

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

AND IN THE MATTER OF a hearing regarding the conduct of

ANTHONY PHILLIP SCHUMACHER
Real Estate Associate
Registration: Lampas Holdings Ltd. O/A Re/Max River City

Hearing Panel Members: [G.F], Hearing Panel Chair
[G.P]
[B.W]

Hearing Date: May 29, 2023

Decision Date: June 29, 2023 (Issued July 5, 2023)

Submissions: Gregory Sim
Legal Counsel for the Registrar, Real Estate Council of
Alberta

Anthony Phillip Schumacher
Self-Represented Licensee

Hearing Panel Decision
Conduct Deserving of Sanction (Phase I)

Background

On November 4, 2022, a Notice of Hearing (Exhibit 3) was issued by the Registrar to Anthony Phillip Schumacher, (the "Licensee"). The Notice of Hearing directed the Licensee to attend a hearing on December 15, 2022. The Notice of Hearing stated that:

- 1) On July 13, 2021, a complaint naming the Licensee, was received by the Registrar; and investigated under file #011888. The Registrar determined that a breach had not occurred and the complaint was refused pursuant to Section 38.1 of the Real Estate Act (the "Act").
- 2) On September 1, 2021, the Complainants filed an appeal of the Registrar's decision pursuant to Section 40(1) of the Act.

- 3) On April 22, 2022, a hearing of the complainant appeal was conducted pursuant to Section 40(2) of the Act.

On May 15, 2022, the hearing panel acting pursuant to its jurisdiction under Section 40 of the Act ("the Section 40 Hearing Panel"), decided that:

- a) the record before it could support a finding of conduct deserving of sanction, and
- b) It was not plain and obvious to the Section 40 Hearing Panel that the Licensee's fiduciary obligations to his client could, or did, override his other obligations to act honestly and avoid misleading other parties.

The RECA Section 40 Hearing Panel directed that the complaint should be considered by a hearing panel.

The May 15, 2022, Section 40 Hearing Panel decision (Exhibit 1 – Item 1) included particulars of the complaint. The Complainants alleged that:

- a) The Licensee failed to act honestly and did not provide competent service in breach of sections 41(a) and 41(b) of the RECA Rules;
- b) The Licensee misled the Complainants and their agent when he did not disclose that the competing offer on the home that they offered to purchase had been withdrawn, in breach of section 42(a) of the RECA Rules; and
- c) The Licensee's conduct undermines public confidence in the industry and brings it into disrepute, in breach of section 42(g) of the RECA Rules.

On July 13, 2022, the Registrar began a full investigation into the complaint. The investigation concluded on September 15, 2022.

On November 21, 2022, the Licensee was served with the Notice of Hearing, as stated in the Affidavit of Service (Exhibit 4).

On November 28, 2022, the Registrar's Professional Conduct Proceedings Manager informed the hearing panel administrator that the Registrar will not make an application nor appear before this hearing panel, because the Registrar is not a party to the hearing under the Act.

On December 15, 2022, this hearing panel convened to hear the complaint; and on that date, the Licensee was the only party to appear. The Registrar did not appear to present the case. The Licensee requested dismissal of the complaint. This hearing panel adjourned the hearing to consider who is a proper party to the hearing. Given the public interest aspect of RECA hearings, this panel deferred its decision regarding the Licensee's request for dismissal.

On December 15, 2022, this hearing panel issued a Direction and Notice to the following interested persons: the Registrar, the Board of the Real Estate Council of

Alberta, the Licensee and the Complainants. The Direction and Notice invited the interested persons to provide written submissions regarding:

- a) Whether the Registrar is a party in these proceedings under the relevant legislation, by-laws, regulations, policies and guidelines;
- b) Whether, after conducting an investigation and issuing the Notice of Hearing in this matter, the Registrar can withdraw its authority to present the case without leave from the hearing panel seized of this matter; and
- c) Who is designated under the relevant legislation, by-laws, regulations, policies and guidelines to present the case in this matter and give effect to the decision of the Section 40 Hearing Panel; that is, how does the legislation contemplate the case be presented to the hearing panel?

On December 21, 2022, the Registrar's Professional Conduct Proceedings Manager and Counsel for the Registrar, issued a written response to this hearing panel's December 15, 2022 Direction and Notice. The Licensee did not issue a response. The Registrar's position was that:

- a) the issue is incorrectly framed. The correct issue is whether the Registrar is responsible for appointing a case presenter for the hearing;
- b) the Registrar is not a party to any hearing, because s.42 of the Act does not identify the Registrar as a party. The Registrar as a party is a procedural fiction, established in the Hearing and Appeal Practice and Procedure Guidelines to conduct hearings in an adversarial manner as opposed to an inquiry;
- c) the Act does not require that the hearing be adversarial; and
- d) the Act does not require that evidence be presented by, or on behalf of, the Registrar.

On January 30, 2023, this hearing panel issued its decision that:

- a) The Registrar is a party to the hearing of this complaint;
- b) The Registrar has a statutory duty to fulfil its obligations under the Act; which may include appointing external legal counsel to advance the case;
- c) The hearing of this matter will continue at 9:30 a.m. on Monday, May 29, 2023. The parties to appear at the hearing are the Registrar and the Licensee; and
- d) This hearing panel has jurisdiction to hear the complaint in this matter.

On May 29, 2023, the Registrar and the Licensee appeared before this hearing panel. The parties submitted, and the panel accepted, an Agreed Exhibit Book and an Agreed Statements of Facts, entered as Exhibits 1 and 2, respectively.

