

March 23, 2020

IN THE MATTER OF: THE REAL ESTATE BROKERS ACT

-and-

IN THE MATTER OF: LEAD PROPERTY MANAGEMENT INC.

**REASONS FOR DECISION
ON MOTION FOR DISCLOSURE OF
THE MANITOBA SECURITIES COMMISSION**

Dates motion argued: February 19 and March 12, 2020

Panel:

Panel Chair:

Ms. L.A. Vincent

Member:

Mr. D.A. Huberdeau-Reid

Appearances:

Ms. K.G.R. Laycock

) Counsel for Commission Staff

Mr. J.B. Kroft

) Counsel for the Manitoba Real Estate

Ms. A.L. Kaufmann

) Association

Background Facts

1. On June 23, 2014, a Notice of Hearing and a Statement of Allegations were issued by the Manitoba Securities Commission (“Commission”) against Lead Property Management Inc. (“Lead”).
2. On March 16, 2015, an Amended Statement of Allegations was issued by the Commission against Lead.
3. On May 29, 2015, a hearing panel of the Commission decided, on a motion brought by the Manitoba Real Estate Association (“MREA”) to grant the MREA status as a party in the matter.
4. On November 20, 2019 a hearing panel of the Commission, comprised of different Commissioners than this hearing panel, considered a settlement agreement between Staff of the Commission and Lead. The settlement agreement was accepted by that hearing panel. The settlement agreement was not disclosed to MREA prior to its acceptance by the separate hearing panel and MREA had no involvement in the terms and provisions of that settlement agreement.
5. On January 13, 2020, this hearing panel of the Commission (“Panel”) commenced the hearing of the matter (“Hearing”), which, due to the settlement referenced above, includes as parties Staff of the Commission (“Staff”) and the MREA.
6. Counsel for Staff called Victor George Neufeld (“Neufeld”) as an expert witness.
7. The expert report (“Report”) of Neufeld was entered as Exhibit #18. Section 4.1 of the Report lists the “*Information Relied Upon*”. That information is not detailed by document, but rather is set out in five bullet points that include many documents and information. Two of the bullet points include documents and information that have not been filed as exhibits to the Hearing and have not been disclosed to MREA.
8. Neufeld began his testimony on January 13, 2020. On January 15, 2020, during the cross examination of Neufeld, Counsel for MREA requested additional disclosure of documents and information from Neufeld.
9. On February 19, 2020 and March 12, 2020, the Panel heard arguments on MREA’s motion for disclosure of additional documents and information from Neufeld. Both parties provided a written submission as well as an oral argument. The written submission of MREA relative to the motion is marked

as Exhibit #28 and the written submission of Staff relative to the motion is marked as Exhibit #29.

Position of the parties and Analysis

1. Counsel for Staff advised the Panel that all of the exhibits filed in the Hearing to date had been made available to Counsel for MREA in 2014 and that Counsel for MREA had attended twice to review the exhibits. She further advised that counsel for MREA is welcome to attend again to review any exhibits. These include the fifty-two (52) bankers' boxes of documents that were marked collectively as Exhibit "B", which include thousands of documents.
2. Counsel for Staff discussed the importance of litigation privilege and provided the panel with several cases in support.
3. Counsel for Staff directed the Panel to the Commission's Pre-Hearing Procedures Policy and noted in particular Part 3.6(h) which provides that no disclosure is to be made of "...information which is protected by privilege."
4. Counsel for Staff argued that, to the extent that the Panel accepts that a waiver of litigation privilege in this matter is appropriate, only documents which the expert relied upon and which are relevant should be required to be disclosed. Specifically Counsel for Staff noted that the fact that Neufeld listed "investigation files" in Section 4.1 of the Report as information on which he relied for the conclusions in the Report does not mean that all documents in those files were actually utilized by him.
5. Counsel for MREA acknowledged litigation privilege but correctly noted that the issue before the Panel on the motion is the law relative to the waiver of that privilege when an expert is called as a witness. The position of MREA is that once an expert is called to give evidence and an expert report is tendered as evidence, then the foundational documents on which the expert relied must be disclosed. Those foundational documents include all documents and information that contain the facts, information, assumptions and directions that an expert considered in preparing an expert report.
6. Counsel for MREA directed the Panel to **Ladco Company Limited v City of Winnipeg et al** 2019 MBQB, 139 and specifically to paragraphs [12] d) and [12] g) which read:

