

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF s. 39(1)(b) and s. 41 of the *Real Estate Act*, R.S.A. 2000, c. R-5, as amended

AND IN THE MATTER OF a Hearing concerning the conduct of Daren M. Broers, who at all material times was a mortgage associate or mortgage broker, registered with Mortgage 1 Corporation or Pioneer West Acceptance Corporation

Hearing Panel Members: Lynn Patrick
Ralph Salomons
William Boon

Hearing Date: April 26, 2011

Appearing on behalf of: James T. Casey, Q.C., on behalf of the Executive Director
James T. Eamon, Q.C., on behalf of Daren M. Broers

Witnesses: None

**DECISION OF A HEARING PANEL OF THE REAL ESTATE COUNCIL OF ALBERTA
ON CONDUCT DESERVING OF SANCTION**

I) INTRODUCTION

This is a hearing on conduct deserving of sanction.

No witnesses appeared. The Panel received an Admission of Conduct Deserving of Sanction made under s.46 of the Real Estate Act and Joint Submissions endorsed by counsel for the Executive Director and Mr. Broers. The Panel therefore considered only the issue of Sanction.

II) ALLEGATIONS

The allegations are set out in the Notice of Hearing attached to the Admission of Conduct Deserving of Sanction which is attached as **Schedule "A"** to this decision.

III) FINDINGS OF FACT

Section 46 provides for an industry member to make an Admission of Conduct Deserving of Sanction. Under section 47 the admissions are "deemed for all purposes to be a finding of the Hearing Panel that the conduct of the industry member is conduct deserving of sanction."

The Admission of Conduct Deserving of Sanction was accepted by the Executive Director and therefore under s.47 the facts and conduct as set out in Schedule "A" of this decision are deemed to be the findings of this Panel on facts and conduct which is deserving of sanction.

Briefly the deemed finding of the Panel is that Mr. Broers engaged the illegal trading and distribution of securities, contrary to the *Securities Act*, R.S.A. 2000, c. S-4, in that as President and a Director for a company named Mortgage 1 Corporation, Mr. Broers solicited sales of M1C securities from 52 investors and raising \$700,126.00 between February 1 and June 22, 2005, while unregistered to trade in securities.

The \$700,126.00 was lost to the investors. Mr. Broers did not profit from the sale of the securities.

The sale of the securities was not exempt from the requirements of the *Securities Act*.

This conduct was prosecuted by the Alberta Securities Commission ("ASC"). Mr. Broers admitted this conduct and in a January 16, 2009, decision the ASC ordered Mr. Broers to pay a \$40,000 administrative penalty and \$10,000.00 in costs.

Further upon receiving the ASC decision in January of 2009, Mr. Broers failed to report the decision to the Executive Director. The decision came to the attention of the Executive Director in June of 2009 from another source.

IV) FINDINGS RE CONDUCT DESERVING OF SANCTION

As set out in the Admission of Conduct Deserving of Sanction the illegal trading is conduct which breached section 7 of the Code of Conduct of the *Real Estate Act* Rules in force during the time of this conduct.

The failure to notify the Executive Director is conduct which breached section 21 or section 40(1)(b) of the *Real Estate Act* Rules in force as of October 1, 2006, or both sections.

These are deemed findings of this Panel as conduct deserving of sanction.

IV) SUBMISSIONS RE SANCTION

Counsel for the Executive Director and for Mr. Broers provided this Panel with a written Joint Submission on Sanction. Both Counsel spoke in support of the Joint Submission which proposed the following sanction as appropriate:

- 1) A 30-month suspension of authorization;
- 2) Costs of \$10,000.00; and
- 3) Prior to lifting of the suspension, Mr. Broers will successfully complete Part 1 of the Mortgage Associates Program

Counsel are making two qualifications of this proposal, one concerning the start date of the suspension and the other for the payment of costs both of which arise from the prior proceedings with respect to this conduct.

When the decision of the ASC concerning Mr. Broers' conduct came to the attention of the Executive Director, an Information Review under the *Real Estate Act* Rules was commenced at the same time as the investigation under Part 3 of the *Real Estate Act* was opened.

