File 14-431

IN THE MATTER OF THE *REAL ESTATE SERVICES ACT*
SBC 2004, c 42 as amended

AND IN THE MATTER OF
SHAHIN BEHROYAN
AND
SHAHIN BEHROYAN PERSONAL REAL ESTATE CORPORATION

REASONS FOR DECISION REGARDING SANCTION

DATE AND PLACE OF HEARING:	February 13, 2020 Office of the Real Estate Council Vancouver, BC
DISCIPLINE COMMITTEE:	Sandra Heath, Chair Rob Gialloreto Sukh Sidhu
INDEPENDENT LEGAL COUNSEL:	Lisa C. Fong, Q.C.
SOLICITOR FOR THE REAL ESTATE COUNCIL:	Jean P. Whittow, Q.C.
LICENSEE:	Shahin Behroyan
SOLICITOR FOR THE LICENSEE:	John Shields
Court Reporter:	Not applicable; hearing via written submissions

1.0. INTRODUCTION

1. A new discipline committee panel (the "Committee") convened to decide on sanctions including enforcement expenses (the "Second Sanction Hearing"), pursuant to an order of the Financial Services Tribunal ("FST") dated October 18, 2019 and indexed as 2018-RSA-002(c) and 003(c) (the "FST Remedy Decision"), based on a review of the record before the FST, the two prior decisions of the FST in this matter, and written submissions of the licensee and the Council.

2. The Committee must make an order under RESA section 43(2) to impose one or more discipline penalties. Such discipline penalties may include an order requiring payment under RESA sections 44(1) and (2) concerning expenses in relation to the investigation and the discipline hearing.

2.0. PREVIOUS DECISIONS IN THIS MATTER

3. A previous Discipline Committee panel (the "First Committee") made a prior determination on October 30, 2017 that the Licensee, Mr. Behroyan committed professional misconduct within the meaning of section 35(1) of the RESA (the "Liability Decision"). Specifically, the First Committee decided that the Council proved allegations of professional misconduct at paragraphs 1a, 1b, 1d, 1e and 1f of the Notice of Hearing, but dismissed allegations at paragraphs 1c and 1g.

4. Based on its decision in the Liability Decision, the First Committee decided about sanctions on May 4, 2018, with a corrigendum issued May 29, 2018 (the "First Sanction Decision").

5. For ease of reference, paragraphs 1a, 1b, 1c, 1d, 1e, 1f, and 1g are as follows, with defined terms added for convenience, and slight reformatting to add clarity. The Committee sets out all allegations, as the full extent of the allegations may be relevant to the issue of enforcement expenses and divided success:

> **1.** "Shahin Behroyan and/or Shahin Behroyan Personal Real Estate Corporation, while licensed as a representative with RE/MAX Masters Realty (the "Brokerage"),
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> - "committed professional misconduct within the meaning of section 35(1)(a) and/or (c) of RESA and
> - "contravened sections 3-3 (duties to clients), 3-4 (duty to act honestly and with reasonable care and skill) and/or 5-11 (disclosure of remuneration) of the Council Rules in that, while acting as the designated agent on the listing of property… (the "Property") pursuant to a listing agreement… (the "Listing Agreement"):"
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> ["ITEM #1" (Notice para. 1(a)) – the "Self-serving Bonus"]
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> a. "In or about November, 2014, Mr. Behroyan caused the seller of the Property and/or H.G., her son and power of attorney, to purport to agree to pay a bonus of $75,000 over the remuneration called for in the Listing Agreement (the "Bonus") without H.G.'s and/or the seller's informed consent, contrary to his duty to act in the best interests of his client and/or to avoid conflicts of interest pursuant to section 3-3 of the Council Rules;"
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> ["ITEM #2" (Notice para. 1(b)) – the "Deception"]
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> b. "Mr. Behroyan represented to H.G. and/or the seller that the Bonus was required by the representative of persons interested in

acquiring the Property, J.C. and A.C. and/or in order to secure an offer for the Property, when one or both of these representations was untrue, which constitutes deceptive dealing pursuant to section 35(1)(c) of RESA and/or a breach of the duty to act honestly pursuant to section 3-4 of the Council Rules;"

["ITEM #3" (Notice para. 1(c)) – obtaining incorrect client representations using the wrong fee agreement]

c. "At around the time of presentation of the offer for the purchase of the Property from J.C. and A.C., Mr. Behroyan caused H.G. to sign a seller's fee agreement dated November 11, 2014, which indicated that neither the buyer or seller were represented, when the Brokerage had previously entered a listing agreement to provide agency services to the seller in which Shahin Behroyan Personal Real Estate Corporation was identified as the designated agent, contrary to Mr. Behroyan's duty to act in the best interests of his client pursuant to section 3-3(a) of the Council Rules and/or to act with reasonable care and skill pursuant to section 3-4 of the Council Rules;"

["ITEM #4" (Notice para. 1(d)) – permitting an untrue term that the seller had been advised to seek independent advice]

d. "Mr. Behroyan permitted the seller and/or H.G. to enter the contract for the purchase and sale of the Property to J.C. and A.C. which contained a term that the seller had been advised to seek independent legal advice, when Mr. Behroyan had not so advised the seller and when it would have not been reasonable to obtain such advice in the period between presentation of the offer and its expiration, contrary to Mr. Behroyan's duty to act in the best interests of his client pursuant to section 3-3(a) of the Council Rules and/or to act with reasonable care and skill pursuant to section 3-4 of the Council Rules;"

["ITEM #5" (Notice para. 1(e)) – failure to disclose material information (agency)]

e. "Mr. Behroyan failed to disclose to the seller and/or H.G. at any material time that he had signed a Working With a Realtor form indicating that he was to provide agency services to J.C. and A.C., contrary to his duty to disclose all material information to his client pursuant to section 3(3)(f) of the Council Rules;"

["ITEM #6" (Notice para. 1(f)) – failure to disclose material information (remuneration)]

f. "Mr. Behroyan failed to disclose to the seller and/or H.G. at any material time that he expected to receive or did receive one half of the selling agent's commission, contrary to his duty to disclose all

material information to his client pursuant to section 3-3(f) of the Council Rules and/or to disclose all remuneration pursuant to section 5-11(2) of the Council Rules; and, or in the alternative,"

["ITEM #7" (Notice para. 1(g)) – failing to properly indicate execution by a seller's attorney]

g. "Mr. Behroyan permitted H.G. to apply the seller's name to documents relating to the sale of the Property, and without indicating H.G.'s authority, contrary to his duty to act with reasonable care and skill pursuant to section 3-4 of the Council Rules."

6. Under RESA s. 35(1), a licensee commits "professional misconduct" if the licensee "(a) contravenes… the Rules", or "(c) does anything that constitutes wrongful taking or deceptive dealing".

7. Rule 3-3 provides for specific duties to clients, including act in their best interests, disclosing to the client all known material information respecting the real estate services, avoiding conflicts of interest, and disclosing any conflict of interest to the client:

Duties to clients

3-3 Subject to sections 3-3.1 and 3-3.2, if a client engages a brokerage to provide real estate services to or on behalf of the client, the brokerage and its related licensees must do all of the following:

(a) act in the best interests of the client; …

(f) without limiting the requirements of Division 2 *[Disclosures] of Part 5 [Relationships with Principals and Parties]*, disclose to the client all known material information respecting the real estate services, and the real estate and the trade in real estate to which the services relate; …

(i) take reasonable steps to avoid any conflict of interest;

(j) without limiting the requirements of Division 2 *[Disclosures] of Part 5 [Relationships with Principals and Parties]*, if a conflict of interest does exist, promptly and fully disclose the conflict to the client.

8. Rule 3-4 stipulates a general duty of honesty, care, and skill:

Duty to act honestly and with reasonable care and skill

3-4 When providing real estate services, a licensee must act honestly and with reasonable care and skill.

9. The Licensee appealed both the Liability Decision and the First Sanction Decision to the FST. The Superintendent of Real Estate (the "Superintendent") appealed the First Sanction Decision to the FST. The FST joined the two appeals but bifurcated the appeal

matters to allow the appeal on the merits to be decided before the appeal on sanctions, by an order dated June 15, 2018.

10. The Licensee applied for specific facts to be admitted as new evidence on the appeal, but the FST dismissed the application in a decision indexed as 2018-RSA-002(a) and 003(a) (the "FST New Evidence Decision").

11. The FST addressing the appeal on the merits in a decision indexed as 2018-RSA-002(b) and 003(b) (the "FST Appeal Decision"):

a. The FST dismissed the appeal with respect to Item #1 (Notice para. 1(a)), Item #2 (Notice para. 1(b)), and Item #5 (Notice para. 1(e)),

b. The FST allowed the appeal with respect to Item #4 (Notice para. 1(d)) and Item #6 (Notice para. 1(f)).

As indicated above, the First Committee dismissed Item #3 (Notice para. 1(c)) and Item #7 (Notice para. 1(g)).

The net result is that the Licensee is liable for Item #1 (the Self-Serving Bonus), Item #2 (the Deception), and Item #5 (failure to disclose material information (agency)). The factual findings of the First Committee in its Liability Decision remain valid, subject to the FST Appeal Decision, and the conclusions of professional misconduct relating to Item #1, Item #2, and Item #5 remain valid.

12. Pursuant to the FST Remedy Decision, this Committee received written submissions from the Licensee and the Council concerning penalty, and its reconsideration as to sanction was to be based on "the record before the Tribunal on this appeal; that is, the transcripts of testimony and submissions before the Panel, exhibits, and decisions of the Panel, plus the Liability Appeal Decision [Decision No. 2018-RSA-002(b) and 003(b)] and the decision of the Tribunal on the application to adduce new evidence [Decision No. 2018-RSA-002(a) and 3(a)]."

