

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF sections 48, 49 and 50  
of the *Real Estate Act*, R.S.A. 2000, c. R.-5 (the "Act")

AND IN THE MATTER OF an Appeal of a Hearing Panel decision regarding the conduct of Salvatore Aiello, agent,  
registered at all relevant times with Re/Max Real Estate North and currently registered with Seabolt Holdings Ltd. o/a  
Sutton Group Canwest

Appeal Panel members: Kevan Ladner, Chair  
Ted Zaharko  
Charlotte Sutherland

Appearing: Mr. Todd Lee, on behalf of the Executive Director  
B.R. , on behalf of Mr. Aiello

Appeal Date: June 16, 2005

DECISION OF AN APPEAL PANEL OF THE REAL ESTATE COUNCIL OF ALBERTA

I) INTRODUCTION

In this matter, Mr. Aiello appeals a decision of a Hearing Panel of the Real Estate Council of Alberta dated January 13, 2005. The Appeal Panel was composed of Kevan Ladner (Chair), Ted Zaharko and Charlotte Sutherland.

The appeal took place on June 16, 2005. In attendance at the hearing were Todd Lee, on behalf of the Executive Director of the Real Estate Council of Alberta, and B.R. on behalf of Mr. Aiello.

II) GROUND OF APPEAL

The grounds of appeal are set out in B.R.'s written submission dated June 10, 2005, and are as follows:

1. Breach of the rules of natural justice and fairness
2. Prejudicial effect of hearing complaints together

### III) STANDARD OF REVIEW

Appeals of Hearing Panel decisions are dealt with in sections 48 to 50 of the *Real Estate Act*. An Appeal Panel may choose to overrule findings on law that were made by the Hearing Panel, however on issues of fact, the Appeal Panel typically defers to the Hearing Panel's decision. The Appeal Panel can only overturn factual findings of the Hearing Panel if those findings are patently unreasonable.

In the July 29, 2004 written decision of the RECA Appeal Panel decision in the Michael James matter, the Appeal Panel stated that:

*The reason for treating matters of law and fact different in an appeal on the record is that the Hearing Panel, having heard directly from the witnesses, is in a better position to make the factual findings than is the Appeal Panel, which is restricted to documents and the Record of the Hearing Panel proceedings. For this reason, an Appeal Panel should give deference to a Hearing Panel's factual findings, and should not overturn them unless they are clearly unreasonable based on the evidence that was presented at the Hearing. It is not appropriate for an Appeal Panel to overturn a Hearing Panel's factual findings merely because it disagrees or holds a different opinion with respect to them.*

### IV) BACKGROUND FACTS

On March 9, 2004, Mr. Aiello was served with a Notice of Hearing containing allegations that resulted from two separate Real Estate Council of Alberta investigations.

RECA investigation 1006-01 arose as a result of a complaint letter received by RECA from J.J. on May 10, 2001. The complaint letter concerned events that occurred between December and January 2001. As a result of this investigation, allegations were made against Mr. Aiello and detailed in the Notice of Hearing. Those allegations included violations of section 2(a), section 4(d), section 6(c), section 7(b) and section 7(c) of the *Code of Conduct*.

RECA investigation 1457-03 arose as a result of a complaint made against Mr. Aiello on November 24, 2002. The complaint concerned events that occurred between August and November 2002. As a result of this investigation, allegations were made against Mr. Aiello and detailed in the Notice of Hearing. Those allegations included violations of section 5, section 2(a) section 2(c), section 2(i), section 4(d), section 6(c) and section 3(c) of the *Code of Conduct* and section 24(1)(c) of the Rules. Allegations by the Executive Director of violations of section 4 and section 7(b) of the *Code of Conduct* were withdrawn by the Executive Director

The Hearing Panel found that there was conduct deserving of sanction on all allegations as alleged, with the exception of section 7(d) of the *Code of Conduct* and section 38(4) of the *Real Estate Act*, which were alleged as a result of investigation 1457-03.

As a result of the Hearing Panel's finding of conduct deserving of sanction, the Hearing Panel ordered that Mr. Aiello's authorization to trade in real estate in Alberta as an agent be suspended for a period of one year, Mr. Aiello pay a fine of \$10,000 and hearing costs of \$15,571.72, and complete an educational requirement. On February 4, 2005, Madam Justice of the Court of Queen's Bench of Alberta ordered a stay of the Hearing Panel's decision pending the outcome of a RECA appeal hearing. On February 10, 2005, Mr. Aiello provided a Notice of Appeal pursuant to section 48 of the

*Real Estate Act*. And in written submissions provided by B.R. on behalf of Mr. Aiello, it was submitted that the Hearing Panel decision be quashed with costs awarded to the appellant.