Agreed Facts

In accordance with the Agreed Statement of Facts, the hearing panel finds that:

- a) In April, 2021, the Complainants, [J.H & M.J.H] (the "Complainants") engaged real estate licensee [J.E] ("[J.E]"), to represent them as Buyer's agent, in their search for a residential home;
- b) On April 29, 2021, the Licensee was the exclusive selling agent of property located at [ADDRESS 1], owned by [S.S & M.S] ("Sellers"); and as of April 29, 2021, the Sellers home was listed for \$314,900 pursuant to an Exclusive Seller Representation Agreement dated March 26, 2021, and an Exclusive Seller Representation Amendment Agreement dated April 18, 2021. (Exhibit 1 – Item 4).
- c) On April 29, 2021, at 9:24 p.m., the Licensee received an offer from real estate licensee [T.R] ("[T.R]"), that was not time limited, on the Sellers home, in the sum of \$290,000, on behalf of Buyer [B.H].
- d) On May 1, 2021, at 9:38 p.m., the Licensee received an offer from [J.E], on the Sellers home for \$295,000, on behalf of the Complainants.
- e) On May 2, 2021, the Licensee disclosed to each of [J.E] and [T.R], that another offer had been received for the Seller's home. [J.E] inquired as to the identity of the other real estate licensee and was informed by the Licensee that the other real estate licensee was [T.R].
- f) On May 2, 2021 at 2:39 p.m. the Licensee received an increased offer from [J.E], on the Sellers home, for \$320,000. [J.E]'s email conveying the \$320,000 offer acknowledged that the Buyers were aware they were "in a multiple offer situation".
- g) On May 2, 2021 at 2:50 p.m., the Licensee acknowledged by email, [J.E]'s \$320,000 offer.
- h) The Sellers instructed the Licensee to accept the \$320,000 offer from [J.E]'s clients, the Complainants, even though [T.R]'s clients had yet to make another offer. The Licensee acted on the Sellers instructions, and sent a text to [J.E], accepting the \$320,000 offer. The exact date and time of this text is not known. The Licensee's evidence was that he tried, but could not, produce this text.
- i) On May 2, 2021 at 3:37 p.m., [T.R] provided the Licensee with email notice that her clients were withdrawing their \$290,000 offer, and would not "partake in the multiple offer". This withdrawal was confirmed by text from [T.R] at 3:39 p.m., on May 2, 2021.
- j) The Licensee did not inform [J.E] that [T.R]'s offer was withdrawn, and that there were no longer multiple offers.

- k) On May 2, 2021 at 3:43 p.m., the Licensee orally confirmed with [J.E] that the Complainants' \$320,000 offer was accepted, and the Sellers would sign the Real Estate Purchase contract as soon as possible.
- l) On May 2, 2021 at 3:56 p.m., the Licensee confirmed by text receipt of [T.R]'s email withdrawing the [B.H] offer (Exhibit 8).
- m) On May 3, 2021 at 9:59 a.m., the Licensee emailed the signed Real Estate purchase Contract to [J.E].
- n) The purchase was completed by the Complainants.
- o) On June 15, 2021 [T.R] contacted [J.E] and after obtaining [B.H]'s authorization, informed [J.E] that [B.H] had withdrawn her offer at 3:37 pm by email, and at 3:39 p.m. by text, on May 2, 2021.
- p) On June 15, 2021, [J.E] informed the Complainants of [B.H]'s withdrawal.
- q) On July 13, 2021, the Complainants made their complaint to RECA (Exhibit 1 – Items 2 and 3). RECA discontinued its investigation on the basis that the Licensee was not obligated to disclose that the competing offer had been withdrawn. The Complainants appealed RECA's decision to discontinue the investigation.
- r) On May 15, 2022, the RECA hearing panel acted pursuant to section 40(1) of the *Act*, to find that there was sufficient evidence of conduct deserving of sanction to warrant this hearing.
- s) On October 13, 2022, the Seller, [M.S], provided the Licensee with a written statement confirming the Sellers instructions to the Licensee (Exhibit 1- Item 23). After [M.S]'s statement was issued, each of the Sellers passed away, on dates not stated in the Agreed Statement of Facts.

Although not stated in the Agreed Statement of Facts, the Complainant's May 2, 2021 Residential Purchase Contract Offer was subject to financing and property inspection conditions that were to be waived or satisfied, on or before 9 p.m. on May 14, 2021, see Agreed Exhibit Book (Exhibit 1, Item 15).

Issues

I. Procedural Fairness

Whether this hearing panel has jurisdiction to hear this complaint, in light of the *Act* s.41(2) that requires a hearing must be convened within 60 days of a s.40 hearing panel's directive referring a complaint to a hearing panel.

II. Jurisdiction

Whether this hearing panel has jurisdiction to consider this complaint, in relation to the requirements of the Realtors Association of Edmonton Rules & Regulations.

III. Merits of the Complaint – Alleged Breaches of the Act

If this panel has jurisdiction to hear this complaint, did the Licensee:

- a) fail to act honestly in breach of section 41(a) and 41(b) of the RECA Rules;
- b) fail to provide competent service in breach of section 41(b) of the RECA Rules;
- c) mislead the Complainants and their agent when he did not disclose that the competing offer on the home that they offered to purchase had been withdrawn, in breach of section 42(a) of the RECA Rules;
- d) engage in conduct that undermines public confidence in the industry and brings it into disrepute, in breach of section 42(g) of the RECA Rules.

I. Procedural Fairness

In raising the issue of procedural fairness, the Registrar relied upon the Act, s.41(2) that states:

A hearing under subsection (1) must be commenced within 60 days after the date on which the matter is referred to the Hearing Panel or the Hearing Panel makes its decision under section 40, or within any other period prescribed by the Board.

Section 41(1) states that:

A hearing Panel shall hold a hearing

- a) on referral of a matter to it under section 39(1)(b) or 83.1(3);
- b) on deciding under section 40(2) that a hearing should be held;
- c) on referral of a matter to it under section 40.1.

Section 39(1)(b) permits the Registrar to complete its investigation and determine there is sufficient evidence of conduct deserving of sanction to refer the matter to a hearing panel. This section is not relevant because the matter was referred to this hearing panel, by the Section 40 Hearing Panel, not the Registrar.

Section 83.1(3) permits the Board to refer an appeal to a hearing panel. This section is not relevant because this hearing is not an appeal.

Section 40(2)(b) authorizes the conduct of a hearing, if a hearing panel determines there is sufficient evidence of conduct deserving of sanction to warrant a hearing by the hearing panel. This section applies to the issue of procedural fairness, before this hearing panel.

Section 40.1 permits the Board to refer an appeal to a hearing panel, when a licensee is suspended and appeals that decision. This section is not relevant because this hearing is not an appeal.

