THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF Section 39(1)(b)(i) and s.41 of the *REAL ESTATE ACT*, R.S.A. 2000, c.R-5 (the "**Act**")

AND IN THE MATTER OF a Hearing regarding the conduct of GORDON WESLEY PETHICK, Agent registered at all material times hereto with BGB REALTY INC. O/A RE/MAX REALTY PROFESSIONALS, Brokerage (the "**Brokerage**")

Hearing Panel Members:	Brian Klingspon, Chair Helen Ang, Industry Member Rita Aggarwala, Public Member
Appearances:	Mr. Doug Koop, for Mr. Pethick Mr. Andrew Bone, for the executive director of the Real Estate Council of Alberta
Hearing Date(s):	August 23, 2016 at the offices of the Real Estate Council of Alberta in Calgary, Alberta

HEARING PANEL DECISION WITH RESPECT TO CONDUCT DESERVING OF SANCTION

UPON Hearing the testimony of witnesses and considering the evidence submitted at the hearing of this matter; **AND UPON** reviewing and considering the materials submitted and the arguments made by the parties;

THE HEARING PANEL HEREBY FINDS AS FOLLOWS:

A. Introduction

It is a centuries-old rule in real estate conveyancing that contracts for the sale of real estate must be in writing (*Statute of Frauds: An Act for the Prevention of Frauds and Perjuries*, 29 Charles II, c. 3 (1677, U.K.)). Additionally, rules have been made that certain amendments and communications regarding such contracts must be in writing. Today, the original rule and additional writing requirements work to protect the public and to ensure parties are clearly aware of the risks they are taking in real estate transactions. Ignoring these rules can cause problems.

These rules were ignored in this case. Communications that should have occurred in writing did not occur in writing. The parties now disagree as to what was or was not explained verbally by the real estate agent and what was or was not agreed to by the client. The unfortunate fallout includes a break down of a long-standing business and personal relationship, an on-going civil suit, and these disciplinary proceedings, all of which may have been avoided had this legal and common sense rule been adhered to.

B. Issue(s)

The executive director ("**ED**") submits that Gordon Pethick has breached Rules 41(b) and 41(d) of the *Real Estate Act Rules* (the "**Rules**"), which state:

> 41 Industry members must:
>
> ...
>
> (b) provide competent service;
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> ...
>
> (d) fulfill their fiduciary obligations to their clients;
>
> ...

For the reasons that follow, the Hearing Panel (the "**Panel**") finds that Mr. Pethick has breached both Rules 41(b) and 41(d), and has thereby engaged in conduct deserving of sanction.

C. Preliminary Matters

Mr. Pethick was assisted in these proceedings by his broker, Mr. Koop. Mr. Koop was also a witness for the ED. Neither party objected to this dual role. The Panel accordingly allowed Mr. Koop to assist Mr. Pethick during the Hearing. Specifically, Mr. Koop assisted with cross-examinations and closing arguments.

D. The Facts

The undisputed facts established by the evidence in this case are as follows:

- On October 20, 2014, a commercial real estate purchase contract for a property located at 3601 17th Avenue S. E., Calgary, Alberta, was entered into between [("Company Name")] and P.M. (the "**Contract**");
- Mr. Pethick acted as agent for both [("Company Name")]and P.M. in the transaction;

- As required by the Contract, P.M. provided a deposit cheque for $100,000 by October 22, 2014 (the "**First Cheque**");
- Mr. Pethick did not make a photocopy of the First Cheque for the Brokerage file;
- Mr. Pethick attempted to certify the First Cheque on October 22, but was informed by the bank that there was not enough money in the account;
- Mr. Pethick met with P.M. on October 22, 2014. He returned the First Cheque to P.M. and obtained another cheque (the "**Second Cheque**") for $100,000;
- The Second Cheque was undated. P.M. told Mr. Pethick that he would inform Mr. Pethick when adequate funds were available in the account, at which time Mr. Pethick could date and certify the Second Cheque;
- Mr. Pethick did not inform [("Company Name")] in writing that the First Cheque had not cleared, and that there was no deposit in the Brokerage trust account;
- Contract conditions were waived on October 29, 2014;
- On November 21, 2014, P.M. informed Mr. Pethick that he could date and certify the Second Cheque for November 24, 2014;
- Some time between November 21 and November 24, Mr. Pethick verbally informed Mr. L., one of the two owners of [("Company Name")](the other owner was Mr. L.'s wife), that P.M. had given the go-ahead to certify and deposit the $100,000 cheque;
- On November 24, 2014, Mr. Pethick attempted to certify the Second Cheque and was informed by the bank that there was no record of the account associated with the Second Cheque, nor was there any bank record of P.M. or his corporation, from which account the Second Cheque was claimed to have been written from;
- On November 25, 2014, Mr. L. wrote to Mr. Pethick expressing concern that the transaction may not close, and stating, "When all the conditions removed by purchaser I knew and expected that you must deposit initial deposit of $100,000.00 into your account."
- On November 26, following a discussion with his broker, Mr. Koop, Mr. Pethick explained to Mr. L. in writing, the events relating to the Second Cheque;
- Mr. L. wrote to Mr. Pethick on November 27, 2014, inquiring as to why the deposit had not been deposited into Mr. Pethick's trust account within 3 business days of October 22, 2014;
- Mr. Pethick wrote to Mr. L. on November 28, 2014, explaining that the First Cheque had never cleared the bank;
- Mr. Pethick and Mr. L. had several verbal communications regarding the transaction, including the deposit, between October 22, 2014 and November 25, 2014;

