

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 ZAFAR BAHADAR a real estate associate, and at all material times registered with 4th Street Holdings Ltd. operating as Re/Max Real Estate (Central)

Hearing Panel Members: Ramey Demian, Chair  
Helen Ang  
Julia Jones

Appearances: Jason J. Kully, Counsel for the Executive Director of the Real Estate Council of Alberta  
David W. Kobylnyk, Counsel for Zafar Bahadar

Hearing Dates: October 25 and 26, 2018

DECISION OF A HEARING PANEL  
ON THE INDUSTRY MEMBER'S APPLICATION FOR A  
STAY OF THE PROCEEDINGS AND COSTS

## A. Introduction

The Real Estate Council of Alberta ("RECA") is the independent governing authority that sets, regulates, and enforces standards for real estate brokerage, mortgage brokerage, property management, and real estate appraisal professionals in Alberta. RECA reviews the industry professionals' compliance with the *Real Estate Act*, R.S.A. 2000, c. R-5, *Regulations*, and *Rules*.

It was in this capacity that the Executive Director of RECA issued a Notice of Hearing dated March 20, 2018 to the Industry Member, Zafar Bahadar. The Notice of Hearing alleged conduct deserving of sanction for breaches of the *Real Estate Act* or *Real Estate Act Rules*. The conduct pertained to a real estate transaction that occurred in and around August, 2007.

In 2007, the Industry Member represented three buyers of a property in Calgary (the "Property"). One of the buyers filed a complaint with RECA regarding the advice she had received from the Industry Member with respect to being a "co-signer" for the mortgage on the Property and her liability for that mortgage. The complaint was dated September 23, 2009, slightly more than two years after the real estate transaction.

RECA commenced an investigation in late 2010 which concluded in 2011. The allegations of conduct deserving of sanction included the advice the Industry Member had given the Complainant regarding her liability on a mortgage and being a "co-signer" and also included allegations that the Industry member had provided an inflated listing and sale price of the Property to the Mortgage Broker.

On June 14, 2018, after the Notice of Hearing was issued by the Executive Director, the Industry Member applied to the Hearing Panel for an order declaring that the proceedings constituted an abuse of process. He sought a permanent stay of the proceedings plus costs of the application.

There were two grounds for the application. The first was that the Executive Director's extreme and inordinate delay in bringing the matter to a hearing had resulted in the Industry Member's ability to mount a defence being significantly prejudiced and impaired. It was his position that he would not receive a fair hearing if the matter proceeded to a hearing. The second ground was that the proceedings were a re-litigation or collateral attack on a Court of Queen's Bench Order granted in 2011. That Order declared that two of the buyers of the Property, not the Industry Member, had provided the mortgagee with false or forged documents in order to obtain the mortgage.

The Notice of Hearing set the hearing dates from April 23 to 27, 2018. An adjournment was granted on April 19, 2018. On July 30, 2018 the Hearing Panel ordered a five day hearing commencing October 25, 2018 and declared it would hear the stay application prior to hearing the disciplinary proceedings.

The Hearing Panel heard the stay application on October 25, 2018 and orally advised the parties of their decision on October 26, 2018 as follows: The Hearing Panel grants a permanent stay of the RECA disciplinary proceedings as it has found that there was an inordinate delay in the proceedings and as a result of the delay, the Industry Member has been significantly legally prejudiced.

The Hearing Panel found it unnecessary to consider the Industry Member's second ground for the stay application as a result of granting the stay based on the first ground of his application.

The Hearing Panel asked the parties if they wished to set a date to make submission regarding costs. Counsel for the Executive Director submitted that the Hearing Panel

did not have jurisdiction to award costs against the Executive Director because the *Real Estate Act* did not explicitly provide for costs against the Executive Director. Counsel for the Industry Member concurred but also stated the Hearing Panel could exercise its discretion and award costs against the Executive Director.

The Hearing Panel orally advised the parties of their decision not to award costs in this matter.

For ease of reference, the parties will be identified as follows in the written Decision:

Role in the real estate transaction	Name	Title in Decision
Complainant/Buyer/Mortgagor/ " Co-signer"	SK	Complainant
Buyer/Mortgagor	KS	Buyer #2
Buyer/Mortgagor	SS Brother to Buyer #2	Buyer #3
Re/Max Broker at time of real estate transaction	FM	Real Estate Broker
Mortgage Broker for mortgage taken on Property	SC	Mortgage Broker
RECA Investigator who interviewed parties and obtained documents	CR	RECA Investigator
Real Estate Associate	Zafar Bahadar	Industry Member
Property purchased by Buyers	[("address")]	Property

## B. Hearing Panel Composition

The parties did not object to the composition of the Hearing Panel after Counsel for the Industry Member asked Ms. Jones if they had any cases together and she confirmed to the best of her knowledge, they had not.

## C. Issues

1. Whether there had been an inordinate or unreasonable delay in investigating and conducting a hearing regarding the allegations of conduct deserving of sanction against the Industry Member.
2. If there had been an inordinate or unreasonable delay, did the delay result in prejudice to the Industry Member by impairing his ability to answer the complaint against him.

3. If there had been an inordinate delay that resulted in legal prejudice to the Industry Member, was a stay of the proceedings the appropriate remedy.

## D. Submissions of the Industry Member

Authorities provided to the Hearing Panel:

- *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 SCR 307;
- *B.S.A. Diagnostics Limited v. Ontario (Attorney General and Health)*, 2014 ONSC 6054;
- *New Brunswick (Financial and Consumer Services Commission) v. Pierre Emond and Armel Drapeau*, 2016 NBFCST8;
- *Humphreys v. Trebilock*, 2017 ABCA 116;
- *Stinchcombe v. Law Society of Alberta*, 2002 ABCA 106;
- *422252 Alberta Ltd. v. Messenger*, 2013 ABQB 399;
- *R. v. Jordan*, [2016] 1 SCR 631;
- *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 SCR 77;
- *R. v. Regan*, [202] 1 SCR 297; and
- *Otis Canada*, 2012 BCIPC No.11.

Documents provided to the Hearing Panel:

- Affidavit of Industry Member sworn June 9, 2018;
- Supplemental affidavit of Industry Member sworn June 15, 2018;
- Affidavit of RECA Investigator sworn August 20, 2018;
- Transcript of cross examination of Industry Member's affidavits dated September 26, 2018;
- Transcript of cross examination of RECA Investigator's affidavit dated September 27, 2018; and
- Cross-Examination on CR Affidavit- Key Admissions Issue by Issue.

Counsel for the Industry Member submitted that his application for a permanent and full stay of the RECA conduct deserving of sanction proceedings, was based on two grounds:

1. Abuse of process and procedural fairness due to inordinate delay; and
2. Re-litigation or collateral attack of a matter adjudicated by the Court of Queen's Bench in 2011.

### INORDINATE DELAY IN PROCEEDINGS

#### 1. Inordinate Delay

Regarding the inordinate delay ground for the stay application, Counsel for the Industry Member submitted that "justice delayed is justice denied". It was his position that the time period between when the alleged conduct deserving of sanction

occurred in 2007 and the hearing in 2018, was more than eleven years which was a shocking and obscene delay. He submitted that the case was stale dated and no reasonable person or professional would allow a case to be prosecuted from eleven years ago.

The Industry Member's Counsel submitted that inordinate delay, a term from the case law, had impaired the Industry Member's ability to defend himself. He submitted that the facts and evidence show that a hearing would be unfair to the Industry Member as the delay had resulted in prejudice to the Industry Member.

The Industry Member's Counsel also submitted that if the Hearing Panel dismissed the Industry Member's application, it would be going against recent trends in jurisprudence. The modern trend was to not accept delay.

Counsel for the Industry Member relied on the evidence below to show there had been an inordinate delay in the RECA investigation and hearing regarding the allegations that the Industry Member's conduct was deserving of sanction:

- i) The affidavit of the Industry Member sworn on June 9, 2018 in Paragraph 6:
  - o the complaint was filed two years after the real estate transaction;
  - o the complaint lacked specificity, including dates which were left blank on the complaint form;
  - o the Complainant could not remember the date that the conduct occurred; and
  - o the Complainant had consulted a lawyer and was told that nothing could be done.
- ii) Paragraph 4 of the complaint:
  - o showed the Executive Director did not act on the complaint for close to two years after it was filed; and
  - o there was a three and a half year period from the real estate transaction and when the investigation commenced.

a) Complexity of case and lack of reasons to explain the delay

It was the Industry Member's position that there was no evidence before the Hearing Panel regarding the length of time the RECA proceedings normally take and the Hearing Panel ought to draw an adverse inference as the Executive Director provided no evidence.

