THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF Section 83.1 of the *REAL ESTATE ACT*, R.S.A. 2000, c.R-5 (the "Act")

AND IN THE MATTER OF a Hearing regarding the conduct of JOHN WILLIAM WADE, currently registered with brokerage Irealty Calgary Inc. o/a Re/Max IRealty Innovations

Hearing Panel Members:	[K.O], Chair (Public Member) [M.W], Panel Member (Licensee Member) [M.B], Panel Member (Licensee Member)
Appearances:	Charles Fair, for John William Wade Mitali Kaul, for the Registrar of the Real Estate Council of Alberta
Hearing Date(s):	January 25, 26, 27, February 11, 2021, virtual hearing

DECISION

A. Introduction

[1] This is an appeal under section 83.1 of the Act of three administrative penalties. The administrative penalties alleged that the Licensee, John William Wade (the "Licensee"), contravened the following:

a. Section 17(a) of the Act, trading in real estate without authorization;

b. Section 41(e) of the *Real Estate Act Rules* (the "Rules"), failing to ensure his role was understood; and

c. Section 41(d) of the Rules, failing to fulfill fiduciary obligations.

[2] The hearing of this appeal proceeded as a *de novo* hearing. Section 83.1(5)(a) permits the Hearing Panel to "quash, vary or confirm the administrative penalty". This decision relates to phase I of the hearing process and considers whether the Registrar has established liability under each of the administrative penalties. The Hearing Panel finds breaches related to all three administrative penalties. However, we do not find that all the alleged circumstances were established. In addition, we find that there was overlap in the facts between some of the allegations.

[3] The Hearing Panel requests written submissions in phase II of the hearing to address whether any of the administrative penalties should be confirmed, varied or quashed in light of our findings below.

B. Issues

[4] The issues for this stage of the appeal are as follows:

a. Did the Licensee trade in real estate while he was not authorized?

b. Did the Licensee fail to ensure that his clients understood his role?

c. Did the Licensee fail to fulfill his fiduciary obligations to his clients?

C. Facts

[5] The administrative penalties arose out of circumstances in the spring of 2014 with clients MSC and PP (collectively, the "Buyers"). This was a contested hearing with differing versions of what happened. The Hearing Panel makes the findings of fact described below.

The Licensee

[6] The Licensee first registered with RECA in 2005. When he started working with the Buyers in March 2014, the Licensee was licensed as a real estate associate with the brokerage 4th Street Holdings Ltd. o/a Re/Max Real Estate (Central) ("Re/Max Central").

The Buyers

[7] The Buyers, MSC and PP, were investment partners, looking to purchase a residential property that they could rent out and which contained a separate suite in which PP could reside.

The Centre Street Property Offer

[8] The Licensee showed the Buyers a property located on Centre Street in Calgary (the "Centre Street Property"). This was a duplex which the seller had partially renovated, and the Buyers liked the quality of the renovations. They also believed that the basement could be converted to a suite for PP's residence. The Buyers wanted the seller to complete the renovations required for the basement because they were satisfied with his other renovations and they did not know any contractors who could complete the work.

[9] On April 1, 2014 the Buyers attended the Licensee's office and signed with the Licensee:

a. Consumer Relationships Guide;

b. Exclusive Buyer Representation Agreement between the Buyers and Re/Max Central as the brokerage;

c. Residential Purchase Contract offer to purchase the Centre Street Property (the "Centre Street Offer"); and

d. Residential Purchase Contract Amendment (the "Amendment").

[10] The list price of the Centre Street Property was $304,900. The Buyers understood that the seller wanted to take away approximately $300,000 from the sale. After back and forth between the Licensee and the Seller's Agent, the Buyers offered $310,000 for the Centre Street Property to account for the value of the renovations required by the Amendment.

[11] The Amendment required the seller to make improvements to the basement of the Centre Street Property, including laundry, a kitchenette, flooring, and a separate bedroom. The Amendment anticipated a holdback for work not completed to the buyers' satisfaction:

> ALL WORK TO BE TO THE SOLE SATISFACTION OF THE BUYER. Walk-through to be conducted 48 hours prior to possession by the buyer. If buyer is dissatisfied with the work then a HOLDBACK of $10,000 to be withheld by the BUYER'S Lawyers and released to the BUYER immediately upon possession of the property.

[12] The Licensee drafted the Amendment on behalf of the Buyers. The purpose of the Amendment was to ensure that the seller completed the renovations that the Buyers wanted. It was not included as an addendum to the Centre Street Offer or otherwise identified in that document. However, the contract number of the Centre Street Offer was identified on the Amendment.

Discussions and Concerns About the Offer

[13] Re/Max Central was a designated agency brokerage. The seller's agent was also a real estate associate licensed with that brokerage (the "Seller's Agent"). Before these events, he had never seen an Amendment like the one attached to the Centre Street Offer, and he was initially concerned about it. The Seller's Agent proposed that the agents discuss the Amendment with management at Re/Max Central.

[14] On April 2, 2014 the Licensee and the Seller's Agent met with a manager at Re/Max Central (the "Brokerage Manager"). The Brokerage Manager raised concerns with proceeding with the transaction as proposed, including that the funds for the basement renovations should go through Canada Mortgage and Housing Corporation ("CMHC") rather than returning directly to the buyers. He was also concerned about whether a legal suite could be developed in the property. Neither the Seller's Agent nor the Licensee understood the Brokerage Manager to expressly prohibit the transaction from going ahead, but rather to raise issues to consider.

[15] The Seller's Agent also called another agent who had worked with the Licensee in the past on a deal with a similar clause, who advised that the past transaction had worked out fine. After the meeting with the Brokerage Manager, the Seller's Agent contacted legal counsel. He testified that he understood legal counsel's advice to be that the wording of the proposed Amendment was a "grey area" or words to that effect. He testified that he discussed with legal counsel the CMHC option and they agreed that CMHC was unlikely to approve funding in these circumstances.

[16] The Seller's Agent presented the Centre Street Offer to his client, along with communicating the concerns he had discussed with the Brokerage Manager and legal counsel. As outlined above, the Amendment contained a holdback of $10,000 if the renovations were not completed to the buyers' satisfaction. The seller accepted the Centre Street Offer. Conditions on the sale included a property inspection.

Property Inspection

[17] On the morning of April 3, 2014, the Buyers arranged for a property inspector to attend the Centre Street Property. The Licensee also attended. The property inspector identified a concern with a retaining wall and recommended that the Buyers retain a structural engineer to assess the structural integrity of the retaining wall.

Brokerage Actions

[18] After the property inspection but also on April 3, 2014, the broker for Re/Max Central (the "Broker") became aware of the accepted Centre Street Offer. She was concerned that the transaction, and particularly that the wording of the Amendment, was an attempt to participate in mortgage fraud. She contacted both the Licensee and the Seller's Agent and communicated that the deal was terminated. She also terminated the employment and the license of the Licensee at the same time. The Broker instructed the Licensee to advise the Buyers that the transaction was terminated.

[19] The Seller's Agent accepted the Broker's termination of the transaction and communicated the same to the seller. The Licensee did not tell MSC or PP about the Broker's position or actions. He believed that the Broker could not unilaterally terminate the contract. The Licensee called RECA's regulatory compliance advisor (the "Practice Advisor") and understood from that discussion that he was correct about the validity of the contract. The Practice Advisor also testified at the hearing and confirmed that he was concerned about the Broker's actions. Both the Practice Advisor and the Licensee testified that the Practice Advisor also cautioned the Licensee to take care not to trade in real estate while unauthorized.

[20] Re/Max Central did not contact the Buyers at any time following April 3, 2014, other than to return their deposit on the Centre Street Property.

Conduct While Unauthorized

[21] Between April 3 and 9, 2014, the Licensee was not authorized to trade in real estate. After his termination and license cancellation, the Licensee phoned the Seller's Agent to discuss the transaction. He expressed the opinion that the contract was still legally binding. In contrast, the Seller's Agent accepted the Brokerage's termination of the transaction and continued to market the Centre Street Property, which eventually sold to a third party.

[22] The Buyers arranged and paid for a structural engineer to assess the retaining wall at the Centre Street Property. Following that inspection, the Buyers remained concerned about the retaining wall and decided not to remove their conditions.

