

**DISCIPLINE COMMITTEE OF THE  
HOME CONSTRUCTION REGULATORY AUTHORITY**

Graham Clarke, Chair ) March 3, 2025  
Nathan Kok )  
Emily Li )

BETWEEN:

HOME CONSTRUCTION REGULATORY AUTHORITY

- and -

BRIARWOOD (ANGUS) LTD., 863195 ONTARIO LTD.,  
BRIARWOOD ESTATES (SUTTON) INC., AND 2401886 ONTARIO LTD.

**ORAL RULING OF THE PANEL  
(Delivered orally on March 3, 2025)**

Demetrios Yiokaris, Niki Manwani, and Abigail March, for Home Construction Regulatory Authority (HCRA)

Justin Nasser, Helen Richards and Gordon Vance, for Briarwood (Angus) Ltd., 863195 Ontario Ltd., Briarwood Estates (Sutton) Inc., and 2401886 Ontario Ltd (the “Briarwood Parties”)

Erica Richler, Independent Legal Counsel

The Briarwood parties have requested an order from this Panel requiring the Home Construction Regulatory Authority to produce the following items:

- (a) The Briarwood Internal Memo;
- (b) The Financial Review (defined below) and all correspondence and documents related to the Financial Review that are not privileged;
- (c) A list of all documents the HCRA amassed as part of its inspection/investigation into the Briarwood Respondents that have not been produced to the Briarwood Respondents, which list

shall include the title, date, and author of each document, and a notation as to whether the HCRA claims solicitor-client privilege or litigation privilege over each document).

The Briarwood parties have also requested that this panel consider such and other further relief as this Panel may think appropriate, including various ancillary orders respecting the re-examination of Justin Vetro, the leading of evidence, the summoning of additional witness and relief in the event of production disputes, all as these pertain to any supplementary productions.

#### The Briarwood Internal Memo

Under cross-examination, Justin Vetro, HCRA's Acting Manager, Inspections, testified that he did not prepare an internal HCRA memo for this case, but that one was prepared by another HCRA inspector. It is understood from Mr. Vetro's testimony and the subsequent affidavit of Abigail March, sworn February 27, 2025, that this memorandum, and memoranda of this type, include a summary of the investigative findings, recommendations, analysis, comments, and opinions of the inspector.

It is further understood from the March affidavit that there is a second internal memorandum in this case, which is a Request for Prosecutorial Viability Assessment ("PVA"). As this is a document prepared for the purpose of seeking a legal opinion, HCRA's position is that this is a privileged document, which is unchallenged by the Briarwood parties. As a privileged document, the Request for PVA is outside the scope of this disclosure request and is to be considered to be separate and distinct from the Briarwood Internal Memo that is the subject of the matter at hand. Any references to the Briarwood Internal Memo in this decision specifically exclude the Request for PVA.

Although there were some discussions about this, HCRA does not claim that the Briarwood Internal Memo is a privileged document.

#### The Financial Reviews

Under cross-examination, Mr. Vetro testified that the HCRA commissioned a financial review of the case. The March affidavit confirms that a financial review was conducted by an outside consultant and further informs this Panel that there are likely four such documents.

Although there were some discussions about this, HCRA does not claim that the Financial Reviews are privileged documents.

#### The Positions of the Parties

In summary, the Briarwood Parties take the position that relevant documents, the existence of which was previously unknown to them, have been withheld by the HCRA and that the withholding of these documents prejudices their ability to make full answer and defence. The Briarwood Parties submit that the HCRA has a broad and continuing disclosure obligation and that the opportunity to bring a motion for disclosure has not lapsed and further submits that the

allegations are extremely serious, as are the implications of 142 findings of misconduct and that the severity of the allegations justifies a higher level of disclosure on the part of the HCRA.

In summary, the HCRA takes the position that the motion should be dismissed for any one or more of the following reasons:

1. The Briarwood Parties are out of time to make such an order and/or that the Briarwood Parties are in breach of a previous order,
2. HCRA has made robust disclosure,
3. Section 28 of the Regulation provides for a low standard of disclosure,
4. Revocation and suspension are not issues,
5. The documents are irrelevant.

#### Are the Briarwood Parties out of time to make a motion?

It is true that the July 24, 2024 Case Conference Report and Order set out a timetable for this matter, including a deadline for preliminary motions. It appears to this Panel that this timetable is not presented as an order, but as documentation of a schedule that the parties agreed to. In any event, order or not, given that the hearing has already commenced, the motion before the Panel is clearly not a preliminary motion and is therefore not subject to the July 24, 2024 Case Conference Report and Order.

