May 29, 2015

IN THE MATTER OF: THE REAL ESTATE BROKERS ACT

- and -

IN THE MATTER OF: LEAD PROPERTY MANAGEMENT INC.

REASONS FOR DECISION
OF
THE MANITOBA SECURITIES COMMISSION

Panel:

Panel Chair:	Mr. D.G. Murray
Member:	Mr. J.W. Hedley
Member:	Ms. S.C. Rolland

Appearances:

K.G.R. Laycock	)	Counsel for Commission Staff
Jonathan B. Kroft Trisha G. Faurschou	)	On behalf of The Manitoba Real Estate Association
Noah M. Globerman	)	On behalf of Lead Property Management Inc.

The Motion.

The Manitoba Real Estate Association ("MREA") has made a preliminary motion seeking one of the two following alternate remedies:

1) An Order that MREA has standing to participate as a party in the hearing of claims against the Real Estate Reimbursement Fund (the Fund);
2) In the alternative, an Order granting MREA standing to participate in the hearing of this proceeding.

This proceeding was commenced by a Notice of Hearing dated June 23, 2014 in which Commission staff asked this panel to invoke sections 39.1 and 26 of the Real Estate Brokers Act ("REBA"). Section 39.1 of REBA deals with payment out of the Fund and Section 26 addresses issues involving trust funds held in bank accounts. It is the request under Section 39.1 of REBA that gives rise to this motion by MREA.

The Fund, pursuant to Section 39.1(1) of REBA was established by MREA. Under REBA, brokers who are members of MREA are required to either file with the Commission a surety bond described in REBA or to participate in the Fund.

LEAD Property Management Inc. ("LEAD") was registered under REBA as a Broker restricted to property management; in other words a property manager. Its registration spanned from August 22, 2008 to 2012 although such registration was suspended from May 19, 2010, to August 11, 2010 and from August 4, 2011 to August 21, 2012. Lead has not been registered under REBA since August 22, 2012.

Commission staff has alleged incidents of fraudulent activity on the part of LEAD and that, as a consequence of LEAD'S registration under REBA, the Fund is the proper source for compensation in favor of victims of LEAD'S fraudulent actions.

Legislation – the Parties' Positions.

According to MREA, by the very nature of the proceeding and its fiduciary responsibility for the Fund, it should be considered a party to this proceeding without having to apply to be qualified. As mentioned, the Fund was established pursuant to REBA but it is the Manitoba Securities Act ("MSA") which governs hearings and proceedings under REBA.

There is nothing in the legislation, either REBA or MSA, which establishes that MREA is by right a party to this proceeding. The MSA does state that notice must be given to "any person or company that, in the opinion of the Commission is substantially affected by the hearing". However, Section 10 of the Real Estate Reimbursement Fund regulation under REBA negates the notice provision:

> "The Commission is not required to give notice of such a hearing to the Association (MREA) and the Association is deemed not to be a person affected by any decision made by the Commission with respect to any claim against the Fund for the purpose of Section 29 of The Securities Act."

We note here that this regulatory provision, or at least part of it, was found to be

invalid by Mr. Justice Schulman of the Manitoba Court of Queen's Bench in the case of *Manitoba Real Estate Assn. Inc and Deshauer et al* ("Deshauer").

In Deshauer, Mr. Justice Schulman referred to the regulatory provision quoted above and held that "(t)his section of the regulation is plainly invalid because it conflicts with a statute to which it is subordinate". He was referring to the words in the regulation which purported to limit MREA's right to appeal decisions made under the MSA. He determined that the right of appeal contained in Section 30 of the MSA was available to MREA notwithstanding the regulatory provision to the contrary. He stopped short of declaring that MREA is a "party' to proceedings affecting the Fund. MREA argues that "it would be an absurd result if the MREA were entitled to appeal the result of a proceeding in which it had no right to participate". The panel does not accept this notion and views the right to appeal simply as protection for those who are not added as parties to a matter but who, as well can be the case in the area of regulatory review, are found to have been negatively affected by a panel decision.