[23] MSC contacted the Licensee on or about April 7, 2014 and discussed the issues with the retaining wall with him. The Licensee advised the Buyers that he agreed with their decision not to go ahead and then contacted the Seller's Agent to advise of the Buyers' decision. The Licensee did not advise the Buyers of the Brokerage's actions, including the purported termination of the contract or his status of being unauthorized.

Offer on the Templemont Property

[24] The Licensee became licensed again on April 10, 2014 with 1601407 Alberta Ltd. o/a Re/max Complete Realty ("Re/Max Complete").

[25] After the termination of the Centre Street Property purchase, the Buyers remained interested in purchasing an investment property. PP identified a property that he wanted to view that had previously been pending but was now available again (the "Templemont Property"). The Licensee showed the Templemont Property to the Buyers.

[26] On April 21, 2014 the Licensee signed with the Buyers the following:

a. Consumer Relationships Guide;

b. Exclusive Buyer Representation Agreement between MSC and PP as the Buyers and Re/Max Complete as the brokerage; and

c. Residential Purchase Contract offer to purchase the Templemont Property.

[27] The offer was accepted and the transaction on the Templemont Property closed.

D. Reasons for Decision

Section 17(a): Trading in Real Estate while Unauthorized

[28] Section 17(a) of the Act prohibits training in real estate while unauthorized:

> No person shall
>
> (a) trade in real estate as a real estate broker,
>
> ...
>
> unless that person holds the appropriate licence for that purpose issued by the Industry Council relating to that industry.

[29] Section 12(1)(k) of the Act permits RECA to make rules relating to section 17:

> Each Industry Council may, with respect to licensees in the industry to which the Industry Council relates, make rules
>
> ...
>
> (k) respecting the issuing of licences for the purposes of section 17, including, without limitation, rules ...

[30] Section 6(2) of the Rules outlines that an associate license constitutes authorization to trade in real estate on behalf of a brokerage:

A real estate associate broker or associate licence issued by the relevant Industry Council under these Rules when registered to a brokerage constitutes the licence required under the Act for a real estate associate broker or associate to trade in real estate on behalf of a brokerage.

[31] Section 6(4) of the Rules prohibits individuals from holding themselves out as a real estate associate without a license:

> An individual must not trade in real estate or in any way hold himself out as a real estate broker, associate broker or associate until such time as the individual has been issued a licence by the relevant Industry Council and they are registered to a brokerage.

[32] The Act defines "trade" in section 1(1)(x):

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

[33] The Broker terminated the Licensee's licence on April 3, 2014. She wrongly believed that the Licensee was helping the Buyers to engage in mortgage fraud. This placed the Licensee into a difficult situation where he was no longer authorized to trade in real estate but there was potentially still a binding contract in place. Although we recognize that the Licensee was placed into a difficult situation, his conduct in communicating with the Buyers and the Seller's Agent about a live transaction between April 3 – 9, 2014 when he was not licensed was a breach of s. 17(a) of the Act and the Rules cited above.

[34] MSC phoned the Licensee on or about April 7, 2014, while he was not authorized to trade in real estate. The Licensee accepted her call and communicated as if he was still a licensed real estate associate. They discussed the result of the second property inspection and lifting conditions in the circumstances. The Licensee agreed with the Buyers that the retaining wall on the Centre Street Property posed a serious unknown financial risk. MSC instructed the Licensee to communicate that she and PP were not lifting their conditions on the Centre Street Property. The Licensee then called the Seller's Agent to communicate the same.

[35] The Licensee's conduct in communicating with the Buyers and the Seller's Agent about an active real estate transaction constituted trading in real estate. He held himself out as trading in real estate and acted in furtherance or attempted furtherance of a real estate transaction. Since he was not authorized to do so between April 3 – 9, 2014, he was in breach of s. 17(a) of the Act.

Section 41(e): Failing to Ensure the Licensee's Role was Understood

[36] Section 41(e) of the Rules requires a licensee to "ensure the role of the licensee is clearly understood by their clients and third parties". The Registrar alleged three breaches of this Rule:

a. Failing to provide the Consumer Relationships Guide and written service agreement prior to signing offers on both the Centre Street Property and the Templemont Property;

b. Failing to ensure that the clients understood his role during April 3 – 9 while unauthorized to trade in real estate; and

c. Failing to ensure that his role was understood about which brokerage he represented.

[37] The Hearing Panel finds that it was not a breach of s. 41(e) in the circumstances for the Licensee to fail to provide the Consumer Relationships Guide or written service agreement prior to making the offers here. However, the Licensee breached s. 41(e) when he failed to ensure that his clients understood his role during April 3 – 9, 2014 when he was unauthorized and when he failed to ensure that his clients understood which brokerage he represented.

Timing of Signing the Consumer Relationships Guide and Written Service Agreement

[38] The Registrar argued that the timing of when the Licensee provided the Consumer Relationships Guide to the Buyers and written service agreement, at the time of signing the offer on the Centre Street Property and then again on the Templemont Property, was a failure to ensure that his role was understood. The Registrar pointed to RECA's Information Bulletin, "Ensure Role is Understood – Real Estate Brokerage", which included the following advice:

> You must explain your role to everyone involved in a real estate transaction:
>
> - before they sign a service agreement with you
> - before you ask or receive information about their real estate needs, financial qualifications, or reason for the transaction
> - as soon as possible after they give you that confidential information

[39] Similarly, this same Information Bulletin advised licensees to ensure that before they agree to represent someone as sole agent and before the licensee performs any services for the clients, to provide a copy of the Consumer Relationships Guide and sign a written agreement.

[40] The Licensee likely showed properties to the Buyers by at least March 17, 2014. MSC met the Licensee at the trade show in mid-March and MSC had a specific memory of viewing properties on St. Patrick's Day. The Licensee likely had information about the Buyers' search criteria, their financial qualifications, and the reason for the transaction by at least the time that he showed them properties approximately one and a half to two weeks before April 1, 2014.

[41] However, when he reviewed the Consumer Relationships Guide with the Buyers on April 1, 2014, it was clear that the Licensee took care to go through each of the bullet points in that document and to explain his role thoroughly. MSC and PP were able to recall that conversation and the general nature of the Licensee's obligations towards them. The file copy of the signed Consumer Relationships Guide also shows asterisks by each of the Licensee's obligations. All of this suggests that the Licensee explained his role as outlined in the Consumer Relationships Guide.

[42] Although it would have been best practice for the Licensee to provide the Consumer Relationships Guide and to have this discussion before he started showing the Buyers properties, we are not satisfied that this was a failure to ensure that his role was understood in these circumstances. We also take judicial notice that the facts here arose in 2014 when the advice in the Information Bulletin to sign a written service agreement before acting for the clients was relatively new and best practices not widespread in the industry.

[43] With respect to the timing on providing the Consumer Relationships Guide prior to making the Templemont Property offer, we find that the Licensee's explanation of the Consumer Relationships Guide just three weeks earlier was satisfactory for that transaction.

Communication about Role During Unauthorized Period

[44] The Licensee failed to ensure that his role was understood during April 3 – 9 when communicating with MSC. He was not authorized at that time and he did not advise his clients of the same. MSC and PP understandably believed that the Licensee continued to represent them as a licensed real estate associate in the Centre Street Property purchase. They communicated with him on that understanding and his communication with them suggested that he was still a licensed real estate associate who was acting for them in that role. This was a breach of s. 41(e) to ensure that his role was understood.

Communication about Role with Brokerages

[45] The Licensee also failed to ensure that his role was understood when he failed to communicate his change in brokerages. Both MSC and PP testified that the Licensee communicated to them simply that his office had moved. They did not understand that he had changed brokerages. The Licensee denied that he had told the clients that his office had moved.

[46] Since there was a conflict in the evidence, we must assess credibility in the circumstances. The leading case on assessing credibility is *Faryna v Chorny*, 1951 CanLII 252 in which the British Columbia Court of Appeal stated at paragraph 11:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, **the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities** which a practical and informed person would readily recognize as reasonable in that place and in those conditions. [emphasis added]

[47] While there was conflicting evidence on this issue, when we look at the whole of the circumstances and what most likely happened, we find that the Licensee likely suggested to MSC and PP that he had simply moved his office, and not that he had changed brokerages. MSC and PP had no interest in the outcome of this matter and their evidence was both internally consistent and their independent testimonies corroborated each other. This interpretation is also consistent with the Licensee's conduct in not advising MSC and PP about his license status during the week of April 3 – 9, being terminated and having his license cancelled was undoubtedly a distressing experience and we find that he likely did not ensure that his role was clearly understood during this time.

