

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF a Hearing under Part 3 of the *Real Estate Act*, R.S.A. 2000, c. R-5, as amended

AND IN THE MATTER OF the conduct of Bobby Lapman Chinn, real estate associate, currently unregistered

Hearing Panel Members: Brian Klingspon, Chair
Wayne McAlister
George Pheasey

Appearing: Gregory Sim, case presenter for the executive director of RECA

Hearing Date: November 4, 2014

DECISION OF A HEARING PANEL
ABOUT CONDUCT DESERVING OF SANCTION

Introduction

Mr. Sim, the case presenter, was personally present before the hearing panel. He had no objection to the hearing panel makeup. Mr. Chinn did not attend the hearing. No representative for Mr. Chinn was present. The Chair confirmed the proceedings were being recorded.

Preliminary Issue: Application to proceed in absence of Bobby Chinn or his representative

Mr. Sim made application to proceed with the hearing in Mr. Chinn's absence. The following exhibits were entered as evidence in support of this application and for other purposes during the hearing:

Exhibit 1: "Notice of Hearing" outlining the alleged facts, *Real Estate Act* Rule breach and allegation Mr. Chinn's conduct was conduct deserving of sanction.

Exhibit 2: An "Affidavit of Service by Verbal Acknowledgement" sworn by Colleen de Moissac which, in part, reads:

1. On October 17, 2014, I sent Bobby Chinn a cover letter and Notice of Hearing in his [sic] matter. These are marked as Exhibits "A" to this my Affidavit.
2. The aforesaid documents were sent via email to Bobby Chinn. This email is marked as Exhibit "B" to this my Affidavit.
3. On October 17, 2014, I telephoned Bobby Chinn wherein he verbally acknowledged that he had received the Cover Letter and Notice of Hearing.

Under section 41(3) of the *Real Estate Act*, Mr. Sim submitted, the executive director must provide Mr. Chinn at least 15 days' notice of the hearing. Mr. Chinn was provided a letter and Notice of Hearing by email on October 17, 2014. He was contacted by telephone on October 17, 2014 and he acknowledged receipt of the October 17, 2014 letter and Notice of Hearing. Mr. Sim advised the hearing panel Mr. Sim had spoken with Mr. Chinn by telephone within the last day before this hearing. Mr. Chinn advised Mr. Sim he would not be attending this hearing.

Mr. Sim submitted Mr. Chinn was given and received proper notice of the hearing and Mr. Chinn advised he would not attend. Mr. Sim stated under section 41(1) of the *Real Estate Act*, the hearing could proceed in Mr. Chinn's absence.

The hearing panel agreed and proceeded with the hearing.

Conduct Deserving of Sanction Allegation(s)

Exhibit 1, the Notice of Hearing dated October 17, 2014, is attached as Schedule A to this decision. It provides in part:

"It is alleged that your conduct is deserving of sanction for breaching sections of the *Real Estate Act* or Rules that were in force. Here are the particulars:

1. You were an industry member and registered as a real estate associate with Century 21 A.L.L. Stars Realty Ltd. at all material times.
2. On or about August 19, 2011 at approximately 0242 hours you were operating a motor vehicle after having consumed alcohol.

3. You were involved in a collision resulting from your failure to negotiate a traffic circle. Your motor vehicle crossed a median and collided with another motor vehicle.
4. The operator of the other motor vehicle was killed in the collision.
5. You pled guilty and were convicted of operating a motor vehicle in a manner that was dangerous to the public causing death, contrary to the Criminal Code of Canada.
6. By reason of the matters described herein, your conduct is deserving of sanction, particulars of which include you breached Rule 42(g) of the Rules made pursuant to the *Real Estate Act* by "engaging in conduct that undermines public confidence in the industry, harms the integrity of the industry or brings the industry into disrepute."

