

**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  
**Duane Jones**, Broker registered at all material times hereto with Point McKay Realty Ltd., Brokerage

**Appeal Panel members:** Ted Zaharko, Chair  
Al Dredge  
Norm Jensen

**Appearing:** Mr. Terry Davis, legal counsel on behalf of the Executive Director  
Mr. Duane Jones, on his own behalf

**Appeal Date:** May 16, 2006

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

**I) INTRODUCTION**

In this matter, Mr. Jones has appealed a decision of a Hearing Panel of the Real Estate Council of Alberta dated September 12, 2005. The Appeal Panel was composed of Ted Zaharko (Chair), Al Dredge and Norm Jensen.

The appeal hearing took place on May 16, 2006. In attendance at the hearing were Terry Davis, legal counsel on behalf of the Executive Director of the Real Estate Council of Alberta, and Duane Jones on his own behalf.

**II) GROUND OF APPEAL**

The appeal is based upon grounds that the matters complained of do not amount to professional misconduct, the findings of the Hearing Panel are inconsistent with the evidence heard, there was no evidence regarding industry practice, there was no evidence that Mr. Jones had any discussions with the complainant, no evidence given with respect to the practice of other realtors in the building in terms of industry practice and the uncertainty in the industry with respect to the size issues.

**III) STANDARD OF REVIEW**

Appeals of Hearing Panel decisions are heard pursuant to the provisions of 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 unless the Appeal Panel finds those factual findings are unreasonable.



#### **IV) BACKGROUND FACTS**

On May 12, 2005, Mr. Jones was served with a Notice of Hearing containing allegations that resulted from a Real Estate Council of Alberta investigation.

The Notice of Hearing alleged that Mr. Jones knowingly or recklessly made representations in the course of marketing property that were untrue by listing a property at the measured size as opposed to the registered size, and further that he failed to act fairly, honestly and with integrity when dealing with non-clients, and that he failed to maintain a state of competency on a continuing basis in all areas in which he rendered services.

Mr. Jones signed a Statement of Agreed Facts and Exhibits, in which he admitted that he represented the condominium unit he sold to S.H. as 79 square metres and that he knew the Survey Plan registered on title to the unit with Land Titles, described the unit's area as 70 square metres.

#### **V) SUBMISSIONS AND FINDINGS AT HEARING**

L.E. submitted that it is difficult to measure a dwelling such as the condominium in question, and get the exact same size measurements every time. He stated that S.H. and any consumer, would have wanted to know the size of the unit according to the land titles survey. He also submitted that if realtors rely on what is registered with land titles for a property, then they cannot go wrong and that is the message that the Executive Director wants sent to the industry. The land title for a property is registered and certifies that the property is a certain size.

LE. then submitted that Mr. Jones made the misrepresentations knowingly or recklessly regarding the size of the condominium unit S.H. purchased and other units in the same building that had been listed and sold by Mr. Jones. This also constitutes a failure to maintain a state of competency.

He also stated that Mr. Jones did not exercise his due diligence when advertising the condominium unit for sale as well as not providing the appropriate information to S.H.

In Mr. Jones' submissions, he stated that he did not put the registered size of the condominium unit in the listing or in the marketing materials. He then submitted that he omitted this because it was not a requirement to do so at the time.

In the Notice of Hearing, there were two separate allegations. In each allegation, there were three breaches referred to: a breach of s.4(a) of the Code of Conduct, s7(b) of the Code of Conduct and s.6(a) of the Code of Conduct. Although there were only two allegations, each allegation contained three breaches of the Code of Conduct. The Hearing Panel found there to be conduct deserving of sanction for both allegations, containing a total of six breaches.

Upon consideration of the evidence and testimony before them, the Hearing Panel issued a written decision regarding conduct on September 12, 2005 and a separate decision on sanction on November 4, 2005. The Hearing Panel ordered that Mr. Jones pay a fine of \$1,000; pay costs of \$1,000 and complete the Listing and Selling Resale Condominiums in Alberta course program offered by the Alberta Real Estate Association by April 30, 2006.



## VI) MERITS OF APPEAL

With respect to the first allegation, Mr. Jones submitted that there was no misrepresentation, either knowingly or recklessly, in any advertising literature he prepared about the registered size of the condominium in question. He stated that there was no registered size referenced in any documentation given to S.H. . He stated that at the time, there was no requirement for registered sizes to be included on MLS listings, and therefore none were given.