[48] MSC and PP signed an Exclusive Buyer Representation Agreement with Re/Max Complete on April 21, 2014, but they did not realize this was a different brokerage than Re/Max Central with whom they had signed an exclusive agreement with a term of April 1, 2014 until July 31, 2014. They believed that it was all Re/Max and the Licensee did not explain to them the reason for signing the new Exclusive Buyer Representation Agreement. While a real estate associate may not always need to explain in detail his relationship with his brokerage, the Licensee should have done so here because he changed brokerages while working with the clients and the term of the Exclusive Buyer Representation Agreement with Re/Max Central had not expired.

[49] The Centre Street Offer was accepted on April 2 and the Templemont Property offer was made on April 21, less than three weeks apart. Sometime between April 3 – 9, likely April 7 according to MCS, the Buyers advised the Licensee that they were not lifting conditions on the Centre Street Property. The Licensee continued to provide email search results to MSC. He also signed an individual identification record with MSC dated April 16, 2014, although he disputed the correctness of the recorded date. MSC and PP also testified that he showed them between 3 and 6 properties between the time that the Centre Street Property deal fell through (approximately April 7) and making the Templemont Property offer on April 21. There was approximately one week where MSC and PP talked to another realtor, but overall the circumstances suggest that the Licensee continued to work with the Buyers throughout the time when he changed brokerages.

[50] Even if we were to accept the Licensee's evidence that there was break in representation between the two offers, it was only a period of two weeks between April 7 when the Buyers decided not to lift conditions on the Centre Street Property and April 21 when they offered on the Templemont Property. This proximity in time suggests an ongoing relationship. The change in brokerage was relevant to that relationship and the Licensee should have ensured that his role was understood.

[51] MSC also testified that she felt that the Licensee had not been honest with her by suggesting that his office had just moved, and she wished he had provided her with that information. The Licensee's clients did not understand his role as it related to his brokerage association. This was relevant information to them during an ongoing relationship and it was relevant because of the overlapping terms of Exclusive Buyer Representation Agreements the Licensee asked his clients to sign.

Section 41(d): Breach of Fiduciary Duty

[52] Section 41(d) of the Rules requires licensees to "fulfill their fiduciary obligations to their clients". Although we do not agree with the Registrar that there were a significant number of breaches of this Rule, we find that there were three instances of a breach of the Licensee's fiduciary obligations to MSC and PP.

[53] The relationship between a real estate agent and his client is historically recognized as a fiduciary relationship: *Maclise Enterprises Inc v Grover*, 2014 ABQB 591 ("*Maclise*") at para. 85; *Henderson v Thompson*, 1909 CanLII 18 (SCC), 41 SCR 445. A real estate agent owes both contractual and fiduciary obligations to his clients. These obligations include the duty to make full and fair disclosure of all material circumstances and of everything the agent knows regarding the subject matter to its principal: *Maclise*, *supra* at para 89; *Trynchy v Gabriel*, 2012 ABQB 682 at para 80.

[54] In *Polaris Realty (1995) Ltd. v Minchau*, 2010 ABQB 116 the Court of Queen's Bench of Alberta outlined that a breach of a fiduciary obligation is one where the agent fails to provide full disclosure on an issue that would have affected the clients' decision:

> To establish the breach of a fiduciary duty, any error or lack of full disclosure by the real estate agent must have affected the principals' decision or the value of the property - it must go to the fundamental character of the transaction.

[55] Determining whether there is a breach of the fiduciary obligation is done on the objective standard of "what a reasonable [person] in the position of the agent would consider, in the circumstances, to be likely to influence the conduct of his principal": *Ocean City Realty v A & M Holdings Ltd.*, 1987 CarswellBC 616, [1987] B.C.W.L.D. 1473 (BCCA), at para 22.

[56] The Registrar argued that there were 8 instances where the Licensee failed to fulfill his fiduciary duty to MSC and PP:

a. The Licensee failed to disclose to the Buyers that any renovation in the basement would be considered illegal;

b. The Licensee failed to demonstrate reasonable care and skill for failing to reference the amendment into the residential real estate purchase contract, and for drafting the clause on an amendment and not an addendum;

c. The Licensee failed to disclose to the Buyers that there were concerns noted with the amendment by the seller's agent, the Brokerage Manager and legal counsel;

d. The Licensee failed to disclose to the Buyers about other options as offered by the Brokerage Manager;

e. The Licensee failed to disclose to the Buyers that the Broker had terminated the Centre Street Property transaction due to the potential for mortgage fraud;

f. The Licensee failed to disclose to the Buyers that the Broker had terminated his registration with Re/Max Central and that he was unauthorized to trade in real estate;

g. The Licensee failed to disclose to the Buyers that he was registered with a new brokerage being Re/Max Complete on April 10, 2014;

h. The Licensee failed to demonstrate loyalty to the Buyers by failing to inquire from them if they would agree to sign a new exclusive buyer representation agreement with a different brokerage.

[57] We do not agree that all these instances constituted a failure to fulfill the Licensee's fiduciary duties in the circumstances. However, we find a failure to fulfill his fiduciary obligations to MSC and PP on the following issues:

a. at the time he accepted MSC's phone call on April 7, 2014, the failure to disclose the Broker's intention to terminate the Centre Street Property transaction;

b. at the time he accepted MSC's phone call on April 7, 2014, the failure to disclose his termination of license; and

c. on April 21, 2014, the failure to clearly advise MSC and PP that they were signing an Exclusive Buyer Representation Agreement with a new brokerage while the previous agreement he had asked them to sign with Re/Max Central continued.

[58] Each of the issues raised by the Registrar are addressed below.

Illegal Basement

[59] The Registrar alleged that it was a breach of the Licensee's fiduciary obligation to not discuss with the Buyers the Brokerage Manager's concern about the legality of a basement suite in the Centre Street Property, for which the addendum and holdback were made. However, the uncontradicted evidence of the Licensee was that he had already spoken to the Buyers about this issue before talking to the Brokerage Manager. The Licensee testified that the Buyers were not concerned about the legality of the suite because PP would reside in it and not a tenant. The Licensee did not raise the issue again after consulting with the Brokerage Manager because he had already discussed it with his clients. The Licensee did not breach his fiduciary obligation about advising the Buyers on the legality of the basement suite.

Amendment

[60] The Registrar also alleged that the use of the Amendment instead of an addendum in these circumstances was a breach of the Licensee's fiduciary duties. We do not agree. This appears to be a competence issue rather than a fiduciary obligation. Subsection 41(b) of the Rules addresses competent service. No administrative penalty was brought under that subsection.

[61] The Licensee testified that he drafted the Addendum in the manner he did to find a practical way for the Buyers to achieve their objective of purchasing the Centre Street Property and to complete the basement renovations. The Buyers relied on his recommendations and advice in proceeding, but there was no suggestion that he did not act in their best interests. The Licensee had completed at least one transaction like this in the past and believed that such an approach would work for his clients' benefit here. The RECA investigator who testified expressed concern about the interests of a potential lender, but the Licensee had no fiduciary obligation to the then undetermined potential lender. His obligation was to his clients, the Buyers. His use of an Amendment instead of an addendum, while not good practice, was not a breach of fiduciary duties to the Buyers.

Disclosing Concerns and Options

[62] The Registrar alleged that the Licensee breached his fiduciary obligations to the Buyers by failing to advise them of the concerns raised by the Brokerage Manager and legal counsel. While advising the Buyers of the discussion with the Brokerage Manager would have been best practices, in the circumstances it was not a breach of the Licensee's fiduciary obligations.

[63] The Seller accepted the offer as it was written. Neither the Licensee nor the Seller's Agent felt that they received clear direction from the Brokerage Manager. The two main concerns that arose were the legality of the basement suite, which the Licensee had already addressed with the Buyers, and the option to proceed with CMHC financing for the renovations. The CMHC option was primarily in favour of the Seller and any potential lender. The Licensee reasonably did not view the Brokerage Manager as raising concerns that would affect the Buyers' decision to continue with the offer.

