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 sanctions and costs determined as a result of findings in the conduct Hearing dated October 21, 2019 of Mehboob Ali Merchant, Registered at all material times hereto with Century 21 Platinum Realty

Appeal Panel Members:	Arlene Blake, Chair George Pelechaty Junaid Malik
Appearances:	Mr. Mehboob Ali Merchant, Industry Member Mr. Christopher Davison, for the Executive Director of the Real Estate Council of Alberta
Hearing Date(s):	May 19, 2020 at 9:30 a.m. via teleconference call

DECISION

The Executive Director (ED) of the Real Estate Council of Alberta (RECA) has appealed the Hearing Panel decision in the case of Mehboob Ali Merchant, file #005064 under s.48(2) of the *Real Estate Act,* RSA 2000 c.-R.5 (*Act*). That impugned decision was issued on October 21, 2019. In its decision the Hearing Panel, based on an Admission of Conduct Deserving Sanction under s. 46 of the REA, imposed sanctions. The breaches admitted include a breach of s. 17, s. 38(4.1), and three breaches of s.42(b) of the *Act* (Rules).

This Appeal was originally scheduled to be heard on March 17, 2020 at the Real Estate Council of Alberta Office in Calgary. The matter was adjourned due to the COVID-19 pandemic until April 14, 2020 in anticipation of the reopening of the office. The office did not reopen on April 14, 2020 and direction was given by the Appeal Panel to arrange for a teleconference hearing of the appeal on May 19, 2020. The following decision results from that teleconference hearing on May 19, 2020 from 9:30 am to approximately 3:30 pm on that day. At the time of the May 19, 2020 hearing the issues on appeal were limited to those of the Appeal of the ED.

By way of background, sanctions were imposed by the Hearing Panel that the Industry member sought to stay pending this appeal. A decision was issued by the Hearing Panel on January 29, 2020 denying the requested stay. The industry member filed a further appeal on the stay decision, but that appeal was withdrawn by the Industry Member on March 13, 2020, along with his withdrawal of his appeal of the sanctions imposed in the October 21, 2019 decision.

This panel also received a request for direction from the industry member in relation to the process of appeal under Part 3 of the RECA *Hearing and Appeal Practice and Procedure Guidelines*, and a decision (procedural direction) was issued on February 27, 2020; and to enhance clarity a revised decision regarding the direction was provided on February 28, 2020 is attached hereto as an appendix.

The facts in this case were appended as Schedule "A" to the Admission of Conduct Deserving Sanction set out in the Hearing Panel decision dated October 21, 2019. For brevity those facts are:

> *(a) Theft by taking $20,000 that belonged to his brokerage, contrary to s. 42(b) of the Real Estate Act Rules (Rules);*
>
> *(b) Engaging in property management without being authorized by council to do so, contrary to s. 17 of the REA;*
>
> *(c) Fraud by leasing a condo without the owner's knowledge or permission, and without informing the tenant he did not have the owner's knowledge or permission, contrary to s. 42(b) of the Rules;*
>
> *(d) Identity fraud by attempting to enter a lease with the condo owner by registering a company that resembled his brokerage and then pretending to be acting on behalf of his brokerage, contrary to s. 42(b) of the Rules;*
>
> *(e) Intentionally withholding documents from investigators, contrary to s. 38(4.1) of the REA .*
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> ED Written Argument p 1, p. 41 Merchant Decision

These admissions continue to be findings as provided under s. 47 (2): *If a statement of admission of conduct is accepted, each admission of conduct in the statement in respect of any act or matter regarding the industry member's conduct is deemed for all purposes to be a finding of the Hearing Panel that the conduct of the industry member is conduct deserving of sanction.*

Those findings were similarly confirmed by the Hearing Panel in its decision. The Hearing Panel, in conclusion, issued the following sanctions:

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

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

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

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

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

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

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

8. Mehboob Ali Merchant shall pay costs of the investigation and hearing of $1500.00

For the purpose of this appeal the Executive Director submits that the Hearing Panel's decision is unreasonable under the following grounds:

1. The Hearing Panel unreasonably limited its powers under s. 43 of the REA;
2. The Hearing Panel unreasonably applied the test found in *The Law Society of New Brunswick v Ryan*, 2003 SCC 20 (*Ryan*); and
3. The Hearing Panel unreasonably provided no reasons for the inconsistent finding that the intentional identity fraud was serious and egregious, yet the intentional theft and intentional fraud (which was part of the same transaction as the identity fraud) were only serious.

