

## THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF Section 83.1 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 WARREN CONSTANTINE PHIPPS, a Real Estate Broker,  
currently suspended formally registered with Mountain  
Park Real Estate Ltd,

Hearing Panel Members: [M.D.H], Chair  
[M.M.B]  
[M.M.W]

Appearances: Mr. Warren Phipps

Mr. Christopher Davison, for the Executive  
Director of the Real Estate Council of Alberta

Hearing Date: October 20, 2020 via video conference

### DECISION

#### A. BACKGROUND

This matter arises from Mr. Phipps' appeal of an Administrative Penalty imposed by the Executive Director ("ED") of the Real Estate Council of Alberta ("RECA").

The Administrative Penalty in question imposed a fine of \$5,000 and was based on a conclusion that Mr. Phipps breached his obligation to cooperate in s.38(4) of the *Real Estate Act* ("the Act"). The alleged failure to cooperate was based on the following:

1. Failure to provide a copy of a certificate evidencing the purchase of a \$25,000 GIC;
2. Failure to provide a copy of a certificate evidencing the purchase of a \$30,000 GIC;
3. Failure to provide copies of GST remittances.

This Hearing proceeded on October 20, 2020 via video conference. During the Hearing, the ED also made reference to, and called evidence regarding, an alleged failure to supply requested management fee information. While this was not specifically part of the original Administrative Penalty, an administrative penalty appeal is a *de novo* hearing, and therefore the evidence and argument was permitted.

On October 30, 2020 we issued our conduct decision in this matter, concluding that Mr. Phipps breached his obligations in s.38(4) in relation to the requests for each of the two GIC certificates, but that he was not in breach in relation to the GST remittances or the management fee information. We directed the parties to provide written submissions on Sanction and Costs.

The parties have now provided their written submissions, and we have carefully reviewed and considered them. Below is our decision on Sanction and Costs.

## B. SANCTION

The ED argues that prior RECA decisions should serve as a guide for the proper sanction. He submits that these decisions, together with the other circumstances of this matter, suggest a fine of \$7,500 would be appropriate. However, since the original Administrative Penalty was less than this, the ED suggests that it would be appropriate to instead impose a penalty of only \$5,000.

Mr. Phipps, on the other hand, argues that the appropriate sanction would be a \$1,000 fine, a 6-month suspension and a requirement to complete the current version of the Real Estate Broker Course.

Both parties rely on the *Jaswal v Newfoundland (Medical Board)* decision (1996 NLSC) for the factors to consider in assessing an appropriate sanction. However, the parties have applied the case in very different ways and reached very different results.

While *Jaswal* and other similar decisions are instructive and useful when assessing an appropriate sanction or penalty, they do not set out an exhaustive or prescriptive list of considerations. Each case must be considered on the basis of the specific circumstances and on its own merits.

This said, since both parties have dealt with the same *Jaswal* considerations, we have set out our conclusions in the same fashion:

### ***The nature and gravity of the proven allegations:***

This case involves a breach of an industry member's duty to cooperate with a RECA investigation. Generally, the duty to cooperate is critical for the industry to function properly and to ensure public trust in the profession. In this case, the investigation related to possibly missing client trust funds. That injects an additional gravity into the failure to cooperate, as any delays in the investigation could jeopardize the ability to recover any missing client funds.

***The age and experience of the industry member:***

At the time of the investigation, Mr. Phipps had been an industry member for 12 years and a broker for 9 years. This is more than sufficient time to understand and appreciate the importance of a RECA investigation, particularly one concerning trust funds.

***The presence or absence of any prior complaints or convictions:***

The parties point to two prior disciplinary offences, both of which resulted in administrative penalties. While these would confirm that Mr. Phipps was familiar with RECA investigations, neither of these prior offences related to an allegation of failure to cooperate. However, they do demonstrate some history of non-compliance with RECA rules or standards of conduct.

It is also worth noting that in his written submission, Mr. Phipps attempts to explain one of the two prior matters by suggesting that the penalty was inappropriate because it arose from something separate from the original complaint. This is troubling because it appears that despite the penalty, Mr. Phipps is still not accepting responsibility for his prior conduct. More will be said below about this apparent inability to accept personal responsibility.

***The number of times the offence was proven to have occurred:***

Between January 10 and March 3, there were ten separate demands for the GIC certificates, most of which were ignored or at least not responded to. Only after the last one did Mr. Phipps provide one of the two requested GIC certificates. Some of the demands included reminders about the statutory obligation to cooperate and the potential for penalty. While we do not suggest that each demand represents a separate breach, minimally, in these circumstances, Mr. Phipps was repeatedly in breach of his obligation to cooperate. However, the breach(es) all relate to a failure to produce the same specific information.

***The role of the industry member in acknowledging what occurred:***

Prior to and throughout the Hearing, Mr. Phipps steadfastly denied that he breached his obligation to cooperate. It was only in his submission on Sanction and Costs that he finally acknowledged his failure to cooperate. However, this came only after the ED argued that failure to acknowledge conduct was an aggravating factor in setting the appropriate sanction.

