

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 **CAROL
HEDDLE MACKENZIE**, a Real Estate Associate, previously registered with
1669430 Alberta Ltd. o/a Royal LePage True North Realty.

Hearing Panel Members: Brian Klingspon, Chair
Charlie Ponde
Colleen Wetter

Appearing: Vanessa Miller, case presenter for the Executive Director
Timothy J. Byron, counsel on behalf of Carol Heddle Mackenzie

**DECISION OF A HEARING PANEL IN RESPECT AN APPLICATION
BY THE EXECUTIVE DIRECTOR**

A) Introduction:

1. The original date of this hearing was set for June 12, 2015 and the Executive Director served notice on Ms. Mackenzie on May 20, 2015. On May 27, 2015 the Executive Director made an application to the Panel to find conduct deserving of sanction based on a court judgment purporting to be dealing with the same issues as those in the Notice (the "Court Decision"), as well as supporting case law and the affidavit of Len Clarke.
2. In June 10, 2015, Ms. Mackenzie requested an adjournment and the adjournment application proceeded by telephone conference on June 10, 2015. Although legal counsel appeared on behalf of Ms. Mackenzie for the adjournment application, he had not been formally retained. The Executive Direction consented to the adjournment and it was granted subject to conditions by the Panel on June 10, 2015.
3. The hearing was rescheduled to August 24, 2015 by consent. On August 24, 2015, the hearing commenced and the Executive Director commenced her opening statements. Ms. Mackenzie chose to defer her opening statements until her case was presented. The Executive Director distributed her exhibits for the hearing that included a copy of the Court Decision about Ms. Mackenzie at Tab 6. Ms. Mackenzie objected to the inclusion of the Court Decision as an exhibit. After

hearing argument from both parties, the Panel decided to not allow the Executive Director to enter the Court Decision at that time. The hearing was then adjourned to a future date based on agreement.

B) Application:

1. In March of 2016, the Executive Director made an application that was scheduled to proceed on April 14, 2016. The Executive Director was seeking to have all or some of her witnesses appear by telephone or videophone if possible. The Executive Director sought the order because all six of the witnesses live out of Calgary and each witness has an affidavit with relevant transcripts. The Executive Director indicated there would be no prejudice to Ms. Mackenzie to proceed this way. On April 13, 2016, Ms. Mackenzie filed a brief in response challenging the application and stating that it was the second application made by the Executive Director to have the witnesses appear by telephone conference. Ms. Mackenzie asked that the Executive Director's application be dismissed.
2. On April 14, 2016, the Executive Director's application was heard by telephone conference call. The Panel adjourned the application to receive additional evidence from the parties about how the evidence would be tendered if the Witnesses did not appear in person at the hearing.
3. On May 2, 2016, the Executive Director made email submissions and proposed that the complainant could testify via video from RECA's Edmonton office. She advised that four other witnesses reside in Fort McMurray and would likely be able to testify via video conference. The sixth witness would likely be able to attend in person as he lives in Red Deer. The Executive Director wrote that she sent Ms. Mackenzie the affidavits of the witnesses and was seeking a reply.
4. The response from Ms. Mackenzie to the email submissions of the Executive Director did not arrive. On August 25, 2016, the Panel requested the response by September 9, 2016 failing which a hearing date would be set. On August 29, 2016, Ms. Mackenzie sought an extension to submit a response until September 16, 2016. On September 16, 2016, Ms. Mackenzie's response was received.
5. In the September 16, 2016 response, Ms. Mackenzie raised objection to the witnesses appearing by video conference and the tendering of prior testimony in transcript form. Ms. Mackenzie raised procedural concerns about how the witnesses will appear and also that the Executive Director's key witnesses or main witnesses should be required to attend in person, notwithstanding whether the other witnesses appear by video conference.
6. Further, Ms. Mackenzie objected to the Executive Director's intention to use the transcripts from the 2011 court proceedings as evidence in this regulatory

proceeding. Ms. Mackenzie argued that because the Panel had previously decided not to enter the Court Decision as an exhibit, the Executive Director was essentially making the same application. Ms. Mackenzie is concerned about not being able to cross-examine on the affidavits and that the transcripts will essentially lead the witnesses through their evidence.

7. On October 4, 2016, the Executive Director provided a further response to Ms. Mackenzie's September 16, 2016 response and the issue of tendering the transcripts. The Executive Director provided administrative information about how the video conferencing will be arranged and the information transmitted. She also confirmed that Ms. Mackenzie has not been an Industry Member with RECA since April 1, 2015, as she did not maintain her registration. The Executive Director sought an order that the written submissions be exchanged on the issue of admission of the Court Decision, the transcripts from the Court Decision and any other evidence arising from that trial and to set a date for hearing oral argument.

C) Decision:

1. The Panel has read and considered all of the written submissions of the parties. We recognize that the original application before us was to permit some or all of the witnesses to appear by video conference. There was a reference in the Executive Director's application to affidavits of the witnesses and transcripts. Ms. Mackenzie then raised the issue of the transcripts of the Court Proceedings in her reply to this application.
2. The Panel makes note that it has not ordered that the prior Court Decision could not be filed. The earlier order made was specifically that the prior Court Decision could not be entered as an exhibit at that time.
3. The Panel is permitting five of the six witnesses of the Executive Director to appear at the hearing by video conference. The *Real Estate Act* addresses the Industry Member's process to cross-examine witnesses: section 42(b). The Panel relies on the acceptance by other regulatory tribunals of alternative attendance of witnesses by telephone or video conference, the Rules of the Court of Queen's Bench that allow same, provisions in the *Criminal Code* that all video or audio testimony and considerable case law that permits such attendance by witnesses.
4. We order that the parties exchange written submissions on the issues of the admissibility of the transcripts and the Court Decision, or any other evidence from the Court proceeding and to set a date for hearing of this argument. We remind the parties that a finding in response to an earlier objection about the admissibility of the Court Decision as evidence at that time was made on August 24, 2015.

5. Within two weeks of receipt of this Panel's decision, the parties will present a schedule to the Panel outlining the process and dates of exchanging written argument and appearing before us. The date of the oral argument must be on or before January 16, 2017 and therefore the written materials must be exchanged by the parties and presented to the Panel before these dates. This is not setting the date of the oral argument on January 16, 2017. It would benefit the Panel greatly to have the written materials a week in advance of the oral argument so we can read them and be prepared for the oral submissions.

This decision was certified and dated on November 16, 2016.



Brian Klingsporn, Chair