- The ED conducted an investigation into the matters that are now before the Panel.

The parties dispute what transpired verbally between Mr. Pethick and Mr. L. between October 22, 2014 and November 25, 2014.

Mr. Pethick asserts that he had told Mr. L. early on that he had a deposit cheque but that it was not dated nor deposited; that Mr. L. had seen the Second Cheque; and that Mr. L. had instructed him to do whatever he had to do to close the deal. Regarding the First Cheque, Mr. Pethick testified that he had explained the circumstances of the First Cheque to Mr. L. verbally, but did not testify as to when that explanation occurred nor the contents of the explanation. Mr. Pethick admitted that he did not discuss anything with Mr. L. about the background of the buyer until their email exchange after the deal had fallen through.

Mr. L. states that he was repeatedly told by Mr. Pethick, in response to Mr. L.'s worries that the deal may not close, that Mr. L. need not worry, as he was protected because he would be able to keep the $100,000 deposit if the deal did not close. Mr. L. testified that he asked Mr. Pethick numerous times during these conversations if he had the deposit and was told not to worry, that the money was coming, and that "it's done." Mr. L. states that he was not aware until after November 21, 2014 that the $100,000 deposit was not in the Brokerage trust account. It was also not until after November 21, 2014, that Mr. L. was made aware that the First Cheque had not cleared the bank.

Mr. Pethick admitted, somewhat reluctantly, that he should have informed Mr. L. in writing, immediately, that the October 22, 2014 cheque had not cleared the bank. He testified that because of their long-standing and successful business relationship, he was "looser" with the writing requirements for commercial contracts.

The Panel finds that although Mr. Pethick may have assumed that between October 22, 2014 and November 24, 2014, Mr. L. understood that there was no deposit in Mr. Pethick's trust account, and that therefore Mr. L. may not receive the $100,000 deposit if the deal did not close, Mr. Pethick did not make efforts to ensure Mr. L. understood this, and it was not in fact clear to Mr. L. that this was a risk he was taking. Mr. L. was repeatedly told by Mr. Pethick that the $100,000 would be his if the deal did not close. He was told not to worry, that he was protected by the deposit. Mr. L. believed that if the deal did not close he would be able to keep the $100,000. The Panel also finds that Mr. L. was

not aware of the circumstances of the First Cheque until after November 21, 2014.

E. Conclusions on Breach

The ED submits that the following specific conduct is deserving of sanction under sections 41(b) and/or 41(d) of the Rules:

- Mr. Pethick's failure to make a copy of the First Cheque for the brokerage file, or to put any notes on the file regarding the First Cheque until November 24, 2014;
- Mr. Pethick's failure to immediately inform [("Company Name")] in writing of the failed First Cheque;
- Mr. Pethick's failure to inform [("Company Name")] in writing until November 26, 2014, that he was not in receipt of any deposit;
- Mr. Pethick's failure to clearly inform [("Company Name")], in writing or otherwise, about the lack of deposit from October 22 to approximately November 24;
- Mr. Pethick's failure to ensure Mr. L. had a clear level of understanding about the lack of deposit between October 22 and November 24, noting that Mr. L.'s first language is not English;

The Panel agrees with the ED, for the reasons that follow.

Section 41(b) (Competent Service)

Competent service is not specifically defined in the Rules or the Act. What constitutes competent service for an agent is determined by practice, policy and precedent. The Rules can also inform what competent service entails. In addition, the Real Estate Council of Alberta provides a helpful Information Bulletin on Competence.

There is no dispute between the parties that Mr. Pethick failed to make a copy of the First Cheque, or to put any notes on the file regarding the First Cheque until November 24. According to the testimony at the Hearing, it was not until about November 24 that Mr. Pethick informed his broker, Mr. Koop, of the First and Second Cheques and of the fact that no deposit had been received.

This was over a month after the deposit was due, after the Second Cheque failed to clear, and 2 days prior to the closing date.

