BRITISH COLUMBIA

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**DECISION NO. FST-RSA-20-A003(b)**

In the matter of an appeal under section 54 of the *Real Estate Services Act*, SBC 2004, c 42

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| **BETWEEN:** | Shahin Behroyan | **APPELLANT** |
| **AND:** | Real Estate Council of British Columbia | **RESPONDENT** |
| **AND:** | Superintendent of Real Estate | **THIRD PARTY** |
| **BEFORE:** | Michael Tourigny, Panel Chair | |
| **DATE:** | Conducted by way of written submissions concluding on July 21, 2020 | |
| **APPEARING:** | For the Appellant: | J. Kenneth McEwan, Q.C., Legal Counsel |
| | For the Respondent, Real Estate Council of BC: | Jean P. Whittow, Q.C., Legal Counsel |
| | For the Third Party, Superintendent of Real Estate: | Joni Worton, Legal Counsel |

**APPEAL**

[1] Shahin Behroyan (the "Appellant"), a real estate agent licensed under the *Real Estate Services Act,* SBC 2004, c 42 (the "*RESA*"), appeals to the Financial Services Tribunal (the "Tribunal") under section 54(1)(d) of the *RESA*. The appeal is from the March 24, 2020 reconsideration decision on penalty (the "Reconsideration Decision") of a discipline committee (the "New Panel") of the Respondent Real Estate Council of British Columbia (the "Council")[1] wherein the New Panel imposed a discipline penalty against the Appellant for his professional misconduct.

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[1] I pause to acknowledge that on August 01, 2021, the Real Estate Council of British Columbia was dissolved and replaced by a new Superintendent of Real Estate. However, for the purposes of consistency, and because this change has no substantive effect on the merits of this appeal, I will refer to the parties as they were prior to August 01, 2021.

[2] In its Reconsideration Decision, the New Panel ordered the following penalty against the Appellant under section 43(2) of the *RESA* (the "Penalty Order"):

i. the cancellation of the Appellant's licence as a real estate agent issued to him under the *RESA;*

ii. a prohibition against the Appellant from applying for a licence under the *RESA* for a period of five (5) years, and until after the Appellant has paid enforcement expenses ordered by the New Panel; and

iii. the Appellant must pay enforcement expenses to Council of $50,000, due sixty (60) days from the date of the Order.

[3] Section 242.2(11) of the *Financial Institutions Act*, RSBC 1996, c 141, (the "*FIA*"), applies to this appeal, and provides that the Tribunal member hearing the appeal may confirm, reverse or vary a decision, or send the matter back for reconsideration, with or without directions.

[4] In his Notice of Appeal the Appellant asks that the Tribunal set aside the Penalty Order as arbitrary and unreasonable. In the alternative, the Appellant asks that the Tribunal vary the Penalty Order to a suspension of his license up to, but not exceeding, one year in duration.

[5] In written submissions in support of his appeal, the Appellant advances an argument that the New Panel exceeded its jurisdiction in its Reconsideration Decision by reconsidering the Appellant's penalty in its entirety. The Appellant submits that the Tribunal had ordered a limited reconsideration on the effect of a diminished liability on penalty, not a completely new sanction decision and, accordingly, the Penalty Order should be set aside in its entirety.

[6] Council submits that the Tribunal's decision remitting the issue of sanction did not place any parameters on the New Panel's reconsideration, nor could it, as the issue of the appropriate penalty had not been argued before the Tribunal. As this issue of "jurisdiction" was not raised by the Appellant either before the New Panel or in his Notice of Appeal, Council submits that the Tribunal should not allow this "new issue" to be argued on this appeal.

[7] Council further submits the appeal should be dismissed as having no merit in any event. The position and submissions of Council are supported and adopted by the Third Party, Superintendent of Real Estate (the "Superintendent"),[2] with the Superintendent expanding upon several of the Council's submissions. Both Council and the Superintendent also seek an opportunity to make submissions on costs.

[2] In accordance with my comments above at footnote no. 1, despite the changes which came into effect on August 01, 2021, I will refer to the parties in this appeal as they were prior to August 01, 2021.

## BACKGROUND

*The Proceedings*

[8] In September 2017, a discipline committee (the "Original Panel") of Council conducted a disciplinary hearing to determine whether the Appellant committed professional misconduct contrary to section 35 of the *RESA*. The seven particularized allegations of misconduct focused primarily on the Appellant causing his client to pay him a bonus of $75,000 over and above the sales commission payable to him by his client on the sale of residential real estate, which sale completed in January 2015. The professional misconduct alleged against the Appellant occurred in late 2014.

[9] By written decision dated October 30, 2017 (the "Liability Decision"), the Original Panel concluded that five of the seven allegations of misconduct that had been particularized against the Appellant in the Amended Notice of Discipline Hearing (the "NODH") had been proven, leading to a finding of professional misconduct under section 35 of the *RESA*.

[10] After hearing oral submissions on penalty, the Original Panel issued a written decision[3] regarding penalty (the "First Penalty Decision"). The First Penalty Decision suspended the Appellant's *RESA* licence for a period of 12 months effective June 1, 2018. The First Penalty Decision also required that the Appellant pay a $7500 fine and enforcement costs of $58,708.85 within specified time limits, and that he take an ethics course prior to the completion of his suspension.

[11] In May 2018, the Appellant appealed both the Liability Decision and the First Penalty Decision to the Tribunal under section 54(1)(d) of the *RESA,* seeking to have both Decisions set aside.

[12] Also in May 2018, the Superintendent filed a separate appeal under section 54(1)(d) of the *RESA* from the First Penalty Decision seeking to vary the 12 month suspension order to an order cancelling the Appellant's licence and providing that he not be eligible to reapply for licensing for a period of 5 years.

[13] At the time, the parties agreed that the two appeals should be joined and heard together. The parties further agreed that the hearing of the appeals should be bifurcated to allow for the appeal from the Liability Decision to be decided prior to consideration of the First Penalty Decision. These agreements of the parties were formalized by order of the Tribunal dated June 15, 2018.

[14] On August 27, 2019 the Tribunal issued its written decision on the Appellant's appeal from the Liability Decision in Decision No. 2018-RSA-002(b) and 003(b) (the "Liability Appeal Decision"). In the Liability Appeal Decision, the Tribunal confirmed the Original Panel's findings of professional misconduct in relation to three of the five allegations found to have been proven by the Original Panel, and held that the Original Panel's findings of professional misconduct in

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[3] Original decision dated May 4, 2018, with corrigendum dated May 29, 2018.

relation to the remaining two allegations were made in error. On the same date, the Tribunal issued a decision rejecting the Appellant's application to adduce new evidence (Decision No. 2018-RSA-002(a) and 003(a)).

[15] In the Liability Appeal Decision, submissions were sought from the parties on the appropriate remedy and the best way to move the appeal forward.

[16] Having received the requested submissions, the Tribunal issued its written remedy decision on October 18, 2019 (Tribunal Decision No. 2018-RSA-002(c) and 003(c)) (the "Remedy Decision").

[17] In the Remedy Decision, the Tribunal declined to proceed with the penalty appeals and ordered, pursuant to section 242.2(11) of the *FIA,* that the matter of penalty be sent back to a New Panel for reconsideration with directions.

[18] The New Panel convened on February 13, 2020. The Appellant submitted that the appropriate penalty was a reprimand and a course on ethics. Alternatively, if licence suspension was seen as necessary then it should only be for one month or less. Council submitted that the Appellant's licence should be cancelled and that he should be prohibited from applying for reinstatement for five years. Council also sought an order that the Appellant complete an ethics course and pay both a penalty of $10,000 and enforcement expenses.

[19] In the Reconsideration Decision, the New Panel reconsidered the question of penalty and imposed the Penalty Order now under appeal.

[20] By operation of section 55(2) of the *RESA,* the Penalty Order made by the New Panel was stayed upon the filing of the Appellant's Notice of Appeal.

[21] On May 4, 2020, Council (supported by the Superintendent) applied to the Tribunal under section 242.2(10)(a)(ii) of the *FIA*, (the "Stay-lift Application"), to lift the statutory stay of the cancellation and prohibition terms of the Penalty Order (together the "Cancellation Order"). Council's Stay-lift Application expressly excluded the term of the Penalty Order requiring the Appellant to pay enforcement expenses.

[22] On September 11, 2020, the Tribunal granted Council's Stay-lift Application and ordered that the stay of the Cancellation Order be lifted (Tribunal Decision No. FST-RSA-20-A003(a)).

*The Underlying Misconduct*

[23] The basic chronology regarding the misconduct was set out in detail in the Liability Appeal Decision which I repeat as follows (at paras. 14-30):

> [14] KH owned a residential property in West Vancouver (the "Property"). She decided to sell the Property. KH's adult son HG handled the sale on his mother's behalf. HG acted throughout in his dealings with the Appellant and the sale of the Property under the legal authority of an enduring power of attorney.
>
> [15] The Property is located in an area of West Vancouver with high traffic volume.
>
> [16] HG initially engaged RM in May 2014 as listing agent to handle the sale. The original listing price was $2,998,000, but there were no offers over a period

of several months. There was some pressure to sell due to cash flow problems and a mortgage had fallen into arrears at some point prior to the sale of the Property.

[17] To try and generate more interest in the Property, RM offered to co-list the Property with another realtor. Among the names put forward by RM to HG was that of the Appellant.

[18] The Appellant was prepared to take on the listing, but only if he were designated exclusive listing agent. RM stepped back to allow this to happen.

[19] On September 22, 2014 HG entered into a new listing agreement with the brokerage the Appellant worked for, with the Appellant as the designated listing agent. The listing price was reduced to $2,850,000 and the Appellant's commission was negotiated and settled at 7 percent on the first $100,000 and 2.5 percent on the balance.

[20] On September 22, 2014 the Appellant also provided HG with a "Working with a Realtor (Designated Agency)" form which describes what a designated agency involved, including a summary of the duties owed by the designated agent to his or her client.

[21] In spite of the Appellant's efforts to sell the Property, no offers had been received by late October. As a result, the Appellant recommended, and HG agreed, to reduce the price of the Property once again. On October 27, 2014 HG signed a second listing agreement at the reduced price of $2,698,000, with the Appellant remaining as the designated listing agent (the "Listing Agreement"). All other terms of the September 22, 2014 agreement remained the same in the Listing Agreement, including the calculation of the Appellant's commission.

[22] The Appellant's testimony at the discipline hearing was to the effect that it was about the time of entering into the Listing Agreement on October 27, 2014 that HG volunteered to pay the Appellant an unquantified bonus over and above the commission provided for in the Listing Agreement as an incentive for the Appellant to redouble his efforts to sell the Property and obtain a full price offer. HG testified that he never volunteered to pay the Appellant a bonus, either on October 27, 2014 or at any other time.

[23] For purposes of this chronology, I mention at this point that the Appellant was separately acting in this time frame as designated listing agent for Mr. and Mrs. C with respect to the sale of their residential property in West Vancouver. That sale completed on November 5, 2014. It was Mr. and Mrs. C, then represented by designated agent TD, (who worked for the same brokerage as the Appellant), who subsequently purchased the Property from KH.

[24] On November 7, 2014 a series of text and telephone communications took place between HG and the Appellant addressing the issue of a bonus payable in relation to the sale of the Property. According to the testimony of HG, the Appellant told him that he had obtained a full price offer, but the buyer's agent wanted a bonus of $100,000 (later in the day reduced to $75,000) as a condition of presenting the offer, which HG reluctantly agreed to. The Appellant strongly denied this version of the communications. The Appellant testified the amount of the volunteered bonus payable to him was discussed and settled at $75,000 after he advised HG of the conflict of interest inherent in the agreement

to pay him a bonus, and after having advised HG to get independent legal advice.

