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Standing to Seek Judicial Review or Simply a Matter of Legislative Drafting?

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Cases Considered:

Real Estate Council of Alberta v. Henderson, 2007 ABCA 303

The Real Estate Council of Alberta (RECA), a self-regulatory organization established by section 3 of the Real Estate Act, R.S.A. 2000, c. R-5, administers the licensing of real estate agents, appraisers and mortgage brokers in Alberta and governs the competence and conduct of such industry members via authority granted by the Act. RECA is comprised of eleven (11) council members appointed by various industry associations, and one additional appointee selected by the Minister.

The Act requires that RECA appoint an executive director to administer its operations, including the receipt of complaints against industry members. Upon receipt of a complaint, the executive director must investigate and, thereafter, decide whether to initiate disciplinary proceedings. RECA staff compiles the case against an industry member and presents to a hearing panel, whose composition, function, and sanctioning authority is set out in Part 3 of the Act. Section 36 requires that a hearing panel consist of at least one appointed council member and two industry members. Industry members seeking to challenge a hearing panel decision have statutory rights of appeal, both internal to RECA and to the Court of Queen's Bench. The Act does not expressly contemplate appeals by RECA staff at any time in the disciplinary process.

It is with this legislative background that I comment on the Court of Appeal judgment in Real Estate Council of Alberta v. Henderson, 2007 ABCA 303. In response to a complaint, the executive director initiated disciplinary proceedings against Henderson, a licenced real estate agent. After hearing the case, a disciplinary panel sanctioned Henderson on some, but not all, grounds put forward by RECA enforcement staff. During the hearing, the panel denied RECA enforcement staff with the opportunity to cross-examine Henderson, and the executive director sought judicial review of this denial presumably thinking that cross-examination would have led the panel to sanction Henderson on all grounds put forward by staff.

The review application was dismissed by the Chambers justice, Madam Justice Adele Kent, on the basis that the governing legislation did not grant a right of appeal to the executive director. In a memorandum of judgment, the Court of Appeal (Fraser C.J.A., O'Brien J.A. and Rowbotham, J.A.) reversed the Chambers decision and went the extra step of setting aside the acquittals granted by the hearing panel. In effect, this granted the executive director a substantive remedy for the panel's procedural error.

The Henderson judgment asserts a constitutional basis for judicial review to overcome the absence of a statutory right of appeal afforded to the executive director. This aspect of the

decision is unremarkable relative to the Court's reasoning with respect to whether a statutory delegate may appeal its own decision.

In its recent judgment on similar facts, Bahcheli v. Alberta Securities Commission, 2007 ABCA 166, the Court held enforcement staff with the Investment Dealers' Association (IDA) could not appeal a disciplinary decision issued by the IDA district council. The Henderson judgment distinguishes Bahcheli on the basis that the applicable legislation in Bahcheli did not distinguish between decisions of the IDA and those of the IDA district council; hence, to allow the appeal would result in the IDA reviewing its own decision.

Contrast this with Henderson wherein the Court finds that the Act distinguishes RECA decisions from those of a hearing panel by virtue of section 44 which requires panel decisions to be served on both the industry member and RECA itself. It is debatable whether this provision establishes separation between a hearing panel and RECA or simply acknowledges the institutional structure of the regulatory entity where a hearing panel need not consist of all council members. This is particularly so when considering sections 49 and 51 which require the executive director to administer the service of documents to an industry member on behalf of a hearing panel with no mention of serving RECA itself. Obviously to require the executive director to serve documents on RECA is absurd, placing into question the appropriateness of allowing the executive director to appeal a panel decision. The Court, however, relies on statutory interpretation to decide the matter rather than address directly whether an administrative decisionmaker can impeach its own decision.

In the result, the Henderson judgment holds that the disciplinary panel was wrong to deny RECA staff the right to cross-examine Henderson, notwithstanding the Act only affords cross-examination to industry members. The Court reasons that Henderson, as a compellable hearing witness under the Act, must be subject to cross-examination in order that the disciplinary panel's right to receive relevant evidence is meaningful. My reading of the Act does not provide a panel with any rights with respect to evidence; rather the Act simply codifies the common law duty on the panel to consider relevant evidence.

Perhaps more troubling, the judgment fails to note that cross-examination in an administrative context is available typically where there is no other effective method of meeting the case against you. In my opinion, the common law right to cross-examination may have been available to Henderson, although the Act expressly provides for it anyways so the point is mute. It is far more questionable whether cross-examination ought to be available to RECA staff responsible for setting out the case against
Henderson in the first instance.