[64] With respect to concerns from legal counsel and the suggestion that the Licensee should have advised the Buyers of counsel's concerns, it is unclear when or if the Licensee became aware of such concerns. Legal counsel raised concerns with Re/Max Central about the transaction only after the offer was accepted. This was after the meeting with the Brokerage Manager. Events then proceeded rapidly. The Broker called both agents to advise that the transaction was terminated. At the same time, she cancelled the Licensee's license and his employment. The evidence did not support that legal counsel ever spoke to the Licensee directly or that the Broker informed the Licensee in detail about legal counsel's concerns. The Licensee did not have an obligation to disclose information he did not have.

Brokerage Cancellation of the Contract

[65] In contrast, on April 7, 2014, when he accepted MSC's phone call, the Licensee breached his fiduciary obligations to his clients by failing to advise MSC that the Broker intended to terminate the contract.

[66] The Exclusive Buyer Representation Agreement signed April 1, 2014 established the Buyers as Re/Max Central's clients. Article 2.2 of that agreement required Re/Max Central to appoint another designated agent, at the clients' request, if the Licensee was no longer registered to the brokerage:

> If the designated agent is no longer registered with us and at your request, we will appoint another designated agent to serve as the sole agent for you or this agreement ends.

[67] In these circumstances, where the Broker terminated the Licensee's registration and employment at the same time as cancelling the transaction, the Licensee did not have a positive obligation to contact the Buyer; he could rely on Re/Max Central to communicate with its clients about the transaction.

[68] However, on or about April 7, 2014, MSC phoned the Licensee. It was then obvious that Re/Max Central had not communicated with the Buyers in any manner and that the Buyers were not aware that Re/Max Central intended to cancel the transaction. At that point, the Licensee had material information that the Buyers did not and his fiduciary obligation to them required him to advise them of these facts.

[69] The information that the Broker intended to terminate the transaction was a material circumstance. The Broker had communicated its intention to terminate the transaction to both him and to Seller's Agent. Even assuming that he was legally correct that the Broker could not unilaterally terminate a valid contract, the Broker's intention to terminate the contract was a material circumstance of which the clients needed to be aware. There was risk to the transaction if the seller accepted the Broker's position and the Buyers still wanted to proceed. This was the type of circumstance that may have affected the Buyers' decision of whether or how to proceed and should have been disclosed.

[70] Although the Licensee was not licensed at the time, his fiduciary obligations still existed to at least advise the clients that there was a problem and that they needed to contact Re/Max Central to ensure that they had all the relevant information they needed.

Termination of License

[71] Similarly, we agree that it was a failure of his fiduciary obligation to his clients when the Licensee failed to advise the Buyers of his termination of license when he accepted MSC's phone call on or about April 7, 2014.

[72] In these circumstances and in line with the language of Article 2.2 of the Exclusive Buyers Representation Agreement, Re/Max Central had an obligation to contact the Buyers and appoint another designated agent at their request or to terminate the agreement. Given this language and the fiduciary obligations of the brokerage, the Licensee did not have a positive obligation to contact the clients, the brokerage did.

[73] However, when the Licensee accepted MSC's phone call, it was obvious that Re/Max Central had not contacted the Buyers and that the Buyers believed that they had a licensed real estate associate representing their interests in an active transaction. His fiduciary obligation required him to act in the Buyers' best interests and to advise them of all material circumstances, including that he was not authorized to represent them at that time.

New Brokerage and New Exclusive Buyers Representation Agreement

[74] It was also a failure of the Licensee's fiduciary obligations to ask his clients to sign a new Exclusive Buyers Representation Agreement without advising them about the nature of the agreement and which brokerage was represented in these circumstances where he had facilitated the Buyers previously signing a similar agreement with an overlapping term.

[75] The Licensee asked the Buyers to sign an Exclusive Buyers Representation Agreement with Re/Max Central, which was in effect April 1, 2014 until July 31, 2014. Without explaining that he had changed brokerages, the Licensee then asked the Buyers to sign an Exclusive Buyers Representation Agreement with Re/Max Complete, which was effective April 21, 2014 until July 31, 2014. The terms of these agreements overlapped considerably.

[76] Although the new Exclusive Buyers Representation Agreement identified Re/Max Complete as the broker, neither MSC nor PP realized that they were signing with a new brokerage and the Licensee did not explain to them the difference between the brokerages. PP, in particular, did not like exclusive agreements and believed that he was only agreeing to work with the Licensee. Neither of the Buyers realized that they were signing potentially conflicting contracts, which were signed solely at the Licensee's request. He had a duty to inform them of all material circumstances, and this went to the heart of the contract.

[77] It is unlikely in the circumstances, where Re/Max Central had terminated a contract and accused the clients of mortgage fraud, that it would seek to enforce its Exclusive Buyers Representation Agreement. However, the facts were that the term of the Re/Max Central exclusive contract had not expired, and the Licensee knew it had not expired because the Buyers signed it at his request. He did not confirm with Re/Max Central that their agreement was at an end or advise his clients to take such steps.

E. Summary of Findings

[78] Between April 3 – 9, 2014, the Licensee breached s. 17(a) of the Act by trading in real estate while unauthorized.

[79] The Licensee breached s. 41(e) of the Rules by failing to ensure that his role was understood in the following instances:

a. on or about April 7, 2014, the Licensee communicated with MSC without ensuring that the Buyers understood that he was not licensed to trade in real estate; and

b. on April 21, 2014, the Licensee failed to ensure that the Buyers understood that he was licensed with a new brokerage.

[80] The Licensee breached s. 41(d) of the Rules by failing to fulfill his fiduciary obligations to the Buyers in the following instances:

a. on or about April 7, 2014, the Licensee failed to inform the Buyers that Re/Max Central intended to terminate the transaction of the Centre Street Property;

b. on or about April 7, 2014, the Licensee failed to advise the Buyers that he was no longer licensed to represent their interests in the Centre Street Property; and

c. on April 21, 2014, the Licensee asked the Buyers to sign an Exclusive Buyers Representation Agreement with Re/Max Complete without advising them that it was with a different brokerage than a similar agreement with an overlapping term they had already signed with Re/Max Central at his request.

[81] There is overlap in the facts between some of these findings on the breaches and not all the circumstances alleged were proven. This may affect the decision in phase II.

F. Request for Submissions on Penalty and Costs

[82] The Hearing Panel requests written submissions from the parties on whether any of the administrative penalties should be confirmed, varied or quashed, and submissions on costs, in light of our findings above. The deadlines for written submissions are as follows:

a. within 14 days of receipt of this decision, the Registrar shall provide submissions to the Hearings Administrator and to the Licensee;

b. within 14 days of receipt of the Registrar's submissions, the Licensee shall provide submissions to the Hearings Administrator and to the Registrar;

c. within 7 days of the Licensee's submissions, the Registrar may provide a rebuttal submission to the Hearings Administrator and to the Licensee.

[83] Once the above timelines have past, the Hearings Administrator will provide all written submissions received to the Hearing Panel for our consideration and decision on the administrative penalties and costs.

This decision is certified and dated at the City of Edmonton in the Province of Alberta, this 3rd day of May, 2021.

"Signature"

[K.O], Hearing Chair

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF Section 83.1 of the *REAL ESTATE ACT*, R.S.A. 2000, c.R-5 (the "Act")

AND IN THE MATTER OF a Hearing regarding the conduct of JOHN WILLIAM WADE, currently registered with brokerage Irealty Calgary Inc. o/a Re/Max IRealty Innovations

Hearing Panel Members:	[K.O], Chair (Public Member) [M.W], Panel Member (Licensee) [M.B], Panel Member (Licensee)
Appearances:	Charles Fair, for John William Wade Mitali Kaul, for the Registrar of the Real Estate Council of Alberta
Hearing Date(s):	January 25, 26, 27, February 11, 2021, virtual hearing, with submissions on sanction and costs provided in writing

DECISION
ON SANCTION AND COSTS

A. Introduction

[84] This decision makes findings on sanction and costs for three administrative penalties issued against the Licensee, John William Wade. The Hearing Panel issued a decision on May 3, 2021 (the "Phase I Decision") that found that the Licensee breached:

a. Section 17(a) of the *Real Estate Act*, R.S.A. 2000, c. R-5 (the "Act"), trading in real estate without authorization;

b. Section 41(d) of the *Real Estate Act Rules* (the "Rules"), failing to fulfill fiduciary obligations; and

c. Section 41(e) of the Rules, failing to ensure his role was understood.