The Panel relies upon Rule 7.02(5) of the HCRA Discipline and Appeals Committees Rules of Practice, which permits a Party to request a Motion at a Hearing. The Briarwood Parties' request is therefore not out of order, nor out of time.

The Panel notes that no submissions have been made to challenge the Panel's jurisdiction to make the orders requested. It is the position of the Panel that the Committee's Rules of Practice, O. Reg. 245/21 under the *New Home Construction Licensing Act, 2017* (hereinafter referred to as the Regulation), and the *Statutory Powers Procedure Act* are consistent in affirming that the Panel has the authority to make such orders. This is especially enshrined in rule 5.4(1) of the *Statutory Powers Procedure Act*, which permit this Panel to "at any stage of the proceeding before all hearings are complete, make orders for, (a) the exchange of documents; (b) the oral or written examination of a party; (c) the exchange of witness statements and reports of expert witnesses; (d) the provision of particulars; (e) any other form of disclosure."

It is argued by the HCRA that the HCRA informed the Briarwood parties that HCRA had not claimed to have produced all non-privileged evidence in their possession. HCRA therefore concludes that the onus was on the Briarwood Parties to make further inquiries. It is countered by the Briarwood Parties that they trusted that the HCRA would make disclosure properly and that the revelation of undisclosed, and, in their minds, relevant documentation has raised the possibility that there may be even more documentation that they would be entitled to.

The Panel notes that Mr. Alton's email, contained in the March affidavit, states "we have not claimed to have produced all non-privileged evidence in our possession". While this implies that there may be unproduced, non-privileged evidence in the possession of HCRA, it does not explicitly state that there is unproduced, non-privileged evidence in the possession of HCRA and

certainly does not explicitly state that there is unproduced, non-privileged relevant evidence in the possession of HCRA. The HCRA appears to be relying on the Briarwood Parties' ability to read between the lines of the response and to investigate more fully. While there is some merit in this argument, there appears to have been imperfect communication on both sides of this exchange, which should not be a barrier to the Briarwood Parties' ability to make full answer and fair defence.

The issue of the relevance of the evidence will be dealt with shortly.

#### Has the disclosure been robust?

The HCRA points to the thousands of pages contained in their evidence brief as a demonstration that the HCRA has already provided robust disclosure and further points to additional documentation disclosed to the Briarwood Parties over half a year ago.

The Panel acknowledges the volumes of material that have been disclosed. Having said that, "robust" does not appear as a qualifier for the level of disclosure required in any of the rules governing these proceedings, nor are the rules satisfied by a minimum page count.

It is the view of the Panel that the degree of robustness is not a factor in this decision.

#### Does Section 28 set a low barrier for disclosure?

Section 28 of the Regulation deals with disclosure of evidence. Without quoting chapter and verse, it is accepted by this Panel that this section only requires that a party disclose to the other parties a copy of written or documentary evidence when that party intends to tender said evidence at a hearing of this Panel. Nowhere in Section 28, or in fact anywhere in the Regulation, are there any rules governing documents in possession of a party that the party does not intend to tender as evidence. In other words, the Regulation is silent on this issue. If there were no other rules of practice, legislation, or case law, that may well be the end of the issue. This is not, however, the case.

At the other end of the disclosure spectrum, we find *Stinchcombe*<sup>1</sup> disclosure. While the *Stinchcombe* decision is a criminal one, the principles of procedural fairness have led to its application, to one degree or another, to administrative law. Counsel for both HCRA and the Briarwood Parties have provided various authorities to explain why, or why not, some level of *Stinchcombe* disclosure is applicable to this case. The Panel has read and considered each of these authorities.

Independent Legal Counsel also drew the Panel's attention to *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, a leading administrative law case in Canada, where Justice L'Heureux-Dubé wrote, for the majority:

"The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected. The purpose of the participatory rights contained within it is to ensure that administrative decisions are made using a fair and open

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<sup>1</sup> *R. v. Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 SCR 326

procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker. Several factors are relevant to determining the content of the duty of fairness: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself. This list is not exhaustive.”

*Hi-Rise and Neilas v. Ontario*<sup>2</sup> also references Baker at para. 18, stating:

“All of this to say that there can be no hard and fast rule as to the degree of disclosure that is appropriate in every case. The degree of disclosure will depend on the nature of the case and a consideration of what fairness requires in the context of that case. In the Supreme Court of Canada decision *Baker v. Canada (Minister of Citizenship and Immigration)* Justice L’Heureux-Dube wrote:

“[21] The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division* [...], “the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case”. All of the circumstances must be considered in order to determine the content of the duty of procedural fairness”

The Panel is mindful that the allegations against the Briarwood Parties are, indeed, serious, and the jeopardy to the Briarwood Parties is significant. Based on the evidence and allegations presented to date, up to \$14.2 million in base fines could be prescribed, an amount that may be increased by an alleged monetary benefit of up to \$18.9 million. Additionally, the Briarwood Parties may be ordered to pay costs to the HCRA.