*[12] d) the rationale and law set forth in **Moore** for the disclosure of documents not specifically identified in Rule 53.03(1) and what has been referred to as "the foundational information" for the opinion to be expressed by the expert, in my view, applies in Manitoba. This has been referred to in*

*the Ontario cases and by recognized authorities (Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, **Sopinka, Lederman & Bryant: The Law of Evidence in Canada**, 4th ed (Markham: LexisNexis, 2014)), as an “implied waiver” of privilege over the facts underlying an expert’s opinion which results from calling the expert as a witness at the hearing. This is not a blanket waiver respecting all documents exchanged between counsel and the expert, but in my view relates to “material relating to formulation of the expressed opinion”.*

*[12] g) what is referred to as “the foundational information’ for the opinion includes details of the documents and information provided to the expert, the facts provided to the expert upon which the opinion is based, the instructions upon which the expert proceeded and the assumptions the expert was asked to rely upon or accept in order to formulate the opinion (see **Moore and Comeicao Farms Inc. v Zeneca Corp** (2006), 215 O.A.C. 233, 2006 CanLII 31976 (CA));*

7. Counsel for MREA further directed the Panel to the two Endorsements in **Ultracuts Franchises Incorporated v Magicuts Inc. et al** which Endorsements are dated November 7, 2018 and April 24, 2019.
8. In **Ultracuts**, (Endorsement dated November 3, 2018) the issue before the court was a motion for disclosure of documents and information that had been used by an expert in the preparation of an expert report. Madame Justice Grammond held that: “It is clear that in Manitoba a party is entitled to both instructional and foundational information underlying an expert report.” [para 13] and “All foundational documents that [the expert] reviewed and relied upon in preparation of the Report must also be produced...” [para18].
9. In **Ultracuts** (Endorsement dated April 24, 2019), paragraph 20 reads: “The plaintiff is entitled to see whatever information [the expert] reviewed and relied upon to prepare the Report, whether or not that information was referenced in the Report. Put another way, the plaintiff is entitled to all information that [the expert] reviewed from any source and on which it based its findings, opinions and conclusions, or the absence of any finding, opinion or conclusion. The communications and process undertaken by [the expert] leading up to the release of the Report is determinative of what information should be disclosed, not a review of the Report itself.”
10. Counsel for MREA also directed the Panel to the following from **Moore v Getahun**, 2015 ONCA 55 at paragraphs 73-75, where the Court stated:

It is important to note that the litigation privilege attaching to expert reports is qualified and disclosure may be required in certain situations...If a party intends to call the expert as a witness at trial, rule 31.06(3) entitles the opposite party on oral discovery to “obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined. “ ...The result is that what has been called “the

foundational information” for the opinion must be disclosed... [The Law of Evidence in Canada] refer[s] to this as an “implied waiver” of privilege over the facts underlying an expert’s opinion that results from calling the expert as a witness.

