Case 005064

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF section 39(1)(b), 41(1) and 43(1) of the *Real Estate Act*, R.S.A. 2000, c. R-5,

AND IN THE MATTER OF a Hearing regarding the conduct of Mehboob Ali Merchant, real estate associate currently registered with Century 21 Platinum Realty

Hearing Panel:	Ramey Demian	Chair, Panel Member (Council Member)
	Kevin Hall	Panel member (Industry Member)
	Julia Jones	Panel member (Public Member)

Date of Decision: October 20, 2019
Hearing Dates: September 9 and 10, 2019
October 15, 2019 (by telephone conference call)

Case Presenter for the Executive Director: Christopher Davison

Industry Member: Mehboob Ali Merchant

Decision of the Hearing Panel

Introduction

The Real Estate Council of Alberta ("RECA") is the independent governing authority that sets, regulates, and enforces standards for real estate brokerage, mortgage brokerage, property management, and real estate appraisal professionals in Alberta. RECA reviews the industry professionals' compliance with the *Real Estate Act,* R.S.A. 2000, c. R-5, *Regulations,* and *Rules*.

It was in this capacity that the Executive Director, upon completing a conduct investigation of real estate associate Mehboob Ali Merchant, referred the matter to a hearing panel, in accordance with Section 39(1)(b) of the *Real Estate Act*. A Notice of Hearing dated May 1, 2019 was issued to Mehboob Ali Merchant, an Industry Member registered with Century 21 Platinum Realty. The Notice of Hearing alleged conduct deserving of sanction for breaches of the *Real Estate Act* and *Real Estate Act Rules*. The conduct pertained to a real estate transaction that occurred in and

around February 2011 wherein the Industry Member represented a buyer of a condominium unit in Edmonton and conduct pertaining to the provision of property management services to the same buyer for the same condominium in 2014 and 2015. The Notice of Hearing also alleged that the Industry Member withheld records during the investigation of the aforementioned conduct, contrary to Section 38(4.1) of the *Real Estate Act*.

Preliminary Applications

The Notice of Hearing set the hearing dates from June 3, 2019 to and including June 6, 2019. The Industry Member applied for an adjournment of the hearing dates because certain of those dates fell on a religious holiday. On May 28, 2019 the Hearing Panel granted the adjournment, out of respect for religious observance, and new hearing dates were set for Thursday, June 6, 2019 and Friday, June 7, 2019, which were dates after the religious holiday was to have ended.

On May 30, 2019 the Industry Member applied for a second adjournment of the hearing. The Industry Member's written reasons for requesting the adjournment were that he was departing on June 3, 2019 to attend to his elderly parents and he had been unable to find legal counsel to represent him in his absence.

The Executive Director did not agree to the adjournment application for several reasons. First, the hearing panel's decision dated May 28, 2019 read, "If either party wish to request a further adjournment, you must appear before the Hearing Panel in person on June 6, 2019." Second, the Industry Member's written submissions did not propose alternate dates for the hearing and had not provided a date when he would return to Alberta from visiting his elderly parents in the United States. Finally, the case presenter had notified the Industry Member of his right to retain counsel on February 1, 2019 and that he had ample time to retain counsel.

The Hearing Panel granted the Industry Member's application for an adjournment in a Decision dated June 11, 2019. The Hearing Panel did not at the time of issuing its Decision provide reasons for granting the adjournment, but its reasons were as follows:

1. The Industry Member had bought the plane ticket to visit his parents prior to the Hearing Panel rendering its decision in the first adjournment and providing the new dates for the hearing;

2. It was plausible that the Industry Member would have believed that the first adjournment would be granted and that the new hearing dates would be for a time further in the future; and
3. Extra time would afford the Industry Member more time to obtain legal counsel.

The new hearing dates were set for "Monday, September 9, 2019; Tuesday, September 10, 2019; Wednesday, September 11, 2019; and if required Friday, September 12, 2019".

On June 14, 2019, the Executive Director made an application to the Hearing Panel asking for:

1. The Hearing Panel to provide reasons for its June 11, 2019 decision, which granted the Industry Member's application for a second adjournment;
2. The opportunity to give submissions regarding the Executive Director's request for costs to be awarded against the Industry Member if the Hearing Panel granted the adjournment or reasons for not awarding costs against the Industry Member;
3. The Hearing Panel to make the new hearing dates set out in the June 11, 2019 Decision, peremptory; and
4. Clarification of the hearing date of "Friday, September 12, 2019" set out in the Decision.

In a Decision dated, August 15, 2019, the Hearing Panel adjourned the Executive Director's application to the commencement of the hearing, being September 9, 2019, and clarified that the reference to "Friday, September 12, 2019" in the June 11, 2019 Decision was a typographical error and that the Hearing Panel had intended the Decision to refer to Friday, September 13, 2019, not Friday, September 12, 2019.

The Hearing Panel also ordered that submissions in respect of costs of all preliminary applications be adjourned to the hearing date of September 9, 2019.

Finally, the Hearing Panel also indicated that the reasons for all of its Decisions to that date, including preliminary applications, would be provided at the end of the hearing when the Hearing Panel renders its decision in the matter regarding the alleged conduct of the Industry Member.

Industry Member's Third Application for Adjournment

On September 3, 2019, six days before the commencement of the hearing on September 9, 2019, the Hearing Panel received a third request for an adjournment from the Industry Member. The Executive Director opposed the application. On September 6, 2019 the Hearing Panel decided to adjourn the application for an adjournment to the commencement of the hearing on September 9, 2019 and would hear the Industry Member's application for an adjournment at the outset of the hearing. The hearing panel conveyed that information to the parties through the RECA hearing administrator in an email that stated:

> The Hearing Panel has considered the submissions of the Industry Member, Mehboob Ali Merchant, dated September 3, 2019, the submissions of counsel for the Executive Director dated September 4, 2019, the further submissions of the Industry Member dated September 5, 2019, and the further submissions of counsel for the Executive Director dated September 5, 2019.
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> The Hearing Panel hereby adjourns the Industry Member's application to the outset of the hearing scheduled to commence on Monday, September 9, 2019 at 9:30 AM. Both the Industry Member and the Executive Director should be prepared to present their respective cases in full in the event that an adjournment is not granted by the Hearing Panel.

On September 9, 2019 at 9:30 a.m., both the case presenter for the Executive Director and the Industry Member attended the hearing. Both parties had no objection to the composition of the hearing panel and the Industry Member confirmed that he knew of his right to obtain legal counsel.

The Industry Member confirmed he wished to proceed with his third adjournment application and the Executive Director confirmed that he opposed the adjournment. Therefore, the Hearing Panel heard oral submissions from both parties and reviewed the written submissions once again that were received from both parties.

The Industry Member submitted that he had applied for the third adjournment on September 3, 2019. He submitted that he had been and was still looking for counsel. He stated that he had contacted many lawyers and they were either not available, were in a conflict of interest or not taking new clients. He submitted that he had discussions with one lawyer but he or she was working with RECA on an ad hoc basis. He wanted a lawyer who practiced administrative law, had no conflict and

was comfortable with a RECA case. The application of this criteria to his search for a lawyer to represent him had resulted in him being unable to retain counsel. His written submissions included a list of lawyers that he contacted or for which he received a referral.

The Industry Member submitted that he had also tried to come to an agreement with the Executive Director, pursuant to s.46 of the *Real Estate Act,* but he felt he was being asked to admit to facts that were not true and that he would prejudice himself. He submitted that he has a right to legal counsel and the lack of counsel would severely prejudice him.

With respect to the delay that would be caused by a further adjournment, the Industry Member submitted that more than four years had passed since the complaint to RECA was filed but the Notice of Hearing was not served to him until May of 2019. That delay was caused by the Executive Director and it was a much longer delay than any delay resulting from the adjournment he was seeking.

The Industry Member reviewed recent RECA cases and provided names and examples of cases where adjournments had been granted. He did not provide the Hearing Panel with copies of those cases. For example, he submitted that in *Paranych* the actual hearing was 22 months after the Notice of Hearing was issued and five adjournments were granted and of those, four were requested by the Industry Member and one was requested by the Executive Director. In another case, he submitted, there was a delay of three years and ten months and although a lawyer was present at the hearing, an adjournment was granted. He also submitted that the Ontario Court of Appeal set out reasons to grant an adjournment and those reasons included that the consequences of the hearing were serious and there was prejudice to the person. The Industry Member alleged that it was the Executive Director's intent to revoke his license for life and prohibit future registration. It was the Industry Member's position that this was a serious consequence. The allegations of fraud against him were serious and he would be prejudiced if the hearing proceeded at this time because he did not have a lawyer to represent him. It was his position that he could not represent himself and he had a right to have counsel represent him.

The Industry Member submitted that he intended to retain a lawyer, David Kobylnyk, who was currently suspended from practicing law until October 2019. It was his position that he could find a date that would suit this suspended lawyer once he returned to practice.

In the Industry Member's written submission dated September 5, 2019 he also stated that he had just received an updated hearing binder and list of documents from the Executive Director and was notified of additional witnesses which was contrary to the required seven day exchange period required in the *RECA Hearing and Appeal Practice and Procedure Guide*. He submitted that the introduction of two new witnesses was doubling the number of witnesses and seemed simply unfair at that point. This situation created an unwarranted "surprise factor", making the hearing process unfair and lengthy.

The Hearing Panel noted that later, in the Industry Member's rebuttal, he stated that he was not using the witness issue as support for his adjournment application.

The Industry Member submitted that he wanted to deal with the matters set out in the Notice of Hearing and that were before the Hearing Panel, but not at the expense of incriminating himself.

In both his written submissions and the oral submissions, the Industry member referred to the mental and financial stress he was under due to the RECA investigation and hearing, having an ill mother and having a young child. He submitted this gave him no choice but to retain legal counsel to represent him.

The Executive Director entered a three-tab package of documents which was exhibit 1 for this preliminary application (third adjournment application). The packaged contained both parties' written submissions, evidence supporting the Executive Director's opposition to the adjournment application and the case, *Royal Bank of Canada v. Independent Electric and Controls Ltd*, 2019 ABQB 217. This case was submitted by the case presenter for the Executive Director which, in his submissions, supported the proposition that any settlement or agreement negotiations pursuant to the s. 46 of *Real Estate Act* between the Industry Member and the Executive Director were the subject to privilege. The privilege belonged to both parties and could not be unilaterally waived or overridden by either of them.

It was the Executive Director's position that the fact that settlement negotiations occurred could be disclosed but not the content of the negotiations. The case presenter submitted that the hearing date was always September 9, 2019 and it was not affected by whether there was an agreement or not. The negotiations had occurred as recently as August 30, 2019. It was the Executive Director's position agreement negotiations did not affect the Industry Member's obligation to be ready for the hearing.

It was the Executive Director's position that the Industry Member knew about his need to retain counsel and the seriousness of his case since February 2, 2019. The evidence submitted by the Executive Director included an email from RECA to the Industry Member dated Feb 1, 2019 that stated this was a serious matter and that reviewing all the disclosure evidence would take considerable time. He was advised to retain counsel soon to avoid delays. The Industry Member was advised that the Executive Director would oppose an adjournment that was based on the Industry Member's inaction or failure to retain counsel. The email confirmed that the Industry Member had received the notice of hearing, disclosure and argument for sanction and advised him to read the documents to be informed of the case against him.

The Executive Director submitted that the two previous adjournments requested by the Industry Member were granted and there had been a generous amount of time to be prepared for the hearing, including retaining counsel. The Executive Director submitted that the Industry Member's lack of counsel had been a reason for his previous adjournment request. The case presenter submitted that the adjournment was not for procedural fairness but was an unreasonable indulgence in the Industry Member's laziness.

It was the Executive Director's position that providing a list of lawyers that the Industry Member had contacted or been referred to, did not change his obligation to retain one or to be ready for the hearing.

The Executive Director submitted that at this point the Industry Member had not retained a lawyer and was only planning to retain a suspended lawyer which was problematic. The Industry Member was attempting to adjourn the hearing without a known hearing date again, which was unacceptable.

It was the Executive Director's position that the Industry Member had a right to retain legal counsel, but he did not have the right to legal counsel. For procedural fairness, the Industry Member required a generous amount of time period to obtain a lawyer and the seven months he had was generous.

Regarding the prejudice that the Industry Member believes he will suffer if not granted the adjournment, the case presenter was not sure what that meant and did not know how that word was being employed by the Industry Member.

The Executive Director agreed with the Industry Member that the consequences of the hearing were serious, but that the Industry Member had ample time to prepare for the hearing.

Regarding the changes to the disclosure and the requirement that they be provided seven days in advance of the hearing, there were only two tabs: one with an email and photos, and a second with Facebook screen shots. There were no other changes to the disclosure documents and the Industry Member had been provided with the remaining documents in May 2019. This was plenty of time for the Industry Member to prepare for the hearing and he had known of the minor changes which afforded him plenty of time to be ready for the hearing.

With respect to the list of witnesses, providing a witness list was not an obligation. It was sent to the Industry Member as a courtesy. The Executive Director's position was that he could call whatever witnesses he wished at the hearing.

