

Cases: 007174, 007763, 007856, 008901, 009223,
009474, 009790, 008338, 0007966, and 008661

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF a Hearing under Part 3 of the *REAL ESTATE ACT*, R.S.A. 2000,
c.R-5 (the "*Real Estate Act*")

AND IN THE MATTER OF a Hearing regarding the conduct of DAVID STEPHEN
KENNEDY, Real Estate Broker, currently unlicensed, formerly licensed with Manor
Management Ltd.

Hearing Panel Members: [J.A], Chair
[A.A]
[J.F]

Appearances: Andrew Bone, Counsel for the Registrar of the Real
Estate Council of Alberta

David Kennedy, self-represented

Hearing Date: July 21, 2022, via video conference

**CORRECTED DECISION ISSUED PURSUANT TO APPLICATION BY THE
PARTIES**

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

INTRODUCTION

1. This hearing involves the conduct of David Stephen Kennedy arising from his conduct from 1995 onward during which time he was licensed as a real estate broker with Manor Management Ltd. ("Manor").
2. The parties did not object to the composition of the Hearing Panel.

3. Mr. Kennedy has been licensed as a real estate broker with the Real Estate Council of Alberta ("RECA") since 1997.
4. Pursuant to section 46(1) of the *Real Estate Act* ("the Act"), the parties submitted an Admission of Conduct Deserving of Sanction to the Hearing Panel ("the Admission"). On May 10, 2022, it was executed by Mr. Kennedy, whose signature was witnessed by Colton T. Smethurst, Student at Law.
5. The Admission includes the following provisions:
 - An acknowledgement that Mr. Kennedy was given the opportunity to seek the advice of a lawyer before signing the Admission;
 - The agreement by Mr. Kennedy that the Admission was given voluntarily;
 - The admission by Mr. Kennedy of the facts and breaches set out in Schedule "A" of the Admission;
 - The admission by Mr. Kennedy that his conduct is deserving of sanction.
6. The parties also provided a Joint Submission on Sanction to the Hearing Panel. It is dated May 10, 2022. The parties jointly propose the following sanctions arising from Mr. Kennedy's conduct:
 - Lifetime cancellation of Mr. Kennedy's Real Estate Broker's Licence, such cancellation commencing immediately;
 - 36 month prohibition for applying for any Real Estate Licence, commencing as at the date of Mr. Kennedy's section 53 suspension (December 13, 2019). At the conclusion of that period, Mr. Kennedy may reapply for a licence, but only at the level of associate.
 - Education
 - i. Mr. Kennedy will be required to successfully complete all education requirements before being eligible to apply for a new authorization from RECA, as though he had never previously received authorization from RECA.
 - Costs

- i. Mr. Kennedy must pay costs in the sum of \$1,500.00 for the investigation and proceedings.

EXHIBITS

7. The following exhibits were entered at the hearing:

Exhibit 1: Notice of Hearing
Exhibit 2: Affidavit of Service of the Notice of Hearing
Exhibit 3: Admission of Conduct Deserving of Sanction dated May 10, 2022
8. Although not formally entered as an exhibit in this hearing, the Hearing Panel accepts the content of the Joint Submission on Sanction ("the Joint Submission") and bases its decision on the exhibits, the parties' oral submissions, and the Joint Submission.
9. The Hearing Panel received the following case law for its consideration:
 - *Jaswal v. Medical Board (Nfld.)*, 1996 CanLII 11630 (NL SCTD)
 - *Adams v. Law Society of Alberta*, 2000 ABCA 240 (CanLII)
 - *Law Society of Upper Canada v. Lambert* 2014 ONLSTH 158 (CanLII)
 - *R. v. Anthony-Cook*, 2016 SCC 43
10. The Hearing Panel received the following decisions of the Hearing Panel for its consideration:
 - *Friesz*, 2011 000033
 - *Liu*, 2013 00572-CM
 - *Cowley*, 2021
11. Hearing Panel received the following RECA Decisions on administrative penalty for its consideration:
 - *Gardner*, 2013 00042
 - *Assef*, 2018 008425
 - *Campbell*, 2020 009659
 - *Helm*, 2012 001600-CM and 000768-CM
 - *McLean*, 2012 000073
 - *Deborah Keatley*, 2013 003358
 - *Oliverio*, 2014 000695