11. Counsel for MREA argued that once Neufeld was called as an expert witness and the Report was tendered as an exhibit, the disclosure requirements set out in the Ladco and Ultracuts decisions apply. There is an implied waiver of litigation privilege for all “foundational” documents and information, as set out in those decisions, and if such disclosure is not provided, then the expert’s testimony in the matter, including the findings and conclusions in the expert report, should not be considered.
12. The Panel agrees with the position advanced by Counsel for MREA. The party that calls an expert and files an expert report in a hearing before this Commission must comply with the disclosure requirements provided for in the Ladco and the Ultracuts decisions. The Panel is framing the order set out below for consistency with these decisions.
13. An expert is required to identify and list all foundational documents and information that were reviewed and relied upon in the preparation of an expert report. This includes all information and documents that the expert reviewed and relied upon to prepare the expert report – whether or not the documents or the information is referenced in the expert report. To be clear, the information and documents that must be identified and produced here include: All instructional and foundational information and documents, including the instructions provided and the assumptions made in forming the opinion, in whatever form such information and documents may exist, including, but not limited to, electronic information, paper documents, hand-written notes, audiotapes or similar.
14. With respect to Counsel for Staff’s argument that the Panel can determine its own procedures, the Panel is of the view that if a matter of procedure, law or process is settled law in Manitoba, as this issue is, then such procedure, law or process should always be followed. It should only be in the most extraordinary of circumstances that a hearing panel of this Commission should deviate from established law, procedure or process. Such extraordinary circumstances do not apply in this instance.
15. Counsel for Staff requested that the MREA be required to bear the costs of Neufeld preparing the list of documents and for copying of the documents and information. This request is inconsistent with the law and is not appropriate in this matter. Counsel for Staff have called Neufeld as an expert and have the obligation to ensure that he has provided a properly detailed list of all of the foundational documents and information and that those

documents and information have been copied and provided to the MREA as the other party to this Hearing.

Additional matters

16. The Securis Material matter: The Hitachi 1TB hard drive from Securis containing electronic images of the hard drives seized from LEAD, query results and PDFs, three (3) DVDs, a copy of case 2040 (Securis Report), copy of PST file and copy of PDFs (collectively the “Securis Materials”) are to be copied, in their entirety, and provided to Counsel for MREA forthwith.

The fact that the Securis Materials had been made accessible to Counsel for MREA previously does not meet the disclosure requirements.

17. The QuickBooks Database matter: On the matter of the QuickBooks Database that Neufeld referred to in his vive voce evidence, Counsel for Staff argued that it is similar to a tape from an adding machine; merely a work product and a way for the expert to organize and outline the information in the foundational documents and information that he reviewed.

However, as Counsel for MREA argued in its submission, Neufeld’s own evidence was that he had taken information from documents and information he was reviewing, including banking documents and the PDF documents and, with assumptions he made, input information from those foundational documents into the QuickBooks Database. In order to conduct a robust cross-examination of Neufeld, Counsel for MREA requires the QuickBooks Database.

The QuickBooks Database is to be copied, in its entirety, and provided to Counsel for MREA, forthwith.

18. Exhibit # 5 matter: In its submission, Counsel for Staff argued that with respect to any fact set out in the Settlement Agreement between Staff and Lead, dated November 15, 2019, (and marked as Exhibit #5 in this Hearing) “...there is no remaining issue before the hearing panel as to proof of such fact.” The Panel does not accept or agree with this position.

The fact that a settlement agreement is approved by a separate hearing panel of the Commission does not mean that every fact in the said settlement agreement is a proven fact. It is not. Counsel for Staff cannot rely on the facts set out in the said Settlement Agreement as proof of anything other than the fact that Lead is no longer a party to this Hearing.

It is Counsel for Staff’s obligation to ensure that there is properly admissible evidence brought forward in this Hearing such that, based on that evidence,

applied to the statutory and common law requirements, the Panel is able to determine the matters at issue.

19. The Investigation Files listed in the Report: Counsel for Staff argued that the fact that Neufeld referred to the “investigation files” as forming information on which he relied for the conclusions in his Report (at Section 4.1 of the Report) does not mean that he reviewed all documents in those files. Counsel for Staff argued that the documents in the investigation files that were not relied upon should not have to be disclosed but continue to be subject to litigation privilege. The Panel is of the view that if the investigation files were reviewed by Neufeld in the formation of the Report then the documents and information in those investigation files are disclosable. If, after reviewing the investigation files, Neufeld determines that he only reviewed certain documents and information in the investigation files, then he is to list those documents and information in the affidavit, as set out in the order below.