On completion of the Information Review, the Executive Director issued a decision cancelling Mr. Broers' license dated September 28, 2009.

Mr. Broers appealed this cancellation under Rule 39 of the *Real Estate Act* Rules.

On December 11, 2009, the Appeal Panel upheld the cancellation of Mr. Broers' license.

Mr. Broers then sought a judicial review of the Appeal Panel's decision. The Alberta Court of Queen's Bench found that s.38 of the Rules was invalid and of no force for the purpose of cancelling Mr. Broers' license. The Court sent the matter back to the Executive Director "... to consider whether to proceed with conduct proceedings ..." (paragraph 70, *Broers v. Real Estate Council of Alberta*, 2010 ABQB 497) under Part 3 of the *Real Estate Act*.

As a result of this ruling by the Court of Queen's Bench Mr. Broers was awarded costs against RECA in the amount of \$9581.79.

Mr. Broers was then advised on behalf of the Executive Director that the conduct process was ready to proceed to hearing and if he were to apply to renew his license prior to the hearing the Executive Director intended to recommend to the Chair of the Council that a suspension be issued under s.53 of Part 3 of the *Real*

Estate Act. Mr. Broers therefore did not attempt to renew and has been unlicensed since September 28, 2009.

Counsel in their Joint Submission ask that the imposed suspension of license as sanction be ordered to commence on September 28, 2009.

Counsel also submit that the Costs of \$10,000 for this investigation and hearing be off-set by the costs awarded to Mr. Broers in the judicial review so that the amount remaining to be paid by Mr. Broers to RECA is \$418.21.

Mr. Broers also provided the Panel with two letters from his doctor in attachments to the Joint Submissions. One is dated October 28, 2008 and the other is dated November 5, 2009, both are written by Dr. T.C. The first letter is a list of visits to a doctor by Mr. Broers and the reason for the visits and the second letter contains responses by Dr. T.C. to questions by Mr. Broers' counsel.

The opinion expressed by Dr. T.C. is that it was possible that some of the medication Mr. Broers was taking as prescribed between January 1 and August 31, 2005, could have some negative affect on his business and professional judgment.

We note from the records of visits by Mr. Broers with his doctor that no complaint of impaired judgment, concentration, thinking or attention were complained of and that Dr. T.C. is expressing an opinion based on his review of the records and not as the treating doctor at the time. Mr. Broers' treating physician at the time was Dr. H. who is now deceased. The negative effect on Mr. Broers' judgment is only suggested to be possible but not confirmed in any other evidence or findings as a fact.

Both Counsel in the Joint Submission directed this Panel to the case of *Jaswal v. Newfoundland (Medical Board)* 1996 CarswellNfld 32 for a list of possible factors to be considered in determining sanction where they are relevant to this case.

The Joint Submission sets out what are agreed by both parties to be the aggravating and mitigating factors in this case. The aggravating factors are:

- M1C's solicitors advised Broers in writing that he was to "only sign the documents if you are satisfied that all of the investors meet the requirements for the bonds of association set out in [the family, friends and business associate exemption category of M1 45-103]"
- Broers admitted that as M1C's President, he signed the Reports of Exempt Distribution filed with the Commission certifying that all of the investors listed in the reports qualified under the family, friends, and business associate exemption category even though many of the

investors did not in fact qualify. Broers said he had not reviewed the Reports of Exempt Distribution but simply signed them as requested.

