

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 regarding the conduct of Jay Harder, a real estate broker, at all material times registered with Providence Real Estate Inc.

Hearing Panel Members: Kevin Clark, Chair
Wendy Robson
Norm Jensen

Hearing Date: August 11, 2011

Appearing on behalf of: Aruna Marathe on behalf of the Executive Director
Jay Harder on his own behalf

Witnesses: None

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

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

Counsel for the Executive Director entered 4 Exhibits. Exhibit 1 was the signed Notice of Hearing, Exhibit 2 the Affidavit of Service of the Notice of Hearing on Mr. Harder, Exhibit 3 was the admission of Conduct Deserving of Sanction signed by Mr. Harder and Exhibit 4 was the written joint Submission of the Executive Director and Mr. Harder on the issue of sanction.

Section 46 of the *Real Estate Act* provides that an industry member may make an admission of conduct deserving of sanction. The admission of conduct deserving of sanction entered by Mr. Harder 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 deserving of sanction.

Briefly the facts are that Mr. Harder did not fulfill his fiduciary duty to a client. Mr. Harder owned a rental property with a partner co-owner. Mr. Harder sold the property to a person he was acting as agent for. Mr. Harder filled in a property disclosure form but before doing so he failed to fully inform himself as to the history of his rental property. The disclosure at issue concerned sewer back. Mr. Harder disclosed one sewer back up he was aware of but did not ask his partner and co-owner who was aware of a second more recent sewer back up. After sale of the property to his client the client experienced moisture issues with the property.

IV) FINDINGS RE CONDUCT DESERVING OF SANCTION

As set out in the admission of conduct deserving of sanction the failure to inform himself fully about the sewer backups before signing the disclosure was a breach of fiduciary duty and therefore contravened s.2(e) of the Code of Conduct then in force.

This is deemed to be a finding of this Panel of conduct deserving of sanction.

IV) SUBMISSIONS RE SANCTION

Exhibit 4, the written Joint Submission on Sanction, proposed the following sanction as:

- 1) A fine of \$1500.00;
- 2) Costs of \$500.00; and
- 3) Mr. Harder will successfully complete Unit 9 of the Mortgage Associate Program "Ethics, Professional Conduct and Risk Reduction" within 6 months of the date of this order.

The Panel was provided with paragraph 36 of 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 Panel was further provided with past RECA cases of similar or related conduct, the cases of Arnold Christiansen, Paul Tat Pui Cheng and Victor Stanley Maxwell. The Cheng case is a consent agreement but is similar to the case before us. In that case the member failed to provide a copy of a disclosure form to a client about prior leaks. The fine was \$1500 with costs of \$250 and an education requirement.

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:

- Mr. Harder is an experienced real estate broker;
- Mr. Harder was involved in a transaction with his own client; and
- Verification of his information for disclosure was not an onerous task.

The mitigating factors set out in the Joint Submission are:

- Mr. Harder cooperated throughout the investigation and
- Mr. Harder did make attempts to resolve the issue including offering to purchase the property back from his client.
- Notwithstanding Mr. Harder's offer to take the property back the buyers elected to keep the property.

Counsel for the Executive Director also provided the Panel with a case in which joint submissions on sanction are discussed by the court. The case is *Rault v. The Law Society of Saskatchewan*, 2009 SKCA 81. This panel was also provided with the decision of *The Law Society of Upper Canada v. Cooper*, [2009] L.S.D.D. No. 18 by independent counsel to consider.

(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" [para 28 of *Rault*] made before it a determination on sanction.

In *Law Society of Upper Canada v. Cooper*, the Hearing Panel was provided with a joint submission and observed the following about the process and the need to give serious consideration to a joint submission:

It is the sensible policy of the Society's Hearing and Appeal Panels that joint submissions on penalty should normally be accepted. The parties will have dealt with each and the issues in all their nuances for quite some time and in quite some detail. Thus, if the parties can agree on a negotiated disposition, panels should, generally speaking, accept the outcome of that and not interfere. Of course, an exception arises when the joint submission contains one or more errors in principle.

For an error to be an error in principle, it does not have to rise to the level of scandalizing the conscience of the panel; though, if it did, that would be more than sufficient. Instead, an error in principle is any error that would result in the imposition of a penalty that is clearly too lenient or too harsh given the facts of the case, the law, the case law, and the Society's responsibilities: (1) to regulate the legal profession in the public interest, (2) to maintain public confidence in the legal profession, and (3) not to lose sight of the human being before the panel in the event of a jointly submitted penalty that is too harsh.

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. The Panel finds that the proposed sanction is not unreasonable in meeting the objectives of general and specific deterrence and educating the subject industry member about proper and professional conduct. The Panel accepts that the two parties have come to the hearing with an agreement between them which addresses the interests of both and on the face of the proposed sanction we cannot say that there is an error in principle or that the sanction is clearly too lenient or too harsh. We therefore accept the proposed sanction.