There is also no dispute that Mr. Pethick failed to immediately inform [("Company Name")] in writing of the failed First Cheque, the

circumstances of the Second Cheque, and the fact that he was never in receipt of a deposit.

The Panel finds that Mr. Pethick failed to inform [("Company Name")] of the events around the First and Second Cheques in time for [("Company Name")] to mitigate its risk.

The Rules provide insight into whether this course of conduct constitutes incompetent service. For example, section 53 of the Rules states:

> A real estate associate broker and associate must:
> ...
> (c) provide to the broker in a timely manner all original documentation and copies of original documents provided to the parties or maintained by other brokerages:
> (i) related to a trade in real estate; and
> (ii) required under the Act and these Rules;
> ...
> (f) notify the broker if a deposit referred to in Rule 51(1)(l) has not been received;

Sections 51(1)(l) and 51(1)(m) of the Rules state,

> 51(1) A real estate broker must:
> ...
> (l) ensure that all parties to an agreement giving effect to a trade in real estate are immediately notified if:
> (i) a deposit contemplated by the agreement that, if received, would be held by the related brokerage under the Act has not been received; or
> (ii) a deposit cheque or other negotiable instrument that the brokerage received in respect of a deposit referred to in (i) above has not been honoured; and
> (m) ensure notice under (l) above is given in writing or confirmed in writing.

These two sections of the rules work together to ensure that when a deposit cheque is not received or is not honoured, the various affected parties will be informed clearly, quickly and in writing. In order for the broker to inform the client as required by the Rules, the associate must inform the broker. In fact, as the person in most intimate contact with the client, as part of providing competent service to [("Company Name")], Mr. Pethick should have immediately informed both his broker

and [("Company Name")] in writing of the failure of the First Cheque to clear, and should have made a copy of the cheque in order to keep a complete transaction record. This is particularly important in a transaction brokerage situation, where the associate must remain impartial to both sides of the transaction and ensure clear disclosures of the events of the transaction.

Mr. Pethick's treatment of the First and Second Cheques and in particular his failure to inform his broker or [("Company Name")] in writing of the circumstances surrounding the deposit cheques and the fact that no deposit had ever been received into the brokerage trust account, show a failure to provide competent service and are conduct deserving of sanction.

The RECA Information Bulletin on Competent Service is a publicly available document. Although neither party referred to the document, the Panel has taken notice of it in its determination of competent service. The Bulletin states, under the heading "Do not mislead consumers",

> ...
> Providing competent advice to clients means industry professionals must explain the various options available to deal with specific issues a consumer encounters during a trade in real estate, deal in mortgages or real estate appraisal. The explanation of each option must also include the advantages and disadvantages and how local circumstances or market conditions might affect the different options. Industry professionals must let their clients decide which option to choose.
>
> Directing a client to a specific course of action without advising the client of other options available may constitute a failure to provide competent service – even if the industry professional believes it is the best course of action for the client.

Under "Practice tips", the Information Bulletin states,

> ...
> Sometimes clients willingly choose to take adverse risks. In such situations, RECA recommends industry professionals obtain a written acknowledgement they have provided the client with various options and the advantages and disadvantages of each.

Clause 3.4 of the Contract states,

> In the event that either Deposit(s) are undelivered or returned by the financial institution as funds not cleared or non-sufficient funds, then the Buyer must replace the Deposit(s) by money order, bank draft or lawyer's trust cheque within two (2) Business Days of being notified that the Deposits did not clear. If the Buyer fails to provide the Deposit(s), the Seller may, at its discretion, terminate the Contract by notice in writing to the Buyer within two (2) Business Days.

On failure of the First Cheque, P.M. did not replace the $100,000 deposit by money order, bank draft or lawyer's trust cheque as required by clause 3.4 of the Contract. As a result, [("Company Name")] could have terminated the Contract as early as October 24, 2014 and pursued other offers. However, Mr. Pethick did not inform Mr. L. of the failure of the First Cheque to clear, nor did he explain to Mr. L. that [("Company Name")] could terminate the Contract as a result of this failure, and seek direction from [("Company Name")] as to its decision regarding termination of the Contract.

Mr. Pethick did not ensure [("Company Name")] understood the risk it was taking by allowing a breach of section 3.4 by P.M. Indeed, Mr. Pethick did not provide [("Company Name")] with the information in time to allow [("Company Name")] to detect the breach and end the Contract. At no point did Mr. Pethick clearly state to Mr. L., verbally or in writing, anything to the effect of, "you are able to terminate the contract because the First Cheque did not clear and was not replaced by money order, bank draft or lawyer's trust cheque. If you decide not to terminate the contract, you may not receive the $100,000, as I do not have a deposited cheque from P.M. and there is no deposit in my trust account. This is a real risk. Are you comfortable with that risk?" This failure to explain the facts surrounding the First Cheque, the options available to [("Company Name")] and the corresponding risks, and to ensure Mr. L. understood those options and risks, as well as the fact that there was no deposit in trust, is a breach of Section 41(b), and is conduct deserving of sanction.

