

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF Subsection 39(1)(b) and 41 of the Real Estate Act, S.A. 1995, c. R-4.5

AND IN THE MATTER OF a Hearing Regarding the Conduct of Chuck Mulholland then registered September 25, 2001 as Broker with Realty in Motion Inc. o/a Realty World in Motion prior to September 25, 2001

Hearing Panel Members: Tom Shields (Chairman)
Lynn Patrick
Dale Kelley

Legal Counsel: Susan Olsen – Legal Counsel for the Executive Director of the Real Estate Council for Alberta

Witnesses: D.P.
Gerry Drysdale
Chuck Mulholland (on his own behalf)
Joeseeph Fernandez

Hearing Date: March 4, 2002 then adjourned to
March 19, 2002 then continued and concluded on
March 22, 2002

Introduction

A hearing was held on the above noted dates in Edmonton, Alberta in reference to allegations of the Executive Director of the Real Estate Council of Alberta (RECA) against Chuck Mulholland, and Realty in Motion Inc. o/a Century 21 Realty in Motion, and Realty in Motion Inc. o/a Realty in Motion. c/o 67 Deane Cr., St. Alberta AB T8N 5A2

The set of charges as set out in the Notice of Hearing as amended are as follows:

1. That on or about February 13, 2001 a RECA compliance auditor conducted an audit at the brokerage, Realty in Motion o/a Realty World in Motion (hereafter "Realty World in Motion"). At the time Chuck Mulholland was registered as the broker for Realty World in Motion. Upon the RECA auditor reviewing the books and records it was determined that bank reconciliations had not been prepared from August 2000 to December 2000.
This was in breach of Rule 38(1) and Rule 21(1)(g) of the Rules pursuant to the Real Estate Act (hereafter "Rules") and this conduct deserving of sanction.

2. On or about February 11, 2001, when the RECA compliance auditor reviewed the books and records, it was determined that on a transaction from Alford Construction to D.W. and L.S., the brokerage held \$5,000 in trust. On or about January 23, 2001, the brokerage received the balance of commissions for the transaction of \$3,206.90. On or about January 23, 2001, the cheque received for the balance of commissions (\$3,206.90) along with a cheque for the \$5,000 held in trust was deposited into the brokerage's "Realtors Account". The commissions owed to the other brokerage for this transaction (\$4,943.40) were then paid on or about February 6, 2001 to the other brokerage from the trust account. Thereby creating a shortage in the trust account.

The RECA auditor identified to Chuck Mulholland the \$9,099 shortage in the brokerage trust account and Chuck Mulholland funded the shortage on February 14, 2001.

This was in breach of Rule 46(1), Rule 46(3), Rule 21(1)(g) of the Rules and is conduct deserving of sanction.

3. On or about March 22, 2001, Chuck Mulholland issued a letter to the RECA compliance auditor advising that he had taken steps to ensure that his office accounting was properly managed and that he took his trust accounting very seriously and had taken drastic and expensive measures to ensure that his financial affairs were managed properly.

Another RECA compliance auditor attended the brokerage in May 2001. The auditor requested that the brokerage supply bank reconciliations up to and including June 30, 2001. The brokerage supplied these reconciliations.

When a RECA compliance auditor attended the brokerage on December 3, 2001, in reviewing the books and records it was determined that no trust account reconciliations had been done on the trust account since June 30, 2001, the last reconciliation the compliance auditor had requested the brokerage forward to RECA.

This was in breach of Rule 38(1), Rule 21(1)(g) of the Rules and is conduct deserving of sanction.

4. When the RECA auditor reviewed the books and records on or about December 3, 2001, it was determined that on a transaction involving J.L. and B.L., the brokerage held \$1,000 in trust. On or about April 12, 2001, the \$1,000 in trust was transferred from the trust account to the general. On or about May 3, 2001, a payment in the amount of \$5,067.20 for June 8, 2001 was indicated in the records, this was never deposited into the trust account, thus creating a shortage in the trust account.

The outstanding receipt was identified on the June 30, 2001 reconciliation and was not immediately funded. The shortage was funded in December 2001 after the brokerage's accounts were frozen by RECA.

This was in breach of Section 25(1)(d) Real Estate Act (hereafter the "Act"), Rule 46(3)(b), Rule 39, Rule 20(d), Rule 21(1)(g), Rule 40 of the Rules and conduct deserving of sanction.

5. On or about May 30, 2001, an Interim, Interim Order was granted by Court of Queen's Bench in Edmonton that ordered funds related to 11 transactions frozen and to remain in the account of the parties holding the funds.