FACTS

12. The agreed breaches of the *Real Estate Act Rules* ("the Rules") and the supporting facts are found in Schedule "A" of the Admission and they are set out below as they appear in the Admission. The names of individual clients have been anonymized:

1. *David Stephen Kennedy (Hereinafter "Mr. Kennedy") and the Registrar agree to the following:*

Agreed Breaches

2. *It is agreed that the below conduct is deserving of sanction for the following breaches:*

a. *Mr. Kennedy engaged in conduct that undermined public confidence in the industry, harmed the integrity of the industry, or brought the industry into disrepute, contrary to s. 42(g) of the Real Estate Act Rules:*

i. *#008338 (TRUST ACCOUNT) In 2018 a TAPR Audit revealed Manor Management Ltd. ("Manor") had a shortage in their trust account of \$118,926.99. This shortage was created by improper withdrawals by Mr. Kennedy and had the potential to cause serious harm to his brokerage clients and to the industry.*

b. *Mr. Kennedy failed to disclose to his clients, at the earliest possible opportunity, any conflict of interest he may have in the course of providing services to, or in his dealings with a client, contrary to section 41(f) of the Real Estate Act Rules.*

i. *#007763 (L) Manor contracted SHEA Floors for flooring in a property under management. Mr. Kennedy had an interest in a property with the owner of SHEA Floors at the time. The client stated she was not aware that Kennedy had business interests with the owner of SHEA Floors, nor was it disclosed to her in writing. SHEA Floors billed the client over \$5,000.*

ii. *#007856 (WESTVIEW) Mr. Kennedy and Manor contracted APM, Mr. Kennedy's own company, to complete certain work for a*

property under management. The clients were not aware of Mr. Kennedy's connection to APM.

- c. Mr. Kennedy failed to provide competent service contrary to section 41(b) of the Real Estate Act Rules.
 - i. #007174, #007763, #007856 (PINE WEST, L, & WESTVIEW) Manor never got authorization from property owners, where required, for various expenses.*
 - ii. #007763 (L) There were no provisions allowing a client agreement to carry on past May 31, 1995, and yet the property management continued until 2017.*
 - iii. #007763 (L) Mr. Kennedy failed to provide all leases and accounting documentation for a property formerly under management to the new property manager.*
 - iv. #007856 (WESTVIEW) A client sent multiple emails to Mr. Kennedy inquiring as to whether he had all copies of leases for a property under management. There was no response by email.*
 - v. #009223 (LAKESHORE DRIVE) Manor advised a client of a legal claim but failed to immediately advise the insurance company of the accident as required in the management agreement.*
 - vi. #009790 (WEST TWO) Between 207 and 2019 Mr. Kennedy and Manor did not provide timely responses to requests by a client in relation to her properties.*
 - vii. #009790 (WEST TWO) After termination Manor was unable to provide approximately 10 leases to the new property manager in relation to a property under management.**
- d. Mr. Kennedy failed to fulfill his fiduciary obligations contrary to section 41(d) of the Real Estate Act Rules.
 - i. E007174 (PINE WEST) Mr. Kennedy's company APM did not pay a security deposit when leasing a property under his management. Every other tenant was required to pay a security deposit.**

- ii. #007174 (PINE WEST) APM did not regularly pay the utility bills when leasing from a property under his management. When the lease was terminated the arrears (sic) were approximately \$4000.
- iii. #007174 (PINE WEST) Mr. Kennedy's company APM did not regularly pay the rent when leasing from a property under his management. When the lease was terminated the arrears (sic) were over \$10,000.
- iv. #007174 (PINE WEST) Manor never prepared a formal lease for APM only an offer to lease.
- v. #007174, #007856 (PINE WEST, WESTVIEW) Mr. Kennedy and Manor contracted APM, his own company, to complete work for several (sic) properties. This was done without getting quotes from competitors to determine the best price.
- vi. #007763 (L) A property under management was not properly maintained by Manor.
- vii. #007763 (L) Manor collected rent from the property under management between January and December 2017 and only remitted a portion to the owner.
- viii. #007856 (WESTVIEW) In and around October 2017 Manor sent eviction notes to multiple tenants at a mobile home site under management without communicating with the client. The County grandfathered the mobile home site, and the client could not replace any tenants once removed. Mr. Kennedy was aware of this.
- ix. #008901 (C) There was damage done to a property under management that may have been mitigated by Manor if dealt with in a more timely fashion.
- x. #009474 (A) Manor did not provide the balance of funds, security deposits and the required financial statement to the new property manager in a timely manner.