[25] On November 10,2014 the Appellant contacted HG advising him that a full price offer had come in on the Property, and that it was available for acceptance until 9pm on November 11, 2014.

[26] A meeting was arranged for HG to meet the Appellant at his office on the morning of November 11, 2014 (a holiday) to consider the offer. At this meeting:

1. HG accepted the offer, (which was from Mr. and Mrs. C), for the full listed price of $2,698,000 with a closing on January 30, 2015 (the "Contract of Purchase and Sale").

2. The Appellant presented to HG, and HG signed, two separate documents that authorized the payment of a bonus of $75,000 over and above the commission agreed to in the Listing Agreement. In one document, the bonus was payable to the brokerage the Appellant worked for, in the other document, (the "Listing Agreement Amendment"), the bonus was payable to the Appellant personally. The addition of the bonus more than doubled the commission from $68,378.57 to $143,378.57.

[27] The Contract of Purchase and Sale closed on January 30, 2015. Prior to completion of the sale HG had obtained legal advice that raised issues as to whether he was obliged to pay the bonus; accordingly, the sale was completed under formal protest as to the obligation to pay the bonus.

[28] In April 2015 HG made a formal complaint about the bonus to the Council on behalf of KH.

[29] HG testified at the discipline hearing that the Appellant failed to disclose to him at any time that he had acted as agent for Mr. and Mrs. C in the sale of their home that completed on November 5, 2014. HG further testified that he had no knowledge until the following year of the fact that TD, as agent acting for Mr. and Mrs. C in the purchase of the Property, had agreed to split her commission with the Appellant 50/50. The Appellant testified that he fully disclosed these matters to HG during his discussions with him concerning the bonus on or about November 7, 2014.

[30] In May 2015 KH commenced civil proceedings in B.C. Supreme Court against the Appellant and his brokerage for recovery of the bonus and other damages.

[24] After the Liability Decision, some three years after the misconduct at issue, the Appellant renounced his claim to the $75,000 bonus.

*Findings on Liability*

[25] The net result of the Liability Appeal Decision was that the Tribunal upheld three of the five findings of misconduct as found by the Original Panel. The Appellant's liability for professional misconduct as particularized in allegations 1.a.

(conflict of interest), 1.b. (deceptive dealing), and 1.e (failure to disclose material information) of the NODH was confirmed. The Tribunal reversed the findings of the Original Panel on allegations 1.d. and 1.f. of the NODH.

[26] Allegation 1.a. of the NODH (conflict of interest) was based on the conflict of interest that arose from the request for a bonus from the Appellant's own client.

[27] The Original Panel found that the nature of the relationship between a realtor and his client is that of a fiduciary, wherein the fiduciary must act at all times in the best interests of his client and with utmost good faith. The request for a bonus requires that particular care be exercised to ensure the interests of the client's interests are protected. Because the amount of commission had been previously agreed upon and the payment of a bonus would benefit the Appellant at the expense of his client, the Original Panel held that his demand for a bonus created a conflict of interest between the Appellant and his client.

[28] In the Liability Appeal Decision, the Tribunal held that the Original Panel's decision on allegation 1.a of the NODH was well founded in the evidence.

[29] Allegation 1.b. of the NODH addressed the deceptive dealing by the Appellant.

[30] Section 1 of the *RESA* defines "deceptive dealing" as the 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. Section 3-4 of the Council Rules provides that when providing real estate services, a licensee must act honestly and with reasonable care and skill.

[31] The Original Panel found this allegation addressed the heart of the misconduct of the Appellant, namely the demand that a bonus was required in order to be presented with the offer of purchase. The Original Panel found the Appellant's conduct constituted deceptive dealing and a breach of the duty to act honestly, finding (at para. 89):

> [89] Mr. Behroyan informed [HG] that the offer to purchase the property would not be presented unless he agreed to pay a bonus to the buyer's agent. This was not true and was an intentional misrepresentation of a material fact that deceived [HG]. At the same time, the representation was dishonest, as it forced [HG] to pay a bonus that he was not obliged to pay in order to receive the offer. In view of our decision to accept [HG's] evidence, we had little difficulty finding Mr. Behroyan's actions constituted deceptive dealing within the meaning of the *RESA* and was a breach of his duty to act honestly.

[32] In confirming the Original Panel's decision on allegation 1.b. the Tribunal found the decision to be reasonable and the Original Panel's reasons to be adequate.

[33] Allegation 1.e. of the NODH (failure to disclose material information) addressed the Appellant's failure to disclose to his client that he had recently acted as agent for the parties who were the purchasers in the transaction in question on this appeal.

[34] The Original Panel rejected the Appellant's evidence to the contrary and found as a fact that he did not, at any time, disclose to HG his prior agency

relationship with Mr. and Mrs. C, nor that he had recently sold their home. The Original Panel found this information to be clearly material information that could have signaled to HG that there was a need for further inquiry in the circumstances. The Tribunal upheld this finding.

## ISSUES

[35] The Appellant submits that the issues on this appeal are:

a. What is the appropriate standard of review for the Reconsideration Decision?

b. Did the New Panel exceed its jurisdiction by re-evaluating the entirety of the First Penalty Decision?

c. Is the Reconsideration Decision arbitrary and unreasonable?

[36] In response, Council agrees that the standard of review and reasonableness of the Reconsideration Decision are issues. Council describes the question of the New Panel's jurisdictional as being whether the New Panel exceeded its authority or jurisdiction. Council raises one additional issue described as:

> The issue of lack of jurisdiction to impose a more severe penalty was not previously raised by Mr. Behroyan, is inconsistent with his position on remedy in the Liability Appeal and cannot now be raised on appeal;

[37] For purposes of my analysis, I have reorganized and reordered the issues on this appeal as follows:

a. As a preliminary issue, can the question of the New Panel's jurisdiction to reconsider penalty in its entirety be raised by the Appellant for the first time in submissions on appeal?

b. What is the appropriate standard of review of the Reconsideration Decision?

c. Did the New Panel exceed its jurisdiction by reconsidering penalty in its entirety?

d. Was the Reconsideration Decision and resulting Penalty Order unreasonable?

## DISCUSSION AND ANALYSIS

### Issue a. *As a preliminary issue, can the question of the New Panel's jurisdiction to reconsider penalty in its entirety be raised by the Appellant for the first time in submissions on appeal?*

[38] On June 5, 2020, the Appellant sought leave to file sur-reply submissions in opposition to Council's Stay-lift Application submitting in part as follows:

> One of the positions to be advanced in the appeal is that the [New Panel] had no jurisdiction to order the cancellation of Mr. Behroyan's license in the first place.

> The Tribunal's order for reconsideration directed that the [New Panel] determine whether the Tribunal's setting aside of two findings of misconduct impacted the one-year suspension penalty ordered by the [Original Panel]. It is the Appellant's position that the Tribunal's directions provided the [New Panel] with authority to consider whether it was appropriate to lessen the suspension penalty due to the Tribunal's lessening of liability but did not provide authority to increase that penalty to a cancellation.

This was the first time the Appellant had raised this issue in these proceedings.

[39] The Appellant's request to file sur-reply submissions on this discreet issue in the Stay-lift Application was granted on condition that Council and the Superintendent had the right of further reply in response.

[40] In his submissions on this penalty appeal the Appellant has expanded upon and focused extensively on this issue. The Appellant submits that the Tribunal in the Remedy Decision ordered a limited reconsideration on the effect of the diminished liability on the reasonableness of the First Penalty Decision, not a completely new sanction decision. Accordingly, the Appellant submits the Reconsideration Decision should be set aside in its entirety.

[41] It is not in dispute that this issue was not raised by the Appellant before the New Panel, nor was it raised by the Appellant in his Notice of Appeal.

[42] The New Panel was not given the opportunity to deal with this issue and make its views known because the Appellant did not raise the issue before it. Consequently, there are no considered reasons on jurisdiction that the Tribunal can review in its role as an appellate body.

[43] In considering whether to allow argument on this issue I have taken into account the fact that the matters addressed before the New Panel, as well as on this appeal, are significant to the Appellant; involving the imposition of the Penalty Order based on findings of dishonesty and misconduct that have had a significant impact on the Appellant's career in the real estate industry. I have also taken into account the public protection objectives of the *RESA* and the need for public confidence in the disciplinary processes followed by the Council under the *RESA* and by the Tribunal on appeal. All of the parties to this appeal are entitled to a high degree of procedural fairness before the Tribunal in general, as well as on this question in particular.

*Council's Submissions*

[44] Council submits that the Tribunal should not hear the Appellant on this issue. Council starts by challenging the characterization of the issue as being one of jurisdiction. Council submits the substance of the Appellant's argument is that the Tribunal restricted the scope of the reconsideration in the Remedy Decision, and argues this is not an issue of jurisdiction.

[45] Council characterizes this issue as a "new issue". Reliance is placed on *R. v Gill,* 2018 BCCA 144 ("*Gill*"), as authority for the proposition that an appellate body does not generally consider new issues on appeal. In *Gill* the BC Court of Appeal set

out four "profound functional justifications" for this general rule, which Council submits apply equally on this appeal (*Gill* at para. 9):

> [9] It is well-settled that this Court does not generally consider new issues on appeal. There are profound functional justifications for this general rule. First, this Court is not a court of first instance and the appellate function is compromised where the evidentiary record is insufficient to permit proper legal analysis of an issue raised for the first time on appeal… Second, and related to the first concern, serious prejudice may be occasioned and the fairness of the process compromised by permitting a party to raise an entirely new issue on appeal. Third, permitting new issues to be raised on appeal may undermine the goal of finality in litigation…Fourth, the reviewing function of appellate courts is enhanced when issues, including interpretive issues like the one at bar, are decided with the benefit of considered reasons prepared by the court from which the appeal is taken.

[46] In *Gill* the BC Court of Appeal followed up its finding that an appellate body does not generally consider new issues on appeal by identifying exceptions to that general rule (at para. 10):

> [10] While the general rule admits of exceptions, it has been said that new issues raised on appeal "ought to be most jealously scrutinized"…Whether to hear a new issue on appeal engages the exercise of discretion. This Court has said that the discretion to hear new issues on appeal will be exercised "rarely" or "sparingly and only where the interests of justice require it" …

[47] Council submits it is both prejudicial and unfair to Council to allow the Appellant to now raise this new issue. If the issue had been raised before the New Panel, then Council would have addressed it at that time. Council may have advanced an alternative position on penalty to account for the unlikely possibility that this new issue may succeed.

[48] Council submits it is also prejudicial to the Superintendent for the same reasons articulated by the Tribunal in the Remedy Decision. In particular, it denies the Superintendent a level of appeal when the Tribunal is the first instance decision maker on an issue. This submission is specifically supported by the Superintendent, adding that without the benefit of the New Panel providing a decision on jurisdiction with reasons that the Superintendent can assess, the Superintendent is not properly in the position of appellant and instead must make *de novo* submissions on the issue.

[49] Council refers to Section 242.2(11) of the *FIA* and submits it is difficult to see how the Tribunal member hearing this appeal could make any of the remedial orders contemplated therein with respect to this new issue, given it was not even raised before the New Panel.