It is from this decision of the Hearing Panel that Mr. Aiello appeals.

## V) MERITS OF APPEAL

Mr. Aiello's grounds of appeal, as stated by B.R. in his written submissions and again at the appeal, focused on breaches of the rules of natural justice and fairness. B.R. argued that one of the fundamental concepts of natural justice and procedural fairness is the right to test the case against you, which includes the right to cross-examine witnesses that appear on behalf of the other side.

The complaint that led to RECA investigation 1006-01 was made by J.J. (Record, Tab 7). The Executive Director tried to call J.J. as a witness, but failed to find him (Record, Tab 5, page 76, lines 40-45). As a result, Mr. Aiello was unable to test the credibility and truth of J.J.'s allegations in the letter found at Tab 7. The Hearing Panel was also denied the right to observe and assess J.J.'s credibility. B.R. argued that it is clear in the original Hearing Panel decision (Record, Tab 1) that the statement of J.J. was treated as fact by the Hearing Panel, despite the fact that never appeared.

Mr. Reid referred to section 42(c) of the *Real Estate Act*, which states that

*the Hearing Panel has the same power as is vested in the Court of Queen's Bench for the trial of civil actions*  
*(i) to summon and enforce the attendance of witnesses*

In the absence of J.J. and evidence given by J.J. under oath, the Hearing Panel could not reach the decision it did and that in doing so, it has acted in a manner that is contrary to Mr. Aiello's fundamental rights to fairness, which includes the right to test the case against him. B.R. also argued that the Hearing Panel should have heard from V.H. at the hearing, given the allegations that Mr. Aiello participated in fraudulent/illegal activities with J.J. and V.H. But as with J.J., V.H. did not appear as a witness, and Mr. Aiello was not given the chance to cross-examine him.

While B.R. acknowledged that the Hearing Panel is not bound by the judicial rules of evidence, he pointed to the RECA Practice and Procedure Guidelines in arguing that at the very least, the letter written by J.J. (Record, Tab 7) should be weighted accordingly by the Hearing Panel given the inability of Mr. Aiello or Hearing Panel members themselves to question J.J. about the events that resulted in the letter of complaint.

*This type of evidence can never be considered as reliable as first hand evidence, and therefore should not be given as much weight as firsthand evidence. Caution should be exercised in accepting hearsay evidence because such evidence cannot be subject to cross examination. This is especially important in a disciplinary hearing where the credibility of the witness is often at issue.*

R.B. also took issue with the fact that a further written statement by J.J. (Record, Tab 26) regarding the allegations he made against Sam Aiello that states the deal was between himself and V.H. does not appear to have been considered by the Hearing Panel in their decision making.

In making their decision, B.R. argued that it appears the Hearing Panel relied on a transcript of an interview between F.C., a RECA investigator, and Mr. Aiello (Record, Tab 21). In that transcript, Mr. Aiello admitted having closed an eye to the transaction involving J.J. (Record, Tab 21, page 16, lines 4-7). However, at the hearing, F.C. gave evidence that she has no idea where the tapes of that interview are (Record, Tab 5, page 13). Also at the hearing, Mr. Aiello expressed a concern that what was before the Hearing Panel as a transcript of his interview with F.C. (Record, Tab 21) was not that accurate as to what was discussed during the interview itself. Mr. Aiello said that there was more on the tapes than what was appearing in the transcript (Record, Tab 5, page 17) and that he would like the opportunity to review the tape. Even F.C. admitted that she would have reviewed the transcript 'quickly' to compare it to what was on the tape (Record, Tab 5, page 13, lines 39-41).

B.R. is of the opinion that the Hearing Panel relied solely on the complaint letter from J.J. and the interview transcript from F.C. to arrive at their decision and in doing so, denied Mr. Aiello of his right to a fair hearing. Mr. Aiello was not given an opportunity to cross-examine J.J. and he was not provided with the tape from the October 20, 2003, interview between himself and F.C. This amounts to a further breach of the principles of natural justice in that Mr. Aiello was not provided with all evidence.