In these circumstances, the nature and timing of Mr. Phipps' recognition and acknowledgment is not sufficient mitigate any sanction.

***Whether the industry member already suffered financial or other penalties as a result of the allegations:***

Mr. Phipps argues that his license has been suspended during the ongoing trust account investigation, and this has caused him significant financial losses. However, this is a separate issue. We are dealing only with the failure to

cooperate. There is no evidence that Mr. Phipps has suffered financial or other penalties due to the charges of failure to cooperate.

***Impact of the incident on the victim:***

In this case there is no "victim" *per se*, apart perhaps from RECA and the integrity of its investigation, which is dealt with elsewhere. As such, this does not have a bearing on the sanction.

***Mitigating circumstances***

The ED alleges that there are no mitigating circumstances. However, during the Hearing there was evidence that Mr. Phipps' mother suffered a life threatening illness and this at least distracted Mr. Phipps from addressing the outstanding RECA requests for several weeks. In our view, this is a mitigating factor that must be considered in Mr. Phipps' favour.

***Aggravating circumstances***

Mr. Phipps argues that there are no aggravating factors. However, in our view, there are several aggravating factors in this case:

- On January 21 Mr. Phipps told the RECA investigator that he had requested the GIC certificates and would provide them when received. However, other evidence confirms that this was untrue and that Mr. Phipps did not actually request the GIC certificates until February 7 (after two follow up demands from the investigator).
- On February 10, Manulife, the financial institution Mr. Phipps dealt with for his GIC purchases, emailed Mr. Phipps the requested GIC information, and authorized Mr. Phipps to forward that email to RECA. It would have been very easy for Mr. Phipps to simply forward that email to the investigator in compliance with the GIC certificate request. However, he failed or refused to do so, even after the investigator specifically requested it. Instead, Mr. Phipps waited until end of March to provide information on one GIC and, for reasons outlined below, he never did supply information on the other. The ease with which he could have complied with the information request is an aggravating factor.
- Ultimately, the evidence confirmed that, contrary to his statements to the investigator, Mr. Phipps had never actually purchased the \$30,000 GIC. Instead the \$30,000 was used to satisfy the client's allegedly outstanding obligations to Mr. Phipps' brokerage or his related company, and ultimately was used in whole or part to pay the brokerage or related company's salary expenses. This must have been known by Mr. Phipps at some point long before the investigator was forced to contact the financial institution directly to obtain the information herself. Minimally, Mr. Phipps would have been known on February 10 when the email was sent from Manulife. The failure to candidly acknowledge this earlier and instead require the RECA investigator to dig it up herself, is an

aggravating factor. Moreover, it injects an element of intentional deception into Mr. Phipps' January 21 misrepresentation and his failure to forward the February 10 email.

- In his written submission on Sanction, Mr. Phipps argues that his broker education from 2010 was defective. He states as follows:

*Broker education for Phipps was mostly self-directed. The education materials Phipps was given for education were outdated at the time and did not reflect revisions to the legislation in 2007 and 2009. The materials were not updated until after Phipps received broker authorization. This is mitigating.*

....

*RECA chose to give an exemption to Phipps for the PHASE 3-PROPERTY MANAGEMENT portion of the broker education....This means that Phipps was not provided education in the area of Property Management which represented nearly 100% of the licensed activity conducted over the nearly 10 years that Phipps was licensed as a broker. This is very mitigating.*

*No additional education or training was provided to Phipps as a broker by any real estate organization subsequent to the self-directed learning using outdated information, examination using outdated information and exemption to being educated in property management, until 2019....This reflects a period of 9 years in which RECA permitted Phipps to practice as an authorized broker without any training in current legislation. Any education and interpretation of the Real Estate Act were solely left to Phipps without guidance for the entirety of his first 9 years of broker authorization. This is mitigating.*

There is so much wrong with these submissions that it is difficult to know where to start. In essence, Mr. Phipps is attempting to blame others for any short-comings he has as a broker. He also seems to expect that someone or some organization should have taken responsibility for training or educating him properly. From his submissions it appears he takes no personal responsibility for his own education or training. The transgressions we are dealing with occurred some 9 years after his brokerage license. To blame an allegedly defective training course from 9 years ago, is completely inappropriate and demonstrates that Mr. Phipps is incapable of taking personal responsibility for his conduct or his own ongoing training and education.

Moreover, we are not dealing with technical breaches related to his role as a broker (something no doubt the subject of the ongoing trust account investigation). Instead we are dealing with a basic obligation to cooperate in a RECA investigation. If Mr. Phipps feels that he needed a

better education 9 years ago for him to understand his legal obligation to cooperate in an investigation, then there are more fundamental problems at play.

We see these submissions as a clear inability to accept any personal responsibility. This is an aggravating factor.

***Specific and general deterrence to protect the public and ensure safe and proper conduct of the profession:***

As indicated, the ability to properly investigate complaints or conduct concerns is critical to allow RECA to properly function and, more importantly, to maintain public trust in the profession. This means a penalty for a failure to cooperate needs to serve as a deterrent both for Mr. Phipps and for the industry generally. Given our comments above regarding his apparent inability to accept personal responsibility for his conduct, specific deterrence is a significant concern in this case.