On or about June 8, 2001, the Interim, Interim Order was reviewed and an Interim Order was issued relating to 27 transactions. The Interim Order specified that Realty In Motion Inc. was to pay some monies forthwith to the Court and others to be paid into court as the transactions closed. The Interim Order specified what funds Realty In Motion Inc. was to pay as well as those funds being held by other parties at the time, for example, law firms and other brokerages.

The brokerage trust account was reconciled for the months of May 2001 and June 2001. The June 2001 trust account reconciliation forwarded to RECA by the brokerage was signed by Chuck Mulholland on or about July 10, 2001.

On or about July 9, 2001, ten (10) cheques were issued from the brokerage's trust account to Court of Queen's Bench with a total amount of \$ 27,183.32. Of the trust funds held as of June 30, 2001, only \$14,000 of the funds held in the trust account related to transactions specified by the Interim Order to be paid into court. By paying \$13,183.32 more from trust than what was held in trust, a trust shortage was created and RECA was not told of the shortage. When asked by the RECA compliance auditor on December 3, 2001 if the brokerage could fund the shortage, the RECA compliance auditor was advised that the brokerage could not. The resulting shortage was not funded until December 2001, after the brokerage's accounts were frozen.

This was in breach of section 25(1)(d) of the Act, Rule 20(d), Rule 21(1)(g), Rule 39, Rule 40, Rule 41 of the Rules and is conduct deserving of sanction.

6. On or about July 31, 2001, the brokerage trust account had a balance of \$1,174.38. The trust summary identified that the balance in trust was to be \$22,425.00. On or about August 1, 2001, a cheque for \$2,425 was written from the brokerage trust account and a \$5 overdrawn handling charge was issued resulting in the brokerage trust account being overdrawn by \$1,255.62 until \$1,300.00 was deposited on August 2, 2001.

This was in breach of Rule 37(f), Rule 20(d), Rule 21(1)(g) of the Rules and is conduct deserving of sanction.

7. On or about September 4, 2001, a cheque was presented on the brokerage trust account for \$535 more than the funds held in trust creating a negative balance in the trust account.

This was in breach of Rule 20(d), Rule 21(1)(g) and Rule 37(f), of the Rules and is conduct deserving of sanction.

8. On or about October 5, 2001, \$1,500 was transferred from the brokerage trust account to the brokerage's general or business account. Chuck Mulholland advised the RECA compliance auditor that the general account was the account from which the brokerage paid its business expenses and it is also the account from which Chuck Mulholland would draw funds for his living expenses. The RECA compliance auditor requested documentation from Chuck Mulholland to support why the \$1,500 was transferred and Chuck Mulholland could not supply any.

This was in breach of Section 25(1)(d) of the Act, Rule 20(d), Rule 21(1)(g) and Rule 37(e) of the Rules and is conduct deserving of sanction.

9. On or about October 18, 2001, a cheque was written from the brokerage trust account to the brokerage general account in the amount of \$100. Chuck Mulholland advised the RECA auditor that he could not supply any documentation to support why the funds were transferred.

This was in breach of Section 25(1)(d) of the Act, Rule 37(e), Rule 20(d), and Rule 21(1)(g) of the Rules and is conduct deserving of sanction.

10. On or about October 19, 2001, a cheque was written from the brokerage trust account to the brokerage general in the amount of \$1,000. Chuck Mulholland advised the RECA auditor that you could not supply any documentation to support why the funds were transferred. On or about the same day, October 19, 2001, \$900 was withdrawn from the general account through an ABM (automated bank machine). Chuck Mulholland advised the RECA compliance auditor that the regular cash withdrawals were used for some business expenses and his living expenses.

This was in breach of Section 25(1)(d) of the Act, Rule 37(e), Rule 20(d), and Rule 21(1)(g) of the Rules and is conduct deserving of sanction.

11. On or about October 31, 2001 \$3,000 was transferred from the brokerage trust account to the general account. Chuck Mulholland advised the RECA auditor that he could not supply any supporting documentation as to why the transfer was made. It was also identified that as the financial position of the brokerage had deteriorated most of the organizations the brokerage dealt with would not accept their cheques and wanted drafts or certified cheques and that this is what some of the more recent transfers were for.

This was in breach of Section 25(1)(d) of the Act, Rule 37(e), Rule 20(d), and Rule 21(1)(g) of the Rules and is conduct deserving of sanction.

12. On or about November 6, 2001, \$2,500 was transferred from the brokerage trust account to the general account with no documentation to support why the transfer was made.