In this case, there are at least two ways to interpret s.41(2), to authorize the convening of this hearing outside the 60 day time frame. One interpretation is that the Registrar could obtain, on a case by case basis, the Board's permission to convene a hearing beyond the 60 day time frame. Another interpretation is that the Registrar can act upon its implied authority under the Procedural Rules and Guidelines to convene the hearing beyond the 60 day time frame. Either way, this hearing panel does not find it necessary to determine which interpretation applies, or was relied upon by the Registrar, because this hearing panel finds that:

- i) the argument regarding exceeding the 60 day time frame was brought forward far too late in the hearing process;
- ii) the 60 day time requirement is not a jurisdictional issue; it is an issue of procedural fairness. The convening of this hearing after July 15, 2022 is not a jurisdictional issue that ousts this panel's authority to determine the merits of the complaint; and
- iii) procedural fairness was not compromised. Due to the Licensee's credibility as a witness, there was no procedural unfairness to either party, and in particular, no procedural unfairness to the Licensee, in not being able to call his clients as witnesses at this hearing.

The Section 40 Hearing Panel issued its decision on May 15, 2022. A plain reading of s. 41(1)(c) requires the hearing of the complaint within 60 days of the May 15, 2022 s.40 hearing panel decision i.e. on or before July 15, 2022; that did not occur in this case. Instead, the Registrar continued its investigation and on November 4, 2022, the Registrar issued a Notice of hearing convening this hearing panel on December 15, 2022.

The Notice of Hearing states at paragraph 4 that on May 15, 2022, the Panel rendered a decision that the complaint should be referred to another hearing panel pursuant to Section 40(2) of the Act. However, it also states at paragraph 5 that "...the Registrar began a full investigation of the complaint. That investigation concluded September 15, 2022."

The Registrar's position was that due to the passage of time in this case, it is procedurally unfair to the Licensee to convene the hearing after July 15, 2022; and as

a result of that unfairness, combined with the language of s.41(2), this hearing panel does not have jurisdiction to hear the complaint. The Registrar submitted that because the Licensee's witnesses (his clients, the Sellers) passed away before this hearing was convened, the Licensee is unable to call evidence to corroborate the instructions given by the Sellers to the Licensee, and that is procedurally unfair.

According to the *Act*, s.41(2), there are two options with respect to the timing of convening the hearing. The hearing must be convened:

- a) within 60 days of the Section 40 Hearing Panel's directive (in this case the required date was on or before July 15, 2022); or
- b) within any other period prescribed by the Board.

One interpretation of "any other period prescribed by the Board" could be that because the Guidelines, which are prescribed by the Board, permit the Registrar to take certain procedural steps after the Section 40 Hearing Panel's decision, including conducting an investigation, the Registrar was acting within the period prescribed by the Board, to convene this hearing panel after July 15, 2022.

Or, a plain reading of s.41(2) could require the Registrar make an application to the Board, on a case-by-case basis, to obtain the Board's authorization to convene a hearing outside the 60 day window established by s.41(2). This interpretation protects the interests of all parties, and the public, to have the benefit and predictability of a timely hearing. However, the "plain reading" interpretation could have significant administrative consequences for RECA to balance its investigative responsibilities with its resources. A literal interpretation of s.41(2) could place a burden on the real estate profession that was not contemplated by the legislature.

This hearing panel prefers to interpret the s.41(2) issue of the timing of this hearing being convened, as one of procedural fairness, rather than jurisdiction; as occurs when a trier of fact is faced with a limitation argument. In such cases, the trier of fact's jurisdiction is not ousted; instead, the party relying on the other side's failure to comply with a deadline, gains a defence that is based upon the legislature's intent that it is procedurally unfair to litigate matters after a prescribed period of time. In that context, this hearing panel prefers to consider the procedural fairness impact upon the parties, of the Registrar issuing the Notice of Hearing to convene this panel on December 15, 2022, rather than on July 15, 2022. This interpretation is consistent with the interpretation suggested by the Registrar, in its arguments; and as adopted by the Licensee.

This hearing panel was originally scheduled to convene, and did convene, on December 15, 2022, 91 days after the Registrar completed its investigation on September 15, 2022. This hearing panel finds it inconsistent that the Registrar, who largely controls the timing of proceedings, and who opted to conduct an investigation

after this hearing was directed by the s.40 panel, and who issued the Notice of Hearing with a December 15, 2022 hearing date, and who refused to appear as a party to present the case against the Licensee on December 15, 2022, now asserts on June 29 2023, that the hearing process has been unfair, or that the Licensee was prejudiced, because the Registrar failed to issue a Notice of Hearing convening this panel on or before July 15, 2022.

There was a delay in proceeding with the hearing on December 15, 2022; that delay was a direct result of the Registrar's refusal to appear as a party on that date. Almost six months later, the Registrar relies upon the 60 day time limit to oust this panel's jurisdiction and thwart the hearing of this complaint. In essence, the Registrar would indirectly achieve the outcome that caused the Complainant to appeal and the Section 40 Hearing Panel to order this hearing.

On June 29, 2023, the Licensee adopted the Registrar's s.41(2) arguments. On December 15, 2022, when this hearing was convened, the Licensee had the opportunity, but did not raise, any objection or concern regarding the s.41(2) time line. This panel finds that due to the passage of time, the Licensee is precluded from relying upon this argument, at this stage of the hearing process.

The Registrar raised the issue of prejudice caused to the Licensee, because the Licensee was unable to call his clients as witnesses, at this hearing. Evidence was given by the Licensee that each of his clients passed away. No evidence was given, nor do the Agreed Statement of Facts establish, the specific date that either of the Licensee's clients passed away. Based on the statement written by the Licensee's client, Mr. Sommers was alive until at least October 13, 2022.

This hearing panel accepts that the Licensee's clients passed away before the Licensee had an opportunity to call either of his clients as a witness at this hearing. On June 29, 2023, when this hearing proceeded with the Registrar appearing as a party, this hearing panel had the benefit of an Agreed Statement of Facts, the Licensee's testimony and a written statement issued by the Licensee's client.

The panel accepts the Agreed Statement of Facts, finds the Licensee is sincere, reliable and credible. The hearing panel accepts his client's written statement. This hearing panel does not require corroboration of the Licensee's testimony, or of the contents of the client's written statement, to accept the facts as Agreed, or to accept the Licensee's evidence on points that are material and relevant to the decision on the merits of the complaint i.e. his client's instructions were to not disclose the fact that the competing offer was withdrawn. The passing of the Licensee's clients, does not prejudice the Licensee in terms of the evidence he was able to present to this panel.