A number of additional of indicia found in the evidence suggest Mr. Pethick did not make proper efforts to ensure Mr. L. understood the nature and progress of the transaction. For example, the Agreement for Remuneration (Exhibit A.5) between [("Company Name")]and the Brokerage states that it is an agreement "for use in designated agency brokerages," whereas the Agreement to Represent Both Seller and

Buyer (Exhibit A.6) states that it is "for use in common law brokerages." It is still not clear to the Panel whether the Brokerage was a common law or designated agency brokerage at the time the events in this case took place. The evidence suggests that this was not made clear to Mr. L. either.

Moreover, the Panel finds that the nature of the brokerage transaction, specifically, that Mr. Pethick had to act in an even-handed way as between Mr. P.M. and [("Company Name")], and could not act purely in [("Company Name")]'s best interests, as he may have previously done, was never clearly explained to [("Company Name")]. In contrast, Mr. L. testified that he trusted Mr. Pethick to do what was in his best interest, given their lengthy business and personal relationship, and Mr. Pethick testified that he dealt more loosely with the writing requirements given his past relationship with Mr. L. All of this suggests, and the Panel finds, that Mr. Pethick did not make the efforts required to ensure that Mr. L. understood the progress and nature of the transaction, particularly given English is not Mr. L.'s first language. Such efforts were required to deliver competent service.

For the reasons above, the panel finds Mr. Pethick in breach of section 41(b) of the Rules, and finds that there has been conduct deserving of sanction.

The panel also parenthetically notes that Mr. Pethick stated in his testimony that the only contact information he had for P.M., who was not traceable following the failure of the Second Cheque, was a P. O. Box. This appears to be a failure to properly identify the buyer. The ED did not put argument forward to explore this.

Additionally, in reviewing the Contract, the Panel notes that although according to his testimony Mr. L. was told by Mr. Pethick that the offer from P.M. would be a cash offer, the Contract actually indicates that the offer was a "cash and mortgage" offer. Mr. L. testified that [("Company Name")] rejected another higher offer because the amount of the proposed financing was too high.

Mr. Pethick, who wrote up the Contract, did not note in the Contract how much financing P.M. intended to secure, and there was no condition with respect to financing inserted into clause 8.1 (buyer's conditions). The offer as presented did not accurately reflect the mortgage aspect of the deal. Although there is no requirement that a financing condition be set, the lack of such a condition, together with the lack of specificity with respect to the mortgage amount and the

failure of the First Cheque to clear, ought to have been a red flag to Mr. Pethick that the buyer may not have had the ability to complete the purchase. This information should have been shared with [("Company Name")]. The Panel finds that it was not shared. Again, the ED did not put argument forward to explore this.

Section 41(d) Fiduciary duty

The ED refers to *S Maclise Enterprises Inc. v. Grover*, 2014 ABQB 591 (CanLii) to provide insight into an industry member's fiduciary duties, if any, towards his client in cases where, as here, the same industry member represents both the buyer and the seller.

The industry member in *Maclise* argued that in situations where both the buyer and seller are represented by the same industry member, no fiduciary duties arise. The Court held that fiduciary duties do arise in such cases, and outlined those duties.

Does the Maclise case apply here with respect to fiduciary duties?

The ED submits that the *Maclise* case applies in this case. Mr. Pethick has not put any argument forward to suggest otherwise. The Panel nonetheless notes that the Rules in their current form were not the Rules that were interpreted by the Court of Queen's Bench in *Maclise*.

The current Rules came into effect in substantially their current form, on October 1, 2006. Although the events in *Maclise* occurred after October 1, 2006 the *Maclise* case appears to apply the Rules as they existed between July 1, 2006 and September 30, 2006 (the "**Interim Rules**"). July 1, 2006 appears to mark a major revision to the *Real Estate Act* Rules. For example, the Rules prior to July 1, 2006 (the "**Old Rules**") did not provide the same level of detail in respect of dealing with situations in which one industry member represented both buyer and seller. The Old Rules and the Interim Rules referred to this type of situation as "dual agency." The Interim Rules defined dual agency as "a situation in which an industry member or brokerage represents both seller and buyer in a transaction." Section 59 of the Interim Rules dealt with obligations owed by brokerages in dual agency situations. In such situations, all parties (buyer, seller and brokerage) were required to enter into a dual agency agreement which outlined certain duties and responsibilities of the parties.