This Panel does not have the authority to suspend or revoke a license. The Panel recognizes, however, that section 38(1) of the *New Home Construction Licensing Act, 2017* is clear that an applicant is entitled to the issuance or renewal of a builder’s license if, in the Registrar’s opinion, the applicant, *inter alia*, “affords reasonable grounds to believe that the applicant will carry on business in accordance with the law and with integrity and honesty”. The allegations in this case are that the Briarwood Parties violated section 3 of the Code of Ethics, the entirety of which is “In carrying on business, a licensee shall treat every person the licensee deals with fairly, honestly and with integrity”. There are, in fact, no other allegations. In the event that this Panel finds that the Briarwood Parties have violated section 3 of the Code of Ethics, which only relate to fairness, honesty and integrity, a plain reading of section 38(1) leads this Panel to conclude that the Briarwood Parties, and their officers and directors, would not be entitled to either a renewal of their existing licenses, or to the issuance of a new license in the future. While not the

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<sup>2</sup> *Hi-Rise and Neilas v. Ontario (CEO of FSRA)*, 2020 ONFST 1

same thing as a direct license revocation, the indirect implications on the licensees should not be ignored.

The Panel is of the view that the serious nature of the allegations, and the likely implications of multiple findings of violations of the Code of Ethics justifies a higher standard of disclosure than the minimum standard outlined in Section 28 of the Regulation.

#### Are License Suspension or Revocation Issues Relevant?

The HCRA submits that *Stinchcombe*-level disclosure has only been applied to administrative tribunals where a licensee faces revocation or suspension of their license, or where the tribunal's rules, themselves, require a *Stinchcombe*-level of disclosure. Neither of these two factors are present in the current proceedings.

The Panel has been made aware of at least one precedent, *Christian v. Northwestern General Hospital*,<sup>3</sup> was held to have some applicability to an administrative matter that did not involve license revocation. In fact, even in cases where potential license revocation was a factor, there is a common thread that a consequence of the loss of a license was potential damage to the reputation of the licensee and to the livelihood or future career prospects. In the matter before this Panel, we recognize that these are real implications, based on the outcome.

In fact, section 8 of the *Statutory Powers Procedure Act* states that:

“Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.”

Although the competence of the Briarwood Parties is not an issue, good character and propriety of conduct most certainly are. Regardless of the minimum disclosure requirements contained in Rule 28 of the Regulation, the disclosure requirements of Section 8 of the SPPA also apply and are not limited to those documents and information that are to be relied upon by the HCRA. The benchmark for disclosure in this case is “reasonable information of any allegations with respect thereto.”

The Panel is of the view that while the bulk of administrative case law applying *Stinchcombe* pertains to license suspension or revocation, this is not absolute, and other factors should be considered.

#### Are the Documents Irrelevant?

The HCRA submits that the Briarwood Internal Memo, which contains a summary of the investigation along with comments and analysis of the investigator, is irrelevant. On this point, the HCRA relies in part upon *Kitmitto*.<sup>4</sup> A review of *Kitmitto* and other decisions support HCRA's position, classifying documents of this type as staff work product, irrelevant, and not subject to disclosure.

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<sup>3</sup> *Christian v. Northwestern General Hospital*, 1993 CarswellOnt 1903, [1993] O.J. No. 3380, 115 D.L.R. (4th) 279

<sup>4</sup> *Kitmitto (Re)*, 2020 ONSC 15 (CanLII)

The Briarwood Parties did not provide any authorities to contradict those provided by the HCRA. Instead, the Briarwood Parties rely on Mr. Vetro's testimony that he has previously produced memoranda similar to the Briarwood Internal Memo in disclosure packages. Mr. Vetro was not asked, nor did he offer, information about the context of these memoranda or information about how the memoranda, or the circumstances might be similar or different.

Based on the case law before this Panel, and the description of the Briarwood Internal Memo, the document is clearly staff work product and not relevant. While Mr. Vetro has indicated that similar memoranda have been included by him in other disclosure packages, this is not relevant to the current proceedings and should in no way set a standard for this or any future proceedings. The fact that Mr. Vetro has disclosed similar documents in the past did not, in and of itself, have the effect of making those documents relevant to those matters, nor does it make the Briarwood Internal Memo relevant.