Regarding the Industry Member's submission that other cases granted adjournments for longer periods of time, the Executive Director stated that whether an adjournment was granted or not was at the discretion of the hearing panel and if other cases did or did not grant adjournments that was irrelevant to the Industry Member's application.

The Executive Director submitted that additional reasons not to grant the adjournment were that there were witnesses from Edmonton at the hearing and expenses had been incurred to travel to Calgary and there were hotel expenses. Also, society does not have a taste for these disciplinary matters taking too long.

Hearing Panel's Decision on Third Adjournment Application

The Hearing Panel carefully considered the parties' submissions regarding the Industry Member's application for a third adjournment and denied the application.

Regarding the Industry Member's submission that there were other RECA cases where more adjournments were granted and for longer periods of time, the Hearing Panel found that adjournment decisions are made on a case by case basis, after careful consideration of all the factors presented to the hearing panel. This was not a reason for this Hearing Panel to grant a third adjournment in this case.

Regarding the section 46 settlement negotiations that the parties were engaged in and that being a reason for an adjournment, the Hearing Panel did not consider this to be a factor to consider as negotiations with the Executive Director would not impede preparations for a hearing.

With respect to the delay or time period from when the Executive Director received the complaint and the Notice of Hearing was issued, that is not relevant to the adjournment application. However, this length of time was considered by the

Hearing Panel as time that the Industry Member could have sought legal counsel or advice or been preparing for the hearing.

The Industry Member was aware of the complaint to RECA in November 2015 and he could have retained legal counsel at any time since that date. He received disclosure, the Notice of Hearing and submissions on sanction in May and February 1, 2019, respectively. These time frames afforded the Industry Member ample time to prepare for the hearing and to obtain legal counsel if he wished. His third adjournment application was for an unknown time frame and based on his desire to speak with a suspended lawyer about possibly representing him. Whether that lawyer could represent him was an uncertainty and the adjournment would have been for an uncertain time period.

The Industry Member is not entitled to be represented by legal counsel; rather, the Industry Member had the right to have the opportunity to retain legal counsel. The hearing panel finds that he had ample time to obtain legal counsel if he wished.

The Hearing Panel acknowledges that the Industry Member may be under stress due to the disciplinary process but that is normal and not a reason for an adjournment.

The Industry Member had the ability to respond to the allegations and he is fully aware of the allegations against him. He has had discussions with representatives of the Executive Director and therefore he had turned his mind to the allegations and their consequences. He received materials and disclosure in plenty of time to prepare for the hearing.

The Industry Member demonstrated in the adjournment application that he was fully aware of the allegations and was capable of defending himself. The Hearing Panel found that it was fair to proceed with the hearing.

Finally, the Industry Member could object to the admission of any document or evidence that the Executive Director submitted to the Hearing Panel on the grounds that he did not have sufficient time to review or address that particular evidence. This was not grounds for an adjournment.

After the Hearing Panel gave its decision that the Industry Member's third adjournment application was denied, the Hearing Panel then proceeded to address the Executive Director's application dated June 14, 2019. The case presenter for the Executive Director advised that he wished to wait until the end of the hearing to proceed with his application.

Shortly thereafter, the parties requested a brief recess to discuss a possible section 46 Admission of Conduct Deserving of Sanction agreement. The brief recess was extended, and the Hearing Panel reconvened at 1 p.m. on September 9, 2019 when the parties indicated they had negotiated an Admission of Conduct Deserving of Sanction agreement pursuant to s.46 of the *Real Estate Act*. Although the parties had not agreed to the sanction, they had agreed that costs awarded against the Industry Member would be capped at $1500.

The Industry Member confirmed to the Hearing Panel that he signed the Admission of Conduct Deserving of Sanction document freely. He read the agreement again in front of the Hearing Panel and confirmed that it was the document he agreed to and signed. However, he did state that he was signing the document because he did not have legal counsel, he had no options and did not want to waste people's time. In other words, he did not provide the Hearing Panel with a clear unequivocal confirmation that he was in agreement with the document he signed. The Hearing Panel offered another five minutes recess for the Industry Member to consider whether he wanted to proceed with the s.46 Admission of Conduct Deserving of Sanction. The Industry Member declined the offer.

The Hearing Panel reviewed the Admission of Conduct Deserving of Sanction document with him again and he agreed to all three items on page 1:

1. I, Mehboob Ali Merchant, acknowledge that I have been given an opportunity to seek the advice of a lawyer before I sign this Admission.
2. I agree to this Admission voluntarily.
3. I admit to the facts and breaches set out in schedule "A" and admit that my conduct is deserving of sanction.

The Admission of Conduct Deserving of Sanction dated September 9, 2019 was entered as Exhibit 1 of the hearing and is Appendix "A" to this Decision.

Sections 46 and 47 of the *Real Estate Act* deal with instances where the Industry Member admits to conduct deserving of sanction, as follows:

> 46(1) An industry member may, at any time after the commencement of proceedings under this Part and before a Hearing Panel makes its findings in respect of the industry member's conduct, submit to the executive director a statement of admission of conduct deserving of sanction in respect of all or any of the matters that are the subject matter of the proceedings.

(2) A statement of admission of conduct may not be acted on unless it is in a form acceptable to the executive director and meets any additional requirements set out in the rules.

47(1) If a statement of admission of conduct is accepted, the executive director shall immediately refer the matter to a Hearing Panel, and in that case the Hearing Panel shall deal with the matter as if it had been referred to it under section 39(1)(b).

(2) If a statement of admission of conduct is accepted, each admission of conduct in the statement in respect of any act or matter regarding the industry member's conduct is deemed for all purposes to be a finding of the Hearing Panel that the conduct of the industry member is conduct deserving of sanction.

The Industry Member admitted to three breaches of section 42(b) of the *Real Estate Act Rules.* This Rule states:

42 Industry members must not:

(b) participate in fraudulent or unlawful activities in connection with the provision of services or in any dealings;

He also admitted to breaching section 17 of the *Real Estate Act* which states:

17 No person shall

(a) trade in real estate as a real estate broker,

(b) deal as a mortgage broker,

(c) act as a real estate appraiser, or

(d) advertise himself or herself as, or in any way hold himself or herself out as, a mortgage broker, real estate broker or real estate appraiser

unless that person holds the appropriate authorization for that purpose issued by the Council.

And "trade" is defined in the *Real Estate Act* as:

(x) "trade" includes any of the following:

(i) a disposition or acquisition of, or transaction in, real estate by purchase or sale;

(ii) an offer to purchase or sell real estate;

(iii) an offering, advertisement, listing or showing of real estate for purchase or sale;

(iv) property management;

(v) holding oneself out as trading in real estate;

(vi) the solicitation, negotiation or obtaining of a contract, agreement or any arrangement for an activity referred to in subclauses (i) to (v);

(vii) collecting, or offering or attempting to collect, on behalf of the owner or other person in charge of real estate, money payable as

(A) rent for the use of the real estate, or

(B) contributions for the control, management or administration of the real estate;

(viii) any conduct or act in furtherance or attempted furtherance of an activity referred to in subclauses (i) to (vii).

The Industry Member also admitted to breaching section 38 (4.1) of the *Real Estate Act* which states:

> s.38 (4.1) A person shall not withhold, destroy, conceal or refuse to produce any books, documents, records or other things required for the purpose of an investigation under this section.

Pursuant to section 47(2) of the *Real Estate Act*, the admissions in the Admission of Conduct Deserving of Sanction document are deemed for all purposes to be a finding of this Hearing Panel and that conduct is conduct deserving of sanction. Accordingly, the Hearing Panel finds that the Industry Member engaged in conduct deserving of sanction, and that specifically he breached the following:

a. section 42(b) of the *Real Estate Act Rules* in three instances;
b. section 17 of the *Real Estate Act; and*
c. section 38(4.1) of the *Real Estate Act*.

Sanction

The hearing proceeded to Phase 2, submissions on sanction. The Industry Member made an application for an adjournment of that phase of the hearing. This was the fourth adjournment application.

The Industry Member submitted that he would like to apply to withdraw from the industry pursuant to section 54 of the *Real Estate Act*, which requires RECA's council's approval. The next council meeting was scheduled for October 16, 2019 and therefore he requested an adjournment until after council had made a decision about his application.

The Executive Director opposed the application for an adjournment because a section 54 application must be submitted by the Industry Member (only an Industry Member could submit an application and that it was possible that the Industry Member would not make the application). In addition, it was argued that if the sanction phase of the hearing proceeded, it did not preclude the Industry Member from making the section 54 application.

The Hearing Panel considered the Industry Member's further application for an adjournment and decided not to grant the adjournment because proceeding with the sanction phase of the submissions would not preclude the Industry Member from making a section 54 application to RECA's council. However, the Hearing Panel did adjourn the hearing to the following day, September 10, 2019, to allow the Industry Member time to prepare his case and his submissions for the sanction phase of the hearing.

The Hearing Panel reconvened on September 10, 2019 at 9:30 am and both parties were present. The Panel was provided with an email sent by the Industry Member to the Hearings Administrator that was time stamped as September 9, 2019 at 4:19 asking for an adjournment of the sanction phase of the hearing. This email became exhibit 1 of the Industry Member's fifth adjournment application.

The Industry Member submitted that he was not prepared for the sanction portion of the hearing and would like legal counsel to assist him. He submitted that he was under stress and had only ten hours sleep in the preceding three days. He was afraid of the consequences of continuing with the proceedings and that costs awarded against him would be exuberant, that is, up to $30,000.

The Executive Director submitted that the Hearing Panel had already considered the Industry Member's application for an adjournment of the sanction phase based on the argument that the Industry Member had not obtained legal counsel. The

Executive Counsel submitted emails sent to the Industry Member on February 1, 2019 that showed all the cases he would be relying on for sanction phase of the hearing and another email sent to the Industry Member on August 12, 2019 about how to make sanction arguments. These were exhibit 2. The Industry Member admitted he received both emails.

It was the Executive Director's position that the sanction phase of the hearing was not more serious that the first part of the hearing. The Executive Director submitted that if the Industry Member was not prepared, that was his fault. Stress is normal and not a reason to grant an adjournment. The sanction phase would only deal with conduct that the Industry Member had admitted. There was no risk of admitting more. In addition, costs had been set at a maximum of $1500 so the fear of high costs being awarded against him could not be a reason for an adjournment.

The Industry Member rebutted the arguments of the Executive Director, stating that he only had three months to retain counsel and he had not been successful. He wanted two particular lawyers to represent him and those lawyers were not available. One of the lawyers had had success with a RECA file and the Industry Member believed it was unfair that he should be forced to pick just any lawyer to represent him. He submitted that he could not find a suitable lawyer.

The Hearing Panel decided to deny the Industry Member's fifth request for an adjournment as there were no new arguments from the Industry Member to consider. It was the same arguments he had used in the previous applications at the hearing. The Hearing Panel had found that he had ample time to retain counsel.

The Industry Member then requested the Hearing Panel grant him the right to submit his submission on sanction in writing. The Hearing Panel proceeded to hear the Executive Director's oral submissions on sanction and then would address the Industry Member's request to submit written submissions after the case presenter for the Executive Director had completed his oral submissions.

The Executive Director provided the Hearing Panel with a Binder which included his written submission on sanction and the case law he was relying on. The Executive Director stated that he had provided the Industry Member with all the case law he was relying on in February 2019. The finalized argument was provided to the Industry Member on September 9, 2019 with the only change being the inclusion of the section 46 Admission of Conduct Deserving of Sanction document.

The case presenter for the Executive Director advised the Hearing Panel that the Executive Director would not be calling any witnesses in phase 2 of the hearing.

The Industry Member then advised the Hearing Panel that he would not be calling any witnesses in respect of phase 2 of the hearing.

The case presenter for the Executive Director then addressed his preliminary application wherein he asked for the Hearing Panel to provide reasons for granting the Industry Member's second adjournment request. He provided to the Hearing Panel, its Decision and case law in support of his position that the Hearing Panel must provide reasons and not just articulate the submissions of the parties and render its decision. The Hearing Panel advised the Executive Director that reasons would be provided in the Hearing Panel's final decision. The Executive Director withdrew the remaining aspects of that preliminary application.

The Hearing Panel then heard the Executive Director's oral submission on sanction but for reasons set out below, the Hearing Panel did not rely on those oral submissions and instead relied on the Executive Director's written submissions, rebuttal written submissions and oral closing submissions heard on October 15, 2019.

By the written submissions of the Executive Director it was submitted that the Hearing Panel should impose license cancellation and a lifetime licensing prohibition on the Industry Member because his misconduct involved intentional fraud and because the evidence did not establish significant or compelling mitigating factors.

It was the Executive Director's submission that *Jaswal v Newfoundland (Medical Board)* lists the factors relevant to a sanction in professional discipline cases. However, it was the Executive Director's position that when a professional participates in a serious and egregious breach of his professional conduct and responsibilities which undermines public confidence in the industry, then the *Jaswal* factors of general deterrence and the confidence of the public in the integrity of the profession are weighted far above other factors.