Mr. Jones disputed the statement made by the Hearing Panel that said, "Mr. Jones, by his own admission, indicated in the MLS computer listing that the registered size of the condominium was 79 square metres, when in fact...". Mr. Jones submitted that he never made such a statement. Mr. Jones stated that all documentation provided to the public was presented as total floor area. He again reiterated that he never referred to registered size to clients, non-clients or to the general public. Mr. Jones then referred the Panel to information prepared by RECA that shows a number of listings. Of the 23 listings, six are Mr. Jones' and only two of all of the listings have a registered size listed. He submitted that this indicates that at that time, no one was using registered size. Mr. Jones stated that because he never referred to registered size as it was not a requirement at the time, he did not breach s.4(a) or s.7(b) of the *Code of Conduct*.

Mr. Jones submitted that there should be no sanction imposed because the Hearing Panel made their decision based on erroneous information.

Mr. Jones submitted that he was aware of how to determine or find the registered size of condominiums. He again stated that registered size was not a requirement at the time and that was the reason why it was omitted from his listings. As a result, he could not have breached s.6(a) of the *Code of Conduct*. Mr. Jones stated that these same reasons stand for allegation two since the nature of the allegations is the same.

Mr. Jones submitted to the Appeal Panel that the Hearing Panel's decision was based on non-factual information. He stated that they based their decision on some testimony given that was heard and assumed to be correct. Mr. Jones stated that with respect to the first allegation, there was no misrepresentation, either knowingly or recklessly, about the registered size of the condominium in question. He also stated that there was no registered size referenced anywhere in documentation given to S.H. as there was no requirement at the time for registered sizes on MLS listings.

Mr. Jones submitted to the Appeal Panel that the complainant said the size was incorrect based on the information she was given at the time. However, the complainant had two realtors before the third realtor advised of the incorrect size measurement. He stated that at the time, there was only a requirement to input total measurements in order for condominium units to determine condominium fees and city taxes.

Mr. Jones then submitted that G.I. , the listing realtor for the complainant, did not know how to take the size of a condominium unit, stating she added six inches up the walls when measuring, which amounted to 70 square metres. He stated that it would be impossible for her to get the actual size doing this. He stated that the Hearing Panel did not seem to grasp that she could not come up with 70 square metres the way she was measuring. He then stated that he makes no contention about the size being 70 square metres, however if the architect's measurements are taken, it states the size to be 79 square



metres. Mr. Jones submitted that he did not list a registered size. He listed everything that was a requirement at the time. It became a requirement a couple of years later to have the registered size and the total size. Mr. Jones submitted his only dispute was with the Hearing Panel's decision and stated that they did not look at or consider all of the facts.

Finally, Mr. Jones finished his submissions by stating that the basis of his appeal is the fact that other individuals have supplied or presented incorrect information, displayed incompetence, or lied during testimony, which indicates corrections must be made. He also stated that his appeal is based on facts surrounding allegations that are groundless in light of information already in existence for the Appeal Panel.

Legal counsel on behalf of the Executive Director, Mr. Davis, outlined for the Hearing Panel the two counts where the Hearing Panel had found conduct deserving of sanction. The first was that Mr. Jones was found to have made misrepresentations that were reckless. Mr. Davis submitted that Mr. Jones, by his own admission, had represented that the property in question had a size of 79 square metres, when in fact the registered size was 70 square metres. Mr. Davis stated that this misrepresented the size of the property and was therefore misleading to other agents. Mr. Davis submitted that Mr. Jones' method of measuring property depicted the measured size and not the registered size and this should have been made clear in the listing of the property. It was also submitted that Mr. Jones admitted during the Hearing that he used the architect's measured size in the MLS listing size and that this would have been confusing and taken to be the registered size. Mr. Davis submitted that Mr. Jones was not trying to deceive anyone in listing the measured size, however, it was reckless to list the measured size since that measurement would be assumed to be the registered size. It was also submitted that the Hearing Panel had made the finding that the registered size of a property was required on the MLS input form and therefore they found conduct deserving of sanction. Mr. Davis also submitted that although it was decided that Mr. Jones was not being dishonest listing the size of the property at the measured size of 79 square metres, Mr. Jones should have disclosed that the size listed was the measured size and not the registered size. The Hearing Panel concluded that in this regard Mr. Jones was not acting fairly and professionally towards the public and other industry members.

With respect to the second allegation, the Hearing Panel also found that there was conduct deserving of sanction. Mr. Davis submitted that since the two allegations dealt with the same breaches but the second with respect to a number of condominiums in the same complex, his submissions on the second allegation mirrored those for the first allegation, as the allegations themselves were the same in nature.