It was also the Industry Member's position that there was no evidence before the Hearing Panel that would explain why the proceedings were delayed for nine years after the complaint was filed. It was his position that there was no evidence that this was a complex case.

Counsel submitted that there was no evidence that the Industry Member had contributed to the delay or waived the delay.

Counsel submitted that the purpose and nature of the proceedings were important but the RECA's mandate did not exist in a vacuum, particularly when alleging mortgage fraud. It was his position that the RECA was a public body and should therefore hear the case in a reasonable time. Although the mandate was important, a stay ought to be granted because of the abuse of process.

In addition, pursuant to the *Real Estate Act*, there was no redress for the Complainant in the RECA proceedings and therefore no rights at stake or lost if a stay was granted.

## 2. Legal Prejudice

It was the Industry Member's position that the delay resulted in legal prejudice for the reasons set out below.

### a) Failed and Lack of Memory

Counsel submitted that the Industry Member's affidavit stated that no one would have a reliable memory after eleven years and no one could reasonably defend himself after that length of time. It was his Counsel's position that the Industry Member could not recall his conversations with the Complainant after eleven years and he pointed to the Industry Member's affidavit as evidence of his faded memory.

It was his position that the nature of the allegations were such that the Hearing Panel would be relying on oral evidence from witnesses and in turn, those witnesses would be relying on their memories regarding conversations and discussions that occurred eleven years ago. He submitted that there was no documentary evidence to support the allegations.

### b) Credibility of Complainant

Counsel for the Industry Member submitted that the Complainant was a liar and a perjurer, having lied to RECA and the mortgagee, therefore her evidence should not be accepted by the Hearing Panel and the Executive Director should not rely on her evidence.

It was submitted that the Complainant perjured herself in a statutory declaration wherein she swore she would reside on the Property. She also lied in her complaint form wherein she stated she had not received paperwork for the real estate transaction but there was a form she signed acknowledging she received mortgage disclosure information.

In addition, Counsel submitted that the Complainant received Independent Legal Advice from the lawyer who acted for her in the purchase transaction and yet she

alleged that she relied on the Industry Member's advice regarding when her name could be removed from the mortgage.

c) Material witness deceased and another unavailable

The Industry Member's Counsel submitted that Buyer #3, one of the two people the court order declared as having provided the mortgagee with false or forged documents, had died. He submitted that this resulted in the Industry Member being unable to cross examine this witness. No evidence was provided to the Hearing Panel about the date of death of Buyer #3.

The Industry Member's Counsel also submitted that Buyer #2, also one of the two people the court order declared as having provided the mortgagee with false or forged documents, was never located by the RECA Investigator. It was his position that this resulted in the Industry Member being unable to cross examine this witness and there were no transcripts available. Counsel indicated he would have questioned these witnesses on several topics as set out in the Industry Member's affidavit:

- "The buyers were present to hear and observe much of the work and time I devoted to helping these people acquire a home in 2007, including all of the negotiations that took place at the material time;
- I believe they knew full well about the financial documents that were submitted to the bank for and on behalf of the co-purchasers (employment letter, pay stubs, etc.), if only because they are the ones who either obtained or prepared them for the bank;
- I believe one or the other brother created and transmitted to [Mortgage Broker] the document that contained the false list price of the property they purchased (I most certainly didn't create or transmit that document to anyone);
- I believe they knew full well that the Complainant would not be residing together with them at the property they all co-purchased; and
- I believe they (and the other brother's wife) knew full well that I never attended at the Land Titles Office together with these people."

The Industry Member's Counsel submitted that the unavailability of these two material witnesses resulted in prejudice to the Industry Member and seriously impaired his ability to defend himself.

d) Real Estate Broker

Counsel submitted that the Industry Member's Real Estate Broker at the time of the real estate transaction, could not be called as a witness at the hearing because he had developed dementia. It was submitted that he was a material witness. He could have

authenticated the broker's file documents obtained by RECA and he had told the RECA Investigator that he thought the buyers in the transaction were "dirty" rather than the Industry Member. It was his position that not having this witness available, due to a delay in the proceedings, also impaired the Industry Member's ability to defend himself in this matter.

In addition to the Broker no longer being available as a witness, there had been four brokers at the Industry Member's Re/Max office since 2007 and the current broker stated there was no longer a file and he had no information regarding the matter.

e) Mortgage Broker

It was submitted that the tape recording of the RECA Investigator's interview with the Mortgage Broker was not available and that also impaired the Industry Member's ability to defend himself.

f) Affidavit of RECA Investigator

Counsel for the Industry Member made several points regarding the affidavit of the RECA Investigator as follows:

- it was devoid of substance regarding the stay application
- it was unresponsive to the Industry Member's affidavit which left the Industry Member's affidavit uncontested;
- it did not deny or speak to whether the Industry Member would not get a fair hearing;
- it spoke to the merits of the case which was prejudicial and irrelevant;
- Counsel for the Executive Director wrote the affidavit for the RECA Investigator; and
- It stated that she had personal knowledge of the matters deposed to but she did not have personal knowledge of paragraphs: 3, 7, 8, 9, 10, 12, 13, 18 ,19, 20, 21, 22, 23, 26, and 27

3. Applying the Authorities to the Industry Member's case

Counsel for the Industry Member provided the Hearing Panel with case law that, in his opinion, set out the law regarding abuse of process and inordinate delay in prosecuting matters. There were several key excerpts set out in *Blencoe, supra* that Counsel submitted applied to the circumstances of this case. Some of the excerpts were as follows:

"In my view, there are appropriate remedies available in the administrative law context to deal with state-caused delay in human rights proceedings. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. "... "In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay."

"Where delay impairs a party's ability to answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy."

"It is thus accepted that the principles of natural justice and the duty of fairness include the right to a fair hearing and that undue delay in the processing of an administrative proceeding that impairs the fairness of the hearing can be remedied".

"Abuse of process is a common law principle invoked principally to stay proceedings where to allow them to continue would be oppressive. As stated by Brown and Evans, *supra*, at pp. 9-71 and 9-72:

The stringency of the requirements for showing that delay constitutes a breach of fairness would seem to be due, at least in part, to the drastic nature of the only appropriate remedy. Unlike other instances of procedural unfairness where it is open to a court to remit the matter for redetermination in a procedurally fair manner, the remedy for undue delay will usually be to prevent the tribunal from exercising its legislative authority, either by prohibiting it from proceeding with the hearing, or by quashing the resulting decision. [Emphasis added.]

"... a stay of proceedings should be granted where "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency" or where the proceedings are "oppressive or vexatious".

"In order to find an abuse of process, the court must be satisfied that, "the damage to the public interest in the fairness of the administrative process should the proceedings go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings here halted" (Brown and Evans, *supra*, at p.9-68). According to L'Heureux-Dube J. in *Power*, *supra*, at p.616, "abuse of process" has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings."

"The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay."

"In *Kodellas*, *supra*, the Saskatchewan Court of Appeal held that the determination of whether the delay is unreasonable is, in part, a comparative one whereby one can compare the length of delay in the case at bar with the length of time normally taken for processing in the same jurisdiction and in other jurisdictions in Canada."

"Lack of resources cannot explain every delay in giving information, appointing inquiry officers, filing reports, etc.; nor can it justify inordinate delay where it is found to exist. The fact that most human rights commissions experience serious delays will not justify breaches of the principles of natural justice in appropriate cases."