- Some, if not all, of the money (over \$700,000) invested in M1C has been lost. Without Broers involvement, many of the investors would not have invested in M1C securities and thereby sustained the financial losses that they have.
- Broers' unregistered trading and illegal distribution of M1C securities was conduct contrary to the public interest and deprived the investors of key protections afforded to them under the Securities Act – the advice of a registrant and the information provided by a prospectus. Issuing the securities without the proper exemptions brought into disrepute exempt market capital-raising and jeopardized the regime for those exempt market participants who seek to raise capital legitimately.
- The ASC relies on directors and officers of issuers to “act scrupulously” in complying with reporting requirements of Alberta securities laws and failures to do so are clearly conduct contrary to the public interest.
- Depriving investors of the advice of a registrant and the information provided by a prospectus is serious misconduct and deserving of significant sanction. Broers' conduct served to “undermine the Commission's oversight function”.
- Broers advanced the argument that he did not intentionally breach securities legislation and that he trusted Savage. The ASC noted that while that might be so: “Broers is a licensed mortgage broker, has been involved in the financial services industry for over 20 years, and with Pinnacle had prior exposure to raising money in the exempt market. Hence, we believe that he ought to have been made aware of the possibility of regulatory requirements and that it was necessary for him to learn of, and ensure compliance with, any such requirements”.
- Broers' failure to assume such responsibility in relation to trades and distributions of securities calls for a significant sanction.
- Broers “lacked the independence and strength of character” required to carry out the duties and responsibilities of a director or officer of an issuer.
- While there was no evidence of any benefit accruing to Broers in consequence of his misconduct, it could “also be fairly said that Broers intended to benefit from his involvement with Mortgage 1, including the trades and distributions in question”. The lack of actual benefit to Broers called for a “slight tempering” of the sanction.

The mitigating factors set out in the Joint Submission are:

- Broers has no prior disciplinary history with RECA other than this matter.
- There is no evidence of any benefit accruing to Broers arising from his misconduct.
- Broers has admitted the allegations against him thereby accepting the consequences of his actions.
- Broers' admissions reduce the time and expense of the hearing and the need to call witnesses.
- Broers takes the position that he was pressured by Michael Savage to sign the Report of Exempt Distribution.
- Broers takes the position that illness and medication affected his conduct during the events relating to Charge 1.

Counsel also provided the Panel with 2 cases in which recommendations on sanction are discussed by the court. The cases are *Rault v. The Law Society of Saskatchewan*, 2009 SKCA 81 and *Visconti v. The College of Physicians and Surgeons of Alberta*, 2010 ABCA 250.

(V) FINDINGS ON SANCTION

In *Rault v. The Law Society of Saskatchewan*, 2009 SKCA 81, the Court of Appeal of Saskatchewan observed that the Discipline Committee of the Law Society of Saskatchewan "was constrained to consider the joint submission" made before it a determination on sanction. This did not require the joint submission to be followed but did require it to be seriously considered and where any intention to depart from it was found reasons needed to be given.

The Court of Appeal of Alberta made a similar observation *Visconti v. The College of Physicians and Surgeons of Alberta*, 2010 ABCA 250, concerning a Recommendation on sanction that was put before a disciplinary Council. In that case where a higher sanction was being considered there was an obligation to bring this intention to the attention of the parties so that they could make submissions about the possibility of a higher sanction.

This Panel has considered the Joint Submission in light of the facts as admitted and the relevant factors. The aggravating and mitigating factors are accepted as relevant here with the exception of the medical history. This Panel gives little weight to the suggestion that Mr. Broers' professional judgment was affected by medication or that this is a mitigating factor. Having found that however, the

Panel finds that the proposed sanction is reasonable in meeting the objectives of general and specific deterrence and educating the subject industry member about proper and professional conduct.

With respect to the issue of loss to the investors and whether this would require a greater sanction than proposed, this Panel recognizes that it is not a fact admitted or found that the illegal activity, essentially unlicensed activity, was the cause of the loss and therefore we cannot give any greater weight to that factor as an aggravating factor.

A 30 month suspension has a direct impact not only on membership but financially for the industry member. We find this suspension to be a significant and appropriate sanction for the serious conduct admitted here with a number of aggravating factors. At the same time Mr. Broers has made the s.46 Admission thereby foregoing the time and further expense and inconvenience to witnesses in spite of his right to a hearing.

With respect to the start date of the suspension, Mr. Broers was made unauthorized to practice as of September 28, 2009. He has not been authorized to be an industry member since that date to the present and we find that this was a result of proceedings in this matter and related to the conduct that is the subject matter of this hearing and at the insistence of the Executive Director. We find that it is therefore reasonable that September 28, 2009 is the start date for the suspension.

