



**Manitoba Financial Services Agency**

April 17, 2024

**IN THE MATTER OF: THE REAL ESTATE SERVICES ACT**

- and -

**IN THE MATTER OF:      LEAD PROPERTY MANAGEMENT INC.**

# **REASONS FOR DECISION OF THE HEARING PANEL OF THE MANITOBA SECURITIES COMMISSION**

Dates of Appearances:

January 13, 14, 15, 2020

January 24, 2024

March 20, 21 and 22, 2024

## Panel:

Panel Chair: Ms. L. Vincent

Member: Mr. A. Babiuk

## Appearances:

A. Poushangi

) Counsel for The Manitoba  
Securities Commission

## **A. Background and Process of the matter**

1. This administrative hearing has taken a long time to conclude. The allegations in the pleadings concerned activities that date back to 2010 and the investigation commenced in 2011. Since that point, there have been changes to the lawyer ("Counsel for Staff") for the Manitoba Securities Commission (the "Commission" or the "MSC"), changes to the individuals appointed to the hearing panel, changes to the parties to the hearing, and the legislation the allegations were based upon was repealed and replaced. For these reasons, the following overview is provided.
2. Lead Property Management Inc. ("Lead") was registered under *The Real Estate Brokers Act C.C.S.M. c. R20* ("REBA") as a Broker, restricted to property management.
3. On June 23, 2014, a Notice of Hearing and a Statement of Allegations were issued by the Commission against Lead.
4. On March 16, 2015, an Amended Statement of Allegations was issued by the Commission against Lead.
5. The pleadings included a request that the Manitoba Real Estate Association ("MREA") be ordered to make a payment out of the Real Estate Reimbursement Fund ("Reimbursement Fund").
6. On May 29, 2015, a hearing panel of the Commission (the "First Hearing Panel") determined, on an application brought by the MREA, to grant the MREA status as a party in the matter.
7. On November 20, 2019 a hearing panel of the Commission (the "Settlement Agreement Hearing Panel"), considered an agreement to settle the proceedings against Lead, which agreement had been entered into between Counsel for Staff and Lead, as represented by its sole remaining shareholder, Sharon Conway ("Conway"). That agreement was accepted by the Settlement Agreement Hearing Panel, and it issued Order No. 2771 on November 20, 2019.
8. On January 13, 2020, a hearing panel of the Commission (the "Second Hearing Panel") commenced the hearing ("Hearing"), which, due to the order issued by the First Hearing Panel, included the MREA as a party.
9. After entering some initial exhibits, Counsel for Staff called Victor George Neufeld as an expert witness. His status as an expert was consented to by the MREA. After reviewing the relevant evidence, including a detailed curriculum vitae, the Second Hearing Panel qualified Victor George Neufeld (the "Expert") as an expert in the field of forensic accounting.

10. The report (“Report”) prepared by the Expert was entered as Exhibits #18 and #19. The Expert had been retained by the Commission in 2012 and completed his report in 2014.
11. 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 includes many documents and information. Two of the bullet points included documents and information that had not been filed as exhibits to the Hearing and had not been disclosed to the MREA.
12. The Expert commenced his testimony on January 13, 2020. On January 15, 2020, during the cross examination of the Expert, counsel for the MREA requested additional disclosure of documents and information from the Expert.
13. On February 19, 2020 and March 12, 2020, the Second Hearing Panel heard arguments on the MREA’s motion for disclosure of additional documents and information from the Expert. Both parties provided written submissions as well as oral arguments.
14. On March 20, 2020 the Second Hearing Panel issued a Decision (the “March 2020 Decision”) that provided for the disclosure of information and documents by Staff to counsel for the MREA on dates that finished on July 27, 2020.
15. Subsequent to July 27, 2020, the Second Hearing Panel contacted persons on staff of the Commission to confirm that the requirements of the March 2020 Decision had been complied with and that the hearing was ready to re-commence.
16. The Second Hearing Panel was advised that none of the requirements of the March 2020 Decision had been complied with. A request for an extension of time to comply with the requirements of the March 2020 Decision had not been made.
17. The Second Hearing Panel heard from Staff of the MSC and counsel for the MREA on September 9, October 23, and December 4, 2020 on a motion brought by Counsel for Staff to vary the March 2020 Decision.
18. On December 14, 2020 the Second Hearing Panel issued a Variance Order (the “December 2020 Variance Order”) that varied the March 2020 Decision, providing Staff Counsel with additional time to meet the requirements of the March 2020 Decision.
19. The December 2020 Variance Order was subsequently amended twice, at the request of the Expert, to allow for additional time for the disclosure work to be completed. After the additional time had been granted, all disclosure to the MREA was to have been provided no later than the end of July 2021.