This was in breach of Section 25(1)(d) of the Act, Rule 37(e), Rule 20(d), and Rule 21(1)(g) of the Rules and is conduct deserving of sanction.

13. On or about November 9, 2001, \$800 was transferred from the brokerage trust account to the general account with no documentation to support why the transfer was made. On or about November 9, 2001, an ABM withdrawal of \$800 was made from the general account.

This was in breach of Section 25(1)(d) of the Act, Rule 37(e), Rule 20(d), and Rule 21(1)(g) of the Rules and is conduct deserving of sanction.

14. In total, an \$8,900 shortage occurred in the brokerage trust account as a result of unsupported transfers from the trust account between September 2001 and December 3, 2001, as identified in allegations 8-13. The total shortage on December 3, 2001 was approximately \$23,286 or \$ 27,791 including an outstanding deposit to the trust account for \$ 4,505, which was a cheque to the brokerage itself.

15. During the audit of December 3, 2001, the RECA compliance auditor through a review of the books and records determined that on six (6) occasions, the cheque from the brokerage (Realty in Motion Inc. o/a Century 21 Realty in Motion) to the other brokerage was either dated prior to the other brokerage's cheque or the other brokerage's cheque had been withheld due to lack of funds.

These were in breach of Rule 46(3)(b) and Rule 21(1)(g) of the Rules and is conduct deserving of sanction.

16. Chuck Mulholland advised the RECA compliance auditor that he had been aware that there was a problem but that the brokerage had not been in a position to fund the shortage and the brokerage had not been paying other brokerages on a timely basis due to a lack of available funds. Chuck Mulholland did not advise the Executive Director in writing of the amount of the trust shortage and what corrective action the brokerage would be taking and the shortage was not immediately funded. Chuck Mulholland funded \$24,874.28, approximately \$1,588 more than the shortage on December 6, 2001.

This was in breach of Rule 40, Rule 41, and Rule 21(1)(g) of the Rules and is conduct deserving of sanction.

PROCEEDINGS ON MARCH 4 2002

The Hearing Panel commenced proceedings at 9:00 AM at the offices of the Alberta Securities Commission in Edmonton Alberta without the presence of Mr. Mulholland. A telephone request to have the Hearing delayed was received and Mr. Mulholland was granted a delay until 2:20 PM at which time the Hearing Panel re-convened the Hearing with Mr. Mulholland present.

The Hearing Panel requested of Mr. Mulholland whether he objected to any member of the Hearing Panel and Mr. Mulholland informed the Hearing that he did not.

Mr. Mulholland, informed the Hearing Panel, without prior notice to the Real Estate Council of Alberta, that he objected to the commencement of Hearing on the basis that the Notice Of Hearing did not disclose a time of Hearing as required by Subsection 41(3) of the Real Estate Act, S.A. 1995, c. R-4.5 (the Act). Mr. Mulholland further contended that the form of amended Notice was not delivered to the correct address within the time prescribed in the Act. The Hearing Panel considered the representations of the parties and granted an adjournment of the Hearing to the 19th day of March, 2002 with the agreement of Mr. Mulholland that the additional time would enable him to prepare his defense to matters in the Notice Of Hearing and that such adjournment would, with his consent on the record of this Hearing, remove any further objection to the matter of contents of the Notice Of Hearing.

PROCEEDINGS ON MARCH 19, 2002 AND MARCH 22, 2002

Mr. Mulholland appeared before the Hearing Panel on the 19th day of March, 2002 and did, without proper prior notice to the Real Estate Council of Alberta, object to the composition of the Hearing Panel, namely to the qualifications of Dale Kelley and Norm Jensen(alternate), on the basis that they were subject to complaints filed by Mr. Mulholland respecting alleged breaches of the Act. The Hearing Panel determined that the complaints, copies of which were entered as exhibits in the proceedings, had not been investigated by the Real Estate Council of Alberta and hence the breaches alleged were not within the meaning of the provisions of the qualifications set forth in the Guidelines of the Council and found further that the members challenged were industry members as set forth in Subsection 36(3) of the Act.

Mr. Mulholland made a further preliminary objection to the Hearing Panel respecting the presence of a media person in the Hearing Room. The request was for the Hearing to be held in camera to protect Mr. Mulholland from having the proceedings reported in the St. Albert Gazette. He claimed that there had been 6 articles printed in that newspaper in respect to himself, his brokerage and his business dealings in connection with various legal proceedings and matters pertaining to this Hearing. His objection was, by Order of the Panel, dismissed on the basis that articles and further reports would not create a bias with the Panel and would be contrary to the public's right to know which was a policy of RECA.