The ED submits that this Appeal panel should allow the appeal and substitute the sanctions given for those originally requested pursuant to s. 50(4)(a) of the REA.

<u>ED Ground #1 – Did the Hearing Panel unreasonably limit its powers under s.43 of the Act?</u>

Section 43 of the *Real Estate Act* provides as follows:

Decision of Hearing Panel

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.

(2) The Hearing Panel may, in addition to or instead of dealing with the conduct of an industry member under subsection (1), order the industry member to pay all or part of the costs associated with the investigation and hearing determined in accordance with the bylaws.

(2.1) In the case of a hearing in respect of an appeal under section 40.1, the Hearing Panel may

(a) quash, confirm or vary the decision of the executive director that is the subject of the appeal, and

(b) order the industry member to pay all or part of the costs associated with the investigation and hearing determined in accordance with the bylaws.

(3) Repealed 2003 c31 s15.

In its reasons (p.51) the Hearing Panel provides:

> The reason the Hearing Panel did not adopt the Executive Director's recommendation for a license cancellation and lifetime licensing prohibition was because there was no precedential case law in the real estate industry regulation area for the Hearing Panel to rely on. There were several cases with similar conduct to this case wherein the

> Hearing Panel ordered suspensions and fines and the Hearing Panel relied on those cases to determine an appropriate sanction. The use of precedents for sanction provides predictability, stability, fairness and efficiency in the law. The Hearing Panel considered that to be of the utmost importance.
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> The Hearing Panel acknowledges that in other professions, dishonesty or fraud results in a lifetime licensing prohibition. However, that approach to sanction, or that standard, has not been applied to the real estate profession. For reasons unknown to the Hearing Panel, the sanction for real estate professionals is generally a suspension and a fine rather than a lifetime licensing prohibition. The Hearing Panel also acknowledges that the Executive Director is attempting to implement a new RECA policy that results in lifetime licensing prohibitions for serious and intentional dishonesty and fraud, but the Hearing Panel could not order this in this instance, without case law from the real estate profession to support that position.

The ED's position in this appeal is that the Hearing Panel unreasonably placed a limitation on its power to impose the sanction of a lifetime ban, arguing that there is no requirement for supporting case law to impose a lifetime licensing prohibition under 43(1)(c) or to cancel licensing under 43(1)(a).

ED's Counsel points to *Vavilov* 2019 SCC 65, to direct the Appeal Panel in the interpretation of s.43; at paragraph 120 of *Vavilov*:

> But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretive exercise: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.

ED's Counsel further submits that "the governing authority for determining the quantum of sanction is *Jaswal* (ROA, Tab E1 at Subtab 1)" and that the Hearing Panel gave consideration to only one of the thirteen factors outlined in *Jaswal*. (*Jaswal v. Medical Board (Nfld.)*, 1996 CanLII 11630 (NL SC)).

Conversely, the Industry Member submits in his written response p. 5 & 6 (read at the appeal):

> The hearing panel did not limit the hearing panel's power to impose sanction. The hearing panel is aware that they have a range of sanctions that they can order. The hearing panel decided not impose the sanction suggested by the ED because it had no corroborative case law from the ED to support his position. There was nothing in precedents within RECA that allowed the sanction imposition. The hearing panel did not state that the reasons they didn't adopt the ED's recommendation was because they were bound by precedents, or the Real Estate Act mandated this, or the REA did not allow for this without precedent. They simply stated they "could not," with one of the reasons being that they did not have corroborative case law within RECA to support that position. This was not a limitation they were placing on themselves.
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> As reviewed above, in *Vavilov*, paragraph 94, "The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body." In this case, the Hearing Panel's interpretation is consistent with that of the Supreme Court. Again, it would be completely illogical to ignore and disregard corroborative case law. The first ever hearing panel would not have any corroborative case law to refer to, at which time they would be able to refer to other administrative tribunals for guidance on the matter. This is not the first ever RECA hearing. PERIOD.
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> Further, the ED argues that the hearing panel's interpretation (of s.43 of the REA) is not consistent with any of these considerations: "text, context and purpose of the provision" (Vavilov paragraph 120). Had the Hearing Panel limited their powers and imposed NO sanction or a sanction that departs from those permitted by s.43, it could be considered that the hearing panel misinterpreted the statue (s 43 of REA). However, this is not the case. The hearing panel does not limit its power of S 43-it does go on to impose the sanctions available to them under the Real Estate Act.