The submission by MREA that it is a party to these proceedings does not have a direct basis in the relevant legislation and regulations. Staff, while acknowledging that MREA should participate in the ultimate hearing of this matter, but not as a party and not as a full participant, submits that LEAD is the only party other than Commission staff. This, after all, is a disciplinary proceeding alleging fraud on the part of a property manager. That, according to MREA's counsel, is not an accurate depiction of the nature of this proceeding. Whereas staff insists that the essence of the matter is a disciplinary action taken against LEAD, MREA counters that the matter is essentially a matter of reimbursement and compensation for LEAD's alleged victims. In that connection, MREA counsel directs us to the Notice of Hearing which makes no mention of any consequence to LEAD rising out of its improper activities. That is, this is not a discipline hearing but rather a determination of how to avail those victims of either the Fund or LEAD's bank accounts. According to MREA, the Notice of Hearing establishes the parties. There is no respondent name in the Notice of Hearing and it is only MREA which is affected by the order sought because MREA is the trustee of the Fund.

As previously mentioned, Commission staff does not take the position that MREA has no ability to make a useful contribution to this process. Staff suggests MREA attend on a watching brief during the stage of the process which bears mainly on the allegations of fraud while being invited to bring forward useful facts touching on those disciplinary aspects of this matter. When the Commission is called upon to allocate sources of compensation, MREA would naturally become a useful participant and invited to make submissions.

There is no dispute among opposing counsel that this panel can order some form of standing in favor of MREA. However, staff disputes the contention of MREA that there is a legislative intent, at least by obvious implication, that MREA should be a full party as of right. Staff submits that the legislature never had any such intent; otherwise REBA would have so indicated. In fact it is clear by a reading of the legislation and the regulation as it was prior to Deshauer that the intent was that MREA would have no interest in a claim against the Fund and would not be a party. It appears that the Fund was initially designed to operate as though it were a bond.

Party as of Right.

While Staff and MREA do not agree that MREA has standing as of right, the parties do agree that the panel has authority to grant standing to MREA. MREA says that this panel should exercise that authority and grant MREA standing to participate in this matter from the outset. Staff counters that granting standing in (enforcement matters) should be rare and only done within the framework of tests which have been established in judicial and administrative jurisprudence.

Briefly stated, MREA submits that the question before us is one of public interest and natural justice – simply the right thing to do. Staff cautions that the tests and criteria set out in the jurisprudence present practical guidelines which do not impeach the fairness of this proceeding but, to the contrary, eliminate the risk of delay and the overburdening of the process before us with multiple parties. Staff urges that the prosecution of LEAD on allegations of fraud should be left to staff and staff alone and that, unless MREA can make a real contribution to the prosecutorial process, its role will simply be to write a cheque if the staff is successful in carrying out its prosecution and proving its allegation of fraudulent activity on the part of LEAD.

We have considered the argument presented by MREA that its participation should be granted as of right. Before Deshauer, it was clearly the intent of the legislature that MREA should not be a participant in the entire process. The section of the Regulation so stating was discredited in Deshauer but that case does not reach any conclusion on the subject of who is a party. In our opinion, there is no clear signal arising out of Deshauer or similar case precedent which instills the right on the part of MREA to be a party from a proceeding's outset without the requirement of meeting some practical criteria. We are not prepared to state categorically that MREA will be a party to all proceedings in which there is potential for payment out of the Fund.

Party status on a case by case basis.

We now turn to an examination of some materials analyzed by counsel for both the staff and MREA having determined, as mentioned, that MREA is not entitled by right to participation in the hearing and upon staff's conceding that MREA can and should make a contribution to the hearing at the argument stage.

The matter of certain *Directors, Officers, and Insiders of Hollinger Inc*. ("Hollinger") was a case decided by the Ontario Securities Commission in 2005. In this case, a number of parties requested standing in an OSC proceeding. After analysis of the various applications, the Commission panel granted two types of standing to the applicants:

a) full standing, including the opportunity to adduce evidence and make submissions; and
b) "Torstar Standing", a restricted form of standing.