[50] Council further submits that the new issue is inconsistent with the prior position taken by the Appellant before the Tribunal in response to the Tribunal's request in the Liability Appeal Decision for submissions on appropriate remedy. The Appellant's submission was summarized in the Remedy Decision as follows (at para. 12):

> [12] The Appellant submits that because the [Original] Panel made [the First Penalty Decision] on the basis of five findings of professional misconduct, and given two of the five findings against him had now been set aside, as a matter of fairness the issue of the appropriate penalty should be remitted to a new panel of Council for a new, independent finding with "full appeal rights as afforded by statute". The appellant argues no one can know what the principal factors were that led to the [First Penalty Decision]. The Appellant submits that if the Tribunal were to proceed to decide the appeals from the [First Penalty Decision] now, this would impair his statutory rights of appeal.

[51] Council points out that this "strategic choice" by the Appellant – to argue that the reconsideration should be a new process independent from the First Penalty Decision, which preserved his statutory appeal rights – was maintained by him before the New Panel. Council submits that the Appellant argued before the New Panel that the Original Panel had erred in its finding on penalty and that "they should be of no moment in this *de novo* assessment".

[52] Council refers to authorities including *Argo Ventures Inc. v Choi,* 2020 BCCA 17 ("*Argo*"), wherein the appellant sought to raise an argument on appeal that was not before the trial judge because it would have been inconsistent with the appellant's position before the trial judge. The BCCA in *Argo* held that the appellants, "having made that decision at trial, they must now live with it in this court" (at para. 33). Based on *Argo* Council submits the Appellant asked for and received a new independent assessment of the proper penalty by the New Panel. Having received exactly what he requested he should not now be allowed to resile from that position.

[53] Council further submits that the taking of inconsistent positions in legal proceedings in some instances can constitute an abuse of process. Council relies on *Fortinet Technologies (Canada) ULC v Bell Canada,* 2018 BCCA 277 (at para. 23), submitting that the Appellant should not be allowed to hold back the new issue before the Tribunal and the New Panel, and then use it to undermine the result that he is unhappy with.

*Appellant's Submissions*

[54] The Appellant submits in response that the scope of the reconsideration ordered in the Remedy Decision is not a "new" issue. Jurisdiction is always a live issue. Now that it has been brought to the Tribunal's attention on this appeal, it would undermine justice and the rule of law to allow a decision without legal authority to stand.

[55] The Appellant refers to *Schill & Beninger Plumbing & Heating Ltd. V Gallagher Estate,* 2001 CanLII 24134 where the Court explained that even if it is withheld for a strategic reason, (which the Appellant submits is not the case here – the jurisdictional issue was simply identified by new counsel), a Court "cannot turn away from a jurisdictional issue" raised on appeal (at paras. 9 and 12).

[56] Reliance is placed by the Appellant on *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada),* 2015 FCA 4, for the proposition that when there is a genuine jurisdictional issue that arises a tribunal is obliged to

consider it, regardless of whether it has been raised by any party (at paras. 36-38). The Appellant submits that it is the task of the Tribunal on this appeal to ensure that the Reconsideration Decision had a proper jurisdictional basis.

[57] Accordingly, the Appellant submits that the issue of jurisdiction cannot be dismissed as "new', as jurisdiction is always a live issue. The Appellant further submits (citing as authority *Quon v Cusson,* 2009 SCC 62, at para. 37) that even where the issue is "new", an appellate body may hear a new issue where the interests of justice require it and the court has a sufficient evidentiary record to do so.

[58] The Appellant submits that no evidentiary record is required to resolve this issue. It is simply a matter of the Tribunal interpreting its own order in the Remedy Decision to determine the scope of the reconsideration it ordered the New Panel to conduct.

[59] The Appellant submits that the interests of justice are not served by ignoring a jurisdictional issue, rather, to do so would undermine justice and the rule of law to allow a decision to stand that was made without a jurisdictional foundation.

[60] The Appellant submits that the "prejudice" articulated by Council does not amount to anything of substance, and the prejudice to be suffered by the Superintendent does not justify the submission of Council that the Penalty Order should stand even if there was no jurisdiction to issue it in the first place. To the contrary, the Appellant submits that it is he who suffers gross prejudice if the Penalty Order is allowed to stand. The sanction was increased dramatically, despite partial victory on liability and without ever having a determination that the earlier sanction was unreasonable.

[61] The Appellant submits that it is of no moment that the jurisdictional issue is inconsistent with his prior position before the Tribunal or the New Panel as parties cannot create jurisdiction where it does not otherwise exist. Likewise, the Appellant submits Council's reliance on abuse of process is misplaced on the facts. Council cannot suggest that abuse of process can protect a decision made without jurisdiction.

*Analysis*

[62] While Council is correct to reference Section 242.2(11) of the *FIA* as setting out the orders available to the Tribunal member hearing an appeal such as this, I observe that under section 242.3(1) of the *FIA,* the Tribunal has the exclusive jurisdiction to both "inquire into, hear and determine all those matters and questions of fact and law arising or requiring determination" as well as to "make any order permitted to be made".

[63] By virtue of section 242.1(7) of the *FIA,* various provisions of the *Administrative Tribunals Act*, SBC 2004, c 45 (the "*ATA*") apply to appeals before the Tribunal, including sections 40(1) and 11(1).

[64] Section 40(1) of the *ATA* provides that the Tribunal may receive and accept information it considers relevant, necessary and appropriate, whether or not it

would be admissible in a court of law, subject to stated exceptions that are inapplicable to the issue at hand.

[65] Section 11(1) of the *ATA* provides that the Tribunal has the power to control its own processes and may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.

[66] The Tribunal has no published rules respecting its practice when faced with a dispute such as this over whether it should entertain a "new issue" that was not before the New Panel.

[67] Based on the Tribunal's jurisdiction under sections 242.2(11) and 242.3(1) of the *FIA,* as well as under sections 40(1) and 11(1) of the *ATA,* I find that the Tribunal member hearing an appeal such as this has the discretion to consider a "new issue" raised for the first time on appeal. In exercising its discretion, the Tribunal member is to be guided by the high degree of procedural fairness that the parties to an appeal before the Tribunal are entitled.

[68] While I agree with the Appellant that jurisdiction is always a live issue, my agreement does not change the fact that it has been raised by the Appellant for the first time in this appeal. In that context, I find this jurisdiction issue to be a "new issue" for purposes of this analysis.

[69] I am also persuaded by Council's submission that *Gill* provides valuable guidance for the Tribunal when considering whether or not to entertain such a "new issue" raised for the first time on appeal.

[70] Like the Court of Appeal, the Tribunal is not a court of first instance. Appeals to the Tribunal are conducted "on the record"[4]*.* By reason of section 242.2(6) of the *FIA,* the record is made up of the evidence before the original decision maker as well as the decision below and the reasons given for it.

[71] For the same four "profound functional justifications" set out in *Gill,* I find that the rule that an appellate body does not *generally* consider new issues on appeal should be applied by the Tribunal. However, again consistent with *Gill,* I find there are possible exceptions to this general rule depending on the particular circumstances. As I have stated above, this engages discretion. This discretion should be exercised guided by procedural fairness as well as the interests of justice.

[72] I agree with the Appellant that on the facts of this case, the Tribunal's appellate function is not compromised by entertaining this issue given that the evidentiary record is sufficient to permit a proper legal analysis of the issue. It is simply a matter of the Tribunal interpreting its own order in the Remedy Decision to determine the scope of the reconsideration it ordered the New Panel to conduct.

[73] I have considered whether any serious prejudice may be occasioned and the fairness of the process compromised by permitting the Appellant to raise this entirely new issue on appeal.

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[4] Pursuant to section 242.2(5) of the *FIA*, subject to an order made by the member considering the appeal to permit the introduction of new evidence under section 242.2(8) of the *FIA.*

[74] I accept the Superintendent's submission that without the benefit of the New Panel providing a decision on jurisdiction with reasons that the Superintendent can assess, the Superintendent is not properly in the position of appellant and instead must make *de novo* submissions on the issue. I also agree that Council was prejudiced to some degree by being denied the opportunity to address this issue before the New Panel. However, both Council and the Superintendent have made extensive submissions in opposition to this jurisdiction issue on its merits in this appeal.

[75] Neither Council nor the Superintendent submit that their ability to make comprehensive submissions on the Appellant's interpretation of the Remedy Decision has been compromised based on any gap in the evidentiary record or by having been "taken by surprise" by the new issue. While they, as well as the Tribunal, would have benefited from considered reasons from the New Panel on this issue, I find the submissions of the parties and the language of the Remedy Decision itself will allow for a full and fair consideration by the Tribunal.

[76] Whether this issue is properly described as a matter of jurisdiction or scope of authority, I find that the New Panel's authority arose from the Tribunal's order in the Remedy Decision that the matter of penalty be sent back to a new disciplinary panel of Council for reconsideration with directions. If the Penalty Order was made beyond the New Panel's jurisdiction or scope of authority, I agree with the Appellant that now that this issue has been brought to the Tribunal's attention, the interests of justice would not be served by denying the Appellant the opportunity to argue the point.

[77] I have concluded as a matter of procedural fairness and in the interests of justice that I will hear the Appellant and determine this jurisdictional issue based on the submissions of the parties and the record in this appeal.

**Issue b. *What is the appropriate standard of review of the Reconsideration Decision?***

*Appellant's Submissions*

[78] The Appellant submits that the order made in the Remedy Decision is the sole basis for the New Panel's jurisdiction, and that the interpretation by the New Panel of that order creating its jurisdiction to conduct a reconsideration is a question of law. As such, it attracts a correctness standard of review.

[79] The Appellant submits that the standard of review on this appeal is that set out by the Tribunal in *Kadioglu v Real Estate Council of BC and Superintendent of Real Estate,* Decision No. 2015-RSA-003(b)("*Kadioglu*"), as follows (at para. 32):

a. correctness for questions of law, including the scope of s. 37(1) of the Act and the allegation of breach of Charter rights;

b. reasonableness for questions of fact, discretion and penalty,

c. fairness, for procedural fairness questions.

[80] In support, the Appellant refers to *R v Dhillon*, 2019 BCCA 373 ("*Dhillon*"), and to *Harrison v British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 1204 ("*Harrison*").

[81] In *Dhillon,* the appellant had been convicted of criminal contempt for breaching orders made by one Supreme Court Justice as interpreted by another Supreme Court Justice that prohibited the publication of derogatory or defamatory statements about persons and entities connected to the administration of a bankruptcy. On appeal, the issues raised concerned the interpretation below of the order that the appellant was found to have breached. The Court (at paras. 14-15) characterized the issues as raising questions of law. Applying *Housen v Nikolaisen*, 2002 SCC 33 ("*Housen*"), the Court applied the correctness standard of review.

[82] *Harrison* was a judicial review of an order of the Information and Privacy Commissioner for British Columbia (the "Commissioner"). In prior proceedings the Court had remitted the matter back to the Commissioner to consider issues raised in a particular section of the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165 ("*FIPPA*"), which were relevant to the order in question. In addressing the standard of review, the Court noted that the *ATA* did not apply to decisions of the Commissioner and therefore the standard of review fell to be determined on the basis of the common law. The court held (at para. 48):

> [48] Based on the nature of the questions involved in the two petitions before me, I conclude the Commissioner's interpretation of the Court of Appeal judgment in 2009 BCCA 203 is judicially reviewable on the correctness standard insofar as it defined the terms of remittal back to the Commissioner. The interpretation of the court's order required no exercise of any specialized expertise under *FIPPA*.

[83] If the issue of jurisdiction is not dispositive, then the Appellant submits that based on *Kadioglu,* in assessing the Reconsideration Decision and the resulting Penalty Order imposed by the New Panel, the standard of review is reasonableness.

*Council's Submissions*

[84] Council submits that reasonableness is the appropriate standard of review for all issues on this appeal.