The parties agree that the standard by which the impugned decision is reviewed is that of reasonableness. The Supreme Court of Canada's recent

decision in *Vavilov* was put forward by both parties as being the current state of the law in relation to the review of an administrative tribunal decision. We concur.

The starting point in the analysis of s.43 is a review of the language contextually. We note that 43(1) provides that the panel "may make any one or more of the following orders". This supports the imposition of any of the sanctions listed in (a) – (e) or a combination of them collectively. That interpretation is supported by the various sanction decisions provided to us in support of the parties' positions on sanction from the original hearing.

S.43(1) provides for the cancellation or suspending of any authorization; the term authorization is not defined in the Act, but at s. 17 ..."no person shall (a) trade, (b) deal, (c) act, (d) advertise... unless that person holds the appropriate authorization for that person issued by Council." We find Authorization for the purpose of the REA is to licence an Industry Member to act in a particular role.

Cancelling or Suspending given their ordinary meaning allows for the bringing to an end or stopping of a particular action. Rule 14 (3) of the Real Estate Act Rules further supports this interpretation:

> 14(3) When a person's licence has been cancelled under the Act and that person applies for a new licence, that person is not eligible to be issued a new licence until 36 months have elapsed from the date of the cancellation, or such lesser or greater time as may be determined by a hearing or appeal panel or the court.

The rule was broadly interpreted by the Hearing Panel in the Aulakh 2019 RECA 121 decision as follows:

> 6.4 The Hearing Panel interprets rule 14(3) to mean that while the standard cancellation period is 36 months, the Hearing Panel may exercise its discretion to impose a lesser or greater cancellation period if it is satisfied that a lesser or greater period is justified, taking into account the relevant factors of the case.

In our view there is no limiting or restrictive language in s43(1)(a) that would prevent a panel from finding that an industry member should be subject to a lifetime ban or suspension from trading in real estate or any other authorized practices. This is unlike subsection (d) that allows the imposition of a fine that may not exceed $25,000.00, thus limiting the amount an industry member can be fined and placing a legislated limitation on sanction.

We also note that at the time of the Hearing Panel's decision it was indicated by ED Counsel that the Aulakh decision resulted in a lifetime authorization cancellation(p. 45), but in truth the decision of that panel was a two year cancellation, and at p.58 of their decision, the Hearing Panel in Merchant, found the conduct in Aulakh to be more egregious than the conduct before them, and which, among other decisions, guides the Hearing Panel in it determining appropriate sanction.

As indicated above, in his submission the Industry Member provides: *The first ever hearing panel would not have any corroborative case law to refer to, at which time they would be able to refer to other administrative tribunals for guidance on the matter* in reference to the imposition of a sanction at the first instance, which is precisely the issue in this case. This Panel can reasonably infer from the Industry Member's statement that he acknowledges that if a lifetime suspension or cancellation is to be imposed, where one has not been previously imposed, the tribunal can appropriately look to "other administrative tribunals for guidance".

The provision of the *Ryan* decision by ED's Counsel was provided to the Hearing Panel to guide the Panel in administering the next level of sanction; the lifetime ban.

The use of the *Jaswal* factors are well accepted in determining the severity of the sanction to impose in matters affecting real estate industry members, and those factors are derived from a medical disciplinary matter. The suggestion that the use of professional disciplinary cases is not appropriate due to the industry they come from is not supported in the reasons. The Industry member argues that the professionals who were disbarred or had their licences cancelled come from professions of highly educated persons, but that is not what the cases consider. While there was some suggestion made that discipline needs to be industry specific, that only doctors can be subject to certain discipline or lawyers to another, the accepted use of the Jaswal factors by the real estate industry is an indication that what is relevant is the professionals' duty to the public, departures therefrom and consequences thereof.