Re: Torstar Corporation ("Torstar") was also an Ontario Securities Commission case from 1985. In that case five parties asked for standing to intervene in a hearing. The panel noted, with approval, the comments of a previous panel that "prosecution of the complaints is in hands of staff counsel. In our view, the other parties to the proceedings are the individuals and persons against whom the proceedings are

directed. To grant...status, which is to permit the intervention as a party of someone who might be perceived as being a second prosecutor, would not be appropriate." The panel in Torstar went on to say:

> Paragraph 29 – We appreciate the applicants were concerned that the necessary factual basis for their argument was not before the Commission in the Torstar/Southam Statements of Fact. We think that the concerns of the applicants can be adequately met by instructing counsel to the Commission to meet with the applicants to consider their concerns with respect to the factual background that will be before the Commission when this hearing resumes. Counsel to the Commission will then have to consider whether it wishes to place some of those facts before the Commission, or whether it is content to go forward with the Torstar/Southam Statement of Facts. We would emphasize that that judgment is solely one for the counsel to the Commission. Our only instruction is that counsel is to listen to the concerns of the applicants and is then to make his own decision as to the facts that are necessary to proceed with the hearing. Whatever that decision is, the applicants will be confined to those facts in making argument before the Commission.
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> Paragraph 30 – Accordingly, the applicants are granted standing to intervene for the purpose of rendering assistance to the Commission by way of argument, but without becoming parties to the proceedings.

The statement in Paragraph 30 above defines what has come to be known as "Torstar Standing".

The issue in Torstar was whether certain of the Directors of Torstar Corporation and Southam Inc. should be deprived of exemptions contained in the Ontario Securities Act. In other words it was a case in which disciplinary consequences were proposed to be imposed on the respondents to the Notice of Hearing.

In Hollinger, the panel cited the case of *Re: Albino* ("Albino") (Ontario Securities Commission 1991) which stated that:

> "where the intending intervener has a clear financial interest – most obviously, as a holder of securities of the subject issuer, but that interest will not be immediately affected by the decision the Commission may make, then only restricted (i.e. Torstar) standing is to be granted. The Hollinger panel set out the following test:
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> 45 Albino suggests that the following factors should be considered in an application for standing:
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> a) the nature of the proceedings;
> b) whether the proposed intervener will make a useful contribution to the proceedings;
> c) whether the proposed intervention would unfairly prejudice the interests of the existing parties; and
> d) the affect if any of the proceedings potential outcomes on the economic interests of the proposed intervener.

In Hollinger, the panel noted that the OSC has granted broader intervention rights in non-disciplinary hearings.

We also note the position put forward by counsel for MREA that, following Deshauer, MREA has been allowed to participate on a party basis in those cases of applications to the Fund where the Association has sought such standing (for example, *Victor Loewen and Realty World Landex*) on a consent basis.

In view of our rejection or MREA's argument that it is entitled as of right to be a party, and since it appears that the parties are essentially in agreement that the four criteria set out in Hollinger should be considered by this panel, we turn to the four tests and the position taken by each party in relation to each of them.

A. The Nature of the Proceeding.

The parties are in substantial disagreement in their analysis of this part of the Hollinger test. Commission staff contends that this proceeding is in substance a disciplinary proceeding turning on the accusation of fraud against LEAD Management. MREA counters that the essence of the matter is the compensation of LEAD's customers. There is no question that a determination that compensation paid from the Fund will require previous determinations of fraudulent activity based upon evidence which may become exhaustive in nature. Staff will bear the burden of making those cases and argues that MREA should play no role whatsoever in that part of the proceeding, in fact suggesting that any role at all would be detrimental to the process. On that issue, MREA states that it indeed will likely be in no position to assist in that stage although it may have some perspective on the manner in which evidence is interpreted. In any event, this panel is in a position to control the process.

B. Will the proposed intervener make a useful contribution to the proceeding?

Staff states that MREA apparently has no helpful evidence to offer which will not be tendered by staff. The response of MREA is more to the point that it is not here to interfere but rather "here to help". Counsel essentially states that the quality of the result is enhanced when all interested parties, particularly those with expertise in the field, cooperate in dealing with the facts and law in depth.