***The need to maintain the public's confidence:***

This is addressed in the factors above.

***The degree to which the offensive conduct was clearly regarded as being the type of conduct that would fall outside the range of permitted conduct:***

Given the number of requests, the amount of the time delay, and the ease with which the requested GIC information could have been provided, Mr. Phipps' conduct was a very clear violation of his duty to cooperate, and it fell well outside the range of conduct we would expect to see from an industry member who is the subject of a trust account investigation.

***The range of sentence in other similar cases:***

The ED has provided a number of RECA hearing panel or administrative penalty decisions setting various sanctions in previous failure to cooperate cases. These decisions involve conduct of varying severity and impose penalties ranging from \$5,000 to \$15,000. In our view, this case more closely resembles the cases at the lower, but not the lowest, end of the range.

***Conclusion on Sanction:***

Taking all of the circumstances into account, a fine of \$7,500 is appropriate. We appreciate that the ED restricted his request to \$5,000, which was the amount of the original administrative penalty. However, we are not bound or limited by the ED's request or by the original penalty. Moreover, the ED's submission was made before Mr. Phipps' written submissions, the content of which aggravate the circumstances and demand a higher penalty.

### C. COSTS:

Mr. Phipps argues that he should be entitled to costs. He submits that because the ED failed to prove a breach in relation to the GST remittances, his appeal should be considered successful, thereby entitling him to costs in the amount of \$3,811.50. We reject Mr. Phipps's argument in this regard. He was found to be in breach of his duty to cooperate and on that basis the ED was successful, even if only partially.

The ED argues that costs should be assessed in accordance with s.28(1) of the *Real Estate Act Bylaws* ("the Bylaws"). Using that approach, the ED has calculated costs at somewhere between \$9,000 and \$19,405 (depending on the hourly rate used for the investigator). He argues that in the circumstances, costs should be awarded against Mr. Phipps in the amount of \$9,000.

Our authority to award costs is governed by the Act and by the Bylaws. Generally, a panel's jurisdiction to order costs is set out in the Act, and the method of calculating those costs is set out in the Bylaws.

In this case, the hearing was an administrative penalty appeal pursuant to s.83.1 of the Act. Section 83.1(5) states that the Hearing Panel may award costs in an amount determined in accordance with the Bylaws.

Section 28 of the Bylaws includes three provisions relating to costs:

- Subsection (1) contemplates costs being calculated on the basis of actual investigation and hearing expenses incurred by RECA (including investigator and legal counsel hourly rates);
- Subsection (3) contains a chart that sets costs on something of a tariff basis. Each tariff amount is expressed as a narrow range that varies with the type of proceeding and the amount of the penalty levied against the industry member.
- Subsection (4) is a general section that sets out factors that may be considered by a panel when determining costs. These include, but are not limited to, such considerations as the degree of cooperation by the industry member, the degree of success, the complexity of the issues, and any other matter the panel feels is appropriate.

Costs awarded pursuant to s.28(1) would generally be substantially higher than costs awarded pursuant to the tariff in s.28(3). For example, as referenced above, using subsection (1) the ED calculates costs at \$9,000 - \$19,405. However, using s.28(3) costs would be \$0 - \$2,500.

The first thing to note is that, contrary to the ED's suggestion, s.28(1) of the Bylaws does not apply to this appeal. Section 28(1) clearly indicates that it only

applies to costs awarded pursuant to s.40(4), s.43(2), or 50(5) of the Act. In this case, costs are awarded pursuant to s.83.1(5) and as such, s.28(1) of the Bylaws has no application.

Therefore, we are left with determining costs pursuant to s.28(3). This provision states specifically as follows:

*28(3) Subject to a panel's discretion, the following Guide to Costs may apply: [following which the tariff chart is set out]*

We interpret "discretion" in this provision as a discretion as to whether or not to apply the tariff at all.

Regardless, whether we award costs by reference to the tariff ranges in 28(3) or whether we elect to reject the tariff and award costs on some other basis, we should consider the factors in s.28(4).

With respect to those factors:

- Given what we considered to be the fairly obvious breach of s.38(4) in relation to the GIC certificates, it might be suggested that Mr. Phipps acted unreasonably in contesting this charge and forcing it through a hearing. However, the ED proceeded on both the GIC certificates and the GST remittances, and was unsuccessful on the GST remittances. Therefore, even if he had admitted the breach in relation to the GIC certificates, this matter would still have proceeded through a hearing.
- Mr. Phipps was cooperative in the sense that he did not complicate or obstruct this Hearing or any investigation into the lack of cooperation allegation.
- The ED was only partially successful in establishing a breach of the s.38(4) duty to cooperate. He succeeded on two of the three allegations. However, the unsuccessful allegation relating to producing GST remittances could not have added in any material way to the complexity or length of the investigation and it certainly did not complicate the hearing.
- Perhaps most significantly, while charges of failure to cooperate are important to the industry generally, in this case, we are dealing with a relatively straight-forward matter. All the important communications and document production requests at issue were in writing or were confirmed in writing. At the risk of somewhat oversimplifying, this really involved nothing more than producing the written communications, and Mr. Phipps providing mitigating information regarding the disruption caused by his mother's illness. The underlying trust account investigation is no doubt quite complicated, but we are only dealing with the narrow question of whether Mr. Phipps breached his duty to cooperate by failing to produce 3 very specific pieces of information.