[85] At the conclusion of the Phase I Decision, we asked for submissions on whether the Hearing Panel should quash, vary, or confirm the administrative penalties considering our findings on the breaches. For the reasons that follow, we confirm the administrative penalty for the breach of s. 17(a) and vary the administrative penalties for the breaches of ss. 41(d) and (e) as follows:

Breach of s. 17(a)	$5,000
Breach of s. 41(d)	$1,500
Breach of s. 41(e)	$500

[86] In addition, we award costs against the Licensee in the amount of $2,500.

B. Issues

[87] The evidence was heard in one oral hearing. However, the Hearing Panel has split its decision into two phases. In the Phase I Decision, the issues were focused on whether there were breaches of the Act or the Rules. In this decision, the focus is on sanction and costs. The following issues arise in this decision:

a. Should any of the administrative penalties be quashed after finding breaches of the Act and Rules?

b. Should the Hearing Panel vary or confirm the s. 17(a) administrative penalty?

c. Should the Hearing Panel vary or confirm the s. 41(d) administrative penalty?

d. Should the Hearing Panel vary or confirm the s. 41(e) administrative penalty?

e. Should the Registrar pay costs to the Licensee?

f. What, if any, costs should the Licensee bear of the costs of the investigation and appeal?

C. Factors on Sanction Relevant to All Allegations

[88] The amount of the administrative penalties must account for the unique circumstances of the case by considering both aggravating and mitigating factors. This appeal relates to administrative penalties for breaches of the Act and Rules. It is not a conduct proceeding under Part 3 of the Act where findings of conduct deserving of sanction are at issue. Nevertheless, similar mitigating and aggravating factors as the Hearing Panel applies in conduct proceedings are applicable to administrative penalties.

[89] In *Jaswal v Newfoundland (Medical Board),*1996 CarswellNfld 32, [1996] N.J. No. 50, 138 Nfld. & P.E.I.R. 181, 42 Admin. L.R. (2d) 233 ("*Jaswal*") at paragraph 36 the court identified the following non-exhaustive factors that are relevant to fashioning professional sanctions:

- the nature and gravity of the proven allegations
- the age and experience of the Licensee
- the previous character of the Licensee and in particular the presence or absence of any prior complaints or convictions
- the age and mental condition of the offended client
- the number of times the offence was proven to have occurred
- the role of the Licensee in acknowledging what had occurred
- whether the Licensee had already suffered other serious financial or other penalties as a result of the allegations having been made
- the impact of the incident on the client
- the presence or absence of any mitigating circumstances
- the need to promote specific and general deterrence and, thereby, to protect the public and ensure the safe and proper conduct of the profession
- the need to maintain the public's confidence in the integrity of the profession
- 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 range of sentence in other similar cases

[90] These factors are non-exhaustive and must be tailored to the circumstances of each case. There were several mitigating factors in this matter:

a. the previous character of the Licensee

The Licensee has no professional discipline history.

b. the Broker's decision to terminate the Licensee's license without notice

The events that led to the breaches occurred quickly. One day, the Licensee was working on the transaction for the Buyers and the next the broker wrongly accused him of mortgage fraud and terminated his license without hearing his side. The Licensee was undoubtedly distressed and confused by this turn of events. This would have been a difficult position for any licensee to find themselves in.

c. *the Broker's decision to terminate the purchase contract*

We recognize that the Licensee was placed in a difficult position due to the Broker's position that the purchase contract was cancelled. He believed that the Broker could not unilaterally terminate a binding contract to which it was not a party, a belief that seems to be supported by both the Practice Advisor and common sense. We reiterate that it was a breach of the Act to trade in real estate while unauthorized and a breach of the Rules to fail to communicate adequately about his role and information relevant to his fiduciary obligations, but we recognize as a mitigating circumstance that this was a challenging position to be in.

d. *the Broker's failure to contact the Buyers*

As we outlined in the Phase I Decision, the Exclusive Buyer Representation Agreement between the Buyers and the brokerage addressed termination of that agreement and circumstances where the designated agent was no longer registered with the brokerage. The brokerage had responsibilities to the Buyers as its clients but it placed the responsibility to communicate with the Buyers entirely on the Licensee, even as it terminated his license and made it unlawful for him to trade in real estate. This hearing is not about the Broker or the brokerage, but about the Licensee. Nevertheless, we recognize as a mitigating factor that the brokerage's failure to address its responsibilities to the Buyers impacted the Licensee.

[91] The Licensee referred to other potentially mitigating circumstances, like an alleged request from the Broker to delay getting licensed elsewhere, alleged misleading statements to the Practice Advisor from the Broker and the failure of the Broker to initiate the return of the Buyers' deposit. We did not hear clear evidence about any of these issues and give these submissions little weight. Nevertheless, we find that there were mitigating factors arising out of the facts, as described above.

[92] In contrast, we find the following aggravating factors in this matter:

a. *the Licensee's experience*

At the time of the breaches, the Licensee had 9 years of experience in the industry and was in his mid-forties. He was an experienced mid-career professional and should have known better.

b. *the nature and gravity of the s. 17(a) breach*

The Licensee traded in real estate while unauthorized. The Hearing Panel agrees with the Registrar that this was the most serious breach here. It is imperative for the protection of the public that licensees only trade in real estate while fully authorized. The Licensee also knew that he was not authorized to trade in real estate.

c. *the nature and gravity of the s. 41(d) breach*

The Licensee breached his fiduciary duties to the Buyers. While this was not as serious on these facts as the s. 17(a) breach, anytime there is a breach of fiduciary duty is a serious concern.

[93] In addition, several *Jaswal* factors were neither aggravating nor mitigating but still relevant, including the following:

a. *the number of times the breaches occurred*

The breaches occurred during a relatively short time in and around April 2014. They involved one transaction with one set of clients. The Registrar argued that because multiple breaches were found that this is aggravating and shows a pattern. We disagree. While there were several breaches, those breaches arose out of one set of circumstances. There is no factual basis to suggest that the Licensee engaged in a pattern of conduct that breached the governing legislation. His breaches appear to be limited to the one transaction.

b. *the impact on the clients*

Fortunately, the Licensee's breaches of the Act and Rules did not cause a substantial impact on the Buyers. The Buyers did not proceed with the transaction for their own reasons. However, there was potential for a negative impact had they wanted to proceed and did not have all the relevant information.

c. *the role of the Licensee in acknowledging his conduct*

The Registrar argued that it was an aggravating factor that the Licensee did not admit to wrongdoing. The Hearing Panel disagrees with the Registrar that the intent of this factor in *Jaswal* is to punish licensees for insisting on their innocence. Rather, this factor creates a mitigating circumstance where a Licensee admits guilt. It is appropriate to give credit to a licensee who takes responsibility in this way.

However, the reverse is not necessarily true that a licensee who proceeds to a hearing to which they are entitled should risk additional punishment because they asserted their rights. Here, the Licensee was entitled to a full hearing and to have the Registrar prove the allegations against him. This was a difficult hearing and it was not obvious from the start whether the Registrar would be successful. This factor is neither mitigating nor aggravating.

d. the nature and gravity of the s. 41(e) breach

The failure to ensure that the Licensee's role was understood was the least serious of the breaches here. While it was still a breach of the Rules, it was not particularly egregious and had considerable factual overlap with the breaches of fiduciary duties under s. 41(d). This factor is neither mitigating nor aggravating.

e. the need for specific deterrence

Specific deterrence relates to the need for the sanction to sufficiently impact the individual Licensee. It ensures that similar conduct will not occur in the future. Imposing a sanction for each breach of the Act or Rules is important to communicate to the Licensee the seriousness of the breach of these provisions, but we believe that there is not a specific need for a stronger message than what we have directed. While he disagreed with the Registrar about these allegations, his conduct and demeanour did not suggest that he will not comply with the Act and the Rules in the future.

f. the need for general deterrence

General deterrence refers to the effect of the sanction on others, including to the industry generally. This is always an important consideration in fashioning a sanction, including for administrative penalties. However, the facts here are somewhat unique including the initial incorrect allegation of mortgage fraud and the sudden upheaval of the Licensee's professional life. We find that general deterrence is a relevant factor but less so than in other cases.

g. the need to maintain the public's confidence in the profession

The public's confidence in the industry is compromised when a licensee breaches the Act and Rules. Although the nature and gravity of the offences here were not of the highest level of seriousness, there is still an impact on the public's confidence in the profession and the administrative penalties must adequately address that impact, while dealing proportionally with the Licensee.