C. Will the proposed intervention unfairly prejudice interests of existing parties?

It is the contention of staff that the inclusion of MREA will cause additional delay and cost and therefore be prejudicial to public interests. MREA submits that there is far greater risk of delay in not including interested parties, including the risk of further appeals before the matter can be heard on its merits.

D. The affect, if any, of the proceedings potential outcomes on the economic interest of the proposed intervener.

The position taken by staff is that MREA does not have a financial interest in the outcome of the proceeding, that it does not own the Fund. Here there is significant difference between the two party's positions. MREA states that it is the legal owner and trustee of the Fund on behalf of its members. The members of MREA contribute

directly to the Fund and are plainly exposed to what could be considered a considerable loss if staff is successful in its prosecution of LEAD Management.

Counsel for MREA have been careful to assure this panel that their client does not intend to interfere with staff's conduct of its case against LEAD Management. As such, there is no need to fear the "unnecessarily cumbersome and duplicitous" hearing which staff warns will result from MREA participating as a party. That assurance was important to us because staff is entitled to prosecute without undue interference. Of course, we as a panel can and will determine procedures before the Commission to ensure that MREA complies with these assurances.

Decision.

Our decision is to grant status to MREA to participate fully, from the outset of the upcoming hearing, with the practical procedural restrictions to which we have referred previously. In the circumstances, we believe that the principles of natural justice and fairness require it.

Although we are not granting "Torstar Status" to MREA, we have found it useful to employ the above-described Hollinger criteria. Our decision effectively has turned on a) the nature of the proceeding) and d) affect on economic interests. We do not believe that the proposed "intervention" will prejudice any other party's interests and see no reason why MREA cannot make a useful contribution to the process.

In our view, the essential nature of the proceeding, from a public interest perspective, is access to the Fund for the purpose of providing compensation to alleged victims of LEAD Management. The Notice of Hearing makes no mention whatsoever of disciplinary consequences to LEAD or to its officers or directors. It refers essentially to the Fund or to relevant bank accounts but it is reference to the Fund which forms the purpose of the hearing. There will be a requirement for a factual foundation on which an Order relating to the Fund will be based. The factual foundation may require volumes of evidence and MREA may even question the relevance, adequacy or accuracy of such evidence. However, it would be unfair in our opinion to require MREA to take a silent sideline seat during the proceeding.

As to economic interests, MREA's position as Trustee of the Fund creates a fiduciary duty on its part toward the Fund's beneficial owners. The economic interests of MREA were discussed in Deshauer. Mr. Justice Schulman states as follows:

> "firstly, the Order directs the Association to make a payment; secondly the Association manages the Fund and holds a sum of Five Hundred Thousand dollars ($500,000.00) as trustee; and thirdly the Association has an interest in the portion of the Fund which exceeds the sum of Five Hundred Thousand dollars ($500.000.00)....and it's rights may be adversely affected by an Order which reduces the Fund to below $500,000.00."

It is noteworthy that the amounts at issue in this case are substantial. Although we decline to state whether or not there should be a threshold amount before status to MREA should be awarded, we do suggest that a smaller amount could open the door to an argument that a minimal affect on the economic interests could change the outcome of a similar motion.

We order that MREA be granted party status in this matter. The parties should consider availing themselves some form of case management but, otherwise, it is in the public interest that this claim against the Fund proceeds with as little delay as possible.

Finally, the panel notes that there is new legislation, The Manitoba Real Estate Services Act (RESA) on the current legislative agenda. The expressed intent is that once enacted this new legislation will replace the current REBA. While the interplay between REBA and its Regulation initially purported to display legislative intent concerning the status of MREA in reimbursement fund claims, subsequent litigation has discredited it, leaving a void. It remains to be seen if the issue will be addressed by the new legislation and regulations.

"D.G. Murray"
D.G. Murray
Chair

"J.W. Hedley"
J.W. Hedley
Member

"S.C. Rolland"
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Member