

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 Shafik Sadrudin Shivji, currently unlicensed, formerly a real estate associate registered with Calgary Independent Realty Ltd. o/a C.I.R. and then with Signet Real Estate Ltd. o/a Signet Commercial, and formerly a mortgage broker registered with Gecko Mortgage Capital Corp.

Hearing Panel: Patrick Rudiger, Chair
Pat Cooper
Kevin Clark

Appearing: Drew Saly on behalf of the Executive Director
Shafik Shivji on his own behalf

Hearing Date: October 28 and November 9, 2010

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

I) INTRODUCTION

The hearing into the matter of Shafik Shivji was scheduled for August 18, 2010. An adjournment application by Mr. Shivji was granted by the Panel and the hearing was re-scheduled for October 28, 2010. On October 19, 2010, the Panel received an adjournment application from the Executive Director. Mr. Shivji was out of the country and did not receive information about the application until October 26, 2010. Both parties appeared before the Panel on October 28. The Executive Director submitted that he had applied for the adjournment but was prepared to go ahead. Mr. Shivji did not oppose the application as he indicated it would give him time to obtain further documentation. He also indicated he was prepared to continue as long as he could introduce evidence on a different day. The Panel made the decision to hear all the evidence on a single day and all parties agreed upon November 9, 2010 as the date to continue the hearing.

II) ALLEGATIONS

The hearing into the matter of Shafik Shivji was opened on October 28, 2010 to determine whether or not Mr. Shivji contravened:

- s.7(d) of the Code of Conduct and s.38(4) of the *Real Estate Act* by failing to cooperate with and provide any information requested to a person appointed under s.38(1) of the *Real Estate Act* to conduct an investigation.

The particulars set out in the Notice of Hearing are:

1. You were an industry member since February 2, 1998.
2. In September of 2003, you were registered with Calgary Independent Realty Ltd. o/a C.I.R. as a real estate associate and registered with Gecko Mortgage Capital Corp. as a mortgage broker.
3. In September of 2003 RECA received information that raised a question as to whether you were involved with others in the creation of false and misleading documents that were used in the sale, and/or mortgage application, of properties during the course of a trade in real estate in Alberta.
4. By letter dated October 22, 2003, you were notified that an investigation under Part 3 of the *Real Estate Act* was being commenced and you were requested to provide information. This Notice of investigation stated as follows:

Upon receiving information the Executive Director of the Real Estate Council of Alberta has opened an investigation regarding your actions as agent registered to Gecko Mortgage Capital Corporation

The investigation is to determine whether or not you participated in the creation of false and misleading documents that were used in the sale, and/or mortgage application, of properties during the course of a trade in real estate in Alberta.

An investigation of this matter will be carried out under Part 3 of the *Real Estate Act*.

The Real Estate Council of Alberta investigates conduct that appears:

- to be in breach of the Real Estate Act, Rules or Bylaws,
- to be contrary to the standards of practice expected of an Industry Member,
- to demonstrate incompetence, and/or
- to be a risk to consumers or other industry members.

The issues that will be examined are whether or not you:

- Took part in the creation and submission of false and misleading documents directly related to a trade in real estate in Alberta.
- Took part in the submission of false and misleading documents to facilitate the granting of mortgages through deceit.
- Acted for more than one party in a transaction having failed to provide full disclosure to all parties and failed to ensure dual agency is agreed to in writing.
- Have maintained a state of competency on a continuing basis in all areas in which the industry member renders services.
- Were professional in dealings with the public and other industry members and practiced in strict accordance with the act, Rules, Bylaws and Regulations and any other laws that govern trading in real estate or mortgage transactions in Alberta.
- Provided all documentation or trade records required under the Real Estate Act Rules to the broker.
- Kept the broker informed of the activities you performed as agent on behalf of the brokerage.

- Notified the broker upon learning of a violation of the Act, the Bylaws, or Rules by any broker, agent or employee associated with the brokerage.