D. The Request to Quash the Administrative Penalties

[94] The Licensee requested that the Hearing Panel quash the administrative penalties because he alleged that the breaches do not constitute conduct deserving of sanction. In contrast, the Registrar submitted that the Hearing Panel cannot quash the administrative penalties after finding that there were breaches of the Act and the Rules. It is unnecessary to determine if we can quash an administrative penalty after finding a breach of the legislation because it is not appropriate to do so in these circumstances in any event.

[95] The Hearing Panel has broad authority to quash, vary or confirm an administrative penalty. The hearing of this matter proceeded as a contested *de novo* hearing pursuant to s. 83.1(3) of the Act. Section 83.1(5) then sets out the Hearing Panel's remedial authority:

> The Hearing Panel on an appeal may
>
> 1. quash, vary or confirm the administrative penalty, and
> 2. make an award as to costs of the investigation that resulted in the administrative penalty and of the appeal in an amount determined in accordance with the bylaws.

[96] A finding of conduct deserving of sanction is not necessary to issue an administrative penalty. The only finding that is necessary is that there has been a breach of the Act, the regulations, the Bylaws, or the Rules. Section 83(1) of the Act authorizes the Registrar to issue an administrative penalty if there is a breach:

> 83(1) Where the registrar is of the opinion that a person has contravened a provision of
>
> (a) this Act,
>
> (b) the regulations,
>
> (c) the bylaws, or
>
> (d) the rules
>
> that is specified in the rules, the registrar may, subject to the bylaws and the rules, by notice in writing given to that person, require that person to pay to the Council an administrative penalty in the amount set out in the notice for each day that the contravention continues.

[97] This contrasts with Part 3 of the Act, which addresses conduct proceedings and conduct deserving of sanction: see s. 43(1). The Legislature clearly anticipated two separate types of professional discipline, (1) professional conduct proceedings under Part 3, and (2) administrative penalties under s. 83. Administrative penalties are issued solely for breaches of the Act, regulations, Bylaws, or Rules without the requirement to find conduct deserving of sanction. In the Phase I Decision, we found that the Licensee breached section 17(a) of the Act and subsections 41(d) and (e) of the Rules.

[98] As outlined above, there were several factors that were both mitigating and aggravating in this matter. The presence of the aggravating factors suggest that this is a matter that is not appropriate for quashing the administrative penalties. In addition, several of the factors that were neither mitigating nor aggravating, but nonetheless important factors, suggest that quashing the administrative penalties would not be appropriate here. These include the need for specific deterrence, the need for general deterrence and the need to maintain the public's confidence in the profession. Accordingly, it is not appropriate in these circumstances to quash any of the administrative penalties.

E. Section 17(a) Administrative Penalty

[99] We confirm the administrative penalty for the breach of s. 17(a) at $5,000. As outlined above, the Licensee requested that we quash the penalty. The Registrar, on the hand, requested that we vary the administrative penalty by increasing it to $10,000.

[100] The facts related to the breach of s. 17(a) are set out in the Phase I Decision. They include that between April 3 and 9, 2014 the Licensee was not authorized to trade in real estate. During this period, however, the Licensee communicated with both the Buyers and the Seller's Agent about an active real estate transaction, which we found to be trading in real estate while unauthorized.

[101] This is the most serious of the breaches. It is imperative for the protection of the public that a licensee only trade in real estate while authorized. This ensures fulsome regulation; the public is protected because the ethical and professional standards of the industry bind the licensee and RECA has the authority to oversee these standards.

[102] The nature and gravity of this breach is made more serious by the fact that the Licensee was fully aware of the limitations on his ability to trade in real estate while unauthorized. The Broker communicated this to him and then the Licensee phoned the Practice Advisor. As we noted in the Phase I Decision, both the Practice Advisor and the Licensee testified that the Practice Advisor cautioned the Licensee to take care not to trade in real estate while unauthorized. After receiving this instruction, the Licensee proceeded to communicate with both the Buyers and the Seller's Agent about the real estate transaction.

[103] While this was a difficult situation where the Licensee was left without brokerage support in the middle of a deal in which there was considerable uncertainty, the Licensee still had a professional obligation to ensure that he complied with the Act. He knew that he was not authorized to trade in real estate, but he communicated with both the clients and the Seller's Agent about the transaction while he was unauthorized. It appears that the Licensee had good intentions in trying to initially keep the deal together, then to receive the Buyer's instructions and to provide them advice or confirmation about their decision not to go ahead, and then finally to maintain communication with the Seller's Agent. However, the Licensee was not authorized to trade in real estate, and he ought not to have involved himself in an active transaction while unauthorized.

[104] Looking at all the *Jaswal* factors as addressed above, including the significant mitigating factors here, we find that $5,000 is the appropriate penalty. The Registrar asked us to vary the administrative penalty by increasing it to $10,000. The Registrar relied on the Hearing Panel's decision in *Phipps (Re)*, 2020 ABRECA 500053 where the Hearing Panel increased the administrative penalty from $5,000 to $7,500. While we agree with the Hearing Panel in *Phipps* that s. 83.1(5) permits us to increase an administrative penalty when it is appropriate to do so, this is not such a case.

[105] *Phipps* is distinguishable in that the licensee in that case was openly defiant and exhibited a "clear inability to accept any responsibility" in a straightforward case where his breaches of the Act and Rules were obvious. Specific deterrence in that case was "a significant concern" due to the licensee's attitude. The Licensee here maintained that there were no breaches, but he was not defiant or devoid of personal responsibility. As outlined above, while there is a need for some specific deterrence here, we do not view this as a significant concern and believe that the Licensee will be governable and compliant with the rules going forward without imposing a harsher penalty.

[106] Comparable cases support the confirmation of the administrative penalty at $5,000.

a. *Gerchick, Head, O'Sullivan, Sears (Re)*, 2013 ABRECA 70

The licensees were Arizona industry members who were not licensed in Alberta. They planned to come to Alberta and attend a home show with the intent of attracting Alberta clients. The Hearing Panel varied the original administrative penalties, awarding $10,000 against the main actor in this scheme and $1,000 each to the other participants.

Gerchick was a serious violation with a deliberate and preplanned element to it. The circumstances here are different in that the breach of s. 17(a) arose unexpectedly and there was no intent to deceive or thwart the intention of the Act. We find that there was a breach of the Act, and it was significant, but it was not deliberate in the same sense as the *Gerchick* matter.

b. *Dyck (Re)*, 2016 ABRECA 112

The licensee's registration lapsed but she continued to manage properties on behalf of owners, including holding trust funds. There were mitigating circumstances in that case, including personal circumstances and technical issues with renewing the license. The Registrar issued an administrative penalty in the amount of $5,000. We find the circumstances to be analogous to a lapse in registration. In addition, there are also mitigating circumstances here.

c. *Herman (Re)*, 2017 ABRECA 087

The licensee in that case failed to renew his license over the course of three months, despite several reminders. He completed 7 real estate transactions during that time. It was a mitigating factor that he admitted his conduct. The Registrar issued an administrative penalty in the amount of $5,000.

Herman was a more serious situation than the case here. Here there was only one transaction involved, which did not go through, and a limited time. However, the complainant did not admit his conduct. Although we do not find this to be an aggravating factor, we recognize it was a mitigating factor in the *Herman* case that is not present here. Balancing these considerations, we find the *Herman* case to be comparable to the seriousness of the present circumstances.

d. *Mercier (Re)*, 2010 ABRECA 213

The licensee in that case traded in real estate while suspended. The administrative penalty in that case was for $25,000 but accounted for the penalty for two separate breaches of the Act.