The Joint Submission also makes the end of the suspension contingent on successful completion of the proposed education. This would mean that although 30 months may pass from September 28, 2009, if the education component has not been met within that 30 months, the suspension will continue. The Panel recognizes that the license will expire at the end of 36 months at which point Mr. Broers will need to complete the entire education requirement for a new license by operation of the Real Estate Act Rules on licensing, so the suspension will operate at least 30 months if the education requirement is completed within that period of suspension but may go longer if the education requirement is not completed in that period

With respect to the order for costs the estimated costs of hearing at \$10,000 are not supported by any documentation in the submissions but we may take notice of the cost of other hearings and the evidence which indicates that investigations were conducted and counsel for the Executive Director was working on the file. We are aware of the honourarium that is required for Panel members and find that an estimate of \$10,000.00 is a reasonable cost for a hearing on these issues. It is accepted on the advice of counsel that there is an amount owed by the Executive Director to Mr. Broers. On that basis the award of costs to the Executive Director of \$10,000.00 will issue by this Panel and the parties are free to off-set payments as suggested.

VI ORDERS

The Hearing Panel hereby orders that:

- a) All licenses issued by the Real Estate Council of Alberta to Mr. Broers are suspended for a period of at least 30 months commencing on September 28, 2009;
- b) Mr. Broers shall successfully complete Part 1 of the Mortgage Associates Program;
- c) The suspension ordered herein shall continue beyond 30 months if Mr. Broers has not successfully completed the education required under b) above and shall continue until he has successfully completed that education requirement;
- d) Mr. Broers shall pay costs of this hearing in the amount of \$10,000.00, which off-set by the award of costs in his judicial review of \$9581.79 will leave the amount of \$418.21 payable by Mr. Broers to RECA on this costs award.

This decision was made on this 18th Day of May, 2011.

Lynn Patrick, Chair

Ralph Salomons

William Boon

IN THE MATTER OF THE *REAL ESTATE ACT*, s. 46, R.S.A. 2000, c. R-5

AND IN THE MATTER OF Daren Broers, mortgage associate or mortgage
broker

registered with Mortgage 1 Corporation or Pioneer West Acceptance
at all material times

ADMISSION OF CONDUCT DESERVING OF SANCTION

1. I, Daren Broers, of the City of Calgary in the Province of Alberta, hereby acknowledge that I have been given an opportunity to seek the advice of legal counsel. I hereby agree to the execution of this Admission of Conduct Deserving of Sanction voluntarily and of my own free will.
2. I, Daren Broers, admit to the allegations of fact and breaches of provisions of the *Real Estate Act* and the Rules thereunder, as set out in the Notice of Hearing attached as Schedule "A" hereto (except that paragraph 1(j) of the Notice of Hearing is amended to read: Such conduct breached section 7 of the Code of Conduct in the *Real Estate Act* Rules (as they were then in force from October 1, 1999 to September 30, 2006") and admit that my conduct in this regard is conduct deserving of sanction. The specific factual admissions in relation to paragraph 1(e) in the Notice of Hearing are as set out in the Alberta Securities Commission Admissions (Attachment 1 and 2 of the Joint Submissions on Sanction).

DATED this 20th day of April 2011.

Signed and delivered
in the presence of

J.E.
Witness to the signature
of Daren Broers

Daren Broers

Schedule "A"

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF s. 39(1)(b) and s. 41 of the *Real Estate Act*, R.S.A. 2000, c. R-5, as amended;

AND IN THE MATTER OF a Hearing concerning the conduct of Daren M. Broers, who at all material times was a mortgage associate or mortgage broker, registered with Mortgage 1 Corporation or Pioneer West Acceptance Corporation.