20. Under the terms of the December 2020 Variance Order, the parties were directed to “*...attend before the Hearing Panel to set dates for the continuance of the hearing as soon as practicable...*”.
21. On October 19, 2021, the parties filed written motions briefs with the Second Hearing Panel requesting, among other things, that the MREA be permitted to withdraw as a party to the matter and that the Panel issue an order directing a payment out from the Reimbursement Fund to the Commission of Two Hundred and Seventy-Eight Thousand Dollars (\$278,000.00) plus an additional fifteen percent (15%) be issued.
22. On December 16, 2021, the Second Hearing Panel issued a decision on the motions (the “December 2021 Decision”). The December 2021 Decision provided that the MREA could withdraw from the hearing, but that it was premature, due to the lack of evidence adduced in the hearing to date, to make an order of payment out from the Reimbursement Fund.
23. Subsequent to December 16, 2021, the lawyer who had been acting as Counsel for Staff resigned from the Commission, and on October 14, 2022, a new lawyer from staff was appointed to the matter.
24. Subsequent to December 16, 2021, one of the two Commissioners appointed to the Second Hearing Panel resigned from the Commission. On September 18, 2023, a new Commissioner was appointed to the panel and he, along with the remaining Commissioner from the Second Hearing Panel, formed the third hearing panel (the “Panel”).
25. On January 1, 2022, the REBA was repealed and replaced by *The Real Estate Services Act C.C.S.M. c. R21* (the “RESA”).
26. On February 7, 2024, a Re-Amended Statement of Allegations was filed which continued the matter under the RESA.
27. On Friday January 24, 2024, the Panel heard from Counsel for staff on initial matters, including the issue of the repeal of the REBA and enactment of the RESA and the consequences of same for the Hearing.
28. On March 20, 21, and 22, 2024 the Hearing resumed and was completed.
29. This decision determines the substantive matters raised by the pleadings in this matter.

## **B. EVIDENCE**

30. The evidence entered at the Hearing included certified statements of the Registrar of the REBA and the RESA, affidavits sworn by members of staff of the Commission,

and vive-voce testimony from the Expert and from one of the Property Owners (as defined below), Ms. Xiaofeng Wang ("Wang"). A significant number of documents were entered into evidence through the Expert.

31. Lead was registered under the REBA as a Broker, restricted to property management from August 22, 2008 to August 21, 2012 with two periods of suspension, from May 19, 2010 to August 11, 2010, and from October 4, 2011 until the expiration of its certificate of registration on August 21, 2012. The first suspension was due to the failure of Lead to file required financial information with the MSC. The second was due to the matters that led to this hearing.
32. Lead has not been registered in any category under REBA or RESA since August 21, 2012. On August 17, 2012, Lead was dissolved.
33. During its period of registration with the MSC, Lead's Authorized Official was Kevin Dell ("Dell"). Dell was one of two shareholders in Lead. Dell died on October 18, 2010.
34. The other shareholder of Lead was Conway. Conway was not qualified to be registered as an Authorized Official under the requirements of the REBA.
35. Subsequent to October 18, 2010 Lead was managed by its accountant.
36. A plan to sell or transfer the Lead business to another registered entity fell through.
37. The Commission's investigation commenced subsequent to the death of Dell. The Bank was directed, pursuant to Commission Order No. 2650 dated October 4, 2011, to hold all funds in the T1 and T2 Accounts (as defined below) and to hold all funds subsequently deposited to those accounts. Order No. 2650 remains in effect.
38. During the Review Period (as defined below), Lead was a member of the MREA.
39. Lead conducted property management services, whereby it would act on behalf of persons and companies that owned rental properties in Winnipeg, Manitoba. During and prior to the Review Period, there were 106 entities (the "Property Owners") for which Lead managed one or more properties ("the Properties", or singularly "the Property").
40. Lead entered into written agreements with the Property Owners, (the "Property Management Agreements") which set out its services and responsibilities to the Property Owners, and how it would be paid.
41. In addition to the terms and conditions of the Property Management Agreements, Lead was obligated pursuant to its registration status with the MSC, to meet the requirements of, and conduct itself in conformity with, the REBA and relevant

regulations. Among other things, and as set out in more detail below, Lead was required to handle and maintain the rental monies and security deposit funds it held for the Property Owners in interest bearing bank accounts as trust funds ("Trust Monies"), and to maintain complete and accurate books and records.