We should also point out that the amount calculated and claimed by the ED involves approximately 100 hours of work by the RECA investigator and legal counsel for the investigation and hearing. This is apart from the additional amounts for the hearing administrator and the panel. It seems highly improbable that a matter as narrow and straight-forward as this could have generated 100 hours of work between the RECA investigator and lawyer. We strongly suspect that most of this time relates to the trust account investigation rather than the investigation and prosecution of the narrow failure to cooperate charge.

Overall, in our view it is appropriate to apply the tariff in s.28(3). This provides a range of \$0 - \$2,500. Considering all of the circumstances, we assess costs at \$1,650, which is roughly two thirds of the maximum (reflecting the ED's partial success).

#### **D. SUMMARY & DIRECTION**

Based on the above, we find and direct as follows:

- Mr. Phipps shall pay a fine in the amount of \$7,500;
- Mr. Phipps shall pay costs in the amount of \$1,650.

This decision is certified and dated at the City of Edmonton in the Province of Alberta, this 18th day of December, 2020.

"Signature"  
\_\_\_\_\_  
[M.D.H]  
Hearing Panel Chair

## THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF Section 83.1 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 WARREN CONSTANTINE PHIPPS, a Real Estate Broker,  
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Hearing Panel Members: [M.D.H], Chair  
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[M.M.W]

Appearances: Mr. Warren Phipps

Mr. Christopher Davison, for the Executive  
Director of the Real Estate Council of Alberta

Hearing Date: October 20, 2020 via video conference

### DECISION

#### A. BACKGROUND

This is an appeal by Warren Constantine Phipps of an Administrative Penalty imposed by the Executive Director (ED) of the Real Estate Council of Alberta (RECA). The penalty was in the amount of \$5,000 and was assessed pursuant to the ED's authority in the Real Estate Act (Act). It was based on Mr. Phipps' alleged failure to cooperate with, or promptly respond to, an investigator contrary to s.38(4)(a) of the Act.

The evidence confirms that at some point prior to January 2020 Ms. Rhonda MacInnis was conducting a review of Mr. Phipps' brokerage trust accounts. That review revealed a possible shortfall. As a result, the ED appointed Ms. MacInnis as an investigator under the Act to formally investigate the issue.

As part of the investigation Ms. MacInnis had a number of meetings and email exchanges with Mr. Phipps between at least January and March 2020. At various times Ms. MacInnis requested that Mr. Phipps supply a number of documents and pieces of information. For our purposes, the critical requests were the following:

1. Certificate or statement confirming the purchase of a \$25,000 GIC from the brokerage trust account and confirming that it was held in trust for the client ("the \$25,000 GIC");

2. Certificate or statement confirming the purchase of a \$30,000 GIC from the brokerage trust account and confirming that it was held in trust for the client ("the \$30,000 GIC");
3. Breakdown of the details of management fees charged to clients and paid by fund transfers from the trust accounts ("the Management Fee Information").
4. Copies of GST returns filed by Mr. Phipps' brokerage (Mountain Park Real Estate Ltd.) ("the GST Returns");

The GIC certificates were requested to verify that the client trust funds were actually used for the stated purpose and that the GIC's were being held in trust for the client.

The Management Fee Information was requested to verify that the amounts withdrawn from the trust accounts to pay management fees were accurate in accordance with the various management agreements.

The GST Returns were requested when it became apparent that getting the Management Fee Information details was going to be difficult or onerous for Mr. Phipps. There were many individual management fees at issue, and the difficulty was that each fee was calculated differently based on the formula in each client property management agreement. Therefore, in an effort to expedite receipt of the required information, Ms. MacInnis concluded that it might be easier for Mr. Phipps to simply provide his brokerage GST Returns, which would contain the details of the management fees. In other words, in Ms. MacInnis' mind she was attempting to make it easier for Mr. Phipps to provide the required information by using this alternative method.

In this Hearing we are not dealing with the substance or merits of the trust account investigation. However, for context it is relevant to note that at some point early in the investigation there was a perceived trust account shortage or shortages of amounts that were not insignificant. For that reason, RECA and Ms. MacInnis felt that time was of the essence in obtaining the requested documentation to verify and justify the various trust account withdrawals.

Mr. Phipps testified that between January and March 2020 he was in virtually constant contact and communication with Ms. MacInnis. He says that the requests for information were constant and each time he provided information it would prompt questions and requests for more. In evidence he tendered a spreadsheet summarizing the communications and it indicates that there were approximately 120 contacts between October 30, 2019 and March 2, 2020, the bulk of which occurred in the January to March, 2020 time frame.