The Executive Director submitted that in these cases license cancellation and lifetime licensing prohibition becomes the presumptive sanction and it must only be departed from if there is evidence of significant and compelling mitigating circumstances. He submitted that there were no compelling mitigating circumstances in this case.

In the *Law Society v Ryan*, 2003 SCC 20 (*Ryan*) at paras. 58-59, the Supreme Court endorsed the sanction of license cancellation and lifetime licensing prohibition by a Panel on the following findings:

a. Though "the professional self-government regime requires that each case must be decided on its own facts, it is nonetheless relevant" to consider if the member's misconduct was similar to ones for which "professional disciplinary bodies have previously imposed a sanction of disbarment."
b. The misconduct amounted to a "serious and egregious breach of his professional conduct and responsibilities" which "undermines public confidence in the … system and is so improper that only significant and compelling factors would mitigate the seriousness of such unethical behaviour";
c. The evidence of mitigation is not compelling; and
d. A previous disciplinary record may be a relevant consideration.

The Executive Director submitted that *Ryan* was authority from the Supreme Court of Canada that was binding on the Panel and it showed there was a scope of conduct which warrants license cancellation. License cancellation and lifetime licensing prohibition was not limited to particular misconduct but rather any misconduct which meets the conditions described above.

The Executive Director submitted that in *Adams v. Law Society of Alberta*, 2000 ABCA 240 (*Adams*), the Alberta Court of Appeal upheld a finding of disbarment by the Law Society. The Court found that undermining confidence in the profession can be rooted in a member's single violation of the public's trust:

> [9] Every member is or ought to be aware that **not only one's professional conduct, but also one's personal conduct** may be subject to scrutiny when that conduct may likely affect one's professional reputation, integrity and trustworthiness. The misconduct may or may not be criminal. Unlike criminal behaviour per se, the individual's misconduct may have a significant effect on the reputation of the legal profession generally.
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> [10] Historians may question the origin and the history of the oft-repeated statements about the honour and integrity of the legal profession, but it cannot be denied that the relationship of solicitor and client is founded on trust. That fundamental trust is precisely why persons can and do confidently bring their most intimate problems and all manner of matters great or small to their lawyers. **That is an overarching trust that the profession and each member of the profession accepts. Indeed, it is the very foundation of the**

> **profession** and governs the relationships and services that are rendered. While it may be difficult to measure with precision the harm that a lawyer's misconduct may have on the reputation of the profession, **there can be little doubt that public confidence in the administration of justice and trust in the legal profession will be eroded by disreputable conduct of an individual lawyer**.
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> [11] It is therefore erroneous to suggest that in professional disciplinary matters, the range of sanctions may be compared to penal sentences and to suggest that only the most serious misconduct by the most serious offenders warrants disbarment. Indeed, that proposition has been rejected in criminal cases for the same reasons it should be rejected here. **It will always be possible to find someone whose circumstances and conduct are more egregious than the case under consideration. Disbarment is but one disciplinary option available from a range of sanctions and as such, it is not reserved for only the very worst conduct engaged in by the very worst lawyers.** [**Emphasis added**.]

It was the Executive Director's position that the Court found that disbarment need not be reserved for the very worse misconduct, but rather anytime that misconduct was bad enough.

The Executive Director submitted that certain types of misconduct by members is so egregious that, by its very nature, it brings the reputation of the profession into disrepute and this type of misconduct warrants a presumptive license cancellation and lifetime licensing prohibition, absent substantial and compelling mitigation.

In the *Law Society of Upper Canada v. Abbott,* 2017 ONCA 525 (*Abbott*) the Ontario Court of Appeal accepted the reasoning of *Law Society of Upper Canada v. Mucha*, 2008 ONLSAP 5 in regard to the principles of presumptive license cancellation and lifetime licensing prohibition. The Panel in *Mucha* stated the basis for the presumption: it is the result of the weight applied to protection of the profession's reputation:

> *Bolton v. Law Society*, which has frequently been cited with approval by disciplinary panels here in Ontario, emphasizes that penalties are designed to address not only specific and general deterrence, but to maintain the reputation of the profession and to sustain public confidence in its integrity. The latter explains why "considerations which would ordinarily weigh in mitigation of punishment" have less

> effect in cases such as those involving knowing participation in mortgage fraud. *Bolton v. Law Society* also supports the view, earlier expressed, that there is nothing new in acknowledging that revocation is the appropriate disposition, absent exceptional circumstances.

The Executive Director submitted that this quotation was authority that certain *Jaswal* factors are more heavily weighted in these cases, those being general deterrence and confidence of the public in the integrity of the profession. Mitigating factors and specific deterrence are given less weight and are secondary except in exceptional cases.

The *Mucha* decision quoted from *Bolton v. Law Society* (*Bolton*) extensively. *Bolton* clearly explained why the factors should be weighted in this way. At para. 24:

> Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. Lapses from the required high standard may, of course, take different forms and be of varying degrees. **The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors.**
> It is important that there should be full understanding of the reasons why the tribunal makes orders which might otherwise seem harsh. There is, in some of these orders, a punitive element: a penalty may be visited on a solicitor who has fallen below the standards required of his profession in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way. Those are traditional objects of punishment. But often the order is not punitive in intention. Particularly is this so where a criminal penalty has been imposed and satisfied. The solicitor has paid his debt to society. There is no need, and it would be unjust, to punish him again. In most cases the order of the tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order of suspension; plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period, and quite possibly indefinitely, by an order of striking off. The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence

> in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission. … A profession's most valuable asset is its collective reputation and the confidence which that inspires.
>
> Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weight in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often, he will say, convincingly, that he has learned his lesson and will not offend again. On applying for restoration after striking off, all these points may be made, and the former solicitor may also be able to point to real efforts made to re-establish himself and redeem his reputation. All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus, it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears likely, to be so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is part of the price.

The Executive Director submitted that this was the "essential issue": the profession is nothing without its reputation. The only justifiable response to a member who acts in a way that damages that reputation is removal from the profession. As stated in *Abbott* at para. 80: "the significant contextual factor is the presumptive penalty and the need to reassure the public of the integrity of the… profession."

It was the Executive Director's position that proof of the misconduct alone was sufficient to impose the presumption. There was no requirement to prove that the member was "unfit" to continue or was at risk of similar conduct in the future (*Mucha* at para. 27).

Regarding significant and compelling mitigating factors, it was the Executive Director's position that in cases of presumptive license cancellation and lifetime licensing prohibition, normal mitigating factors carry less weight. In *Mucha* at para. 28 it states:

> As noted earlier, we do not suggest that there can never be exceptional circumstances justifying departure from the ordinary disposition of revocation where the licensee has knowingly participated in mortgage fraud. By way of illustration only, there may be compelling psychiatric or psychological evidence that, among other things, credibly indicates not only that the misconduct was out of character and unlikely to recur, but explains why it occurred: See *Law Society of Manitoba v. MacIver*, [2003] L.S.D.D. No. 29. It must be noted here that the Hearing Panel remained puzzled by the Respondent's motive for engaging in this misconduct. With respect, it must be said, in that context, that the good character evidence could not be said to have been "powerful" in mitigation of penalty. Further, the fact that the Respondent collected "merely ordinary and modest legal fees" should have played little or no role in mitigating the penalty where the Respondent knew that his fee was being extracted from an unsuspecting client in respect of fraudulent transactions.

It was the Executive Director's position that good character evidence was insufficient and any mitigating factors needed to establish that the member's personal responsibility for the misconduct was reduced.

Abbott further expanded on what might amount to mitigating evidence that could avoid license cancellation. The evidence must negate the public's need to be reassured about the integrity of the profession. In *Bishop* the Divisional Court allowed for mitigating factors beyond those personal factors that would explain the lawyer's misconduct, at para. 31:

> The other observation is that the mitigating factors that will amount to exceptional circumstances in any given case are not restricted to only certain types or forms. Medical reasons or financial desperation or situations of duress serve as examples of the type of mitigating factors that may amount to exceptional circumstances but those situations are not exhaustive of such factors. That said, it remains the case that any such factors will normally have to be ones that would rise to the level where it would be obvious to other members of the profession, and to the public, that the underlying circumstances of the individual clearly obviated the need to provide reassurance to them of the integrity of the profession. I would add, on that point, that factors that provide an explanation for the conduct of the lawyer

> will generally be ones that would most likely reach that requisite level of mitigation but they are not the only ones that may achieve that result.

It was the Executive Director's position that intentional fraud and dishonesty warrants presumptive license cancellation and lifetime licensing prohibition and this standard had been imposed historically by professional regulators for conduct that ranges from dishonesty, mortgage fraud, misappropriation of trust funds, criminal conduct, sexual misconduct with clients, incompetence, failure to cooperate with investigations and ungovernability.

Knowing participation in fraud has resulted in license cancellation and lifetime licensing prohibition from a variety of professional regulatory bodies:

2. Nurses
    a. *College of Nurses of Ontario v Mackenzie*, 2009 CanLII 92075 (ON CNO) [Tab 5];
    b. *College of Nurses of Ontario v Samson*, 2010 CanLII 100026 (ON CNO) [Tab 6];
3. Teachers
    a. *Ontario College of Teachers v Nugent*, 2000 ONOCT 14 [Tab 7];
    b. *Ontario College of Teachers v Williams*, 2008 ONOCT 67 [Tab 8];
4. Doctors
    a. Ontario (College of Physicians and Surgeons of Ontario) v. Taylor 2017 CarswellOnt 5911, 2017 ONCPSD 17 (*Taylor*) [Tab 9]; and
5. Lawyers
    a. *Abbott;*
    b. *Bolton;*
    c. *Adams*.

With respect to lawyers, the Court in *Abbott* held at para. 22: "There is, as yet, no precedent for a lower penalty than licence revocation for a lawyer who has knowingly participated in mortgage fraud." In *Bolton,* the Court described the misconduct as "proven dishonesty", which would include theft and knowing participation in fraud. From *Bolton* as quoted above in *Mucha* at para. 24:

> … The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors.

The Executive Director submitted that the reasoning with respect to lawyers, in particular, was applicable to Real Estate Professionals because:

a. lawyers and real estate professionals are the two professions most closely involved in real estate and mortgage transactions;
b. lawyers and real estate professionals act as fiduciaries. The public place their trust and reliance in the hands of both professionals; and
c. this trust and reliance on both professionals are profoundly impacted in the public's eyes when even one member acts dishonestly and in self-interest.

It was the Executive Director's position that there should not be a discrepancy between one profession and another regarding dishonesty and fraud. It would be wrong for the public to see that other professions refuse to tolerate a dishonest member, but real estate professionals will.

The Executive Director submitted that in this case, the industry member knowingly engaged in theft and fraud. This fraud impacted multiple victims and caused financial loss to multiple parties while the Industry Member profited. The Executive Director reviewed the Industry Member's conduct in this regard and summarized as follows:

a. With respect to the condo purchase in 2011, the Industry Member knowingly stole from his brokerage, and put trust funds into his own bank account. This breach was a crime of knowing deception and proven dishonesty.

b. With respect to the condo rental in 2014-2015, the Industry Member knowingly rented a property without authorization of RECA to property manage, and without the consent of the condo owner. He attempted to hide this activity by registering a company name and impersonating his brokerage in order to fraudulently induce the condo owner into entering a lease with him. He would have profited from this lease had it been successfully signed.

c. The Industry Member also misled the renter, took their money, and caused them financial loss when the scheme collapsed.

d. The Industry Member was not forthcoming with investigators and did not disclose all documents requested in an attempt to frustrate discovery of his deceptions. Even while confessing to his misconduct, Mr. Merchant still engaged in deception. Throughout the investigation, Mr. Merchant confessed to some of his misconduct while hiding other misconduct. He did not fully confess until he was confronted with key documents, and even then, he lied about forging his wife's signature in the middle of his confession.

e. Mr. Merchant's misconduct and behavior in the investigation showed a complete willingness on his part to engage in wonton deception and criminality in the course of trades in real estate. The deceptions were numerous and occurred at several different time periods, years apart (during 2011 then 2014-2015 then during the investigation). The industry member would have had to take multiple intentional steps to commit and cover up these deceptions. His pattern of misconduct showed that deception for personal profit is the way he conducts business, and the way he interacted with RECA.

The Executive Director submitted that because the breaches demonstrated the Industry Member's deceptions over time, the intentional fraud was not out of character. The evidence did not explain why the fraud occurred in any meaningful way such that it lessens his culpability. The circumstances are such that the public needs reassurance of the integrity of the profession.

Upon the completion of the Executive Director's submission for sanction, the Industry Member asked the Hearing Panel for permission to provide written submission on sanction. He also asked for transcripts of the hearing but was advised the cost to produce written transcripts would be around $1500 but he could have a copy of the hearing audio recording that day. He agreed to accept the audio recording which was available through the internet with a special password. He asked for a month to provide written submissions and later asked for 15 to 20 days to provide the submissions.

It was the Executive Director's position that the Industry Member wanted to submit written submissions on sanction in order to delay the matter as long as possible and therefore if the Hearing Panel agreed to allowing the Industry Member to provide written submission, they should be provided by the following Monday (six days later).