The Industry Member's Counsel submitted that the excerpts from *Blencoe*, *supra* supported the Industry Member's position that a stay ought to be granted as did the following evidence that *Blencoe*, *supra* found to be relevant:

- There was no opportunity for the Industry Member to question Buyer #2 or #3 or the Real Estate Broker, but the Executive Director had the opportunity to question two of these three witnesses;
- The excuse that RECA was busy could not justify the delay;
- The recording of the mortgage broker's interview failed and could not be used to refresh memories or to cross examine the witness;
- There was no evidence that the Industry Member waived the delay;
- If a stay was granted there would be no impact on the Complainant as no redress was available for her in the RECA proceedings;
- There was no complexity to the file to explain the delay; and
- There was no evidence before the Hearing Panel regarding the typical length of time it takes for processing these complaints in Alberta or in other jurisdictions in Canada.

Counsel submitted that it was difficult to find decisions for the Hearing Panel to consider wherein the delays were more than eight years. He did provide *B.S.A. Diagnostics Limited*, *supra*, an Ontario Superior Court of Justice Divisional Court decision, wherein a decision of the Health Services Appeal and Review Board was being appealed.

In that case, the Board found that there had been ample evidence of delay of almost fifteen years. They also found some evidence of prejudice to the Director resulting from the delay: one of the authors of the assessment reports had no recollection of the events of the assessments and no notes or other documentation about them, and two of the Director's other witnesses had retired. The Board noted that the passage of time "would exacerbate the difficulty in locating the witnesses." The court upheld the Board's decision stating, "when the reasons are viewed as a whole, it is apparent that the Board applied the test in *Blencoe*."

Counsel also submitted *New Brunswick (Financial and Consumer Services Commission)*, *supra*, which was an administrative proceeding that matched the delay in this case. It was found that the delay in those proceedings constituted a breach of the requirement for procedural fairness. The delay was inordinate and resulted in significant prejudice to the registrant. They found that the overall delay from receipt of the compliant to the hearing was approximately ten years. In that case, the Commission had not presented any evidence indicating that it could not have started the proceedings at an earlier date. Nor had it provided any evidence indicating that the investigation was complex and required nearly four years.

In *New Brunswick (Financial and Consumer Services Commission)*, *supra*, the Commission cited cases wherein the delays were found to be inordinate but were shorter than that of the proceedings under consideration. The examples were:

*Misra v. College of Physicians & Surgeons (Saskatchewan)* (1988), 70 Sask. R. 116: A delay of five years in proceeding with a hearing on the merits while awaiting the outcome of criminal proceedings and while the physician was subject to a temporary suspension of five years, was an unreasonable delay.

*Stinchcombe v. Law Society (Alberta)* 2002 ABCA 106: A lawyer was suspended from the practice of law pending a hearing on the merits. Delays of twelve years and fourteen years respectively were found to be unreasonable.

*Brown v. Assn. of Professional Engineers & Geoscientists (British Columbia)*, [1994] B.C.J. No. 2037: A delay of just over three years was found to be unreasonable.

*Kolellas v. Saskatchewan (Human Rights Commission)* (1989), 77 Sask. R. 94: A delay of four years was found to be unreasonable.

*Investment Dealers Association of Canada v. MacBain* (2007), 299 Sask. R. 122 (Sask. C.A.): A delay of three years and eight months between the commencement of the investigation and the commencement of the proceedings and seven years overall, was found to be unreasonable.

The Industry Member's Counsel pointed out that two of the cases were decided before *Blencoe, supra*.

The Commission in *New Brunswick (Financial and Consumer Services Commission)*, *supra*, found the purpose of these proceedings did not justify the delay. The mandate of the Commission was in part to "provide protection to investors from unfair, improper or fraudulent practices". Given this public interest mandate, the Commission found it was imperative that enforcement proceedings proceed as fairly and expeditiously as possible.

In addition, unlike the case of a human rights commission such as that considered in *Blencoe, supra*, the enforcement proceedings would not provide direct redress to the investors. The lack of redress to victims was an important consideration as set out in *Stinchcombe* at paragraph 55:

[...] The availability of redress is not affected by staying the disciplinary proceedings. While there is a public interest involved, that public interest was addressed with a suspension. The very real interest of the suspended member must also be considered. The suspension is very onerous, with serious consequence to the member, and requires the Law Society to proceed without delay unless the delay is clearly waived by the member. Neither the nature nor the purpose of the Law Society proceedings justified the delay in this case."

The Commission found that the nature of the case, its complexity, and facts and issues did not justify the delay in the proceedings.

The Commission rejected the argument that although one of the registrants did not contribute to the delay, he did nothing to accelerate the proceedings and did not oppose any of the motions filed and as such, he may have waived delay. They relied on *Stinchcombe, supra*, at paragraph 58, wherein the court found that the respondent does not bear the onus of moving an administrative proceeding ahead and silence does not constitute waiver. A waiver of delay must be "informed and unequivocal".

They found there was significant prejudice which resulted from the delay and that warranted a dismissal of the proceedings against both parties. The prejudice included that one of the Commissioner's witnesses had died. Given the delay of approximately ten years since the initial complaint, they accepted the argument that the registrants could not defend themselves as too much time had passed and their ability to recollect events had faded or disappeared. They also found that it was also probable that witnesses' memories had faded and that this could have an impact on their credibility. This was supported by the court's findings in *Brown v. Assn. of Professional Engineers & Geoscientists (British Columbia)*, [1994] B.C.J. No. 2037 and *Stinchcombe, supra*. In the Commission's view, the greater the passage of time, the greater the probability of an impact on witnesses' memories and the fairness of the hearing.

The Commission found that while one of the registrants had not provided concrete evidence of prejudice other than the impact on his memory, such as deceased witnesses [his witnesses] or lost evidence, they were satisfied that the impact of the delay on one of the registrant's memory was sufficient to seriously prejudice his ability to make full answer and defence. They found it was no longer possible for the registrants to have a fair hearing.

Counsel for the Industry Member submitted that this case, *New Brunswick (Financial and Consumer Services Commission), supra*, was directly on point regarding the fading of memories and the time that had elapsed since the real estate transaction occurred.

He also pointed out that the purpose of the Commission was like the RECA's: protecting the public. Also, the lack of redress for the Complainant was the same in this case.

Counsel for the Industry Member also provided *422252 Alberta Ltd, supra*, which was a Court of Queen's Bench of Alberta decision in a civil litigation matter that commented on faded memories as follows:

"If you or I were called upon to remember, with detail, an event that occurred in our professional or working life 23 years ago, the answer about whether asserting a claim for it now would give rise to serious prejudice would seem obvious. The mere passage of time, if there is enough of it, makes anyone but the most extraordinary or unusual Defendant, defenceless against claims that are old and stale. This is one of the central tenants of a limitation system and the rationale for the ten year cap."

In its Report for Discussion, the Institute of Law Research and Reform said:

The judicial system must, insofar as possible, ensure that the adjudicative process secures justice for claimants and defendants. By the time that ten years have passed after the occurrence of the events on which a claim is based, we believe that the evidence of the true facts will have so deteriorated that it will not be sufficiently complete and reliable to support a fair judicial decision. At this point adjudication will as likely result in a judicial remedy for a claimant with a spurious claim as one with a meritorious claim. Adjudication under these circumstances can only detract from the credibility of the judicial system and undermine its effectiveness. The judicial system is a human system, and we think it is counterproductive for a society to require it to attempt to do what it cannot do properly. We quote from the opinion of Laycraft, J.A. in Ruzicka case: Every trial judge is aware that stale claims with stale testimony produce bad trials and poor decisions."

"An inability to answer a claim is serious prejudice. The passage of seven or eight years might be enough to have this effect."

### Procedural Submission

Regarding the Executive Director's position that the Hearing Panel could proceed with the hearing and address with the delay in the sanction phase of the hearing, was not supported by the case law. It was his position that the hearing should not continue if there was inordinate delay that compromised the Industry Member's ability to defend himself at the hearing. It was his position that the remedy ought to be granted at the front end rather than the back end of the proceedings.

### PROCEEDINGS ARE A COLLATERAL ATTACK OF A COURT ORDER

Regarding the re-litigation ground for the stay application, it was the Industry Member's position that the Court of Queen's Bench had adjudicated the matter of

mortgage fraud. The court had issued an order declaring that Buyers #2 and #3, not the Industry Member, had provided the mortgagee with false or forged documents in order to obtain the mortgage and therefore the RECA hearing was an improper collateral attack on the Court Order granted in 2011.