NOTICE OF HEARING

TO: Daren M. Broers
c/o James T. Eamon, Q.C.
Gowlings
1400, 700 - 2nd Street SW
Calgary AB T2P 4V5

TAKE NOTICE THAT you are required to attend a hearing before a Hearing Panel at 9:30 a.m. on April 25 and 26, 2011, in the City of Calgary, in the Province of Alberta, at the offices of the Real Estate Council of Alberta, located at 350, 4954 Richard Rd SW in Calgary, Alberta.

AND FURTHER TAKE NOTICE that you will be required to answer the following allegations:

1. **THAT** in or around February 1, 2005, to June 22, 2005, you engaged in the illegal trading and distribution of securities, contrary to the *Securities Act*, R.S.A. 2000, c. S-4 ("*Securities Act*"). This conduct is conduct deserving of sanction, the particulars of which include the following:

- a) You were the President, and a director, of Mortgage 1 Corporation ("M1C") from its incorporation on November 5, 2004, until July 20, 2005. M1C described itself as a financial services corporation engaged in the non-traditional residential and commercial mortgage lending business.
- b) You admitted to the Alberta Securities Commission (the "ASC") that you "played an integral role, as senior officer and director, in the formation and operation of M1C".
- c) You were never registered with the ASC to trade in securities. M1C was never a reporting issuer, as defined in *Securities Act*, was never registered with the ASC to trade in securities, and never filed a preliminary prospectus, or a prospectus.
- d) Nevertheless, between February 1, 2005, and June 22, 2005, M1C solicited sales of M1C securities from at least 52 Alberta investors, raising \$700,126.
- e) Although you were not registered to trade in securities, you participated actively in the sale of M1C securities through various activities, including:
 - i. encouraging M1C staff to sell M1C securities to their friends and families;
 - ii. soliciting potential investors, via email and correspondence, to attend M1C investment seminars, and, generally, to invest in M1C
 - iii. attending and speaking at M1C investment seminars;
 - iv. authoring and distributing correspondence to potential investors regarding developments at M1C;
 - v. signing and accepting, on M1C's behalf, share subscription agreements; and
 - vi. personally attending at an investor's home to receive her investment funds, and to assist in completion of a M1C share subscription agreement.
- f) In addition, you expressly admitted to the ASC that you signed Reports of Exempt Distributions, which certified that the purchasers of M1C securities qualified for the friends, family, and business associates registration and

prospectus exemption, when, in fact, many did not (the “Reports of Exempt Distributions”).

- g) You expressly admitted to the ASC that you acted contrary to the public interest and breached securities legislation by trading in securities of M1C without being registered with the ASC, and without filing a preliminary prospectus or prospectus, and without appropriate exemptions.
- h) Following a hearing regarding your actions, the ASC, in a January 16, 2009 decision (the "ASC Decision"), prohibited you from trading in securities or exchange contracts, from using any of the *Securities Act* exemptions, and from acting as a director or officer of any issuer, for a period of 10 years. In addition, the ASC ordered you to pay a \$40,000 administrative penalty and \$10,000 in costs.
- i) In reaching its decision, the ASC made several key findings:
 - i. In a June 8, 2005, letter, M1C’s solicitors advised you to sign the enclosed Reports of Exempt Distributions only if you were satisfied that all of the investors met the family, friends, and business associate exemption requirements.
 - ii. You admitted that, as M1C’s President, you signed the Reports of Exempt Distributions, which were filed with the ASC, certifying that all of the investors listed in the reports qualified under the family, friends, and business associate exemption category, even though many did not, in fact, qualify.
 - iii. Your unregistered trading and illegal distribution of M1C securities was conduct contrary to the public interest; it deprived M1C investors of key protections afforded to them under the *Securities Act* (i.e. the advice of a registrant and the information provided by a prospectus).
 - iv. Your abuse of the *Securities Act* exemption regime brought the exempt capital-raising market into disrepute, and jeopardized the regime for those who seek to raise capital legitimately.
 - v. The ASC relies on directors and officers to scrupulously comply with the reporting requirements of the Securities Act, and the failure to do so was clearly conduct contrary to the public interest.