Mercier involved a more deliberate element in that the licensee was suspended at the time. It also involved prior serious discipline leading to the suspension.

[107] Looking at all the relevant *Jaswal* factors and the comparable cases, we find that $5,000 is the appropriate amount for the administrative penalty for the breach of s. 17(a).

F. Section 41(d) Administrative Penalty

[108] We vary the s. 41(d) administrative penalty from $3,000 to $1,500. The Licensee asked us to quash this administrative penalty while the Registrar asked us to confirm it at $3,000. The breach of s. 41(d) relates to the three breaches of the Licensee's fiduciary duties:

a. on or about April 7, 2014, the Licensee failed to inform the Buyers that Re/Max Central intended to terminate the transaction of the "Centre Street Property";

b. on or about April 7, 2014, the Licensee failed to advise the Buyers that he was no longer licensed to represent their interests in the "Centre Street Property"; and

c. on April 21, 2014, the Licensee asked the Buyers to sign an Exclusive Buyers Representation Agreement with Re/Max Complete without advising them that it was with a different brokerage than a similar agreement with an overlapping term they had already signed with Re/Max Central at his request.

[109] As outlined above, this is the second most serious of the breaches because it involves a breach of fiduciary duties. However, it was not a particularly serious breach. We noted in the Phase I Decision that the information that the Broker intended to terminate the transaction was a material circumstance that the Licensee had an obligation to disclose to the Buyers, at least when he answered the phone with MSC. Instead of disclosing material facts in his possession, the Licensee discussed the property inspection as though the deal was proceeding normally. We agree with the Licensee that the seriousness of this breach was mitigated by the fact that the Buyers did not want to proceed with the transaction in any event and there was no negative impact on them from this failure. Nevertheless, this was still a breach of the Rules as a breach of the Licensee's fiduciary obligations. A penalty is warranted in the circumstances.

[110] Similarly, the failure to advise the Buyers that he was no longer licensed was a breach of the Licensee's fiduciary duties. The Licensee spoke to MSC about a live deal and gave her his opinion that he agreed with her about the risks identified in the inspection report about the retaining wall. MSC called him as her licensed representative under the understanding that he was her real estate agent. He was not licensed at that time and it was a breach of his fiduciary obligations to communicate with her without disclosing this material fact. Again, there does not appear to have been a negative impact on either of the Buyers because of this breach and we acknowledge the existence of other mitigating factors.

[111] Lastly, the Licensee had the Buyers sign a new exclusive buyers representation agreement with his new brokerage when the term of a previous similar agreement he had asked them to sign had not yet expired. As we noted in the Phase I Decision, the Licensee did not confirm with his former brokerage that their agreement was at an end or advise his clients to take such steps before requesting that they sign the new, potentially conflicting, agreement. Again, there was no negative impact on the Buyers as a result of this breach and the potential for a negative impact on them was low since it was unlikely that the brokerage would seek to enforce its agreement after accusing the Buyers of mortgage fraud. Nevertheless, it was a breach of the Rules to fulfill his fiduciary duties because the information went to the heart of the contract and a penalty is warranted in the circumstances.

[112] The cases that the Registrar cited in favour of confirming the original administrative penalty were more serious than the circumstances here.

a. *Moravec (Re)*, 2019 ABRECA 026

   The licensee undertook to return original copies of a power of attorney and medical certification to a client but failed to do so. The result was that the client had to incur legal expenses to retrieve the documents. The Registrar issued an administrative penalty of $3,000. This failure involved a breach of trust with a significant impact on the clients, unlike the present circumstances.

b. *Randhawa (Re)*, 2019 ABRECA 060

   The licensee failed to present an offer and failed to meet with or communicate directly with the client. The licensee also had a prior disciplinary record. The Registrar issued an administrative penalty of $5,000. This involved a dereliction of duty that was not present here.

c. *Zuk (Re)*, 2018 ABRECA 009

The licensee placed the interests of potential buyers over the interests of his client, the seller. The seller requested that the buyers make an offer within 24 hours of seeing the property. The buyers asked the licensee to provide them with comparable properties, but he delayed doing so because he believed his client had unreasonably pressured the potential buyers. The potential buyers did not make an offer on the property. The Registrar issued an administrative penalty of $3,000.

Acting in the interests of another party is one of the more serious forms of a breach of fiduciary obligations. That was not the case here, where the Licensee attempted to assist his clients, although he failed to act in their best interests when he withheld material information.

d. *Kainth (Re)*, 2020 ABRECA 146

The licensee recommended that his clients waive their financing condition on a property when they did not have written approval. He also failed to address the clients' concerns about the property. The buyers lost their deposit. The Registrar issued an administrative penalty of $4,500.

Kainth involved a serious breach in providing demonstrably bad advice to the licensee's clients that resulted in significant financial loss to the clients. That was not the case here.

[113] Every penalty must address the public interests of sanctioning, including specific and general deterrence, while maintaining proportionality. To be proportional here, we believe that a penalty is necessary. However, considering the mitigating factors, including the lack of impact on the Buyers and the other *Jaswal* factors listed above, we find that $1,500 is the appropriate balance of protecting the public and recognizing the unique circumstances that arose here.

G. Section 41(e) Administrative Penalty

[114] We vary the administrative penalty for the breaches of s. 41(e) from $1,500 to $500. The Registrar requested that we confirm the penalty while the Licensee asked that we quash it. In the Phase 1 Decision, we found the following breaches of s. 41(e), failing to ensure that the Licensee's role was understood:

a. on or about April 7, 2014, the Licensee communicated with MSC without ensuring that the Buyers understood that he was not licensed to trade in real estate; and

b. on April 21, 2014, the Licensee failed to ensure that the Buyers understood that he was licensed with a new brokerage.

[115] This was the least serious breach. It also overlapped considerably with the facts giving rise to the breach of s. 41(d) for failing in his fiduciary obligations. The Registrar argued that full penalties should be issued for each breach of the Act or the Rules and relied on the Hearing Panel's comments in *Kalia (Re)*, 2018 ABRECA 10 in which the Hearing Panel found:

> Where the same set of facts lead to multiple breaches of the Act or Rules, multiple sanctions may be awarded as each breached provision addresses a specific harm that the legislature or regulating body intended to address.

[116] In *Kalia*, the Hearing Panel noted that the breaches in that case took on a different character under the lens of each of the breached provisions. We agree with the Registrar that each subsection in s. 41 speaks to a different obligation. Here, there was both a failure to ensure that his role was understood and a breach of his fiduciary duty to convey all material information to his clients. These were separate breaches and independent obligations. On that basis, it is appropriate to issue a penalty for each breach, and the s. 41(e) breach is a distinct breach of the Rules.

[117] At the same time, every sanction must be proportional. That is, the penalty must reflect both the facts and the responsibility of the Licensee in the circumstances. Given the administrative penalty imposed for the s. 41(d) breach addressed much of the same facts and conduct, it would be inappropriate to impose an unduly harsh double penalty for this breach. A $500 penalty reflects the independent nature of the obligations that were breached under s. 41(e) while recognizing that the Licensee has already been punished for much of the conduct at issue in the s. 41(d) administrative penalty.

[118] We recognize that the comparable cases that the Registrar cited for breaches of s. 41(e) were in the $1,500 to $2,000 range. We find those cases to be different than the facts of this case. Almost all those cases involved acting for more than one client and failing to ensure that the dual representation was understood. Here, there were no issues about preferring one client's interests over the others and no dual representation. The issue here was that the Buyers did not know that they no longer had a licensed representative working on their deal and that they did not know the Licensee had changed brokerages and was asking them to sign a new exclusive agreement with a different brokerage with overlapping terms. That is not the same thing as not being clear about the licensee's role in who they were representing.

a. *Theriault (Re)*, 2014 ABRECA 30 involved a licensee who claimed to be neutral in a transaction but was really acting in the seller's interests. The licensee inappropriately and aggressively tried to persuade the buyers. A fine of $2,000 was imposed.

b. *Irvine (Re),* 2019 ABRECA 023 involved a licensee who represented both sellers and buyers without a service agreement with the buyers. Neither party agreed in writing to resolve the conflict of interest. A fine of $1,500 was imposed.

c. *Logue (Re),* 2020 ABRECA 109 similarly involved a licensee representing both parties with no agreement in place to resolve the conflict. The sellers were confused about the licensee's role, which was not explained until after the offer had been presented and accepted. A fine of $1,500 was imposed.

d. *Simmons (Re),* 2015 ABRECA 109 involved self-interest. The licensee was selling his own property but never made clear to the clients that he was not representing them. A fine of $1,500 was imposed.

