THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF Section s.48 of the *REAL ESTATE ACT*, R.S.A. 2000, c.R-5 (the "Act")

AND IN THE MATTER OF an Appeal Hearing regarding certain sanctions and costs determined as a result of findings in the conduct Hearing dated September 17 & 18, 2018 of SAMEER KALIA, Registered at all material times hereto with
Century 21 A.L.L. Stars Reality Ltd., Brokerage

Hearing Panel Members:	R. Telford, Chair C. Zwozdesky A. Blake B. Dawson
Appearances:	Mr. M. Engleking, for Mr. S. Kalia, Industry Member Mr. Andrew Bone, for the Executive Director of the Real Estate Council of Alberta
Hearing Date(s):	September 12, 2019 at the offices of the Real Estate Council of Alberta in Calgary, Alberta

DECISION

UPON considering the record giving rise to this Appeal; AND UPON reviewing and considering the materials submitted and the arguments made by the parties in the matter of this Appeal;

THE HEARING PANEL HEREBY FINDS AS FOLLOWS:

The decision of the Hearing Panel was justifiable, transparent and intelligible; falling within a range of possible, acceptable outcomes (*Dunsmuir v New Brunswick* 2008 SCC 9 at para 47) and the Appeal Panel confirms the decision concerning sanctions and costs of the Hearing Panel in all respects.

A. INTRODUCTION

This appeal was filed by the Industry Member, under s. 48 of the Act. The Industry Member appeals a number of sanctions determined by the hearing panel resulting from an investigation and subsequent hearing held on September 17 and 18, 2018. In particular the Industry Member appeals the sanctions given for breaches of ss. 41(d) and (f) and 42(a). The Industry Member also appeals the global amount of the sanction issued, suspension and costs. The Industry Member takes no issue with sanctions issued for breaches of ss. 53(c), and 62 (1)(a) and (b).

B. ISSUE(S)

The parties are at odds on the standard of review the Appeal Panel must apply when considering the decision of the Hearing Panel. The Appellant submits that this panel should apply a correctness standard, and counsel for the Executive Director (ED) submits that a reasonableness standard is appropriate and correct in this case. Once the standard of review is determined, the Panel is then tasked with determining whether the sanctions being appealed are excessive and disproportionate to the conduct, and whether the Hearing Panel erred in awarding costs against the Industry Member; applying the standard of review.

The Appeal Panel has the authority to (s.50 (4)) *...do one or more of the following:*

> *(a) make any finding or order that, in its opinion, ought to have been made by the Hearing Panel;*
> *(b) quash, confirm or vary the finding or order of the Hearing Panel or substitute or make a finding or order of its own;*
> *(c) refer the matter back to the Hearing Panel for further consideration in accordance with any direction that the Appeal Panel makes.*

In particular, the Appellant suggests s.50(4)(a) attracts a correctness standard by requiring the Appeal Panel to (a) make any finding or order that, in its opinion, ought to have been made by the Hearing Panel.

C. THE BACKGROUND FACTS

The following findings of facts were made by the Hearing Panel as a result of the September 2018 hearing, which findings the Appellant does not dispute:

1. A purchase contract for approximately 76 acres of land in Nisku, Alberta (the "Nisku Property" or "Property"), was entered on January 12, 2013, between [("Company1")]. or nominee or assignee (the buyer), and sellers who were represented by [("Brokerage")] (the "First Contract"). The agreed purchase price was $920,000.

2. The buyer was a corporation owned and directed by Mr. Kalia.

3. Mr. Kalia initialed and signed the First Contract on behalf of the corporate purchaser, with the initials "M.K." He witnessed that signature himself, with a different signature, reading "Sam Kalia." He did this without the sellers of the Nisku Property or their agent present.

4. Mr. Kalia owned other land, directly or indirectly, close to the Nisku Property, and was interested in expanding his holdings in the area.

5. In the First Contract, Mr. Kalia included the following term: "One of the buyers is a licensed Realtor in the Province of Alberta."