- xii. #008338 (TRUST ACCOUNT) In 2018 a TAPR Audit noted Mr. Kennedy was improperly taking funds from Manor's rental trust account for himself, to offset brokerage operating account shortages and fund APM, his maintenance business.

Agreed Facts

3. At all material times Mr. Kennedy was the Broker of Manor.

File #007174 (PINE WEST)

4. [PWMI] ("PWMI") entered into a management agreement with Manor for [ADDRESS] (the "[PWMI] Property") commencing on December 15, 2005 (the "[PWMI Agreement]"). The [PWMI] Agreement could be cancelled with thirty days written notice.
5. NC ("Ms. C") was one of the directors of [PWMI] and noted on the [PWMI] Agreement as the contact person at all materials (sic) times.
6. Under the [PWMI] Agreement approval from Ms. C was required for non-recurring items exceeding \$1000.00. Ms. C was not aware of this term. Mr. Kennedy never contacted her to request authorization for any expenses although many exceeded \$1000.
7. Under the [PWMI] Agreement a management fee of \$625.00 was paid per month to Manor and leasing was the responsibility of a "separate agency". However, at the request of [PWMI], Manor Management did all the leasing over the material period.
8. Alberta Property Maintenance ("APM") entered into an offer to lease with [PWMI] through Manor Management for Unit 6B at the [PWMI] Property, commencing on December 01, 2014.
9. Mr. Kennedy was a Director of APM and held 49% of the voting shares at the material time. The registered office for APM was [ADDRESS]; this was the same address as Manor.
10. APM's offer to lease for \$1300.00 was payable on the first day of each month commencing on December 01, 2014. The lessee, APM was responsible for the utilities. There was no security deposit paid.

11. *Of all the leases at the [PWMI] Property over the material period it was only APM that didn't provide a security deposit.*
12. *Mr. Kennedy signed the offer to lease as the lessee, he also signed for Manor.*
13. *Under the offer to lease, Manor was to deliver APM with a lease upon acceptance. A formal lease was never prepared.*
14. *Ms. C was aware Kennedy had an affiliation with APM. However, she did not receive anything in writing noting this. Mr. Kennedy presented the offer to lease after another tenant left suddenly.*
15. *Mr. Kennedy did not prepare a formal lease agreement for APM.*
16. *Soon after the lease commenced Ms. C began receiving invoices from Direct Energy LP for unpaid utilities on unit 6B of the [PWMI] Property.*
17. *Ms. C provided copies of these invoices to Mr. Kennedy on multiple occasions. Mr. Kennedy assured her they would be paid.*
18. *Upon termination of the lease Unit 6B was in arrears (sic) with Direct Energy LP for \$4,022.75. Direct Energy LP sent the invoices to collections thereby affecting [PWMI]'s credit rating.*
19. *The Manor rental history for unit 6B, show APM was in arrears (sic) on multiple occasions from December 01, 2014, through to March of 2017. The arrears were as high as \$11,914.48 as at July 2015 and upon termination of the lease in March 2017 it was \$10,435.97.*
20. *Ms. C initiated a civil action in the Court of Queen's Bench to recover monies owed.*
21. *A settlement agreement and release were entered into where APM paid [PWMI] \$8500.00 on May 09, 2018.*
22. *Mr. Kennedy and Manor contracted APM, his own company, to complete the snow removal for the [PWMI] Property. This was done without getting quotes from other companies to determine the best price.*

File #00763 (L)

23. KL ("Ms. L") inherited [ADDRESS] and [ADDRESS] (the "L Property") from her father Doctor JL in 2014 in 2014, when he passed away.
24. JL purchased the L property with his company [M LTD]. When JL passed away, Ms. L became a director of that company.
25. A management agreement (the "L Agreement") was entered into between [M LTD] And Manor for the L Property commencing on June 01, 1994 and ending on May 31, 1995.
26. The L Agreement showed:
- a. approval was required for non-recurring items exceeding \$1000.00;
 - b. the Management fee was 3% of the monthly gross receipts;
 - c. leasing was the responsibility of a separate agency.
27. The L Agreement was not reviewed with Ms. L when she became a director, and she was not sure what leasing being the responsibility of a "separate agency" meant in the agreement. Mr. Kennedy was the one leasing the L Property at that time.
28. There were no provisions allowing the L Agreement to carry on past May 31, 1995.
29. There were no further management agreements past 1995 although Manor continued to manage the L Property until Ms. L terminated Manor in writing on October 25, 2017.
- 30. Manor Management Ltd. Contracted SHEA Floors for flooring in the L Property. Mr. Kennedy had an interest in a property with the owner of SHEA Floors at the material time. Ms. L was not aware that Kennedy had business interests with the owner of SHEA Floors, nor was it disclosed to her in writing. SHEA Floors billed Ms. L over \$5,000.***
31. At all material times Manor did not provide Ms. L with quotes for any non-recurring work or services over \$1,000 as required in the management agreement.
32. Ms. L normally received approximately \$16,000.00 in rental income per month for the L Property.