The Hearing Panel decided to grant the Industry Member's request to provide the Hearing Panel with written closing submissions on sanction. He was to provide the written submissions to the Hearings Administrator on or before September 24, 2019 at 4 p.m. and the Executive Director was to provide any response to those submissions on or before September 30, 2019 at 12 p.m.

At that time the hearing was adjourned, subject only to the written closing submissions of the Industry Member and any response the Executive Director might provide by written submissions.

Subsequently, the hearing panel received a request for advice and direction from the Industry Member dated September 20, 2019 because the audio recording of the hearing had failed. Although the request for guidance did not explicitly state he wanted an extension of time to submit his submissions on sanction, the hearing panel understood that to be his request. The Industry Member stated in his letter to the hearing panel:

> "I do not know how to proceed, as I am unable to draft a response to the ED's case without reviewing these recordings" and "It is my understanding that all oral evidence received in front of a hearing panel must be taken down in writing or electronically to ensure an accurate record of the proceedings is available."

It was the Executive Director's position that the Industry Member was provided with a written version of the Executive Director's legal argument on sanction and all supporting materials on September 9, 2019. The recording of the hearing was not required to respond to those submissions.

In a written decision dated September 25, 2019, the hearing panel granted the Industry Member an extension to submit his written closing submissions on sanction to October 8, 2019 at 4 p.m. The time for the Executive Director to respond to those submissions was extended to October 11, 2019 at 12 p.m.

The hearing panel's decision stated it would rely only on the written submissions on sanction of the Executive Director and not on any of the oral submissions provided during the hearing on sanction on September 10, 2019.

In addition, if either the Executive Director or the Industry Member wished to have the opportunity to make oral closing submissions after the written submissions were provided, they would be granted that opportunity by way of telephone conference call.

The Industry Member did request oral submission in addition to the written submissions he provided to the Hearing Panel. The Hearing Panel heard those oral submissions from both the Industry Member and the Executive Director on October 15, 2019. The Executive Director also provided the Hearing Panel with a written rebuttal.

Written Submissions on Sanction of the Industry Member

The Industry Member proposed the following sanctions:

1. Letter of reprimand for lack of cooperation during the investigation, not depositing the commission cheque with his broker's account and reckless behaviour with a client;

2. A three month suspension for offering property management without authorization;

3. Completion of educational courses: Consumer Relationships, Ethics, Professionalism and Risk Reduction, and Property Management; and

4. Costs of $1500 as agreed with the Executive Director.

However, these sanctions were based on an amended section 46 Admission of Conduct Deserving of Sanction that the Industry member proposed. He submitted that the Admission of Conduct Deserving of Sanction entered into and agreed to on September 9, 2019 should be amended to accurately reflect the breaches. The Industry Member did not verbally ask the Hearing Panel to withdraw the s. 46 Admission nor did he provide any authority for the Hearing Panel to withdraw it. His written submissions stated:

> "I will be making arguments on sanctions based on the most recent s.46 agreement which I signed on September 9, 2019 under extreme stress, because of a lack of options available, and an adjournment denial based on lack of legal counsel. I want to make it very clear to the hearing panel that I signed the s.46 agreement under duress, extreme pressures and stress but could not claim this during the hearing because I feared the ED's counsel.
>
> If I can retract the s.46 agreement of September 9, 2019, submitted under duress and without much choice; and instead submit one that I am in agreement with (as previously discussed with ED's counsel), it would better reflect the allegations, statements of facts and agreed admission of conduct deserving of sanction".

The Industry Member's written submission went on to provide legal reasoning for his proposed amended section 46 Admission of Conduct Deserving of Sanction, listed

his mitigating factors for the Hearing Panel to consider and his recommended sanction.

It was the Industry Member's position that the conduct he had agreed to did not align with the breaches that were set out in the Admission of Conduct Deserving of Sanction. Also, that the Executive Director wanted to "apply the toughest of breaches" and "seek the harshest sanctions in order to set a precedence."

The Industry Member asked the Hearing Panel to determine if:

(a) the section breaches in the Admission of Conduct Deserving of Sanction (or as he stated, imposed by the Executive Director) were correct or an error of law;
(b) if they were incorrect, if the proposed corrections were valid;
(c) if they were correct, whether the sanction of presumptive suspension was fair.

In addition, the Industry Member asked the Hearing Panel to establish whether the sanction of presumption of license cancellation was appropriate in this instance and

(a) whether it was fair to compare cases outside of the real estate industry administration to establish presumptive license cancellation;

(b) whether real estate industry administration cases were more appropriate comparisons to this case;

(c) if the Executive Director's reliance on extreme cases was a fair application of precedent in RECA proceedings, despite having precedents from other real estate administrative bodies

The Industry Member also submitted that although the Executive Director had not admitted to the unnecessary delay in proceeding with this case, the delay should negate the extreme sanction proposed by the Executive Director.

Regarding the Industry Member's submission that the breached sections in the Admission of Conduct Deserving of Sanction (or as he stated, breaches imposed by the Executive Director) were correct or an error of law, the Industry Member submitted:

A. The *Real Estate Act* is established to help regulate the real estate industry in Alberta. The Real Estate Act Rules are established to set the standards of practice expected of professionals in Alberta. The Rules are clearly defined and structured so that if an individual acts out of practice of a particular rule, there is a corresponding breach. The Rules contain most of the requirements affecting the industry professionals' business activities. In addition, they contain the Industry Standards of Practice, containing standards for all industry professionals, as well as standards for different types of members. The Act and Rules clearly outline sections and subsections, thereby, allowing the appropriate charge and application of any potential breach. It is not only unfair, but also unreasonable for the Executive director, or any of his appointees to charge an individual with a breach of a section that is incorrect. To go forward with the breaches suggested by the Executive Director would be an extreme procedural unfairness.

B. The Executive Director is suggesting multiple breaches of section 42(b) "participate in fraudulent or unlawful activities in connection with the provision of services or in any dealings" of the Real Estate Act Rules on 3 actions.

a. The Supreme Court of Canada has recently defined a civil test for fraud which outlines 4 specific elements that have to be met to satisfy a fraud charge (*Bruno Appliance and Furniture, Inc. v. Hryniak* 2014 SCC 8):

1. a false representation made by the defendant
2. some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness)
3. the false representation caused the plaintiff to act
4. the plaintiff's actions resulted in a loss.

b. The multiple fraud charges claimed by the Executive Director clearly do not meet the test for civil fraud as established by the Supreme Court of Canada. The Executive Director does not present evidence or findings that support the 4 above mentioned specific elements which have to be met to satisfy a fraud charge. Rather, the Executive Director arbitrarily places the word of "fraud" on the multiple alleged charges.

C. In my arduous efforts to come up with a sanction agreement, I have been unsuccessful at finding case law to reflect the erroneous application of section breaches and what a precedent is when a situation like this arises. Given this;

a. The hearing panel has the expertise to determine whether the ED is applying section breaches in an error, or if this would be a procedural unfairness, or another scenario deemed more appropriate for my matter

b. It must then be up to the hearing panel to determine whether there has been an error in law applied to the application of breaches as suggested by the ED.

D. As per the s.46 agreement and breaches presented in the agreement, please consider the following changes:

a. On or around February 7, 2011, Mr. Merchant received $20,000 directly from his client in connection to the sale of the condo. This was the amount agreed to be paid as commissions on the purchase contract. He accepted that money as commission, and thereby breached section 42(b) of the Real Estate Act Rules.

i. The correct section for this action would be section 54(1)(c) of the *Real Estate Act Rules*

ii. When discussing the technicality of this with the ED's counsel, it was maintained by the ED that they would not change the breached section in order to apply a more serious penalty, and to make an example of me. This was the same rhetoric maintained by the ED's counsel when presenting sanction argument to the Panel.

iii. An incorrect application of a section of the Act or Rule is a procedural unfairness and should be corrected immediately to reflect the action instead of an arbitrary application of an irrelevant rule.

iv. In her complaint to RECA in April 2015, MB stated that I charged her $20,000 to give to the seller. RECA's initial take was that I did not pay these funds to the seller, and thereby stole this money from MB. Despite having a copy of the signed contract by MB (Buyer Brokerage Agreement), confirming MB will pay $20,000 as fees/ commissions to me, RECA investigators spent hours interviewing and researching this money trail in hopes of establishing me as a thief of this money. Unable to establish and prove this as a "theft" from MB, RECA has now spun this around as a "theft and fraud" which I committed from my brokerage.

v. The deposit of the commission funds into my account were a clerical oversight on both my end and my brokerage's, which can simply be dealt with administratively. To date, this error has not been brought up by anyone from my brokerage (brokers, managers, owners, support

staff, etc.), nor has it been audited by RECA even after knowing this as a simultaneous error on part of my brokerage.

vi. During the hearing, even the Panel questioned the proper application of Rule 42(b) where The ED is trying to establish theft. In response, ED's counsel gave an example about a backpack. He commented that "It is as if Mr. Merchant was given a backpack to pass on to his brother. But instead he kept it because he knew his brother would turn around and give it to him anyways. This is theft." What the ED mentions here is valid as reckless, but not as theft or fraud. The backpack was not full of gold. My brother would not gain or lose any significant value if I kept the backpack. Similarly, my brokerage did not lose any money.
They would have deducted a very small processing fee from the $20,000.00 commission and remitted the balance to me. In this particular scenario, almost 9.5 years ago, while I was quite new to the industry, I made the mistake of depositing the cheque directly into my company account instead of my brokerage. I did however get charged by my brokerage for all costs and fees associated with this transaction. I did pay all applicable fees charged by my brokerage, and thereby, did not commit any theft or breached the alleged Rule.

vii. This transaction/ breach was never an actual part of the complaint made by MB. In her complaint to RECA, she goes on to say that she is only mentioning this to RECA.

viii. For the 4 years of owning her condo (2011 - 2015), MB never questioned or complained about the purchase price, commission, or any other parts of the transaction. It was actually during those 4 years following the purchase of her condo where we really built our friendship/ relationship, and forged our familial bonds.

The Industry Member reviewed the civil test for fraud as defined by *Bruno Appliance and Furniture, Inc. v. Hryniak,* 2014 SCC 8 and submitted the test had not been met in his case for the following reasons:

- A full disclosure of the scenario was not given to both people involved, which was reckless on my end, not fraudulent. There were no losses incurred by the renter or the condo owner.

- The condo owner did give me express written permission to allow the rental of her condo. My full disclosure of the agreements I had with the condo owner was not expressed in writing to the tenant when she initiated a rental. This was reckless on my part but not fraudulent.

- Multiple times in her interview with the RECA investigator, the tenant was confused and unclear about details of events and the rental details, and even her own age at the time of the rental—a person's lack of memory or assumption of something should not be blamed upon me—at no time did I tell the tenant that I was the condo owner—she automatically assumed this, even though she dealt with 3 different parties in the actualization of the rental.

The Industry Member stated:

i. RECA regulations on property management were changing during this time.
ii. Prior to 2015 no licensing was enforced on people conducting property management.
iii. the complainant approached him for assistance.
iv. It was a one-off case involving a very close friend.
v. No property management contracts were created or signed.

It was the Industry Member's position that the correct section for this action would be section 42(a) of the *Rules*, which states "makes representations or carry on conduct that misleads or deceives any person or is likely to do so."

The Industry Member submitted that the Admission of Conduct Deserving of Sanction stated: "On or around January 30, 2015, Mr. Merchant attempted to enter into a lease with MB by pretending to be acting on behalf of his brokerage. The tenant was actually a corporation Mr. Merchant registered to appear to be his brokerage. He did this for the purpose of personally profiting, and thereby committed identity fraud and breached section 42(b) of the *Real Estate Act Rules*.". His response to this admission was as follows:

i. The correct section for this action would be section 42(a)
ii. The corporation referred above was actually registered by my wife a year earlier in 2014 to handle her private real estate portfolio. It was not my corporation and I have never had any positions or rights to this corporation
iii. There were no agreements that were executed with the complainant in this matter
iv. The elements in the test for fraud are not met, as defined by *Bruno Appliance and Furniture, Inc. v. Hryniak,* 2014 SCC 8.
v. My actions were reckless—I did not fully disclose the details of the company offering to lease MB condo
vi. No signatures were forged, no documents signed, no agreements finalized.

With respect to the Admission of Conduct Deserving of Sanction that states: Between April 20, 2015 and July 21, 2015, RECA investigators asked Mr. Merchant multiple times to provide a copy of the lease with GC and copies of all correspondence in regard to that lease. He intentionally withheld these documents, and thereby breached section 38(4.1) of the *Real Estate Act,* his response was as follows:

> i. The corrected section for this action would be section 38(4)
> ii. Documents were not in my possession when asked for them
> iii. The documents in question have been recovered from GC, who was one of the rightful signatory on the document
> iv. I stated repeatedly and responded promptly when asked about the documents, that they were not in my possession
> v. I did not destroy, withhold, conceal or refuse to produce the documents requested—I simply did not have them in my possession to provide to RECA investigators

It was the Industry Member's position that the Executive Director was using case law from other professions' administrative bodies instead of relying on precedents from RECA cases or any Canadian Real Estate administration or tribunal.