6. On January 16, 2013, RG conducted a corporate search on [("Company1")]. as part of his standard practice, and realized that:
   a. the corporation had been struck, and
   b. Mr. Kalia was the sole director of the corporation.

7. RG informed Mr. Kalia of his findings.

8. On January 17, 2013, Mr. Kalia registered a new corporation, [("Company2")], in which he, his wife and his father were directors. The First Contract was amended to change the name of the buyer from [("Company1")] to [("Company2")].

9. Mr. Kalia was an owner of [("Company2")] as well as a director. Ownership of this corporation was not specifically documented or testified to in the evidence, however the Panel finds that on the totality of the evidence, it is more likely than not that Mr. Kalia was an owner.

10. Sometime after January 12, 2013, Mr. Kalia met GL at a restaurant. They discussed the Nisku Property. GL expressed an interest in purchasing the land.

11. This meeting was an opportunistic or chance meeting. Mr. Kalia did not seek out GL to induce him to buy the Nisku Land.

12. Mr. Kalia and GL attended at the land on the same day as they met. GL did not see any [("Brokerage")] signs on the land during the visit.

13. GL believed Mr. Kalia was acting as his representative in the sale.

14. GL believed Mr. Kalia also represented the sellers, who were unknown to GL. This was a point of contention during the hearing. Mr. Kalia testified that he told GL that he had the Nisku Property "under contract," meaning Mr. Kalia was in the process of purchasing it. GL understood that to mean Mr. Kalia had a contract with the owners of the Nisku Land to represent them in a sale. The Panel believes GL on this point.

15. Mr. Kalia helped GL to come up with an offering price for the Nisku Property. This fact was contested, and the Panel prefers GL's evidence.

16. Mr. Kalia prepared a purchase contract for the Nisku Property, with GL's corporation, [("Company3")], as the buyer and Mr. Kalia's corporation, [("Company2")]., as the seller.

17. GL and Mr. Kalia met at a restaurant to review the purchase contract. Changes were made to the purchase contract. These changes were initialed by Mr. Kalia as "M.K" on behalf of [("Company2")]. Mr. Kalia witnessed the "M.K." signature with a different signature which read "Sam Kalia." These different initials and signatures were made in the presence of GL.

18. GL did not pay attention to the formalities or terms of the purchase contract, other than the purchase price. He simply signed or initialed where Mr. Kalia told him to.

19. A purchase contract was finalized between [("Company3")] and [("Company2")] on February 2, 2013. The purchase price agreed to was $1,200,000 (the "Second Contract").

20. Mr. Kalia did not explain to GL, in writing or verbally, at any point, that the Nisku Property was conditionally sold to [("Company2")]; nor that Mr. Kalia had an interest in the Property through [("Company2")]; nor that Mr. Kalia was not representing GL.

21. GL was not in fact aware of these three points. GL's actual knowledge of the two latter points were facts in dispute at the Hearing. Mr. Kalia's counsel argued that GL "must have known" that Mr. Kalia had an interest in the Nisku Property and that Mr. Kalia was not representing GL, despite the fact that this was never clearly stated to him. The Panel does not agree with Mr. Kalia and prefers GL's evidence on these points.

22. GL attended at the Nisku Property again, without Mr. Kalia, and noticed a [("Brokerage")] sign on the Property.

23. On February 7, 2013, GL spoke with RG and learned the Property was not Mr. Kalia's listing, and that it was conditionally sold to [("Company2")]

24. Mr. Kalia did not submit any documentation to his brokerage regarding the Second Contract, as he believed it was a personal real estate trade.

25. GL contacted Mr. Kalia's broker shortly after February 7, 2013.

26. GL instructed his lawyer to contact Mr. Kalia's lawyer and not to allow the release of the deposit funds for the Second Contract.