II. Jurisdiction

The Licensee is governed by the *Real Estate Act Rules*, Part 2, Industry Standards of Practice, (the "RECA Rules"). During the hearing, the parties acknowledged that the Licensee is also governed by the Realtors Association of Edmonton Rules & Regulations, January 3, 2018 (the "Edmonton Rules"). This fact is not in dispute. Both parties, and particularly the Licensee made submissions regarding difficulties complying with both the RECA Rules and the Edmonton Rules. This hearing panel is not required to adhere to the strict rules of evidence. Given both parties referred to the operation of both sets of Rules, this hearing panel finds that the RECA Rules and the Edmonton Rules, as well as the harmonization provisions for those Rules, are relevant. Based upon the fact that both parties were aware that the RECA Rules and the Edmonton Rules were relevant, it is procedurally fair, and should be of no surprise to the parties, that this hearing panel refer to both sets of rules, in making its findings.

The issue raised by the Registrar was whether this hearing panel can look to the Edmonton Rules, and exercise its jurisdiction, over their application and interpretation.

If this complaint had arisen solely under the Edmonton Rules, which is not the case, this panel would not have jurisdiction to hear the complaint. However, the complaint was made under the RECA Rules, therefore this panel has jurisdiction to consider whether the Licensee met the requirements for competency, honesty and other alleged conduct as required by the RECA Rules. Even though the Edmonton Rules are silent regarding a Licensee's duty to act honestly, Part 2 of the Edmonton Rules, "Harmonized Practice Rules for Alberta" state:

It is the duty and a requirement of each Member to comply with these rules ... Members are also expected to conduct themselves in accordance with the Alberta Real Estate Act, ...and Common Law with which these rules are fully compatible. In the event, however, that provisions in these rules do not align, the Alberta Real Estate Act ("the Act") will take precedence, as will current legislation.

In this case, there is no misalignment of the rules, as argued by the Licensee; by operation of the harmonization requirement with the RECA Rules, the Edmonton Rules also require a Licensee act with honesty, and not mislead.

This panel has jurisdiction to determine whether under RECA rules, the Licensee acted competently, honestly and without misleading the Complainant's real estate licensee; and whether the Licensee's actions brought the reputation of the profession into disrepute.

III. Merits of the Complaint – Alleged Breaches of the Act

The Registrar's position, as well as that of the Licensee, was that there is no RECA rule, nor common law rule, that requires a Licensee to disclose that a competing offer was withdrawn. The Registrar also submitted that:

- a) there is no duty of fairness between the parties in a real estate transaction;
- b) it is the Seller's prerogative to decide if disclosure of multiples offers should occur;
- c) there must be clear, cogent and convincing evidence that the Licensee's conduct breached a standard or rule, to declare a Licensee's conduct deserving of sanction; and
- d) RECA's Rules expressly state, and the Licensee must adhere to:
 - i. s.41(d) that sets out a fiduciary obligation between the Licensee and the Sellers;
 - ii. s.44(1) that requires the Licensee not disclose information without the client's authorization *unless required by law*; and
 - iii. s.7(d) that requires the Licensee obey the Vendor's *lawful* instructions. (*emphasis added*)

The Registrar's position, as well as the Licensee's position, was that the Licensee did not commit a breach of any RECA Rules; but, if he did, that breach was not serious enough to warrant sanction. Both parties relied upon practice directives and videos, explaining the Licensee's obligations in a multiple offer situation.

Competency

The complaint raises the issue of whether the Licensee acted competently, in the delivery of services; and in accordance with RECA Rule 41(b). Section 41 of the RECA Rules requires that the Licensee must:

s.41(a) act honestly;

s.41(b) provide competent service;

s.41(d) fulfill their fiduciary obligations to their clients;

s.41(g) practice in strict accordance with the Act, Regulations, By-Laws and any other laws that govern trading in real estate ...

s.41(j) refuse to provide further services to or on behalf of a client who instructs him to withhold a disclosure required by the Act, Regulations, By-Laws and any other laws.

This hearing panel has no hesitation in finding that the Licensee acted competently and on behalf of his clients' interests, to secure an offer that was acceptable to them. The sale of the home proceeded, and was completed, to the satisfaction of the Licensee's clients; but not to the satisfaction of the Complainants.

For the purposes of this complaint, this hearing panel limits its assessment of competency to the delivery of services required for a Licensee's client to receive, and accept, an offer to purchase real estate. Based on the Agreed Statement of Facts, and the Licensee's evidence, this panel finds in this fact situation that the Licensee served his clients competently by achieving that goal. It is possible that in a different fact situation, the question of competency may be defined more broadly, to include being honest in meeting the needs and expectations of both parties to the transaction.

Honesty

The Edmonton Rules, Harmonization section part 2, page 18, require that a Licensee operating under its jurisdiction shall also adhere to the RECA rules. RECA Rule 41(a) requires that a Licensee must act honestly. RECA Rule 42(a) requires that a Licensee must not make representations or carry on conduct that is reckless or intentional and that misleads any person or deceives any person or is likely to mislead any person or deceive any person.

There is no need for this panel to assess if the RECA Rules take precedence over the Edmonton Rules, because the RECA Rules requiring a Licensee to act honestly, and not to mislead, are not contradicted by the Edmonton Rules. Both the Edmonton Rules and the RECA Rules, require the Licensee adhere to RECA Rule 41(a), to act honestly; and to RECA Rule 42(a), not to mislead. This hearing panel has jurisdiction to determine both issues, as well as the issue of whether the Licensee undermined public confidence, in breach of RECA Rule 42(g).

Honesty includes being forthright, and acting in a manner that meets the expectations of a reasonable person. In this case, the Complainant's real estate licensee had been informed, by the Licensee, that two or more written offers to purchase were received by the Seller's representative, as required by Edmonton Rule 11.05(a). This requirement existed unless the Seller's clients provided instructions to the contrary, in writing; and that did not occur.

It was reasonable for the Complainant's real estate licensee to expect that the Licensee would, in fulfilling his duty to act honestly and not mislead, disclose to the Complainants, in a timely manner, that the competing offer was withdrawn "unless

otherwise instructed in writing by the Seller ..." and "... while negotiations are still ongoing with other Buyers", as required by Edmonton Rule 11.05 (c).