He submitted his response to the Executive Director's position that when professional participates in a serious and egregious breach of his professional conduct and responsibilities which undermines public confidence in the industry, then the *Jaswal* factors of general deterrence and confidence of the public in the integrity of the profession are weighted far above other factors, as follows:

- General deterrence is applied in order to dissuade others in the industry from conducting similar actions if it is known that sanctions can be imposed for similar actions.
    - The ED is suggesting a presumptive suspension without specifying
      which breach should be the subject of the sanction;
    - There is a great flaw in the ED's sanction suggestion in that a presumptive license suspension is recommended about 4 years AFTER the incident takes place—what message is being relayed to other/all industry members as a deterrence here?
    - How can deterrence be effective if applied after so much time has passed?
- Confidence of the public in the integrity of the profession

- A person may lose confidence in the integrity of the profession because of the circumstances he/she endured. The complainant by no means lost any confidence in the industry profession of Real Estate.
- The Complainant did not lose confidence in the real estate industry at any time of these dealings—she matter of factly resorted to hiring another real estate agent within 30 days of filing a complaint against me
- Her confidence in the real estate profession did not decrease nor diminish because of whatever alleged actions I may have committed
- The complainant's resort to hire another real estate representative within 30 days of the complaint, and then to hire another real estate agent to successfully sell her home prove that she did not lose confidence in the profession, rather her complaint was a direct attack on the industry member, and was brought forward for whatever background reasons or pressures placed upon her
- the complainant had absolutely no hesitation to rely on the real estate profession to conduct future business—there was no loss of confidence in the industry of real estate professionals

It was the Industry Member's position that it was incorrect for the Executive Director to rely on the *Law Society v Ryan* 2003 SCC 20 (Ryan) and A*dams v Law Society of Alberta* for licence cancellation and lifetime licensing prohibition as these and the 8 different cases regarding nurses, doctors, teachers and lawyers, were applied to other professions that were very different than the real estate industry.

The Industry Member submitted that when comparing teachers, nurses, doctors and lawyers to real estate professionals, one must recognize that these individuals are all professionals who undergo serious education and training for multiple years to achieve their professional status. However, one can become a realtor right out of high school with the completion of a rather very simple course and no formal training. The professions mentioned above are all salaried and hired by institutions--none of them work on commission, unlike real estate professionals. Lawyers charge by the hour, whereas realtors are compensated only on results. Teachers handle and shape children. Doctors and nurses handle human life. Lawyers may know the most intimate details about their clients. There is a much higher value of trust and reliance put onto those professions compared to realtors.

The Industry Member submitted that it was imperative to consider sanction imposed in other RECA proceedings rather than other profession's administrations and tribunals.

The Industry Member disagreed with the Executive Director's position that there was a similarity between real estate professionals and lawyers, because both professions are involved with real estate and mortgage transactions. It was his position that realtors and mortgage professionals were the two professions most closely aligned but the Executive Director had not provided any cases related to either profession.

The Industry Member submitted that the Hearing Panel should give less weight to the cases the Executive Director provided regarding lawyers and other professions and more weight to other RECA cases.

It was the Industry Member's position that the Executive Director failed to admit that there were plenty of cases within the real estate industry involving dishonesty that have been tolerated with much less serious sanction than other professions. On this point he made the following submissions:

- It is imperative to consider that RECA has been in operation since 1996 and there is a plethora of administrative hearing cases, administrative actions, and letters of reprimand that have been issued to industry members. To simply compare real estate cases to that of the law society would be a severe bastardization of any administrative disciplinary body, especially since there are historical precedents in similar RECA matters.

- RECA handles about 1000 complaints against industry members annually—surely there are RECA cases that are similar in nature than those quoted of the other industries by the ED.

- Some case samples and sanction summaries are below which are more appropriate for the breaches that the ED plans to charged me with. None of these precedential cases suggest a presumptive suspension. At current, there are NO cases within RECA that suggest a lifetime suspension or presumptive suspension of license.

It was the Industry Member's submission that there were cases that warrant suspension which are more appropriate only if the Hearing Panel deems the breaches of 42(b) as stated by the ED were appropriate. The Industry Member submitted RECA cases for the Hearing Panel to consider. He submitted that the

conduct of the Industry Member in these cases was more serious and damaging than his conduct.

a. Sedgewick 2018
Suspended for 3 months for the creation of a fraudulent agreement by copying and pasting signatures from one agreement to another, for lying to his broker, for lying to his clients, for presenting and circulating a forged document, false written statement, and misrepresentation to RECA . He had been an industry member for over 16 years when the breaches happened.

b. Lalji 2016
Suspended for 18 months for breaches of Real Estate Act Rules 42(a), 42(b), 41(h) and 41(a). Her breaches included altering contracts, creating false documents, forging signatures on multiple documents, intentional reckless conduct, participation in fraudulent and unlawful activities, failing to act honestly, failing to cooperate with and provide information to RECA, and trying to influence possible witnesses in the investigation.

c. Aulakh 2019
Suspended for 24 months for participating in fraudulent and unlawful activities, falsification of documents and information in a private lending loan, failing to provide competent service to her client and not disclosing the details of compensation for services, not disclosing the existence of conflict of interest, and failing to fulfil fiduciary duty of loyalty and confidentiality to the client. Ms. Aulakh has been an industry member for over 13 years. She was dually licensed; both as a mortgage broker and a realtor. She has worked in a broker capacity for over 10 years.

d. Odetunde 2006
Suspended for 18 months for breaching 10 different allegations dealing with conduct deserving of sanctions. Such included fraudulently misappropriating trust funds, utilizing trust funds for personal use, unlawful conduct, and neglecting fiduciary duties. At the time of the decision, Mr. Odetunde had been an industry member for 23 years and acted as a broker for his office.

The Industry Member submitted there were multiple RECA proceedings that dealt with mortgage fraud, which was of the most serious and egregious nature. None of these proceedings were sanctioned with presumptive suspension or lifetime suspension.

The Industry Member submitted that the cases below were more similar to the breaches in his case and accordingly the sanction in these cases ought to be considered by the Hearing Panel:

> a. **Inglis (Re), 2019 CanLII 53386 (BC REC)** suspended for 9 months for deceptive dealing by fabricating an offer for a purchase agreement, making a false statement to the Council in his response to the allegations made against him, and threatening retaliation against the complainant.
>
> b. **Wu (Re) 2007 CanLII 71610 (BC REC)** suspended for 180 days where he admitted to deceptive dealing by creating a fictitious transaction to give the appearance of activity on the listing.
>
> c. **Howard (RE), 2014 ABRECA 14** suspended for 3 months for multiple mortgage frauds, falsifying documents, and failing to render competent service on 7 different properties over the course of 2 years.
>
> d. **Benavides (RE), 2009 ABRECA 44** suspended for 18 months for failing to cooperate with an investigation, failed to provide requested documentation, failed to act in the best interest of the client, revealed confidential client information, creation of a contract that was false or misleading, and participated in fraudulent activities related to mortgage transactions.
>
> e. **Behroyan (Re), 2018 CanLII 50247 (BC REC)** suspended for 1 year for deceptive dealing, breach of his duty to act honestly, failure to act in his client's best interest and/or avoid conflicts of interest, failure to advise his client to obtain independent legal advice.

It was the Industry Member's position that these cases support his proposition that the sanction ought to be less serious than for cases involving fraud. In addition, the Executive Director did not refer to any RECA cases which would indicate that the penalty being proposed by the Executive Director was not consistent with the sanction imposed in other cases. This issue was discussed in *Jaswal, supra* at (paragraphs 43 and 44):

> Whilst I agree with counsel for the Board that the court ought to show deference to the sentencing policy of a disciplinary tribunal, in this case where the Board was unable to demonstrate any consistent past practice or to refer to cases in other jurisdictions which would justify a penalty of the size imposed in this case in broadly similar circumstances, the notion of deference has little application. In my view, the penalty imposed was so excessive when viewed against the dispositions in other cited cases involving more serious

> offences that…the inference can be drawn that the Board must have acted on a wrong principle. The need to foster deterrence and thereby protect the public by ensuring the proper practice of medicine, and the need to maintain the public's confidence in the integrity of the medical profession does not in my view demand, in the circumstances of this case, a penalty in the range imposed.

It was the Industry Member's position that the purpose and nature of proceedings were important but RECA's mandate did not exist in a vacuum, especially when alleging fraud. RECA is a public body and should therefore hear the case in a reasonable time. RECA has no set guidelines on the processing of cases. It was the Industry Member's submission that it was imperative that RECA processes such extreme cases in an expedited manner. He referenced the Supreme Court of Canada case, *Blencoe*, regarding delays in proceedings and stated there was a delay of over 4 years from the time the complaint was filed to when the Notice of Hearing was issued.

The Industry Member submitted that the Executive Director has the power to suspend an industry member's license if they fail to cooperate during an investigation, as claimed by the Executive Director. However, the Executive Director never exercised this power during the investigation and if the case was as serious and egregious as the Executive Director claimed, then the Executive Director ought to have exercised his power to suspend him. He claimed that aside from not being able to provide a copy of a lease agreement which he did not have in his possession, he was fully cooperative with the investigation, by promptly responding to questions by the investigators.

The Industry Member submitted that the following were mitigating factors that the Hearing Panel ought to consider:

1. He had been a real estate industry member since 2007
2. He had no prior discipline history
3. Duration of the alleged misconduct was short and only on one situation
4. There was no misappropriation of funds or fraud
5. He had a 100% commission structure with his brokerage, where he paid a small flat transaction fee and kept all commissions earned and was allowed one free transaction per year
6. He was billed and paid all applicable transaction fees to his brokerage
7. There was no theft, fraud or loss to the brokerage
8. His brokerage never inquired about the commissions related to the purchase in February 2011

9. He was never offered the Broker Resolution Program and later was refused this program when inquired with the RECA investigator
10. He was never offered assistance through REIX
11. For the period of time concerning the property rental, and while being investigated, he was out of the country and suffered mental stress due to certain familial, health and professional affairs
12. His family and the complainant's family were close friends since 2009
13. He helped the complainant with the sale of her Ontario home in 2012/13
14. He helped the complainant's daughter to set-up her photography business and connected her to other photographers, designers, models, and make-up industry professionals
15. He requested account information from the complainant several times so he could deposit the funds into her account. She abandoned communication with him and did not provide her account information
16. Regardless of numerous mentions to RECA by me, the student tenant and by her father, a key person involved with the rental was never contacted or investigated. This was the property manager (C) hired in his absence through online services/ Kijiji who handled the said rental in 2015
17. RECA being a regulator and promoter of public safety and regulation, and having clear knowledge that the property manager hired was not licensed, completely failed to investigate her
18. The owner of the private company whose information appeared on the rental agreements, documents, and registry records were never contacted despite RECA investigators having access to this information
19. Fraud charges were brought against me in relation to the condo rental. The Court of Queen's Bench dealt with the charges within 90 days and dismissed these charges
20. The time and costs were significantly reduced by signing an s.46 agreement, albeit under stress and pressure

The Industry Member submitted that he had shown personal remorse since 2015 in his dealings with his office broker and manager, during and after the RECA investigation and throughout his dealings with the Executive Director. He stated that he sincerely regretted his mistakes and was deeply sorry for what has arisen from his actions.

The Industry Member's oral submissions were a summary of part of his written submissions and he alleged that the prosecution of him by RECA was malicious.

The Executive Director's Rebuttal

The Executive Director's rebuttal was as follows:

1. At this stage of the proceedings, the Industry Member cannot challenge already determined findings of fact or bring in new evidence without an application.

The proceedings thus far are as follows: phase 1 is completed. The only evidence entered was the s. 46 agreement as exhibits 1 and 2. The Hearing Panel confirmed by asking the Industry Member if he signed the s. 46 agreement, and he said yes. The Hearing Panel asked the Industry Member if he was under duress when he signed the agreement. He responded by saying he was "stressed" and did not state he was under duress. Phase 2 has commenced. The Hearing Panel asked the Executive Director and the Industry Member if either wanted to submit evidence on sanction. Both parties said no. We moved onto argument. The Executive Director submitted his argument and the Industry Member has now submitted his argument.

The Industry Member's argument attempts to ask the Hearing Panel to ignore the s. 46 agreement that is already in evidence. The Hearing Panel cannot do this. There is no mechanism in law that allows evidence already submitted to be removed or rescinded". Section 47 of the *Real Estate Act* states:

> If a statement of admission of conduct is accepted, each admission of conduct in the statement in respect of any act or matter regarding the industry member's conduct is deemed for all purposes to be a finding of the Hearing Panel that the conduct of the industry member is conduct deserving of sanction.