42. Lead had set up two bank accounts in its capacity as a property manager, in addition to its operating accounts) which accounts were held at the Canadian Imperial Bank of Commerce (the "Bank") located at the One Lombard Place, Winnipeg branch.
43. The first account, ("T1 Account") was to hold all receipts related to the rental payments and other monies due to the Property Owners from the tenants of the Properties. Under the REBA these funds were Trust Monies and required to be treated as such, at all times, by Lead. Only certain expenses were entitled to be deducted from the T1 Account (the "Allowable Expenses"), which expenses were restricted to operating expenses for the Properties, including maintenance, repairs, utilities, trash hauling, decorating and similar services.
44. The second account ("T2 Account") was to hold the security deposits paid by tenants of the Property Owners. Under the REBA these funds were Trust Monies and required to be treated as such, at all times, by Lead.
45. Lead did not properly designate the T1 and T2 Accounts as trust fund accounts with the Bank, in contravention of the requirements of the REBA.
46. The Expert was retained by the Commission pursuant to an engagement letter dated February 28, 2012. The scope of the work required that a group of staff members (the "Team") from his business assist the Expert with the work. The Expert checked and verified the work completed by the Team prior to the submission of the Report.
47. Following the Expert's initial review of the available books and records of Lead in December 2012 and January 2013, he met with Staff of the Commission on several occasions. He disclosed that there were certain limitations within the available Lead documentation which MSC Staff determined would prevent him from delivering the original engagement letter scope of work. In January 2013, Staff of the Commission revised the mandate from the initial retainer, such that the Expert's work was to provide an estimate of the shortfalls in the T1 and T2 Account balances. It was also determined that the Expert would concentrate his work on the time period from September 1, 2010 to September 15, 2011 (the "Review Period"). September 1, 2010 was determined to be the start of the Review Period because that was the date that Lead began generating information from a new property management (accounting) software system ("Property Boss"). September 15, 2011 was chosen as the final date of the Review Period as it was the date used by Lead for the last known PDFs (as defined below) sent to the Property Owners.
48. Commission staff also retained an IT company, Seccuris Inc.("Seccuris") to provide electronic images of information from four Lead computers for the Expert's review.

49. The primary document Lead had provided to the Property Owners on the work it conducted for them was a monthly report (the “PDFs” or singularly the “PDF”), which provided accounting details of the rental income, security deposits, expenses paid and amounts owing to each Property Owner.

50. The Expert and the Team conducted procedures sufficient to address the revised mandate, which are described in more detail below. The Expert also conducted some interviews with staff of Lead, including Conroy.

51. The Expert and the Team reviewed, among other things, the following:

- a. All documentation obtained from the offices of Lead, including paper files and the computer files provided by Seccuris;
- b. All internal accounting information, which included a written blue colored ledger (the “Blue Ledger”) that was handwritten;
- c. Written notations on documents in files found in the office;
- d. Communications with the Property Owners, including the PDFs;
- e. Internal Lead email communications, and the communications by Lead with other individuals;
- f. Bills and invoices from various vendors, including the City of Winnipeg for water, Manitoba Hydro, Shaw, Fido, MTS, pest control companies, lawn service companies, handyman repairs and similar;
- g. All banking documentation from the Bank relating to the T1 and T2 Accounts, the Lead operating bank account, and the Delcon (as defined below) operating bank account;
- h. The Property Management Agreements; and
- i. Information from the MSC including compliance reporting files for Lead, correspondence to the MSC from Property Owners, and faxes to the MSC from the Bank regarding banking information.

52. The Expert’s review procedures of the Review Period, included the following:

- a. All transactions recorded on the bank statements and related documents such as deposit slips for the four Lead and Delcon (as defined below) bank accounts (including the T1 and T2 Accounts and an operating account for each of Lead and Delcon) were entered into Quickbooks (an accounting software program) to support subsequent cash flow analyses. Summary information from the available PDFs sent to Property Owners was entered into Quickbooks to facilitate high-level comparisons between rent revenue and property expense amounts reported to the Property Owners and the actual amounts received or paid by Lead.
- b. Comparisons between rent revenue and property expense amounts reported to Property Owners, and the actual amounts paid or received by Lead;

- c. Available expense invoices were reviewed to determine, if it was readily apparent, that they were paid through Lead's or Delcon's (as defined below) bank accounts and if they related to expenses;
    - i. dated outside the Review Period,
    - ii. incurred for Property-related expenses (i.e. reported on the PDFs), or for Lead or Delcon operating expenses; or
    - iii. incurred for properties owned by Lead or its shareholders or entities other than the Property Owners;
  - d. Expense invoices were reviewed to identify whether markups had been added by Lead to the expenses reported in the PDFs;
  - e. Paid expense invoices were traced to PDF entries on a limited basis to determine how Lead handled different types of paid expenses;
  - f. Unpaid expense invoices were generally traced to PDFs to see if the expense was reported as being paid with Trust Monies. The PDFs were also reviewed to identify unpaid Property expenses where the invoice was unavailable;
  - g. Available Property Management Agreements were reviewed with MSC staff to identify key terms;
  - h. Security deposits reported on Lead reports and bank transactions shown on documents as relating to security deposits, were also reviewed at a high level; and
  - i. MSC investigation files were reviewed to identify information provided by Property Owners, and to compare to findings in the Expert's work.
53. In the course of the testing, the Expert identified a company, Delcon Developments Inc. ("Delcon") which was incorporated by Dell on February 28, 2010. It operated out of the Lead offices. It had its own operating bank account. Delcon appeared to be providing construction and other services at some of the Properties. Delcon also retained third party entities (e.g. pest control companies) to conduct work at the Properties and then billed it to the Property Owners as an invoice from Delcon. On most of the invoices an additional upcharge amount of up to 20% was charged to the Property Owners. The ownership of Delcon and the fact that an upcharge was being added to their bills was not disclosed to the Property Owners.
54. In the course of the testing the Expert also identified another entity, called Achievers ("Achievers"), which was listed in some of the Lead-prepared documentation as a company which did work on some of the Properties. The Property Owners were charged by Lead for work listed on the PDFs as having been completed by Achievers. There were no invoices or receipts with respect to Achievers, and no

evidence that this entity actually existed, or that the amounts charged to the Property Owners were for services or work actually performed.