[119] Considering the absence of relevant comparable cases, the *Jaswal* factors discussed above, the overlap in the circumstances of the s. 41(d) breach for which the Licensee is already being punished, we find that $500 is the proportional amount of administrative penalty for the Licensee's failure to ensure that his role was understood.

H. Costs

[120] We order costs in the amount of $2,500 against the Licensee. The Registrar asked for costs of $7,500 while the Licensee asked that he be awarded costs for his partial success. Section 83.1(5)(b) authorizes the Hearing Panel to make an award of costs:

> The Hearing Panel on an appeal may
>
> ...
>
> (b) make an award as to costs of the investigation that resulted in the administrative penalty and of the appeal in an amount determined in accordance with the bylaws.

Costs Against the Registrar

[121] It is not clear that the Act or Bylaws authorize us to make an award of costs against the Registrar during an appeal under s. 83.1. In any event we decline to do so. The Registrar was able to prove the three sections of the Act and Rules alleged, even if all the particulars were not proven. Overall, the Registrar was the successful party.

[122] The Licensee asserted that he did not materially dispute many of the facts relevant to the final findings and that the Registrar had not clarified the issues in dispute in advance. We disagree with these submissions. The Licensee contested all three of the administrative penalties and pursued a fully contested hearing, as was his right, with lengthy cross examination, some of which delayed the hearing. It was not the Registrar's conduct that required the hearing to need additional time. We do not fault the Licensee for vigorously defending himself, but the suggestion that the Registrar was not cooperative or acting prejudicially is not supported. In addition, we note that the Registrar set out detailed particulars in the original administrative penalties and disclosed the investigative file to the Licensee so that he could know the case to be met.

[123] We give little weight to the email correspondence between counsel that the Licensee produced in his submissions on sanctions and costs. This was correspondence between counsel, was produced without consent and was not entered as evidence in the hearing. In any event, the content of this correspondence appears to support the Registrar's submissions about cooperation as much as the Licensee's.

Costs Against the Licensee

[124] As outlined above, we award costs of $2,500 against the Licensee, using the top range of the Guide to Costs outlined in s. 28(3) of the Bylaws. The Licensee was unsuccessful in the appeal on the three main alleged breaches of the Act and Rules, even if he had partial success on some of the particulars. It is appropriate that he bear some of the costs of the investigation and appeal.

[125] Section 28(4) of the Bylaws provides factors that the Hearing Panel may consider in determining an order for costs.

(a) the degree of cooperation by the licensee

The Registrar acknowledged that the Licensee was fairly cooperative during the hearing but noted the Licensee's application for or submissions on particulars, the lengthy cross-examinations and the without notice application to make one of the witnesses an expert. We agree with these observations including that the Licensee was fairly cooperative but this was a highly contested hearing. This is a neutral factor.

(b) the result of the matter and degree of success

There was mixed success in this matter. Overall, the Registrar was successful in proving the breaches cited in each administrative penalty but did not prove all the particulars. We consider this factor in not exercising our discretion to exceed the range of costs recommended in s. 28(3) of the Bylaws.

(c) the importance of the issues

The s. 17(a) breach for trading while unauthorized was the most important issue. The other breaches, while significant because they were breaches of the Rules, were not as important on these facts. This is a neutral factor.

(d) the complexity of the issues

This was a complex hearing, with arguments and evidence about what conduct constituted trading in real estate, and serious factual disputes about what was communicated and when. We consider this factor in setting the costs at the higher range of the recommended Guide to Costs in s. 28(3) of the Bylaws.

(e) the necessity of incurring the expenses

The expenses for the successful aspects of the investigation and appeal were reasonably necessary to prove the allegations. This, of course, does not apply to the unsuccessful particulars. However, as outlined below, there was no reasonable anticipation of the case outcome on of the allegations or particulars. This made all the expenses reasonably necessary. We consider this factor in setting the costs at the higher end range of the Guide to Costs in s. 28(3).

(f) the reasonable anticipation of the case outcome

There was no reasonable anticipation of the case outcome. This hearing involved questions of credibility and difficult factual findings. The mixed success is reflective of the difficulty in reasonably anticipating the case outcome. This is not a matter where it was obvious that either party should have taken a different position. We consider this factor in not exercising our discretion to exceed the range of costs recommended in s. 28(3) of the Bylaws.

(g) the reasonable anticipation for the need to incur the expense

There was a reasonable anticipation for the need to incur the expenses. The Licensee fully contested each administrative penalty. There were no witnesses who were unnecessary or any expenses that appeared unreasonable. We consider this factor in setting the costs at the higher end range of the Guide to Costs in s. 28(3).

(h) the financial circumstances of the licensee and any financial impact experienced to date by the licensee

We heard no evidence about the Licensee's financial circumstances. This is a neutral factor.

(i) any other matter related to an order reasonable and proper costs as determined appropriate by the Hearing Panel

The Guide to Costs in s. 28(3) provides only a small portion of even the low end of the costs of the investigation and appeal. We consider this factor in setting the amount of costs at the higher end of the range of the Guide to Costs in s. 28(3) of the Bylaws.

At the same time, this matter occurred 7 years after the alleged events in question and after initially being an investigation into mortgage fraud. No evidence was provided about why the delay occurred, but we recognize that the pending nature of the allegations for this amount of time was undoubtedly challenging for the Licensee. We also observed that the delay likely contributed to hostility and a negative view of RECA from some of the witnesses. We consider this factor in not exercising our discretion to go beyond the range of costs recommended by s. 28(3).

[126] Section 83.1(5)(b) requires us to make a costs award in accordance with the Bylaws, subject to our discretion. Unlike conduct proceedings where there are two potential approaches, under either s. 28(1) as a cost recovery approach or s. 28(3) under a Guide to Costs, only s. 28(3) applies to administrative penalty appeals. Section 28(1) outlines that it applies to the following sections of the Act:

a. s. 40(4), costs against a complainant who makes a frivolous or vexatious complaint;

b. s. 43(2), costs after a conduct proceeding;

c. s. 43(2.1), costs of an appeal of a disposition by the Registrar in a conduct proceeding; or

d. s. 50(5), costs awards of the Appeal Panel.

[127] None of these provisions apply. Section 40(4) does not apply to an administrative penalty since there is no complainant. Similarly, the two subsections of s. 43 do not apply because s. 83.1(4) expressly outlines that sections 43 to 47 of the Act do not apply to administrative penalty appeals. Lastly, s. 50(5) does not apply because this is a decision of the Hearing Panel, not the Appeal Panel. This leaves only s. 28(3), the Guide to Costs.

[128] Section 28(3) of the Bylaws provides the Hearing Panel a range of recommended costs, subject to the Hearing Panel's discretion, of which the relevant portions include:

Item	Column 2
Total fine or penalty	$5,000 - $9,999
Costs for fully Contested Hearing,	$0 - $2,500

including Administrative Penalty Appeal	

[129] We find that it is appropriate to award $2,500 in this case. This award is in accordance with the range permitted by s. 28(3) of the Bylaws and is only a small portion of the actual costs of the investigation and appeal. Considering all the factors in s. 28(4), we find this to an appropriate amount of costs in the circumstances. We believe that the broad discretion in s. 28(3) would allow us to award costs higher than the recommended range in s. 28(3), but we decline to do so in the circumstances.

I. Conclusion

[130] The Hearing Panel makes the following orders under s. 83.1 of the Act:

(i) We confirm the administrative penalty for the breach of s. 17(a) of the Act at $5,000;

(ii) We vary the administrative penalty for the breach of s. 41(d) of the Rules to $1,500;

(iii) We vary the administrative penalty for the breach of s. 41(e) of the Rules to $500; and

(iv) the Industry Member shall pay to the Real Estate Council of Alberta costs associated with the investigation and appeal in the amount of $2,500.

This decision is dated at the City of Edmonton in the Province of Alberta, this 25th day of June 2021.

"Signature"

[K.O], Hearing Chair