It was Counsel's position that the issue of mortgage fraud had already been litigated and pointed to the Industry Member's supplemental affidavit, exhibit "C" as evidence. It was the court order dated October 4, 2011 where the court declared and ordered that Buyers #2 and #3 were found to have provided the Mortgagee with false or forged documents in order to obtain the mortgage. Therefore, the RECA hearing was an improper collateral attack on the Court Order granted in 2011.

He submitted that the court order was of paramount importance as Buyers #2 and #3 were found to have provided false or forged documents to the mortgagee and this order had not been appealed. In addition, it was his position that the Complainant could have third partied the Industry Member (brought him into the litigation as a defendant) as she was a plaintiff in the case.

Counsel submitted *Toronto (City) v. C.U.P.E.*, Local 79, [2003] 3 SCR 77 as support for his position. He submitted that the case addressed whether parties are required to be the same regarding issue estoppel and the need to bring everyone into one law suit. He submitted it stood for the proposition that one cannot use another court or tribunal to over rule another.

## E. Submissions of the Executive Director of the RECA

Authorities provided to the Hearing Panel:

- *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 SCR 307;
- *Hennig v. Institute of Chartered Accountants of Alberta (Complaints Inquiry Committee)*, 2008 ABCA 241;
- *Wachtler v. College of Physicians and Surgeons of the Province of Alberta*, 2009 ABCA 130;
- *A.D.M. v. Canadian Institute of Actuaries*, 2008 ABQB 522;
- *The Law Society of Upper Canada v. Abbott*, 2017 ONCA 525;
- *Duncan v. Law Society of Alberta*, 1991 ABCA 107;
- *Law Society of Alberta v. Odishaw*, 2011 ABLS 28
- *Alberta Law Enforcement Review Board Decision*, 2013 – 30 September 30, 2013;
- *Dr. J. R. v. The College of Psychologists of British Columbia*; 1995 – April 6, 1995;
- *British Columbia Worker's Compensation Board v. Figliola*, 2011 SCC 52; and
- *Garland v. Consumers' Gas Co.*, 2004 SCC 25.

Documents Provided to the Hearing Panel:

- Affidavit of Industry Member sworn June 9, 2018;
- Supplemental affidavit of Industry Member sworn June 15, 2018;
- Affidavit of RECA Investigator sworn August 20, 2018;
- Transcript of cross examination of Industry Member's affidavits dated September 26, 2018;
- Transcript of cross examination of RECA Investigator's affidavit dated September 27, 2018; and
- Submissions of the Executive Director Regarding the Application for Stay of Proceedings Due to Delay.

## UNREASONABLE OR INORDINATE DELAY IN PROCEEDINGS

### 1. Delay

Counsel for the Executive Director submitted that delay itself does not give rise to grounds for stopping an administrative process. To warrant a stay of proceedings, that delay must also result in "significant prejudice" of "such magnitude that the public's sense of fairness and decency is affected". Otherwise, the imposition of any rigorous time limit would be tantamount to imposing a judicially created limitation period: *Blencoe, supra* and *Hennig, supra*.

Having consideration for the principles of fairness, a stay is only warranted if:

- a. There is an unreasonable or inordinate delay; and
- b. That delay caused:
  1. Significant prejudice to the ability of the person to present their case (referred to as legal prejudice), or
  2. Such personal prejudice to the person that to allow the proceeding to continue would bring the disciplinary process into disrepute (referred to as personal prejudice).

Legal prejudice, which was the prejudice the Industry Member submitted that he suffered, related to the impairment of the party's ability to answer the complaint against him due to the delay. These include where memories have faded, essential witnesses are unavailable, or where evidence has been lost.

Counsel for the Executive Director submitted that the Industry Member had the onus to demonstrate unreasonable or inordinate delay.

He also submitted that elapsed time was not the same thing as "delay" (*Hennig, supra*) and to determine whether the "elapsed time" in bringing a complaint to a hearing involved an inordinate or unreasonable delay would depend on several factors, including:

- a. The nature of the case and its complexity;
- b. The facts and the issues;
- c. The purpose and the nature of the proceedings;
- d. Whether the applicant contributed to or waived the delay;
- e. The actual length of the delay compared to the usual time required for such proceedings; and
- f. Other circumstances: *Blencoe, supra*.

The Executive Director acknowledged that the delay in this case was sufficient to warrant an inquiry into whether the Industry Member suffered significant prejudice. However, the Executive Director also found it important to break down the elapsed time, so it could be determined which delays were attributable to the Executive Director because it was only the delay caused by or attributable to the prosecuting party that mattered. The Executive Director relied on *Wachtler, supra* wherein the total length of time between the complaint and the hearing was 53 months but the Court of Appeal broke out the delays and found that 34 months were attributable to the college as follows:

- a. 6-7 months: delay resulting from physician's decision to change Counsel and attributable to the physician;
- b. 12 months: time associated with the normal course of such proceedings and not attributable to the physician or to the college (referred to as institutional delay);
- c. 21 months: delay for which no explanation was provided and attributable to the college; and
- d. 13 months: delay caused when a member of the investigative committee recused herself which was attributable to the college.

The Executive Director also submitted that other cases could provide some assistance in identifying general guidelines about the length of permissible delay. For example:

- a. *Blencoe, supra*: a 32 months' duration between the initial sexual harassment complaint and the hearing was not an unreasonable delay;
- b. *A.D.M., supra*: a 51 month delay between the filing of a complaint and the laying of a citation was not unreasonable or inordinate;
- c. *The Law Society of Upper Canada v. Abbott, supra*: the hearing did not take place until approximately 7 ½ years after the complaint was made which was not fatal to the proceedings; and
- d. *Duncan, supra*: an eight year delay by the Law Society in initiating proceedings was not fatal to the continuation of the proceedings.

Counsel submitted it was important to assess the factual context rather than to rely on the length of time alone or timing benchmarks from other cases. As warned in *Law Society of Alberta v. Odishaw, supra*, "regulatory regimes for investigation and

disciplinary hearings vary between professions. Some are more demanding and time consuming than others. The nature and complexity of the issues under review may also vary. Caution must therefore be exercised so as not to make overly simplistic comparisons".

#### Attributing the Delay

Counsel for the Executive Director provided information about the steps that were taken in the proceedings during the nine year delay as follows:

The initial complaint was made on September 23, 2009. In the RECA Investigator's affidavit she stated that during late 2009 the staff were working on approximately 800 complaints. Due to this backlog the complaint against the Industry Member was initially reviewed for jurisdiction and for an examination of the conduct but an investigation did not officially begin until December 12, 2010. The Executive Director submitted this delay of approximately 15 months was attributable to the Executive Director.

During 2011 the investigation proceeded which included a response from the Industry Member received on January 12, 2011. Other relevant parties continued to provide documents throughout 2011. Most of the documents from other parties were received by May 6, 2011. However, on June 6, 2011, RECA requested a written response from the Industry Member along with further information which was not received until November 7, 2011. An investigation report was provided to the Executive Director on December 6, 2011. The elapsed time during this period was required to allow for information gathering and decision-making as a result of the facts and issues in the case and it was submitted, this should not be considered as a period of unreasonable delay.

The results of the investigation had to be reviewed by the legal services unit to determine which allegations were appropriate. As of December 2011, the legal services unit was also extremely busy and there was a period of delay between December 16, 2011 and April 16, 2014 of approximately 28 months which was attributable to the Executive Director.

After April 16, 2014, the review by the legal services unit continued. On June 4, 2014 a disclosure package of investigation records was provided to the Industry Member's Counsel. It was submitted that this was part of bringing the complaint to a hearing and was part of the complaint process and therefore not a delay attributable to the Executive Director.

A reply to this letter and disclosure package was requested within 30 days but was not received until October 6, 2015. The Executive Director submitted that this delay should not be attributed to the Executive Director.

It was submitted that another period of delay of approximately 15 months occurred between October 2015 and January 2017 that was attributable to the Executive Director.