55. In the course of his work, the Expert identified an individual (the "Third Party") who was not a Property Owner, a shareholder, or a staff member of Lead but who had been in the Lead offices for much of the Review Period. The Third Party received transfers of funds from the T1 and T2 Accounts, although he was not entitled to such funds. He also received a payment of \$23,645 from Conway, which were monies for rent payments that should have been deposited directly to the T1 Account.

56. In addition, from emails reviewed by the Expert, the Third Party had been directing the staff at Lead as to which Properties could incur maintenance repairs.

57. The Expert was able to provide a reasonable estimate of the shortfalls in the T1 and T2 Accounts, represented by Property Owner, subject to certain limitations which were included in the Report. These limitations included gaps within available Lead records that required assumptions to be made by the Expert. Examples of these gaps included:

- a. Missing bank documents and printed reconciliations;
- b. Missing Property Management Agreements;
- c. Missing entries in the Blue Ledger;
- d. Missing PDFs;
- e. Transactions that created inter-month differences in balances that were not reported to Property Owners, where no explanations were documented for such differences;
- f. Missing payment records or vendor expense invoices to determine what remained unpaid; and
- g. Evidence of Lead management review of the above.

The Expert testified that reliable steps were taken to compensate for and bridge these gaps.

58. The Panel finds that the Expert's work provides the necessary level of detail and specificity to support the estimates of the shortfalls in the T1 and T2 Accounts and the amounts of direct losses by Property Owner.

59. With respect to compliance with the REBA, the Expert identified the following incidents of non-compliance:

- a. The Bank accounts that the Trust Monies were to be deposited to had not been designated with the Bank as trust accounts, and were not interest-bearing, as required under REBA;
- b. The T1 Account balance was less than required;

- c. The T2 Account balance was less than required;
- d. Reported payments to Property Owners were missing;
- e. Reported payments to Property Owners had not been made by Lead;
- f. Reported Property expenses, which were Allowable Expenses, had not been paid by Lead;
- g. Lead used a related company (Delcon) for some work added markups to reported expenses without disclosure to, and consent from, Property Owners;
- h. Trust Monies were used for non-Allowable Expenses, including many incidents where Trust Monies were used for Lead's operating purposes, where Trust Monies were transferred to the operating accounts for Lead and Delcon and where Trust Monies were transferred to the Third Party.
- i. Some mortgage and insurance payments made for two Property Owners were not reported to the Owners;
- j. Some Property Owners had debit account balances where these account balances appear not to have been collected by Lead on a timely basis; and
- k. All rent funds were not deposited into the T1 Account.

60. Regarding the T1 Account, the Expert found specific examples where Trust Monies were used for non-Allowable Expenses, which included:

- a. Three payments totaling \$19,000 made by a Property Owner from October 2010 to March 2011, were deposited to Lead's operating bank account. Only one of these deposits appears to have been transferred back to the T1 Account, leaving almost \$14,000 remaining in the Lead operating bank account;
- b. An internal Lead document authorized the transfer of approximately \$5,070 from the T1 Account on June 15, 2011, to cover the payroll of Lead staff, including Conway. The document identified the authorizing signature as that of Conway;
- c. Other transfers of funds from the T1 Account to the Lead operating bank account identified, on the cheques, that the payments were to cover Lead's payroll and other operating costs;
- d. A transfer of \$20,000 from the T1 Account was made to the Lead operating account on September 7, 2010, and was used by Lead, in part, to cover an

overdraft in the lead operating account created by a cheque written to Dell on that same date; and

- e. That T1 Account was less than required. The Report concluded that the amount that should have been in the T1 Account was at least \$81,341. However at the end of the Review Period, there was only \$24,200 in the T1 Account.
61. The Expert conducted testing on the T2 Account to determine whether Lead had properly dealt with the security deposits throughout the Review Period and whether there were sufficient funds in the T2 Account throughout the Relevant Period. From his testing the Expert concluded that;
- a. Lead did not deposit all surety deposits received from tenants of the properties to the T2 Account.
  - b. Lead transferred Trust Monies from the T2 Account for various non-Allowable Expenses, including for operating costs of Lead and Delcon and to the Third Party. In this respect;
    - i. In November 2010 there were two transfers of Trust Monies from the T2 Account to the Lead operating account totaling \$26,000;
    - ii. In December 2010 there was a transfer of Trust Monies from the T2 Account to the Delcon operating account in the amount of \$4,750;
    - iii. In May 2011, there was a transfer of Trust Monies from the T2 Account to the Lead operating account in the amount of \$20,000; and
    - iv. On July 14, 2011 a cheque for \$10,000 was drawn on the T2 Account payable to RONA which monies were for Non-Allowable Expenses, including for supplies purchased for Conway owned properties and for supplies related to the properties of the Third Party.
  - c. The T2 Account balance was less than required. The Report concluded that the amount that should have been held in the T2 Account was at least \$63,790. However, at the end of the Review Period there was only \$1,899 in the T2 Account.
62. Although Lead did not regularly transfer funds from the T1 and T2 Accounts to its operating account for its management and administration fees, the net transfers from the T1 and T2 Accounts were in excess of the known fees, indicating that the transfers above were not in relation to Allowable Expenses.

