

IN THE MATTER OF
THE REAL ESTATE ACT, C. R-1.3
AND
IN THE MATTER OF TIMOTHY CHICILO

DECISION OF THE
SASKATCHEWAN REAL ESTATE COMMISSION

Commission File: #2009-14

Before: A Saskatchewan Real Estate Commission Hearing Committee
comprised of the following:
Randal C. Touet - Chairperson
Larry Gingerich
Anne Odishaw
Ron Skinner

Appearances: Tom Ketterer, on behalf of the Investigation Committee
and Tim Chicilo, registrant

Hearing Date: June 16, 2011, Saskatoon Club

Written Decision: August 18, 2011

The Formal Hearing was held on June 16, 2011, at the Upper Lounge at the Saskatoon Club, 417 – 21st Street East, Saskatoon, Saskatchewan, before a hearing committee (The Committee) of the Commission.

REASON FOR HEARING

This matter was set at the direction of the Deputy Superintendent of Real Estate by a Decision dated April 4, 2011, whereby pursuant to clause 43(6) (c) of *The Real Estate Act* the Saskatchewan Real Estate Commission was directed to hold a new hearing on the issue of costs associated with the original formal Hearing of August 19, 2010. It was also directed that there be no further costs against Mr. Chicilo as a result of the new hearing.

LEGISLATION

Section 38 of the *Act* states:

“Disciplinary powers

38(1) Where the Commission finds a registrant guilty of professional incompetence or professional misconduct, it may make one or more of the following orders:

- (a) an order that the registration be cancelled;
 - (b) an order that the registration be suspended for a specified period;
 - (c) an order that the registration be suspended pending the satisfaction and completion of any conditions specified in the order;
 - (d) an order that the registrant may continue to be registered only under conditions specified in the order, which may include, but are not restricted to, an order that the registrant:
 - (i) successfully complete specified classes or courses of instruction;
 - (ii) obtain treatment, counselling or both;
 - (e) an order requiring the registrant to pay restitution to any person as compensation for a loss suffered by that person as a result of the registrant’s professional incompetence or professional misconduct;
 - (f) an order reprimanding the registrant;
 - (g) any other order that the Commission considers just.
- (2) In addition to any order made pursuant to subsection (1), the Commission may order:
- (a) that the registrant pay to the Commission within a fixed period:

- (i) a fine in a specified amount not exceeding \$5,000 for each finding and \$15,000 in the aggregate for all findings; and
 - (ii) the costs of the investigation and hearing into the registrant's conduct and related costs, including the expenses of the investigation committee and the Commission and the costs of legal services and witnesses; and
- (b) where a registrant fails to make payment in accordance with an order pursuant to clause (a), that the registration be suspended.
- (3) The registrar shall send a copy of an order made pursuant to this section to the registrant whose conduct is the subject of the order and to the person, if any, who made the complaint.
- (4) Where a broker, branch manager, associate broker or salesperson is found guilty of professional misconduct or professional incompetence, the Commission shall inform the registrant's brokerage of the order made against that registrant.
- (5) Where a registrant does not comply with an order pursuant to clause (1)(e) within 15 days after the day on which a copy of the order is sent to the registrant, the person named in the order may file a certified copy of the order with the court and enforce the order as if it were a judgement of the court"

FACTS

This matter arises following the decision of the Real Estate Commission Hearing Committee after a full hearing held before the Commission on August 19, 2010 in Saskatoon. Mr. Chicilo was charged that he had committed professional misconduct with respect to a breach of *Bylaw 715*; in particular, that he had between the dates of January 28, 2008 and June 1, 2008 when acting as a buyers representative failed to ever physically view for patent or latent defects a property that his buyers had engaged him to assist them to purchase. The Hearing Committee heard from five witnesses and ultimately determined that Mr. Chicilo was guilty of the offence and a fine was levied in the amount of \$2,000.00 for the violation and costs were awarded in the amount of \$3,300.00. In the course of the decision the Committee stated that page 5:

"the Committee in reviewing the matter determined there was very little in factual contention in this matter. It is clear that the property was not viewed by the Registrant, neither at his own initiative nor at the request of the Complainants."

At page 7 of the Decision the Committee stated:

"The Committee agrees with the position of Mr. Miller that this was a matter in which the evidence was extremely clear that the reasonable steps were not

taken. Mr. Chicilo appeared not to see that he had made an error and is only appearing to change his practise due to the problems associated with this disciplinary process and this Hearing. The Commission feels that it is essential for the protection of the public that the responsibilities of Registrants are enforced by the Commission. It is also important to show all Registrants in the Province the seriousness of accepting and completing their responsibility to their client.”