Evidence

Mr. Sim called Ms. Sarah Witzke, RECA Licencing Compliance Officer. She was asked to identify documents for entry as Exhibits. She identified the following documents and, together with Exhibits 1 and 2 above, these documents constitute all of the exhibits entered during this hearing:

Exhibit 3: Notification Pursuant to s. 40(1) of the *Real Estate Act* Rules. This as a form RECA received from Mr. Chinn on December 15, 2011 wherein Mr. Chinn advised Criminal Code proceedings had been commenced against him as of November 15, 2011.

Exhibit 4: Four (4) documents pertaining to RECA's *Real Estate Act* s.53 temporary suspension of Mr. Chinn's authorization to trade in real estate as a real estate associate.

Exhibit 5: Agreed Statement of Facts in the criminal proceeding in the Court of Queen's Bench of Alberta. This was a document obtained from the Court by the RECA investigator during the misconduct investigation.

Exhibit 6: Mr. Chinn's affidavit dated December 15, 2011 provided to RECA at RECA's request.

Exhibit 7: An email dated March 24, 2014 from James Porter to Mr. Chinn and an email dated March 25, 2014 from Mr. Chinn to James Porter. These were communications during the RECA misconduct investigation.

Exhibit 8: Proceedings Excerpt of the criminal proceeding in the Court of Queen's Bench of Alberta dated August 8, 2013. This is the criminal sentencing transcript in Mr. Chinn's criminal proceedings. It was obtained from the Court during the RECA misconduct investigation.

Exhibit 9: Report of Criminal Trial dated August 8, 2013. It was obtained from the Court during the RECA misconduct investigation.

Exhibits 1 through 9 is the documentary evidence the case presenter supplied to the hearing panel.

Case Presenter's Submissions about Conduct Deserving of Sanction

Mr. Sim submitted the questions the Hearing Panel must decide are i) whether the facts occurred, ii) whether the facts amount to Mr. Chinn's conduct breaching Rule 42(g) and are conduct deserving of sanction, and iii) if the conduct was conduct deserving of sanction, what sanctions to impose.

Mr. Sim stated the evidence established the facts set out in the Notice of Hearing occurred. He said Mr. Chinn was at a bar with real estate clients. In the early morning hours, having consumed alcohol excessively, he made the decision to operate his vehicle and drove over the speed limit, failed to negotiate a traffic circle properly, hit an oncoming vehicle and killed that vehicle's driver.

In brief, Mr. Sim submitted:

1. There is a connection between Mr. Chinn's conduct on the evening in question and his capacity as a real estate professional because he was at a client's party in a bar on the evening in question. This brings the conduct under the *Real Estate Act*. He stated if the hearing panel does not agree or the connection is too weak, the law does not excuse personal "off-duty" conduct from compliance with professional rules of conduct. He submitted case law confirms an

individual's personal and private conduct, outside their profession, is subject to regulatory oversight. This is because such conduct can have the effect of undermining and damaging the reputation of the individual's profession. It can harm the confidence and trust the public places in the profession. In support of this proposition, Mr. Sim provided the following case law:

- *Erdmann v. Institute of Chartered Accountants of Alberta*, 2013 ABCA 147: a chartered accountant's off-duty conduct as a private citizen can be found to be professional misconduct by a professional discipline body.
- *Adams v. Law Society of Alberta*, 2000 ABCA 240: a lawyer's personal conduct may have a significant effect on one's personal reputation and on the profession generally.
- *Isaghehi v. Nursing and Midwifery Council*, [2004] EWHC 127: a health professionals' personal conduct can be damaging to the reputation of the profession to which they belong and can be "extremely damaging to the reputation of the profession and is therefore hard to remedy."
- *Re Chu*, 1999 LNICAO 2: a chartered accountant was subject to the rules of his profession regardless of what activities he was engaged in.

2. Mr. Sim stated it was indisputable Mr. Chinn's conduct harmed his own integrity. He stated Mr. Chinn's conduct also undermined public confidence in the real estate industry, harmed the integrity of the industry and brought the industry into disrepute. He submitted real estate industry professionals must maintain a high degree of conduct at all times because when the public consults regulated members, they are entitled to deal with real estate industry professionals of the utmost integrity. He said the public must be able to trust real estate industry professionals. Therefore, because of what happened on the evening in question which led to Mr. Chinn's criminal conviction for dangerous driving causing death and prison sentence, Mr. Chinn's conduct breached *Real Estate Act* Rule s. 42(g) and is conduct deserving of sanction.