While the hearing panel said that it "could not" impose the requested lifetime ban, we are satisfied that the statement was not made to limit their authority to impose the lifetime ban under s.43, but rather that the precedents before them did not support the sanction requested and that they therefore applied precedent on a similar fact basis when considering the request for the lifetime cancellation. While this panel finds that the Hearing Panel could have imposed a lifetime suspension or cancellation of an authorization, the

proposition that the sanction imposed by that Hearing Panel is somehow unreasonable does not naturally follow as a result. It is necessary to further review the decision to determine its reasonableness in relation to the sanction that it did impose. "...a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para 47 as quoted by *Vavilov* at para 126.

The Hearing Panel was live to the arguments of the ED in relation to the imposition of a lifetime ban: "that cancellation need not be reserved for the very worse misconduct, but rather anytime misconduct is bad enough; ...that certain types of conduct is *(sic)* so egregious that, by its very nature, it brings the reputation of the profession into disrepute and this type of misconduct warrants a presumptive license cancellation and lifetime licensing prohibition, absent substantial and compelling mitigation." (p.17 written argument of the ED).

The Hearing Panel thoroughly reviewed the various precedential decisions put forward by both parties at pp 43-47. On behalf of the Industry member: Sedgewick 2018 ABRECA 015, Lalji 2016, Aulakh 2019, Odentunde 2006, Inglis Re 2019 Canlii 53386, Wu (Re)2007 Canlii 71610, Howard (Re) 2014 ABRECA 14, Benavides (RE) 2009 ABRECA 44, Behroyan (Re) 2018 Canlii 50247 (BC REC). The ED presented two cases in rebuttal; Aulakh and Kalia 2018 ABRECA 010. The Hearing Panel's review of the submitted cases lead them to the following finding:

> After reviewing other similar cases and finding that the factors of general deterrence and the confidence of the public in the integrity of the profession ought to be weighted heavily given the Industry Member's multiple breaches of theft, fraud and identity fraud were committed intentionally, authorization cancellation is more appropriate than a suspension. Also, the cancellation ought to be for 12 months which reflects the seriousness of the breaches and the fine should reflect current similar RECA cases. (P. 60)

Counsel for the ED submits that the Hearing Panel ignored the importance of 12 of the 13 factors in *Jaswal*, singling out the importance of precedent above all else.

At p.15 of the decision:

> It was the Executive Director's submission that *Jaswal v Newfoundland (Medical Board)* lists the factors relevant to a sanction in professional discipline cases. However, it was the Executive Director's position that when a professional participates in a serious and egregious breach of his professional conduct and

> responsibilities which undermines public confidence in the industry, then the *Jaswal* factors of general deterrence and the confidence of the public in the integrity of the profession are weighted far above other factors."

The Appeal Panel is satisfied that the Hearing Panel reasonably reviewed the *Jaswal* factors in relation to the quantum of sanction based on the admission of conduct at pages 53-57 of their decision. The consideration of deterrence and public confidence are specific factors from *Jaswal* at J and K, while the range of cases is considered at M (pp 56 & 57). The consideration of the factors is fact specific and subject to the panel reviewing those facts. That another panel might find, for example, that mitigating circumstances are not as mitigating in their view is not a proper review for reasonableness, as in *Vavilov* at para. 125:

> It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42.

The Hearing Panel looked to the facts before them, those found in the admission, and reviewed each *Jaswal* factor considering the facts individually. While it may appear that they weighted the use of precedent more heavily, their consideration of each factor is transparent, including the need to promote public confidence and deterrence.

This Panel finds that it is reasonable for the Hearing Panel to confine its review of precedent to those within the real estate industry where those precedents appropriately address similar circumstances within similar statutes or rules. Counsel for the ED discusses the evolving approach to member's misconduct by RECA and the Hearing Panel reasoned that without supporting case law from the real estate industry it could not apply the requested sanction (page 45 of the decision). It must be remembered that a change in the ED's internal policy is not a change in the law, there is no legal requirement for the Hearing Panel to accept the suggested sanction simply because the ED wishes to implement the new policy. The Hearing Panel is at liberty to apply those sanctions outlined in s.43 as it finds fitting in the circumstances, and it is reasonable to rely on industry specific precedent to do that.