3.0. STATUTORY AUTHORITY

13. RESA authorizes and mandates discipline penalties under section 43(1)(a), (2) and (2.1):

> Discipline orders
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> 43 (1) After a discipline hearing, the discipline committee must
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> (a) act under this section if it determines that the licensee has committed professional misconduct or conduct unbecoming a licensee, or
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> (b) in any other case, dismiss the matter.
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> (2) If subsection (1) (a) applies, the discipline committee must, by order, do one or more of the following:
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> (a) reprimand the licensee;
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> (b) suspend the licensee's licence for the period of time the committee considers appropriate or until specified conditions are fulfilled;

(c) cancel the licensee's licence;

(d) impose restrictions or conditions on the licensee's licence or vary any restrictions or conditions applicable to the licence;

(e) require the licensee to cease or to carry out any specified activity related to the licensee's real estate business;

(f) require the licensee to enrol in and complete a course of studies or training specified in the order;

(g) prohibit the licensee from applying for a licence for a specified period of time or until specified conditions are fulfilled;

(h) require the licensee to pay amounts in accordance with section 44 (1) and (2) *[recovery of enforcement expenses]*;

(i) require the licensee to pay a discipline penalty in an amount of

(i) not more than $500 000, in the case of a brokerage or former brokerage, or [*prior to Sept. 30, 2016, this amount was $20,000*]

(ii) not more than $250 000, in any other case; [*prior to Sept. 30, 2016, this amount was $10,000*]

(j) require the licensee to pay an additional penalty up to the amount of the remuneration accepted by the licensee for the real estate services in respect of which the contravention occurred. [*provision not added until Sept. 30, 2016*]

(2.1) A discipline penalty imposed under subsection (2) (i) may be imposed for each contravention. [*provision not added until Sept. 30, 2016*]

14. RESA section 43(3) also allows an order to provide that in the event of a licensee's non-compliance, the Committee may suspend or cancel the licensee's licence.

15. RESA section 44(1) authorizes the Committee to require, by order, that a licensee "pay the expenses, or part of the expenses, incurred by the real estate council in relation to either or both of the investigation and the discipline hearing to which the order relates." Enforcement expenses are subject to maximum amounts set under section 4.2 of the *Real Estate Services Regulation*, B.C. Reg. 506/2004 (the "Regulation").

4.0. RELEVANT SANCTION PRINCIPLES

16. The Council has published *Sanction Guidelines* (the "Guidelines") that set out the principles that Discipline Committees will generally follow when deciding on disciplinary penalties. The Guidelines do not fetter the discretion of any Discipline Committee, but serve to enhance transparency, consistency of approach, and fairness. The Discipline Committee has considered the principles set out in the Guidelines.

17. As set out in section 2.11 of the Guidelines, sanctions serve specific purposes, all of which have an overarching goal of protecting the public:

a. denouncing misconduct, and the harms caused by misconduct;

b. preventing future misconduct by rehabilitating specific respondents through corrective measures;

c. preventing and discouraging future misconduct by specific respondents through punitive measures (i.e., specific deterrence);

d. preventing and discouraging future misconduct by other licensees (i.e., general deterrence);

e. educating respondents, licensees and the public about rules and standards; and

f. maintaining public confidence in the real estate industry.

18. As set out in the Guidelines, the Committee may apply the following principles:

a. use corrective sanctions where appropriate (section 2.2);

b. consider proportionality (sections 2.3 and 2.4), meaning that the nature and severity of sanctions are proportional to the seriousness of the misconduct, resulting harms, the degree of responsibility or blameworthiness of the licensee, and the totality of the misconduct;

c. account for progressive discipline (section 2.5), where a licensee's prior discipline record shows, for example, misconduct of an identical or similar nature;

d. consider suspension and fine effectiveness in specific contexts (section 2.6);

e. prevent profit from wrongdoing (section 2.7), e.g., to achieve a genuine deterrent effect; and

f. consider if misconduct justifying a lengthy suspension justifies cancellation (section 2.8).

19. Also as set out in the Guidelines (section 3.1), the Committee may consider a variety of mitigating and aggravating factors, based on factors set out in such tribunal cases as *Law Society of British Columbia v. Ogilvie*, 1999 LSBC 17, and *Law Society of British Columbia v. Dent*, 2016 LSBC 05. Such factors may include the following:

a. the respondent's age and experience;

b. the respondent's discipline history;

c. the nature and gravity of the misconduct, including

i. if the misconduct involved fraud, dishonesty or deception;

ii. the vulnerability of affected persons, or the general public, e.g., due to lower sophistication, or to a relationship of trust;

iii. if the misconduct involved the respondent engaging in misconduct knowing of, willfully blind to, or reckless of rules or standards, including where the respondent received warnings from the Council or others;

iv. if the respondent demonstrably and reasonably relied on competent advice (e.g., legal advice); and

v. the duration, number of instances, or any pattern of misconduct, e.g., isolated, or repeated, pervasive or systemic;

d. if and to what extent the respondent obtained or attempted to obtain a financial benefit, or other advantage, from the misconduct;

e. the extent of harm or consequences to clients, other persons, or the general public;

f. if the respondent has, prior to or during investigation,

i. acknowledged and accepted responsibility for misconduct, or

ii. voluntarily taken measures to compensate or mitigate impacts on others, or to avoid recurrence of the misconduct;

g. if the respondent concealed or attempted to conceal misconduct from, or mislead, affected persons, or other persons, including where the respondent has acted to frustrate, delay or undermine investigations by the Council;

h. the impact that different forms of corrective, preventative or punitive sanctions might have on a respondent, and how those impacts might achieve specific purposes, e.g., by depriving a respondent of benefits of misconduct, by otherwise deterring a respondent from future misconduct, by deterring others from future misconduct, and maintaining public confidence in the profession and the disciplinary process;

i. the impact of criminal or other sanctions or penalties, if any, relating to the same conduct;

j. the proportionality of sanctions, including parity with sanctions previously imposed for similar misconduct in similar circumstances.

5.0. THE NATURE OF A RECONSIDERATION

20. The FST ordered a "reconsideration" of penalty by a new panel, pursuant to s. 242.2(11) of the *Financial Institutions Act*, R.S.B.C. 1996, c. 141. As a new panel, while the Committee must defer to the findings of the First Committee in the Liability Decision (subject to the FST Appeal Decision), the Committee is not bound to defer to any findings or decisions the First Committee in the First Sanctions Decision.

21. The Council referred the Committee to *The Superintendent of Real Estate v. Real Estate Council of British Columbia and Kenneth Scott Sprong*, FST 05-007 ("Sprong #1"), where the FST remitted a sanction matter back to a hearing committee for reconsideration. The FST held (at p. 15), "In law, remitting a matter 'for reconsideration' means the decision-maker may reach the same or a different conclusion." The Committee is a new panel responsible for weighing any facts found by the First Committee relevant to sanctions; finding and weighing any additional facts relevant to sanctions, based on the record; and ordering appropriate sanctions under RESA s. 43(2), in the light of fresh submissions that were not before the First Committee. Both parties view this reconsideration as a *de novo* decision respecting sanctions. The Council seeks

sanctions that include cancellation, based the finding of the First Committee that the Licensee "intentionally deceived his client in order to cause his client to pay him $75,000 to which he was not entitled" (Council Submissions, para. 5).

6.0. EVIDENCE AND FINDINGS

22. The Committee has considered the the evidence before the First Committee (including transcripts and exhibits), the First Committee's findings, subject to the FST New Evidence Decision and the FST Appeal Decision, and the sanction submissions of the parties both to the First Committee (as they form part of the record), and to this Committee. The Licensee has objected to the Committee considering the parties' written submissions to the First Committee as a potential error of law. Since the Committee has found the parties' most recent sanction submissions sufficient for its purposes, the Committee need not address the Licensee's objection.

6.1. Evidence and findings in the Liability Decision

23. The Committee makes its findings in the context of the findings of the First Committee, which include undisputed "background" facts (Liability Decision paras. 3-13). We refer to the owner of the property sold by the Licensee as the "Owner", and to her son, who handled the sale through an enduring power of attorney, as the "Vendor".

24. The First Committee set out much of the Vendor's evidence (Liability Decision paras. 15-34). Although the Licensee provided a different account of events (Liability Decision paras. 37-48), the First Committee performed a credibility assessment (Liability Decision paras. 53-73) which led it to prefer the evidence of the Vendor, where it conflicts with the evidence of the Licensee.

25. Respecting Item #1 and Item #2, the First Committee accepted the following evidence of the Vendor:

a. The Licensee told the Vendor that he had obtained a full price offer, but the agent of the interested buyers (the "Buyers") wanted a bonus of $100,000 in order to present the offer. (Liability Decision para. 16)

b. After the Vendor discussed the demand for a bonus with his mother and brother, and a friend, the Vendor called the Licensee. The Licensee told him this was how properties with problems were sold: the agent would convince the purchasers to buy the lower-priced property instead of a more expensive property but wanted to be compensated for making less commission. (Liability Decision, para. 19)

c. When the Vendor asked the Licensee if the bonus was legitimate, the Licensee said, "don't even go there," and said he wanted to do more business with these people in the future. (Liability decision para. 20) The Licensee said that if anyone questioned the legitimacy of the bonus, the Vendor should say it was for the Licensee. (Liability Decision, para. 20)

d. The Vendor asked the Licensee to try to negotiate a lower bonus. (Liability decision para. 21)

e. The Licensee told the Vendor he was able to get the bonus down to $75,000. (Liability decision para. 22)

f. At no point did the Vendor ever offer to pay the Licensee a bonus. (Liability Decision, para. 31)

g. When on Nov. 11, 2014 the Vendor accepted an offer to purchase from the Buyers, the Vendor signed two documents that authorized the payment of a $75,000 bonus, in addition to a previously-agreed commission: one document provided the bonus would be paid to the Licensee's brokerage, and the other document authorized the bonus be paid solely to the Licensee. (Liability Decision para. 11)

26. Respecting Item #1 and Item #2, the First Committee specifically found as follows:

a. The Licensee advised the Vendor on Nov. 7, 2014 of a full-price offer on the property, "but that the agent for the prospective buyer would not present the offer unless he paid a $100,000 bonus." (Liability Decision, para. 74)

b. The nature of the relationship between "a realtor and his client is that of a fiduciary" (Liability Decision, para. 81) and the Licensee's demand for a bonus created a conflict of interest between himself and the Vendor. (Liability Decision, para. 82)

c. When the Licensee informed the Vendor that the offer to purchase the property would not be presented unless the Vendor agreed to pay a bonus to the Buyers' agent, this was "not true and was an intentional misrepresentation of a material fact that deceived" the Vendor. (Liability Decision, para. 89) The representation was also "dishonest" as it forced the Vendor to pay a bonus that he was not obliged to pay. Accordingly, the Licensee's actions "constituted deceptive dealing" and was a breach of his duty to act honestly. (Liability Decision, para. 89)

27. Respecting Item #5, the First Committee accepted the evidence of the Vendor that he was unaware that the Licensee had any relationship with the Buyers, and unaware that the Licensee had acted for them in the sale of their home earlier that month, on Nov. 5, 2014.