Hearing Panel Analysis and Findings

Fact Findings

To make our findings of fact we are not constrained by the rules of evidence. We are, however, cognizant of the importance of procedural fairness.

We believe the facts set out in the Agreed Statement of Facts in the criminal proceedings, Exhibit 5, have a high degree of credibility and trustworthiness. We are prepared to rely on the Agreed Statement of Facts in the criminal proceeding and we are prepared to accept the facts in this document for purposes of this hearing. We are also prepared to accept as fact the evidence of the criminal conviction and sentence in Exhibits 8 and 9.

We note Mr. Sim stated Mr. Chinn was with clients at the bar on the evening in question. On the evidence presented, it is unclear whether Mr. Chinn was socializing with "clients", as that term is defined in the *Real Estate Act* and Rules. In an Affidavit to RECA, Exhibit 6, Mr. Chinn states he was with "clients". In the Agreed Statement of Facts in the criminal proceedings, he states he was with "friends". We have said we accept the Agreed Statement of Facts for purposes of this decision. In either event, that is whether he was socializing with clients or friends on the evening in question, we wish to point out our decision would be the same.

We find the following are the basic facts found in the Agreed Statement of Facts in the criminal proceedings:

1. On August 19, 2011 at approximately 2:42 a.m. Mr. Chinn was operating a vehicle.
2. Mr. Chinn failed to negotiate a traffic circle and collided directly into the driver's door of another vehicle.
3. The driver in this vehicle was on his way to work.
4. Mr. Chinn called 911 requesting police and ambulance, advising them he had hit someone.
5. Mr. Chinn admitted to being at a bar and eatery with a group of friends during the evening and to excessive consumption of double shots of hard scotch. The bartender at the bar that evening informed the police that Mr. Chinn was a regular at the bar and was attending the bar's one year celebration. Mr. Chinn

had a tab at the bar that night and had purchased food and alcohol for the group he was with.

6. During the police interview, Mr. Chinn advised the following:

- he is familiar with the roadway and traffic circle as this is the route he normally travels on his way home
- he did not get a good sleep the night before and that he should not have gone out that evening
- he was concerned about his real estate deals and appointments scheduled for that day
- when asked if alcohol could have been a factor he stated that he did not know
- he advised that he drinks about once per week and prior to leaving somewhere he will stop drinking about 1 – 2 hours prior to driving. He is not sure if he stopped before he left to go home on this occasion
- he normally drinks scotch when he is tired because it makes him feel good and sleep good
- roadway and weather conditions were not a factor in this collision. The streetlights in the area provide adequate lighting along the roadway where the collision occurred

We are satisfied the facts set out in the Notice of Hearing have been proved and occurred.

Conduct Deserving of Sanction Findings

On the question of whether Mr. Chin was acting in the business of a real estate industry member on the evening in question, as defined in the *Real Estate Act*, we do not accept there is ample connection between the events that evening and his capacity as a real estate professional under the *Real Estate Act*. Mr. Chinn was not trading in real estate as a real estate industry member, as those terms are defined in the *Real Estate Act*, at the relevant time. The facts accepted by this panel are Mr. Chinn attended a celebration at a bar with friends, who may or may not have been “clients”. Whether he was socializing at a bar with friends, clients or friends who were clients, in the

particular circumstances of this case, we find he was not acting in his professional capacity at the relevant time. There is inadequate connection between what happened that evening and his professional capacity.

On the question of whether a real estate industry member's personal, private or "off-duty" conduct, in this case Mr. Chinn's "off-duty" conduct, can constitute conduct deserving of sanction under the *Real Estate Act*, we find it can. We accept and follow the Canadian case law provided in support of this proposition. In those cases, when viewed through the lens of the particular legislation breach, the "off-duty" misconduct was found to have had a significant adverse impact on the individual's profession. The off-duty conduct was found by the disciplinary body in those cases to be unprofessional misconduct.