33. Ms. L terminated Manor as of November 01, 2017, after no remittance of rental income since January 2017. A portion of this rent owing was eventually paid to Ms. L.
34. After the termination Manor continued to improperly collect rent, despite repeated efforts and requests by Ms. L to have the rent forward (sic) to her.
35. Ms. L states that Manor Management cashed the rent cheques for November and December 2017. This money was never properly remitted to Ms. L.
36. [ACPM] ("[ACPM]") commenced managing the L Property November 01, 2017.
37. Ms. L, along with [ACPM], inspected the L Property in and around November 2017 and met with the remaining tenants.
38. The L Property was in the following state:
- a. the roof had been leaking;
 - b. bathrooms flooded;
 - c. squatters living in the building; and
 - d. there was a fire hazard in the basement.
39. Mr. Kennedy had assured Ms. L the leaks in the roof were going to be repaired in an email sent to her September 16, 2016. This was never done.
40. Ms. L attended at Manor with [ACPM] in November 2017. At that time Mr. Kennedy failed to provide all leases and accounting documentation for the L Property.
41. In or around late 2017 Ms. L received correspondence from Wagner, Falconer & Judd, Ltd. Attorneys for Honeywell International inc. Honeywell retained their services to assist in collecting an outstanding debt owed for \$30,147.62. Manor had been delinquent in payments to third party contractors, including Honeywell. Ms. L paid to settle the claim in excess of \$16,000.00.

File #007856 (WESTVIEW)

42. [ADDRESS] is a mobile home park known as [W.E] which consists of 49 lots ("[W.E]"). W and R T ("the Ts") purchased [W.E], taking possession on July 20, 2017.

43. *The Ts entered into a management agreement with Manor for [W.E] commencing on July 20, 2017, and thereafter for yearly periods.*
44. *The agreement required approval for non-recurring expenses exceeding \$500.00.*
45. *The Ts terminated the agreement on January 31, 2018.*
46. *The Ts sent multiple emails between August 2017 and December 2017 to Mr. Kennedy inquiring as to whether he had all copies of leases at [W.E]. There was no response to their emails.*
47. *In and around October 2017 Manor sent eviction notes to multiple tenants at [W.E] without first communicating with the Ts. The County grandfathered the mobile home site and the Ts could not replace any tenants once they were removed. Mr. Kennedy was aware of this.*
48. *Mr. Kennedy and Manor contracted APM, his own company, to complete certain work for [W.E]. This was done without obtaining quotes from other companies. Further, the Ts were not aware of Mr. Kennedy's connection to APM.*
49. *At all material times Manor did not provide the Ts with quotes for work over \$500 as required in the management agreement.*

File #008901 ([THE C's])

50. *M and H C ("[THE C]'s") entered into a management agreement with Manor for [ADDRESS] ("the C Property"). The agreement commenced on November 01, 2010 and was set on a year over year basis.*
51. *The Cs received a telephone call from the City [CITY] in January 2018. There was a water problem at the C Property and Manor had not responded to the (sic) City's calls. The Cs asked Manor to deal with the issue. This was not done as soon as possible.*
52. *In April 2018 the Cs received an invoice from the City [CITY] for the C Property in the amount of \$3,810.58. The invoice related to extensive water flooding in the basement.*
53. *This damage may have been somewhat mitigated had it been dealt with by the property manager in a more timely manner.*

54. The Cs terminated the lease with Manor in August 2018.

File #009223 ([L.D])

55. [CONDO] entered into a condominium management agreement with Manor commencing on October 01, 2007, for a period of one year and thereafter for yearly periods (the "5135 Agreement").

56. The municipal address for the condominium [ADDRESS] (the "5135 Condominium"). All 12 units and the common property were included in the 5135 Agreement.