Mr. Davis submitted that the sanctions imposed by the Hearing Panel were reasonable and not oppressive. He further stated that the Hearing Panel concluded that Mr. Jones did not try to deceive anyone. They also took into consideration that Mr. Jones agreed to a Statement of Agreed facts and as a result, the Hearing Panel ordered a reduced sanction.

Mr. Davis also reminded the Appeal Panel that in order to overturn a Hearing Panel's decision, they must find an error in principle or must find the decisions to be manifestly excessive, disproportionate, oppressive or unreasonable. Mr. Davis submitted that this is not the case in this situation.



## **VII) APPEAL PANEL CONCLUSIONS**

We conclude that the findings and conclusions of the Hearing Panel are sound, and as such we refuse Mr. Jones' appeal. We agree with the Hearing Panel that in failing to disclose that he was using measured size instead of registered size, Mr. Jones is guilty of both allegations one and two.

We reiterate that we do not believe that Mr. Jones intentionally tried to mislead anyone regarding the physical size of the condominium unit. However, he did use the measured size instead of the registered size when marketing the property. We agree with Mr. Davis and the Hearing Panel that most members of the public and most other industry members would assume that the size used would be registered size, not measured size. We also conclude that Mr. Jones should have known that this is how the size would have been interpreted by the public and other industry members. As such, by using measured size without making it clear that it was not registered size, Mr. Jones was guilty of a misrepresentation, failing to act fairly towards non-clients and failing to maintain a state of competency.

After considering the submissions made by both parties on sanction, we, the Appeal Panel, believe that the sanction ordered is reasonable, given the findings on conduct. As such, we see no reason to interfere with the sanction imposed by the Hearing Panel.

As a result, there is no basis for overturning any of the Hearing Panel's conclusions and findings.

## **VIII) DISPOSITION AND COSTS**

Based on the foregoing, the appeal is hereby dismissed.

During the Appeal hearing there were no submissions made on costs. We therefore invite the parties to supply written submissions on this issue as follows:

- Mr. Davis will have two weeks from the date this decision is served to provide any written submissions he has regarding costs. Any such submission shall be delivered to both the Hearing Secretary and to Mr. Jones within the two-week deadline.
- Mr. Jones shall provide any written submissions he may have within two weeks of receiving Mr. Davis' submission. Any such submission shall be delivered to both the Hearing Secretary and to Mr. Davis within the two-week deadline.

The Appeal Panel will then issue a written decision on costs after considering the written submissions.

This decision was made on May 16, 2006.

"Ted Zaharko"

Ted Zaharko, Chair

Al Dodge

Norm Jensen

This decision was made on May 18, 2006.

Ted Zaharko Chair

"Al Dredge"

Al Dredge

Norm Jensen



This decision was made on May 16, 2006.

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Ted Zaharko, Chair

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Al Dredge

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"Norm Jensen"

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Norm Jensen



**THE REAL ESTATE COUNCIL OF ALBERTA**  
**IN THE MATTER OF** subsections 39(1)(b) and 41 of the *Real Estate Act*, S.A.1995, c. R-4.5, as amended

**AND IN THE MATTER OF** an Appeal of a Hearing Panel decision regarding the conduct of  
**Duane Jones**, Broker registered at all material times hereto with Point McKay Realty Ltd.,  
Brokerage

**DECISION OF AN APPEAL PANEL OF THE REAL ESTATE COUNCIL OF ALBERTA**  
**ON COSTS OF THE APPEAL**

**I) INTRODUCTION**

The members of this Appeal Panel are Ted Zaharko (Chair), Al Dredge and Norm Jensen. The Appeal into this matter took place on May 16, 2006. We issued a written decision on our findings in respect to Mr. Jones' appeal, on May 16, 2006, of the Hearing Panel's finding of conduct deserving of sanction in this matter which was dated September 12, 2005. Following the issuance of the Appeal Panel decision, we requested submissions on costs of the appeal from Mr. Davis, legal counsel on behalf of the Executive Director of the Real Estate Council of Alberta, and Mr. Jones, the industry member who was not represented by legal counsel, since no submissions were made on costs of the appeal during the Appeal Hearing.

**II) SUBMISSIONS ON COSTS OF THE APPEAL**

Submissions on costs of the appeal were provided in writing to us by Mr. Davis and Mr. Jones.