The Agreed Exhibit Book does not include any written instructions from the Seller that would authorize the Licensee not to disclose withdrawal of a competing offer. The October 13, 2022 statement signed by the Late [M.S] (Exhibit 1, Agreed Exhibit Book, Item 23), states that "We agreed to the higher price and told Tony to accept the highest offer even though the other party had not responded." There is nothing in the Seller's statement to indicate that written instructions had been given by the Seller(s) at any time, to the Licensee, to withhold disclosure of the fact that a competing offer had been withdrawn. The Licensee admits that he did not disclose the withdrawal of the offer, to the Complainant's real estate licensee.

This hearing panel takes notice of the practice that in the real estate industry, negotiations are considered to be "ongoing" until the conditions of a sale and purchase contract are satisfied and the contract is no longer conditional. In this case, the parties entered into a conditional sale contract, therefore, the Licensee's duty to be honest, and his corresponding lawful duty (under the Edmonton Rules) to disclose that the competing offer was withdrawn, continued until those conditions were satisfied. More than 14 days passed between the date the competing offer was withdrawn, and "negotiations ceased". As a result of that duty existing, and continuing, the Licensee had a significant window of time in which to inform the Complainant's real estate licensee that the competing offer was withdrawn, but the Licensee did not do so.

The Complainant's real estate licensee had the same opportunity and window of time to make inquiries about the status of the competing offer. The Complainant's real estate licensee failed to make those inquiries, on behalf of the Complainants. The Licensee acknowledged during the hearing that if the Complainant's real estate licensee had made those inquiries, he would have been obliged to disclose that the competing offer had been withdrawn. However, in the context of a sale under the Edmonton Rules, in order to meet the requirement to act honestly under both the RECA Rules and the Edmonton Rules, the Licensee had an obligation to disclose withdrawal of the competing offer, even in the absence of such an inquiry. In that context, it was reasonable for the Complainants, and their real estate licensee, to expect disclosure; instead, they were misled by omission. It is logical to conclude that if the Complainant's real estate licensee had been informed of the fact there was no multiple offer situation, the Complainants might not have relied, to their detriment, upon the misleading fact situation, to complete the sale.

The Licensee's evidence was that he asked his clients if they want him to disclose the withdrawal of the competing offer to the Complainant's real estate licensee. The panel

accepts that the Sellers instructed the Licensee that it was not necessary to do so, because they accepted the Complainant's offer. There is no doubt as to the Licensee's credibility in having received, and acted upon, those instructions.

It was at this point in the process, that the Licensee was faced with two competing obligations: 1) the duty to follow his client's instructions; and 2) the duty to act with honesty. The panel accepts that the Licensee genuinely believed that he had a fiduciary duty under s.41 of the RECA Rules, to act in his client's best interests, and that in doing so, he must follow their instructions not to disclose that the competing offer was withdrawn. This panel finds that the instructions given by the Licensee's clients were not lawful because they were contrary to the specific requirements for honesty, and not to mislead, as stated in the Edmonton Rules, and consequently, the RECA Rules.

In balancing these competing obligations, the Licensee failed to recognize that acting honestly requires that a Licensee not mislead another person, including by omission; and especially in a situation where that person has a reasonable expectation the Licensee will act in a certain manner, as required under the Edmonton Rules. The reasonable expectations of the Complainants, and their real estate licensee, establish the context for the application of the RECA Rules. In this case, when the Licensee failed to disclose, the Licensee allowed the Complainant's real estate licensee to continue to believe that there were multiple offers, when that was not true.

The instructions given by the Licensee's clients were contrary to, and compromised, the Licensee's duty to act honestly and not mislead by omission. The Licensee failed to recognize that in the context of this sale, his clients' instructions were not lawful because they undermined the Licensee's duty to act honestly, by not misleading. If the Licensee had recognized that his duty under both the RECA Rules and the Edmonton Rules required him to disclose withdrawal of the competing offer, and that duty took priority over his duty to act in a fiduciary manner, the Licensee could have recommended his clients change their instructions.

This panel recognizes that the Licensee ran the risk that his clients would not adhere to his recommendation; in which case he might have been required to withdraw as their real estate licensee. On the other hand, by not making the appropriate recommendation, the Licensee placed his fiduciary duty to his clients ahead of his duty to act honestly; and by doing so, the Licensee put his reputation as an honest real estate licensee, and the reputation of the real estate profession, at risk. This panel acknowledges that balancing competing interests is not easy, and especially when wanting to serve clients and complete a sale. But, at the end of the day, a real estate licensee's reputation for honesty, and that of the profession as a whole, must outweigh

the needs of the client. This panel finds the need for honesty, and disclosure, paramount.

This panel finds that despite the Licensee's competence and undisputed intention to serve his clients best interests, the Licensee acted in a misleading manner, and by doing so, did not act honestly, when he adhered to his client's instructions not to disclose to the Complainant's real estate licensee that the competing offer was withdrawn.

This panel notes that the particular context of this case, wherein the Edmonton Rules provide specific details relating to the duty to act honestly and not mislead, is important to its decision. If the Edmonton Rules had not formed part of the context of this case, this hearing panel's decision might have been different.

This hearing panel is not determining if there was a breach of the Edmonton Rules. This hearing panel is only considering breaches of the Act and RECA Rules. In order to make that determination, the entire context of the real estate transaction between the parties must be considered.

Public Confidence

RECA Rule 42(g) requires that a Licensee not engage in conduct that undermines public confidence in the industry or harms the integrity of the industry or brings the industry into disrepute. This panel finds that the Licensee's actions undermined the confidence of the Complainant's, and their real estate licensee; however, because the panel recognizes the difficulty in navigating multiple, possibly competing duties, this hearing panel does not find that the Licensee's actions went so far as to undermine the confidence of the public in the real estate industry; or bring the industry into disrepute.

Findings

Pursuant to its authority in the *Real Estate Act, s.43(1)*, this panel finds that the Licensee's conduct is deserving of sanction for:

- a) failing to act honestly in breach of RECA Rule 41(a); and
- b) misleading the Complainants and their agent when the Licensee did not disclose that the competing offer on the home that they offered to purchase had been withdrawn, in breach of RECA Rule 42(a).