28. Respecting Item #5, the First Committee specifically found that the Licensee did not disclose that he had acted for the Buyers and sold their home on Nov. 5, 2014. (Liability Decision, para. 74) The First Committee also accepted that this was clearly "material information", and the Licensee contravened s. 3-3(f) of the Rules, given the broad obligation of every agent to disclose "everything known to him respecting the subject-matter of the contract which would be likely to influence the conduct of his principal". (Liability Decision, para. 95-96, referring to *Ocean City Realty v. A&M Holdings Ltd.,* 1987 CanLII 2872 (B.C.C.A.))

29. In summary, the First Committee concluded as follows (to the extent not modified by the FST Appeal Decision), as summarized in the First Sanction Decision:

> [2] In summary, we found that Mr. Behroyan caused his client, HG, to pay him a $75,000 bonus by falsely stating that the agent of prospective purchasers of his property would not present a full price offer for sale unless he first agreed to pay a bonus. We also found that Mr. Behroyan failed to disclose that he had acted for the purchasers in the recent sale of their home….
>
> [3] These findings led the committee to conclude that Mr. Behroyan had committed professional misconduct that included deceptive dealing, breach of his duty to act honestly, failure to act in his client's best interest and/or avoid conflicts of interest….

By his course of conduct, the Licensee committed professional misconduct by contravening the Rules and engaging in deceptive dealings. He contravened Rule 3-4(a) [best interests], (f) [disclosure of material information], (i) and (j) [failure to avoid, or disclose, a conflict of interest], and Rule 3-4 [honesty].

6.2. Evidence and findings in the First Sanction Decision

30. Relevant to the nature and gravity of the misconduct, the First Committee concluded the Licensee's representation was dishonest and constituted deceptive dealing (Liability Decision, para. 89), and that the Licensee's conduct met the four elements of civil fraud (First Sanction Decision, paras. 12-14). The Committee accepts these conclusions. In particular, with respect to civil fraud:

a. The Licensee falsely represented to the Vendor the agent for the Buyers would not present a full price offer unless the Vendor agreed to pay a bonus of $75,000 to that agent.

b. The Licensee knew this representation was false. The evidence does not show that the Buyers' agent made such a demand.

c. The false representation caused the Vendor to agree to pay $75,000 as a bonus.

d. As a result of the Vendor agreeing to pay, he bound himself to pay $75,000 as part of the transaction. By the time the sale proceeded, however, the Vendor had formally protested his obligation to pay the $75,000 as a bonus. (Liability Decision, para. 12) As the First Committee noted, the $75,000 bonus remained held in trust after the completion of the sale. (First Sanction Decision, para. 13)

31. After the Liability Decision, more than three years after events, the Licensee renounced his claim to the funds. (First Sanction Decision, paras. 13 and 21) The First Committee concluded, however, the Licensee's decision to give up the bonus "is too little and comes too late" to significantly assist him with respect to sanctions.

32. The First Committee concluded that the Licensee probably failed to disclose to the Vendor that he had represented the Buyers "in order to advance the fraud", for had

he disclosed his relationship with the Buyers, the Vendor might have become suspicious. (First Sanction Decision, para. 16) The Committee accepts this conclusion.

33. With respect to other mitigating or aggravating factors, the First Committee noted, as of April 2018, that

a. the Licensee had been an agent for about five years at the time of the misconduct;

b. did not have any disciplinary record; and

c. had no further complaints against him in the approximate three years since the misconduct.

(First Sanction Decision, para. 18) The Committee accepts these conclusions.

34. The First Committee also noted the Licensee provided four letters attesting to his character but found them to be of limited assistance. The Committee reaches a similar conclusion.

7.0. NEW EVIDENCE SUBMITTED BY THE LICENSEE

35. The Licensee provided a new affidavit, sworn on January 20, 2020 (the "New Affidavit"), along with written submissions on sanction. The parties had previous opportunity, however, to provide evidence relevant to sanctions to the First Committee.

36. After the First Sanction Decision, the FST ordered as part of the FST Remedy Decision that a new panel reconsider sanctions based on "the record before the Tribunal on this appeal; that is, the transcripts of testimony and submissions before the Panel, exhibits, and decisions of the Panel," as well as two previous FST decisions. This Committee is to reconsider the order of the First Committee under RESA section 43(2) based on the record.

37. The Licensee provided, but did not address, why the Committee should consider the New Affidavit. The Council submitted that the Committee should disregard the New Affidavit:

a. the FST directed that reconsideration be on the record and did not contemplate new evidence;

b. the Licensee had an opportunity to testify at the First Sanction Hearing but elected not to do so; and

c. the FST's direction means the Council is unable to cross-examine the Licensee on his affidavit or adduce evidence to the contrary.

8.0. REASONS ON SANCTION

38. The Committee agrees with these submissions. The Committee does not accept the New Affidavit and has reconsidered sanctions based on the information the FST has directed, without referring to the content of the New Affidavit. To be clear, however, even if the Committee had considered the New Affidavit, it would not have given the new evidence any meaningful weight. The new evidence expresses the Licensee's

"regret" and "remorse" for the incident, refers to the negative publicity resulting from the decisions of the Discipline Committee, and says the Licensee paid $75,000 to the Vendor in 2018. The Licensee's expression of remorse and the fact of his returning the $75,000, is, in the words of the First Committee, "too little and comes too late" given the passage of time since events in 2014, and that this conduct of the Licensee only comes after the Liability Decision of 2017.

8.1. Overview

39. Based on different findings of professional misconduct, the First Committee decided to order a suspension of one year; a fine of $7,500; an ethics course; and enforcement expenses of $58,708.85. Both the Licensee and the Superintendent of Real Estate, however, appealed that sanction order. Given a change in the foundation for the order, the FST ordered that a new panel reconsider the matter.

40. The Licensee submits the sanction decision of the First Committee has no bearing in this "de novo assessment". The Council implicitly takes the same position, since it seeks a more substantial penalty than what the First Committee ordered. The parties are wide apart on the sanctions they propose:

a. The Council submitted the appropriate sanction was cancellation of licensure, a five-year prohibition of any application for re-licensing, an ethics course at the Licensee's own expense prior to reapplying for a license, a fine of $10,000, and enforcement expenses.

b. The Licensee submitted a reprimand would suffice, or that if a suspension is required, it should be for no more than one month; no fine is necessary or appropriate; and no "costs" can or should be awarded against him.

41. The Council notes a key difference between a suspension and a cancellation is that with the former, a licensee resumes practice as of right, while with the latter, an applicant must satisfy the Council he or she meets statutory qualifications of good reputation and suitability.

42. The Council refers to four principles relating to criminal sentencing, as discussed by the Commercial Appeals Commission in *Wong v. Real Estate Council of BC*, C.A.C., July 25, 2003:

> (1) the safety of the public; (2) the deterrent effect of a sentence; (3) punishment of the offender; and (4) reformation and rehabilitation of the offender…. However, it is also beyond dispute that the primary purpose of legislation governing professional bodies is protection of the public….

As also noted by the Council, these and other purposes of sanctions have been set out in the Guidelines, as addressed earlier in these reasons.

43. The Committee has considered all materials before the FST, the FST decisions, and new written sanction submissions from the parties. The Council's submissions consist of both initial penalty submissions and reply submissions. In referring to the

submissions of parties, the Committee refers to their written submissions unless otherwise indicated.

44. The Council proceeded with several allegations of professional misconduct, and ultimately, the Council failed to establish several allegations. The Licensee has submitted that "only 3 of the initial 7 complaints were upheld." However, the fact of the Council not having established several allegations of wrongdoing may not reduce the sanctions the Committee may impose for the allegations that were proven. Unsuccessful allegations are relevant only to a question of "divided success" relating to an award of enforcement expenses.

45. All the remaining instances of professional misconduct are aspects of a single transaction, with Item #2 being the most serious misconduct that lies at the heart of this case. The misconduct underlying Item #2 (Notice para. 1(b)) is that the Licensee, at a time when his client was under financial pressure to sell the Property, made knowingly false statements to his client, so that his client would pay him $75,000 – reduced from $100,000 – on the pretence the payment was for the Buyers' agent, and not the Licensee. The Licensee deceived his own client to obtain a substantial financial benefit for himself, at his client's expense. In other words, he defrauded his client. The two other acts of professional misconduct relate to Item #2:

a. Item #1 (Notice para. 1(a)): As part of deceiving his own client by telling him that another agent was demanding $75,000 – initially $100,000 – the Licensee failed to disclose to his client that he, rather than another, would receive and benefit from the "bonus" as further remuneration, contrary to the client's best interests, and he failed to obtain the client's informed consent to that undisclosed benefit.

b. Item #5 (Notice para. 1(e)): The Committee agrees with the First Committee's assessment that the Licensee probably failed to disclose to the Vendor he had acted as agent for the Buyers "in order to advance the fraud", since his disclosing his relationship with the Buyers might have raised suspicion about the Licensee's role in the demand for a "bonus" by the Buyer's agent.

46. Ultimately, the three acts of professional misconduct were part and parcel of an attempt by the Licensee to defraud his own client of a substantial sum.

8.2. Mitigating and aggravating factors

47. The Committee has considered the Guidelines, including mitigating and aggravating factors listed in section 3 of the Guidelines. The Guidelines do not fetter the discretion of the Committee as to how it may apply its powers or fulfil duties (as noted in section 1.2.4 of the Guidelines). The Guidelines do, however, provide principled guidance aimed at ensuring the transparency, consistency, and fairness of discipline committee sanction decisions.