This means, by law, the facts and admissions from the s. 46 agreement entered in phase 1 are deemed findings of fact. They cannot be undone by the Industry Member or by any subsequent decision of the Hearing Panel. Any submission that the Industry Member made that in any way contradicts the s. 46 agreement entered in phase 1 must, by law, be disregarded by the panel. It is unfair in any event to allow the Industry Member to challenge the Executive Director's case at this stage of the proceedings. He had an opportunity in phase 1 to challenge the case and address concerns about incomplete investigation, witness statement issues, inconsistencies in the witness evidence, and which breaches he should be found guilty of. Instead of challenging these matters, he signed a section 46 agreement. He cannot back away from this and challenge the Executive Director's case now that the witnesses are home, we are no longer in

the hearing room, and the Executive Director cannot defend himself. The Hearing Panel must disregard any of Industry Member's submissions which challenge facts on the record.

The Industry Member also seeks to put in new evidence. Without a proper application to the Hearing Panel, he cannot do this. The Industry Member's exhibits have not been submitted during a time in the proceedings where new evidence can be entered, where the Executive Director might have the opportunity to challenge, test, and rebut that evidence. The Industry Member's exhibit 1, exhibit 2, exhibit 3 and exhibit 4 are all new evidence and they must be disregarded by the Hearing Panel without proper application.

Moreover, even if there was an application, any evidence he attempted to submit could not be considered if it contradicted the previous findings of fact in any way. This means the Industry Member's exhibit 1 and exhibit 3, as well as many of his submissions, could never be entered into evidence. Arguably, the other exhibits as well.

The Executive Director submitted that phase 2 must be decided on the evidence and facts which are on record. The only evidence properly on the record is the s. 46 agreement entered in phase 1. The Hearing Panel must make its sanction decision based on that evidence and the findings of fact.

2. The proceedings were fair

The Industry Member has further argued that the proceedings were procedurally unfair. This is incorrect. He has been given every opportunity to respond to the Executive Director's case against him, to get counsel, to be made aware of what is going on, and to participate in the proceedings. The Hearing Panel has been generous with the adjournments and extensions granted and has (or will) provide reasons for each of his applications that were denied.

The Industry Member's arguments actually advocate for making the proceedings unfair. For him to challenge facts/evidence and submit new evidence at this stage denies the Executive Director the opportunity to properly defend ourselves. Unless the Hearing Panel disregards those submissions, the proceedings would become procedurally unfair.

The Industry Member also claims that he was under duress when he signed the s. 46 agreement and was cornered into signing it. The Industry Member has been resistant to having a hearing held during this whole process. Once his adjournment request was denied, he was faced with having to hear witnesses, watch his own

confession, and read documents which would demonstrate his intentionally dishonest dealings. This was his source of stress. This was the corner he was in, and it was of his own making. He chose to not run a hearing and admit to his misconduct.

Duress has a meaning under law, and it does not apply to the Industry Member's situation. He was put in a position where he could either run a hearing (which he did not want to do) or sign the s. 46 agreement. He chose to sign the agreement. Now he is trying to deny responsibility for nearly everything he has admitted to. This is not duress; this is avoidance, and lack of courage.

Further, it should be noted that the case presenter referred to him at the hearing as "my friend" because this is how lawyers address the other side to a dispute, to show respect.

3. The Industry Member committed all the breaches he admitted to in the Admission of Conduct Deserving of Sanction.

The Industry Member argued that he should in fact be found guilty of different breaches than those he admitted to in the s. 46 agreement. Due to s. 47 of the *Real Estate Act*, the Hearing Panel cannot change the breaches. The deemed findings of fact precisely set out the breaches that he committed. It clearly states that his conduct is conduct deserving of sanction.

Moreover, the facts substantiate the breaches. To quickly review the facts, and why these facts make out the admitted breaches:

- The Industry Member took $20,000 into his personal bank account that belonged to his brokerage. It was their property based on the contract MB signed with them. He never gave it to his brokerage. This is theft.
- The Industry Member offered property management service when his brokerage was not authorized to do so. This breached s. 17 of the *Real Estate Act*.
- The Industry Member leased MB condo to GC without MB permission, and without telling GC he was not authorized by the owner to lease the condo. This cost GC money because she had to move early and unexpectedly. This cost MB money because she was deprived of the lawful use of her own property, and because even when the Industry Member offered to provide MB with the money it was less than what

he collected as rent. Industry Member unlawfully collected rent from GC, which he kept for himself. This is fraud.

- The Industry Member attempted to enter into a lease with MB while pretending to be his brokerage, but while actually acting on behalf of a corporation that was registered with a name that imitated the name of his brokerage. He did this so he could deceive MB into signing the lease, and so he could personally profit. This is identity fraud.
- The Industry Member withheld documents that were demanded from him by RECA investigators. This breached section 38(4.1) of the *Real Estate Act.*

The Industry Member's attempt to modify the theft charge, challenge the section 17 charge, modify the identity fraud, and modify the section 38(4.1) charge appears to be based on new evidence (exhibit 3, for example) and an attempt in each case to challenge facts found in the s. 46 agreement. As already argued, the Hearing Panel must disregard any challenges he makes to the facts. They are already facts.

The Industry Member's attempt to modify the fraud charge is based on a definition of fraud found in *Bruno Appliance and Furniture, Inc. v. Hryniak, supra*. The Executive Director submitted this is the incorrect test for fraud. The Executive Director submitted the facts actually make out a fraud based on *Hyrniak*, especially given s. 46 agreement para. 34 which states "the theft, fraud, and identity fraud were all committed intentionally, with full knowledge that he was deceiving his victims." However, again, this is the incorrect test.

The Executive Director submitted that the correct test of fraud, as used by a Hearing Panel in Kalia (Re), 2018 ABRECA 10 [See Tab 1], is to be found in R. v. Olan 1978 CanLII 9 (SCC), (1978] 2 S.C.R. 1175 [See Tab 2] which states at page 1182:

> Courts, for good reason, have been loath to attempt anything in the nature of an exhaustive definition of "defraud" but one may safely say, upon the authorities, that two elements are essential, "dishonesty" and "deprivation". To succeed, the Crown must establish dishonest deprivation.

The element of deprivation is satisfied on proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim. It is not essential that there be actual economic loss as the outcome of the fraud.

The Executive Director submitted that the facts show that Industry Member dishonestly caused actual loss and/or risk of prejudice to the economic interests of both GC and MB. To quote the s. 46 agreement at para. 33, he "committed multiple

breaches that are criminal in nature and involve intentional deception for the purposes of enriching himself." The Industry Member therefore clearly committed fraud.

4. There is no collateral attack or re-litigation of a decided issue.

The Industry Member relies on evidence he submitted as exhibit 2 to allege that he is being unfairly adjudicated for fraud when this was already litigated and a court dismissed his charges. As already argued, the Hearing Panel cannot consider his exhibit 2 without proper application, as it is new evidence.

However, the Executive Director would like to point out that the Industry Member's exhibit 2 does not state the matter was already litigated, or that a court dismissed his charges. Page 2 of exhibit 2 states that charges were "withdrawn at the request of the crown." This means the charges were never litigated, that a court never made a ruling on them. They were simply withdrawn.

The Industry Member's submissions are predicated on a misunderstanding of what it means to have his charges withdrawn. Withdrawing charges means there has been no judicial findings, and therefore collateral attack and res judicata (litigation on an already decided issue) do not apply (See: *Law Society of Upper Canada v. Aliamisse Omar Mundulai*, 2011 ONLSAP 23.

Additionally, even if the Industry Member was tried and acquitted of fraud charges in a criminal court, the Executive Director would still be entitled to proceed with conduct proceeding charges (See: Po/grain Estates v. Toronto East General Hospital, 2008 ONCA 427 at paras. 34-37; Borden v Bob's Taxi, 2015 CanLII 9153 (NS HRC) at para. 16).

The Executive Director submitted that these proceedings are an attempt to litigate Industry Member's fraud, not re-litigate it.

5. There was no delay.

The Industry Member argues the proceedings are delayed and that somehow has an impact on sanction. As Industry Member argued, the case for a delay in civil proceedings such as ours is *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44. This case contains a test which a Hearing Panel must use in order to determine if an industry member deserves a remedy for delay in the proceedings. It requires proof of (1) inordinate delay and then (if (1) is proven), (2) proof of prejudice to the industry member caused by that delay.

The Industry Member has not made a delay application. There has been no proper procedure followed where the Industry Member or the Executive Director can properly adduce evidence or argue such an application. In addition, there is no evidence or facts currently before the Hearing Panel upon which the Hearing Panel could make a finding of inordinate delay or of prejudice.

All that the facts show is that 4 years has passed to bring this matter to hearing. This is not proof of inordinate delay. This is the passage of time.

The fact that the Industry Member signed the s. 46 shows there is also no prejudice by the passage of time. He admitted to everything, so how can he now claim his defence against the charges was prejudiced? He cannot. To do so would be absurd as he specifically chose not to defend himself against these charges.

The Executive Director therefore respectfully submits that no delay has been established and the Hearing Panel cannot consider delay when determining sanction.

6. The Executive Director's sanction argument is appropriate given what Industry Member actually did.

The Industry Member argues that the Executive Director's argument relies on cases that are outside of the real estate industry and this somehow means they should not be applied by the Hearing Panel to his case.

The Executive Director submitted that our sanction argument is based on *Law Society of New Brunswick v. Ryan,* 2003 SCC 20 from the Supreme Court. This is binding authority which applies to every member of every regulated industry. It should be applied when any member of any industry engages in conduct that is sufficiently serious. This applies to the Industry Member directly, given his intentional dishonesty for the purposes of enriching himself. Any other case law is not binding. Any other case law that conflicts with *Ryan* can and should be disregarded.

The Industry Member's argument for sanction appears to be predicated on the idea that he did not actually commit fraud. As already argued, this is factually and legally incorrect. He actually engaged in wanton criminality and deception over a long period of time in order to enrich himself.

The cases cited by the Executive Director were appropriate for imposing sanction with regard to the very type of conduct engaged in, that being intentional dishonesty. The Executive Director submitted that any member of the public reading the s. 46 agreement findings of fact would be horrified at the Industry Member's misconduct and would expect that he would be kicked out of the industry. To allow him to stay in the industry would bring the industry into disrepute. This was exactly what the case law the Executive Director relied on speaks to, and it aptly applies to the Industry Member's conduct. This is also fundamentally why we are seeking license cancellation and permanent lifetime prohibition from the industry.

The Industry Member argues that greater reliance is put on teachers, nurses, doctors and lawyers than on a real estate professional. The Executive Director submitted this is incorrect. As stated in our argument, the fiduciary responsibility that real estate professionals have, and the reliance that the public places on them with sensitive personal and confidential information means they are in the same position as lawyers vis-a-vis public trust. The same law that applied to their conduct should also apply to all real estate professionals, including the Industry Member.

7. Industry Member's proposed sanction is inappropriate given what Industry Member actually did.

The Industry Member's proposed sanction ignores his actual misconduct and how serious it is. Again, the Industry Member states that he did not commit theft or fraud despite those facts being in evidence and admitted to by him. Based on the actual findings of fact, his proposed sanction is totally deficient. It does not address the seriousness of his misconduct.

The Industry Member provided a list of cases where sanctions, other than cancellation and lifetime licensing prohibition, were imposed. As already argued, to the extent these disagree with *Ryan,* they can and should be disregarded. The Executive Director would also point out that few cases deal with intentional deception to the degree and duration of the Industry Member's. Usually industry members in similar situations withdraw from the industry before facing sanction, so there are few precedents that would apply.

The Industry Member also, with his list of sanction cases, seeks to emphasize only one of the *Jaswal* factors, that being the range of sentences in other similar cases. There are, in fact, twelve other factors to consider. Moreover, as stated in the Executive Director's argument, because his misconduct involved intentional

deception, the factors that should come to the forefront are general deterrence and confidence of the public in the integrity of the profession. They should be given the most weight - more, even, than the range of sentences in similar cases.

The Executive Director submitted that, with our sanction argument, we are attempting to create a new sanction regime for cases of intentional dishonesty, and this is our first case of doing so. We are doing this in an attempt to implement the "right touch" policy adopted by Council which seeks to use the whole range of sanctions rather than just the lower end. There is nothing wrong with this being the first case, especially since the approach we are advocating is based on binding case law, is principled, and is appropriate given the facts.

The industry needs to draw a bright line which members are not permitted to cross or they are expelled from the industry. The issue is not whether the Industry Member's misconduct is better or worse than any other industry member's conduct. The issue is if his misconduct, as it is factually found to have occurred, crosses the line. The Executive Director submitted it does, and so he should be expelled.

The Executive Director would like to point out that there is already a change happening with sanction ranges in RECA, and they are increasing. Very recently a license cancellation was imposed in the case of *Aulakh (Re)* ABCRECA. Notably, among the breaches admitted to was rule 42(b).

The Executive Director also responded to the Industry Member's argument that somehow *Jaswal* at para. 43 and 44 supports his position. It does not. Paragraph 43 states:

> Whilst I agree with counsel for the Board that the court ought to show deference to the sentencing policy of a disciplinary tribunal, in this case where the Board was unable to demonstrate any consistent past practice or to refer to cases in other jurisdictions which would justify a penalty of the size imposed in this case in broadly similar circumstances, the notion of deference has little application.