RECA investigation 1457-03 resulted in allegations 4 through 9 in the Notice of Hearing (Record, Tab 6). Allegation 6 alleges that Mr. Aiello allowed unauthorized access to a client's property to a third party. B.R. argued that evidence submitted demonstrates that while S.I. had access to the property she had purchased on October 21, 2003, Mr. Aiello was not present and in fact, Mr. Aiello had not given her the front door key to the condominium building. Mr. Aiello had provided her with a key to the parking garage and to the unit she had purchased, but did not provide her with a key to the building. The combination of the parking garage key and the suite key appear to have in fact allowed access to the condominium unit to S.I. Section 2(i) of the *Code of Conduct* states:

*An industry member must not allow unauthorized access to or control of a client's property to third parties.*

In not providing S.I. with the key to the condominium building, it was submitted that Mr. Aiello had not allowed S.I. access to the property.

Further to that argument, G.S. stated that just as with J.J., because the vendor of the property S.I. purchased, G.S. did not appear at the hearing Mr. Aiello was unable to cross-examine him. While a transcript of the G.S. interview appeared at the hearing (Record, Tab 25), Mr. Aiello was not able to question him nor was the Hearing Panel given the opportunity to assess his credibility under oath. Mr. Aiello was denied his right to natural justice and fairness because G.S.'s evidence was entered by way of a transcript.

B.R.'s final ground for appeal was that significant prejudice against Mr. Aiello occurred because allegations arising from two separate complaints were heard together. Mr. Aiello was entitled to a fair and impartial hearing on each of the allegations from the two complaints. Despite the fact that the two

allegations were completely unrelated, witnesses were heard on each allegation in an almost alternating fashion. All evidence in relation to the J.J. complaint was irrelevant to the S.I. complaint and vice versa. B.R. submitted that the Hearing Panel should have heard allegations stemming from the two complaints separately. However, in hearing the matter as one hearing, it creates the appearance of bias on the part of the Hearing Panel as evidence being tendered on one allegation would inevitably impact the neutrality when hearing evidence on the other matter.

In closing his oral submissions, B.R. referred to an Alberta Court of Queen's Bench decision involving Mr. Gary Lee and the Canadian Kennel Club. Mr. Gary Lee was called before a disciplinary hearing of the Canadian Kennel Club regarding two completely separate complaints of misconduct, as was done in the matter of Mr. Aiello. The CKC Appeal Committee decision determined there was no evidence of bias as a result of dealing with the two complaints in one disciplinary proceeding, however, on appeal, the Alberta Court of Queen's Bench disagreed. The court discusses the effect of hearing the two matters consecutively in paragraph 129:

*While I am not satisfied that institutional bias would arise in every case, in this case the fact that the Discipline Committee heard the irrelevant and prejudicial evidence with respect to the Wyler matter, also taints its decision with respect to the McGowan matter. Ms. Wyler and Ms. Driscoll painted a picture of a person who was always disrespectful and pushing boundaries. Those very things were in issue in the decision with respect to the McGowan matter.*

B.R. also drew the Appeal Panel's attention to paragraph 104 of the same decision, which states:

*The nature of the decision and the decision-making process is quasi-judicial. Complaints are prosecuted before the Disciplinary Committee, and at the end of a fairly formal hearing, the Discipline Committee decides whether a person is guilty of violating the CKC's rules. The Discipline Committee then imposes a penalty, which can include depriving the person of Club privileges...this penalty can carry significant consequences for a person who depends on showing dogs for a living.*

Because the penalty in the CKC matter, as in the Aiello matter, deprives the individual in question of their ability to earn a livelihood, the disciplinary body owes that individual a higher duty of procedural fairness. In the Aiello matter, this standard has not been met.

As B.R.'s argument focused largely on the principles of natural justice and procedural fairness, Mr. Lee countered by first drawing the Appeal Panel's attention to page 4 of the RECA Practice and Procedures Guidelines Manual, which states that the three fundamental principles of natural justice are:

- a. *The person whose interests are affected by a decision should be given notice of the allegations or case to be made against him/her (the right to due notice);*
- b. *The person should be allowed to present his/her case and rebut the case against him/her (the right to be heard); and*
- c. *The decision-maker should be disinterested and impartial (the right to an unbiased decision-maker). This decision-maker must hear the evidence and argument in order to be eligible to make a decision.*

Page 4 of the Guidelines also lists the procedures that are necessary to meet the requisite standard of natural justice and fairness throughout the disciplinary process. Those include:

- *Notice of the investigation and hearing;*
- *A hearing*
- *The right to representation by legal counsel;*
- *Disclosure of information as to the case to be made against him/her;*
- *The opportunity for cross examination of witnesses; and*
- *Panel decision made on the basis of the record.*