Direction regarding Sanction and Costs – Phase 2 Submissions

The panel directs the parties to provide their written submissions for this panels' consideration in Phase II of this hearing, in accordance with the following deadlines:

- the Registrar shall provide its written submission on Sanction and Costs to the hearing administrator on or before the expiry of fourteen (14) days from the date the Registrar and the Licensee are served with this decision; and
- the Licensee shall provide his written submission on Sanction and Costs to the hearing administrator on or before the expiry of twenty-one (21) days from the date the Registrar and the Licensee are served with this decision; and
- the Registrar shall have seven (7) days from the date the Registrar is served with the Licensee's written submission on Sanction and Costs, to provide its written Reply to the hearing administrator.

In the alternative, the parties may explore and provide to the hearing administrator, a Joint Submission on Sanction and Costs, before the expiry of twenty one (21) days from the date the Registrar and Licensee are served with this decision.

This decision was unanimously made by this hearing panel at the City of Calgary, in the Province of Alberta on June 29, 2023; and issued in writing on July 5, 2023.

"Signature"

[G.F]

Hearing Panel Chairperson

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

AND IN THE MATTER OF a hearing regarding the conduct of
ANTHONY PHILLIP SCHUMACHER
Real Estate Associate
Registration: Lampas Holdings Ltd. O/A Re/Max River City

Hearing Panel Members: [G.F], Hearing Panel Chair
[G.P]
[B.W]

Hearing Date: Phase I May 29, 2023
Phase II August 4, 2023 Written Submission Deadline
No oral hearing

Decision Date: Phase I June 29, 2023 (Issued July 5, 2023)
Decision Date: Phase II August 10, 2023 (issued August 15, 2023)

Submissions: Gregory Sim
Legal Counsel for the Registrar, Real Estate Council of
Alberta (RECA)

Anthony Phillip Schumacher
Self-Represented Licensee

**Hearing Panel Decision
Sanction & Costs (Phase II)**

Background

On July 13, 2021, a complaint naming the Licensee was received by the Registrar; and investigated under file #011888, [J.H & M.J.H] ("the Complainants") alleged that:

- a) The Licensee failed to act honestly and did not provide competent service in breach of sections 41(a) and 41(b) of the Real Estate Act Rules (the "RECA Rules");

- b) The Licensee misled the Complainants and their agent when he did not disclose that the competing offer on the home that they offered to purchase had been withdrawn, in breach of section 42(a) of the RECA Rules; and
- c) The Licensee's conduct undermines public confidence in the industry and brings it into disrepute, in breach of section 42(g) of the RECA Rules.

The Registrar determined that a breach had not occurred. The complaint was refused pursuant to Section 38.1 of the Real Estate Act (the "Act").

On September 1, 2021, the Complainants filed an appeal of the Registrar's decision pursuant to Section 40(1) of the Act.

On April 22, 2022, a hearing of the complainant appeal was conducted pursuant to Section 40(2) of the Act.

On May 15, 2022, the panel hearing the complainant appeal decided that the record before it could support a finding of conduct deserving of sanction, and it was not plain and obvious that the Licensee's fiduciary obligations to his client could, or did, override his other obligations to act honestly and avoid misleading other parties. A hearing to consider the merits of the complaint was directed.

On July 13, 2022, the Registrar began a full investigation into the complaint. The investigation concluded on September 15, 2022.

On November 21, 2022, the Licensee was served with the Notice of Hearing.

On December 15, 2022, this Hearing Panel convened to hear the complaint; and on that date, the Licensee was the only party to appear. The Registrar did not appear to present the case, on the grounds that it was not a party to the complaint. The Licensee requested dismissal of the complaint. The hearing was adjourned to provide interested parties with the opportunity to provide submissions regarding the Registrar's position that it was not a party to the complaint.

On January 30, 2023, this Hearing Panel issued its decision that the Registrar is a party to the complaint and the hearing would proceed on May 29, 2023.

The Hearing & Findings

On May 29, 2023, the Registrar and the Licensee appeared before this Hearing Panel. The parties made oral submissions. The parties also submitted, and the panel accepted, an Agreed Exhibit Book and an Agreed Statements of Facts. The Complainants were not called as witnesses.

On June 29, 2023, pursuant to its authority under the *Real Estate Act*, s.43(1), this Hearing Panel found that the Licensee's conduct was deserving of sanction for:

- c) failing to act honestly in breach of RECA Rule 41(a); and
- d) misleading the Complainants and their agent in breach of RECA Rule 42(a)

when the Licensee did not disclose that the competing offer had been withdrawn.

The June 29, 2023 Decision (Phase 1)

On July 5, 2023, the Hearing Panel released its June 29, 2023 decision regarding the merits of the conduct allegations made by the Complainants, against the Licensee (Phase 1 – the “Conduct Decision”).

In accordance with RECA’s Hearing and Appeal Practice and Procedure Guidelines (the “Guidelines”), and in particular, Part 5B, the Hearing Panel directed the parties to provide their written submissions for this panel’s consideration in Phase II of this hearing, in accordance with specified deadlines. In the alternative, the parties were provided the opportunity to explore and provide to the hearing administrator, a Joint Submission on Sanction and Costs, before the expiry of twenty one (21) days from the date the Registrar and Licensee are served with this decision.

On July 12, 2023, at the request of the Registrar’s legal counsel, the deadlines for submissions were extended for each party, with the final date for the Licensee’s Reply being August 4, 2023.

Submissions on Sanctions and Cost

The Registrar’s Submission

On July 28, 2023 the Registrar’s legal counsel submitted the Registrar’s 8 page formal written submission relating to Sanction and Costs (Phase 2). The Registrar’s position and submissions are summarized below:

At paragraph 2: on November 3, 2022 the Licensee had been sanctioned for his conduct during the same transaction, by the Real Estate Association of Edmonton (“RAE”). RAE ordered the Licensee pay a fine of \$5,000 and complete an educational course on enforceable contracts. On January 3, 2023, the Licensee received written confirmation that he successfully completed both requirements.

At paragraph 3 the Hearing Panel should order no further sanction, given RAE’s outcome for the same conduct, the relatively low gravity of the conduct and the mitigating factors. RECA’s

mandate of public protection and ensuring public confidence in the industry can be achieved by making the proposed order.