[85] With respect to the issue of the New Panel's jurisdiction, Council relies on *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 ("*Vavilov*"), for its submission that there is no longer a category of "jurisdictional question" attracting a correctness standard on review. Rather, issues with respect to a tribunal or board's authority are to be reviewed on a reasonableness standard. The majority in *Vavilov* noted that (at para. 67):

> [67] …A proper application of the reasonableness standard will enable courts to fulfill their constitutional duty to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary assessment regarding whether a particular interpretation raises a "truly" or "narrowly" jurisdictional issue and without having to apply the correctness standard.

[86] In response to this point, the Appellant submits that this is an incorrect position that stems from the Council's misapplication of *Vavilov. Vavilov* applies to judicial review by the courts of administrative decisions; it does not change the law on the standard of review for the Tribunal, and it does not stand for the proposition that jurisdictional questions do not arise within administrative procedures. *Vavilov* has nothing to do with whether, within the context of an internal appeal, an issue of law can arise as to whether the decision on review rests upon a sound jurisdictional foundation.

[87] Council submits that applying the reasonableness standard in reviewing a penalty decision in *Kadioglu* was consistent with *Vavilov* wherein the majority held that a reasonable decision (at para. 85):

> [85]… is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker.…

[88] Council submits that the relevant considerations on a reasonableness review are whether the Reconsideration Decision "as a whole is transparent, intelligible and justified", as set out in *Vavilov* (at para. 15).

[89] Council further relies on *Vavilov* specifically with respect to the application of reasonableness in the context of penalties for professional misconduct as follows (at para. 107):

> [107].. [a] reasonable penalty for professional misconduct in a given case must be justified both with respect to the types of penalties prescribed by the relevant legislation and with respect to the nature of the underlying misconduct.

*Superintendent's Submissions*

[90] The Superintendent agrees with Council that there is no true question of jurisdiction in this appeal that would attract the correctness standard, and that the standard of review applicable for all issues on the appeal is reasonableness.

[91] The Superintendent refers to the Tribunal decision in *TruNorth Warranty Plans of North America, LLC v Superintendent of Financial Institutions,* Decision No. 2019-FIA-003(a) ("*TruNorth*"), at paras. 28-88, where the Tribunal considered *Vavilov's* impact on the Tribunal's standards of review.

[92] In *TruNorth,* the Tribunal held that a standard of correctness was applicable for questions of law (at para. 69). For question of mixed fact and law, the Tribunal found that "[t]he more fact-intensive and the less law focused a particular issue on this appeal is, the more deference I will give to the original decision-maker in applying a reasonableness standard of review" (at para. 78). For questions of fact and discretion, including remedy, the Tribunal found that reasonableness is the appropriate standard of review (at para. 79).

[93] The Superintendent references para. 85 of *TruNorth,* where the Tribunal held that when applying the reasonableness standard, the Tribunal should consider the guidance offered in *Vavilov* .

[94] The Superintendent also refers to para. 87 of *TruNorth,* where the Tribunal considered the approach to penalty appeals set out in *Financial Institutions Commission v Insurance Council of British Columbia et al,* Tribunal Decision No. 2017-FIA-002(a) – 008(a) ("*Bridge Tolls")*, and found that in considering *Vavilov,* the approach to assessing reasonableness on penalty appeals to the Tribunal should more accurately be described as reasonableness taking its "colour from the context".

*Analysis*

[95] I have found above that the New Panel's authority to reconsider the matter of penalty arose from the Tribunal's order in the Remedy Decision. In reconsidering the matter of penalty the New Panel was also acting under its authority to make discipline orders under section 43 of the *RESA.*

[96] For purposes of determining the standard of review on the issue of the New Panel's jurisdiction, I will first consider whether the New Panel's interpretation of the remedial instructions provided by the Tribunal in the Remedy Decision is a question of law.

[97] While the submissions of Council and the Superintendent do not specifically address this question (instead referring to extracts from *Vavilov*), the Appellant has done so. I find both of the decisions in *Dhillon* and *Harrison* to be of assistance in answering this question. Both of those decisions concluded, in substance, that the interpretation of a court order or decision by another court or administrative decision-maker raises a question of law. Likewise, I find that the interpretation by the New Panel of its authority based on the remedial instructions provided by the Tribunal in the Remedy Decision raises a question of law.

[98] With respect to the standard of review to be applied on this question of law, I am guided by *Kadioglu,* but more so by the analysis of the issue in *TruNorth,* wherein the impact of *Vavilov* on the Tribunal's standards of review was considered in detail.

[99] In *TruNorth*, the panel addressed the standard of review on questions of law in light of *Vavilov* and held in part as follows (at paras. 68-70):

> [68] I also find that the quoted analysis and conclusions in *Hensel* and *Bridge Tolls* remain sound and continue to apply in the post *Vavilov* legal landscape. There is and should be no starting assumption that *Vavilov* dictates the framework for determining the standard of review to be applied by the FST when conducting an appeal of an administrative decision within its statutory mandate.
>
> [69] The FST's jurisprudence is consistent insofar as appeals from questions of law are concerned in applying correctness as the standard of review. I find that this approach is reinforced by *Vavilov* insofar as it holds [at para 37] that judicial statutory appeals from administrative decisions will review for correctness on questions of law.
>
> [70] Accordingly, and further given my findings as to the presumed expertise and statutory mandate of the FST, I find that deference is not owed by the FST on this appeal to the Superintendent's interpretation of the *IA,* the *FIA* or regulations under the *FIA* or on questions of law generally. As pointed out in

> *Hensel,* just as our court system proceeds based on the institutional premise that an appeal judge knows as much about the law as does a trial judge, the FST is also entitled to proceed on the premise that the legislature intended that it would correct legal errors made by the first instance regulator. I will apply correctness as the standard of review on this issue.

[100] In result, based on the analysis and above-referenced findings in *TruNorth* and *Kadioglu,* I will apply correctness as the standard of review on the issue of the New Panel's jurisdiction.

[101] In reviewing the Reconsideration Decision and the resulting Penalty Order, the parties agree that reasonableness is the standard of review. I also agree. This is, again, consistent with both *Kadioglu* and *TruNorth.*

[102] As submitted by Council, in conducting this reasonableness review I will consider whether the Reconsideration Decision "as a whole is transparent, intelligible and justified" (*Vavilov* at para. 15).

[103] In *TruNorth,* (at paras. 80 – 87), having found that the Tribunal had established its own appellate standard of review, and having found that there is no starting assumption that *Vavilov* dictates the framework for determining the standard of review to be applied, the panel went on to consider the guidance provided by *Vavilov* on the proper application of the reasonableness standard.

[104] In applying the reasonableness standard of review of the Reconsideration Decision, I will adopt the approach set out in *TruNorth* as follows (at para. 85):

> [85]…In applying a reasonableness standard of review, the FST should take into account the guidance from *Vavilov*. Being so guided, when conducting reasonableness review the FST should focus on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. When applying the reasonableness standard, the FST should not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. Instead, the FST should consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable. …

[105] I will also take into account the following extract from *Vavilov* referenced by Council (at para. 107):

> [107] …[a] reasonable penalty for professional misconduct in a given case must be justified *both* with respect to the types of penalties prescribed by the relevant legislation and with respect to the nature of the underlying misconduct.

**Issue c. Did the New Panel exceed its jurisdiction by reconsidering penalty in its entirety?**

[106] As decided above, I will apply a correctness standard of review in relation to this issue.

*Did the Tribunal order a limited reconsideration of the impact of the varied findings on the First Penalty Decision?*

[106] As a foundational argument, the Appellant submits that the Tribunal ordered a limited reconsideration of the impact of the varied findings on the First Penalty Decision. The Appellant submits that it was never contemplated or ordered in the Remedy Decision that the reconsideration would allow the New Panel to order a change in sanction unrelated to the diminution of liability (let alone the dramatically increased penalty at issue). The Appellant submits that in doing so, the New Panel exceeded its jurisdiction on reconsideration by re-evaluating the entirety of the Appellant's sanction.

[107] For practical purposes, the Appellant's submission is to the effect that the New Panel on the reconsideration was only to consider whether the one-year suspension imposed by the Original Panel in the First Penalty Decision should be varied downwards because the Tribunal had only upheld three of five finding of misconduct in the Liability Decision.

[108] Council and the Superintendent submit that the Tribunal did not place any limitations on the New Panel's reconsideration of penalty other than as prescribed in its directions, none of which limited the reconsideration as submitted by the Appellant.

[109] To resolve this disagreement requires the interpretation of the Remedy Decision.

*Appellant's Submissions*

[110] In support of his submission that the Remedy Decision ordered a limited reconsideration, the Appellant relies upon his interpretation of particular portions of the Remedy Decision.

[111] The Appellant refers to paragraphs 16 and 17 of the Remedy Decision, wherein the Tribunal considered Council's submissions that rather than ordering a reconsideration with directions, the Tribunal should proceed with both appeals of the Penalty Decision in which each of the appellants would have a full right of reply to the other appellant's submissions. Paragraphs 16 and 17 of the Remedy Decision state:

> [16] The Council submits that given the Tribunal's familiarity with the matter it is best positioned to consider the entirety of the record and determine whether the reversal of Panel's decisions as regards allegations 1.d. and 1.f. impacts the reasonableness of the Penalty Decision. The Council argues a referral to a new panel would be a duplication of effort, add complexity, and would prolong the case unnecessarily.
>
> [17] Council is correct that the Tribunal has the discretion to proceed to address the appeals from the Penalty Decision to determine whether the reversal of Panel's decisions as regards allegations 1.d. and 1.f. impacts the reasonableness of the Penalty Decision. Council is also correct in observing that doing so would likely avoid some duplication of effort and expedite the ultimate determination of this case, both of which objectives could be seen to serve the interests of justice.

[112] The Appellant reads into paragraphs 16 and 17 of the Remedy Decision that the Tribunal was making it clear that it considered the choice before it as simply determining, as between the Council and the Tribunal *who* ought to determine whether the reversal of the Original Panel's Liability Decision on two allegations impacts the reasonableness of the First Penalty Decision (emphasis added).

[113] Because the Tribunal accepted that it had the discretion to proceed to address the appeals from the Penalty Decision to determine whether the reversal of Original Panel's decisions as regards two allegations of misconduct impacted the reasonableness of the Penalty Decision, the Appellant in essence submits that this acknowledgement likewise defined the task of the New Panel on reconsideration.

[114] The Appellant goes on to submit that there was no question or concern expressed in the Remedy Decision that the New Panel should conduct a complete reassessment of the First Penalty Decision – nor was there any sensible or lawful reason for why that would occur. To allow argument on portions of the First Penalty Decision that have nothing to do with the misconduct set aside through the Liability Appeal Decision undermines the goals of efficiency and fairness that animated the Remedy Decision. The intention of the Remedy Decision was not to, in effect, grant the Superintendent's appeal or to give the Council a second opportunity to argue a position already considered and rejected by the Original Panel. The Superintendent's appeal can only be granted if the First Penalty Decision is found by this Tribunal to be unreasonable or unfair, neither of which has occurred.

[115] The Appellant next refers to paragraph 36 of the Remedy Decision, which addressed submissions of the Superintendent and Council on proposed directions for the reconsideration. The Appellant submits that the first sentence of paragraph 36 reiterates the Tribunal's understanding of a narrow reconsideration of the discrete issue of whether the successful appeal on two allegations affected the First Penalty Decision as follows:

> [36] I agree with the submissions of the Superintendent and Council to the effect that a decision on penalty based on the varied findings can fairly be reached by a review of the record and with the benefit of written submissions from the parties…

[116] The Appellant then submits that in ordering a reconsideration in paragraph 24 of the Remedy Decision, the Tribunal expressed a desire to adopt a process that would be fair at the Tribunal level. The First Penalty Decision was not set aside as having been unfairly made. As pointed out by the Tribunal in paragraph 20 of the Remedy Decision, "due to the bifurcation of the appeals I have not yet been provided with submissions from the parties or otherwise commenced consideration of the substance of the appeals from the Penalty Decision."