63. The internal emails of Lead disclosed that the accountant and Conway were aware that Lead was not meeting the requirements of the REBA and the Property Management Agreements, and specifically knew:

- a. of the shortfalls of Trust Monies in the T1 and T2 Accounts;
- b. of Lead's failure to pay the Property Owners what they were owed, including the failure to pay Property Owners \$22,463.30 for the July 2011 Owner Credit Balances and \$64,466.30 for the Owner Credit Balances for the period of time up to August 22, 2011;
- c. that the Third Party had been provided with Trust Monies from the T2 Account of approximately \$40,000 which he misappropriated for repairs on his own properties;
- d. of the failure to pay outstanding invoices for the Properties for Allowable Expenses;
- e. that Lead had been misrepresenting to the Property Owners that Allowable Expenses due on the Properties had been paid when they had not been paid. These included outstanding invoices of \$19,085.63 owed to Manitoba Hydro and \$32,195 owed to the City of Winnipeg; and
- f. that, as at August 23, 2011, the Lead records evidenced a net shortfall of its obligations of \$182,980.83.

64. An affidavit filed at the Hearing, sworn by Nancy Hoodspith on March 13, 2024, evidenced that:

- a. All Property Owners were contacted in early 2024 and asked to confirm the amounts that the Report outlined were owed to them as Owner Credit Balances. That contact was made by mail and email. In addition, the MSC put a notice on the Homepage of its Website and posted a notice in the Business Classified section of the *Globe and Mail* newspaper, a national publication available across Canada, for three days;
- b. Of the 106 Property Owners, 37 contacted Staff of the Commission (the "Confirmed Property Owners");
- c. Each of the Confirmed Property Owners confirmed to Staff of the Commission that the amounts listed in the Report as the Owner Credit Balance owed to them was the correct amount; and
- d. The Property Owners were not asked by Staff of the Commission about either the Owner Debit Balances or the amounts of security deposits that were owed to them.

65. The Expert testified to the information he prepared which was filed as Exhibit #36 to the Hearing. Exhibit #36 contains a subset of the information on Schedule 1 to the Report and lists, by Confirmed Property Owner, the Owner Debit Balances owed to Lead.
66. The Expert also testified to the information he prepared which was filed as Exhibit #39 to the Hearing, which contains information on the amounts of security deposits owed by Lead to the Confirmed Property Owners.
67. Wang, who is one of the Confirmed Property Owners, contacted Staff of the Commission concerning the security deposit she claimed was owing to her from Lead. The amount she claimed she was owed corresponded with the amount that the Report had indicated she was entitled to. Wang testified at the Hearing.

### **C. Issues and Analysis**

68. Staff have asked that the Panel make orders i) to have monies paid out of the Reimbursement Fund, ii) to have the funds in the T1 and T2 Accounts, which have been held by the Bank pursuant to Commission Order 2650, be paid to the Commission, and iii) determining the amounts, if any, that are owed to the Property Owners.
69. Prior to dealing with the requests for these orders, the Panel will briefly note two other relevant matters which arose in the Hearing.

#### **The Qualification of the Expert and use of Expert Opinion Evidence**

70. As noted earlier, the Panel qualified the Expert following a review of his qualifications and experience. With respect to the qualification of the Expert, and the admissibility of the Expert's opinion evidence in the Hearing, the Panel was cognizant that the common law requires that such evidence must be:
  - a. logically relevant to a material issue or issues and necessary to assist the trier of fact;
  - b. not inadmissible under any other exclusionary rule;
  - c. offered by a properly qualified expert; and
  - d. fair, objective and non-partisan.
71. The Panel reviewed the decision in *Ladco Company Limited v City of Winnipeg* (2020) MBQB 101 (CanLII) at paragraphs 80 to 82 where the court held:

[80] ... To determine admissibility, the onus is on the party who wishes to adduce expert opinion evidence to satisfy admissibility criteria established in the leading authorities. (See *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9 (S.C.C.) and *White Burgess Langill Inman v Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182 (QL)). In order for the expert opinion evidence to be admissible, each of the following factors must be met:

- a) the evidence must be relevant to some issue in the application;

- b) the evidence must be necessary to assist the trier of fact;
- c) the evidence does not contravene an exclusionary rule; and
- d) the witness is a properly qualified expert.

(See *Mohan and The Law of Evidence in Canada* 4th ed (Canada: LexisNexis, 2014) at para. 12.39)

[81] Expert witnesses have a duty to give fair, objective and non-partisan opinion evidence. An expert witness who is unable or unwilling to fulfill this duty is not properly qualified to perform the role of an expert. Exclusion at the threshold stage of analysis should only occur in very clear cases (See *White Burgess Langille Inman*, at para.49.)