This is consistent with the Executive Director's argument. We are relying on case law both from the Supreme Court (thus our jurisdiction) and other jurisdictions/industries that justify a penalty of the size we are suggesting in similar circumstances of intentional dishonesty. The Executive Director is not sure why Industry Member quoted *Jaswal* since it supports our approach and not his.

8. The Industry Member's mitigating factors are insufficient.

The Industry Member argues that the Executive Director does not recognize his mitigating factors. The Executive Director submitted this is incorrect. What we stated was that his mitigating factors are insufficient.

As per the proper test from the Executive Director's argument, the presumptive license cancellation, can only be rebutted if the facts contain significant and compelling mitigating factors. These mitigating factors need to go so far as to establish in evidence that the member's personal responsibility for the misconduct is reduced. The evidence must negate the public's need to be reassured about the integrity of the profession. The evidence might be, *for* example, compelling psychiatric *or* psychological evidence that, among other things, credibly indicates not only that the misconduct was out of character and unlikely to recur but explains why it occurred.

The Executive Director submitted that none of the mitigating factors found in the s. 46 or listed in Industry Member's argument mitigate sufficiently. There is nothing that reduces to any real extent his personal responsibility or reassures the public. The mitigating factors do not address his intentional deception for the purposes of personal profit.

The Executive Director submitted the stress the Industry Member suffered at the time he committed the frauds is not enough to constitute psychiatric or psychological evidence which explains why this misconduct occurred. Being under stress does not explain his deception or greed.

Rather, the findings of fact show that intentional deception for the purposes of personally profiting is the way that the Industry Member does business, stretching from 2011 to 2015, to the investigation, up until 2019 dealing with RECA employees when he admitted he had lied in his own confession.

The Executive Director submitted that the Industry Member lists several puzzling things as mitigating factors:

- He takes his offers to pay MB some of the illicit rent collected as mitigating. The Executive Director pointed out that he only offered to pay her once his scheme was discovered, and even then, he did not offer the full amount collected. Even while trying to allegedly pay her, he was still trying to profit from his fraud.

- He takes signing the s. 46 agreement as mitigating. The Executive Director submitted it is not a mitigating fact in this case given he fully confessed to the breaches during the investigation. It does not make him deserve of a lesser sanction since he decided not to waste our time with a hearing. Further, signing the s. 46 agreement saved him a significant amount in costs, so he is looking to further benefit while already having benefitted financially.

- He mentions over and over again about how close he was with MB and her family, how he helped them in the past, and that the loss of this relationship is mitigating. The Executive Director submitted this is ridiculous. This is his victim! He victimized her due to their close relationship and he violated that trust in order to try to make money without her knowing. This is not a mitigating factor; it is an aggravating factor that he would attempt to victimize someone he knew so well and claims to care about.

9. The Industry Member's submission on costs show his misconduct playing out in these very proceedings.

The Industry Member states that $1500 in costs should be imposed, just as the Executive Director submitted. The Executive Director pointed out, however, that we stated to the Hearing Panel when adducing the s. 46 agreement that the cap of $1500 costs was contingent on Industry Member signing the s. 46 agreement.

However, in this very argument, Industry Member seeks to both rescind and replace the s. 46 with something else, and yet also receive the benefit of our agreement.

He is attempting to have it both ways, to both make an agreement with the Executive Director, and then deceptively back out of that agreement while also receiving financial benefit.

The Executive Director submitted that the Panel could observe in action the way Industry Member makes deals. He lies and manipulates in order to obtain personal gain.

The Executive Director submitted this is further demonstration of why he should be expelled from the industry.

We respectfully submit that the Hearing Panel should impose the sanction of license cancellation and lifetime licensing prohibition.

Sanction - Hearing Panel's Reasons and Decision

Before the Hearing Panel considered the appropriate sanction in the circumstances, the matter of the Industry Member challenging the exact breaches set out in the signed Admission of Conduct Deserving of Sanction and his request to have those breaches amended, had to be considered. Also, the Industry Member had provided additional information that was not included in the Admission of Conduct Deserving of Sanction that also had to be considered.

First, the Hearing Panel considered the process wherein the Industry Member and the Executive Director presented the Admission of Conduct Deserving of Sanction and that the Industry Member confirmed to the Hearing Panel that:

- he acknowledged that he had been given an opportunity to seek the advice of a lawyer before he signed the Admission;
- he was agreeing to the Admission voluntarily and that he admitted to the facts and breaches set out in the document; and
- he admitted that the conduct was deserving of sanction.

In addition, the Industry Member provided no authority for the Hearing Panel to withdraw or amend the document. The Hearing Panel heard no witnesses and received no other evidence at the hearing, from the Executive Director or the Industry Member. At the hearing, the Industry Member submitted the Admission of Conduct Deserving of Sanction to the Hearing Panel rather than provide evidence or challenge the evidence of the Executive Director.

Pursuant to section 47(2), the Admission of Conduct Deserving of Sanction is deemed for all purposes to be a finding of the Hearing Panel. The Hearing Panel also considered section 46 and section 47(1) of *the Real Estate Act*:

> **46(1)** An industry member may, at any time after the commencement of proceedings under this Part and before a Hearing Panel makes its findings in respect of the industry member's conduct, submit to the executive director a statement of admission of conduct deserving of sanction in respect of all or any of the matters that are the subject-matter of the proceedings.

(2) A statement of admission of conduct may not be acted on unless it is in a form acceptable to the executive director and meets any additional requirements set out in the rules.

47(1) If a statement of admission of conduct is accepted, the executive director shall immediately refer the matter to a Hearing Panel, and in that case the Hearing Panel shall deal with the matter as if it had been referred to it under section 39(1)(b).
(2) If a statement of admission of conduct is accepted, each admission of conduct in the statement in respect of any act or matter regarding the industry member's conduct is deemed for all purposes to be a finding of the Hearing Panel that the conduct of the industry member is conduct deserving of sanction.

The Admission of Conduct Deserving of Sanction was accepted and presented to the Hearing Panel and therefore it is deemed for all purposes to be a finding of the Hearing Panel. As there was no other evidence properly before the Hearing Panel, the Panel found that it could only rely on the facts as set out in the Admission of Conduct Deserving of Sanction.

Regarding the information provided to the Hearing Panel in the Industry Member's submission on sanction, it cannot be accepted into evidence in this manner. The evidence ought to have been provided to the Hearing Panel at the hearing to determine whether the alleged conduct deserving of sanction was proven. This did not occur as the Industry Member chose to submit the Admission of Conduct Deserving of Sanction instead. The Hearing Panel did not rely on this information in making its determination about sanction. It has relied solely on the findings in the Admission of Conduct Deserving of Sanction.

Regarding the Industry Member's arguments about the proceedings be unfair, there was no evidence to support this argument. Again, if the Industry wished to challenge the evidence of the Executive Director, he ought to have conducted the hearing rather than submitting the Admission of Conduct Deserving of Sanction.

Regarding the Industry Member's arguments about a collateral attack or re-litigation of a decided issue, there was no evidence to support this argument. Again, if the Industry wished to make these arguments, he ought to have conducted the hearing rather than submitting the Admission of Conduct Deserving of Sanction.

Finally, with respect to the Industry Member's arguments about the delay, there was no evidence to support this argument. Again, if the Industry wished to argue there was an inordinate delay in the proceedings that resulted in prejudice, he ought to have conducted the hearing rather than submitting the Admission of Conduct Deserving of Sanction.

The Hearing Panel proceeded to deliberate on the appropriate sanction based on the Agreed Breaches, Agreed Facts and Additional Facts set out in the Admission of Conduct Deserving of Sanction and signed by the Industry Member.

The Hearing Panel's authority to impose sanction is set out in section 43 of the *Real Estate Act*:

> 43(1) If a Hearing Panel finds that the conduct of an industry member was conduct deserving of sanction, the Hearing Panel may make any one or more of the following orders:
>
> a) an order cancelling or suspending any authorization issued to the industry member by the Council;
> b) an order reprimanding the industry member;
> c) an order imposing any conditions or restrictions on the industry member and on that industry member's carrying on of the business of an industry member that the Hearing Panel, in its discretion, determines appropriate;
> d) an order requiring the industry member to pay to the Council a fine, not exceeding $25 000, for each finding of conduct deserving of sanction;
> d.1) an order prohibiting the industry member from applying for a new authorization for a specified period of time or until one or more conditions are fulfilled by the industry member;
> e) any other order agreed to by the parties.

For the reasons set out below in this decision, the Hearing Panel orders the following sanction against the Industry Member, Mehboob Ali Merchant:

1. All authorizations issued by the Real Estate Council of Alberta ("RECA") to Mehboob Ali Merchant are hereby cancelled, effective immediately;

2. Mehboob Ali Merchant will not be eligible to apply to RECA for any new authorization whatsoever for a period of 12 months from October 17, 2019;

3. Mehboob Ali Merchant will be required to successfully complete all education requirements before being eligible to apply for a new authorization from RECA, as though he had never previously received authorization from RECA;

4. Mehboob Ali Merchant shall pay all the fines set out below before being eligible to apply for a new authorization from RECA;

5. Mehboob Ali Merchant shall pay a fine for the three (3) breaches of Rule 42(b) of the *Real Estate Act Rules* in the total amount of $15,000.00;

6. Mehboob Ali Merchant shall pay a fine of $1,000.00 for the breach of section 17 of the *Real Estate Act*;

7. Mehboob Ali Merchant shall pay a fine of $5,000.00 for the breach of section 38(4.1) of the *Real Estate Act*; and

8. Mehboob Ali Merchant shall pay costs of the investigation and hearing of $1,500.00.

The Hearing Panel advised the parties of its decision on sanction in a written decision dated October 17, 2019. The decision stated that reasons would be provided in due course. Below are the Hearing Panel's reasons for ordering the above sanction.

The reason the Hearing Panel did not adopt the Executive Director's recommendation for a license cancellation and lifetime licensing prohibition was because there was no precedential case law in the real estate industry regulation area for the Hearing Panel to rely on. There were several cases with similar conduct to this case wherein the Hearing Panel ordered suspensions and fines and the Hearing Panel relied on those cases to determine an appropriate sanction. The use of precedents for sanction provides predictability, stability, fairness and efficiency in the law. The Hearing Panel considered that to be of the utmost importance.

The Hearing Panel acknowledges that in other professions, dishonesty or fraud results in a lifetime licensing prohibition. However, that approach to sanction, or that standard, has not been applied to the real estate profession. For reasons unknown to the Hearing Panel, the sanction for real estate professionals is generally a suspension and a fine rather than a lifetime licensing prohibition. The Hearing Panel also acknowledges that the Executive Director is attempting to implement a

new RECA policy that results in lifetime licensing prohibitions for serious and intentional dishonesty and fraud, but the Hearing Panel could not order this in this instance, without case law from the real estate profession to support that position.

In the Supreme Court of Canada case, *The Law Society v Ryan*, 2003 SCC 20 (*Ryan*) at paras. 58-59, the Supreme Court did endorse the sanction of license cancellation and lifetime licensing prohibition by a Hearing Panel, but all four parts of the test must be met. In this case the Hearing Panel found that when it considered if the member's misconduct was similar to ones for which professional disciplinary bodies have previously imposed a sanction of disbarment, the first prong of the test, that the court was referring to similar hearing panels for similar professional bodies.

Although the Executive Director equated the standards for lawyers with the standards for real estate professionals, there was no case law to support this position. On the contrary, similar conduct to that of this Industry Member in recent RECA cases, has resulted in suspensions and fines or in one case, a license termination for a period of 2 years. Many of these sanctions imposed in RECA cases, were joint submissions to the hearing panel and therefore both the Industry Member and the Executive Director had agreed to the sanction.

The test set out in Ryan is as follows:

a. Though "the professional self-government regime requires that each case must be decided on its own facts, it is nonetheless relevant" to consider if the member's misconduct was similar to ones for which "professional disciplinary bodies have previously imposed a sanction of disbarment."

b. The misconduct amounted to a "serious and egregious breach of his professional conduct and responsibilities" which "undermines public confidence in the … system and is so improper that only significant and compelling factors would mitigate the seriousness of such unethical behaviour";

c. The evidence of mitigation is not compelling; and

d. A previous disciplinary record may be a relevant consideration.

There were no cases provided to the Hearing Panel where similar conduct had resulted in a real estate professional being "disbarred". There were cases for doctors, lawyers, teachers and nurses but none for real estate professionals.

As stated above, the Hearing Panel did not find that the first prong of the test was met as there were no similar cases for which the professional disciplinary bodies had previously imposed permanent license cancellation for real estate professionals (disbarment in the case of lawyers).

In addition, although the Industry Member's conduct was undoubtedly serious, the Hearing Panel did not find it to be serious and egregious, with the exception of one of the section 42(b) breaches as follows:

On or around January 30, 2015, Mr. Merchant attempted to enter into a lease with MB by pretending to be acting on behalf of his brokerage. The tenant was actually a corporation Mr. Merchant registered to appear to be his brokerage. He did this for the purpose of personally profiting, and thereby committed identity fraud and breached section 42(b) of the *Real Estate Act Rules*.