On October 1, 2006, the Interim Rules were replaced by the current Rules. Although the term "dual agency" is still defined, it is not referred

to anywhere in the Rules save for the definitions section. Instead, the term "transaction brokerage" is defined as "a relationship in which a brokerage or industry member provides facilitation services to the buyer and the seller in the same trade." Facilitation services are defined in the current Rules as

> services by which the interests of the buyer and seller are met in an even handed, objective and impartial manner without providing confidential advice, advocating on behalf of either the buyer or seller, or using discretion or judgment that benefits the buyer or seller to the prejudice of the other client....

Although they weren't formally defined, facilitation services were listed in section 59 of the Interim Rules, in a virtually identical manner as they are listed in sections 59 and 59.1 in the current Rules. Provision of facilitation services is one facet of the obligations placed on industry members in transaction brokerage situations. Sections 59 and 59.1 of the current Rules, which describe various obligations owed by industry members in transaction brokerage situations, are substantially the same as section 59 of the Interim Rules, subject to the change in terminology from "dual agency" to "transaction brokerage." A transaction brokerage continues to be a situation in which one common law brokerage or designated agent represents both the buyer and the seller, as evidenced by the transaction brokerage agreement in this case, entitled "Agreement to Represent Both Seller and Buyer" (the "**TBA**").

Furthermore, there is no explicit statement in the current Rules modifying the fiduciary duties owed in transaction brokerage situations as compared to those owed in the Interim Rules in dual agency situations, and there is no clause in the TBA stating that no fiduciary duties are owed by the Brokerage. Section 60 of the Rules does make it clear there are no fiduciary obligations owed to individuals with "customer status," but that was not the status of [("Company Name")]here. Additionally, RECA's *Practice Guide for Industry Members on Transaction Brokerage*, a publicly available document of which the panel takes notice, specifically lists a number of fiduciary obligations arising in transaction brokerage situations:

- Avoid all conflicts of interest
- Disclose all conflicts of interest
- Not misuse confidential information
- No secret profits
- Account for funds (eg. deposits)

Finally, in the Agreement of Remuneration between the Brokerage and [("Company Name")](Exhibit A.5), Mr. Pethick specifically crossed out the words "[the Brokerage] owes the Seller no fiduciary duties."

Considering all of the above, the Panel agrees with the ED that the *Maclise* case applies here with respect to fiduciary duties owed in brokerage transactions.

What the current Rules introduce that the Old Rules and Interim Rules did not have is the concept of "designated agency" brokerages. This framework allows brokerages who opt into the designated agency framework to assign two different associates from the same brokerage to act on behalf of a buyer and a seller, respectively, without requiring all the parties to enter a transaction brokerage agreement. Brokerages who opt into this framework must have certain safeguards in place to ensure the two associates can each engage in sole representation without triggering a conflict of interest. In designated agency brokerages, the transaction brokerage situation only arises when a single associate from a designated agency brokerage (the "**designated agent**") represents both the buyer and the seller.

Section 59.1 of the current Rules deals with obligations owed by brokerages and designated agents when brokerage transactions arise in a designated agency brokerage. Again, this section is substantially the same as section 59 of the Interim Rules, with the various obligations listed under section 59 of the Interim Rules divided between the brokerage and the designated agent.

The parties did not specify whether the brokerage in this case was a common law brokerage or a dual agency brokerage. In the panel's view, as far as associates' fiduciary duties are concerned, associate duties under the common law brokerage framework are as explained in *Maclise*, and duties under the designated agent framework with respect to the designated agent are at least as onerous, if not more. This is because in the designated agent framework, the associate takes on a number of the responsibilities, as per section 59.1 of the Rules, that are otherwise assigned to the brokerage in section 59 of the Rules. It may follow, though we need not decide that here as the ED is content with applying *Maclise* with respect to fiduciary duties owed by Mr. Pethick, that the designated agent also takes on more fiduciary duties.

Fiduciary duties in transaction brokerage situations

As explained in *Maclise* at para. 89, real estate agents owe both contractual and fiduciary obligations to their principals. Any fiduciary obligation not expressly limited by the contractual agreement, in this case the TBA, continue to apply.

Gates J. describes the broad nature of a fiduciary relationship at para. 82 of *Maclise*, quoting *Guerin v. The Queen*, [1984] S.C.J. No. 48, 2 SCR 335 at 384:

> ... where ... one party has an obligation to act for the benefit of another, and that obligation carries with it discretionary power, the party thus empowered becomes a fiduciary ...