On January 12, 2017, a draft notice of hearing was provided to the Industry Member's Counsel and until July 2017 there was communication between the Industry Member's and the Executive Director's Counsel regarding his request for disclosure materials and copies of precedent conduct cases. On July 24, 2017, Counsel for the Industry Member indicated that a five day hearing would be required and that he was not available until March 2018. As a result, the parties requested that the matter be scheduled for April 2018.

On April 17, 2018, Counsel for the Executive Director and Counsel for the Industry Member jointly requested an adjournment of the April hearing due to technical and logistical issues with the testimony of witnesses.

After the Industry Member applied for a stay of proceedings on June 14, 2018 the Hearing Panel directed that the hearing and stay application proceed from October 25 to 31, 2018.

The Executive Director submitted that from January 2017 to October 2018 was not delay that should be attributed to the Executive Director.

The Executive Director recognized there were periods of unexplained delay attributable to the Executive Director totalling approximately 58 months which was sufficient to warrant an inquiry into whether the Industry Member had suffered significant prejudice.

However, it was submitted that 58 months was within the range of other cases where a stay had not been granted. In addition, there was a strong public interest in the adjudication of conduct complaints against self regulated professionals.

Regarding the time it normally takes for the Executive Director to investigate a complaint, there was no theoretical "standard" time. The gathering of information, the preparation of an investigation report, the referral for consideration by the legal services unit, and the schedules of the parties' counsel and witnesses all contribute to delay that makes it almost impossible to define a "standard" time.

Counsel submitted that when all these factors are considered, there was no inordinate or unreasonable delay in investigating the complaint and scheduling it for a hearing. Any delay in bringing a complaint against the Industry Member did not offend the community's sense of fairness.

## 2. There was no Legal Prejudice

Counsel for the Executive Director submitted that delay without significant legal or personal prejudice does not warrant a stay of proceedings in the administrative law context: *Odishaw, supra*.

If delay had prejudiced a party's ability to defend against a complaint and to have a fair hearing, this may warrant a stay. This type of prejudice generally arises from the loss of evidence, the failing or fading of memories, or the unavailability of essential witnesses because of death or other reasons: *Blencoe, supra*.

The prejudice must be caused by the delay and the onus is on the applicant to present concrete proof to establish that delay had prejudiced their rights to a fair hearing. A finding of prejudice because of an inability to make full answer and defense must be made on evidence, not on assertions or presumptions: *Fish, supra*.

Vague or speculative assertions of prejudice arising from factors such as the death of witnesses or the impairment of memories were not enough. Proof of prejudice of sufficient magnitude to impact on the fairness of the hearing was necessary. *Blencoe, supra*.

In *Blencoe, supra*, two witnesses had died and Mr. Blencoe alleged that the memories of witnesses might be impaired by the passage of time. Despite this, the Supreme Court of Canada concluded that proof of prejudice had not been demonstrated to be of sufficient magnitude to impact the fairness of the hearing.

The Executive Director submitted that the Industry Member had failed to provide clear evidence of significant legal prejudice as a result of any delay. As in *Blencoe, supra*, the evidence fell short of establishing an inability to prove facts necessary to respond to the allegations.

a) The Industry Member's inability to recall and other available evidence

The Executive Director submitted the following points regarding the Industry Member's assertion that he was unable to recollect the details of verbal conversations relating to the allegations of conduct deserving of sanction and other evidence that was available:

- He did not explain the extent of his compromised memory;
- He did not explain whether it was the result of the delay;
- He did not explain how it may be relevant to the ultimate issue at the hearing;
- He could have refreshed his memory and preserved relevant evidence when he was provided notice that a complaint had been received;
- He was provided a copy of the complaint on December 14, 2010 and responded on January 12, 2011, memorializing his memory of the incident;
- His response included information regarding telephone calls with the Complainant, including the initial call regarding buying a house;

- In his response he could recall some of the conversations with the Complainant;
- Any conversation he could not remember at the time of the response was not due to any delay by the Executive Director;
- He was interviewed on May 13, 2011 and November 7, 2011 shortly after he received notice of the complaint and replied;
- The interviews were documented by the Executive Director;
- Steps were taken through the investigation to collect and preserve evidence;
- The Executive Director had gathered documentary and other evidence that may be relied upon to prove the allegations of conduct deserving of sanction;
- The RECA Investigator uncovered and preserved documentary and other evidence, such as interviews, that could be used to prove each of the allegations;
- His memory could be refreshed from this evidence;
- His statement that the paper trail was insufficient to refresh his memory was a vague assertion and was not supported by the documents collected;
- His complaint appeared to be about his belief that there were questions as to who prepared and transmitted the documents and not about the contents of the documents and how they could refresh his memory;
- He had raised no complaint about the contents of his own response to the complaint or the transcript of his interviews which he had been provided; and
- These documents could also be used to refresh his memory

b) Buyers #2 and #3 as Witnesses

The Industry Member had stated he would have called Buyer #3 as a witness if he had not died and went on to indicate some of the testimony that could have been provided. He also stated that RECA's inability to locate Buyer #2 had impaired his ability to defend himself. However, in the cross examination on his affidavit, the Industry Member admitted he talked to Buyer #2 in May of 2011, after he received notice of the complaint, and indicated he was still in touch with him in September 2018. The Industry Member had the ability to contact Buyer #2 and call him as a witness. It was the Executive Director's position that both Buyers #2 and #3 had the same information and therefore the Industry Member had not suffered prejudice due to Buyer #3's death or RECA's lack of contact with Buyer #2.

In addition, it was the Executive Director's position that Buyer #3 was interviewed by the RECA Investigator on November 24, 2011. A recording and transcript of the interview existed and the Industry Member could seek to introduce and rely upon this evidence at the hearing.

c) Calling the Real Estate Broker as a Witness

Regarding the Real Estate Broker's inability to testify now because of dementia, the Executive Director submitted that the Industry Member stated, during the cross examination on his affidavit, that the Broker would have been a character reference.

A character witness would only be relevant in the sanction phase of the hearing and the Industry Member would have other witnesses available to him if he wished to put his character in issue. It was the Executive Director's position that the Real Estate Broker's inability to testify had no impact on the Industry Member's defense.

Regarding the Industry Member's position that his ability to defend himself was compromised because Re/Max had four brokers since 2007 and there was no longer a file dealing with the real estate transaction, the Executive Director submitted that was not relevant to the allegations. The Broker file was obtained by RECA during the investigation on January 19, 2011 and was provided to the Industry Member as part of the disclosure of evidence. Only the original real estate purchase contract was missing. The file could be used by the Industry Member or the current broker or any other broker to familiarize themselves with the transaction.

d) Lost documents

It was submitted that other than the original real estate purchase contract, the Industry Member's evidence does not identify any lost or compromised documentary evidence.

e) Allegations regarding the Complainant

The Executive Director submitted that the Industry Member's allegations that the Complainant was a liar and a perjurer were not evidence of legal prejudice caused by delay. The hearing panel could determine the Complainant's credibility at the hearing and it was not for the Industry Member to prejudge it.

3. Remedy

The Executive Director submitted there had not been an abuse of process as there was no prejudice suffered by the Industry Member and accordingly no remedy was warranted. However, if the Hearing Panel found prejudice, it was the Executive Director's position that a stay was not the appropriate remedy because it was not the "clearest of cases" or a "gross or shocking abuse of process". The Industry Member had not been prohibited from carrying on his profession during the investigation or suffered any negative consequences to his reputation or his career due to the delay.

Counsel submitted that a stay was an extraordinary remedy and was one that should only be imposed in circumstances where other remedies were inadequate: *Odishaw, supra*.

In *Wachtler, supra*, it was accepted that unexplained lengthy delays that cause prejudice could be accounted for at the penalty stage with a reduction in sanction or relief from costs. The Alberta Court of Appeal confirmed that delay falling short of requiring a stay may call for other remedies.

In addition, the selection of an appropriate remedy must balance the competing interests of the applicant, the Complainant and the public: *A.D.M. v. Canadian Institute of Actuaries, supra*. RECA, being the regulator of real estate professionals, holds a significant responsibility to the public. Complainants, as well as the public, rely on RECA to investigate and remedy complaints against industry members. In this case, granting a stay would negatively affect the public's interest in having the complaint adjudicated and, if necessary, remedied.

