pellettier's statement, which he did not correct, the seller was deprived of exercising the very remedy put forward by the ED.

Reckless conduct is conduct that is beyond a simple oversight or misunderstanding. It is conduct that is carried out without regard to its consequences. In this case, the evidence is that Mr. Pellettier's decision not to correct his mis-statement was made despite his knowledge that as a result of the omission, it was very likely that the seller would be unaware of her right to void the contract. This suggests reckless conduct that led to the seller being misled. The Panel views the evidence as sufficient to warrant a hearing with respect to a breach of Rule 42(a) by Mr. Pellettier.

Rule 53(f) requires an associate to notify their broker if a deposit referred to in Rule 51(1)(l) has not been received. Although the Rule does not specify that the notification must be "immediate," the Rule 51(1)(l) requirement of immediacy informs the timeline under which the notification in Rule 53(f) must be provided. In light of Rule 51(1)(l), there must be some urgency to the notification requirement in Rule 53(f). In terms of the timing of Mr. Pellettier's notification to Mr. Eger, the Panel points the ED to page 2 of investigation document 222328. The Panel finds there is sufficient evidence of a breach of Rule 53(f) by Mr. Pellettier to warrant a hearing.

Although the Panel has found sufficient evidence of conduct deserving of sanction to warrant a hearing for the above potential breaches, the ED may

determine that other provisions warrant consideration, for example Rule 43 dealing with written service agreements.

There is insufficient evidence that ReMax Central has engaged in conduct deserving of sanction

The Panel has reviewed the legislation in respect of brokerage responsibilities and prohibitions, particularly, Rules 49, 50 and rules that apply to all industry members. [N.H] has not alleged any breaches of specific rules that apply to the brokerage. Many of the alleged breaches pertain to rules for brokers. It is understandable that [N.H] might conflate duties of brokers and brokerages, particularly since he was unrepresented. The Panel finds there is insufficient evidence that ReMax Central engaged in conduct deserving of sanction.

E. SUMMARY

In this decision, the Panel has determined that

- notice to industry members was not required to ensure procedural fairness for the complainant appeal;

- the complainant appeal is to be heard *de novo*, on the record of the investigation. Alternatively, the proper standard of review for the Panel to apply to this complainant appeal under section 40(2) of the Act is a standard of correctness. The Panel accordingly gave no deference to the ED's decision under appeal;

- "sufficient evidence of conduct deserving of sanction to warrant a hearing" in this case means evidence that is cumulatively strong enough that there is a reasonable likelihood that a subsequent hearing panel would find conduct deserving of sanction when the evidence is considered in the context of a hearing. The severity of the conduct under section 40(2) is not to be assessed, and was not assessed, by the Panel.

F. DECISION

Based on all of the above, the Panel decides as follows:

- [N.H]'s complaint is not frivolous or vexatious;
- There is sufficient evidence of conduct deserving of sanction to warrant a hearing by a Hearing Panel for Mr. Eger;
- There is sufficient evidence of conduct deserving of sanction to warrant a hearing by a Hearing Panel for Mr. Pellettier;
- There is insufficient evidence of conduct deserving of sanction for ReMax Central.

In directing that the matter be referred to a hearing, the Panel is cognizant of the possibility that the ED may expand the scope of the hearing, for example to consider additional breaches or to consider conduct that occurred before May 2 or after May 13. The Panel also recognizes that the ED and one or more industry members (now licensees) may come to agreement on facts or proposed sanctions. The Panel's decision in no way limits the scope and procedures available to the ED and the licensees in connection with hearings. Finally, the Panel is aware that a subsequent hearing panel may decide there has been no conduct deserving of sanction, based on an assessment of all of the evidence before it. The Panel is in no way directing what the outcome of the subsequent hearing ought to be.

Signed this 8th day of December, 2020, at the City of Calgary, Province of Alberta.

[R.A]

[R.A]
Hearing Panel Chair

[1] *Real Estate Act, R.S.A. 2000*, c. R-5; *Real Estate Amendment Act,* in force December 1, 2020, available at https://www.reca.ca/about-reca/legislation-statndards/real-estate-act/.
[2] Alberta Regulation 113/1996.
[3] *Real Estate Act Rules*, current as of November 30, 2020, available at https://www.reca.ca/about-reca/legislation-standards/real-estate-act-rules.
[4] *Real Estate Act Bylaws*, current as of November 30, 2020, available at https://www.reca.ca/about-reca/legislation-standards/real-estate-act-bylaws/.
[5] RECA publication: *Appealing the Executive Director's Decision That No Further Action be Taken,* 2019 (Investigation document 254796).
[6] *Old St Boniface Residents Assn Inc* v *Winnipeg (City),* 1990 3 SCR 1170.
[7] The Act, section 41(3).
[8] The Act, section 38(1).
[9] For example, RECA's *Guide to a Professional Conduct Review for Industry Professionals*, March 2016, available at https://www.reca.ca/wp-content/uploads/2018/07/Guide-to-a-Professional-Conduct-Review.pdf.; *Guide to Investigations: For Licensees*, November 2020, available at https://www.reca.ca/wp-content/uploads/2020/12/Guide-Investigations-For_Licensees-Nov-2020.pdf.
[10] *Friends of the Old Man River Society v. Association of Professional Engineers, Geologists and Geophysicists of Alberta*, 2001 ABCA 107.
[11] *Ibid*, at para. 36.
[12] See RECA's *Hearing and Appeal Practice and Procedure Guidelines,* January 2018, available at https://www.reca.ca/wp-content/uploads/2018/07/Hearing-and-Appeal-Practice-and-Procedures.pdf, at Part 12.
[13] 2010 ABCA 399.
[14] *Ibid* at para. 57.
[15] https://www.reca.ca/2012/09/13/scalable-enforcement/.
[16] *Ibid.*
[17] 2010 ABQB 497.
[18] *Ibid,* at para. 135.
[19] *Ibid,* at para. 136.
[20] *Friends of the Old Man River*, at para. 41.

[21] See, for example, RECA's *Hearing and Appeal Practice and Procedure Guidelines, supra*; RECA information bulleting on conduct deserving of sanction, April 2014, available at https://www.reca.ca/wp-content/uploads/PDF/Conduct-Deserving-of-Sanction.pdf.
[22] See, for example, https://www.reca.ca/complaints-discipline/types-of-decisions/.