This leads to the second ground of the appeal.

ED Ground #2 – Did the Hearing Panel unreasonably apply the test in *Ryan*?

ED's Counsel takes the position that the Supreme Court decision of *Law Society of New Brunswick v. Ryan* 2003 SCC 20 ("*Ryan*") was misapplied by the Hearing Panel.

ED's Counsel provided no supporting case law concerning the application of *Ryan* but asserts that this Panel is bound by the case and must apply the purported test. At the time of the original hearing ED submitted "that *Ryan* was Authority from the Supreme Court of Canada that was binding on the Panel and it showed there was a scope of conduct which warrants license cancellation." (Merchant decision, p.16)

ED's Counsel at paragraph 28 of their appeal notice submits that "… it is an irrational chain of analysis and not justifiable in law to change the test to make optional components mandatory, then apply their own test rather than the test that was written by the Supreme Court."

To suggest that *Ryan* promotes a test that must be met prior to the imposition of a specific sanction puts limitations on every disciplinary body in the country that requires subjective consideration of each of the factors in light of the particular profession and factual circumstances to which it is being applied.

We note that the case of *Ryan* was, in part, concerning the application of precedent in discipline cases, the Court of Appeal made a finding that the disciplinary panel had not applied similar precedents as argued by *Ryan*. The Supreme Court overturned the Appeal Court's finding and reinstated the Discipline Committee's findings.

Ryan was decided in the era of the pragmatic and functional approach to determine the standard of review. In the result, the Supreme Court in *Ryan* through its Pragmatic and Functional analysis settles on a standard of reasonableness. It then proceeds to consider what is required of the court when conducting a reasonableness review (para 48). The Supreme Court acknowledges that the original disciplinary panel reasonably considered those factors put forward by ED as a test, but there is no language within the SCC's decision that specifically endorses those factors as a test for universal consideration by a tribunal determining disciplinary sanctions.

ED suggests that *Ryan* sets out a particular test when a disciplinary body is considering "disbarment" However, in the vein of reasonableness what the Court asks is "What reasons Did the Committee Give for its Decision?" The Supreme Court answered its question as follows:

The reasons for confirming the penalty of disbarment therefore included the following findings and premises:

> (1) even though the professional self-government regime requires that each case must be decided on its own facts, it is nonetheless relevant that Mr. Ryan's breaches of professional ethics were similar to ones for which professional disciplinary bodies have previously imposed a sanction of disbarment;
>
> (2) Mr. Ryan's conduct amounted to a "serious and egregious breach of his professional conduct and responsibilities";
>
> (3) forging court documents undermines public confidence in the legal system and is so improper that only significant and compelling factors would mitigate the seriousness of such unethical behaviour;
>
> (4) the evidence presented in mitigation was not compelling;
>
> (5) when the duration of Mr. Ryan's deceit was considered against the backdrop of his previous disciplinary record, it was clear that his honesty, trustworthiness, and fitness as a lawyer were irreparably compromised. (para 58)

The follow up question that the Court asks is "Do These Reasons Support the Decision and Do they withstand Examination?". At paragraph 59 the Court finds that the reasons given by the Committee, "taken as a whole, are tenable, grounded in the evidence and supporting of disbarment as the choice of sanction."

Nowhere in the decision does the Supreme Court indicate or imply that the reasons provided by the Disciplinary Committee shall be viewed as a test for self regulating professions in the matter of discipline. We accept that, like the *Jaswal* factors, an application of reasons viewed multiple times by a variety of disciplinary bodies can be helpful in determining quantum on sanction, and may become entrenched over time, However, in our view, this does not elevate the analysis of the Disciplinary Committee's reasons in Ryan to the level of a test that displaces what has become the standard in the real estate context, which are the *Jaswal* factors.

It is unclear to this panel as to why, if ED believes that a Hearing Panel has clear statutory authority under s. 43 to cancel or suspend an authorization for the lifetime of the Industry member, that it is also necessary to diverge from the use of the Jaswal factors in support of the quantum of sanctions, and require the application of alternate considerations per *Ryan*.