Mr. Mulholland made a further submission to the Hearing Panel on March 19, 2002 prior to the commencement of the presentation of evidence by offering to enter into an agreed statement of facts in exchange for an Order for the proceedings to be held in camera and requesting a three week adjournment to negotiate an agreed statement of facts with the Executive Director of RECA. The Hearing Panel made an Order rejecting the application to have the Hearing in camera and denying the application to adjourn the matter for three weeks.

The Hearing Panel proceeded to hear the evidence presented by the Counsel for RECA and the cross-examination of the witnesses by Mr. Mulholland.

At the end of the presentation of the case presenter for RECA in respect to the matters appearing in the Notice Of Hearing, Mr. Mulholland applied to have RECA witness, Mr. Drysdale recalled in order to challenge an answer given in his cross-examination. Mr. Mulholland stated that he would not be calling any evidence to refute that of Mr. Drysdale and accordingly the Hearing Panel rejected the application at that point and until such time as Mr. Mulholland did present such evidence.

Mr. Mulholland then applied to exclude any media persons from the Hearing and submitted that a media person present at the Hearing appeared to be interfering with witnesses at the Hearing contrary to the Guidelines of the Council and further requested a three week adjournment. Mr. Mulholland did not present any evidence of witness interference and the Hearing Panel made an Order refusing to exclude the media from the Hearing and denying the application for an adjournment.

The Hearing Panel proceeded to hear the evidence presented by Mr. Mulholland in his own defense followed by closing arguments by Counsel for RECA and by Mr. Mulholland.

DECISION OF THE HEARING PANEL

After hearing and considering all of the evidence presented to the Hearing Panel and the submissions and arguments presented by Counsel and by Mr. Mulholland on his own behalf, the Panel made the following findings:

1. Preliminary Findings
 - 1.1 That Chuck Mulholland was at all material times the registered broker of Realty in Motion Inc. a/o Realty World in Motion and Realty in Motion Inc. a/o Century 21 Realty in Motion (the Brokerage).
 - 1.2 The Hearing Panel is duly constituted and has jurisdiction in this matter.
 - 1.3 The Investigator in this matter was duly appointed.
 - 1.4 The Notice of Hearing in this matter was, by consent, duly served upon Chuck Mulholland and the Brokerage
2. With respect to the allegations set out in the Notice of Hearing, the Hearing Panel finds:
 - 2.1 That for the period including August 2000 to and including December 2000 the Brokerage failed to prepare bank reconciliations pursuant to the Rules as alleged in the Notice of Hearing(the Notice).
 - 2.2 That on or about January 23, 2001 the Brokerage deposited trust funds to an account other than a trust account of the Brokerage in breach of the Rules as alleged in the Notice.
 - 2.3 That on or about February 6, 2001 the Brokerage paid out a commission of \$ 4,943.40 to another broker from its trust account without the corresponding trust funds having been deposited to such trust account in breach of the Rules as alleged.

- 2.4 That for the period including July 2001 to and including November 2001 the Brokerage failed to prepare bank reconciliations for its trust account pursuant to the Rules as alleged in the Notice.
- 2.5 That on or about May 3, 2001 the Brokerage paid a commission in the sum of \$5,067.20 to another broker from its trust account without the corresponding trust funds having been deposited to such trust account in breach of the Act and the Rules as alleged in the Notice.
- 2.6 That on or about June 8, 2001 trust funds in the sum of \$5,067.20 were received by the Brokerage but were not deposited to its trust account in breach of the Act and the Rules as alleged in the Notice.
- 2.7 That on or about July 9, 2001 trust funds in the sum of \$27,183.32 were paid by the Brokerage to the Court of Queen's Bench of Alberta when only \$14,000.00 in corresponding trust funds were in the trust account of the Brokerage in breach of the Act and the Rules as alleged in the Notice.
- 2.8 That on or about July 31, 2001 the records of the Brokerage disclosed \$22,425.00 having been received and held in trust by the Brokerage however the trust account contained only the sum of \$1,174.38 in breach of the Act and the Rules as alleged in the Notice.
- 2.9 That on or about August 1, 2001 the Brokerage issued a cheque in the sum of \$2,425.00 drawn upon the trust account of the Brokerage resulting in an overdraft of \$1,250.62. A bank charge of \$5.00 increased the overdraft to \$1,255.62 in breach of the Rules as alleged.
- 2.10 That on or about September 4, 2001 the Brokerage paid out of its trust account \$535.00 more than the corresponding amount held in its trust account in breach of the Rules as alleged.
- 2.11 That between October 5, 2001 and November 9, 2001 6 transfers of trust funds were made from the Brokerage trust account to the general account in varying amounts totaling \$8,900.00 and in each case without records or documentation having been prepared or retained by the Brokerage to support the transfers and resulting in a shortfall of trust funds in such amount in breaches of the Act and Rules as alleged in the Notice.