Accordingly, this was not an extremely rare case where the extraordinary remedy of a stay should be imposed, even if an inordinate delay and prejudice were found.

#### 4. Distinguishing the case law provided by the Industry Member

The Executive Director submitted that cases submitted by the Industry Member could be distinguished as follows:

*Jordan, supra* and *Humphreys, supra*: the courts commented about avoiding delays but as a tribunal, the Hearing Panel was required to follow *Blencoe, supra*;

*Jordan, supra*: this was a constitutional right for a quick hearing which was a different test than *Blencoe, supra*;

*BSA diagnostics, supra*: a 15 year delay and two witnesses could not be located and evidence was not be preserved;

*New Brunswick, supra*: there were multiple witnesses not available after 10 years; and

*Stinchcombe, supra*: the lawyer was suspended during the process and the Industry Member had not been suspended in this case.

#### **COLLATERAL ATTACK OF A COURT ORDER**

Counsel submitted that these proceedings were not a collateral attack or re-litigation as the Executive Director was not seeking a different result from the Mortgage Fraud Order granted by the Court of Queen's Bench in a different forum. Any findings by the Hearing Panel on the allegations before it would not have any effect on the validity of the Mortgage Fraud Order and would in no way question its validity.

#### **Procedural Submission**

The Executive Director submitted that the Hearing Panel could proceed with the disciplinary hearing and then determine if there was sufficient evidence of prejudice to grant a stay after hearing all the evidence. However, if the Hearing Panel decided that there should be a stay granted pursuant to the Industry Member's second ground,

a collateral attack on the mortgage fraud order, the Hearing Panel would have to decide that issue first, as the hearing should not proceed if it was a collateral attack.

## F. The Hearing Panel's Decision

### Inordinate Delay

The Hearing Panel agrees with both parties that the proper test to be applied in the application for a stay of the RECA proceedings was set out by the Supreme Court of Canada in *Blencoe v. British Columbia (Human Rights Commission)*, *supra*. That test was set out in the context of an administrative law case and is as follows:

In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay.

There is no doubt that the principles of natural justice and the duty of fairness are part of every administrative proceeding. Where delay impairs a party's ability to answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy. It is thus accepted that the principles of natural justice and the duty of fairness include the right to a fair hearing and that undue delay in the processing of an administrative proceeding that impairs the fairness of the hearing can be remedied.

The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.

The key factors that the Hearing Panel considered when determining whether the Industry Member demonstrated that the delay was unacceptable to the point of being so oppressive as to warrant a stay of proceedings, are summarized below:

1. Delay
  - the length of the delay;
  - whether the delay was attributable to the Executive Director;
  - the nature of the case and its complexity;
  - causes or reasons for the delay;
  - waiver of the delay;

- the purpose and nature of the proceedings; and
- the nature of the various rights at stake in the proceedings.

2. Legal Prejudice
3. Remedy

- a) Length of delay

The complaint was filed two years after the real estate transaction occurred and the hearing date was set for nine years after the complaint was filed.

The Hearing Panel agrees with the Executive Director that when considering the delay, it commences when the complaint was received and not from the date of the real estate transaction. Counsel for the Industry Member referred to the delay as being from the date of the real estate transaction to the date of the hearing and that it was the totality of the delay that was to be considered.

The Executive Director submitted that only certain time periods were delays attributable to the Executive Director and the Hearing Panel ought to consider only those delays when deciding if there had been an inordinate delay. The Executive Director admitted to delays totalling 58 months.

The Hearing Panel finds that the case law supports the approach of the Executive Director which is to consider whether the Executive Director or the Industry Member caused the delay but it is also important to consider the totality of the delay when considering how the parties' memories could be impacted with the passage of time.

The Hearing Panel finds that the delay of 58 months attributable to the Executive Director, with a total elapsed time of nine years, warrants an analysis of whether there were reasons for the delay and if not, whether the Industry Member was prejudiced as a result of the delay. As a result of this decision, it was not necessary for the Hearing Panel to consider whether the time periods referred to by the Executive Director as "procedural" or as not being attributable to the Executive Director, were delays attributable to the Executive Director. For example, waiting 1.5 years for a response from the Industry Member after providing disclosure or requesting an adjournment to organize witnesses.

The Hearing Panel's decision that the 58 month delay and total elapsed time of 9 years, warrants further analysis of the delay and possible legal prejudice, is supported by the case law provided by the parties regarding administrative law proceedings. In each of the cases below, the tribunal or court considered the length of the delay and then went on to analyze whether there was prejudice as a result of the delay.

*Blencoe, supra:* total delay of 32 months - 5 months attributed to the Commission.  
*Wachtler, supra:* total delay of 53 months - 34 months attributable to the College.

*A.D.M., supra* total delay of 51 months.  
*Abbott, supra:* total delay of 90 months.  
*Duncan, supra:* total delay of 8 years.  
*Hennig, supra:* total delay of 4 years.  
*Stinchcombe, supra:* total delay of 7 to 8 years.  
*B.S.A. Diagnostics Limited, supra:* total delay of 15 years.  
*New Brunswick (Financial and Consumer Services), supra:* 10 years in total

Counsel for the Executive Director submitted it was important to assess the factual context rather than to rely on the length of time alone or timing benchmarks from other cases. As stated in *Odishaw, supra*, regulatory regimes for investigation and disciplinary hearings vary between professions. Some are more demanding and time consuming. The nature and complexity of the issues under review vary and therefore caution must be exercised so as not to make overly simplistic comparisons.

The Hearing Panel agrees and although it finds that the delay from when the complaint was filed to the hearing date was clearly inordinate, and that at least 58 months were attributable to the Executive Director, the Hearing Panel must also consider other factors that may explain the delay.

b) Nature of the case and its complexity

The case against the Industry Member included four allegations of conduct deserving of sanction for breaching sections of the *Real Estate Act* or the *Real Estate Act Rules*:

1. verbal advice the Industry Member allegedly gave to the Complainant regarding being a "co-signer" for the mortgage used to purchase the Property;
2. the documentation and verbal information the Industry Member allegedly provided to the mortgage broker which included an inflated purchase price for the Property;
3. the Industry Member did not know his buyers sufficiently to provide competent service; and
4. the Industry Member failed to provide his Broker with the original purchase contract in a timely fashion.

The nature of the case was allegedly giving incorrect verbal advice to the Complainant and assisting her and Buyers #2 and #3 obtain a mortgage on fraudulent pretences or with fraudulent information. As stated in *Stinchcombe, supra*, "The legal tests for fraud and misrepresentation are relatively clear and do not involve great legal complexity. A hearing required few witnesses and documents. The issue is one of application of known legal principles to the facts."

A complex case can suggest the elapsed time from when the complaint was received until the hearing was set, was not inordinate. However, the Hearing Panel finds there was no evidence that the case was complex. The Executive Director did not argue that the case was complex but the RECA Investigator's affidavit stated the investigation

was complex and time consuming. However, in cross examination on her affidavit, she stated that all the investigations she undertook for RECA were complex and required face to face interviews. She testified that this case involved only two additional witnesses when compared to other cases. The RECA Investigator confirmed that the voluminous records she referred to in her affidavit, fit into one binder. None of this evidence supported the position that the case was complex. Moreover, the evidence of the Executive Director showed that the investigation was completed in five months, except for a second request for information from the Industry Member which took an additional six months. There was no evidence provided to the Hearing Panel that would demonstrate that the complexity of the matter required nine years to investigate and advance the matter to a hearing.

c) Other Causes of delay

The RECA Investigator stated in her affidavit that RECA was working on over 800 complaints when the complaint was filed. In addition, once the investigation was completed, the legal services team was also busy. Other than these explanations, there was no evidence to explain the delays attributable to the Executive Director in advancing the case to a hearing. In *Blencoe: supra*, the court stated:

"Lack of resources cannot explain every delay in giving information, appointing inquiry officers, filing reports, etc.; nor can it justify inordinate delay where it is found to exist. The fact that most human rights commissions experience serious delays will not justify breaches of the principles of natural justice in appropriate cases."

In *Blencoe, supra*, the Court stated:

In *Kodellas, supra*, the Saskatchewan Court of Appeal held that the determination of whether the delay is unreasonable is, in part, a comparative one whereby one can compare the length of delay in the case at bar with the length of time normally taken for processing in the same jurisdiction and in other jurisdictions in Canada.