Gates J. explains at para. 88 that real estate agents, as agents of their clients, owe fiduciary duties to their clients as a matter of course, by the very nature of the agent-principal relationship. Indeed, section 48(a) of the Rules states:

> For the purposes of this division:
>
> (a) an agency relationship is established when a buyer or seller expressly or implicitly consents that an industry member should act on his or her behalf, and the industry member consents so to act in a trade of real estate;

It is clear from the various agreements entered into by the Brokerage and [("Company Name")] that the Brokerage and [("Company Name")] were in an agency relationship. Mr. Pethick was also in an agency relationship with [("Company Name")], as [("Company Name")] consented to Mr. Pethick acting on its behalf and Mr. Pethick agreed to do so. An agency relationship between the associate and the client was also established in *Maclise* (at para. 114), though it was the Brokerage that was a party to the dual agency agreement.

The establishment of a fiduciary relationship as a matter of course does not change with respect to dual agency (or transaction brokerage) situations. As explained in *Maclise*, in dual agency (or in this case, transaction brokerage) situations, the fiduciary duty still exists, subject to the disclosure limitations specified in sections 59(4)(j) (for common law brokerages) and 59.1(4)(b)(vii) (for dual agency brokerages) of the Rules, dealing with non-disclosure of the parties' bottom lines, motivations and personal information.

Gates J. goes on to explain that the agent, as the sole conduit controlling the information flowing between the parties, owes the following fiduciary duties to his or her principals in a dual agency (or transaction brokerage) situation:

- Faithfulness, loyalty, good faith and avoidance of potential conflict;
- Fairness, even-handedness, not favouring one principal over the other;
- Disclosure of dual agency (or transactional brokerage) to both parties;
- Reasonable care and skill;
- Full disclosure and full accounting, subject to sections 59(4)(j) or 59.1(4)(b)(vii) of the Rules. Specifically, sections 59(4)(e)(ii) and 59.1(4)(b)(v)(B) require disclosure to the seller of "all material facts relevant to the buyer's ability to purchase the property known to the brokerage," notwithstanding the disclosure limitation in sections 59(4)(j) and 59.1(1)(4)(b)(vii) dealing with personal and confidential information;
- Acting in the best interests of both parties, and subordinating the fiduciary's own interests to those of the principals.

It may be mentioned that the Consumer Relationship Guide published by the Real Estate Council of Alberta and identified as Exhibit A.11 in this case, states at page 2 that where a transaction brokerage situation arises, the agent facilitates the transaction, "without acting in the interest of either side." This may appear to be in conflict with a fiduciary's duty to act in the best interests of both parties. In the Panel's view, the phrase "without acting in the interest of either side" is most logically interpreted as meaning "without favouring either side," as the agent is clearly representing both parties and working to serve the interests of both parties in an even-handed way. Without something more explicit, this phrase can not nullify the otherwise existing fiduciary duties.

As explained above, Mr. Pethick did not inform Mr. L. of the breach of Clause 3.4 of the Contract and he did not inquire as to whether [("Company Name")] wanted to treat the Contract as ended. In contrast, Mr. Pethick testified that he asked P.M., following the failure of the First Cheque, whether P.M. wanted to kill the deal. This is not impartial behaviour, and is a breach of Mr. Pethick's fiduciary duty to [("Company Name")].

Furthermore, Mr. Pethick did not ensure Mr. L. clearly understood that he did not have a deposit in trust and that there was a risk that Mr. L.

would not receive the $100,000 if the transaction did not close, given the failure of the First Cheque to clear. This was material information related to the ability of P.M. to purchase the property, which Mr. Pethick was required to disclose to [("Company Name")] as part of his fiduciary obligation, clarified in section 59.1(4)(b)(v)(B) of the Rules. Instead, Mr. Pethick repeatedly informed Mr. L. that he did not need to worry and that he was protected by the deposit. It was a duty of Mr. Pethick to ensure this was communicated *and* understood, particularly in light of English being Mr. L.'s second language.

For the reasons above, the panel finds Mr. Pethick in breach of section 41(d) of the Rules, and finds that there has been conduct deserving of sanction.

F. Request for Submissions on Sanction and Costs

The Panel requests written submissions from the parties on the appropriate sanction and costs against Mr. Pethick, as follows:

The ED is directed to supply written submissions to the Hearings Administrator within 14 days of receipt of this decision. The Hearings Administrator is directed to supply those written submissions to Mr. Pethick immediately on receipt. Mr. Pethick may supply written submissions to the Hearings Administrator within 14 days of receipt of the ED's written submissions. The ED may provide a written rebuttal within 7 days of receipt of Mr. Pethick's submissions.

Once the timelines for provision of written submissions to the Hearings Administrator has passed, any written submissions received will be supplied to this Hearing Panel for its consideration and decision on sanction and costs.

Dated and certified at the City of Calgary in the Province of Alberta, this 20th day of September, 2016.