- 2.12 That on December 3, 2001 the records of the Brokerage and the bank where the trust account of the Brokerage was held disclosed that there was a shortage of trust funds in the sum of \$27,791.00. The Brokerage and Mr. Mulholland failed to notify the Executive Director of RECA in writing about the shortage in breach of the Rules as alleged in the Notice.
- 2.13 That during the period prior to December 3, 2001 the Brokerage had on 6 occasions paid out commissions to other brokerages in transactions after the Brokerage had paid itself its share of the commissions in breach of the Rules as alleged in the Notice.
- 2.14 That at all material times in respect to the forgoing findings by the Hearing Panel, Chuck Mulholland was the Broker registered to the Brokerage and either directed the actions or himself carried out the actions which have been found to be breaches of the Act and the Rules herein.

With respect to the forgoing findings the Hearing Panel has determined that each such finding constitutes conduct by Chuck Mulholland and the Brokerage deserving of sanction.

It is the opinion of the Hearing Panel that such conduct deserving of sanction is as follows:

1. Detrimental to the Public interest.
2. In contravention of the Act and the Rules thereunder.
3. In breach of the fiduciary duties owed their clients.
4. Damaged the professional standing of real estate brokers.
5. Displayed a lack of knowledge of the duties, obligations and proper business practices required of a licensed broker in Alberta.

It was also determined, that although trust funds had been misappropriated by Chuck Mulholland that such funds had been replaced and that no client had suffered any direct financial loss. It was, however, apparent to the Panel that certain trust account transactions by Mr. Mulholland were indicative of the fact that he used clients' trust moneys for his own purposes in disregard of the fact that those funds were not his.

PENALTY

The Hearing Panel reconvened on May 9, 2002 by telephone conference call to hear submissions on penalties. Mr. Norm Jensen, the alternate member of the Hearing Panel participated in the Hearing in the place of Mr. Tom Shields and Mr. Patrick acted as Chair for this portion of the Hearing.

Submissions were made to the Hearing Panel by Ms. Olson on behalf of RECA and by Mr. Mulholland in his own behalf.

After hearing the submissions made by the parties the Hearing Panel proceeded to consider the respective submissions and the circumstances noting that pursuant to Subsections 43(1) and 43(2) of the Act the Panel may consider cancellation or suspension of any authorization issued to the industry member by RECA which includes authorization to act as an agent and/or broker; conditions or restrictions on the industry member and the member's carrying on of business as deemed appropriate; a monetary penalty of not more than \$25,000.00; and all or part of the costs of the investigation and hearing determined in accordance with the bylaws.

As a result of the above findings the Hearing Panel hereby orders that:

1. Mr. Mulholland shall not, subject to the conditions hereinafter set out, be granted authorization under the Act and the Rules to either operate as or become a real estate broker up to and including the 7th day of December, 2006 or operate as or become a real estate agent up and including the 31st day of August 2002.
2. Prior to becoming entitled to apply for authorization to operate as or become a real estate broker Mr. Mulholland shall have successfully completed all aspects of the Broker's Licensing Program as shall then be required by RECA for real estate brokers in Alberta and that prior to becoming entitled to apply as a real estate agent Mr. Mulholland shall have successfully completed a course entitled *Ethical Principles and Professional Standards*(#2250) or its successor as shall then be offered by the Real Estate Institute of Canada and approved by RECA for real estate agents in Alberta.
3. Mr. Mulholland shall forthwith pay a fine of \$10,000.00 to RECA and in any event the same shall be paid before being entitled to apply for authorization in any capacity under the Act and the Rules.

12.

4. Mr. Mulholland shall forthwith pay the sum of \$7,500.00 toward costs of the investigation and hearing in this matter and in any event the same shall be paid before being entitled to apply for authorization in any capacity under the Act and the Rules.

Dated this 9th day of May , 2002

"Tom Shields"

Tom Shields, Chairman

"Dale Kelley"

Dale Kelley, Member

"Lynn Patrick"

Lynn Patrick, Member

"Norm Jensen"

Norm Jensen, Member