The Court went on to say this factor had limited weight.

The Executive Director submitted there was no theoretical "standard" time to complete the investigation of a complaint. The various stages in the proceedings and the schedule of the parties and their Counsel all contribute to delay, making it almost impossible to define a "standard" time. Therefore, no comparison of the length of time it typically takes RECA or regulators in other provinces, to complete an investigation and conduct a hearing was available.

The Industry Member's Counsel asked the Hearing Panel to make an adverse inference given that the Executive Director did not provide a standard time for concluding investigations and hearings.

The Hearing Panel finds that RECA's reason for the delay, which was being busy, does not justify the inordinate delay in this case and there was no evidence presented to the Hearing Panel showing why the hearing could not have been scheduled earlier. A standard time to process complaints received by RECA was not available and therefore cannot justify or explain the inordinate delay either.

d) Waiver of delay

Counsel for the Industry Member submitted that the Industry Member was not obligated to advance the case and there was no evidence the Industry Member waived the delay. The Executive Director did not argue that the Industry Member had waived the delay but submitted that he could have advanced the proceedings.

The Hearing Panel finds that the Industry Member had no obligation to advance the proceedings and he did not waive the delay. As stated in *Stinchcombe, supra*:

"A waiver of rights accruing from delay will typically only be construed from unequivocal actions or statements to that effect."

There was no case law to support the Executive Director's position that it was relevant that the Industry Member did not advance the proceedings. In addition, the Hearing Panel finds that the Industry Member did not waive the delay.

e) Purpose of the proceedings

The purpose of the RECA's disciplinary process is to regulate the activities of real estate professionals so that the public is protected. Allegations of this nature, mortgage fraud and incorrect advice about mortgage liability, are important to the real estate industry and to maintaining the integrity of the profession and the public's confidence in the industry. The RECA Investigator stated in her cross examination on her affidavit at page 101, line 25 to page 102, line 4:

"The matter itself (mortgage fraud) is serious in nature, and our mandate includes the protection against, detection, investigation, and suppression of mortgage fraud, and it's in the public interest to meet the aspects of that mandate because mortgage fraud Is very serious in nature and has an eroding effect on our economy as a whole, both locally, nationally, and internationally."

There is a strong public interest in the adjudication of conduct complaints against self regulated professionals such as Real Estate Associates. RECA's mandate is like the Financial and Consumer Services Commission's mandate as set out in *New Brunswick (Financial and Consumer Services), supra* wherein the tribunal stated at paragraph 112, "Given this public interest mandate, it is imperative that enforcement proceedings proceed as fairly and expeditiously as possible."

Given the nature of the allegations and the purpose of the disciplinary process, which includes a public interest mandate, the Hearing Panel finds that the community's sense of fairness would be offended by the inordinate delay.

In addition, unlike the case of a human rights commission as considered in *Blencoe, supra*, or unlike a civil proceeding, the RECA disciplinary proceedings do not provide direct redress to the Complainant. The availability of redress for the Complainant would not be affected by a finding of inordinate delay or by staying the disciplinary proceedings.

### Legal Prejudice

The delay was not justified by the complexity, nature nor purpose of the proceedings; therefore, the Hearing Panel will consider whether the Industry Member suffered legal prejudice as a result of the inordinate delay. The Industry Member did not argue that he was personally prejudiced by the inordinate delay.

If the delay has prejudiced the Industry Member's ability to defend himself against the complaint and to have a fair hearing, this may warrant a stay. This type of prejudice generally arises from the loss of evidence, the failing or fading of memories, or the unavailability of essential witnesses because of death or other reasons: *Blencoe, supra*.

The Industry Member has the onus to prove that the delay prejudiced his rights to a fair hearing. The proof of prejudice must be of sufficient magnitude to impact the fairness of the hearing: *Blencoe, supra*.

The Hearing Panel reviewed the allegations set out in the Notice of Hearing and the possible witnesses and documents available to the Industry Member after the delay, to determine if his ability to defend himself against the complaint had been significantly prejudiced.

A summary of the possible witnesses and their situations are as follows:

- Buyer #3 was interviewed by the RECA Investigator in 2011 and died some time after that. His interview was recorded. He was identified as a key witness by the RECA Investigator in her cross examination on her affidavit. He had not been cross examined by the Industry Member's Counsel.
- Buyer #2 was never located or interviewed by RECA but in cross examination on his affidavit, the Industry Member testified he had contact with him. He was identified as a key witness by the RECA Investigator in her cross examination on her affidavit.

- The Mortgage Broker was interviewed by the RECA investigator in 2011 but the recording failed and was not available. The failed recording was not the result of delay. The RECA Investigator's notes of the interview were available.
- The Industry Member was interviewed twice by the RECA Investigator and recordings were available. In his affidavit he swears that his memory of the real estate transaction has faded.
- The Complainant was interviewed by the RECA Investigator and recordings are available.
- The Real Estate broker was interviewed by the RECA Investigator and the Broker file was obtained by RECA. He developed dementia during the delay and would be unable to testify at the hearing.

a) Allegations regarding the Complainant's credibility

The Hearing Panel agrees with the submissions of the Executive Director that the possible lack of credibility of the Complainant was not evidence of legal prejudice caused by delay. The Hearing Panel would have assessed the Complainant's credibility at the hearing, had the stay not been granted.

b) Real Estate Broker

Regarding the Real Estate Broker, the Hearing Panel agrees with the Executive Director that the number of brokers at the Re/Max office since the real estate transaction occurred is irrelevant. However, it is relevant that during the delay in the proceedings, the Real Estate Broker developed dementia and is now unable to testify at the hearing.

It was the Executive Director's position that the Broker was only a character witness for the Industry Member and therefore his evidence would only be used in the sanction phase of the hearing. The evidence did not support that the Broker was a character witness only. On cross examination of the RECA Investigator on her affidavit at page 33 line 24 to page 34 line 1, she is asked about the broker's possible testimony: "I put to you that during your interview of [the broker], he told you more than once that he suspected that it was the buyers who committed the mortgage fraud on this file. Do you agree? Answer: yes."

This evidence strongly suggests that the evidence the broker could have provided was relevant to the conduct deserving of sanction allegations, in particular allegations 2 and 4. The Hearing Panel finds that the broker was an essential witness and that as a result of the delay, he is no longer available to testify at the hearing.

c) Buyer #2 and Buyer #3

Regarding Buyer #3, the Hearing Panel finds that he died after 2011 and therefore became unavailable to testify at the hearing due to the delay in the proceedings. He was also an essential witness.

The Executive Director submitted that the Industry Member could have Buyer #2 testify on his behalf and that his evidence would have been the same as the evidence of Buyer #3. This would mean that the Industry Member would not suffer prejudice as a result of Buyer #3 dying, however, that is speculative and there was no evidence to support that position. In addition, there were few witnesses available regarding the allegations and losing one or two would have a significant impact on the Industry Member being able to defend himself.

In addition, the lack of a transcript or recorded interview of Buyer #2 may make it difficult for the Industry Member to test the witness' credibility at a hearing.

d) Documents to Prove the Conduct

The Executive Director submitted that he had gathered documentary and other evidence such as interviews, in addition to the oral testimony of the Complainant and other witnesses, that may be relied upon to prove the allegations of conduct deserving of sanction in the Notice of Hearing.

The Hearing Panel reviewed the documentary evidence provided in the RECA Investigator's affidavit as well as the cross examination on her on the affidavit to determine whether there were documents available regarding each allegation against the Industry Member as set out in the Notice of Hearing. Regarding allegation #1, RECA was not in possession of documentary evidence to support the allegations except for the written complaint filed by the Complainant. This was confirmed in the cross examination of the RECA Investigator. The allegation related to verbal conversations and advice that was allegedly given by the Industry Member to the Complainant. The witnesses would be relying on their memories when testifying about this allegation.

Regarding allegation #2, the mortgage fraud allegations, there were documents regarding the inflated listing and purchase price of the Property. However, the question that a Hearing Panel would be required to answer was, who provided those documents and other information to the mortgagee or the Mortgage Broker. There was some evidence about fax numbers and who had access to the property listing system, but this could not properly be referred to as documentary evidence.