8.2.1. The respondent's age and experience

48. As accepted above, the Licensee had been an agent for about five years at the time of the misconduct.

49. The Licensee submitted through legal counsel that he was “a youthful offender”.

50. The Council submitted through legal counsel that while the Licensee now emphasizes his youth and experience, he emphasized during the hearing his experience and success in the industry. The Council submitted that the Licensee “had more than enough experience to know better than to breach his fundamental fiduciary duty of honesty and good faith.”

51. The Committee does not consider the Licensee’s experience to be a mitigating factor. This is not a case involving a technical aspect of practice where a new licensee could understandably have difficulty. The Licensee had five years’ experience at the time of his misconduct, when even a new licensee would know he must act honestly and with good faith.

8.2.2. The respondent’s discipline history

52. The Licensee submitted he had a “clean disciplinary record prior to the incident” and that his conduct was “one isolated incident… which has never been repeated.” He emphasized that he has not, in the five years since the incident, reoffended.

53. The Council acknowledged that the Licensee has no record of other disciplinary findings, and submitted that, “In this sense alone can the misconduct be characterized as an isolated incident.” The Council submitted that while the absence of other disciplinary findings is a relevant mitigating factor, it does not justify a lesser penalty when weighed against the full extent of other relevant considerations. The Council referred to cases where regulatory bodies have cancelled a professional's licence despite the professional having no discipline record.

54. The Committee recognizes that, due to the absence of any previous discipline, this is not a case where the Committee may infer, from a pattern of misconduct, that prior sanctions were inadequate to deter a licensee from further misconduct, and that specific deterrence justifies an increased severity of sanction.

55. With respect to the absence of any complaints against the Licensee since the event, this misconduct at issue involved ignorance or incompetence the Licensee has managed to correct. As addressed below, the misconduct of the Licensee involved his wilfully deceiving a client in order to double his remuneration. An absence of further, wilful misconduct while discipline proceedings are outstanding is a neutral factor, since the absence further misconduct alone does not show that the Licensee has changed, such that he understands what he did wrong, and would now resist whatever motives or circumstances led him to defraud his own client.

8.2.3. The nature and gravity of the misconduct

56. The Licensee submitted the Vendor “was effectively overcharged” and that, “There is no issue of public safety or public interest.” The Licensee submitted that the Licensee has paid the $75,000 to the Vendor.

57. The Council submitted that the Licensee resists the application of fraud cases but is unable to distinguish them, and that the Licensee significantly understates the gravity

of the misconduct. The Council further submitted that the Vendor was deprived of the $75,000, as he had to sue for them: "Relinquishing the claim to the bonus after three years does not undue the vast harm done to the Sellers and to the reputation of the industry."

58. The Committee agrees with the First Committee's assessment that the Licensee's conduct met the elements of civil fraud. The purpose of the fraud was also to procure a substantial financial benefit for the Licensee himself, at his client's expense, while blaming the Buyer's agent. The Licensee's fraudulent conduct was a serious form of professional misconduct that violates express statutory provisions. RESA s. 35(1) defines "professional misconduct" as including anything that constitutes deceptive dealing. Rule 3-4 also stipulates that a licensee must act honestly, as well as with reasonable care and skill.

59. Section 1 of RESA defines "deceptive dealing" to mean any of the following:

> (a) an intentional misrepresentation, by word or conduct, or in any other manner, of a material fact in relation to real estate services, or in relation to a trade in real estate to which the real estate services relate, or an intentional omission to disclose such a material fact;
>
> (b) a course of conduct or business that is intended to deceive a principal about the nature of the real estate services, or about the nature of a trade in real estate to which the real estate services relate;
>
> (c) an artifice, agreement, device or scheme to obtain money, profit or property by illegal means;
>
> (d) a promise or representation about the future that is beyond reasonable expectation and not made in good faith….

60. Neither RESA nor the Rules define what a duty to act honestly requires, but a duty of honesty has been addressed by courts. For example, in *Royal Brunei Airlines Sdn Bhd v. Tan* (P.C.), [1995] 2 A.C. 378, [1995] UKPC 22 (P.C.) [BAILII], examined by a Discipline Committee when granting an order in urgent circumstances relating to *Kevindeep Singh Bratch* (Oct. 30, 2017), at para. 74, the Judicial Committee of the Privy Council said this about dishonesty:

> …acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. …
>
> However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not

> subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour.
>
> In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others' property.

This Committee concludes the Licensee's conduct constituted both deceptive dealing and dishonest conduct.

61. After the Vendor resisted paying the bonus, the Licensee argued in civil proceedings and in discipline proceedings that the complaint was fabricated (Council Submissions, para. 77), and the bonus had been freely "'offered, agreed to, and authorized' (Response to Civil Claim, Record p. 435, para. 23)". This Committee cannot penalize the Licensee for defending himself in discipline proceedings. However, the Committee may take the nature of his defence into consideration when assessing a later assertion by the Licensee that he is "contrite", "apologetic", and "remorseful". Due to the Licensee's position, and the absence of such evidence on the record, the evidence does not support the Licensee acknowledging or accepting responsibility for his misconduct. The Committee is not persuaded the Licensee understands the severity of his actions, or that he is remorseful. Even if the Committee were to account for the New Affidavit, that added evidence would not change the Committee's conclusion.

8.2.4. Extent of harm to client or others

62. The Committee disagrees with the Licensee's assertion that his conduct involves no issue of public safety or public interest. The Licensee attempted to defraud the Vendor, which would have deprived the Vendor of $75,000. The Licensee only gave up his claim to the $75,000 after the Vendor ultimately resisted paying the bonus. Such professional misconduct, without sanction, would permit the Licensee to engage in similar conduct against other members of the public. Furthermore, trust is a fundamental part of the relationship between real estate agents and their principals. Fraudulent conduct by a licensee against a client, for the licensee's own financial benefit, abuses that trust, and undermines public confidence in the entire real estate industry.

8.2.5. Mitigating conduct prior to or during investigation

63. The Committee is aware the Licensee submitted to the First Committee that he gave up his claim to the bonus after the Liability Decision. (First Sanction Decision, para. 20) Since this Committee has declined to accept the New Affidavit, the Licensee repaying the $75,000 to the Vendor is not evidence before the Committee. The Committee agrees with the assessment of the First Committee, however, that the Licensee giving up his claim to the $75,000 – or his returning the funds to the Vendor, if the Committee were to account for the New Affidavit – is "too little and too late" in terms of a factor bearing on sanctions. (First Sanction Decision, para. 21) As the First

Committee noted, the Licensee cannot undo the fraud by renouncing his claim to the bonus more than three years after events.

8.2.6. Attempts to conceal misconduct

64. The Licensee's conduct inherently involved an attempt to conceal that he would be benefitting from the bonus payment. The Licensee misrepresented the bonus as a demand from the Buyer's agent. The Licensee suggested that the Vendor explain the wrongful bonus as a bonus for the Licensee, which falsely implied that any payment by the Vendor to the Licensee was merely a payment to the Licensee as an intermediary.

8.2.7. The effectiveness of corrective, preventative, or punitive sanctions

65. The Licensee submitted that based on the First Sanction Decision, he has "already been publicly pilloried and, as such, substantially punished through extensive publicity…."

66. The Committee does not accept that how the marketplace reacts to the professional misconduct of a Licensee may substantially replace sanctions by the Discipline Committee. As set out in the Guidelines, sanctions fulfil specific purposes:

a. denouncing misconduct, and the harms caused by misconduct;

b. preventing future misconduct by rehabilitating specific respondents through corrective measures;

c. preventing and discouraging future misconduct by specific respondents through punitive measures (i.e., specific deterrence);

d. preventing and discouraging future misconduct by other licensees (i.e., general deterrence);

e. educating respondents, licensees and the public about rules and standards; and

f. maintaining public confidence in the real estate industry.

67. While the Committee accepts that negative public reaction to a licensee defrauding a client *may* result in a degree of specific deterrence, the Discipline Committee must nonetheless order sanctions to ensure it achieves the purposes served by the sanction regime. Sanctions aimed at achieving specific deterrence also operate to denounce misconduct, discourage similar misconduct by other licensees, and maintain public confidence in the real estate industry.

8.2.8. the impact of criminal or other sanctions or penalties

68. After the Liability Decision, the Licensee voluntarily surrendered his claim to the $75,000 sum held in trust. But based on the findings of the First Committee in its Liability decision, the Licensee only obtained an interest in the monies through fraud. The Licensee giving up his claim to monies which he only obtained through fraud is a form of restitution to the Vendor. The Licensee has given up an ill-gotten gain but has not suffered any formal sanction or penalty for his misconduct.

8.3. Sanction Principles

69. The Guidelines set out several sanction principles, including the following:

a. a Discipline Committee should order sanctions that fulfil specific purposes;

b. a Discipline Committee should use corrective sanctions where appropriate; and

c. a Discipline Committee should consider proportionality.

70. With respect to corrective sanctions, the Committee does not view this matter as one where the public interest is better served by a licensee being rehabilitated, rather than punished. Corrective sanctions are aimed at situations where, for example, a licensee acts in ignorance of or misunderstands rules or standards; suffers a lapse of judgment; or suffers from a physical or mental condition, such as an alcohol or other substance addiction. This case involved deliberate deception by a licensee to extract extra money from a client. The facts do not support a corrective action instead of punitive action.

71. With respect to proportionality, the Licensee has pointed to *Cooper v. BC Liquor Control*, 2017 BCCA 451, for the proposition that a disproportionately harsh result can render a decision unreasonable, and a tribunal must ensure some degree of proportionality between the wrongdoing and the penalty imposed. This principle restates a more general duty of the Committee to ensure its decision is transparent, intelligible, and justified. The Committee must apply internally coherent reasoning, act within the constraints of what the RESA permits or requires, and reach a decision justified in the light of the facts and the submissions of the parties.

72. The Guidelines explicitly refers to proportionality as a sanction principle to which a discipline committee should have regard (at section 2.3.1):

> "The nature and severity of sanctions in each case should be proportional to the seriousness of the misconduct, resulting harms, and the degree of responsibility or blameworthiness of the licensee."