We find all regulated industry members' conduct, whether it is professional or private, is subject to the *Real Estate Act* and Rules. Mr. Chinn is a regulated industry member. We find his off duty conduct could be conduct deserving of sanction under the *Real Estate Act*. We find Mr. Chinn attended an event at a bar with others in his private and personal capacity on the evening in question. This private or off-duty conduct is subject to the *Real Estate Act*.

It is alleged Mr. Chinn breached *Real Estate Act Rule s. 42(g)* and his conduct is therefore conduct deserving of sanction. The Rule provides:

Industry Member Prohibitions

- 42 Industry members must not:
- (g) engage in conduct that undermines public confidence in the industry, harms the integrity of the industry, or brings the industry into disrepute.

On the facts, the hearing panel must answer the following questions:

1. Did Mr. Chinn's conduct undermine public confidence in the real estate industry? and/or
2. Did Mr. Chinn's conduct harm the integrity of the real estate industry? and/or
3. Did Mr. Chinn's conduct bring the real estate industry into disrepute?

If the answer to any one, two or all three of the questions is yes, Mr. Chinn will have breached Rule s. 42(g) and his conduct will be found to be conduct deserving of sanction. The particular wording of the rule alleged to have been breached is all important. We understand this rule to mean the conduct of the real estate industry member is to be considered in the context of its impact on the real estate industry in Alberta as a whole. We are to decide whether Mr. Chinn's "off-duty" conduct undermined public confidence in the real estate industry, harmed the integrity of the industry or brought the industry into disrepute.

In his submissions, Mr. Sim asked us to determine that the facts in this case, including the criminal conviction and sentence, without more, amount to a breach of the rule as alleged in the Notice of Hearing. We are unable to do this. We are unable to answer yes to any of the three questions. Our reasons follow.

This hearing panel's scope is not that of a criminal court. It is limited by the *Real Estate Act*. We are a professional disciplinary panel. Our scope is restricted. We are required to follow the rules of procedural fairness. We are tasked with determining whether Mr. Chinn's conduct is conduct deserving of sanction as alleged in the Notice of Hearing on the basis of the evidence submitted.

We are required to examine the evidence to answer the questions of whether Mr. Chinn engaged in conduct that undermined public confidence in the real estate industry, harmed the integrity of the real estate industry or brought the real estate industry into disrepute. We do not find adequate assistance in the evidence before the hearing panel to answer the questions yes. We are required to consider only the evidence submitted in this hearing. We may be influenced by argument.

We carefully reviewed the evidence and argument. We accept as fact the Agreed Statement of Facts in the criminal proceeding. We accept as fact Mr. Chinn was convicted of dangerous driving causing death and he was sentenced to a prison term of 2 ½ years and a 3 year driving suspension. It is clear Mr. Chinn's conduct was criminal and egregious. The consequences of his actions were tragic. There is no doubt that the events on the evening in question, the criminal conviction and sentence have and will continue to seriously adversely affect Mr. Chinn's personal reputation, integrity and

trustworthiness. This hearing panel confirms clearly this conduct was seriously wrong and we believe the consequences will follow Mr. Chinn for the rest of his life.

We are asked to find Mr. Chinn's conduct adversely impacted the real estate industry in the specific manner set out in the rule. We have said because of the specific rule wording, we do not believe the circumstances, the criminal conviction and sentence, without more, is enough to find the particular rule was breached. To find the conduct undermines public confidence in the real estate industry, harms the integrity of the real estate industry or brings the real estate industry into disrepute, we need evidence this in fact is the case. We identified only the following evidence that could potentially assist us:

1. Evidence in Exhibit 8, a victim impact statement, where a victim identified Mr. Chinn as a real estate associate. The reference demonstrates the person believed Mr. Chinn's integrity, as an individual real estate associate, was harmed.
2. Evidence in an unsworn statement to the RECA conduct review officer, Mr. Porter, in Exhibit 6, where Mr. Chinn stated: "feel I let down...the real estate industry".
3. Evidence in Exhibit 4 where the RECA Chair suspended Mr. Chinn's authorization on an interim basis until this hearing could be held. The Chair accepted a recommendation there were reasonable grounds to believe Mr. Chinn's conduct may have breached Rule s. 42(g) and it created an adverse impact on the real estate industry as required by the rule.