27. The Second Contract was cancelled.

28. Mr. Kalia used the due diligence clause in the First Contract to cancel the First Contract.

On the 10th day of October 2018 the Hearing Panel rendered its decision finding the Industry Member had breached the *Act*, subsequently the following sanctions were imposed on the Industry Member:

a) A $5,000 fine for his breaches of section 41(d) and 41(f) of the Rules;
b) A $10,000 fine for his breach of section 42(a) of the Rules;
c) A $2,500 fine for his breach of section 53(c) of the Rules;
d) A $2,500 fine for his breaches of sections 62(1)(a) and (b) of the Rules;
e) A 3-month suspension of Mr. Kalia's authorization to trade in real estate under the Act;

f) An education requirement, being the completion of Unit 4 (Consumer Relationships) and Unit 12 (Ethics, Professionalism and Risk Reduction) of the Fundamentals of Real Estate – Real Estate Associates Program, at his own expense.
g) Costs in the amount of $13,294.
(Reply of the Executive Director to Appellant's submission, #5, p.3)

The sanctions were stayed pending the outcome of this Appeal by a decision of the Hearing Panel dated 17th, December 2018.

DISCUSSION AND FINDINGS

D. Standard of Review

The Appellant suggests s.50(4)(a) attracts a correctness standard by requiring the Appeal Panel to *...(a) make any finding or order that, in its opinion, ought to have been made by the Hearing Panel*.

In part, the nature of the question relates to a review of a decision by an internal reviewing body versus an external reviewing body, such as an appeal panel versus a court. In support of this position the Appellant has provided the authority of *LSBC v Lessing* 2013 LSBC 29. Lessing, a member of the Law Society of British Columbia had been fined for a breach of the Law Society code of conduct; his punishment was the imposition of a fine by the discipline committee. The Law Society sought a review of the decision and the imposition of a suspension rather than a fine. In reviewing the decision of the discipline committee, the review committee necessarily had to determine what standard of review should be applied to decisions of the discipline committee. In reasons provided, the review committee found that the discipline committee's decision should be reviewed on a correctness standard. *Lessing*, in our view, is distinguishable as a decision from British Columbia, with little precedential value. Further, the *Hordal* decision that the Appeal Panel determined its correctness standard on predates the seminal case of *Dunsmuir.*

Counsel for the Executive Director submits that when considering the standard of review there is generally deference granted to a tribunal / panel interpreting its own enabling legislation. Counsel cites *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), *Dunsmuir* and *Nelson v. Alberta Association of Registered Nurses, 2005 ABCA 229* in support of this position, as well as *Newton v Criminal Trial Lawyers Association* 2010 ABCA 399. The

Alberta Court of Appeal in *Newton* specifically discusses standard of review as between the appellant body of an administrative tribunal and the tribunal of first instance and this Panel finds it to be persuasive as an Appeal Court decision from this jurisdiction on internal review. In particular the Court provides a number of factors, which evolve out of the various leading administrative law cases that should be considered and adapted to the particular context (para 42/43):

[43] The following factors should generally be examined:

(a) the respective roles of the tribunal of first instance and the appellate tribunal, as determined by interpreting the enabling legislation;
(b) the nature of the question in issue;
(c) the interpretation of the statute as a whole;
(d) the expertise and advantageous position of the tribunal of first instance, compared to that of the appellate tribunal;
(e) the need to limit the number, length and cost of appeals;
(f) preserving the economy and integrity of the proceedings in the tribunal of first instance; and
(g) other factors that are relevant in the particular context.

Considering the various factors above, when this Panel reviews the role of the Hearing Panel we note that they are tasked with hearing and weighing of evidence in relation to a complaint presented and after an investigation by the ED, based on their findings from the evidence, they are provided discretion to issues sanctions under the Act (s. 43). Under the Act, the Hearing Panel has the authority to deal with complaints referred to the Hearing Panel by the ED, it also has the power to hear appeals from decisions of the ED under ss. 39, 40. The Hearing Panel has significant expertise in its own right to deal with these matters. The Hearing Panel has broad authority to issue sanctions for findings of breach of the Act. The Appeal Panel utilizes the record before the Hearing Panel in addressing any appeal. The same procedures are required for a hearing on the matter before either the Hearing Panel or the Appeal Panel, s.42(c) - (k). The enabling legislation acknowledges the role of the Hearing Panel to address matters with their specialized experience and judgment, that role should not be undermined by the application of a correctness standard, unnecessarily.