[83] In performing the gatekeeper analysis, I must also consider the ability and willingness of the experts to give their evidence in a fair, objective and non-partisan manner in accordance with the additional threshold requirement outlined in *White Burgess Langille Inman*...

72. The Panel determined that the Expert's opinion evidence met the qualifying factors. The evidence was specialized, directly related to the issues before the Panel and necessary to allow the Panel to make the decisions required. There was no exclusionary rule to the evidence provided by the Expert in this Hearing.
73. The Expert answered all questions put to him, including questions during cross-examination by counsel for MREA in January 2020 fully and directly. The Panel found the Expert's testimony throughout the Hearing to be balanced, impartial and objective.
74. The Expert clearly identified the issues relevant to his remit, including any limitations on the information and steps needed to compensate for these limitations and in particular, highlighted the fact of the Owner Debit Balances.

#### The Basis for Proceeding with the Hearing under the RESA and Regulation 81/2022

75. The Hearing was continued, subsequent to January 1, 2022 under the provisions of the RESA and Regulation 81/2022 to the RESA (the "Regulation").
76. The REBA, which had founded the pleadings at the commencement of the Hearing in January 2020, was repealed on January 1, 2022.
77. The RESA was proclaimed on January 1, 2022. The explanatory note to the relevant bill (Bill 70) which enacted the RESA, provided that the RESA "...replaces *The Real Estate Brokers Act*."
78. There are no transition provisions in the RESA respecting the REBA.
79. There are also no provisions in the RESA that provide that *The Interpretation Act*, C.C.S.M. c. I80 (the "Interpretation Act") does not apply to it. This is relevant in that section 2 of the Interpretation Act provides that it applies to the interpretation of every

act and regulation unless a contrary intention appears in the said act or regulation. We found no contrary intention in the RESA.

80. The Interpretation Act contains a section that deals with amendments and repeals, which section applies to the Hearing. Included in the section is the following:

**Proceedings continue under the new Act**

**47(3)** A proceeding commenced under the former Act or regulation must be continued under the new one, in conformity with the new one as much as possible.

**When the new procedure must be used**

**47(4)** To the extent it can be adapted, the procedure established by the new Act or regulation must be followed in the following cases:

- (a) in recovering a fine or enforcing a penalty or forfeiture imposed under the former Act or regulation;
- (b) in enforcing a right existing or accruing under the former Act or regulation; and
- (c) in a proceeding in relation to matters that happened before the repeal or amendment.

81. From its review of these sections, and after hearing arguments from Counsel for Staff on the issue, the Panel is satisfied that it was required to proceed with the Hearing subsequent to January 1, 2022 under the provisions of the RESA and the Regulation.

**Payment Out from the Reimbursement Fund**

82. The MREA represents real estate professionals and real estate boards in Manitoba. Among other things, MREA provides education to people wishing to become real estate salespeople, provides continuing education to real estate professionals and operate programs for education and the protection of the public involved in real estate transactions.

83. The Reimbursement Fund was created to provide reimbursement to members of the public who suffer losses due to fraudulent activity committed by a firm or salesperson who is a member of the MREA. Registrants that are not covered by the Reimbursement Fund are required to obtain surety bonds as a condition of registration with the Commission.

84. The MREA acts as the trustee of the Reimbursement Fund.

85. In reviewing the requirements under the RESA for an order of payment out from the Reimbursement Fund the Panel reviewed the following sections of the RESA and the regulation to the RESA, Regulation 84/2102 (the "Regulation"):

**"trade in real estate"** means a transaction or potential transaction for the purchase or sale of real estate, for the leasing of real estate or for any other form of acquisition or disposition of real estate.

Part 5 of the RESA deals with the Reimbursement Fund.

### **Payment out of fund — misconduct**

65(2) When, in connection with a trade in real estate, a brokerage registered in a brokerage registration category on the basis of membership in the Manitoba Real Estate Association Inc., a director, partner, officer or employee of the person or a registrant engaged by the person

(a) is found, after an investigation under Part 4, to have committed a fraudulent act, including, in the case of a registrant, an act of professional misconduct or conduct unbecoming a registrant;

(b)...; or

(c)...

the commission may, subject to the regulations, order the association to pay out of the fund any amount to a person or the commission that the order may require and the regulations may permit

Part 1 of the Regulation provides the definition of fraudulent act

**"fraudulent act"**, for the purposes this regulation and subsection 65(2) of the Act, includes deceptive dealing and wrongful taking, as defined in section 44 of the Act.

Section 44 of the RESA reads:

**"deceptive dealing"**, in relation to a person providing real estate services as a registrant, means any of the following:

- (a) an intentional misrepresentation, by word or conduct, or in any other manner, of a material fact in relation to real estate services, or in relation to a trade in real estate to which the real estate services relate;
- (b) an intentional omission to disclose a material fact described in clause (a);
- (c) a course of conduct or business that is intended to deceive a person about the nature of the real estate services, or about the nature of a trade in real estate to which the real estate services relate;
- (d) an artifice, agreement, device or scheme to obtain money, profit or property by illegal means;
- (e) a promise or representation about the future that is beyond reasonable expectation and not made in good faith.