[117] The Appellant submits that a limited reconsideration was ordered at the request of the Superintendent, who wished to have fulsome reasons from Council that considered the diminished liability in order that it might pursue its sanction appeal to the Tribunal.

[118] The Appellant concludes his submissions on the interpretation of the Remedy Decision by submitting that the rationale for the order of preserving the Superintendent's right to a meaningful appeal is inconsistent with an interpretation

whereby the Council could treat the First Penalty Decision as set aside and reargue its original position (as well as the Superintendent's appeal position) at reconsideration.

*Council's and the Superintendent's Submissions*

[119] Council submits that in ordering reconsideration of the question of penalty, the Remedy Decision does not indicate that this reconsideration was for the purpose of the Council imposing a lesser penalty in light of the Tribunal's varied findings on liability in the Liability Appeal Decision. The Superintendent adopts this submission and submits that the Remedy Decision did not in any way restrict the authority of the New Panel to impose a more severe penalty than ordered by the Original Panel, nor was the New Panel tasked simply to determine if the setting aside of two findings of misconduct ought to have any effect on the existing penalty. It was the broad question of penalty that was sent back to the New Panel for reconsideration.

[120] The Superintendent submits that the Appellant's interpretation is not supported by the clear wording of the Remedy Decision at paragraph 24 as follows:

> [24] In the rather unique circumstance of dealing with a bifurcated appeal, I am persuaded by the submissions of the Superintendent to the effect that the question of penalty should be sent back to a new panel of Council for reconsideration as a matter of procedural fairness. I so order. …

[121] In response to the Appellant's submission that a limited reconsideration was ordered at the request of the Superintendent, the Superintendent submits that it did not, at any time, request a limited reconsideration. Rather, the Superintendent's position was that if penalty was not fully considered by the Council, the Superintendent would have no meaningful appeal and would have had to make an argument *de novo* on penalty before the Tribunal. Without a penalty decision from the Council, the Superintendent would not be in the position of the appellant. It was not the Superintendent's position on appeal that was preserved, it was the Superintendent's ability to appeal at all that was preserved. This was the purpose in sending the matter to the New Panel for a decision on penalty, and the Tribunal in no way restricted the penalty available for consideration by the New Panel.

[122] In response to the Appellant's submission that the purpose of ordering a reconsideration was to preserve the Superintendent's "position on appeal", Council submits this characterization of the rationale is incorrect for the following reasons:

a. The Tribunal determined that it was important to preserve the Superintendent's right to a *level* of appeal. The Tribunal accepted the Superintendent's argument that if the Tribunal proceeded to consider the outstanding penalty appeal from the First Penalty Decision in the circumstances, the Superintendent would have been deprived of the benefit of a disciplinary committee decision in relation to which it could fairly consider whether to exercise its appeal rights under section 54(1)(d) of the *RESA*.

b. Further, the Tribunal accepted that the Superintendent's ability to make submissions as appellant would be potentially compromised if the matter of penalty was not sent back to a New Panel, as the Superintendent would be forced to make speculative submissions with respect to the reasonableness of the penalty decision.

[123] Council submits that if the Tribunal had remitted the matter back to the New Panel with an order specifying that the penalty in the First Penalty Decision could only be varied downwards, as argued for by the Appellant, the Superintendent would have been denied the opportunity to argue the merits of its position that the Appellant's penalty should involve licence cancellation. This result would have been contrary to the Tribunal's stated purpose of ensuring procedural fairness, as well as the parties statutory appeal rights.

[124] In response to the Appellant's submissions on paragraphs 16 and 17 of the Remedy Decision, Council submits that while the Tribunal noted its discretion to proceed to determine whether the First Penalty Decision was reasonable, it did not say that if the matter were sent to the New Panel for reconsideration, then the same issue would be before the New Panel.

[125] In response to the Appellant's submissions on paragraph 36 of the Remedy Decision, Council submits the phrase "a decision on penalty based on the varied findings can fairly be reached…" used in that paragraph simply means that the sanction would relate to the three findings of misconduct that were upheld. Nowhere in the Remedy Decision was it said that the New Panel was to consider how the varied finding affected the First Penalty Decision.

[126] In further response to the Appellant's submission that the New Panel was only to consider whether the one year suspension imposed in the First Penalty Decision should be varied downwards, Council submits that in order for this argument to succeed, there would have needed to first be an order from the Tribunal that the one year suspension was reasonable and appropriate as it related to the five findings of misconduct. Council points out that the Tribunal made no such finding as it had not "been provided with submissions from the parties or otherwise commenced consideration of the substance of the appeals from the Penalty Decision" (paragraph 20 of the Remedy Decision). Council adds that the Tribunal was not prepared to consider or make an order as to the reasonableness of penalty in the circumstances.

[127] Council relies on *Testa v WCB (BC),* 1989 CanLII 2727 (BCCA) ("*Testa*"), for the proposition that directions given under section 242.2(11) of the *FIA* can direct the *extent* of the reconsideration, however, the power to give directions does not include the power to direct the *result* of the reconsideration. Council submits that the directions given to the New Panel in the Remedy Decision in no way circumscribed the result of the reconsideration as submitted by the Appellant.

[128] The Superintendent adds that if the Appellant's interpretation of the Remedy Decision is correct, and the Tribunal restricted the New Panel's ability to fully consider the penalty options available to it under section 43(2) of the *RESA*, then the Tribunal would have fettered the discretion of the New Panel to decide the appropriate penalty. The Tribunal cannot dictate the outcome of a reconsideration

under section 242.2(11) of the *FIA.* In any event, as the Tribunal had not been provided with submissions or otherwise commenced consideration of the penalty appeals, it would have been premature for it to provide directions circumscribing the New Panel's discretionary authority. The Superintendent refers to the decision of the BCCA in *Chandler v British Columbia (Superintendent of Motor Vehicles),* 2018 BCCA 300, at para. 29, and the decision of the SCC in *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para. 52, in support of these principles.

[129] The Superintendent submits the Tribunal did not fetter the discretion of the New Panel on its reconsideration of penalty, and refers to paragraph 25 of the Remedy Decision where the Tribunal noted:

> [25] ..I am comforted by the fact that the subject matter of the appropriate penalty in light of the Liability Appeal Decision also falls squarely within Council's expertise. I have taken this expertise into account in deciding to send the question of penalty back to Council for reconsideration.

*Analysis*

[130] The resolution of this disagreement on interpretation is found in the language of the Remedy Decision. As submitted by the Appellant, it is simply a matter of the Tribunal interpreting its own order to determine the scope of the reconsideration it ordered the New Panel to conduct.

[131] I also agree with the Appellant's submission, based on *Bernard v Canada (Attorney General),* 2014 SCC 13, that when a decision maker is asked to interpret its own order there is a "common-sense assumption that [it] knew what it meant" (at para. 35). This Tribunal is well suited to interpret its order for reconsideration in the Remedy Decision and whether the New Panel was correct in its interpretation of that order.

[132] I start this analysis by reading paragraphs 24 and 25 of the Remedy Decision, wherein the order that the question of penalty be sent back to a new disciplinary panel of Council for reconsideration was made and the rationale for doing so was provided. The Tribunal held at paragraphs 24 and 25 as follows:

> [24] In the rather unique circumstance of dealing with a bifurcated appeal, I am persuaded by the submissions of the Superintendent to the effect that the question of penalty should be sent back to a new panel of Council for reconsideration as a matter of procedural fairness. I so order. The rationale for the bifurcation of the penalty appeals from the liability appeal would otherwise be frustrated. Likewise, if the Tribunal were to proceed to hear both appeals from the Penalty Decision, as suggested by Council, the ability of the Superintendent to make fulsome submissions as an appellant would be complicated and potentially compromised by being forced to engage in speculation when addressing the reasonableness of the Penalty Decision.
>
> [25] As submitted by the Superintendent in the appeal of the Liability Decision, Council is a licensing and regulatory body with a mandate to protect the public interest in relation to the conduct and integrity of its licensees by enforcing the licensing and licensee conduct requirements of the *RESA*. The Council's core business areas are education, licensing, and disciplinary and hearing processes.

> While the Tribunal clearly has the expertise and is in a position to decide penalty in this matter, I am comforted by the fact that the subject matter of the appropriate penalty in light of the Liability Appeal Decision also falls squarely within Council's expertise. I have taken this expertise into account in deciding to send the question of penalty back to Council for reconsideration.

[133] As the Superintendent points out, the wording used in paragraph 24 was clear. I find this was an order for a reconsideration of the matter of penalty by the New Panel under section 242.2(11) of the *FIA*. The reconsideration ordered was circumscribed only by the directions given to the New Panel in the Remedy Decision at para. 37, none of which limited the discretion of the New Panel to determine the appropriate penalty under section 43(2) of the *RESA.*

[134] The directions ordered by the Tribunal in the Remedy Decision provided that the reconsideration be conducted by written submissions on the record made up of the transcripts of testimony and submissions before the Original Panel, exhibits, and decisions of the Original Panel, plus the Liability Appeal Decision and the decision rejecting the Appellant's application to adduce new evidence. The outstanding appeals from the First Penalty Decision by the Appellant and the Superintendent were adjourned generally to avoid complications arising from multiple proceedings.

[135] Contrary to the Appellant's submissions, the order that the question of penalty be reconsidered was not to in effect grant the Superintendent's appeal from the First Penalty Order. The directions provided that both appeals were adjourned generally without being considered by the Tribunal. Both the Appellant and Council were afforded an opportunity to argue their position on penalty anew before the New Panel.

[136] I cannot accept the Appellant's argument that the wording used in paragraphs 16 and 17 of the Remedy Decision indicate that the New Panel was ordered to limit its reconsideration to a consideration of whether the reversal of the Original Panel's Liability Decision on two allegations impacted the reasonableness of the First Penalty Decision. In these two paragraphs, the Tribunal was considering Council's submissions that rather than ordering a reconsideration with directions, the Tribunal should proceed with both appeals of the First Penalty Decision in which each of the appellants would have a full right of reply to the other appellant's submissions. It was not addressing the nature of the reconsideration being considered under section 242.2(11) of the *FIA*.

[137] Just because the Tribunal accepted that it had the discretion to proceed to address the appeals from the Penalty Decision to determine whether the reversal of Original Panel's decisions as regards two allegations impacted the reasonableness of the First Penalty Decision, does not reasonably or logically define the task of the New Panel on its reconsideration. The Appellant's submission that it was simply a question of "who" should conduct a reasonableness review of the First Penalty Decision in light of the changes in liability lacks any support in the language of these paragraphs or elsewhere in the Remedy Decision.

[138] Likewise, the Appellant's reference to paragraph 36 of the Remedy Decision does nothing to advance his cause. Paragraph 36 addressed submissions of the

Superintendent and Council on proposed directions for the reconsideration. I agree with Council's submission that the phrase "a decision on penalty based on the varied findings can fairly be reached…" used in that paragraph, simply means that the sanction would relate to the three findings of misconduct that were upheld. This phrase, as used in its context, does not support the Appellant's interpretation that it evidenced the Tribunal's understanding of a narrow reconsideration of the discrete issue of whether the successful appeal on two allegations affected the First Penalty Decision.