Hearing Panel of the
Real Estate Council of Alberta

Brian Klingspon
Hearing Panel Chair, for the Panel

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF Section 39(1)(b)(i) and s.41 of the *REAL ESTATE ACT*, R.S.A. 2000, c.R-5 (the "**Act**")

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Hearing Panel Members:	Brian Klingspon, Chair Helen Ang, Industry Member Rita Aggarwala, Public Member
Appearances:	Mr. Doug Koop and Mr. Pethick, for Mr. Pethick Mr. Andrew Bone, for the executive director of the Real Estate Council of Alberta
Hearing Date(s):	August 23, 2016 at the offices of the Real Estate Council of Alberta in Calgary, Alberta

DECISION ON SANCTION

FOLLOWING the decision of the Hearing Panel with respect to conduct deserving of sanction (the "Phase I Decision") and **UPON Considering** the written submissions of the parties with regards to the appropriate sanction in this matter;

THE HEARING PANEL HEREBY FINDS AS FOLLOWS:

A. Introduction

On August 23, 2016, a contested Phase I hearing was held, to determine whether certain conduct of Gordon Wesley Pethick was deserving of sanction.

On September 20, 2016, the hearing panel in this matter (the "**Panel**") made findings with respect to Mr. Pethick's conduct, and determined that Mr. Pethick's conduct was deserving of sanction. Specifically, in the Phase I Decision, the Panel found the following conduct to be deserving of sanction:

- Mr. Pethick's failure to make a copy of a deposit cheque for his brokerage's file, or to put any notes on the file regarding that cheque for over one month;
- Mr. Pethick's failure to immediately inform his client or his broker in writing that the deposit cheque had failed to clear the bank;
- Mr. Pethick's failure to immediately inform his client or his broker in writing, for over one month, that he was not in receipt of any deposit;
- Mr. Pethick's failure to clearly inform his client, in writing or otherwise, about the lack of deposit and the associated risks of continuing with the transaction, thereby compromising his client's ability to mitigate its risk;
- Mr. Pethick's failure to ensure his client understood the facts around the deposit, the nature of the brokerage transaction, and the risks associated with continuing the transaction;
- Mr. Pethick's failure to treat both sides in the brokerage transaction in an even-handed manner.

As a result of his conduct, the Panel found that Mr. Pethick breached rules 41(b) and 41(d) of the *Real Estate Act Rules* (the "**Rules**"). These provisions require industry members to provide competent service and fulfill fiduciary obligations, respectively.

The only issue to be determined in these reasons is the issue of the appropriate sanction for Mr. Pethick. The facts and breaches are set out in the Panel's written Phase I Decision, issued on September 20, 2016.

B. Parties' Submissions on Sanctions and Costs

The parties were invited to make submissions with respect to the appropriate sanction and costs, and both parties did so.

The executive director ("**ED**") cites *Jaswal v. Newfoundland (Medical Board)* (1986), 138 Nfld. & P.E.I.R. 181 (Nfld. S. C. T. D.), a case involving professional conduct in the medical profession, as authority for factors which are to be taken into account in determining the appropriate sanction. The case has been cited with approval by the Alberta Court of Appeal in professional conduct scenarios, and is commonly referred to in RECA hearings.

At para. 35 of *Jaswal*, Green J. (as he was then) lists 13 non-exhaustive factors that ought to be considered in determining appropriate sanctions where, as here, professional misconduct has been proven.

The ED, in his submissions, considers each of these factors in the case of Mr. Pethick. Specifically, the ED submits the following to be important factors for consideration in this case:

- Mr. Pethick was very experienced;
- Mr. Pethick had a disciplinary history with RECA in which he simultaneously acted for buyer and seller and failed to submit a deposit check to his brokerage's trust account;
- The breaches by Mr. Pethick in this case were fundamental obligations of industry members;
- Public confidence in the real estate profession is negatively impacted in these situations;
- The complainant in this case lost hundreds of thousands of dollars due to Mr. Pethick's actions;
- Mr. Pethick has been reluctant in acknowledging his wrong-doing, which suggests specific deterrence is warranted;

The ED has also provided a number of non-binding precedents, and argues that a substantial monetary sanction of $19,000, along with a period of suspension of 3 months and an educational requirement, being the successful completion of Unit 4 of the Fundamentals of Real Estate course, is warranted with respect to the breaches found by the Panel.

Mr. Pethick's submissions essentially re-argue many of the facts, which have been found by the Panel, and attempt to introduce additional facts to those stated in the agreed facts relating to his previous 1996 disciplinary proceedings.

As the Panel has already made a decision with respect to Mr. Pethick's conduct deserving of sanction and can not revisit findings in the 1996 proceedings, Mr. Pethick's submissions in this regard are not relevant to these sanctioning reasons.