ARGUMENT

The Hearing Committee heard from Mr. Tom Ketterer who stressed that section 38 of *The Real Estate Act* provides the ability to order costs in addition to fines. He noted that prior to the hearing in August of 2010 a complete written package was given to Mr. Chicilo which included references to sections 37, 38, 39 and 40 of *The Real Estate Act* and sections, 9 and 10 of *The Real Estate Act Regulations* and part 8 of *The Real Estate Bylaws*. He indicates that he feels that this should have clearly allowed Mr. Chicilo to understand the Committees powers in this matter. He notes that there have been a number of formal hearings held in Saskatchewan over the past ten years which had a range of costs awarded with a low of \$500.00 and the largest being \$8,000.00.

Mr. Ketterer indicates that based on the facts and arguments at the time of the Hearing the recommendation by the Investigation Committee was for payment of the costs. It is his position that the merits of each case must be looked at individually and there is no given template for the matter of costs. It is his position that the policy of the Real Estate Commission is not to provide costs ahead of the hearings because of the various variables in determining the costs including but not limited to the length of the hearing, the travel cost incurred and the number of witnesses. Mr. Ketterer also indicated that at the initial Hearing there was a preliminary tabulation of costs presented at the Hearing and that representations were made concerning these costs in the amount of approximately \$3,352.00 at the Committee Hearing in the presence of Mr. Chicilo.

Mr. Ketterer also indicates that according to the transcript after the finding of guilty the Chairperson of the Hearing Committee had asked the parties for representations with regard to the sanctions. At lines 19 to 25 on page 12 of the transcript it was indicated that the estimated costs were presented at that time to the hearing panel and at page 14 the chairperson asked for Mr. Chicilo's response to the allegations. It is noted that in Mr. Chicilo's response he did not address the fine or the hearing costs and never indicated anything wrong or excessive with regard to the costs.

At this Hearing the actual costs were provided which were slightly more than the estimate being a total of \$3,384.75. Mr. Chicilo has never questioned the amount of the costs according to Mr. Ketterer. The potential cost to clients due to breaches by the Registrants leads to more risk for the general public. Mr. Ketterer indicates there is a general increase in costs with regard to the costs of hearings.

Mr. Ketterer feels that the awarding of costs in this matter would act as a significant deterrent to both the general industry and this particular Registrant.

Mr. Ketterer indicates that there was no question or discussion on the matter of costs or on the amount of costs and in the exercise or discretion of the Hearing Panel based on the facts and findings the costs awarded were within reasonable range. Mr. Ketterer referred the Panel to the 2007 awards for Ehman in the amount of \$1,200.00, Lee Brisdon in the amount of \$1,335.00 and Dwain Kok in the amount of \$2,500.00. He recommends the sanction should include the reasonable costs of the formal hearing. It is also Mr. Ketterer's position that this awarding of costs means that other Registrants are not bearing the costs of a hearing against a Registrant who has otherwise has been found guilty of an offense under the Act.

In questioning Mr. Ketterer it was determined that on July 12, 2010 the letter had been sent to Mr. Chicilo which included references to the *Act*.

Mr. Chicilo in his response to the position of Mr. Ketterer indicated that Mr. Miller the former investigator for the Saskatchewan Real Estate Commission had been contacted and Mr. Chicilo asked Mr. Miller how he should proceed. At the meeting Mr. Chicilo says he was lead to believe he could expect a \$600.00 to \$1,000.00 fine for the matter. He further indicated he was lead to believe that the hearing process would be a meeting in a boardroom setting and the issue of costs were never mentioned. At the August 2010 hearing Mr. Chicilo indicates he was surprised at the procedure as it was much more of a courtroom type setting. When costs were mentioned Mr. Chicilo indicates he did not know how to respond. Mr. Chicilo had sent an email before the end of the appeal period from the hearing and paid his fine but had not received the content of the amount of cost. He indicates that the first time he had a look at the breakdown of expenses was on June 13th, 2011, three days before this Hearing. Mr. Chicilo indicated he felt blindsided by the process and felt the Commission was trying to catch him unaware. He does acknowledge that he had made a mistake in this matter and had felt he had made a bigger mistake by relying on the representations of Mr. Miller.

Mr. Chicilo indicated that he was so overwhelmed by the process he didn't know how to deal with matters at the time of the hearing and had relied more on Mr. Miller taking him at his word. He never went into the various sections which had been referred to him because of his reliance on Mr. Miller.

Mr. Chicilo indicates that costs should not be awarded because he had put his trust in Mr. Miller in feels let down. He feels he would have properly assessed his risks otherwise. Mr. Chicilo was asked whether he had any issue with the amount of the actual costs and indicated that he has no issue whatsoever.