Mr. Davis outlined the sanction ordered by the Hearing Panel, amounting in \$1,000 in fines, \$1,000 in costs as well as an educational course. Mr. Davis first provided us with a Schedule of Costs in the amount of \$4,585.22. This Schedule of Costs provided a breakdown of the total costs being sought in this Appeal, containing approximately \$3,500 in legal fees, \$500 for Panel Honorariums and various preparatory costs.

It was submitted that there were several factors for the Appeal Panel to consider regarding the issuance of costs in this amount. Mr. Davis submitted that the degree of success in resisting charges must be considered and that Mr. Jones was unsuccessful in doing this on appeal. As well, the necessity for incurring expensed associated with the Hearing must be considered. Mr. Davis submitted that all costs as set out in the Schedule of Appeal Costs were reasonably incurred. Thirdly, Mr. Davis submitted that the Appeal Panel must consider whether the Hearing result could have been anticipated, which he submitted it could not since there were meritorious and serious issues brought on appeal by Mr. Jones. Finally, Mr. Davis submitted that Mr. Jones' financial circumstances should be considered. He submitted that no evidence was brought before the Panel concerning Mr. Jones' financial situation, therefore the costs of the appeal would not impose an undue hardship upon him. As such, Mr. Davis requested that full costs of the appeal be ordered by the Appeal Panel.



Mr. Jones began his submissions on costs of the appeal by stating that he felt that he was wrongfully sanctioned for professional conduct and that both the Hearing and Appeal Panels were using today's standards to make their findings. Mr. Jones also submitted that no one suffered a loss as a result of his actions for which the Hearing Panel made a finding of conduct deserving of sanction and which the Appeal Panel upheld. He submitted that costs in the amount proposed by Mr. Davis of \$4,585.22 were excessive and would cause significant financial harm to him. As a result of this, Mr. Jones submitted that costs in the amount of \$500 were sufficient.

### III) ORDERS AND REASONS

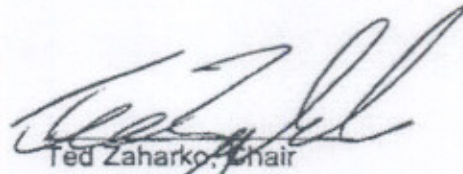
We have considered the submissions made by both Mr. Davis and Mr. Jones. We recognize by Mr. Jones' submissions, that costs in the amount of \$4,585.22 as proposed by Mr. Davis would cause financial strain on Mr. Jones. As a result of this, the Appeal Panel is reducing the assessed costs of the appeal to \$1,000.00, which reflects a reduction of approximately \$3,500, being the legal fees incurred by RECA. In addition the Appeal Panel is upholding the original sanctions of the Hearing Panel, that being a fine of 1,000.00; Hearing Panel cost of \$1,000.00 and the completion of an educational course.

As a result of our findings and upholding the Hearing Panel's determination that there is conduct deserving of sanction; and after due consideration of the submissions made by the parties regarding costs of the appeal, we hereby order, pursuant to Section 43 of the Real Estate Act, the following:


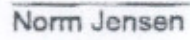
1. Mr. Jones shall pay appeal costs of \$1,000.00;
2. Mr. Jones shall pay original hearing cost of \$1,000.00;
3. Mr. Jones shall pay a fine of \$1,000.00;
4. Mr. Jones shall complete and pass the Alberta Real Estate Association's Listing and Selling Resale Condominiums in Alberta course. As the Hearing Panel had ordered that this course be completed by April 30, 2006, and being that an appeal was launched by Mr. Jones, the timeframe for its completion is hereby changed to six months from the date of service of this decision on Mr. Jones. Should this course not be available within the time frame, another course shall be substituted at the sole discretion of the Executive Director. This course cannot be used for credits in the required professional development programs for agents and brokers.



This decision was made August 21, 2006.

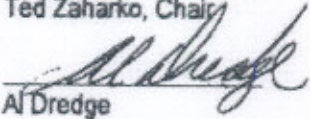
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Ted Zaharko, Chair

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This decision was made August 21, 2006.

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Ted Zaharko, Chair

  
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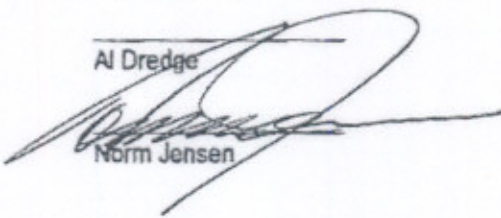


This decision was made August 21, 2006.

Ted Zaharko, Chair

Al Dredge

Norm Jensen

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