During the hearing we heard testimony about a number of these contacts, focusing in particular on the various contacts in relation to the 4 items outlined above. Among other things, this evidence confirmed the following:

GIC Certificates:

- Ms. MacInnis contacted Mr. Phipps to request the GIC certificates or statements on January 10, January 14, January 31, February 6, February 7, February 10, February 11, February 13, February 19, and March 3.
- Most of these communications imposed a deadline for provision of the information. However, a few of the above contacts were to provide deadline extensions at Mr. Phipps' request.
- On January 21, 2020 Mr. Phipps emailed Ms. MacInnis to indicate that he had contacted Manulife to request the GIC certificates and would provide them when received.
- However, on February 7, 2020 Mr. Phipps copied Ms. MacInnis on an email to Manulife authorizing them to disclose GIC information to RECA.
- Manulife emailed Mr. Phipps and Ms. MacInnis indicating that he had provided GIC statements to Mr. Phipps on February 10, 2020 and that Mr. Phipps could forward that email to Ms. MacInnis.
- At some point near the end of March 2020, Mr. Phipps provided the statement in relation to the \$25,000 GIC.
- At no time did Mr. Phipps provide a statement or certificate for the \$30,000 GIC. However, Ms. MacInnis was able to obtain information on this issue herself by dealing directly with the financial institution. The information was obtained toward the end of March and it confirmed that the funds were not used for a GIC but instead were used to purchase a bank draft payable to a subsidiary of Mountain Park Real Estate Ltd., and most of those funds were then used to meet the brokerage's payroll obligations.

Management Fee Information:

- The original request for the Management Fee Information was in 2019. In response, Mr. Phipps prepared a spreadsheet setting out total management fees for a portion of the period requested. Ms. MacInnis responded by indicating that she required a breakdown of the fees to verify that they were appropriate, not merely totals.
- Ms. MacInnis requested the Management Information details on January 14 (with deadline of January 21) and March 3 (with deadline of March 31).
- The information was not provided by January 21, but it was shortly after this that Ms. MacInnis shifted her focus to obtaining this information via the GST Returns. As such, although the information was not provided by the deadline, it was not pursued further until March 3.
- At no time has Mr. Phipps ever supplied the Management Fee Information.

### GST Returns:

- Ms. MacInnis contacted Mr. Phipps to request the GST returns on February 6, February 7, February 10, February 13, February 19, and March 3.
- Most of these communications imposed a deadline for provision of the information. However, a few of the above contacts were to provide deadline extensions at Mr. Phipps' request.
- On February 13 Mr. Phipps provided a GST Return summary from Canada Revenue Agency. This met the deadline that was imposed and extended. However, it covered only a portion of the time frame Ms. MacInnis was asking for, and it only provided totals. It did not provide any of the supporting details on the individual management fees that went into the totals. Those details were requested on February 19 and March 3.
- On February 21, Ms. MacInnis interviewed Mountain Park Real Estate's former accountant who indicated that the GST Returns and details were readily accessible and located in a filing cabinet in the Mountain Park office.
- Mr. Phipps did not have any involvement in the GST Returns and appears to have had no knowledge of how they were prepared, what they contained or where they were located. He left this to his accountant, who had resigned from Mountain Park prior to February and by February 6 she had not yet been replaced. Therefore, Mr. Phipps did not have access to his accountant to assist directly with the GST Return request.
- Mr. Phipps eventually supplied the requested GST Returns with details at some point near the end of March 2020. This would have met the deadline imposed by the March 3 demand.

It is important to note that at some point in early February Mr. Phipps' mother was hospitalized with a life-threatening illness. She was released around February 13 and Mr. Phipps was required to live with her in her home to administer care and medication. This meant that he was absent from the office from February 13 until February 24 or 25, and was at least distracted by his mother's hospitalization for perhaps a week prior to February 13. During this time Mr. Phipps candidly admits that his priority was his mother and this caused delays in providing the documents and information requested by Ms. MacInnis. It is for this reason that a February 10 deadline for the GIC's and GST Returns was extended to February 13, and it was the reason that RECA did not take any action on the missed deadlines until February 25.

On February 25, 2020 RECA issued the Administrative Penalty in question. The outstanding information and documents were then requested again on March 3 with a new deadline of March 31.

## **B. PRELIMINARY MATTERS - Adjournment:**

The Notice of Hearing in this matter originally set the Hearing date as August 27, 2020. The Notice of Hearing was served on Mr. Phipps on July 31, which was the Friday afternoon before the long weekend. On August 6 he sent an email to RECA requesting an adjournment because he did not feel there was sufficient time to prepare for the hearing on the 27<sup>th</sup>. The ED refused and Mr. Phipps was compelled to make an adjournment application.

On August 14, 2020 we heard and granted Mr. Phipps' application, with reasons to follow. The reasons are set out below.

At the application Mr. Phipps indicated that he had a trip booked that would take him out of town from August 15 to 25. He also indicated that he needed to consult a lawyer regarding the merits of the Appeal and to obtain advice on how to conduct the Appeal Hearing. He indicated that the few business days he was scheduled to be in town between receipt of the Notice of Hearing and the Hearing itself did not permit him the time necessary to consult the lawyer and prepare for the Hearing.