ED's Counsel submits that *Ryan* is "relevant, binding, Supreme Court authority to consider when imposing sanction, their decision must be justified with reference to it." (para 27 – ED written appeal argument). What we see is the Supreme Court providing further guidance for disciplinary bodies in relation to what will be considered when reviewing a decision from a reasonableness perspective: the Court is not endorsing the Committee's reasons as a test for all disciplinary bodies.

ED is incorrect about what Ryan stands for in the context of the issues before this Appeal Panel. *Ryan i*s not a test in the manner that ED argues it is. Rather, *Ryan* is a very helpful illustration from the Supreme Court about whether the type of reasoning undertaken by that particular decision maker in that particular matter was sufficient to survive appellate intervention on a reasonableness standard.

The Supreme Court did not, in effect, set out a strict set of parameters for whether any decision to issue or not issue a lifetime suspension will be reasonable or unreasonable in the circumstances. Again, such a strict test or edict would, at its core, essentially strip a decision maker from their ability (and perhaps even their obligation) to approach decisions based on the nuance of facts before them, the context of the facts, the applicable legislation, regulations, bylaws, procedures and practices material to the profession, and the other well established guiding principles. Essentially then, the reasonableness of a decision maker in the circumstances would only be measured by whether or not the decision-maker followed the ED's articulation of a *Ryan* test. Moreover, *Ryan* was decided 16 years prior to the Hearing of the Merchant matter and has been the subject of much discussion in subsequent cases, and yet ED Counsel did not provide one supporting decision utilizing the *Ryan* "test" as suggested.

While the Hearing Panel appears to have been in error in accepting that *Ryan* was a specific and binding test for lifetime suspensions, the Hearing Panel nonetheless found that the "test" was not met. The Hearing Panel went on to consider the *Jaswal* factors, which are a well recognized set of guiding principles for sanctions in professional regulatory proceedings. While the Hearing Panel appeared to have been in error in approaching *Ryan* as a "test" for lifetime suspension, it came to the right conclusions that in the circumstances of the matter before it, *Ryan* did not bind the Hearing Panel to a determination that the Industry Member must be suspended for life.

Further, the Hearing Panel did proceed with a consideration of the well-recognized set of guidelines on what the appropriate sanction should be in the circumstances, namely, the *Jaswal* factors, as discussed above.

A corollary position of the ED presented by Counsel is the suggestion that where conduct of an industry member meets a specific threshold for serious and egregious conduct that there should be a presumptive cancellation of authorization. This Panel firmly rejects that submission. ED is charting unknown territory and in Canada the notion of any person being presumptively sanctioned based on undetermined events offends the rule of law. Sanction is a factually driven analysis of the conduct and circumstances.

This leads to the final grounds of appeal.

ED Ground #3 – Did the Hearing Panel unreasonably provide no reasons for the inconsistent finding that the intentional identity fraud was serious and egregious, yet the intentional theft and intentional fraud (which was part of the same transaction as the identity fraud) were only serious?

This Panel sees this argument as an extension of the claim that *Ryan* has been misapplied. As we have found that *Ryan* is not a test as advocated by ED, the matter of describing conduct of the Industry Member in precise terms as serious and egregious is immaterial. In the *Aulakh* case the term "serious" was used in the context of the ED's submission and not by the Hearing Panel at all in its reasoning: choice verbiage alone is not determinative. ED's counsel did not suggest or provide a distinction as to what might be seen as "serious" or "serious and egregious". It could be inferred that "serious and egregious" is worse than "serious", but there is nothing to support that. Moreover, as we discuss above, the terms as used in the context of *Ryan*, do not concern a technical analysis but a review of the conduct.

In conclusion, the Appeal Panel finds that the decision of the Hearing Panel in the matter of Mehboob Ali Merchant, Case 005064 is reasonable, and the sanctions imposed therein shall be confirmed pursuant to s.50(4)(b) of the Act. The ED's appeal is dismissed.

This decision is certified and dated at the City of Calgary in the Province of Alberta, this 17th day of July, 2020.

Arlene Blake, Appeal Hearing Chair