**"wrongful taking"**, in relation to a person providing real estate services as a registrant, means any of the following:

- (a) a misappropriation or wrongful conversion of money or other property received by the person in relation to the real estate services;
- (b) an intentional failure to — within a reasonable time — account for or pay over money or other property that
  - (i) was received by the person, and
  - (ii) belongs to one or more other persons in relation to the real estate services.

86. The evidence at the Hearing established that Lead;

a. was registered with the MSC during the Review Period; and

- b. was a member of the MREA during the Review Period;
87. After reviewing the evidence at the hearing, including from the Expert, the Panel finds that Lead, through its shareholders and staff, committed numerous fraudulent acts, which included acts of deceptive dealings and wrongful takings, and which all related to trades in real estate.
88. The internal e-mails dated July 7, 2011, July 26, 2011, August 17, 2011, August 23, 2011, and August 30, 2011 all evidence the knowledge of Lead and its shareholders and staff with respect to the numerous acts of deceptive dealings and wrongful takings. The Lead Annual Trust Account Report for December 31, 2010 also evidenced that Lead was aware it was misappropriating funds by transferring Trust Monies from the T1 and T2 Accounts to its operating bank account, in violation of the REBA.
89. These deceptive dealings and wrongful takings, included, but were not limited to:
- a. Many incidents of misappropriation of Trust Monies from the T1 and T2 Accounts, including for the payment of non-Allowable Expenses, such as payments for properties owned by the shareholders of Lead and the Third Party, transfers made to the Third Party, and transfers to the operating accounts of Lead and Delcon;
  - b. Many incidents where Lead failed to deposit rent funds and security deposit funds into the T1 and T2 Accounts;
  - c. Many incidents of intentionally misrepresenting to the Property Owners;
    - i. the status of the Allowable Expenses paid on the Properties;
    - ii. the actual true amounts that had been expended on the Properties; and
    - iii. claiming that work and services had been performed on the Properties when such work and services had not been performed;
  - d. A continuing pattern of conduct where Lead intentionally failed to disclose to the Property Owners the true status of the deficient T1 and T2 Accounts;
  - e. Many incidents of failing to collect debit balances immediately from Property Owners resulting in other Property Owners' accounts subsidizing shortfalls in the overall T1 Account balances;
  - f. Many incidents of Lead making payments to Delcon and Achievers for work not performed on the Properties which were each non-Allowable Expenses;
  - g. Many incidents where Lead added upcharges to invoices from Delcon invoices and charged same to the Property Owners, which charges were non-Allowable Expenses;

- h. Many incidents where Lead and its employees failed to properly account to the Property Owners for the Allowable Expenses relative to their Properties; and
  - i. Many incidents where Lead failed to account to the Property Owners for Allowable Expenses due on the Properties that Lead failed to pay, for which additional penalties and interest charges accrued on the Properties.
- 90. In addition, the evidence proves that Lead failed to meet its obligations under the RESA to maintain trust accounts and to meet minimum requirements of record keeping.
- 91. The only case in which the relevant provisions of the legislation concerning the payment of monies out of the Reimbursement Fund have been dealt with is *Manitoba Real Estate Assn. v Manitoba Securities Commission* 139 Man. R. (2d) 227, 1999 CanLII 14216 (MB KB) (the “Decision”).
- 92. In the Decision, the Court held that the obligation of the Commission is to ensure that any order for a payment out from the Reimbursement Fund meets the requirements of the legislation.
- 93. At paragraph 50 of the Decision the court held that three criteria must be met at the outset:
  - [50] There are several considerations here:
    1. There must be a connection established between the fraud and a trade or transaction in real estate.
    2. The fraud of Stonehouse giving rise to a reimbursement claim must have occurred after Stonehouse was registered as a real estate agent.
    3. When the fraud occurred, Stonehouse must have been acting in his capacity as a real estate agent and the Partnership or the limited partners must have been relying on him in that regard
- 94. The Panel finds that each of the considerations set out above have been met by the evidence adduced at the Hearing. There was clearly a connection between each of the fraudulent acts and transactions in real estate, the definition of which includes the work of property managers. The fraudulent acts all occurred while Lead was registered with the Commission as a broker restricted to property management, and registered with the MREA. When the fraudulent acts occurred, Lead was acting in its capacity as a property manager and the reliance on Lead by the Property Owners was evident in their contracting with it to take care of their Properties and deal with all matters concerning rents, security deposits and Allowable Expenses, all as set out in their contractual relationships with Lead.
- 95. In terms of assessing how we are to calculate the losses incurred by the Property Owners, we look to the Decision. In this respect the Court held:

[52] The objective is to identify the net direct financial loss suffered by the Partnership as a result of the fraudulent activity ...

[63]...means the Commission does not have to absolutely precise in arriving at whatever order it chooses to make. The calculations I am now directing it to perform may be difficult to determine in all respects. If there are problems, the Commission should resolve them as best it can....