DECISION

The Hearing Committee in accordance with *The Real Estate Act* and Regulations made the following order:

That the Registrant pay the costs of the Hearing in the amount set at \$3,300.00 on or before September 30, 2011 and should the Registrant not pay any portion of the costs by September 30, 2011 his Registration shall be suspended.

CONCLUSION

The Hearing Committee has listened to the arguments of both Mr. Ketterer and Mr. Chicilo in this matter. The comments of the Deputy Superintendent of Real Estate as indicated in her Decision of April 4, 2011, have been taken into account. The Committee feels that the alleged comments of Mr. Miller at the earlier time are not relevant to the decision to be made at this hearing. The issue of costs was squarely before the hearing panel and Mr. Chicilo. Mr. Chicilo again indicates there is no issue with the amount of the costs just that no costs should be awarded against him. The Hearing Committee feels that in the circumstances such as this Hearing where the position of the Registrant in requesting a formal Hearing as opposed to a Mitigation Hearing given his conduct is such to warrant costs being awarded. In the letter that Mr. Chicilo had received prior to the August 2010 Hearing, it was indicated clearly that there was a potential of a fine and costs. Mr. Chicilo chose not to take this matter seriously enough to respond and review the contents of the letter.

In Mr. Chicilo's September 29, 2010 letter to the Superintendent of Real Estate which forms the basis of this appeal indicates that he had looked through all his emails and correspondence from the Commission and stated;

"There has never been a mention that I would be responsible for any 'expenses issued if I was to go to a hearing'".

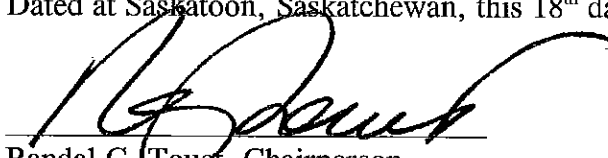
This clearly is contradicted by Mr. Chicilo's actual correspondence that he received going back to the letter of July 12, 2010 to him. The Hearing Committee feels these costs are legitimate and consistent with previous cases. In the Leah Brisdon case Mr. Brisdon was found guilty of one of two charges and received partial costs awarded against him in the amount of \$1,335.00. In the Ehman case Mr. Ehman was found guilty of three of five charges and again only partial charges were found against him in the amount of \$1,200.00. In this matter Mr. Chicilo clearly had been aware of the possibility of costs being awarded against him. He had the information to determine this and certainly for this Hearing there is no question that he knew the matter of costs was to be awarded. His sole argument against the matter of costs being awarded is that he does not think they should be. While he may certainly not wish to have costs awarded it is an option for the Commission to award costs where they so determine it to be relevant. In the circumstances of this matter and in view of the lack of remorse shown by Mr. Chicilo for his actions the initial Hearing Panel felt that costs were reasonable to be awarded and now that Mr. Chicilo has had ample time to respond to the

matter of costs it cannot be said that they have been sprung upon him. In the previous cases where partial costs were awarded full costs were not awarded on the basis that the partial success had been had by the Registrant. Even in those cases there were still costs awarded.

It is the Committee's position that costs should be awarded in circumstances where in the discretion of the Hearing Committee the position held by the Registrant in defending his actions are not reasonable or where the actions of the registrant otherwise warrant the awarding of costs. The Hearing expense is a cost against all Registrants and ultimately is a cost to the public. While the awarding of costs is not done as a matter of course by the Hearing Committees of the Real Estate Commission they must have the ability to make such awards in circumstances where they determine that the hearing was an unnecessary cost to the Commission. In this matter there was virtually no evidentiary disagreement and as indicated in the Hearing Decision Mr. Chicilo showed little remorse or full acceptance of his behaviour as improper. This was clear in the written Decision and again at this Hearing Committee the attitude of the Registrant towards the Commission shows a lack of remorse or understating of the true matter before the Committee. Mr. Chicilo did not indicate why in the circumstances there should be no costs awarded against him other than his feeling that he did not initially know costs could be awarded against him. This was determined by the Committee to not be correct as Mr. Chicilo was made aware in writing of the matter of costs and chose not to deal with them at the initial Hearing. At this Hearing of which the sole focus was that of costs Mr. Chicilo never addressed the matter of whether costs should be awarded in the circumstances of the August 10, 2010 Hearing.

The Hearing Committee wishes to make it clear to all Registrants that the potential of costs being awarded in a formal Hearing or a Mitigation Hearing is real. The Hearing Committee of the Commission will continue in the future to review the option of awarding costs or partial costs against Registrants should the specific circumstances of that case warrant such an award.

Dated at Saskatoon, Saskatchewan, this 18th day of August, 2011.



Randal C. Touet, Chairperson