- At paragraph 4 The Licensee was acting in the best interests of his client, and put in a difficult position of balancing two competing interests. The Licensee admitted to acting on his client's unlawful instructions; that he believed were lawful. RAE and RECA's required processes spanned two years.
- At paragraph 5 The *Real Estate Act*, (the "Act"), s.43(1) allows the hearing panel discretion to make one or more orders, after finding a Licensee engaged in conduct deserving of sanction.
- At paragraph 6 The Act does not require the Hearing Panel to order a sanction. The hearing panel is empowered to deem the RAE outcome as sufficient sanction, as long as the RAE sanction adequately protects the public.

The Licensee's Submission

On July 30, 2023, the Licensee emailed RECA's administrator a 1 page written submission relating to sanctions and costs. The Licensee's email stated:

I have reviewed Mr. Sims/the RECA Registrar's submissions and bookmarked book of authorities to the Hearing Panel. I have no further submissions to make and accept the Registrar's proposal to the Hearing Panel accordingly.

On July 31, 2023, the Registrar submitted a letter in response to the Licensee's submission. The Registrar's letter submitted that since both parties agree, the Registrar's proposal should be considered a Joint Submission on Sanctions, as described in *Anthony-Cook 2016 SCC 43*. The Registrar's position was that a Joint Submission on Sanction is entitled to deference from the Hearing Panel, and the threshold for interfering with, or rejecting the joint submission is high; and rejection of that submission should only occur where the proposal would bring the administration of justice into disrepute. The Registrar also submitted that the parties "joint submission is reasonable, appropriate and not contrary to the public interest nor would it bring the administration of justice into disrepute.

No Joint Submission on Sanction and Costs

On August 3, 2023, and on August 10, 2023, the Hearing Panel convened to review the Registrar's written submission and reply on Sanction and Costs and the Licensee's submission. The parties did not provide one document titled "Joint Submission on Sanction and Costs"; however, by accepting the Registrar's submissions via email, the Licensee aligned with the Registrar's proposed outcome for sanction and costs.

In this case, the Registrar did not assume an adversarial role in presenting the case against the Licensee. Adverse parties may negotiate and come to an agreement that results in a Joint Submission on Sanction and Costs. *Anthony-Cook* establishes that a Joint Submission on Sanction and Costs shall be accepted by a tribunal or court unless doing so would bring the administration of justice into disrepute or otherwise be contrary to the public interest.

In this case, the Hearing Panel does not accept the Registrar's submission that the parties entered into a Joint Submission on Sanction and Costs. The hearing panel's reasons are that:

- a) the parties did not submit and sign a joint submission on sanction and costs. Instead, the Registrar provided its submission on sanction and costs; and by email, the Licensee accepted the Registrar's submission. The parties were aligned with respect to sanction and costs; but they did not place on the record, a Joint Submission on Sanction and Costs. A Joint Submission on Sanction and Costs is a formally and mutually executed document. In this case, that document does not exist.
- b) The indicia that encourage acceptance of a joint submission, being negotiation and compromise between adverse parties, is not present in this case. The Registrar has not acted as a party adverse in interest to the Licensee.
- c) As a result, there is a real risk that if the panel simply accepts the aligned position of the parties as a "Joint Submission on Sanction and Costs" per *Anthony-Cook*, that a reasonable member of the public will lose confidence in the administration of justice; and view the hearing panel's actions as a break down in the proper function of the justice system.

Due to the foregoing reasons, this Hearing Panel may deviate from *Anthony-Cook* and exercise its discretion in deciding an appropriate sanction and costs. The Hearing Panel may accept, or reject, in whole, or in part, either party's submission on sanction and costs.

The Hearing Panel's Decision on Sanction and Costs

In reaching its decision on sanction and costs, the Hearing Panel applied the factors outlined in *Jaswal v Medical Board (Nfld.) (1996)138 Nfld. & PEIR 181*. After applying the *Jaswal* factors, the Hearing Panel concludes that in light of the sanctions imposed by RAE, the Licensee should not be sanctioned further by RECA. The *Jaswal* factors are:

a) The nature and gravity of the proven allegations:

The Licensee was found to have breached the Act, by acting in a dishonest and misleading manner. Acting honestly and in a manner so as not to mislead, are behaviors that are required to instill public confidence and trust in the profession.

Part 2 of the *Real Estate Act Rules*, section 41(a) requires that a Licensee "act honestly", and at Section 41(d) fulfill their fiduciary duties to their clients. The Rules also require at Section 41(g) that the Licensee practice in strict accordance with the Act, Regulations, Rules, and Bylaws ..." Section 42(b) prohibits a Licensee from acting dishonestly. Even though the Licensee may not have realized that his conduct could be construed as dishonest or misleading, the hearing panel considers honesty as a very important factor to maintain the integrity of the profession. The panel finds the nature of the proven allegations as aggravating.

The Hearing Panel does not accept the Registrar's submission that the nature and gravity of the proven allegations are on the "low end of the spectrum". Even though the Licensee's actions were the result of the Licensee's genuine belief in the correctness of his decision to adhere to his fiduciary duty to his client over and above his duty to act honestly and without misleading the Buyer's agent, the fact is that failing to act honestly, and in a misleading manner, are grave and serious matters.

The Licensee's failure to recognize which of his competing duties took precedence (honesty and candor vs the duty to follow his client's unlawful instructions not to disclose withdrawal of the competing offer) is an aggravating factor.

Honesty is a value that the public relies upon heavily, in looking to the real estate profession for services. The expectation that a real estate licensee will act with honesty, and in a manner that does not mislead, are relevant to the legislature granting the profession the privilege of self-governance.

b) The age and experience of the offending Licensee

The Licensee has been licensed as a real estate licensee since January 2016. It is an aggravating factor that a Licensee with six years in the profession failed to

recognize that there were competing interests between his fiduciary duty to his client and his duty to act honestly and without misleading the Complainants, to disclose an offer had been withdrawn, in a multiple offer situation.

- c) The previous character of the Licensee, and in particular, the presence or absence of prior complaints or convictions.

The Licensee has "no disciplinary history" with RECA. There is no disciplinary history to find as an aggravating factor.

- d) The age and mental condition of the Complainants

There was no evidence submitted regarding the age of the Complainants. The Complainants agent, and the Complainants, were concerned enough about the Licensee's conduct in this matter to take the time to follow up, discuss the matter and file a complaint with RECA, and subsequently to file an appeal of the Registrar's initial decision not to pursue the complaint. The perceived impact of the Licensee's non-disclosure upon the Complainants state of mind is a moderately aggravating factor.