96. Bearing in mind that any order of payment out from the Reimbursement Fund must be restricted to the direct losses arising as a result of the fraudulent acts, the Panel has determined that the work of the Expert leading to the Report, and the procedures performed by the Expert and admitted into evidence at the Hearing, provides the necessary level of detail and specificity to determine direct losses.
97. In calculating the amounts due to each of the Confirmed Property Owners, the Panel has included the Estimated Owner Debit Balances determined by the Expert. The reasons provided by Staff in its argument for ignoring the Estimated Owner Debit Balances were not persuasive. Those were monies that the Expert identified as being owed by the Property Owners to Lead. The direction provided in the Decision does not allow us to ignore these amounts. Further, and as noted above, the Reimbursement Fund is funded by members of the MREA. The Confirmed Property Owners are entitled to compensation only for direct losses. They are not entitled to have debts wiped out at the expense of the members of the MREA which fund the Reimbursement Fund.
98. The Panel has determined that the Confirmed Property Owners are collectively entitled to the following:

Credit Balances owed to the Confirmed Property Owners	\$137,816.00
<u>Less</u> the estimated Debit Balances owed	
by the Confirmed Property Owners*	<u>- \$12,550.00</u>
	<b>Sub-total</b>
	<b>\$125,266.00</b>
<u>Plus</u> Security Deposits owed	
to the Confirmed Property Owners	<u>+\$23,231.71</u>
	<b>Total</b>
	<b>\$148,497.71</b>

**\*Note: the amount in Exhibit #36 showing a debit of \$1,571 owing to Lead by Confirmed Owner No. 106 has not been included as this entity has no amounts owing to it by Lead to offset against. The Panel has no jurisdiction to deal with the collection of funds from Confirmed Owner No. 106.**

99. The amounts that each Confirmed Property Owner is entitled to are set out on Schedule "A" to this Decision, which collectively total \$148,497.71.
100. The Bank is holding, as at March 11, 2024, the sum of \$39,813.27 from the T1 and T2 Accounts.

101. Accordingly, the amount to be paid from the Reimbursement Fund is \$108,684.44.

**D. Orders**

102. The Panel hereby orders that:

- a. pursuant to section 61(3) of the RESA, the Bank is ordered to pay all funds in the T1 and T2 Accounts, being CIBC accounts number 00007-65-18419 and 00007-34-26912, which accounts were ordered held by Order of the Commission No. 2650 dated October 4, 2011, to the Commission forthwith;
- b. pursuant to section 65(2) of the RESA, the MREA is ordered to pay the sum of \$108,684.44 from the Reimbursement Fund to the Commission, forthwith; and
- c. the Commission is to make payments to each of the Confirmed Property Owners in the amounts set out in Schedule "A" as soon as is practicable following receipt of the monies from the Bank and the MREA.

"L. Vincent"  
*L. Vincent*  
*Panel Chair*

"A.W. Babiuk"  
*A.W. Babiuk*  
*Panel Member*

### Schedule 1

<b>Number(s) assigned to the Confirmed Property Owner*</b>	<b>Owner Credit Balances&amp;</b>	<b>LESS Owner Debit Balances&amp;</b>	<b>Plus Security Deposit&amp;</b>	<b>Amount Payable to the Confirmed Property Owner &amp;</b>
1	574			574.00
2	1,005			1,005.00
4	255	798	955.00	412.00
6	7,364		1,220.27	8,584.27
9 & 100	9,606	45	1,500.00	11,061.00
10	1,271	997	618.00	892.00
12 & 13	12,944	6,042		6,920.00
14 & 111	3,244		912.50	4,156.50
17	2,172		500.00	2,672.00
19	4,727		451.50	5,178.50
20	2,361		950.00	3,311.00
25	1,452			1,452.00
26	6,417	3,560	1,290.00	4,147.00
29	2,779		900.00	3,679.00
34	2,838			2,838.00
36	1,136			1,136.00
37	4,743		375.00	5,118.00
39 & 81	5,652		1,400.00	7,052.00
44	12,358		667.50	13,025.50
46	234	217	300.00	317.00
55	706	201		505.00
59	13,480		1,627.50	15,107.50
60	8,002		1,525.50	9,527.50
65	3,447		550.00	3,997.00
66	1,407		300.00	1,707.00
76	2,122		1,300.00	3,422.00
81			700.00	700.00
86	1,083			1,083.00
89	2,843	555	1,577.50	3,865.50
91	4,533			4,533.00
94	10,034		775.00	10,809.00
96	572		347.50	919.50
98		135	1,300.00	1,165.00
101	3,949		538.94	4,487.94
104	2,506		650.00	3,156.00
<b>TOTALS</b>	<b>\$137,816.00</b>	<b>\$12,550.00</b>	<b>\$23,231.71</b>	<b>\$148,497.71</b>

\* references the numbers assigned to Property Owners and Property addresses in Tab J of Exhibit #32, Exhibit #36 and Exhibit #39.

& All figures in Canadian dollars.