Apart from Exhibit 6 where Mr. Chinn made an unsworn statement to a RECA Conduct Review Officer about his feelings that his conduct affected the real estate industry, no evidence about the impact of Mr. Chinn's conduct on the real estate industry in Alberta was presented to us to support a Rule 42(g) breach in the particular circumstances of this case. We are unable to find adequate evidence of the type we believe would persuade us to find breach of the section alleged. Examples of the evidence we would have found sufficient to make the finding could be set out. However, we do not see merit in this exercise. This is because the onus rests on the case presenter representing the

executive director to present evidence convincing us, on a balance of probabilities, the elements of the section have been made out.

Without evidence beyond the circumstances on the evening in question, criminal conviction and sentence, we cannot find there was a breach of the particular rule at issue. Without more, we cannot accept Mr. Sim's assertion "...but it also undermines public confidence in the real estate industry, harms the integrity of the industry and brings the industry into disrepute." Mr. Sim asked "how can we maintain public confidence if we don't do something?" Assertions in argument and questions, seemingly rhetorical, are not evidence. It is evidence that would persuade us.

Without more, the evidence presented to us in this case, regardless of how objectionable we may as a matter of our own personal values believe the conduct to be, does not lead to breach of *Real Estate Act* Rule s. 42(g). When do circumstances and criminal convictions undermine public confidence in the real estate industry, harm the integrity of the real estate industry, or bring the real estate industry into disrepute? What is it that distinguishes? We believe specific evidence on the elements in the rule must be gathered and led at a hearing permitting a hearing panel to make the finding. For this hearing panel in this case, the circumstances, criminal conviction and sentence alone does not lead to an inevitable or automatic conclusion that this particular rule has been breached. As we have explained, we need evidence demonstrating the particular rule elements have been satisfied.

With respect to his argument about rule breach and conduct deserving of sanction, Mr. Sim directed us to three Court cases. Two were from Alberta (one from the legal profession and the other from the chartered accountant profession) and the third was from England (health profession). He also supplied a decision of a professional regulatory body (Institute of Chartered Accountants) from Ontario. No RECA real estate industry misconduct cases were supplied to us and no cases were supplied with a finding of breach of *Real Estate Act* Rule s. 42(g).

We reviewed the cases carefully. Findings of professional misconduct in the cases supplied must be read within the context of the specific professions, the case facts, particular legislation and allegations of professional misconduct. Mr. Sim said some of the cases supported the "off-duty" misconduct issue. We have decided that issue and agree with Mr. Sim. Mr. Sim said he was using two

cases as examples. They are distinguishable from the case we are dealing with. In one case, it appears evidence was called to establish the professional misconduct breach elements and the adverse impact the professional's conduct had on the profession as a whole. In the other Alberta Court of Appeal case, *Adams v. Law Society of Alberta*, a lawyer made a clear and unambiguous admission to the allegation of breach under oath at the hearing. Adams admitted "... he had dishonored his profession as a result of his misconduct."

That has not happened here. Mr. Chinn has not admitted he breached *Real Estate Act* Rule s. 42(g). It is our view insufficient evidence was presented to establish the rule was breached.

CONCLUSION

Because of what is an evidentiary issue, we are unable to find the rule was breached as alleged in the Notice of Hearing. Conduct cannot be found to be deserving of sanction.

Dated December 1, 2014

Brian Klingspon, Chair

Wayne McAlister

George Pheasey

SCHEDULE A

THE REAL ESTATE COUNCIL OF ALBERTA

Case: 003774
Process: A Hearing under Part 3 of the *Real Estate Act*
Industry Member: Bobby Chinn
Class of License: Real Estate Associate
Registration: Currently Not Registered
Document: NOTICE OF HEARING

TO: Bobby Chinn
16755-111 Street
Edmonton, AB

A Hearing has been scheduled to review allegations about your conduct. Read this entire document to see what you must do.