Proportionality requires that the Committee ensure that sanctions are neither too lenient nor too harsh:

> "Proportionality means that sanctions must not be too lenient, or be too harsh, to uphold the public's confidence in the Council's ability to regulate licensees fairly and in the public interest. For example, licence cancellation is the most severe form of punishment available under RESA, and should be reserved for cases of serious misconduct, or misconduct of a serious character. This does not mean however that it should be reserved only for misconduct at the highest end of the severity scale…."

73. Proportionality depends on many factors, including expectations within the industry; expectations of the public; parity with sanctions previously imposed for similar misconduct in similar circumstances; legislative changes (e.g., increases in fine powers

under RESA); and changes in public policy concerning specific types of misconduct. A range of different sanctions may be proportional to the misconduct, and the sanctions that a discipline committee may decide is best is a matter of discretion. Accordingly, the Committee will make its reconsideration decision without deciding if the sanctions ordered by the First Committee was proportionate, too lenient, or too harsh.

8.4. Relevant case law

74. Both parties have referred the Committee to many cases. The Committee will address some, but not all, of those cases.

8.4.1. Cases relied on by the Council

75. The Council referred the Committee to the Parsons case (*Parsons v. Real Estate Council of British Columbia*, FST Decision No. 2015-RSA-002(d)), for the proposition that while cancellation is reserved for cases of serious misconduct, it is not reserved for cases of the most serious misconduct (at para. 91). In *Parsons*, a licensee acted as agent for a vulnerable client, who was suffering from mental distress, to sell her home and buy another. He acted for her when she bought a Victoria condominium, which was in a building that suffered water ingress, and was later subject to a substantial levy for building remediation costs. The offer did not have an inspection clause, and the licensee, who had inspected the strata documents, did not advise his client that they indicated a material latent defect in the form of water ingress issues, and the existence of an engineer's report addressing water ingress. The licensee also intentionally did not tell his client the listing agent for the condominium was his son, which was material information about a conflict of interest. The FST upheld sanctions including cancellation, ineligibility for licensure for a time, and a fine, but it reduced the period of ineligibility from five years to 30 months and reduced the fine from $10,000 to $5,000. The FST reasoned the licensee "did not misappropriate money and that his conduct was not akin to a fraud" (at para. 93), and his failing to tell his client about the water ingress may have been a matter of carelessness or incompetence rather than dishonesty (at para. 93). But he also did not protect the interests of a client undergoing a crisis (at para. 94), and he had a "startling lack of insight that he has done anything wrong" (at para. 95).

76. In the *Lalli* case (*Binder Singh Lalli*, 2010 CanLII 46486 (RECBC)), a licensee, among other things, received as a deposit funds of $4,280 USD (about $5,292 CAD) but did not deposit them into a brokerage trust account, and wrongfully took them, as he failed to pay them back on demand. The licensee also contravened various other rules. The Discipline Committee cancelled his licence, although he had no license at the time, and ordered ineligibility for licensure for five years. The reasons in *Lalli* list precedents involving cancellation and ineligibility for licensure for several years, including but not limited to the following matters:

a. cancellation and ineligibility for licensure for three years for a licensee misappropriating $9,975 in the *Karim* case (*Zahir Karim*, Dec. 5, 2002

(RECBC), appeal as to penalty dismissed by the Commercial Appeals Commission);

b. cancellation and ineligibility for licensure for five years for, among other things, a licensee accepting a loan of $25,000 from a buyer, resulting in a conflict of interest, in the *Smetaniuk* case (*Kevin Robert Smetaniuk*, 2007 CanLII 71548 (RECBC)); and

c. cancellation and ineligibility for licensure for seven years for a licensee misappropriating $15,000, in the *Bal* case (*Harinder Singh Bal*, Apr. 18, 2002 (RECBC)).

77. In the *Salanga* case (*Johnson Castaneto Salanga*, 2017 CanLII 57049 (RECBC)), a licensee who engaged in fraud and wrongful taking, convicted for criminal fraud, and had no license at the time of his penalty hearing, was subject to a $10,000 fine and ineligibility for licensure for fifteen years. His misconduct included his misappropriating a $70,000 deposit for which he was criminally convicted for fraud; his misappropriating $16,850 in funds that he persuaded an owner to provide to him to invest; his misappropriating more than $100,000 in deposit monies for which he was criminally convicted for fraud; his misappropriating $150,000 in deposit monies, and his misappropriating another $25,000 which he falsely represented he would use to make renovations on a property. The Licensee notes that Mr. Salanga did not take part in the hearing. In the sanction decision, the Discipline Committee said that the licensee, "It is impossible to overstate the seriousness of Mr. Salanga's misconduct," and that he betrayed the trust of his victims, and abused his privileged position (at para. 11). Although the Discipline Committee considered a clean discipline history for a five-year period, it decided that, "This might have been relevant had his transgressions been trivial but they were not. It seems to us impossible, in the circumstances, to assign any palliative significance to his prior unblemished record" (at para. 12).

78. In the *Westin* case (*Westin Realty Ltd.*, 2010 CanLII 56277 (RECBC)), where buyers had agreed to a price of $420,522, inclusive of net GST, which involved a pre-tax price of $396,718.86), a licensee created a sham contract addendum which indicated the buyers and the seller had agreed to an increased sale price of $405,000 plus GST. The Discipline Committee concluded deceptive dealing, cancelled the licensee's licence, ordered ineligibility for licensure for five years, and ordered a fine of $5,000.

79. Outside of RECBC cases, the Council also referred the Committee to the Law Society's *McGuire* case (*Law Society of British Columbia v. McGuire*, 2006 LSBC 20, affirmed 2007 BCCA 442), where a lawyer had misappropriated trust funds, and was practising under an interim condition that he have no access to a trust account, and asserted that practice conditions would be sufficient. The Discipline Committee reasoned that disbarment was necessary to protect the public interest, as a lesser remedy would not accomplish that goal:

> [23] … We cannot accept the Respondent's argument, for two reasons. First, a restriction on a lawyer's use of his trust account is appropriately used, as it was in this case, as an interim measure pending a full

> examination of the lawyer's conduct. Once the misappropriation has been proved, however, we cannot see how such a restriction can properly be used as a permanent condition on a lawyer's ability to practise. To put it bluntly, a lawyer who, in light of his past conduct, cannot be completely trusted with sole control of his trust accounts should not be practising law.
>
> [24] The second reason relates to the protection of the public. We accept that disbarment is a penalty that should only be imposed if there is no other penalty that will effectively protect the public. Protecting the public, however, is not just a matter of protecting the Respondent's clients in future. Even if the latter could properly be done by imposing restrictions on the Respondent's use of his trust account, we do not think that such a measure adequately protects the public in the larger sense. Wrongly taking a client's money is the plainest form of betrayal of the client's trust. In our view, the public is entitled to expect that the severity of the consequences reflect the gravity of the wrong. Protection of the public lies not only in dealing with ethical failures when they occur, but also in preventing ethical failures. In effect, the profession has to say to its members, "Don't even think about it." And that demands the imposition of severe sanctions for clear, knowing breaches of ethical standards. A penalty in this case of a fine and a practice restriction is, in our view, wholly inadequate for the protection of the public in this larger sense.

80. The Discipline Committee in *McGuire* went on to note that it did not think that keeping the public trust trumped all other considerations: "There may be mitigating factors even for the deliberate taking of trust funds." It noted, however, that while the member had gone through a crisis, he did not act under the pressure of a sudden and overwhelming event.

81. The Licensee asserts that the present case is distinguishable from *McGuire*: the lawyer in *McGuire* deliberately misappropriated trust funds over a lengthy period with numerous unlawful withdrawals, whereas the Licensee did not engage in any long period of improper conduct, did not impact trust funds, and did not receive any improper benefit. The Committee is not, however, persuaded that these differences are significant differences. The Licensee fabricated events for his own client, over a period, to get him to pay a significant sum in addition to his commission. Where a licensee engages in fraud against his own client for direct financial benefit, the difference between multiple small misappropriations and a single large misappropriation is not a meaningful distinction.

8.4.2. Cases relied on by the Licensee

82. The Licensee has referred to several RECBC or FST cases, which he argues as involving fraud, for the proposition the one-year suspension imposed by the First Committee was disproportionately harsh. The Committee will address some of those cases here.

a. The *Mann* case (*Mann v. Insurance Council of BC*, FST Decision No 2015-FIA-002(a) involved a suspension of an insurance agent's licence. The agent was involved in a motor vehicle accident while driving a Lexus vehicle bearing license plates transferred from his daughter's Volkswagen. The agent backdated transfer forms respecting the vehicle to enhance his prospects of coverage. As a result of his misconduct, the Insurance Corporation of BC (ICBC) permanently prohibited Mr. Mann from dealing with Autoplan insurance and forced him to give up his one-third ownership in his agency, by suspending the Autoplan Agency Agreement with the agency, until he ceased as an owner and paid a $23,000 fine. The Insurance Council suspended his licence for one year, but the FST reduced the sanction to two months, in part because the agent and his family had "already paid a heavy price for his highly improper behaviour in the form of the ICBC sanctions." Respecting the length of the regulatory suspension, the *Mann* case is not like the case here, where the Licensee tried to defraud a member of the public. Mr. Mann acted in an untrustworthy manner but did not defraud a member of the public. Mr. Mann did, however, falsify coverage to the detriment of ICBC, and for that, ICBC imposed a permanent prohibition.

b. In the *Sun* case (*Yanquing Sun*, 2010 CanLII 78445 (RECBC)), a licensee drafted a contract addendum and signed for the Buyers without their written authorization. Under a Consent Order, he received a reprimand, had to take a course, and pay $1,000 in expenses. The Licensee characterized this misconduct as "nothing but intentional fraud", but as the Council correctly notes, the Agreed Statement of Facts that forms part of the Consent Order indicated (at para. 13) that the buyers had requested that Mr. Sun sign the addendum on their behalf. This case did not involve fraud by a licensee against his client.

c. Similarly, the Licensee also asserts fraudulent conduct by licensees who received lesser sanctions in the *Kwatra* case (*Neha Rani Kwatra*, 2012 CanLII 82611 (RECBC)) and the *Lau* case (*Season Shi Sun Lau*, 2013 CanLII 15993 (RECBC)), but as the Council correctly notes, the Agreed Statements of Facts show that these licensees were acting with client approval, or apparent client approval.