By November 10th, 2003, please forward to our attention:

- A detailed explanation as to any recent or past involvement with former industry member, C.H., as related to deals in mortgages in Alberta.
- A complete list of all deals in mortgages you were involved in where clients were referred to you by former industry member, C.H., agent registered to Residential One Real Estate, for the period of January 1, 2003 to October 22, 2003.
- A detailed explanation as to any recent or past involvement with former industry member, K.K., as related to deals in mortgages in Alberta.
- A complete list of deals in mortgages you were involved in where clients were referred to you by former industry member, K.K. agent registered to Calgary Independent Realty o/a C.I.R., for the period of January 1, 2003 to October 22, 2003.
- A detailed explanation as to any recent or past involvement with former industry member, R.K., as related to deals in mortgages in Alberta.
- A complete list of all deals in mortgages you were involved in where clients were referred to you by former industry member, R.K., agent registered to Realty Executive Cityview, for the period of January 1, 2003 to October 22, 2003.
- All documents of all deals in mortgages you were involved in for the period of January 1, 2003, to October 22, 2003.
- A list of all Corporations, Businesses, Partnerships or other like/similar organizations of which you are currently involved in or have been involved in for the period of January 1, 2000 and October 1, 2003.
- Copy of all Corporation, Business, Partnership or like/similar organizations records including:
 - Copy of the Corporations papers and minute book.
 - Annual minutes for the period of January 1, 2003 to October 22, 2003.
 - Financial records including accounts payable, invoices, cheques, records demonstrating liabilities and assets.
 - List of all properties owned or operated.
 - List of all employees including employment records, Revenue Canada submissions and status of employment.
 - Copy of the companies phone records.
- A complete list of all your employers since your date of licensing, including records provided to Revenue Canada by all of your employers for this period.
- A copy of your cellular phone records for the period of January 1, 2003 to October 1, 2003.
- A copy of your residential phone records for the period of January 1, 2003 to October 1, 2003.
- Copies of your personal bank records including all holdings with institutions within Canada, including accounts where you possess signing authority for the period of January 1, 2003 to October, 2003.
- Complete and sign waivers of confidentiality with the following organizations and/or persons:
 - Customs and Revenue Canada
 - Your business and personal tax accountant
 - Your business partners/corporate shareholders/directors/ or others as the case may be.
 - Your cellular provider Rogers, Bell, Fido, Telus or other as the case may be.
 - Your residential and business communications provider Telus, Bell or other as the case may be.

The time required to complete this investigation will depend on factors such as its complexity, the level of co-operation of all parties and the number of investigations underway. I will be in touch with you as the investigation proceeds, and you may contact me at any time to provide documents or information.

5. By letter dated December 14, 2004, you provided the RECA investigator with a written statement responding to the request for information. In this statement you refused to provide certain documents that were requested, in particular the following:

You have requested details of my Corporations records including financial, phone, employment records and minute book. I cannot provide these records at this time because of privacy concerns expressed by my partner. However, if you are able to provide me with a detailed explanation as to why these records are critical to your investigations, my partner may allow the records to be released.

...

Regarding your request for a copy of my cellular phone records for the period of January 1, 2003 to October 1, 2003; those documents have long been discarded. Again, if you can provide me with a valid reason as to why these documents are necessary for your investigation, I may be able to obtain copies from the cellular phone company.

With regards to your request for a copy of my residential phone records for the period of January 1, 2003 to October 1, 2003, again these documents have been long discarded. Again, if you can provide me with a reason as to the relevance and importance of these records to your specific investigation, I may be able to obtain copies of these from my phone company.

Concerning your request for copies of my personal bank records including all holding with institutions within Canada including accounts where I possess signing authority for the period of January 1, 2003 to October ?? 2003, my legal counsel and I do not feel that you have the right to this information. I am not willing to provide this information unless you can clearly demonstrate the need for this invasion of my privacy.

Similarly, I am not willing to sign any waivers of confidentiality on the advice of my legal counsel unless you can demonstrate the need for and specify the exact information that you require instead of being vague and generic.