The ED's position was that Mr. Phipps' reasons and arguments did not justify an adjournment. His counsel pointed to RECA Hearing and Appeal Guidelines that indicate that hearing dates should not be adjourned. The ED's position was that that an adjournment should not be permitted unless a refusal would result in a denial of natural justice or procedural fairness. He further argued that this is a relatively straight-forward matter that should be easy to prepare for and as such there would be no denial of natural justice if we refused to grant the adjournment.

In our view, the ED's position is incorrect. While we agree that ongoing delays are undesirable and should not be lightly permitted without reason, the ED's position would impose severe limitations and strict rules around adjournments, and would generally handcuff a panel's discretion by preventing it from evaluating each case on its own merits. In our view, adjournment requests should be governed by considerations of fairness and practicality and should be dependent on the circumstances of each case.

In this case, given his planned trip out of town, Mr. Phipps would have had 4 business days to retain and consult a lawyer and to prepare for a Hearing that was scheduled for a date he did not have input into. In our view, not only does this justify the adjournment generally, it would be have been a denial of natural justice to refuse to adjourn in these circumstances. Therefore, even by the ED's inappropriately narrow approach, the adjournment was justified in this case.

As a result, in the circumstances of this case, we granted Mr. Phipps' request for adjournment.

## C. MERITS OF APPEAL

### General Comments Regarding Nature of this Appeal:

This is an appeal of an Administrative Penalty imposed by the ED arising from an alleged breach of s.38(4)(a) of the Act. In essence, the Administrative Penalty is based on an allegation that Mr. Phipps failed to cooperate or promptly respond to requests from Ms. MacInnis, an investigator appointed pursuant to the Act. This appeal is pursuant to s.83.1 of the Act.

The relevant portions of the Act are set out below:

#### ***Investigation***

*38(1) The executive director shall,*

*....*

*(b) in a case where no complaint is made but the executive director believes that any conduct of an industry member constitutes or may constitute conduct that is deserving of sanction,*

*commence or appoint a person to commence an investigation into the conduct.*

*(2) The person conducting an investigation may*

*(a) by notice in writing demand that any person produce to the investigator any books, documents, records and other things in that person's possession or under that person's control that are relevant to the investigation,*

*(b) demand that any person answer any questions that are relevant to the investigation,*

*....*

*(4) A person who is required under subsection (2) to answer the questions of a person conducting an investigation*

*(a) shall co-operate with the investigator and promptly respond to the questions, and*

*....*

*(4.1) A person shall not withhold, destroy, conceal or refuse to produce any books, documents, records or other things required for the purpose of an investigation under this section.*

#### ***Appeal of administrative penalty***

*83.1(1) A person to whom a notice to pay an administrative penalty is given under section 83(1) may, within 30 days after receipt of the notice,*

*by notice of appeal in writing to the executive director, appeal the decision to a Hearing panel.*

....

*(3) On receipt of a notice of appeal and security for costs, the executive director shall refer the matter to a Hearing Panel, which shall hold a hearing.*

....

*(5) The Hearing Panel on an appeal may*

*a) quash, vary or confirm the administrative penalty, and*

*b) make an award as to costs of the investigation that resulted in the administrative penalty and of the appeal in an amount determined in accordance with the bylaws.*

*(6) The hearing panel's decision under this section is final.*

#### **Evidence Regarding Breach of s.38:**

While this is Mr. Phipps' appeal, the onus is on the ED to prove that there has been a breach of s.38(4) as alleged. This, in turn, requires the ED to prove the following:

1. An investigator was appointed pursuant to s.38;
2. The investigator demanded Mr. Phipps supply information;
3. The information demanded was relevant to the investigation; and,
4. Mr. Phipps failed to cooperate or to promptly respond to the investigator.

Most of the above are not seriously contested in this case, but for the sake of completeness, we have addressed each below.

#### **1. Investigator:**

Section 38 authorizes the ED to appoint an investigator to investigate any industry member's conduct he believes may constitute conduct deserving of sanction.

The evidence confirms that as a result of a trust account review, the ED became concerned about potential trust account shortfalls, which, if verified, would constitute conduct deserving of sanction. The evidence also confirms that Ms. MacInnis is an investigator employed by RECA and that she was appointed by the ED to investigate this matter.



On this basis, Ms. MacInnis was properly appointed as an investigator and thereby had the authority set out in the Act.

2. Information Demand:

The evidence also confirms that Ms. MacInnis made both formal and informal requests for various information, including certificates or statements regarding the \$25,000 GIC and the \$30,000 GIC, the Management Fee Information, and the GST Returns.

3. Relevance:

In her evidence, Ms. MacInnis explained that the trust accounts showed transfers out for GIC purchases and to pay outstanding management fees allegedly owed to Mr. Phipps' brokerage. The investigation required Ms. MacInnis to verify that these transfers were legitimate and accurate. If they were not, then, minimally, there was a trust account shortage, and at worst, a possible misappropriation of trust funds.

Therefore, the GIC certificates or statements were requested to verify that GIC's were actually purchased with the funds and that they were being held in trust for the clients.

The Management Fee Information was requested to verify that the amount transferred to pay the fees was appropriate and accurate.