Mr. Lee also took the Appeal Panel through the timeline that led to Mr. Aiello's hearing and ultimately, his appeal. In accordance with the principles of natural justice, Mr. Aiello was provided with a Notice of Hearing, which set out the particulars of all allegations against him (Record, Tab 6). At the same time as the Notice of Hearing was provided, so too were the binders of disclosure. The disclosure binders included the transcripts of all the interviews from the two RECA investigations into Mr. Aiello's conduct, all documents and all notes to file. Mr. Aiello was provided with everything. Leading up to the scheduled hearing, Mr. Aiello was granted an adjournment of proceedings on to separate occasions. Transcripts for those adjournment applications are found at Tab 3 and Tab 4 of the Record. These adjournments were granted by the Hearing Panel at significant cost and inconvenience to the Executive Director. They were granted so that Mr. Aiello had the benefit of the principles of natural justice. Mr. Aiello was given the chance to obtain legal counsel prior to the start of the hearing.

Also in the Notice of Hearing, Mr. Aiello was informed of his right to object to members of the Hearing Panel. Mr. Aiello was also asked if he had any objections to the Hearing Panel at the hearing (Record, Tab 5, page 3). Though Mr. Aiello's response was inaudible, it is clear from further comments at the hearing that Mr. Aiello made no objections to the members of the Hearing Panel. This was a further assurance that the principles of natural justice were being met by the Hearing Panel.

With respect to the witnesses called by the Executive Director, Mr. Lee submitted that in each case, Mr. Aiello was given the chance to cross-examine all live witnesses. Mr. Lee also detailed an exchange that took place between himself and Mr. Aiello during which Mr. Aiello stated that he did not want to be sworn in at the hearing to give evidence. Mr. Lee took an adjournment to try and persuade Mr. Aiello to testify and convince him to be sworn in, because otherwise, the only sworn evidence that would be before the Hearing Panel is the evidence given by other live witnesses (Record, Tab 5, pages 79-81). Again, this was to ensure the benefit of natural justice for Mr. Aiello. Towards the closing of the hearing, the Hearing Panel Chair asked Mr. Aiello if he thought he had had a fair hearing. Mr. Aiello said yes (Record, Tab 5, page 92, lines 24-27).

Mr. Lee also addressed B.R.'s concerns about hearsay evidence being relied upon so extensively by the Hearing Panel in their decision. The Executive Director does not take the position that the Jhuty letter should be considered hearsay evidence. J.J. letter was typed by C.U. , and she witnessed some of the events that gave rise to the letter. She gave evidence in person at the hearing about the letter and as such, the letter should not be considered hearsay. Further to that, Mr. Lee disagreed with B.R. assertion that the J.J. letter was the only thing relied upon by the Hearing Panel to find Mr. Aiello guilty of conduct deserving of sanction. In fact, argued Mr. Lee, the Hearing Panel had plenty of other evidence from the hearing that could have given rise to the same finding and same level of sanction ordered. Mr. Aiello made certain admissions in various interviews with RECA

investigators, transcripts of which are in the Record before the Appeal Panel. F.C. and S.H. were both called as witnesses to give evidence as to the interviews conducted by themselves with Mr. Aiello. Though there was no certificate of transcript accompanying any of the interview transcripts, Mr. Lee submitted that having the people who conducted the interviews appear at the hearing to give evidence under oath is better than any piece of paper that certifies a transcript's authenticity.

With respect to the second investigation, file 1457-03, Mr. Lee agreed with B.R. submission that Mr. Aiello was not with S.I. when she accessed the condominium property prior to possession, however, Mr. Lee also pointed out that that specific allegation is minor in comparison to the mortgage fraud allegation (from file 1006-01) and the allegation that Mr. Aiello stole a washer and dryer from the property S.I. had purchased. Mr. Lee also explained that in the interest of keeping hearing costs as low as possible, G.S. was not called as a witness. There were also jurisdictional concerns as G.S. no longer lives in Canada and Mr. Lee would be unable to ensure his attendance before the Hearing Panel. Regardless, Mr. Lee submitted that G.S. lawyer and the investigator who interviewed G.S. were both called as witnesses, and that the evidence should therefore be admissible and should not be defined as hearsay in the way that R.B. asks that it be.