6. The documents refused were relevant to prove or disprove whether you were communicating with certain parties to transactions by phone and whether funds were passing through your personal accounts or whether properties or funds were being transferred through businesses controlled by you. The relevance of these documents was communicated to you in the letter opening the investigation.
7. By letter dated July 12, 2005, the RECA investigator repeated the request for information and also asked you to respond to new questions raised from information you provided in your statement. This request stated as follows:

Additionally the following requires further clarification:

- You state you were the director of 974380 Alberta Ltd, created February, 2002, for the purposes of purchasing a condominium unit. Please identify the property you are referring to (address/legal description) and provide an explanation of your involvement in this failed transaction from beginning to end. Your explanation shall

be accompanied with copies of all documents related to this transaction including but not limited to:

- Purchase contract
 - Deposit (verification through cheque or receipt)
 - Mortgage application
 - Identity's of all persons connected to this trade
- You indicate you are the director of 1066413 Alberta Incorporated, created on September 16, 2003. Please identify the property owned by this corporate entity as well as provide all information requested as detailed to you on October 22, 2003.
8. This letter of July 12, 2005 requested that you provide the documents and information requested by July 25, 2005.
 9. You did not respond by that date.
 10. By letter to you dated September 1, 2005, the Executive Director formally requested that you co-operate with the investigation and provide the information requested and provide the documents and information requested by September 23, 2005.
 11. You did not respond by that date.
 12. By letter dated September 27, 2005, you were notified that an investigation was being commenced into whether you failed to cooperate with the aforesaid investigation. You were asked to provide an explanation for his failure to cooperate by October 11, 2005.
 13. You did not reply to this request for information.
 14. You did not provide any further documents or response to the foregoing requests until you sent a fax to RECA on November 3, 2009, advising that you were willing to cooperate with the investigation and provide the documents requested prior to expiry of your real estate license. You then provided the documents requested that were in your possession but not all of the documents requested.

II) **EVIDENCE**

The Notice of Hearing was entered as Exhibit 1. A collection of 28 documents were entered collectively as Exhibit 2. A doctor's note was presented by Mr. Shivji and entered as Exhibit 3.

The Executive Director called one witness, Ron Lawson who testified regarding the attempts RECA made to obtain information from Mr. Shivji and the reasons for opening an investigation into Mr. Shivji's conduct. Mr. Lawson testified that in 2003 RECA received information that brought into question whether or not Mr. Shivji was involved with others in mortgage fraud activities. Investigations had been started on 50 or 60 mortgage brokerages regarding mortgage fraud and a review was being done. Mr. Lawson spoke to Tab 14 in Exhibit 2, a spreadsheet that was created as part of a large volume of information to enable investigators to see if there were any patterns with regards to people being connected with known individuals. Mr. Lawson stated that the information drew attention towards Mr. Shivji as he was the realtor on a particular transaction which involved false employment letters and payroll stubs. Because RECA was investigating mortgage fraud, the investigators requested information that they knew was intrusive. This was the first foray into RECA's stance on misrepresentation

and RECA was asking for personal information; residential phone records, personal bank accounts to determine a money trail to the masterminds. To that end they were inviting industry members to attend a meeting at RECA at which time; RECA would provide notice of the investigation and the industry member could ask questions about the investigation and the rationale for requesting the information would be explained. Mr. Shivji was asked to come to a meeting at RECA but after a telephone conversation with Mr. Lawson, sent a letter saying he could not attend on the date and requested more time. The documentary evidence in Exhibit 2 contains copies of the letters sent to Mr. Shivji by RECA investigators and the Executive Director. These are itemized in the Notice of Hearing.

Mr. Shivji testified that when he received the notice of investigation from RECA, he felt that it was an accusation and not an inquiry. Mr. Shivji blamed RECA for his firing from Gecko Mortgage. Although the broker gave no reason for his firing, Mr. Shivji thought it was the fault of RECA because RECA asked the broker for files in which Mr. Shivji was involved. Mr. Shivji admitted that he realized it was a mistake for him not to have responded to RECA's requests. He acknowledged he should have supplied the documents he eventually gave to RECA in 2009 when he was first asked for them. Mr. Shivji stated he mistakenly relied on the opinion of others who told him it was an invasion of his privacy. Mr. Shivji testified that although he is not using his health as an excuse, he really did have severe health issues as indicated by his testimony and the doctor's note entered as Exhibit 3. Mr. Shivji stated that his license was suspended for not providing information and that he will cooperate with RECA and requests that his licence be re-instated.

III) FINDINGS

The Panel finds that Shafik Shivji contravened s.7(d) of the Code of Conduct and s.38(1) of the *Real Estate Act* by failing to cooperate with, and provide any information requested to, a person appointed under the *Act* to conduct an investigation.