d. In the *Kuan* case (*Min Kuan*, 2013 CanLII 57820 (RECBC)), a licensee received a 21-day suspension, by way of Consent Order, for, among other things, whiting out dates on a Listing Agreement for the term of the agreement, after it had been signed, and inserting new dates. The Agreed Statements of Facts shows that the existing listing was cancelled, and the property was to be relisted to show as a new listing. The client, to avoid attending to sign a new listing agreement, told the licensee to just change the dates and resubmit. The licensee had acted with client approval.

e. In the second *Kuan* case (*Chiow Min Kuan*, 2016 CanLII 60719 (RECBC)), a licensee received, by way of Consent Order, a sixty-day suspension for practising while suspended in 2013, with a "licensed assistant" title on marketing materials. This case has no bearing to the matter presently before the Committee.

f. In the *Liu* case (*Richard Yan-Yun Liu*, 2013 CanLII 70428 (RECBC)), a licensee received a reprimand, a $5,000 discipline penalty, and coursework, relating to various forms of misconduct relating to strata management, including one instance of his failing to avoid a conflict of interest. The licensee made a demand on behalf of the owner-developer that the strata corporation hold a vote on, among other things, his written service agreement, without disclosing the conflict to his client. This case did not involve fraud by a licensee against his client.

g. In the *Weiser* case (*Christopher Charles Weiser*, 2014 CanLII 42909 (RECBC)), a licensee received, by way of Consent Order, a fourteen-day suspension and coursework for making changes to a contract and submitting it as an amended offer of a buyer, based on apparent instructions from a colleague via telephone, but without the consent of the buyer, or of the second licensee whose name he removed and replaced with the name of his colleague. As the Council correctly notes, the Agreed Statements of Facts show that the licensee believed he was authorized by his colleague to substitute his colleague's name.

h. In the *Kong* case (*Lin Kong*, 2016 CanLII 60720 (RECBC)), a licensee acting as a seller's agent received, by way of Consent Order, a ninety-day suspension and coursework for inserting a second licensee's name as the buyer's agent, when she knew that the buyer did not have an agent, and knew that the second licensee had never met or spoken to the buyer. The case illustrates deceptive conduct by a licensee, but is not like this case, where the Licensee fabricated a demand for a "kickback" or bribe by another agent, which payment was for the Licensee, at his own client's expense.

i. In the *Vincenzi* case (*Marco Vincenzi*, 2013 CanLII 30196 (RECBC)), a licensee received, by way of Consent Order, a 120-day suspension and coursework, for various forms of misconduct while acting as a buyer's agent, including his presenting a fee agreement to the sellers that provided for more commission to himself, without the knowledge or consent of his buyer client. The case illustrates a licensee failing to disclose to his own client his attempting to secure more commissions from a seller. It does not, however, rise to the level of seriousness of the Licensee's conduct, where the Licensee actively fabricated events for his client.

83. The Licensee referred the Committee to *Davis v. British Columbia (Securities Commission)*, 2018 BCCA 149 ("Davis"), where a registrant agreed to sell shares to an investor, ultimately for $7,000, under an agreement representing that he was the owner of the shares. The registrant did not own the shares but believed he would receive shares to complete the transaction. The Securities Commission concluded fraud, and imposed a permanent market ban on the registrant, which the court characterized as being in effect "capital punishment" (at para. 86). The Court did not, however, decide the permanent ban was itself unreasonable. To the contrary, it recognized that "the outcome reached by the Commission may ultimately be justified by the seriousness of Mr. Davis's conduct" (at para. 88).

84. The issue for the Court in *Davis* involved defects in the Commission's reasoning. The Court decided the sanction decision was unreasonable as the panel had made its order, "on the basis that permanent market bans are appropriate in fraud cases, regardless of the circumstances of the offence or the offender" (at para. 74). The Court noted that the Commission "did not mention the evidence before it of Mr. Davis's personal circumstances" which included an unblemished record over the course of about 25 years, and that "its reasons… must demonstrate a consideration of individual circumstances and alternative sanctions" (at para. 87). The Court remitted the matter of sanction to the Securities Commission for reconsideration.

85. The *Davis* case does not, as the Licensee seems to assert, support a proposition that cancellation for one instance of fraud is categorically disproportionate and unlawful. First, the court in *Davis* did not conclude that a permanent ban was unjustifiable in that case, only that the ban was not actually justified by the reasons, which failed to address mitigating factors. Second, the mitigating factors that the Commission failed to consider in *Davis* – including an unblemished record of about twenty-five years – may be contrasted with the Licensee's unblemished pre-conduct record of only about five years, which the Committee has in fact considered, and which it considers to be a minor mitigating factor. Third, the fraud of the registrant in *Davis* was of a different and lesser nature from the present case – the registrant misrepresented his ownership of shares, but did not intend to deprive his investor of her monies without giving her anything in return, which is conduct that may be contrasted with the Licensee's intentions. Fourth, the sanction of a permanent ban in *Davis* is more serious than a cancellation under the RESA. The language of the FST in the *Parsons* decision, on which both parties rely, describes that difference:

> [91] … I see a qualitative difference between licence cancellation under RESA and permanent expulsion of a person from his or her profession under certain other self-regulatory regimes…. Such expulsions have as those have permanent effect and thereby amount to capital punishment that is only warranted for capital offences, so to speak. Under RESA, however, there is an ability to both cancel a licence and expressly contemplate the re-admission of the individual on application for a fresh licence after a certain lapse of time. … …[L]icence cancellation has not historically been restricted only to the most serious forms of realtor misconduct, with gradations of these contraventions being accounted for in the length of the ineligibility period ordered to accompany the cancellation.

Parsons v. Real Estate Council of British Columbia, FST Decision No. 2015-RSA-002(d), at para. 91.

8.5. Decision on sanctions

86. The Guidelines lists factors that may specifically support cancellation (at section 3.6.1), including the following:

> a. the misconduct involves a significant departure from rules or standards,

…

c. the misconduct involved serious harm,

...

f. circumstances show the licensee is unsuitable as a licensee, e.g. due to conduct involving dishonesty, an abuse of trust, violence, or a persistent lack of insight.

87. Cancellation is reserved for cases of serious misconduct, but it is not reserved to misconduct at or near the extreme of the severity scale, given that applicants may apply for relicensing again at a defined time in the future: *Parsons v. Real Estate Council of British Columbia*, FST Decision No. 2015-RSA-002(d), at para. 91.

88. The Licensee's conduct in this case involved a fraud of significant magnitude on his own client, at the client's expense. The fraud was predatory conduct of a serious nature. As the Council submitted, "It is difficult to imagine a more fundamental breach of the fiduciary duties owed by an agent to a client". (Council Submissions, para. 67).

89. The First Committee properly reasoned that "cancellation of [the Licensee's] licence is well within the range of an appropriate remedy." (First Sanction Decision, para. 30) While the First Committee decided in favour of a limited sanction, and while its sanction of a one-year suspension may fall within the range of an appropriate remedy, the unanimous view of this Committee is that the significant and self-serving fraud of the Licensee warrants cancellation. Specifically, to the extent Items #1 and #2 are separable, Item #2 alone warrants cancellation of licensure. The fraud by the Licensee was not a mere error of judgment; it was a form of deceptive dealing where the Licensee abused the trust of his client, to extract money from his client. A willingness of the Licensee to defraud a client signals an issue concerning good character and suitability that represents a threat to the public, and a threat to public confidence in the real estate industry. The Committee cannot see how a lesser remedy, such as a suspension, would sufficiently denounce the fraud the Licensee committed, and safeguard the public from predation. A prohibition of the Licensee from re-applying for a licence for five years will ensure the Licensee has enough time – after the scrutiny of the Licensee during a professional discipline hearing has ended – to potentially rehabilitate himself for purposes of relicensing. The Committee orders

a. cancellation of the Licensee's licence (pursuant to RESA s. 43(2)(c));

b. a prohibition against the Licensee from applying for a licence for five years (pursuant to RESA s. 43(2)(g)); and

c. enforcement expenses as set out below (pursuant to RESA s. 43(2)(h) and s. 44(1)).

90. Given these sanctions, the Committee declines to impose a fine (pursuant to RESA s. 43(2)(i)), or order course work as a condition of future licensing (pursuant to RESA s. 43(2)(f) and/or s. 43(2)(g)), as the purposes of such sanctions are sufficiently served by the cancellation order and the period of ineligibility for licensure. The

Licensee's professional misconduct did not result from his ignorance of the Rules or of his ethical obligations.

9.0. ENFORCEMENT EXPENSES

9.1. The power to order payment of enforcement expenses

91. If a discipline committee determines that a licensee has committed professional misconduct or conduct unbecoming a licensee, it may order that the licensee "pay the expenses, or part of the expenses, incurred by the real estate council in relation to either or both of the investigation and the discipline hearing to which the order relates" (RESA section 44(1)), subject to maximum amounts prescribed by regulation (RESA section 44(2)).

92. The RESA uses the term "expenses" instead of the term "costs". The legislature's choice of language is significant. Where a statute or regulation refers to "costs", then unless the statute or regulation provides otherwise, the costs provisions in the rules of the British Columbia Supreme Court will govern: *Shpak v. Institute of Chartered Accountants of British Columbia*, 2003 BCCA 149 at para. 56. In such a circumstance, the expenses of a tribunal cannot form a part of costs: *Shpak*, at paras. 61-65. By using the term "expenses" instead of "costs" in the RESA, the legislature intended to allow discipline committees to deviate from the "costs" system of the court.

93. Despite the RESA providing for expenses instead of costs, an award of "expenses" may, like an award of "costs" by a court, serve several purposes. First, where a discipline committee concludes that a licensee has engaged in professional wrongdoing, enforcement expenses may partially indemnify the Council for investigative and hearing expenses that the licensee's wrongful conduct has brought about. As a result, the sanctioned licensee, rather than the collective membership, will bear the expense of disciplinary proceedings, as an aspect of the burden of being a licensee: *Abrametz v. Law Society of Saskatchewan*, 2018 SKCA 37 at para. 44. Second, the possibility of liability for enforcement expenses may influence how licensees act by encouraging settlement through measures like agreements or consent orders; deterring frivolous defences; and discouraging unnecessary steps that unduly prolong an investigation or a hearing process.