57. Under the 5135 Agreement Manor had certain duties including:

- a. collecting and receiving, in trust, on behalf of the [CITY] Corporation all monthly assessments, levies, contributions and any monies owed;
- b. depositing all monies paid to the 5135 Corporation by the owners for the Corporation's Capital Reserve fund, in a separate trust account registered in the name of the corporation; and
- c. reporting all accidents or claims for damage to the ownership, operation and maintenance of the common property to the insurers.

58. Mr. Kennedy on behalf of Manor signed the 5135 Agreement.

59. The 5135 Condominium submitted their formal cancellation of the 5135 Agreement to Manor on March 29, 2019. Thirty days' notice was given to terminate the contact effective April 30, 2019.

60. Manor advised the 5135 Corporation of a legal claim and provided documentation regarding a slip and fall that occurred in or around March 2014. Manor failed to advise the insurance company of the accident, as required in the 5135 Agreement, until 2016.

File #009474 ([JM and KA])

61. [AB LTD]. Owned by JM and KA entered into a management agreement with Manor commencing November 01, 2013, for a property at [ADDRESS] (the "5110 Property").

62. On May 22, 2019, a termination agreement was signed between [AB LTD] And Manor. Manor agreed to cease managing the 5110 Property immediately and relinquish all keys and modes of access.

63. The termination agreement had a number of stipulations including the following:

- a. Manor shall provide the new property manager all documentation in a timely manner;
- b. Manor shall complete a financial statement for the operation of the 5110 Property for the month of May 2019 and deliver it to the new property manager by June 20, 2019; and
- c. Manor shall deliver all funds, including security deposits held in trust for the 5110 Property to the new property manager.

64. The new management company did not receive the balance of funds, security deposits and the required financial statement from Manor in a timely manner.

File #009790 (WTE LTD)

65. SD is the director of [WTE LTD]. (“[WTE LTD]”) along with her son and daughter.

66. [WTE LTD] owns [ADDRESS], along with two mobile home parks in [ADDRESS] (the “D Properties”).

67. Manor has been managing the D Properties since approximately 1990.

68. Only one management agreement was signed between Manor and [WTE LTD] and that would have been when Manor was first hired.

69. Between 2017 and 2019 Mr. Kennedy and Manor did not provide timely responses to requests by Ms. D in relation to the D Properties.

70. The contract with Manor Management was terminated on September 15, 2019.

71. Manor was unable to provide approximately 10 leases to the new property manager. These leases were either misplaced or not prepared.

File #008338 (TRUST ACCOUNT)

72. Complaints on file #007966 and #008661 led to concerns regarding Manor's trust accounting practices. These files were the basis of a practice review which led to File 008338.
73. On May 14 to 17 of 2018, Trust Assurance and Practice Review audited trust accounts belonging to Manor (the "TAPR Audit").
74. The TAPR Audit revealed that in May 2018 the fund shortage in Manor's rental trust account was \$118,926.99. This amount included \$50,100.94 in improper personal loans, \$35,000.00 to cover brokerage operating costs and \$33,826.05 worth of funds borrowed by APM. As stated above Mr. Kennedy had an ownership stake in APM.
75. The trust shortfall was funded by Mr. Kennedy on or around June of 2018. No clients suffered a loss as a result of the shortage.

Suspension

76. On December 13, 2019, RECA suspended the real estate licence of Mr. Kennedy pursuant to section 53 of the Real Estate Act.

Sale of Manor

77. Manor's book of business was sold to Red Key Realty and Property Management in or around September 2020.

CONDUCT DESERVING OF SANCTION: ISSUE AND FINDING

13. Sections 46 and 47 of the Act provide as follows:

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

(2) A statement of admission of conduct may not be acted on unless it is in a form acceptable to the Board and meets any additional requirements set out in the bylaws.

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

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

14. The Hearing Panel has considered the Admission and pursuant to subsection 47(1), deems the Admission to be a finding of the Hearing Panel. The Admission discloses conduct that is deserving of sanction.