- vi. You lacked the independence and strength of character required to carry out the duties and responsibilities of a director or officer of an issuer.
- vii. While there was no evidence of any benefit accruing to you, it could be said that you intended to benefit from your involvement with MIC, including the trades and distributions in question.
- viii. Some, if not all, of the investors' money (over \$700,000) was lost and without your involvement, many of the investors would not have invested in MIC securities, and they would not have sustained the resulting financial loss.
- j) Such conduct breached the Code of Conduct in the *Real Estate Act Rules* (as they were then, in force from October 1, 1999 to September 30, 2006) including paragraph 4 (representations or conduct that is reckless or intentional and that misleads or deceives any person or is likely to do so) and paragraphs 7 (a), (b), and (c).

2. **THAT** from January 16, 2009, to June 4, 2009, you failed to report to the ASC Decision to the Executive Director of the Real Estate Council of Alberta. This conduct is conduct deserving of sanction, the particulars of which include:

- a) On January 16, 2009, the ASC prohibited you from trading in securities or exchange contracts, from using any of the *Securities Act* exemptions, and from acting as a director or officer of any issuer, for a period of 10 years. In addition, the ASC ordered you to pay a \$40,000 administrative penalty and \$10,000 in costs.
- b) On June 4, 2009, the Real Estate Council of Alberta advised you that it had become aware of the ASC Decision, and that it had opened an investigation into your conduct at MIC.
- c) Between, January 16, 2009, and June 4, 2009, you did not report the ASC Decision, and the discipline it imposed upon you, to the Executive Director of the Real Estate Council of Alberta.
- d) The failure to report breached section 21 or section 40(1)(b) of the current *Real Estate Act Rules* (in force as of October 1, 2006) or both.

AND FURTHER TAKE NOTICE that the Hearing Panel may make one or more orders outlined in section 43 of the *Real Estate Act*, including but not limited to an Order cancelling or suspending any authorization issued to you by the Real Estate Council of Alberta, an Order requiring you pay a fine, and an Order that you pay the costs of the Hearing.

AND FURTHER TAKE NOTICE that the following Hearing Panel members will hear the allegations against you:

1. Lynn Patrick
2. Ralph Salomons
3. William Boon
4. Richard Parker (alternate)

If you have any objections to the composition of the Hearing Panel, you must notify the Real Estate Council of Alberta of the objections, together with the reasons for the objections, within 14 days of receipt of this Notice of Hearing. If you fail to object to the composition of the Hearing Panel within 14 days, the proposed Hearing Panel will hear the allegations against you.

AND FURTHER TAKE NOTICE that the Hearing Panel will accept oral or written submissions or both and, unless otherwise ordered by the Hearing Panel, written submissions must be received by the Hearing Panel within 15 days after the date on which all evidence has been received by the Hearing Panel.

AND FURTHER TAKE NOTICE that the Hearing Panel may proceed with the hearing in the absence of the industry member who is the subject of the hearing or if the industry member initiated an appeal, the Hearing Panel may dismiss or reschedule a hearing if the industry member does not attend the hearing.

DATED at the City of Calgary, in the Province of Alberta, this 23rd day of December, 2010.

REAL ESTATE COUNCIL OF ALBERTA

Per:

Bob Myroniuk
Executive Director

AFFIDAVIT OF EXECUTION

CANADA) I, J.E.of
)
PROVINCE OF ALBERTA) the City of Calgary, in the Province of Alberta
)
TO WIT:) MAKE OATH AND SAY:

1. THAT I was personally present and did see Daren Broers, named in the annexed instrument, who is personally known to me to be the person named therein, duly sign and execute the same for the purpose named therein.

2. THAT the same was executed at the City of Calgary, in the Province of Alberta, and that I am the subscribing witness thereto.

3. THAT I know the said party and he is in my belief of the full age of eighteen years.

SWORN BEFORE ME at the City)
of Calgary, in the Province of)
Alberta this 20th day of)
April, 2011.)
) J.E.
) Witness Signature
)
)
E.R.)
A Commissioner for Oaths in and)
for the Province of Alberta)