The documents in Exhibit 2 clearly outline the many attempts that RECA made to obtain information from Mr. Shivji. Mr. Shivji did not provide the documentation requested and in a letter to RECA dated December 14, 2004, he refused to provide certain information. During the course of the hearing, Mr. Shivji admitted that he did not cooperate with the investigations and that it was a mistake on his part not to do so.

Had Mr. Shivji cooperated with the investigation by attending interviews and providing information as requested, this matter could have completed in a timely manner. This Panel has no jurisdiction to reinstate Mr. Shivji's license as he requested.

IV) ORDERS

Having found the Shafik Shivji has conduct deserving of sanction, the Hearing Panel requests submissions on sanction by the Executive Director to be provided to Mr. Shivji and the Hearings Coordinator within 14 days of service of this decision. Mr. Shivji then

has 14 days from that date to provide his submissions to the Executive Director and to the Hearings Coordinator. The Executive Director has until January 14, 2011 to submit a rebuttal to Mr. Shivji's submissions on sanction to Mr. Shivji and the Hearings Coordinator.

If no submissions are received by the Executive Director or Mr. Shivji within the allocated timeframes, the Hearing Panel will proceed to make a decision with respect to sanction without the benefit of those submissions.

This Decision was made on 20th December, 2010.

Pat Rudiger, Chair

Pat Cooper

Kevin Clark

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

AND IN THE MATTER OF a Hearing regarding the conduct of
Shafik Sadrudin Shivji, currently unlicensed, formerly a real estate
associate registered with Calgary Independent Realty Ltd. o/a
C.I.R. and then with Signet Real Estate Ltd. o/a Signet Commercial,
and formerly a mortgage broker registered with Gecko Mortgage
Capital Corp.

**DECISION OF A HEARING PANEL OF THE REAL ESTATE COUNCIL OF
ALBERTA ON SANCTION AND COSTS**

I) INTRODUCTION

The members of this Hearing Panel are Patrick Rudiger (Chair), Kevin Clark and Pat Cooper. The Hearing into this matter took place on October 28, 2010 and November 9, 2010. The Hearing Panel issued a written decision on its findings in respect to the Hearing on December 20, 2010 and found that Shafik Shivji ("Mr. Shivji") had breached section 7(d) of the *Code of Conduct* (as it then was, in force from October 1, 1999 to September 30, 2006) and section 38(4) of the *Real Estate Act* and that this was conduct deserving of sanction. Following the issuance of that decision, the Hearing Panel requested submissions on sanction and costs from both Drew Saly, counsel on behalf of the Executive Director of the Real Estate Council of Alberta, and Mr. Shivji.

II) SUBMISSIONS

Counsel for the Executive Director submitted that the following sanction was appropriate in this case:

- That Mr. Shivji pay a fine of \$12,000.00;
- That Mr. Shivji not be eligible to apply for authorization as a real estate associate, mortgage broker, or appraiser for a total period of 3 years from the date the Hearing Panel's decision on Sanction and Costs is served upon Mr. Shivji;
- That Mr. Shivji pay full costs for the investigation and hearing in the amount of \$9,592.00; and
- That before returning to the industry, Mr. Shivji be required to successfully complete the Real Estate Associate Program and pass the exam.

Counsel for the Executive Director provided the Hearing Panel with the case, ***Jaswal v. Newfoundland (Medical Board)*** (1996) 1996 CarswellNfld 32 (Nfld. T.D.) and submitted that this case sets out the factors that a Hearing Panel may properly consider when coming to a determination on sanction. The factors to consider set out in *Jaswal* are:

- the nature and gravity of the proven allegations;
- the age and experience of the offending member;
- the previous character of the member and in particular the presence or absence of any prior complaints or convictions;
- the age and vulnerability of the complainant or party harmed;
- the number of times the violation was proven to have occurred;
- the role of the member in acknowledging what had occurred;
- whether the offending member had already suffered other serious financial or other penalties as a result of the allegations having been made;
- the impact of the incident on the complainant or other victim;
- the presence or absence of any mitigating circumstances;
- the need to promote specific and general deterrence and, thereby, to protect the public and ensure the safe and proper practice in the industry;
- the need to maintain the public's confidence in the integrity of the industry;
- 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; and
- the range of sentence in other similar cases.