Regarding allegations #3 and #4, knowing your client and failing to provide the original real estate purchase contract, there were no documents collected by the RECA Investigator regarding these matters.

The Hearing Panel finds that the documentary evidence that would have been available at the hearing was minimal and the Panel would require verbal evidence of what the Industry Member told the Complainant, mortgagee or mortgage broker, in order to decide about the conduct deserving of sanction allegations. In other words, the witnesses would be required to provide oral testimony and would be relying on their memories of conversations and discussions that occurred eleven years earlier.

e) Faded and Failing Memories

The Industry Member's Counsel submitted that after eleven years all potential witnesses would have failing memories that would not be reliable.

Another tribunal accepted the argument that an accused could not defend himself when too much time had passed and his ability to recollect events had faded or disappeared when there was a delay of approximately 10 years from the initial complaint: *New Brunswick (Financial and Consumer Services Commission)*, *supra*. They found that it was also probable that witnesses' memories had faded and that this could have an impact on their credibility. They supported their findings with *Brown v. Assn. of Professional Engineers & Geoscientists (British Columbia)*, [1994] B.C.J. No. 2037 and *Stinchcombe*, *supra*. In their view, the greater the passage of time, the greater the probability of an impact on witnesses' memories and the fairness of the hearing.

In *422252 Alberta Ltd.*, *supra*, at paragraph 59 the Court of Queen's Bench of Alberta stated "an inability to answer a claim is serious prejudice. The passage of seven or eight years might be enough to have this effect."

The Executive Director submitted that the Industry Member's evidence was a vague assertion that he was unable to "recollect the details of verbal conversations" but this did not explain to what extent his memory had been compromised by the delay or how any uncertainty about the events may be relevant to the ultimate issue at the hearing. His inability to recollect the conversation he had with the Complainant may have occurred a day or month after it occurred.

The Hearing Panel does not agree with this position. Early on when the Industry Member responded to RECA about the complaint, he included information regarding telephone calls he had with the Complainant, including the initial call he had with her regarding buying a house. His ability to recall some of the conversation at that time was intact. His affidavit indicates that he no longer has clear memories of these conversations.

Both affidavits and the cross examinations on the affidavits of the Industry Member and the RECA Investigator illustrated that their memories had faded with time and they were not certain of events and conversations related to the allegations or the investigation. For example, the RECA Investigator could not remember in her cross

examination on her affidavit how many witnesses she had interviewed regarding this case or whether she followed up with the mortgagee regarding the mortgage fraud civil proceedings. The Industry Member was asked numerous questions about conversations with the Complainant wherein he could not remember.

In addition, the Industry Member provided evidence and submissions illustrating that the allegations were primarily about verbal conversations with the Complainant and the mortgage broker and therefore he did explain how any uncertainty about the events may be relevant to the ultimate issue at the hearing.

The Hearing Panel acknowledges the Executive Director's submissions that there were recordings of some interviews and some documents that would assist in refreshing the memories of witnesses. Also, that the Industry Member had the opportunity to memorialize the events and preserve relevant evidence when he first learned about the complaint and responded to the RECA Investigator's inquiries.

The Hearing Panel finds that although this may assist with a faded memory in some instances, it would be of little assistance to a memory after a delay of nine or eleven years. There was no case law provided to the Hearing Panel to support the position that refreshing memories with documents and interviews or memorializing events could compensate for failed or failing memories caused by a delay of nine years, when the nature of the case was primarily discussions and conversations between the parties.

After careful consideration and review of the witnesses that are no longer available as a result of the delay, the documents available regarding the allegations against the Industry Member and the effects the delay has had on witnesses and the Industry Member's memories, the Hearing Panel finds that the Industry Member has met the heavy burden required to prove that the delay has significantly prejudiced his ability to defend himself and to have a fair hearing. The legal prejudice is clear and convincing and meets the test as set out in *Blencoe, supra*.

### Remedy

As the Hearing Panel has found that there was inordinate delay and the Industry Member has shown that the delay clearly caused significant legal prejudice to him, the Hearing Panel must decide if the appropriate remedy is a stay.

The Industry Member's position was that a stay was the only appropriate remedy given that there was legal prejudice. The Executive Director submitted that a stay was not the appropriate remedy because it was not the "clearest of cases" or a "gross or shocking abuse of process". The Industry Member was not prohibited from carrying on his profession during the investigation or suffered any negative consequences to his reputation or his career due to the delay.

The Executive Director pointed to *Wachtler, supra*, as support for the position that unexplained lengthy delays that cause prejudice could be accounted for at the penalty stage with a reduction in sanction or relief from costs. The Executive Director submitted that the Hearing Panel could proceed with the disciplinary hearing and then determine if there was sufficient evidence of prejudice to grant a stay after hearing all of the evidence. However, if the Hearing Panel decided that there should be a stay granted on the Industry Member's second ground, a collateral attack on the mortgage fraud order, it would have to be decided first as the hearing should not proceed if it was a collateral attack.

In *Odishaw, supra*, the Hearing Committee dismissed the stay application but reserved jurisdiction to consider whether other relief might be appropriate after hearing the evidence on the merits of the citations. The member had not established significant prejudice as a result of the delay attributable to the Law Society of Alberta. They reserved jurisdiction to consider whether other relief might be appropriate after hearing the evidence on the merits of the citations stating: "In the event significant prejudice is demonstrated, the member is at liberty to seek any of a range of remedies, including potentially the exclusion of evidence, the dismissal of any or all of the citations, a reduction in sanction , and relief from costs."

The Hearing Panel finds that the legal prejudice was proven by the Industry Member and it was the clearest of cases which is different from *Odishaw, supra* wherein the member had not proven significant legal prejudice.

The Industry Member did not argue personal prejudice and therefore the fact that he was not prohibited from carrying on his profession during the investigation was irrelevant. The prejudice he suffered was regarding his inability to defend himself against the allegations.

The Hearing Panel also found that the appropriate remedy for the Industry Member was a permanent and full stay of the conduct deserving of sanction proceedings pursuant to the *Real Estate Act*. Although other remedies may be available to a tribunal or court when personal prejudice has been proven or legal prejudice has been shown but is not significant, the proper remedy is a stay when significant legal prejudice has been proven and to proceed with a hearing would violate the general duty of fairness resting with all public decision-makers. This is consistent with the principles of natural justice and procedural fairness. To allow the proceedings to continue when the Industry Member's ability to defend himself has been compromised would be oppressive: *Blencoe, supra*.

To proceed with a hearing when the Industry Member has clearly proven legal prejudice and then attempt to address the prejudice at the sanction phase would be contradictory to the principles of natural justice and procedural fairness.

The selection of an appropriate remedy must balance the competing interests of the applicant, the Complainant and the public: *A.D.M., supra*. The Hearing Panel finds that the damage to the public interest in the fairness of the administrative process if the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted: *Blencoe, supra*. The proceedings would provide no redress for the Complainant and therefore her interests would not be advanced by a hearing.

For the above reasons the Hearing Panel finds that the appropriate remedy for the abuse of process due to inordinate delay and the finding of significant legal prejudice is a permanent and full stay of the RECA proceedings.

#### **Collateral Attack**

Due to the finding regarding the Industry Member's first ground in his application for a stay due to an abuse of process, the Hearing Panel finds it unnecessary to consider or decide his second ground which was the re-litigation or collateral attack of a matter adjudicated by the Court of Queen's Bench in 2011.

#### **Costs**

The Hearing Panel declined to award costs in this matter as both Counsels submitted that the *Real Estate Act* did not explicitly give the Hearing Panel jurisdiction to award costs against the Executive Director.

### **G. Conclusion**

The Hearing Panel finds that there was an inordinate delay in the RECA investigation and proceedings regarding the Industry Member's alleged conduct deserving of sanction that resulted in significant legal prejudice. The Hearing Panel grants the Industry Member's application for a permanent and full stay of the RECA conduct deserving of sanction proceedings. His application for costs is dismissed.

This Decision is dated this 13<sup>th</sup> day of December, 2018.

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Ramey Demian, Hearing Panel Chair