[139] I also reject the Appellant's submission that a limited reconsideration was ordered at the request of the Superintendent – so as to preserve the Superintendent's position on appeal. The Superintendent's position was that if penalty was not fully considered by the Council, the Superintendent would have no meaningful appeal and would have had to make an argument *de novo* on penalty before the Tribunal. Without a penalty decision from the Council, the Superintendent would not be in the position of appellant. It was not the Superintendent's position on appeal that was preserved, it was the Superintendent's ability to appeal at all that was preserved. As characterized by Council, it was the Superintendent's right to a *level* of appeal that was preserved. This was the purpose in sending the matter to the New Panel for a decision on penalty, and the Tribunal did not restrict the penalty available for consideration by the New Panel.

[140] Contrary to the Appellant's interpretation, I find no language in the Remedy Decision directing the New Panel to limit its reconsideration to a determination of whether the setting aside of two findings of misconduct ought to have any effect on the First Penalty Decision.

[141] I agree with Council that in ordering reconsideration of the question of penalty the Remedy Decision does not indicate that this reconsideration was for the purpose of the Council imposing a lesser penalty in light of the Tribunal's varied findings on liability in the Liability Appeal Decision. I also agree with the Superintendent that the Remedy Decision did not restrict the authority of the New Panel to impose a more severe penalty than ordered by the Original Panel.

[142] I further agree with Council that in order for there to be any foundation for the Appellant's interpretation, there would have needed to first be a finding by the Tribunal that the one year suspension was reasonable and appropriate as it related to the five findings of misconduct. Council correctly points out that the Tribunal made no such finding.

[143] I find that the Tribunal did not fetter the discretion of the New Panel on its reconsideration of penalty. In fact, in paragraph 25 of the Remedy Decision the Tribunal set out its confidence in Council's expertise that qualified it to reconsider the question of penalty in its entirety.

[144] In result, I find that the Tribunal in the Remedy Decision did not order a limited reconsideration of the impact of the varied findings on the First Penalty Decision, as submitted by the Appellant. It was the broad question of penalty that the Tribunal sent back to the New Panel for reconsideration under section 242.2(11) of the *FIA*.

*The general nature of a reconsideration under section 242.2(11) of the FIA*

[145] Given that I have just found that it was the broad question of penalty that the Tribunal sent back to the New Panel for reconsideration, the Appellant's submission that the New Panel acted "beyond" the Tribunal's order in the Remedy Decision raises the question of the general nature of a reconsideration under section 242.2(11) of the *FIA*.

[146] How the parties have described this issue in their submissions demonstrates their fundamental disagreement over the nature of a reconsideration ordered under section 242.2(11) of the *FIA*. The Appellant imbeds in his description of this issue the proposition that the New Panel was to reconsider the reasonableness of the First Penalty Decision in light of the reduction in the number of contraventions found in the Liability Appeal Decision. On the other hand, Council describes this issue as addressing whether the New Panel exceeded its authority or jurisdiction by reconsidering the matter of penalty under section 43(2) of the *RESA* anew.

[147] In the "Nature of a Reconsideration" section of the Reconsideration Decision, the New Panel held in part as follows in relation to its understanding of its task when conducting the reconsideration ordered in the Remedy Decision (at paras. 20 and 21):

- The Tribunal had ordered a "reconsideration" of penalty by a new panel, pursuant to s.242.2(11) of the *FIA.*
- As a New Panel, while they must defer to findings of the Original Panel in the Liability Decision (subject to the Liability Appeal Decision), the New Panel is not bound to defer to any findings or decisions of the Original Panel in their Penalty Decision.
- Reliance was placed on the Tribunal decision in *The Superintendent of Real Estate v Real Estate Council of British Columbia and Kenneth Spong,* FST 05-007 ("*Spong #1*"), where the Tribunal had remitted a sanction matter back to a hearing committee for reconsideration, and it was held (at page 15) "[i]n law, remitting a matter 'for reconsideration' means the decision-maker may reach the same or a different conclusion."
- The New Panel is responsible for weighing any facts found by the Original Panel relevant to sanctions and finding and weighing any additional facts relevant to sanctions, based on the record; and ordering appropriate sanctions under *RESA* section 43(2), in light of fresh submissions that were not before the Original Panel.

[148] In the Overview section of the "Reasons on Sanction", the New Panel further set out its understanding of its task on reconsideration as follows (at paras. 39, 40 and 44):

> [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 as they propose:
>
> …
>
> [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.

[149] The New Panel conducted its reconsideration of penalty anew, leading to the imposition of the Penalty Order on the Appellant that was more severe than that ordered in the First Penalty Decision.

*Appellant's Submissions*

[150] The Appellant submits that having made the First Penalty Decision, the Council could not reconsider this decision merely because it decides it was unreasonable. The Appellant refers to the common law power to reopen and submits that it merely allows a tribunal to complete its statutory task if it has been left unfinished for some reason. It does not allow a tribunal to correct errors made within its jurisdiction. Rather, absent any statutory or common law power to correct an error, a tribunal is *functus officio* after it has completed its statutorily prescribed task. In support of this submission the Appellant refers to the majority decision of the BC Court of Appeal in *Fraser Health Authority v Workers' Compensation Appeal Tribunal*, 2014 BCCA 499 ("*Fraser Health*").

[151] In the present case, the Appellant submits that Council completed its statutory task by issuing the First Penalty Decision. Based on the Appellant's interpretation of the Remedy Decision, the Appellant submits that the New Panel was incorrect in how it interpreted its task in the Reconsideration Decision.

[152] The Appellant submits that the New Panel's statement that "[b]oth parties view this reconsideration as a *de novo* decision respecting sanctions", is an inaccurate description of the reconsideration proceedings. In support, the Appellant refers to authorities setting out the legal meaning of the term *de novo* when used to describe an appeal or hearing arising from an earlier decision. The Appellant acknowledges that it was counsel, including his previous legal counsel, that described the process that way. Nevertheless, he submits the use of the term was inaccurate to describe the process followed by the New Panel.

[153] The Appellant submits that an order for a reconsideration is not an order for a *de novo* hearing, relying on *Landau v Ontario*, 2012 ONSC 6926 ("*Landau*"), where it was held that: "[a] reconsideration is not an appeal or a hearing *de novo*" (at para. 17). The Appellant further relies on *Taucar v Human Rights Tribunal of Ontario*, 2017 ONSC 2604, ("*Taucar*"), and *Kostiuk v Workers' Compensation Appeal Tribunal*, 2019 BCSC 363 ("*Kostiuk*"), in support of this proposition.

[154] However, the Appellant also submits that in fact, the New Panel did not engage in a *de novo* process. The New Panel considered the Original Panel's findings as referenced at paragraphs 22, 23 and 43 of the Reconsideration Decision.

[155] The Appellant then submits that it is irrelevant to the issue of jurisdiction that the parties may have consented to a broader jurisdiction as it is a fundamental and well-known principle of law that "consent cannot confer jurisdiction". In support the Appellant cites *Re Hueper and Board of Naturopathic Physicians*, (1976), 66 DLR (3d) 727, (BCCA) ("*Heuper*").

[156] In conclusion, the Appellant submits that the Reconsideration Decision must therefore be set aside.

*Council's Submissions*

[157] Council submits that the reconsideration by the New Panel was not a "reopening" as had occurred on the facts of *Fraser Health*. Rather, it was a reconsideration ordered pursuant to section 242.2(11) of the *FIA*. The New Panel was not *functus officio* as submitted by the Appellant. Council refers further to *Fraser Health,* where the Court cited a background paper to the *ATA* which provided that a statutory reconsideration was a specific exception to *functus officio* as follows (at para. 154):

> …Subject to certain common law exceptions, a statutory decision maker does not have power to reconsider its decision unless that power is granted by statute.

[158] In response to the Appellant's submissions on the New Panel's reference to the term *de novo*, Council submits that nothing turns on the use of this term. It was not being used as a defined term with a specific legal meaning, rather, it was merely used to mean a "fresh look" with respect to the reconsideration.

[159] As to the nature of a "reconsideration" under section 242.2(11) of the *FIA,* Council refers to the New Panel's reference to *Spong #1* (referenced above), and the finding that "[i]n law, remitting a matter 'for reconsideration' means the decision-maker may reach the same or a different conclusion" (*Spong* #1 at page 15).

[160] Council submits that more recently, *Spong #1* was followed in *Lin v Real Estate Council of British Columbia and Superintendent of Real Estate,* (Decision No. 2016-RSA-002(d) ("*Lin*"), wherein the Tribunal was dealing with an appeal of a licence cancellation order made against the appellant *ex parte* by a discipline committee of Council under provisions of the *RESA.* The Tribunal, having found the cancellation order to have been made without giving proper reasons, ordered a reconsideration by Council with directions under section 242.2(11) of the *FIA.* At para. 148 the Tribunal held:

> [148] I have, however, reluctantly decided that the proper course is nonetheless to remit this matter to the discipline committee for reconsideration on penalty and the giving of proper reasons. I am not prepared to remit the matter merely for the giving of reasons for the decision the Committee has already made, as Council proposes, but rather will do so for a reconsideration entirely of the issue of penalty, as occurred in *Wong* and *Spong, supra,* and as I think is consistent

> with the very word "reconsideration" as used in subsection 242.2(11) set out above. The ultimate Order may or may not be for cancellation of Mr. Lin's licence but regardless it is to be preceded by a genuine reconsideration, on directions that I will set out later in these reasons.

[161] Council submits that the New Panel's interpretation of the scope of the reconsideration ordered in the Remedy Decision is consistent with appellate authority. For example, in *McKee v College of Psychologists (British Columbia),* 1994 CanLII 1404 (BCCA) ("*McKee*"), the Court remitted the matter of penalty for the respondent psychologist back to the Board of the College of Psychologists. In doing so, the Court noted that it was open to the Board on a reconsideration of penalty to impose *any* penalty contemplated under the governing legislation, and the Board was not bound by its previous order (at para. 16).

[162] Likewise, here it was open to the New Panel to impose *any* discipline contemplated by section 43(2) of the *RESA,* including the cancellation of the Appellant's licence, and it was not bound by the First Penalty Decision. Accordingly, the New Panel had authority to impose the Penalty Order on the Appellant. There is no merit to this ground of appeal.

*Analysis*

[163] I will first consider the meaning of the word "reconsideration" as used in section 242.2(11) of the *FIA*.

[164] The *FIA* does not provide a definition of the word "reconsideration" as used in section 242.2(11). There are also no rules of procedure or practice directions of either Council or the Tribunal addressing the scope of a reconsideration ordered under section 242.2(11) of the *FIA.*

[165] As a matter of statutory interpretation, the usual and ordinary meaning of the word in question as used in the context of the legislation is the appropriate starting point.

[166] The online version of the Cambridge dictionary defines "reconsideration" as "the act of thinking again about a decision or opinion and deciding if you want to change it"[5].

[167] The provisions of section 242.2(11) of the *FIA* are remedial in nature, and provide the Tribunal member hearing an appeal with broad discretion in crafting a remedy. Accordingly, "reconsideration" should be given a broad and liberal interpretation consistent with that remedial purpose, particularly given the public protection mandate of both the *FIA* and the *RESA*.

[168] Giving the word "reconsideration" as used in section 242.2(11) of the *FIA* a broad and liberal interpretation, I find it means the "act of thinking again about a decision or opinion and deciding if you want to change it" being the question or issue identified by the Tribunal for reconsideration. I also find that contrary to the submissions of the Appellant, subject only to any directions given with the

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[5] https://dictionary.cambridge.org/dictionary/english/reconsideration - as retrieved on July 21, 2021.

reconsideration order, the reconsideration can indeed be a wholesale "do-over" of the matter referred for reconsideration.