The GST Returns were requested when Mr. Phipps indicated that producing the details required by the Management Fee Information request was an onerous and time-consuming task. Ms. MacInnis knew that the management fee details would have to be disclosed in the brokerage's quarterly GST Returns. Therefore, she requested these as an alternative to the Management Fee Information.

In our view, all of the above information clearly meets the relevancy requirement in the legislation and as such they were legitimate requests that required cooperation under s.38.

4. Failure to Cooperate or Promptly Respond:

This is the substance of the dispute between the parties.

The ED alleges Mr. Phipps failed to cooperate or promptly respond because he failed to supply the \$25,000 GIC certificate, the GST Returns and the Management Fee Information until end of March, and he completely failed to supply the certificate or statement for the \$30,000 GIC. He argues that this information was readily accessible to Mr. Phipps and it could have been supplied quickly and with little effort. It was requested repeatedly but was not provided "promptly" as required.

Mr. Phipps, on the other hand, argues that he generally responded to Ms. MacInnis' requests, but each time he supplied information, she asked for more. He also argued that any failure to respond or provide information in the period when his mother was ill (from early February to February 25), ought to be excused because his focus was understandably on his mother rather than on business.

In response to the latter argument, the ED submits that the requirement in the Act to cooperate is absolute and there are no excuses for a failure to comply. While Mr. Phipps' mother's illness was unfortunate, the Act simply does not permit a person to ignore or delay responding to an investigator's requests.

While we agree that the legislation does not expressly set out any exceptions to the duty to cooperate, we reject the notion that the obligation must be viewed in absolute terms without any consideration for surrounding circumstances. The requirement is to "co-operate" and to respond "promptly". These terms are not expressly defined in the legislation. Instead, they must be defined by the surrounding circumstances of each case. As such, it is not possible to set out a specific or absolute time frame by which cooperation or response must occur and that would be applicable to every case. Instead, the exact manner and timeframe by which a person must cooperate must be measured by the surrounding circumstances.

In this case, some of the relevant considerations include the following:

- Urgency and importance of the issue under investigation: In this case, the investigation involved the possibility of missing trust funds. Trust funds belong to clients and as such any possibility of misappropriation or misuse demands an urgent time-sensitive investigation to protect the interests of the clients and public, and to maximize the ability to recover any missing funds.
- Nature, volume and accessibility of the information requested: In this case, certainly the GIC Information and the GST Returns were fairly specific requests and were easily accessible by Mr. Phipps. The Management Fee Information would have been much more difficult to provide due to the fact that it involved numerous different fees, each of which were calculated differently depending on each management agreement.
- The general circumstances of the person under investigation: In this case, Mr. Phipps suffered from at least two issues that created problems for him in responding to all of the requests:
  - The first was that his accountant left the brokerage's employ sometime prior to February 2020. While Mr. Phipps is the person ultimately responsible, the accountant (as opposed to Mr. Phipps

personally) looked after GIC purchases and filing GST Returns, and was likely heavily involved in recording and charging the management fees. Therefore, it is somewhat understandable that Mr. Phipps may have required more time to respond than he would have if the accountant was still employed.

- The second was Mr. Phipps' mother's life-threatening illness. Certainly, it is understandable that his focus would have temporarily been on his mother first for most of February 2020, and this would have understandably caused delays in responding.

With the above in mind, we turn to each of the specific document requests in question.

#### *GIC Certificates:*

The evidence is clear that Ms. MacInnis requested the GIC certificates or statements no less than 10 times between January 10 and March 3. Despite his assurances that he had requested the information from Manulife January 21, it appears that Mr. Phipps did not actually request it until February 7. This was after 4 requests had been made. Moreover, the information was emailed from Manulife to Mr. Phipps on February 10 and could easily have been forwarded to Ms. MacInnis, but despite her specific request to this effect, it was not. Finally, near the end of March (at least 5-6 weeks after the Manulife email attaching the information, and at least 10 weeks after the original request), the information regarding the \$25,000 GIC was provided. The information on the \$30,000 GIC was never provided (likely because it did not exist) and Ms. MacInnis was compelled to approach the bank herself to try to get verification.

While we appreciate that Mr. Phipps would have been distracted by his mother's illness during much of February, this does not excuse the complete failure to make any effort to comply with the request between January 10 and February 7. Moreover, even with his mother's illness, Mr. Phipps was sending some lengthy emails to Ms. MacInnis during this time. Therefore, forwarding Manulife's February 10 email would have been a simple matter and would have provided the information on the \$25,000 GIC.

Mr. Phipps offered no explanation for his complete failure to forward the email or for his delay prior to February 7.

Even with the most generous allowances for his circumstances, the response to the request for the GIC certificates cannot be considered cooperation or a prompt response. Therefore, we have no hesitation in concluding that Mr. Phipps is in breach of his obligations under s.38 in relation to this request.

#### *Management Fee Information:*

The Management Fee Information was initially requested in 2019 and Mr. Phipps responded with a detailed spreadsheet. Unfortunately, the spreadsheet only included totals, whereas Ms. MacInnis required the details underlying the totals. The details were requested on January 14, but Ms. MacInnis then largely abandoned the request in favour of obtaining the GST Returns instead. The request for the Management Fee Information was renewed again on March 3 and was then supplied by the end of month deadline.