SANCTION AND COSTS: ISSUE AND FINDINGS

15. Section 43 of the *Real Estate Act* gives a Hearing Panel the discretionary authority to order a sanction where an industry member's conduct has been found to be deserving of sanction. It provides that:

43(1) If a Hearing Panel finds that the conduct of a licensee was conduct deserving of sanction, the Hearing Panel may make any one or more of the following orders:

- (a) an order cancelling or suspending any authorization issued to the licensee by an Industry Council;*
- (b) an order reprimanding the licensee;*
- (c) an order imposing any conditions or restrictions on the licensee and on that licensee's carrying on of the business of a licensee that the Hearing Panel, in its discretion, determines appropriate;*
- (d) an order requiring the licensee to pay to the Council a fine, not exceeding*
\$25 000, for each finding of conduct deserving of sanction;
- (d.1) an order prohibiting the licensee from applying for a new licence for a specified period of time or until one or more conditions are fulfilled by the licensee;*
- (e) any other order agreed to by the parties.*

16. The Hearing Panel has reviewed the Joint Submission on Sanction and the conduct of Mr. Kennedy in the context of the authorities provided by the parties and the proposed sanction.
17. The decision in *Jaswal v. Newfoundland (Medical Board)*, 1996 CanLII 11630 (NL SCTD) sets out factors to be considered when weighing sanctions in a disciplinary matter. The Hearing Panel's consideration of the relevant factors is set out below, with other relevant considerations:

- a. Age and experience of the industry member

Mr. Kennedy is currently 56 years old and he was first licensed as a real estate professional in 1997. He has been a licenced a real estate broker for 18 years.

Given these facts, the Hearing Panel accepts that he ought to have known that his conduct breached the Rules. These are aggravating factors when considering sanction.

- b. The previous character of the industry member

Mr. Kennedy has a disciplinary history with RECA. From 2015 through 2017 he received five administrative penalties:

- i. March 18, 2015, a \$1,500 penalty for failure to submit a timely report on the operation of Manor's trust accounts in breach of section 91(4) of the Rules;
- ii. December 2, 2016, a \$1,500 penalty for failure to submit a timely report on the operation of Manor's trust accounts in breach of section 91(4) of the Rules;
- iii. July 31, 2017, a \$1,500 penalty for failure to cooperate fully in providing information requested by an investigator carrying out their duties under the *Act*, in breach of section 41(h) of the Rules;
- iv. November 22, 2017, a \$1,500 penalty for failure to submit a timely report on the operation of Manor's trust accounts in breach of section 91(4) of the Rules;
- v. November 22, 2017, a \$1,500 penalty for failure to ensure the business of Manor was carried out competently and in

accordance with the Act, Regulations, Rules and Bylaws, in breach of section 51(1)(d) of the Rules.

The Hearing Panel considers this to be a significant disciplinary history that is relevant to the previous character of Mr. Kennedy. It is an aggravating factor when considering the discipline to be imposed.

- c. The number of times the offences were proven to have occurred

As described in the *Admission*, Mr. Kennedy admitted to 21 breaches that are described in the 10 files before the Hearing Panel.

The Hearing Panel considers the number of offences to be an aggravating factor.

- d. The nature and gravity of the proven allegations

Mr. Kennedy failed to act competently, failed in his fiduciary obligations, failed to disclose conflicts of interest, and engaged in conduct that undermined public confidence in the industry.

The Hearing Panel views the nature and gravity of the admitted breaches of the Rules to be severe and consider this as an aggravating factor.

- e. The need to maintain the public's confidence in the integrity of the profession

Industry members must practice in strict compliance with the Act and Rules to maintain the integrity of the industry. A licensee places the public's confidence at risk when, as admitted, he does not act competently, fails in his fiduciary duties, fails to disclose conflicts of interest, and engages in conduct that undermines the public confidence.

In *Adams*, (above), the Alberta Court of Appeal noted that public confidence in a profession should be of utmost importance to disciplinary bodies. At para. 6, it held:

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

public dimension is of critical significance to the mandate of professional disciplinary bodies.

In *Lambert*, (above), a hearing panel for the Law Society of Upper Canada added that a profession's most valuable asset is its collective reputation and this must be considered in determining an appropriate sanction. The panel relied on previous case law in holding that a profession's most valuable asset is its collective reputation. At para. 17, it held:

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

The Hearing Panel has determined that Mr. Kennedy's breaches of the Rules impact the collective reputation of Alberta's real estate industry and the public confidence that this reputation should inspire. This is an aggravating factor.

- f. The role of the industry member in acknowledging what occurred

The Hearing Panel acknowledges that Mr. Kennedy admitted his conduct. This is a mitigating factor.