[169] I find support for this interpretation of the nature of a reconsideration ordered under section 242.2(11) of the *FIA* in the authorities relied upon by Council. I agree with the Tribunal decisions in *Spong #1* as adopted in *Lin,* specifically addressing the nature of a reconsideration of penalty ordered under section 242.2(11) of the *FIA.* In law, remitting a matter "for reconsideration" under section 242.2(11) of the *FIA* means the decision-maker may reach the same or a different conclusion on the matter remitted for reconsideration. *Lin* found support for this interpretation as it is consistent with the very word "reconsideration" as used in subsection 242.2(11); I make the same finding here. The decision in *McKee* (at para. 16), while not specifically addressing section 242.2(11) of the *FIA,* is consistent with *Spong #1* and *Lin*.

[170] The Appellant submits that a reconsideration must be the same as would be a penalty appeal applying a reasonableness standard of review by the Tribunal of the First Penalty Decision taking into account the two fewer findings of contravention found in the Liability Appeal Decision. This submission evidences a fundamental misunderstanding by the Appellant of the nature of a reconsideration as well as the statutory mandates of Council and the Tribunal, and I reject it.

[171] As observed by the Tribunal in paragraph 25 of the Remedy Decision, Council is a licensing and regulatory body with a mandate to protect the public interest in relation to the conduct and integrity of its licensees by enforcing the licensing and licensee conduct requirements of the *RESA*. The Council's core business areas are education, licensing, and disciplinary and hearing processes.

[172] Part 4, Division 2 of the *RESA* sets out the statutory mandate of a discipline committee such as the New Panel in its conduct of discipline proceedings such as the one in question here. Section 43(2) of the *RESA* lists the discipline orders or penalties available for consideration by a discipline committee if a contravention by a licensee has been proven. The statutory mandate of the New Panel, as set out in section 43 of the *RESA,* does not include the authority to conduct a penalty appeal based on a reasonableness standard of review of its own decision in place of the Tribunal. While section 43(5) of the *RESA* provides that: "[a] discipline committee may, by order, on the application of or with the consent of the licensee subject to the order, vary or rescind an order made under this section.", this subsection, which contemplates a limited re-opening by a discipline committee, has no application under the circumstances being addressed in this appeal.

[173] If such a penalty appeal based on a reasonableness standard of review were to be done it would be the jurisdictional responsibility of the Tribunal as one of the remedies available to it on an appeal under section 242.2(11) of the *FIA* being to either "confirm, reverse or vary a decision, or send the matter back for reconsideration, with or without directions." The Tribunal cannot delegate its statutory authority to Council to "confirm, reverse or vary a decision" by ordering a reconsideration of a matter with directions.

[174] The Appellant submits that the effect of ordering a reconsideration of the question of penalty amounted, in essence, to the granting of the Superintendent's

appeal of the First Penalty Decision without that decision having been varied or rescinded by the Tribunal. This submission lacks any factual or legal foundation. In fact, one of the directions to which the reconsideration was subject was that the outstanding appeals from the First Penalty Decision by the Appellant and the Superintendent were adjourned generally, to avoid complications arising from multiple proceedings.

[175] I agree with Council that *Fraser Health,* relied upon by the Appellant, is distinguishable on the facts and law from the issue before the Tribunal on this appeal. In *Fraser Health* the tribunal in question (WCAT) reopened its original decision to determine whether it was patently unreasonable purporting to rely on the common law or a particular provision of its governing legislation in doing so. A preliminary question addressed by the BCCA was whether the WCAT had jurisdiction to do so. The BCCA held at para. 163 that the WCAT reconsideration was a nullity because it was made without authority. Here, the New Panel was ordered by the Tribunal acting under its appellate authority set out in section 242.2(11) of the *FIA* to reconsider penalty with directions. Accordingly, Council was not *functus officio* when the Tribunal ordered the reconsideration. Council had not yet completed "what it was mandated to do" as referenced at para. 160 of *Fraser Health.* I also agree with Council that a statutory reconsideration is a specific exception to *functus officio* based on the reference at para. 154 of *Fraser Health* that a statutory decision maker does not have power to reconsider its decision *unless that power is granted by statute*.

[176] On the use of the term "*de novo"* in paragraph 21 of the Reconsideration Decision, I agree with the Appellant that the formal legal term does not accurately describe the nature of the reconsideration conducted by the New Panel. I also agree with the Appellant's submission that in fact the New Panel did not engage in a *de novo* process. Since the Appellant acknowledges that the New Panel in fact considered the Original Panel's findings that formed part of the record before the New Panel, his references to *Landau, Taucar,* and *Kostiuk* are irrelevant to any live issue on this appeal.

[177] However, and in any event, I agree with Council that nothing turns on the New Panel's reference to the term *de novo.* The term was not being used as a defined term with a specific legal meaning; rather, it was merely used by counsel for both parties to mean a "fresh look" with respect to the reconsideration.

[178] Based on the forgoing analysis, I find that the New Panel correctly described the nature and scope of its jurisdictional mandate on its reconsideration of the question of penalty as ordered in the Remedy Decision.

[179] I further find that the New Panel was correct in proceeding to reconsider the matter of penalty in its entirety. It was open to the New Panel on its reconsideration of the question of penalty to impose any penalty contemplated under section 43(2) of the *RESA* and the New Panel was not bound by the First Penalty Decision.

[180] The New Panel had jurisdiction to make the Penalty Order. This ground of appeal is dismissed.

*Issue Estoppel and Abuse of Process*

*Appellant's Submissions*

[181] The Appellant submits that it is a fundamental tenant of the law that a decision will stand unless and until it is properly set aside. The Appellant submits that the First Penalty Decision could have been set aside by the Tribunal on appeal after applying the appropriate standard of review, but it was not. If the Reconsideration Decision is allowed to stand, the Superintendent would have accomplished a circumvention of that process as the effect of the New Panel's *ultra vires* action is the setting aside of the First Penalty Decision despite it never being labeled unreasonable or unfair by the Tribunal. Accordingly, the decision of the New Panel is fundamentally flawed as it offends the principle of finality that underlies the doctrines of estoppel and abuse of process.

[182] In support the Appellant relies on *Danyluk v Ainsworth Technologies Inc.,* 2001 SCC 44 ("*Danyluk*"), for the proposition that the law seeks finality to litigation and that the doctrines of abuse of process and issue estoppel have developed to accomplish that purpose. The Appellant refers to *Danyluk,* wherein the elements of issue estoppel are set out as follows (at para 25):

1. that the same question has been decided;
2. that the judicial decision which is said to create the estoppel was final; and
3. that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[183] The Appellant submits all three of the above elements are present in the Reconsideration Decision. The Appellant submits that apart from the narrow question of whether the sanction should change considering the reversal on two allegations of misconduct, the question of the appropriate sanction for the conduct at issue had been tried. He adds that the First Penalty Decision was final and had not been set aside on appeal.

[184] The Appellant submits the Reconsideration Decision should be set aside for running afoul of the principle of finality which demands that the First Penalty Decision be accepted by the parties (subject to any variance needed to reflect the diminished culpability of the Appellant).

*Council's Submissions*

[185] Council and the Superintendent submit the doctrines of issue estoppel and abuse of process have no application on the facts or law relevant to this appeal.

[186] Council submits that the purpose of issue estoppel is to prevent a collateral attack or re-litigation of a decided matter. The second element of issue estoppel identified in *Danyluk* is that the judicial decision which is said to create the estoppel is final. Council relies on *British Columbia (Workers' Compensation Board) v Figliola,* 2011 SCC 52 ("*Figliola*") for the proposition that "final" in this context means "all available means of review or appeal have been exhausted" (at para. 51).

[187] Council observes that in this case both the Appellant and the Superintendent had appealed the First Penalty Decision and that a direction attached to the reconsideration order made in the Remedy Decision was that both of these appeals be adjourned generally to avoid complications from multiple proceedings. In these circumstances, the doctrines of issue estoppel and abuse of process have no application.

*Analysis*

[188] The First Penalty Decision was subject to outstanding appeals by both the Appellant and the Superintendent. In the Remedy Decision both of these appeals were directed to be adjourned generally to avoid complications from multiple proceedings. I agree with Council that in these circumstances the second element of issue estoppel identified in *Danyluk,* being that the judicial decision which is said to create the estoppel is final, has not been met. Based on *Figliola* I find the First Penalty Decision was not final and I find that the doctrines of issue estoppel and abuse of process have no application.

[189] Instead of proceeding with these appeals from the First Penalty Decision, the Tribunal determined to order the reconsideration of the question of penalty anew with directions. I have already held that the New Panel acted within its jurisdiction in doing so. The Appellant's characterization of the Reconsideration Decision as being *ultra vires* is incorrect. The Appellant is also incorrect in characterizing the Reconsideration Decision as "setting aside" the First Penalty Decision. The practical effect on the First Penalty Decision of the Penalty Order arising from the New Panel's reconsideration of the question of penalty is that it has been superseded.

[190] This ground of appeal is dismissed.

**Issue d. Was the Reconsideration Decision and resulting Penalty Order unreasonable?**

[191] As decided above, I will apply a reasonableness standard of review in relation to the Reconsideration Decision and resulting Penalty Order. In doing so I will adopt the approach set out in *TruNorth,* and will be guided by *Vavilov* as set out above.

*Appellant's Submissions*

[192] The grounds of appeal set out by the Appellant in his Notice of Appeal are as follows:

1. The penalty is unreasonable and arbitrary. The [New] Panel ordered cancellation of the Appellant's license with a five-year prohibition against application for re-licensing, a penalty far more severe than the one-year suspension ordered by the first Disciplinary Panel, despite there being fewer findings of liability against the Appellant. The [New] Panel does not address the increased severity of the sanctions, and the assessment of the penalty is arbitrary and disproportionately harsh, thereby rendering the decision unreasonable.

2. The [New] Panel erred in law and in principle by failing to properly consider and apply the sanction principles and guidelines, including but not limited to the principle of proportionality.

[193] In his written submissions the Appellant starts by submitting:

> [H]aving determined that the Tribunal's varied findings did not affect the reasonableness of the First Penalty Decision and that the one-year suspension decided by the [Original Panel] fell within the range of possible, acceptable outcomes it was arbitrary and unreasonable for the [New Panel] to overturn the suspension in favor of a license cancellation that had been previously considered, but rejected, by the [Original Panel].

[194] Later in his submissions the Appellant references paragraph 89 of the Reconsideration Decision in apparent support for this submission where the New Panel states in part:

> [89] The First Committee properly reasoned that "cancellation of [the Licensee's] license 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.

[195] The Appellant maintains his characterization of the reconsideration ordered in the Remedy Decision as a reconsideration of the First Penalty Decision, and how the setting aside of two of the contraventions impacted the reasonableness of the First Penalty Decision. On this premise, and also based on the Appellant's above noted submission that the New Panel had determined that the Tribunal's varied findings on liability did not affect the reasonableness of the First Penalty Decision, the Appellant then submits that the New Panel exceeded its authority by proceeding to re-examine the First Penalty Decision in its entirety. Accordingly, the Appellant submits, this led to the arbitrary and unreasonable result of an increased penalty based on decreased liability.

[196] The Appellant then refers to standard of review authorities, including *Vavilov,* and submits that the unique context of this appeal must be taken into account in assessing the deference to be accorded to both the Original Panel and the New Panel, as well as the reasonableness of the Reconsideration Decision as a whole.