Hearing Information

Date: Tuesday, November 4, 2014
Time: 9:30 a.m.
Where: The Hearing Room, 3rd Floor
4954 Richard Road SW, Calgary, Alberta

Hearing Panel: Brian Klingspon
Wayne McAlister
George Pheasey
Alternates: Angela Kolody, Ken McCoy, Connie Leclair

It is alleged that your conduct is deserving of sanction for breaching sections of the Real Estate Act or Rules that were in force. Here are the particulars:

1. You were an industry member and registered as a real estate associate with Century 21 A.L.L. Stars Realty Ltd. at all material times.

2. On or about August 19, 2011 at approximately 0242 hours you were operating a motor vehicle after having consumed alcohol.
3. You were involved in a collision resulting from your failure to negotiate a traffic circle. Your motor vehicle crossed a median and collided with another motor vehicle.
4. The operator of the other motor vehicle was killed in the collision.
5. You pled guilty and were convicted of operating a motor vehicle in a manner that was dangerous to the public causing death, contrary to the Criminal Code of Canada.
6. By reason of the matters described herein, your conduct is deserving of sanction, particulars of which include that you breached Rule 42(g) of the Rules made pursuant to the *Real Estate Act* by engaging in conduct that undermined public confidence in the industry, harms the integrity of the industry or brings the industry into disrepute.

The Hearing

The hearing is your opportunity to respond to the allegations and state your side of the case in front of the Hearing Panel.

Please read "Hearing and Appeal Practice and Procedures Guidelines" and "Information for Unrepresented Industry Members" on the Real Estate Council website under the [Publications and Resources](#) tab under the heading *Guides to Disciplinary Proceedings*.

You must bring any witnesses and evidence you want the Hearing Panel to consider with you to the hearing.

If you do not attend the Panel may proceed to make a decision without you.

After hearing all evidence and argument the Panel will decide whether the Executive Director has proven any of the breaches. If no breach is proven you will face no sanction.

If the Hearing Panel finds a breach has been proven the Panel may do one or more of the things listed in **section 43** of the Real Estate Act:

- Cancel or suspend your authorization
- Order you to pay a fine for each breach
- Order you to pay the cost of the investigation and the hearing
- Order you to complete an education course

The Hearing Panel will also accept written arguments. You can provide written arguments at the end of the hearing or after the end of the hearing but you must provide these to the **Hearings Administrator and the lawyer for the Executive Director (contact information below) no later than 15 days after the end of the Hearing**. You can ask the Hearing Panel to extend this deadline if you need more time.

You may get legal advice and may be represented by legal counsel at the hearing. If you do not have a representative please read "Information for Unrepresented Industry Members" at

<http://www.reca.ca/industry/content/publications-resources/guides.htm>.

Please review who is on the Hearing Panel. If you object to any of the people being on the Panel, you must advise the Hearings Administrator **who you object to and**

why within 14 days of receiving this Notice. If you do not object to the Hearing Panel within 14 days, this Hearing Panel will conduct the hearing.

If you cannot make yourself available on the date set for the hearing you can apply to the Hearing Panel for an adjournment. Advise the lawyer for the Executive Director and the Hearings Administrator as soon as possible if you are applying for an adjournment.

Dated at Calgary, Alberta, on October 17, 2014.

Charles Stevenson, for

Bob Myroniuk, Executive Director
of the Real Estate Council of Alberta

Contact Information

Hearings Administrator: Melissa Savidant Email: msavidant@reca.ca Fax: 403 228 3065 Direct: 403 685 7913 Toll Free: 1 888 425 2754 Address: Real Estate Council 350 4954 Richard Road SW Calgary, Alberta, T3E 6L1	Lawyer for the Executive Director c/o Colleen de Moissac Email: cdemoissac@reca.ca Fax: 403 228 3065 Direct: 403 685 7912 Toll Free: 1 888 425 2754 Address: Real Estate Council 350 4954 Richard Road SW Calgary, Alberta, T3E 6L1
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