The Hearing Panel went on to consider the *Jaswal* factors as set out in *Jaswal v. Newfoundland (Medical Board), [1996] N.J. 50* as follows:

a. **The nature and gravity of the proven allegations**

The Hearing Panel found the nature and gravity of the admitted breaches to be serious. As stated above, one of the breaches of section 42(b) was serious and egregious. Fraud and theft, identity fraud, dishonesty and failing to provide documents, are all very serious conduct deserving of sanction.

The Rules are enacted for public protection and for the public to trust industry members and their dealings in real estate. Breaching these Rules undermines the integrity of the industry and brings the industry into disrepute.

b. **The age and experience of the industry member**

The Industry Member has been a real estate associate for 11 years. He was not inexperienced when these breaches occurred.

c. **The previous character of the offender and, in particular, the presence or absence of prior complaints or convictions**

The Industry Member had no previous disciplinary history.

d. **The number of times the offence was proven to have occurred**

As the Executive Director has submitted, the instances occurred over a long period of time and included misconduct during the RECA investigation.

e. **The role of the industry member in acknowledging what occurred**

The Industry Member lied during his "confession". He withheld documents. He did not acknowledge what occurred in a forthright manner. He did not accept responsibility for signing the Admission of Conduct Deserving of Sanction and made excuses for signing that document as well. It cannot be said that he acknowledged what occurred notwithstanding that he signed the Admission of Conduct Deserving of Sanction.

The Additional Facts with respect to Sanction in the Admission of Conduct Deserving of Sanction states:

> Throughout the investigation, Mr. Merchant admitted progressively more of his misconduct, however he continued to conceal the rest of his misconduct. Throughout the investigation Mr. Merchant claimed to be "coming clean" without actually doing so. He did not fully admit his misconduct until he was confronted with documents he intentionally withheld from investigators.

And:

> Moreover, Mr. Merchant continued to knowingly deceive investigators even in the middle of his confession. He falsely claimed that he forged his wife's signature on the lease between GC (the tenant) and [("Company")]
>
> . He did not advise RECA of this lie until 2019.

f. **Whether the industry member had already suffered serious financial or other penalties as a result of the allegations having been made**

There was no evidence provided to the Hearing Panel of financial or other penalties suffered by the Industry Member.

g. **Impact of the incident on the victim, in any**

The tenant had to leave the premises quickly before her tenancy ended. There was no other facts or evidence before the Hearing Panel regarding the impact on the victims.

h. Mitigating circumstances – factors supporting leniency

The Industry Member listed many mitigating factors for the Hearing Panel to consider. Of those, only a few were included in the Admission of Conduct Deserving of Sanction document and therefore could be considered by the Hearing Panel. The Hearing Panel found the following could be mitigating circumstances but in this instance they did not or minimally supported leniency:

- He was never offered the Broker Resolution Program;
- He was never offered assistance through REIX;
- For the periods of time concerning the property rental, and while being investigated, he was out of the country and suffered mental stress due to certain familial, health and professional affairs;
- He and one of the victim's family were close friends and he had supported and assisted her family prior to the last incident; and
- Several times he requested account information from one of the victims so he could deposit the collected rent into her account. She abandoned communication with him and did not provide her account information.

The Hearing Panel did consider the following mitigating factors supported leniency:

He had a 100% commission structure with his brokerage, pays a small flat transaction fee, and keeps all commissions earned. He was allowed to have 1 free transaction per year through his brokerage;

- The brokerage never inquired with him regarding the commissions related to the purchase in February 2011;
- MB (the complainant) agreed to let the Industry Member manage rental of the condo; and
- The tenant received a full refund of rent for February 2015.

i. Aggravating circumstances - factors supporting a stronger penalty

The Hearing Panel found the following were factors supported a stronger penalty:

- The Industry Member committed multiple breaches that were criminal in nature and involved intentional deception for the purposes of enriching himself;

- The theft, fraud and identity fraud were all committed intentionally, with full knowledge that he was deceiving his victims;
- Throughout the investigation, the Industry Member admitted progressively more of his misconduct, however he continued to conceal the rest of his misconduct;
- Throughout the investigation the Industry Member claimed to be "coming clean" without actually doing so. He did not fully admit his misconduct until he was confronted with documents he intentionally withheld from investigators;
- The Industry Member continued to knowingly deceive investigators even in the middle of his confession. He falsely claimed that he forged his wife's signature on the lease between GC and [("Company")]. He did not advise RECA of this lie until 2019; and
- The conduct spanned from 2011 to 2014 and continued into the investigation in 2015.

j. **The need to promote specific and general deterrence and thereby protect the public and ensure the safe and proper conduct of the profession**

Specific deterrence is the concept that the punishment imposed should have the effect of discouraging the individual from engaging in misconduct in the future. The Panel found specific deterrence to be of significance in the circumstances because of the Industry Member's lack of acknowledgement of his conduct and lack of forthrightness. Also because of the serious and in some instances, egregious conduct. In addition, there was not one incidence of fraud and theft but several which shows a pattern of conduct.

General deterrence is the concept that the punishment imposed should have the effect of discouraging others from engaging in similar misconduct. The Panel found general deterrence to be important in the circumstances. It must be clear to the real estate profession that this type of conduct is serious and therefore a significant sanction is supported in these circumstances. This will assist with the public having confidence in their dealings with the industry.

The Executive Director submitted that general deterrence and the need to maintain the public's confidence were the most significant factors and perhaps the only factors for the Hearing Panel to consider due to the serious and egregious conduct. The Hearing Panel agrees that these two factors should be weighted heavily because

of the fraud, theft and dishonesty the Industry Member committed. However, those factors will not be exclusively considered by the Hearing Panel, the other *Jaswal* factors will also be considered by the Hearing Panel as there is no case law relating to the real estate industry that supports that approach.

k. **The need to maintain the public's confidence in the integrity of the profession**

As stated above, the Hearing Panel finds this to be an important and significant aspect to be considered in this situation. Maintaining the public's confidence and the integrity of the profession is of the utmost importance and therefore the sanction must reflect how serious this consideration is for the Hearing Panel.

l. **The degree to which the offensive conduct that was found to have occurred was clearly regarded, by consensus, as being the type of conduct that would fall outside the range of permitted conduct**

The conduct the Industry Member admitted to clearly falls far outside the range of permitted conduct by real estate professionals. Other professional groups employ license cancellation and lifetime prohibition for this type of conduct which reflects how serious the conduct is regarded. To date, this has not been supported by the case law for real estate professionals, however, there is consensus that this type of conduct falls far outside the range of permitted conduct.

m. **The range of sentence in other similar cases.**

No RECA or other real estate professional regulatory cases were provided to the Hearing Panel in the written closing submissions of the Executive Director. However, in the Executive Director's rebuttal submissions the Hearing Panel was provided two RECA decisions: *Aulakh* and *Kalia*.

The Industry Member provided several RECA cases as set out above but in the summary of the cases he provided for consideration, he failed to set out the fines and costs that were ordered against the industry members.

The Hearing Panel found the following cases, which were provided to the Hearing Panel, to involve similar conduct deserving of sanction and therefore the Panel carefully considered the sanction imposed in each of these situations with a view of comparing the particulars of these cases with the circumstances in this case.

Aulakh, RECA Case 005363, September 3, 2019
An Admission of Conduct Deserving of Sanction and Joint Submission on Sanction was presented to the Hearing Panel. The industry member committed mortgage fraud that resulted in foreclosure proceedings for her client's property. She admitted to breaching Rules 41(b) twice, 41(e), 41(f), 54(3), and 57(e) of the *Real Estate Act Rules*.

Ms. Aulakh had been an industry member for over 13 years and was authorized as a mortgage broker and an associate. The sanction was license cancellation with a re-application prohibition for 24 months. No costs or fines were imposed.

The Hearing Panel considered this case to be similar to the circumstances in this case. However, the Hearing Panel found the conduct in *Aulakh* to be more egregious and therefore reduced the authorization cancellation for the Industry Member and imposed fines instead. The fines were supported by the cases below. In *Aulakh*, there was no fine or costs awarded but the authorization cancellation was for 24 months and the Industry Member cooperated with the investigation and submitted a joint submission on sanction.

Kalia, (Re), 2018 ABRECA 010
The industry member failed to disclose he had an interest in the property and was not the listing agent. He was misleading about his relationship with one of the companies involved and he did not submit documents to the brokerage. His authorization was suspended for three months and he was fined as follows:

- $5000 fine for breaching Rule 41(d) and 41(f) of the *Real Estate Act Rules*
- $10,000 fine for breaching *Rule* 42(a)
- $2,500 fine for breaching *Rule* 53 (c)
- $2,500 for breaching *Rules* 62(1)(a) and (b)
- Completing particular educational courses were also ordered and costs of $13,294.

The Hearing Panel considered this case to be very similar to the circumstances in this case. The Hearing Panel found the Industry Member's conduct to be more egregious than in *Kalia* and therefore increased the authorization cancellation or suspension for the Industry Member from three months to 12 months. As the conduct was similar to that in Kalia, the Hearing Panel imposed fines and costs that were in line with this case.

Sedgewick (Re), 2018 ABRECA Case 015
An Admission of Conduct Deserving of Sanction and Joint Submission on Sanction was presented to the Hearing Panel. The industry member created a fraudulent agreement by copying and pasting signatures from one agreement to another, lied to his broker, lied to his clients, presented and circulated a forged document, gave a false written statement, and lied to RECA. He had been an industry member for over 16 years. His license was suspended for three months and he was fined $10,000 for the breach of section 38(4)(a) of the *Real Estate Act* and fined $15,000 for breach of Rule 42(b). He was ordered to complete educational courses and to pay costs of $1,590.

The Hearing Panel considered this case to be very similar to the circumstances in this case but the conduct deserving of sanction carried on for a much longer period in this case. It was not a one-time incident as it was in *Sedgewick*. Therefore, the Hearing Panel increased the suspension or authorization cancellation from three months to 12 months. As the conduct was similar to that in Sedgewick, the Hearing Panel imposed fines and costs that were in line with this case.

Lalji RECA 2016
The industry member breached *Real Estate Act Rules* 42(a), 42(b), 41(h) and 41(a). She altered contracts, created false documents, forged signatures on multiple documents, committed intentional reckless conduct, participated in fraudulent and unlawful activities, failed to act honestly, failed to cooperate with and provide information to RECA, and tried to influence possible witnesses in the investigation. Fines and costs totaling $52,000 were ordered and the industry member was suspended for 18 months.

The Hearing Panel considered this case to be similar to the circumstances in this case but the conduct deserving of sanction in Lalji was more egregious. Therefore, the Hearing Panel decreased the suspension or authorization cancellation from 18 months to 12 months. As the conduct was similar, but not as egregious, to that in Lalji, the Hearing Panel reduced the fines and costs significantly in this case.

Odetunde, RECA 2006
The industry member fraudulently misappropriated trust funds, utilized trust funds for his personal use and neglected his fiduciary duties. He had been an industry member for 23 years and acted as the broker for his office. His authorization to trade as a broker was suspended for five years, his authorization to trade in real estate was suspended for 18 months, he was fined $1500, ordered to pay costs in the sum of

$12,372.20, ordered to take courses to become a broker again and to complete the courses to become a real estate associate again.

The Hearing Panel considered this case to be similar to the circumstances in this case but the fines were out of line with other more recent RECA cases so the Hearing Panel decreased the suspension or authorization cancellation from 18 months to 12 months and added fines totalling $21,000 for the Industry Member.

After reviewing other similar cases and finding that the factors of general deterrence and the confidence of the public in the integrity of the profession ought to be weighted heavily given the Industry Member's multiple breaches of theft, fraud and identity fraud were committed intentionally, authorization cancellation is more appropriate than a suspension. Also, the cancellation ought to be for 12 months which reflects the seriousness of the breaches and the fine should reflect current similar RECA cases. The parties had agreed to costs of $1,500.

To summarize, the Hearing Panel carefully considered the submissions of both parties regarding the sanction to be imposed in these circumstances and pursuant to section 43 of the *Real Estate Act*, ordered as follows:

1. All authorizations issued by the Real Estate Council of Alberta ("RECA") to Mehboob Ali Merchant are hereby cancelled, effective immediately;

2. Mehboob Ali Merchant will not be eligible to apply to RECA for any new authorization whatsoever for a period of 12 months from October 17, 2019;

3. Mehboob Ali Merchant will be required to successfully complete all education requirements before being eligible to apply for a new authorization from RECA, as though he had never previously received authorization from RECA;

4. Mehboob Ali Merchant shall pay all the fines set out below before being eligible to apply for a new authorization from RECA;

5. Mehboob Ali Merchant shall pay a fine for the three (3) breaches of Rule 42(b) of the Real Estate Act Rules in the total amount of $15,000.00;

6. Mehboob Ali Merchant shall pay a fine of $1,000.00 for the breach of section 17 of the Real Estate Act;

7. Mehboob Ali Merchant shall pay a fine of $5,000.00 for the breach of section 38(4.1) of the Real Estate Act; and

8. Mehboob Ali Merchant shall pay costs of the investigation and hearing of $1,500.00.

This decision is certified and dated October 21, 2019

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Ramey Demian, Hearing Chair