94. As an administrative tribunal, a discipline committee must interpret and apply the provisions of its "home statute", the RESA, and any regulations. In relation to enforcement expenses, the Committee understands the RESA has having two important features:

a. **One-way expense orders:** Unlike "costs" under the Civil Rules of the Supreme Court of British Columbia, "expenses" under the RESA may be ordered by a discipline committee only against licensees. The RESA does not empower a discipline committee to award "expenses" against the Council.

b. **Tribunal expenses.** The RESA allows for orders relating to expenses of "the real estate council", which acts as a party before a discipline committee, but which also may "establish" a hearing committee as a discipline committee

under section 38(1) of the RESA. Expenses of "the real estate council" may therefore include expenses relating to the discipline committee as a tribunal. This wider understanding of expenses is consistent with section 4.2 of the *Real Estate Services Regulation*, BC Reg 506/2004 (the "Regulation"), which contemplates that expenses may include "administrative expenses" relating to a discipline committee, based on the number of committee members.

95. Like any tribunal power to award costs, a power to impose "expenses" is a matter of "broad discretion": *Reid v. College of Chiropractors of Ontario*, 2016 ONSC 1041 at para. 219, leave to appeal dismissed 2016 ONCA 779. A discipline committee should, however, endeavour to address enforcement expenses in a principled and consistent manner. While enforcement expenses are ordinarily not punitive – although a committee may use them to chastise a licensee for conduct during an investigation, before a hearing, or during a hearing – enforcement expenses may be significant sums.

9.2. Types of enforcement expenses

96. Section 4.2 of the Regulation sets out maximums for specific types of expenses, which one may categorize by stage and by role in the process:

Council investigation expenses ("Investigation Expenses"):

a. "investigation expenses" (Reg. 4.2(a)): maximum $100/hour for each investigator;

b. expenses for "an audit" during an investigation leading to a hearing (Reg. 4.2(b)): maximum $150/hour (Council employee) or $400/hour (any other case);

c. legal counsel, or more precisely, "reasonably necessary legal services" (Reg. 4.2(c)): maximum $150/hour (Council employee) or $400/hour (any other case);

d. disbursements relating to "legal services to the real estate council" (Reg. 4.2(d)): the actual amount of the disbursements;

e. other reasonably-incurred expenses "arising out of… an investigation leading up to a hearing" (Reg. 4.2(i)): the actual amount incurred;

Council hearing expenses ("Prosecution Expenses"):

f. legal counsel, or more precisely, "reasonably necessary legal services" (Reg. 4.2(c)): maximum $150/hour (Council employees) or $400/hour (any other case);

g. disbursements relating to "legal services to the real estate council" (Reg. 4.2(d)): the actual amount of the disbursements;

h. for witnesses attending at the request of the Council (Reg. 4.2(f), (g), and (h)): $50/day or partial day (non-expert) or $400/hour (expert), and reasonable travel and living expenses;

i. other reasonably-incurred expenses "arising out of a hearing" (Reg. 4.2(i)): the actual amount incurred;

Discipline Committee hearing expenses ("Committee Expenses"):

j. administrative expenses for each full or partial day of hearing (Reg. 4.2(e)): maximum $1,000 (one member), $1,500 (three members), or $2,000 (four or more members);

k. independent legal counsel, or more precisely, "reasonably necessary legal services" for the discipline committee (Reg. 4.2(c)): maximum $150/hour (Council employees) or $400/hour (any other case);

l. disbursements relating to "legal services to… the discipline committee" (Reg. 4.2(d)): the actual amount of the disbursements;

m. for witnesses attending at the request of the Discipline Committee (Reg. 4.2(f), (g), and (h)): $50/day or partial day (non-expert) or $400/hour (expert), and reasonable travel and living expenses; and

n. other reasonably-incurred expenses "arising out of a hearing" (Reg. 4.2(i)): the actual amount incurred.

97. A discipline committee may order payment of all or a part of enforcement expenses by, first, calculating gross enforcement expenses subject to the maximum amounts under the Regulation, and second, deciding if a licensee should pay all or a part of such expenses.

98. **Gross enforcement expenses, based on actual expenses:** In calculating gross enforcement expenses, a discipline committee will ordinarily address the following types of enforcement expenses based on expenses actually incurred, including any taxes, not to exceed the maximum amounts under the Regulation:

a. external audit expenses (Reg. 4.2(b)(ii)),

b. external legal counsel fees relating to investigation or prosecution (Reg. 4.2(c)(ii)),

c. legal-services-related disbursements (Reg. 4.2(d)),

d. expert witness fees (Reg. 4.2(g)),

e. witness accommodation and living expenses or per diems (Reg. 4.2(h)), and

f. other reasonably-incurred expenses (Reg. 4.2(i)), e.g., photocopies, court reporter fees, or process server fees.

99. At this time, while the RESA and the Regulations allow enforcement expenses to include the legal fees of independent legal counsel (or "ILC") acting for a discipline committee (Reg. 4.2(c)(i)), this Committee declines at this time to treat ILC fees as enforcement expenses. This is not a comment about what a Discipline Committee may award in any future case.

100. **Gross enforcement expenses, based on "deemed" expenses:** With respect to other types of expenses, the RESA does not define "the expenses… incurred by the real estate council" under section 44(1), but the term "expenses" may encompass expenses that a discipline committee accepts as incurred, based on a tariff or deemed rate, rather than based on evidence of actual expenses.

101. Proof of actual expenses may, with respect to some categories, require an impractical amount of evidence and hearing time. For example, proof of actual investigation expenses relating to a particular investigator would involve not only the investigator's personal salary, but also the value of his or her personal benefits, and some proportion of overhead expenses of the Council, such as support staff and office space, allocated to each investigator and further to each matter.

102. Accordingly, a discipline committee may accept "incurred" expenses on the basis of "tariff" rates based on the maximum amounts in the Regulation, as follows:

a. investigation expenses (Reg. 4.2(a)) at a rate of $100 per hour for each investigator;

b. internal audit expenses (Reg. 4.2(b)(i)) at a rate of $150 per hour for an auditor "regularly employed by the real estate council";

c. administrative expenses for each full or part day of hearing (Reg. 4.2(e)) at a rate of $1,000, $1,500, or $2,000 for committees consisting of one, three, or four or more members, respectively;

d. internal legal counsel fees for investigation or prosecution purposes (Reg. 4.2(c)(i)) at a rate of $150 per hour for a lawyer "regularly employed by the real estate council"; and

e. non-expert witness fees (Reg. 4.2(f)) of $50 for each day or partial day.

103. A discipline committee will generally not require that the Council waive solicitor-client privilege or any other privilege relating to legal services. The Council must show, however, some evidence of the actual amount of legal fees, so that the Committee may satisfy itself, in the context of the duration, nature and complexity of the hearing, that those fees are "reasonably necessary legal expenses".

104. A discipline committee is an administrative tribunal that is, in the absence of any statutory provision to the contrary, not bound by court rules of evidence. It may consider any evidence it considers relevant: *Wilson v. Esquimalt and Nanaimo Railway Company Co*., [1922] 1 A.C. 202 (P.C.) [B.C.]; *Kane v. The Board of Governors (University of British Columbia)*, [1980] 1 S.C.R. 1105; *Hale v. B.C. (Superintendent of Motor Vehicles)*, 2004 BCSC 1358 at para. 23. A discipline committee may, however, elect to draw on principles underlying court rules of evidence to exclude or assess evidence.

105. **Net enforcement expenses:** In this statutory and policy context, a discipline committee may order that a licensee pay enforcement costs as follows.

106. First, where the Council has been successful due to a discipline committee determining that a licensee has committed professional misconduct or conduct

unbecoming a licensee, the discipline committee will ordinarily order that the licensee pay enforcement expenses. Although a discipline committee cannot award expenses against the Council in any event, the principle that costs "follow the event" applies: a discipline committee cannot order expenses against an "innocent" licensee, but will ordinarily order expenses against a licensee who has engaged in misconduct, or conduct unbecoming.

107. Second, and subject to reasonableness, a discipline committee will ordinarily order that an unsuccessful licensee pay all or a part of gross enforcement expenses in the following proportions:

a. Investigative Expenses:

    i. for matters of simple or ordinary investigative complexity, all or a portion of gross investigation or audit expenses (whether internal or external);

    ii. all or a portion of legal counsel fees for investigation purposes, and 100% of disbursements relating to such legal services; and

    iii. 100% of other reasonably-incurred expenses.

b. Prosecution Expenses:

    i. all or a portion of legal counsel fees for prosecution purposes and 100% of disbursements relating to such legal services;

    ii. 100% of witness fees (whether non-expert or expert) and 100% of reasonable travel and living expenses; and

    iii. 100% of other reasonably-incurred expenses.

c. Committee Expenses:

    i. 100% of administrative expenses; and

    ii. 100% of other reasonably-incurred expenses.

108. A discipline committee may further make its order to address special circumstances. For example:

a. A discipline committee may order that a licensee pay a greater portion of gross investigation or audit expenses than it might otherwise order, e.g., to rebuke for a licensee for any objectionable conduct or omission during an investigation, before a hearing, or during a hearing.

b. A discipline committee may order that a licensee pay a greater portion of legal counsel fees than it might otherwise order, to rebuke the licensee for any objectionable conduct or omission during an investigation, before a hearing, or during a hearing. (A discipline committee need not, however, reserve higher percentages of legal counsel fees only for what courts consider as "reprehensible" conduct for purposes of ordering "special costs". Discipline

committees under the RESA are free to develop their own approaches to addressing licensee conduct during investigations and hearings.)

c. The discretionary nature of the discipline committee's power to order enforcement expenses means that it may award enforcement expenses

    i. of a proceeding, or

    ii. that relate to some application, step, or matter in or related to the proceeding, or

    iii. except as far as they relate to some application, step, or matter in or related to the proceeding.