The nature of the question in issue is a request by the Appellant to review the sanctions and costs award issued by the Hearing Panel, and given the authority and expertise of the Hearing Panel it would be inappropriate to presume that the expertise of one Panel prevails over

that of the other (Para 78, *Newton*), there is no question by the Appellant concerning the Hearing Panel's jurisdiction to make the decisions they did on sanction / suspension /costs; if that were the case the applicable standard may be different.

> *[15] The Appeal Panel interpreted and applied its statutory authority under s. 50(5) of the Real Estate Act and s. 28 of the Bylaws. That question was within its jurisdiction and a matter of interpretation of its home statute; as such, it is not a true question of jurisdiction. I emphasize in this respect that the jurisprudence of the Supreme Court to date casts significant doubt on whether true questions of jurisdiction even exist, and certainly does not encourage this or any trial court to characterize regulatory decisions as raising one: Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd 2016 SCC 47 (CanLII) at para 26; Alberta Teachers Association v Alberta (Information and Privacy Commissioner) 2011 SCC 61 (CanLII) at paras 33-39.*
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> *Pethick v. Real Estate Council (Alberta)* 2019 ABQB 431.

Pethick, as the most recent decision concerning an Appeal Panel decision under the Act, whereby Madame Justice Woolley considers the standard of review in relation to a decision of this Panel, albeit on an external basis, is highly informative and provides guidance on the appropriate standard of review. In *Pethick* Justice Woolley in considering the *Act*, provides:

> *[17]... Rather, even where there is a statutory right of appeal, the standard of review must be determined on administrative law principles (Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd. 2016 SCC 47 at paras 27-31.*
>
> *[18] Applying administrative law principles suggests that the Appeal Panel's cost decision ought to be reviewed deferentially, against a reasonableness standard. The Appeal Panel interpreted and applied its home statute and related enactments, namely 50(5) of the Real Estate Act and s.28(4) of the Bylaws; this creates a presumption of reasonableness... RECA and its Appeal Panel are expert self-regulatory bodies charged by the legislature with enforcing and setting standards of conduct for the industry and, like a law society, ought to be afforded deference when exercising that statutory authority: Law Society of New Brunswick v Ryan, 2003 SCC 20 at para 42. The Appeal Panel does not enjoy a privative*

clause and is subject to broad-ranging statutory right of appeal: that legislative structure weighs against deference but is not sufficient to discharge the presumption of reasonableness in light of the other aspects of the standard of review analysis.

It is also the case here that the Hearing Panel below applied its home statute and related enactments in relation to its findings of fact, there is nothing definitive in s. 50(4) that attracts a correctness standard. The subsection provides that *...the Appeal Panel shall..., do one or more of the following* – this statement gives broad discretion to the Panel to take any number of steps to address the issues in the appeal. The Hearing Panel is equally entitled to deference when exercising its statutory authority in determining matters before it. The Panel is aware that where questions of law or true jurisdiction are posed, a standard of correctness may apply, however, no question of jurisdiction arose in the matter before the Hearing Panel such that a correctness standard would apply on this Appeal. This Panel finds that a reasonableness standard applies to the decision of the Hearing Panel.

Looking to the other factors for considering standard of review in internal matters from *Newton;* the Appeal Panel acknowledges that the need to limit the length, number and cost of appeals is a constant consideration for all levels of legal system, but can never impede on resolution of disputes / issues within the boundaries of the law.

There is value in considering the need to preserve the economy and integrity of the proceedings in the tribunal of first instance. If a correctness standard is to be applied to what the Hearing Panel "ought" to have decided, it would allow the Appeal Panel to subjectively review the Hearing Panel's findings and substitute its own decision for that of the Hearing Panel. This would significantly undermine the process and hearings at first instance; with the reasoning above, that is not the intent of the legislation.