Costs are reasonable and are accepted notwithstanding that these were not supported by any documentation.

With respect to the education we were informed that although Mr. Harder is licenced as a real estate associate, the Mortgage Associate Program at contains the most current content at present and given that some of the units in that program are not specific to dealing in mortgages those more general units are appropriate for use as reclamation and education in a case like this one.

VI ORDERS

The Hearing Panel hereby orders that:

- a) Mr. Harder will pay a fine of \$1500.00
- b) Mr. Harder will pay costs of \$500.00, and
- c) Mr. Harder will successfully complete Unit 9 of the Mortgage Associate Program (MAP), "Ethics, Professional Conduct and Risk Reduction", offered by the RECA within 6 months of the date of this decision. If this course is not available the Executive Director may replace this education requirement with another similar course without further order of this Panel.

This decision was made on this 29 Day of August, 2011.

Kevin Clark, Chair

Wendy Robson

Norm Jensen

Schedule "A"

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

AND IN THE MATTER OF Jay Harder, real estate broker,
registered with Providence Real Estate Inc.
at all material times

ADMISSION OF CONDUCT DESERVING OF SANCTION

1. I, Jay Harder 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, Jay Harder admit to the allegations of fact and breach(es) of provisions of the Code of Conduct (as it was then) made pursuant to the *Real Estate Act*, as set out in the Notice of Hearing attached as Schedule "A" hereto and admit that my conduct in this regard is conduct deserving of sanction.

DATED this 2 day of August 2011

Signed and delivered
in the presence of

M.L.
Witness to the signature of
Jay Harder

Jay Harder

Schedule "A"

THE REAL ESTATE COUNCIL OF ALBERTA

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

AND IN THE MATTER OF a Hearing regarding the conduct of **Jay Harder**, a **real estate broker**, at all material times registered with Providence Real Estate Inc.

NOTICE OF HEARING

TO: Jay Harder, real estate broker
c/o Providence Real Estate Inc.
6324 Bowness Road NW
Calgary, AB
T3B 0E5

TAKE NOTICE THAT you are required to attend a hearing before a Hearing Panel at 9:30 a.m. on, Thursday, August 11, 2011 in the City of Calgary, in the Province of Alberta, at Suite 350, 4954 Richard Road SW in Calgary, Alberta.

AND TAKE NOTICE that you will be required to answer the following allegations of conduct deserving of sanction:

1. You did not fulfill your fiduciary duties to your client in that you failed to disclose all relevant information contrary to s. 2(e) of the Code of Conduct (as it was then) made pursuant to the *Real Estate Act*, R.S.A. 2000, c. R-5, particulars of which may include but are not necessarily limited to the following:
 - a) You did not fully investigate the condition and history of the property at 96 Range Way N.W. before giving disclosure,

- (i) You purchased the property at 96 Range Way N.W. on or about March 2003.
- (ii) The property was rented from December 2004 to June 2005.
- (iii) During the rental period there were two sewer back-ups - in January 2005 and April 2005.
- (iv) You were aware of the January 2005 sewer back-up.
- (v) Your partner L.G. was involved with both clean-ups.
- (vi) The property was listed for sale on July 4, 2005.
- (vii) An offer for purchase on the property was made on July 27, 2005 by L.B. and B.C.
- (viii) On August 4, 2005, you provided a property disclosure related to the sewer and water back-ups. You identified one sewer back up in early 2005 and one water leak in July 2005. You did not disclose the second sewer back-up in April 2005.
- (ix) You did not verify the status of the sewer system and the history of the back-ups with your silent partner L.G.

AND TAKE NOTICE that the Hearing Panel may make one or more orders 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 Council, an Order requiring you to pay a fine and/or costs of the Hearing and educational requirements.

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

1. Norm Jensen
2. Wendy Robson
3. Kevin Clark
4. Jim Kerrison, alternate

AND TAKE NOTICE if you have any objections to the composition of the Hearing Panel, you must notify the Real Estate Council of Alberta of your objection, together with the reason(s) for the objection, 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 TAKE NOTICE that the Hearing Panel will accept either 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 this is a formal notice for you to attend the hearing. The Hearing Panel may proceed with the hearing in your absence and may make a decision in your absence. If the Hearing Panel finds that your conduct is deserving of sanction, the Hearing Panel may assess the cost of the hearing and/or the cost of the investigation against you, in addition to any sanctions arising from your conduct.

DATED at the City of Calgary, in the Province of Alberta, this 8th day of July, 2011.

REAL ESTATE COUNCIL OF ALBERTA

Per:

Bob Myroniuk
Executive Director