- g. The impact of the incident on the complainants

According to the *Admission*, many of the complainants suffered financial losses due to Mr. Kennedy's conduct. This is an aggravating factor.

- h. The need to promote specific and general deterrence and thereby protect the public and ensure the safe and proper conduct of the profession

The Hearing Panel accepts that due to the number and breadth of the offences, the need for specific deterrence is a factor to be considered. The nature of the offences weighs significantly on the Hearing Panel's determination that the circumstances and outcome of this matter should provide strong, general deterrence from conduct of this nature.

- i. The presence or absence of any mitigating circumstances

The Hearing Panel accepts that Mr. Kennedy's willing agreement to the *Admission* saved the considerable time and expense of a full hearing on the merits. It also saved witnesses the inconvenience and stress of appearing before the Hearing Panel to give evidence.

The Hearing Panel considers this to be a mitigating factor.

- j. The range of sentence in other similar cases.

Following is a summary of similar cases presented in the Joint Submission on Sanction. They result both from hearings and administrative penalties.

Breach of section 41(b) of the Rules

Section 41(b) provides that licensees must act honestly.

- i. In the *Freisz* matter (above), a Hearing Panel found Mr. Freisz breached section 41(b) of the Rules by failing to confirm his client's authority over the subject property and failing to provide an expiry date for the listing contract. There was no financial harm or prior disciplinary history. A fine of \$4,500 was imposed.
- ii. In *Gardner* (above), an administrative penalty of \$1,500 was imposed for failure to put a condition date or any expiry date on a counter offer. There was no financial harm or prior disciplinary history.
- iii. In *Assef* (above), an administrative penalty of \$1,500 was imposed for releasing keys to a buyer without authority. There was no financial harm or prior disciplinary history.
- iv. In *Campbell* (above), an administrative penalty of \$1,500 was imposed for failure to provide competent service in the accurate measurement of a property. Ms. Campbell subsequently took education and adjusted her practice. There was no financial harm or prior disciplinary history.

Mr. Kennedy admitted to seven breaches of section 41(b) of the Rules.

In the *Freisz* matter, there were two breaches of the rules, and the *Gardner*, *Assef* and *Campbell* matters each represented one breach. The Hearing Panel considers that the conduct described in each of these matters is of a significantly lower magnitude and number than the conduct of Mr. Kennedy.

Breach of section 41(d) of the Rules

Section 41(d) provides that licensees must fulfill their fiduciary obligations to their clients.

- i. In *Helm* (above), on multiple occasions over an extended period of time, Mr. Helm was found to have misused client's trust money to fund shortages in brokerage accounts. For the breach of this section of the Rules, the Hearing Panel issued a fine of \$15,000, a suspension of 30 months, and a requirement to complete an education before returning to the industry.
- ii. In *McLean*, an administrative penalty of \$5,000 was issued for failure to fulfill fiduciary duties by failing to ensure a deposit was collected in accordance with the terms of a purchase contract.
- iii. In *Keatley* (above) an administrative penalty of \$5,000.00 was imposed for arbitrarily rejecting the buyers' request for an extension regarding the financing condition without consulting the seller who was the client.

Mr. Kennedy admitted to 11 separate breaches of section 41(d) of the Rules. There is no precedent for a penalty in a case with this number of breaches of the section.

While the breaches occurred over a shorter period than in the *Helm* matter, in the context of Mr. Kennedy's additional, non-trust violations of this section, the Hearing Panel accepts that they are cumulatively more serious. This is not a merely a question of the number of breaches, but also their seriousness and consequences. The *McLean* and *Keatley* matters are relevant, but the Hearing Panel notes that they were cases of single breaches in comparison with the number of breaches of the present case.

Breach of section 41(f) of the Rules

Section 41(f) provides that licensees must disclose any conflict of interest to a client.

- i. In *Oliverio* (above), an administrative penalty of \$1,500 was issued when a mortgage broker provided bridge financing to

his client without disclosing that the loan came from his personal company.

- ii. In *Liu* (above), the Hearing Panel imposed a fine of \$3,500 and required education to be undertaken when Mr. Liu verbally agreed to represent a client on the sale of a property. He then presented the client with an offer to buy the property on his own behalf without disclosing the conflict of interest in the offer.

The Hearing Panel accepts that the present case is similar to the *Oliverio* case where the client had no knowledge of the conflict of interest.

Mr. Kennedy failed to disclose his conflict of interest with APM on two occasions. In both *Oliverio* and *Liu*, only one breach was found.