DETERMINATION ON SANCTIONS AND COSTS

On reviewing the decision of the Hearing Panel on the reasonableness standard, the leading authority is *Dunsmuir v. New Brunswick* 2008 SCC at para 47, quoted in *Pethick* at para 20:

[20] An administrative decision is reasonable if the reasons for decisions are justifiable, transparent and intelligible, and if

its "decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law"

The boundaries involving sanctions are set out at s.43 of the *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.*

<u>Suspension</u>

The Appellant submits that suspensions are reserved for egregious conduct, including cases demonstrating fraudulent acts, which is not the case with this Industry Member. In considering the necessary element of public protection in relation to the suspension the Appellant argues that the events relating to the suspension took place in 2013 and that no other complaints or issues have arisen since that time, making the incident a "one off" event.

The Hearing Panel reasoned that while the Executive Director's suggestion of a 12-month suspension for the Industry Member was too onerous on the facts (p. 23), the suggestion that an administrative penalty would be appropriate was also not persuasive. In distinguishing the case of *Antonini (RECA 1972-05)* Materials vol. 3, tab 11, the Hearing Panel noted that Mr. Antonini was not motivated by profit, unlike Mr. Kalia, and that in the *Antonini* matter there was a joint submission on sanction indicating some agreement between the parties on the appropriateness of the possible sanctions. The Hearing Panel acknowledges that both in *Antonini* and the current case there was no actual loss or harm to a member of the public. The Appeal Panel finds the decision of a suspension to be reasonable and supported in the decision, and moreover, within the range of possible sanctions for a breach.

As to the fines for the findings of breaches of Rules 41(d) and (f), and 42(a), amounting to $15,000 in total; $5,000 for 41(d) and (f), and $10,000 for 42(a), again, the Hearing Panel has made findings of fact leading to a determination of breach. The further determination of sanction for those breaches, which was spoken to by both parties, and in most cases the Hearing Panel reduced the amount of the fines being sought by the Executive Director, is wholly reasonable. Applying s.43(1)(e), the Hearing Panel may impose a fine "for each finding of conduct deserving sanction". The Appellant's suggestion that the aggregate of the fines is excessive cannot be upheld on the basis of the provision of individual cases of lessor sanction.

On the matter of costs, in spite of there not being a finding of fraud on the part of the Industry Member, there were multiple breaches of the *Act*, and in cases where a breach is found it is common practice for the ED to seek costs. The absence of a finding on a single allegation, regardless of its gravamen, does not negate or diminish the ability to seek costs or for costs to be awarded. The Hearing Panel did acknowledge that fraud was not proven and reduced costs to payment of 30% of costs sought. The Appellant provided no authority in support of the claim that failing to prove an allegation removes the ED's ability to seek costs.

E. DECISION & FURTHER DIRECTION

Based on the foregoing, our decision and directions are as follows:

The Decision of the Hearing Panel imposing sanctions dated November 23, 2018 is confirmed.

Costs were not argued or spoken to during the hearing of this Appeal. Therefore, we invite the parties to provide written submissions on costs of this Appeal. If either party objects to proceeding by written submission only, they may raise it within the time noted below. Otherwise, written submissions shall be submitted within the time frames outlined below.

Unless an objection is made by either party within the time outlined below, costs of this Appeal will be dealt with by written submission only, to a maximum of 5 pages, with submission dates as follows:

- Mr. Kalia's written submission shall be supplied to the Hearings Administrator and to counsel for the Executive Director by no later than November 8, 2019.
- The Executive Director's submissions in response shall be supplied to the Hearings Administrator and to Mr. Kalia's counsel by no later than November 22, 2019.
- Mr. Kalia's rebuttal submission, if any, shall be supplied to the Hearings Administrator and to the Executive Director's counsel by no later than November 29, 2019.

If any party objects to costs being determined by written submission only, or to the dates outlined above, any such objection must be declared by delivering an objection in writing to the Hearings Administrator and to opposing counsel by no later than October 25, 2019.

This decision is certified and dated at the City of Calgary in the Province of Alberta, this 17th day of October.

Robert Telford, Appeal Hearing Chair