Counsel for the Executive Director submitted that this sanction was appropriate and reasonable for the following reasons:

- Mr. Shivji was an experienced industry member at the time these events took place and as such he was very aware of his obligation to cooperate with his regulatory body.
- Mr. Shivji's conduct with respect to his failure to cooperate with the investigation was deliberate.
- Mr. Shivji was provided with the opportunity to comply with the investigator's requests for information over a lengthy period of time. In addition, he received several requests for information and he was also made fully aware of what the consequences would be if he failed to cooperate.
- Mr. Shivji provided no explanation or defence for his failure to cooperate
- Although Mr. Shivji offered to cooperate, this took place after a significant period of time, and only took place at the point that his licence to trade in real estate was about to expire. Even at this point, he still did not provide full cooperation.

- Amongst the factors for a Hearing Panel to consider when determining what an appropriate sanction should be, specific deterrence is an important consideration. Mr. Shivji was sanctioned by a Hearing Panel in 2003 for the very same type of conduct that formed the subject matter of this hearing. Despite this previous sanction, he still engaged in the same conduct.
- There were no special circumstances in this case that supported Mr. Shivji bearing anything other than full costs for the investigation and hearing into this matter.

Mr. Saly submitted an Estimated Schedule of Costs setting out the time and expenses incurred by Investigations, Legal Services, and the Hearing Panel in respect of this matter.

Mr. Saly also provided a previous decision from a RECA Hearing Panel, *Harrison Tse*. This was a case of an industry member failing to cooperate, and in this case, Mr. Tse at no time cooperated with the Executive Director in the course of an investigation into his conduct. Mr. Tse also had no previous disciplinary history with RECA. For this first instance of failure to cooperate, the Hearing Panel ordered that Mr. Tse pay a fine of \$10 000. Mr. Saly submitted that the circumstances in this case were more serious, especially given Mr. Shivji's previous disciplinary history for the same conduct, and as such a higher sanction was warranted.

III) REASONS and ORDER

As previously stated, the Hearing Panel only had the benefit of Mr. Saly's submissions. The Hearings Coordinator advised that she made repeated attempts to contact Mr. Shivji both by telephone and email (at telephone numbers and email addresses that he had provided) in order for him to provide his submissions on sanction but that he failed to respond and that he failed to provide any submissions.

The Hearing Panel in reaching its decision on sanction gave great consideration to the seriousness of the proven allegation of failure to cooperate. In order for a self regulatory body to properly function and have the confidence of the public in its regulation, industry members must cooperate with their regulator. In turn, any breach of this duty must be taken seriously and strongly sanctioned in order to emphasize the enormity of this breach and the importance of this duty.

The Hearing Panel was also very troubled by the fact that Mr. Shivji was sanctioned by a previous RECA Hearing Panel for similar conduct and considered this to be an aggravating factor. The Hearing Panel has no choice but to assume that the previous sanction failed to specifically impress upon Mr. Shivji his duty to cooperate with his regulator. As such, the Hearing Panel must impose a significant penalty for this reason as well. Given the seriousness of the breach of the duty to cooperate and Mr. Shivji's previous disciplinary record as well as the other reasons put forth by Mr. Saly with which the Hearing Panel agrees, the Hearing Panel feels that the submissions put forth

by the Executive Director with respect to sanction and costs is appropriate and reasonable.

The Hearing Panel orders the following:

- That Shafik Shivji pay a fine in the amount of \$12,000.00;
- That Shafik Shivji pay costs in the amount of \$9,592.00;
- That before returning to the industry, Shafik Shivji must successfully complete the Real Estate Associate Program (or meet the licensing requirements in place at the time of seeking re-entry) and pass the provincial qualifying exam (it its equivalent in place at the time of seeking re-entry) ; and
- That Shafik Shivji is not eligible to apply for an authorization as a real estate associate, mortgage broker, or appraiser for a period of 3 years from the date this decision is served upon him.

This decision was made on March 25th 2011.

Pat Rudiger, Chair

Kevin Clark

Pat Cooper

CC Drew Saly, Legal Counsel for the Executive Director