The Panel notes that Neufeld was added as an investigator to the Lead investigation by Commission Order No. 2655 dated July 4, 2012. Order No. 2655 does not alter or impact the requirements on Neufeld as set out in the order below. Once Neufeld was called to give evidence as an expert witness, any privilege relating to the documentation and information he obtained in his capacity as an investigator under Order No. 2655 became subject to the same waiver of privilege as outlined in this decision and is to be identified and provided to Counsel for MREA on the basis set out in the order below.

Order

1. The Panel orders the following;
 - a. The Securis Materials, as defined herein, are to be copied, in their entirety, and provided to Counsel for MREA forthwith.
 - b. The QuickBooks Database, as defined herein, is to be copied, in its entirety, and provided to Counsel for MREA forthwith.
 - c. On or before May 11, 2020, Neufeld is to provide a sworn affidavit (“Affidavit”) which includes a detailed written list (the “List”) of each and every document and information he reviewed in preparing the Report. The List is to include and itemize all documents and information Neufeld relied upon to prepare the Report, whether or not the documents and information are referenced in the Report. The information and documents that must be identified include: All instructional and foundational information, including all directions, instructions and assumptions received and/or reviewed in forming the expert opinion, in whatever form such information and documents

may exist, including but not limited to, electronic information, paper documents, hand-written notes, audiotapes or similar.

- d. If any instructions or information were provided verbally to Neufeld, by Counsel for Staff or anyone else, and such instructions or information was used by him in preparing the Report, he is to reduce to writing such instructions and/or information in a document which is to be included in the List and provided to Counsel for MREA.
 - e. The List is to be sufficiently detailed to allow for a clear identification of which documents and information are referred to. For example: within the various bankers' boxes of documents that comprise Exhibit #B, Neufeld is to list each document and information that he reviewed and relied upon in the preparation of the Report. It will not suffice to merely refer to a box number, a binder number or similar. The Panel appreciates that this may be a time consuming process, but that is what is required. Each document and information must be marked and identified, by number or letter, such that it can be easily cross-referenced to the List in the Affidavit.
 - f. Counsel for Staff is to provide a copy of the Affidavit, together with one complete copy of each document and information set out on the List, to Counsel for MREA, on or before May 25, 2020.
 - g. If Counsel for Staff disagree with the provision to Counsel for MREA of any of the documents or information on the List, on the basis that litigation privilege continues to apply, or for some other reason, then Counsel for Staff is to provide Counsel for MREA with a detailed written explanation of why Staff believe that each of the documents or information cannot be provided, at the date the other materials to be provided, which is on or before May 25, 2020;
 - h. Counsel for MREA will have until July 20, 2020 to determine its position relative to any of the documents or information that Counsel for Staff has taken the position cannot be provided. If the MREA takes the position that it is entitled to one or more of the documents or information that have not been provided, it may bring a motion before the Panel for a determination on same. This motion should be served on the Commission on or before July 27, 2020.
2. A copy of this decision is to be served on Neufeld within two (2) business days of the date it is signed.
 3. This Panel is seized of all motions relative to this matter and if there is any part or parts of this decision that the parties and/or Neufeld, require

clarification and/or assistance with, either party and/or Neufeld may request time before the Panel to discuss same.

4. There will be no costs awarded against the MREA pertaining to this motion for disclosure including the costs of the work and time required by Neufeld, the copying and production of the documents and information ordered herein, or any other matter related to this order, regardless of the ultimate outcome of this hearing.

"L.A. Vincent"

L.A. Vincent
Hearing Chair

"D.A. Huberdeau-Reid"

D.A. Huberdeau-Reid
Member