- e) The number of times the offence was proven to have occurred.

The hearing panel does not accept the Registrar's submission that the heart of the conduct deserving of sanction occurred "over a matter of a few minutes". As noted in the Phase 1 Decision, the hearing panel found that the Licensee had the opportunity to disclose the withdrawal of the competing offer over several days; not a few minutes. While it is true that the Licensee's breach arose in the context of one sale and purchase transaction, rather than with respect to the sale and purchase of multiple properties, the fact is that the Licensee failed to recognize that he had a duty, and an opportunity over several days, to disclose withdrawal of the competing offer. This factor is aggravating.

- f) The role of the Licensee in acknowledging what occurred

The Licensee's acknowledged his error and his omission in not disclosing the status of the competing offer; his acknowledgement is not an aggravating factor but is, in fact, a mitigating factor.

- g) Whether the Licensee already suffered serious financial or other penalties as a result of the allegations having been made

The Licensee was sanctioned by RAE with a \$5,000 penalty and a requirement to attend an educational course on enforceable contracts, for the same breaches as occurred in this case. The hearing panel accepts the Registrar's submission, as well as the Licensee's submission, that having suffered a \$5,000

financial penalty and an educational requirement via RAE sanction is not aggravating, but instead, is a highly mitigating factor.

h) Impact of the incident on the victims, if any

The Licensee did not have a fiduciary duty to the victims (the complainants). The Licensee had a fiduciary duty to his client. However, he also had a duty to be honest and not mislead. It is speculative that the Licensee's conduct resulted in the Buyers paying a higher price for their home; there are many contingencies that could affect a purchase price. The hearing panel acknowledges that the Buyers were adversely impacted when they perceived that they may have paid more than necessary for their home. The Hearing Panel accepts that their perception and emotional stress, are aggravating factors.

i) Mitigating circumstances

Also, the Licensee's sincere acceptance of his responsibility for his breaches of the Act, as outlined in f) above is a significant mitigating factor. The Licensee submits, through his email accepting the Registrar's submissions, that his sanction by RAE, as outlined in g) above, for the same breaches, is a mitigating factor. The panel accepts the submission of each party, on this point, and finds the Licensee's RAE sanctions are significant mitigating factors. The hearing panel is also cognizant that multiple offer situations, and competing regulatory schemes, are complex; and for that reason, those factors are somewhat mitigating.

j) 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 considers the general need to ensure other Licensees are aware that acting honestly, and not acting in a misleading manner, are essential aspects of professional conduct, to protect the integrity of the profession. Having found that the Licensee's conduct was a breach of both obligations, and of the Act, an appropriate sanction must follow. The imposition of a sanction is also necessary to deter other Licensees from breaching their duties to be honest and not mislead.

In this case, because the Licensee was sanctioned by RAE for the conduct that formed the basis for this complaint, the need to impose further sanctions upon the Licensee is not required. The Licensee has acknowledged his breaches, and he satisfied his RAE sanction requirements. The Licensee is aware that he breached the Act, and that his actions were contrary to the Act. Any additional sanction for the sake of deterrence of the Licensee is not required. The need for deterrence is not an aggravating factor in this case. The hearing panel also considers that the publication of this decision (both Phase 1 and Phase 2),

including the panel's finding that a sanction is required in this case, should be sufficient to raise awareness and provide general deterrence to all Licensees.

k) The need to maintain the public's confidence in the integrity of the profession

It is very important to maintain the public's confidence in the honesty of the profession. In light of this case, ensuring the public's confidence is an aggravating factor. The hearing panel takes into consideration that the Licensee was sanctioned by RAE with a \$5,000 penalty plus an educational course requirement regarding the enforceability of contracts. The RAE sanction is an appropriate sanction. But for the RAE sanction, this hearing panel would have concluded that it is consistent with the *Jaswal* factors for this hearing panel to sanction the Licensee with a financial penalty plus a reprimand.

l) The degree to which the offensive conduct that was found to have occurred was clearly regarded, by consensus, as being the type of conduct that would fall outside the range of permitted conduct

The Hearing Panel found that the Licensee failed to be honest and not mislead; these actions are not included in the permitted conduct of "being honest". What is less straightforward is the profession's view of whether managing competing obligations under two regulatory bodies creates "ranges" of permitted conduct. This factor is neither aggravating nor mitigating.

m) The range of sentence in other similar cases

The Registrar submitted precedents of similar cases that imposed financial sanctions of approximately \$1,500, a letter of reprimand or a nominal penalty. The Registrar did not submit existing precedents of similar cases that imposed greater financial or other sanctions. The hearing panel recognizes that the Registrar invited this hearing panel to request the parties provide further submissions and precedents. However, the hearing panel does not require additional submissions regarding sanctions. After having considered the *Jaswal* factors, the hearing panel accepts the Registrar's submission, and the Licensee's submission, that imposing additional sanctions, on top of RAE's sanctions, is inappropriate in this fact situation.

In this case, RAE imposed a \$5,000 penalty upon the Licensee, plus an educational requirement. The hearing panel is satisfied that imposing an additional financial penalty would exceed the typical range of penalties in similar cases and is therefore not justifiable in this case. The RAE sanctions are sufficient to raise awareness, address deterrence of the profession and address public confidence.

The Hearing Panel's Decision on Costs

The Hearing Panel accepts the Registrar's submission that no costs be imposed upon the Licensee. The Hearing panel acknowledges that the hearing process has been unnecessarily complex due to the Registrar being unwilling to proceed with the hearing of this complaint. The Licensee co-operated fully, and he underwent a two-year process to attain resolution. Under those circumstances it is inappropriate to expect the Licensee to bear the costs of this proceeding. This hearing panel prefers to follow *Jinnah v Alberta Dental Association and College 2022 ABCA 336*; the real estate profession shall generally bear the cost of such proceedings.

Conclusion

This Hearing Panel declines to award an additional sanction, in light of sanctions already received by the Licensee in another forum. This Hearing Panel declines to award costs against the Licensee.

Dated at the City of Calgary in the Province of Alberta on August 15, 2023.

"Signature"

[G.F]
Hearing Panel Chairperson