Breach of section 41(g) of the Rules

Rule 41(g) provides that licensees must practice in strict accordance with the Act, Regulations, Rules, and bylaws, as well as the governing law.

- i. In *Helm* (above), on multiple occasions over an extended period of time, Mr. Helm was found to have misused client's trust money to fund shortages in brokerage accounts. For the breach of this section of the Rules, the Hearing Panel issued a fine of \$15,000, a suspension of 30 months, and a requirement to complete an education before returning to the industry.

In the Joint Submission on Sanction, the parties noted that Mr. Kennedy's trust deficiency was slightly less than Mr. Helm's and that it occurred over a shorter period of time.

18. In the Joint Submission on Sanction, the parties presented one additional authority for the consideration of the Hearing Panel when determining the appropriate penalty.

19. In *Cowley* (above), the Hearing Panel noted the following at page 13:

The Panel considers real estate brokers to hold positions of responsibility that affect everyone associated with their brokerages, from associates to staff members to members of the public. Mr. Cowley failed in the most basic and

fundamental of his duties as a broker. His breaches were serious and had the potential to severely compromise many individuals and members of the public.

Mr. Cowley received a lifetime prohibition to hold a broker licence and a one year cancellation of his ability to hold any other licence.

20. The parties submitted that in the present case, Mr. Kennedy cooperated, admitted the breaches, and accepted a longer period of prohibition from holding a licence. In this context, they submitted that fines were not an appropriate penalty.

21. The Hearing Panel has reviewed the authorities presented concerning the penalty to be imposed. The parties relied on the decision of the Supreme Court of Canada in the case of *R. v. Anthony-Cook* to support the principle that the Hearing Panel should not depart from the agreement reached by the parties except in circumstances where it would bring the administration of justice into disrepute or be contrary to the public interest.

22. Addressing the question whether to accept or reject a joint submission, Moldaver, J. stated in the *Anthony-Cook* decision at paragraph 34:

Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down.

23. *Bradley v. Ontario College of Teachers*, 2021 ONSC 2303 (CanLII), cited in oral argument by the Registrar's counsel, is relevant to the Hearing Panel's deliberations. The Court in *Bradley* held that the principles enunciated in the *Anthony-Cook* decision apply equally in the context of a disciplinary proceeding such as the matter before this Hearing Panel.

24. The Hearing Panel has determined that the proposed sanctions are reasonable in the circumstances described in the Admission and in view of the aggravating and mitigating factors. In making this finding, the Hearing Panel accepts that the lifetime cancellation of Mr. Kennedy's real estate broker's licence is a substantial penalty. The further prohibition of 36 months before applying for any real estate licence is a significant penalty. Given the seriousness, number, depth, and breadth of the admitted breaches, the proposed requirement for education is an essential component of the sanction.

25. The Hearing Panel concludes that the sanctions do not bring the administration of justice into disrepute and they are not contrary to the public interest. When considered together with the agreement on costs, they sufficiently underscore the gravity of Mr. Kennedy's conduct.

26. As such, the Hearing Panel accepts the Joint Submission on Sanction and finds no basis to intervene, require any further explanation or substantiation of the sanctions proposed by the parties.

CONCLUSION AND ORDER

27. Pursuant to section 43 of the *Real Estate Act* and for the reasons above, the Hearing Panel finds that Mr. Kennedy engaged in conduct deserving of sanction as he breached sections 41(b), 41(d), 41(f), and 42(g) of the Rules.

28. In consequence of those breaches, the Hearing Panel orders the following sanctions against Mr. Kennedy:

- a) Lifetime cancellation of Mr. Kennedy's Real Estate Broker's Licence, such cancellation commencing immediately;
- b) 36 month prohibition for applying for any Real Estate Licence, commencing as at the date of Mr. Kennedy's section 53 suspension (December 13, 2019). At the conclusion of that period, Mr. Kennedy may reapply for a licence, but only at the level of associate.
- c) Education
 - i) Mr. Kennedy will be required to successfully complete all education requirements before being eligible to apply for a new authorization from RECA, as though he had never previously received authorization from RECA.
- d) Costs
 - i) Mr. Kennedy must pay costs in the sum of \$1,500.00 for the investigation and proceedings.

Dated the 1st day of September 2022, in the City of Edmonton, in the Province Alberta.

"Signature"

[J.A] Hearing Panel Chair