Mr. Lee also offered his own submissions on the Alberta Court of Queen's Bench decision involving Mr. Gary Lee and the Canadian Kennel Club. In the case of Mr. Gary Lee, two separate disciplinary conduct matters were put to the same Hearing Panel. The first was regarding an incident in a parking lot (Wyler matter) and the second matter concerned a judge in a competition (McGowan matter). Mr. Gary Lee argued that the practices of the Canadian Kennel Club's disciplinary committee creates institutional bias. Justice Donald Lee did not agree with that argument and was not satisfied that bias arises in every instance of two matters proceeding before the same Hearing Panel. However, because irrelevant and prejudicial evidence was heard at the Wyler matter, it also tainted the decision of the McGowan matter. In the Wyler matter, Mr. Gary Lee was portrayed as always disrespectful and pushing boundaries and it was those very things that were at issue in the McGowan matter, which was heard by the same Hearing Panel. Because the Hearing Panel heard that information in the first matter, it affected their decision in both matters and that creates a problem. But, Mr. Lee argued that that is not the case in the Aiello matter as the two investigations giving rise to the disciplinary proceeding were completely unrelated and did not demonstrate a pattern of behaviour.

Mr. Lee concluded by reminding the Appeal Panel that the Executive Director had done everything possible to give Mr. Aiello the benefit of natural justice and fairness. Full disclosure was given, two adjournments were granted so that Mr. Aiello could obtain legal counsel and Mr. Aiello himself could have called any witnesses who he thought would benefit his case.

## **VI) APPEAL PANEL CONCLUSIONS**

B.R. set out four main grounds of appeal, that the J.J. complaint letter was hearsay and was used as the primary piece of evidence to convict Mr. Aiello; that V.H. did not testify and therefore Mr. Aiello was not given the opportunity to cross-examine him under oath; that the transcript of the F.C. /Aiello interview was not accurate and the tapes of that interview cannot be located; and, that the two matters were heard concurrently by the Hearing Panel with a prejudicial cumulative effect.

As stated previously, the Appeal Panel can overturn decisions made by the Hearing Panel on law, but should be hesitant to overturn factual findings of the Hearing Panel.

1. *Heresay evidence of J.J.*

The Appeal Panel did not agree that the J.J. complaint letter was heresay in the strictest sense of the word. While J.J. did not appear at the hearing, the person who typed the letter on his behalf (C.U. ) appeared at the hearing and testified under oath that she was responsible for typing the letter according to J.J.'s instructions. The letter was verified by a witness under oath and the Appeal Panel did not consider it heresay evidence. Further to that, Hearing and Appeal Panels of the Real Estate Council of Alberta are not bound by the judicial rules of evidence and Mr. Lee argued that the rule of heresay is eroding. As long as the evidence in question is deemed as reliable, it can be used. The J.J. letter was deemed to be reliable and as stated, was verified under oath at the Hearing.

2. *V.H. did not testify*

The argument was made by B.R. that V.H. was not called to appear at the hearing by the Executive Director and therefore, Mr. Aiello was not given the opportunity to cross-examine him under oath. While this is true, the Appeal Panel does not agree that this is a breach of the fundamental rules of natural justice and procedural fairness as Mr. Aiello could have also compelled V.H. to testify at the hearing on his behalf.

3. *Accuracy of the F.C. /Aiello interview transcript*

At the hearing, F.C. verified, under oath, the accuracy of the transcript in question and the Hearing Panel accepted that the transcript was an accurate transcription of the interview that took place between herself and Mr. Aiello. The Appeal Panel also accepts that the transcript was accurate.

4. *Prejudicial effect of hearing two matters concurrently*

The Appeal Panel notes that there was nothing in the Hearing Panel's decision to indicate that the Hearing Panel decision in file 1006-01 (the J.J. complaint) tainted their decision-making in the file 1457-03 (the S.I. complaint). The onus in this case is on Mr. Aiello to prove that the decision of the Hearing Panel was tainted, it should not just be assumed to be so. B.R. did not bring forth any argument at the appeal to support the notion that the Hearing Panel's decision was tainted as a result of the two matters proceeding concurrently.

## **VII) DISPOSITION AND COSTS**

Based on the foregoing, Mr. Aiello's appeal is hereby dismissed.

With respect to the issue of costs, the Appeal Panel is satisfied that the original cost order of the Hearing Panel, \$15,571.72, is substantial enough that they do not order the payment of appeal costs by Mr. Aiello.



This decision was made on July 18, 2005.

"Kevan Ladner"

Kevan Ladner, Chair

Ted Zaharko

Charlotte Sutherland

This decision was made on July 18, 2005.

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Kevan Ladner, Chair

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Kevan Ladner, Chair

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