While the initial response to the request failed to include the details Ms. MacInnis was looking for, there is no evidence whatsoever to suggest that Mr. Phipps intentionally withheld this information. Instead, the evidence establishes that Mr. Phipps supplied what he thought Ms. MacInnis was looking for, and it was only when she indicated she required the supporting details that Mr. Phipps had any reason to believe his initial response was deficient.

The result is that Mr. Phipps provided a timely response to the initial request with the information he thought was necessary. Once it became apparent that the task was onerous, Ms. MacInnis abandoned pursuit of this information until March 3 at which point it was requested again and Mr. Phipps supplied it by the March 31 deadline. Admittedly, on the surface the delay from the initial request for details in January to the March 31 response appears unreasonable, but it was in compliance with the deadlines Ms. MacInnis imposed. Also, after February 6, Mr. Phipps had no reason to supply the Management Information because Ms. MacInnis shifted her request to the GST Returns rather than the Management Fee Information (until the request was renewed again on March 3).

Therefore, in these circumstances, there is no failure to cooperate or failure to promptly respond to the request for the Management Fee Information. Quite the opposite, it appears that Mr. Phipps responded by the deadlines Ms. MacInnis imposed.

As such, in our view, the ED has not established a breach of the Act in relation to the request for Management Fee Information.

*GST Returns:*

The GST Returns were first requested February 6, and there were a total of 6 requests for this information between February 6 and March 3. On February 13 Mr. Phipps provided the Canada Revenue Agency GST Return summary pages for one of the periods requested. This reply met the deadline Ms. MacInnis imposed. Unfortunately, it showed only summary totals and therefore it did not supply the information required to verify the management fees. That additional detail was the subject of the final requests. It was ultimately

supplied near the end of March, which met the deadline imposed in the March 3 formal demand.

There is no evidence or suggestion that Mr. Phipps intentionally failed to provide the required details when he initially responded on February 13. The evidence demonstrated that he did not file the returns personally and was not that familiar with them. It is not surprising, therefore, that he may have thought he was complying with the request when he provided the Canada Revenue Agency summary information.

The ED argues that Mr. Phipps breached his obligation to cooperate by failing to supply the required information until the end of March. The initial request was February 6 and the request for details was February 13. There were weeks of delay before the information was finally supplied. He further submits that the information would have been readily available and easy to access.

We disagree with the ED's characterization of the evidence. Mr. Phipps complied with the February 13 deadline, but innocently failed to supply the details. He also complied with the end of March deadline that was in the March 3 demand. Therefore, the only real issue of delay relates to the period between February 13 (when details were requested) and March 3. Unfortunately, obtaining the information would have required attendance at the office, and because Mr. Phipps was out of the office caring for his mother between February 13 and 25, obtaining the information was difficult. When he returned to the office the Administrative Penalty was imposed and the fresh demand for the GST Returns was not made until March 3.

While a 12 day delay (February 13 to 25) in supplying information that was available at the office is not desirable, in the circumstances of this case, we are not prepared to conclude that this constitutes a breach of the Act. Mr. Phipps was out of the office for something critical and simply could not get his hands on the information he required to respond. Ms. MacInnis was aware of this. By the time he returned to the office, the Administrative Penalty had been imposed and shortly thereafter he received a new demand with an extended deadline that he met.

As a result, while the delay is not ideal, in the circumstances of this case there is no failure to cooperate and no failure to respond promptly in relation to the request for the GST Returns.

**Conclusion Regarding Breach of s.38:**

As a result, we conclude that Mr. Phipps breached his obligation to cooperate and respond promptly in relation to the request for the GIC certificates, but there is no violation in relation to the requests for the Management Fee Information or the GST Returns.

#### D. SANCTION:

The Administrative Penalty imposed a financial penalty of \$5,000.

By agreement this was not addressed during the Hearing. Instead, we indicated that if we found a breach of s.38(4), we would then invite the parties to make separate written submissions on the appropriate penalty.

Given our finding above, it will now be necessary for the parties to provide submissions on Penalty and we will thereafter issue a separate written decision.

#### E. SUMMARY & NEXT STEPS

Based on the above, we find and direct as follows:

- Mr. Phipps breached his obligations in s.38(4) of the Act by failing to cooperate or respond promptly in relation to the requests for the GIC certificates.
- There is no breach of s.38(4) in relation to the requests for the Management Fee Information or for the GST Returns.
- We will deal with the issue of sanction or penalty via written submission. In this regard, we direct as follows:
  - The ED shall provide his written submission to Mr. Phipps and to the Hearings Administrator by no later than Friday, November 13, 2020.
  - Mr. Phipps shall provide his written submission in response by no later than Friday, November 27, 2020.
  - If either party feels that they cannot comply with the above deadlines, they must so indicate by no later than November 6, 2020, together with reasons why they cannot meet the deadline and a proposed new deadline.

Signed this 30th day of October, 2020.

"Signature"  
\_\_\_\_\_  
[D.H]  
Hearing Panel Chair