    A discipline committee may reduce any award of enforcement expenses, including disbursements, to account for special circumstances. Special circumstances may include partial or divided success, e.g., where the Council has failed to prove one or more allegations corresponding to a significant and distinct part of a hearing, or where all or part of a hearing went to waste, due to a lack of procedural fairness warranting a new hearing.

109. These principles express factors that a discipline committee may consider when deciding to award all, part, or any enforcement expenses. As noted by a discipline committee in *Ontario (College of Physicians and Surgeons of Ontario) v. Shamess*, 2019 ONCPSD 47, a committee may consider many factors when exercising discretion respecting costs:

a. the nature of the misconduct,

b. any settlement offer made in writing, and the date in terms of the offer,

c. the member's failure to acknowledge any error or to act reasonably unprofessionally to avoid a hearing,

d. the relative success of the parties,

e. the costs of the investigation and hearing,

f. the nature of the member's defence, and

g. the impact of the cost order on the member's ability to continue to practice.

The Saskatchewan Court of Appeal examined similar lists of factors in *Abrametz*, referenced above, at paras. 46 and 47.

Enforcement expenses in this case

110. **Proof of expenses and procedural fairness:** The Council submits that costs are routinely awarded by RECBC hearing panels where there has been a finding of liability. The Council has set out cases demonstrating that RECBC panels have developed their own interpretation of what RESA allows. The Committee accepts that this is a proper case for an order that the Respondent pay enforcement expenses. The Licensee submits that the Committee should not award any enforcement expenses, on the basis that he

successfully defended four of seven allegations. The allegations are not, however, all equal in their importance. The Council proved that the Licensee defrauded a client, which allows and would ordinarily warrant an order of enforcement expenses.

111. The Licensee submitted that this Committee cannot make any lawful award respecting enforcement expenses without the Council first making "proper disclosure" and allowing cross-examination with respect to expenses. The Licensee characterizes proper disclosure as involving putting actual bills before the Committee, putting underlying time charges and records in evidence, making the lawyers' files available for review, and putting a witness on the stand for cross-examination. The Licensee relies, however, on court decisions relating to "costs" awards, while the RESA provides a discipline committee with a power to order "enforcement expenses", for which discipline committees must interpret and create their own processes.

112. The procedural fairness that the Committee should afford to the Licensee in relation to enforcement expenses are indicated by the non-exhaustive considerations listed by the Supreme Court of Canada in the *Baker* case (*Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817):

a. The nature of the decision being made and the process followed in making it (e.g., the closeness of the administrative process to the judicial process);

b. the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;

c. the importance of the decision to the individual affected (e.g., when the right to continue in one's profession or employment is at stake);

d. the legitimate expectations of the person challenging the decision (e.g., that a certain procedure will be followed, based on the promises or regular practices of administrative decision makers); and

e. the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures.

113. The decision about enforcement expenses is occurring as part of a discipline hearing where the Licensee's right to continue as a licensee is at stake, and that hearing process is close to a judicial process. The decision to order enforcement expenses based on what the Council has incurred is not, however, the same as the decision to cancel the Licensee's licence and to order ineligibility for a time. The Committee has already decided to order cancellation under RESA s. 43(2)(c). The decision here is whether and to what extent the Committee will require that the Licensee pay enforcement expenses under REA s. 43(2)(h) and s. 44(1). The decision to require that the Licensee pay enforcement expenses is not inherently punitive; it is primarily about whether and to what extent the Council's investigative and hearing expenses, arising as a result of the Licensee's misconduct, should be borne by the Licensee, instead of by all licensees. A decision about enforcement expenses will be important to Licensee, but its importance is financial in nature, and is distinct from the Committee's decision to limit his licence to provide real estate services to the public.

114. With respect to the nature of the statutory scheme, the RESA allows a discipline committee to order that a licensee who has committed professional misconduct, or conduct unbecoming a licensee, to pay investigation and discipline hearing expenses of the Council. This one-way, prosecutorial "enforcement expenses" regime under the RESA is distinct from other statutory regimes that allow awards of "costs", such as the *Commercial Arbitration Act* (now the *Arbitration Act*, R.S.B.C. 1996, c. 55) as considered in *Williston Navigation Inc. v. BCR Finav No. 3*, 2007 BCSC 190.

115. In terms of legitimate expectations, the Committee is not aware of any basis on which the Licensee should expect that, as a matter of the regular practices of discipline committees under RESA, the Licensee is entitled to a level of procedural fairness that extends to cross-examining anyone with respect to enforcement expenses.

116. Finally, the RESA does not specify any process relating to enforcement expenses. The practice of discipline committees is to assess reasonableness of investigation expenses, legal service expenses, and disbursements, by examining total amounts in the context of the duration, nature and complexity of the hearing and its issues. Where the Committee has received enough information to assess the reasonableness of enforcement expenses, based on the documentation provided and the hearing that has taken place, a discipline committee under the RESA will generally not require actual invoices, or fully-unredacted invoices that waive solicitor-client privilege, or live testimony. As a matter of procedural fairness, the Licensee is entitled to know and respond to the information supporting enforcement expenses that the Council provides to the Committee. But in deciding on a fair and efficient process on this collateral issue of enforcement expenses, discipline committees need not afford licensees a right of cross-examination with respect to expenses. Enforcement expenses are not factual issues relating to the professional conduct at issue; they are administrative consequences of a hearing where a licensee has committed professional misconduct. Discipline committees are entitled to devise flexible procedures that achieve a certain balance between the needs for fairness, efficiency and predictability of outcome: *Knight v. Indian Head School Division No. 19*, 1990 CanLII 138, [1990] 1 S.C.R 653 at 685 (S.C.C.).

117. The evidence a discipline committee may require from the Council respecting enforcement expenses will depend on the circumstances. Under section 4.2 of the Regulations, in addition to ensuring that enforcement expenses do not exceed the maximum amounts set out, a discipline committee must be satisfied that expenses relate to legal services that are "reasonably necessary" (s. 4.2(c)), that disbursements are "properly incurred" (s. 4.2(d)), that witness travel and living expenses are "reasonable" (s. 4.2(h)), and that "other expenses" are "reasonably incurred" (s. 4.2(i)). If circumstances are such that a discipline committee is not satisfied an expense is reasonable, absent further information that is not available due to solicitor-client privilege, it may limit its order to such amounts that it deems reasonable, given the available evidence.

118. **Assessment of enforcement expenses:** In this case, the Council asserts total enforcement expenses of $90,069.23:

a. $1,500 for Investigation Expenses, based on 15 hours of investigation at a rate of $100 per hour;

b. $75,450 for Prosecution Expenses, consisting of

   i. $75,450 for legal services, including fees for outside counsel and fees for in-house counsel (based on 10 hours of in-house legal services at a rate of $150 per hour); and

   ii. $1,419.38 for disbursements of outside legal counsel;

c. $6,000 for Committee Expenses; and

d. $4,199.85 for Allwest Reporting.

119. The Committee Expenses reflect three days of hearing on liability, and one day of hearing on sanctions, initially before the First Committee, and now before a three-member Committee for reconsideration.

120. In this case, 15 hours for an investigation and preparation of an investigation report for the Complaints Committee is reasonable. Similarly, 10 hours for in-house legal services, to prepare, conduct and record notes of her interview with the complainant in this matter, is reasonable. With respect to the external legal fees claimed, they are reasonable for a three-day liability hearing and a one-day sanction hearing, all of which included preparation for the hearing, conducting the hearing, and preparing written and oral submissions. With respect to disbursements, which include external legal services disbursements and reporting expenses, the Committee accepts that the Council properly incurred these disbursements, and that they should be entirely recovered.

121. A discipline committee reduce gross enforcement expenses by a percentage to reflect allegations that were unproven. In this case, the Council submitted that a reasonable figure for enforcement expenses is $50,000, to account for the following factors. First, the hearing was originally set for June 2017 but adjourned at the last moment due to the unavailability of a panel member. Second, four allegations were dismissed. The Council further submitted, however, that the time spent in addressing the dismissed allegations did not materially extend the time or expense of the hearing and warrants a modest reduction only.

122. The Committee agrees that since the facts involved a single transaction, the divided success between the Council and the Licensee does not call for a large reduction in enforcement costs. Even without the allegations of professional misconduct that the Council failed to establish, the Council would have had to prove substantially the same facts relating to Items #1, #2 and #5. The First Committee reduced enforcement expenses by 15% to represent the portion of expenses relating to unproven allegations. This Committee agrees with this same reduction but declines to further reduce enforcement expenses with respect to the findings of professional misconduct set aside by the FST.

123. After accounting for divided success, and accounting for an adjournment, the Committee concludes that the $50,000 sum sought by Council is a reasonable and

proper sum for enforcement expenses. The Committee orders $50,000 in enforcement expenses, to be due sixty (60) days from the date of these reasons (pursuant to RESA s. 43(2)(h)), and payment shall be a condition of the Council considering any application for future licensing (pursuant to RESA s. 43(2)(g)).

DISCIPLINE ORDER

124. The Committee orders as follows:

a. Cancellation of Mr. Behroyan's licence.

b. Mr. Behroyan is prohibited from applying for a licence for a period of five years, and until after Mr. Behroyan has paid enforcement expenses ordered by the Committee.

c. Mr. Behroyan must pay enforcement expenses to Council of $50,000 CAD, due sixty (60) days from the date of this decision.

RIGHT OF APPEAL

125. Subject to any existing appeal before to the FST applying to the Committee's order, the Licensee has a right to appeal to the Financial Services Tribunal under RESA section 54(1)(d). The Licensee will have 30 days from the date of the sanction decision: *Financial Institutions Act*, RSBC 1996, ch 141, section 242.1(7)(d) and *Administrative Tribunals Act*, SBC 2004, section 24(1).

DATED at VANCOUVER, BRITISH COLUMBIA this 24th day of March, 2020.

FOR THE DISCIPLINE COMMITTEE

"Sandra Heath"

_____

Sandra Heath
Discipline Committee Chair

"Rob Gialloreto"

_____

Rob Gialloreto
Discipline Committee Member

"Sukh Sidhu"

_____

Sukh Sidhu
Discipline Committee Member

File 14-431