Mr. Pethick has challenged the ED's contention that he was dishonest and acted for his own gain, and that his client ended up losing hundreds of thousands of dollars because of his conduct. This is discussed further in the following section.

Finally, as part of Mr. Pethick's submission, he included a letter from his broker, Mr. Koop. Mr. Koop also made submissions for Mr. Pethick at the oral Phase I hearing of this matter on August 23, 2016. In Mr. Koop's letter, apart from also re-arguing many of the facts that have been

found by the Panel, he suggests that the fact that Mr. Pethick has not had any disciplinary proceedings in 20 years should be viewed as a mitigating factor in these circumstances.

Mr. Pethick did not provide any precedents or proposals with respect to appropriate sanction for the Panel to consider.

With respect to costs, the ED cites section 28(3) of RECA's Bylaws, where the suggested upper limit for costs for a fully contested hearing with a fine in the range $10,000-29,999 is $5,000. The ED also provided an estimated schedule of costs for the investigation and hearing, of $11,111.28. Finally, the ED cites the RECA Hearing and Appeals Practice and Procedure Guidelines, which state that, although costs are ultimately at the discretion of the Panel, industry members whose conduct is deserving of sanction ought to be responsible for full costs of the hearing process. The ED suggests costs of $5,000 be ordered against Mr. Pethick.

C. Decision on Sanctions and Costs

The Panel agrees with the ED that given the factors and circumstances in this case, a monetary penalty is warranted. Having regard to the precedents cited by the ED, Mr. Pethick's disciplinary history, the fundamental nature of the breaches by Mr. Pethick, the importance of the public confidence in the real estate industry, particularly in transaction brokerage situations, and Mr. Pethick's reluctance to recognize the gravity of his wrong-doings, the Panel orders a total monetary sanction in the amount of $19,000 for all of the breaches found.

It should be mentioned that the ED also suggests that Mr. Pethicks' client lost hundreds of thousands of dollars because of Mr. Pethick's conduct. Although evidence was entered suggesting Mr. Pethicks' client received more than one offer in the relevant period, the Panel did not make a finding as to whether a monetary loss was suffered. What the Panel did find is that because of Mr. Pethick's failure to fulfill his duties, his client was not able to make a decision that may have mitigated its losses. Although a specific monetary loss was not found by the Panel, this loss of opportunity to mitigate its risk was a significant negative effect suffered by Mr. Pethick's client.

Part of the ED's submission, specifically dealing with a proposed period of suspension, suggests Mr. Pethick was dishonest and acted for

personal gain. However, the Panel did not make findings of fact with respect to Mr. Pethick's motivation for his conduct; rather the focus was on the nature of the conduct itself.

The Panel accordingly orders a period of suspension of 1 month.

The Panel also believes that an education component is warranted in this case. To that end, the Panel orders Mr. Pethick to complete, within 6 months of being served with these reasons and at his own expense, Units 2 and 4 of the Fundamentals of Real Estate Course.

Finally, the Panel agrees with the ED's proposal on costs against Mr. Pethick.

In summary, the Panel orders the following sanction and costs against Mr. Pethick:

1. Mr. Pethick shall pay, in full, within a reasonable timeline to be determined by the ED, a fine of $19,000;

2. Mr. Pethick shall pay, in full, within a reasonable timeline to be determined by the ED, $5,000 to RECA for costs of the investigation and proceedings;

3. Mr. Pethick shall complete the following education requirements from the Fundamentals of Real Estate course at his own expense, within 6 months of being served with these reasons, and notify RECA in writing that he has done so:
    a. Unit 2: *Real Estate Act,* Rules and Regulations
    b. Unit 4, Consumer Relationships

    If the education requirement above is not available, the ED may substitute a similar course at his sole discretion.

4. Mr. Pethick's real estate license shall be suspended for a period of one month, which period will commence immediately upon the service of these reasons on Mr. Pethick, unless the ED in his sole discretion agrees in writing to substitute a different date for commencement of the one-month period.

5. Should Mr. Pethick be unable to comply with the deadlines determined by the ED for items 1 and 2 above, or with the deadline specified in item 3 above, he may request an extension by submitting to the ED prior to the deadline a request in writing stating a reason for requesting the extension and a time frame for

completion. The ED shall, at their sole discretion, determine whether a time extension will be granted and will notify Mr. Pethick in writing if the extension has been granted.

6. In the event that Mr. Pethick fails to comply with any of the sanctions or cost orders set out above, Mr. Pethick's license to practice shall be immediately suspended.

Dated at the City of Calgary in the Province of Alberta, this 21 day of November, 2016.

Hearing Panel of the
Real Estate Council of Alberta

Brian Klingspon, Hearing Panel Chair