The Financial Reviews, on the other hand, were prepared by an outside consultant. As such, it does not fall within the category of staff work product. The HCRA notes that the financial reviews are irrelevant because they exclusively provide analysis, comments, and opinions. The Panel notes that the *Shambléau*<sup>5</sup> decision of the Ontario Securities Commission consistently and specifically refers to internal memoranda and internally generated documents. The Panel takes the view that documents involving outside consultants are not, by default, to be considered irrelevant. The Panel is persuaded by *David Charles Phillips et al.*,<sup>6</sup> a 2012 Decision of the Ontario Securities Commission, itself relying on *Shambléau*, which defines "staff work product" as "internally-generated documents evidencing Staff's analysis, commentary, opinion or discussions about commencing proceedings".

Staff work product aside, there remains the issue of whether or not the Financial Reviews are irrelevant for other reasons. Other than the assertion that these "exclusively provide analysis, comments, and opinions", no other basis for considering them to be clearly irrelevant has been provided.

A review of case law suggests that there is a spectrum of relevance, including "clearly irrelevant", "relevant", and "possibly relevant." While the relevance of some documents can be readily established based on a description, this may be more difficult to determine with other documents. It may even be that one party's filter for "possibly relevant" may be slightly different than another party's. As noted by the Briarwood Parties, the reviews were obtained during an investigation and are part of the investigative file. While HCRA does not intend on relying on it, this Panel is of the view that the reviews may be possibly relevant. As noted, no privilege has been claimed over these reviews and the reviews are not irrelevant on the basis of them being staff work product.

### Procedural Fairness

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<sup>5</sup> *Shambléau (Re)*, 2002 LNONOSC 179 (QL)

<sup>6</sup> *David Charles Phillips et al.*, 2012 ONSEC 43 (CanLII)

As described above, the Panel considers the allegations before it to be serious. Case law reviewed by this Panel makes it clear that there is no one-size-fits-all approach when it comes to disclosure. In making our decision, this Panel has given due consideration to the five factors outlined in *Baker v. Canada*. It is the view of the Panel that the serious nature of the allegations demand that the Briarwood Parties be given every reasonable opportunity to fairly defend themselves and that, in this case, the disclosure rules contained in Section 28 of the Regulation, if strictly adhered to, would prejudice the Briarwood Parties' ability to make full answer and defence.

The Panel is persuaded by *Christian v. Northwestern General Hospital* where Trafford J wrote at paras. 19 and 20:

19 *R. v. Stinchcombe* also recognized that the "fruits of the investigation" in the possession of the Crown "are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice be done" (p.331). We are of the opinion that this point applies with equal force to the proceedings before a Board of Inquiry and that the fruits of the investigations are not the property of the Commission.

20 We are also of the opinion, while not necessary to our decision, that the role of Commission counsel is analogous to that of the Crown in criminal proceedings.

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to bring before a jury, what the Crown considers to be credible evidence relevant to what is alleged to be a crime. *Stinchcombe*, p.333.

The tradition of Crown counsel in this country in carrying out their role as "ministers of justice" and not as adversaries has generally been very high. *Stinchcombe*, p.341.

Applying this to the current proceedings, the Panel is of the opinion that the role of HCRA counsel is analogous to the Commission counsel in *Christian* and therefore analogous to the Crown in criminal proceedings. Based on the *Christian* and *Stinchcombe* reasons, it should not be the role of the HCRA to secure a conviction, but to allow all credible evidence to be brought before this Panel, especially given the serious financial and reputational jeopardy faced by the Respondents.

It is the view of the Panel that Section 8 of the *Statutory Powers Procedure Act* supports our position.

### Decision

The motion to require the HCRA to produce the Briarwood Internal Memo is dismissed.

The Panel orders the HCRA to produce the Financial Reviews and all possibly-relevant and non-privileged correspondence and documents related to the Financial Reviews to the Briarwood Parties.

The Panel orders the HCRA to produce a list of all possibly-relevant and non-privileged documents collected as part of HCRA's investigation into all four Briarwood Parties that have not been produced to the Briarwood Parties, which list shall include a title, and, where applicable, the date and author of each document and to which of the Briarwood Parties the document is applicable.

The Panel will not be making any ancillary orders at this stage but may consider hearing future motion requests based on the outcome of the above-noted disclosure. The Panel cautions all parties that, for the sake of expediency and efficiency, such requests should be kept to a minimum to avoid prolonging these proceedings.