[197] The Appellant refers to the fact that the Original Panel considered and rejected license cancellation as a penalty based on the then five proven allegations of misconduct before settling on a suspension of one year.

[198] The Appellant's submissions on his deference point continue by comparing the First Penalty Decision to the Reconsideration Decision. The Original Panel heard live witnesses and had the benefit of a day-long oral hearing on sanction. The New Panel did not. The Appellant submits that in result the Tribunal should give more deference to the findings and assessments of the Original Panel over those of the New Panel, citing in support *Hensel v registrar of Mortgage Brokers,* FST Decision No. 2016-MBA-001(a) ("*Hensel*") at para. 17.

[199] The Appellant observes that both the Original Panel and the New Panel concluded that cancellation fell within the range of an appropriate penalty and that the New Panel did not dispute that the one-year suspension imposed by the Original Panel also fell within the range of the possible, acceptable outcomes. The Appellant then refers to a portion of the Reconsideration Decision where the New Panel was considering sanction principles including proportionality and held in part (at para. 73):

> [73] …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.

The Appellant then submits that the New Panel failed to follow this pronouncement where it held (at para. 89):

> [89] …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.

[200] The Appellant concludes his submissions on the reasonableness of the Penalty Order by submitting that the New Panel "usurped" the Original Panel's discretion and its First Penalty Decision entirely. Having recognized that the one-year suspension fell within the range of possible, acceptable outcomes, it was arbitrary and unreasonable to overturn the suspension.

*Submissions of Council and the Superintendent*

[201] Council commences its submissions in response by stating that the Appellant's position on this issue is premised on the incorrect proposition that the New Panel had a limited mandate to consider whether the First Penalty Decision was reasonable in light of the reduced number of proven contraventions. Council repeats that the New Panel was entitled to reach its own conclusion on penalty and was not limited to a review of the First Penalty Decision. The task of the New Panel was to reconsider penalty on the record as ordered in the Remedy Decision.

[202] On the Appellant's deference argument, Council points to the fact that the *viva voce* evidence heard by the Original Panel related to the liability stage of the disciplinary hearing, not the penalty stage. Thus, the presence of *viva voce* evidence does not weigh into the analysis on penalty. Council also submits that in *Hensel,* the Tribunal noted that its discussion of deference related to an appeal that took issue with evidentiary findings and related assessments. As *Hensel* did not involve a penalty appeal the Tribunal specifically noted that it would leave the question of deference owed by the Tribunal to first instance decision-makers on matters of penalty to another day.

[203] Council submits that while there were two fewer findings of misconduct before the New Panel than before the Original Panel, the underlying findings with respect to one of the misconduct allegations set aside were not disturbed and the

New Panel viewed the dismissed misconduct findings as being inconsequential to the main fraudulent misconduct.

[204] The two findings of misconduct overturned in the Liability Appeal Decision related to a term in a contractual document that the seller had been advised to seek independent advice (NODH para. 1.d.) and to the Appellant's failure to disclose material information; being that the Appellant failed to disclose to his client at any material time that he expected to receive or did receive one half of the selling agent's commission (NODH para.1.f.).

[205] The Original Panel held that the Appellant did not advise HG that the selling agent TD had agreed to split one half of her commission with the Appellant. The Tribunal held this finding of fact to be reasonable and that there was a proper evidentiary foundation to consider whether the proven facts constituted a breach of section 5-11(2) of the Council Rules. However, the Tribunal held that the Original Panel's very brief reasons for its finding of liability were not adequate. Thus, the finding that the Appellant had not been forthright with his client on this issue remained.

[206] Council submits that the New Panel recognized that the two findings that were over-turned in the Liability Appeal Decision were inconsequential to the main liability finding being that the Appellant had defrauded his client. In particular, the New Panel noted that the three findings of misconduct that remained were aspects of a single transaction involving the most serious misconduct at the heart of the case as follows (at paras. 45-46):

> [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 pretense the payment was for the Buyers' agent, and not the Licensee. <u>The Licensee deceived his own client to obtain a substantial financial benefit for himself, at his client's expense.</u> 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.

[Emphasis added]

[207] Council notes that the New Panel held that item #2 (NODH para. 1(b) (deceptive dealing)) *alone* warranted cancellation of the Appellant's license.

[208] Council submits that the Appellant's submissions fail to address the substance of the Reconsideration Decision in light of the relevant issues on a reasonableness review being whether the Reconsideration Decision "as a whole is transparent, intelligible and justified" as set out in *Vavilov*.

[209] Council then proceeds to review and address the reasonableness of the Reconsideration Decision guided by the elements identified by the SCC in *Vavilov* as generally being relevant in evaluating whether a given decision is reasonable. These elements, depending on the circumstances, include the governing statutory scheme, relevant law, the evidence, the submissions of the parties, relevant decisions of Council and the potential impact of the decision on the individual to whom it applies.

[210] Council's submissions review and comment extensively on the specific analysis and findings made by the New Panel in the Reconsideration Decision bearing upon a reasonableness analysis of the Penalty Order under headings:

a. The governing statutory scheme
b. The evidence and the facts
c. The submissions of the parties and past decisions of the Council

[211] Council submits that when a reasonableness review analysis is undertaken, it is clear that the Reconsideration Decision as a whole is transparent, intelligible and justified. Accordingly, this Tribunal on appeal must defer to the Reconsideration Decision and confirm the Penalty Order.

[212] Likewise, the Superintendent submits that on a reasonableness review, and taking the colour from the context, the Reconsideration Decision and resulting Penalty Order was reasonable and should not be interfered with.

*Analysis*

[213] Before embarking on my analysis, I note that the *RESA* is remedial in nature, and that its primary objective is the protection of the public. I will consider the reasonableness of the Penalty Order in that light.

[214] I agree with Council that the Appellant's position on this issue is premised on the incorrect assumption that the New Panel had a limited mandate to consider whether the First Penalty Decision was reasonable in light of fewer findings of contravention. As I have already held, that is not what the New Panel was ordered to do in the Remedy Decision.

[215] It was the broad question of penalty that was sent back to the New Panel for reconsideration. The Remedy Decision did not in any way restrict the authority of the New Panel to impose a more severe penalty than ordered by the Original Panel.

[216] Contrary to the Appellant's submissions, I find that the New Panel did not conduct a reasonableness review of the First Penalty Decision or determine that the Tribunal's varied findings did not affect the reasonableness of the First Penalty Decision. The following observation of the New Panel does not support the Appellant's submissions in this regard (at para 89):

> [89] …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…

[217] I also reject the Appellant's submission to the effect that in assessing the reasonableness of the Reconsideration Decision the Tribunal should grant more deference to the Original Panel or the First Penalty Decision than to the New Panel. On this appeal the Tribunal is conducting a reasonableness assessment of the Reconsideration Decision and the Penalty Order, not the First Penalty Decision. This appeal is not a contest between the Penalty Order and the First Penalty Decision. Nor did the New Panel owe deference to the Original Panel in relation to its First Penalty Decision. The New Panel was entitled to reach its own conclusion with respect to the appropriate penalty.

[218] I agree with Council where it points to the fact that the *viva voce* evidence heard by the Original Panel related to the liability stage of the disciplinary hearing, not the penalty stage. Thus, the presence of *viva voce* evidence does not factually support the Appellant's deference argument. I also agree with Council that *Hensel* does not support the Appellant's position for the reasons stated by Council.

[219] Contrary to the Appellant's submission, the fact that the Original Panel considered and rejected license cancellation as a penalty based on the then five proven allegations of misconduct before settling on a suspension of one year, does not make the New Panel's imposition of license cancellation as part of its Penalty Order on two fewer findings of misconduct unreasonable.

[220] In any event, I find that the New Panel reasonably found that the two findings that were overturned in the Liability Appeal Decision were inconsequential to the main liability finding being that the Appellant had defrauded his client. In particular, the New Panel reasonably noted that the three findings of misconduct that remained were aspects of a single transaction involving the most serious misconduct at the heart of the case.

[221] Despite the Appellant's claims to the contrary, the New Panel did consider and apply the sanction principles, including proportionality, and held (at para. 73):

> [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.

[222] The New Panel's finding that a lesser remedy would not sufficiently denounce the Appellant's conduct and safeguard the public does not constitute a reasonableness assessment of the First Penalty Decision. Nor did the New Panel "usurp" or "overturn" the Original Panel's discretion and its First Penalty Decision as submitted by the Appellant.

[223] A review of the substance of the Reconsideration Decision in light of the issues on a reasonableness review is called for. As was held by the Tribunal in *TruNorth,* when conducting reasonableness review the Tribunal should focus on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome.

[224] The Appellant focuses his submissions on his comparison between the First Penalty Decision and the Penalty Order. The Appellant does not address whether the decision actually made by the New Panel, including both its reasoning process and the outcome was reasonable, other than by asserting that since the Penalty Order was more severe than the First Penalty Decision with fewer findings of misconduct, it must therefore be arbitrary and unreasonable.

[225] On the other hand, Council has addressed whether the Reconsideration Decision "as a whole is transparent, intelligible and justified"*.*

[226] After summarizing the previous decisions in the proceedings, the New Panel referenced the statutory authority for discipline penalties for professional misconduct under section 43 of the *RESA,* and for the recovery of enforcement expenses under section 44(1) of the *RESA*.

[227] The sanctions available for the New Panel's consideration included reprimand, suspension of license, cancellation of license, imposition of restrictions or conditions on license, coursework, prohibition from applying for a license for a specified period of time, payment of a disciplinary penalty, and payment of enforcement expenses. I find it is clear that the New Panel was authorized by its governing statute to impose the Penalty Order it did.

[228] The New Panel then set out the relevant sanction principles from the *Sanction Guidelines* published by Council ("Guidelines") that set out the principles that disciplinary committees will generally follow when deciding on penalties.

[229] After addressing the nature of a reconsideration, the New Panel extensively reviewed the evidence and findings relevant to its reconsideration of the question of penalty.

[230] The New Panel carefully considered mitigating and aggravating factors listed in the Guidelines including:

a. The Appellant's age and experience.
b. The Appellant's disciplinary history.
c. The nature and gravity of the Appellant's misconduct.
d. The extent of harm to his client and others.
e. Mitigating conduct prior to or during the investigation.
f. The Appellant's attempts to conceal his misconduct.

g. The effectiveness of corrective, preventative, or punitive sanctions. and

h. The impact of criminal or other sanctions or penalties.

[231] The New Panel agreed with the Original Panel's assessment that the Appellant's misconduct met the elements of civil fraud. Moreover, it concluded that the Appellant's misconduct constituted both deceptive dealing and dishonest conduct and it was not persuaded that the Appellant understood the severity of his actions or that he was remorseful.

[232] The New Panel found that the Appellant's attempt to defraud his client involved issues of public safety and public interest. The New Panel held (at para 62):

> [62]…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.

[233] The New Panel found that the fact that the Appellant gave up his claim to the $75,000 was "too little and too late" in terms of a factor bearing on sanctions. The New Panel agreed with the Original Panel that the Appellant could not undo the fraud by renouncing his claim to the bonus more than three years after the events.

[234] The New Panel found that the Appellant's conduct inherently involved an attempt to conceal that he would be benefitting from the bonus payment.

[235] While the New Panel accepted that negative public reaction to a licensee defrauding a client *may* result in a degree of specific deterrence, the New Panel held it must ensure that the sanctions imposed achieve the purposes served by the sanction regime.

[236] I find that it is evident that the New Panel considered the statutory scheme, Guidelines, and the Appellant's particular circumstances in a thorough and thoughtful manner.

[237] The New Panel considered the relevant case law relied upon by both the Appellant and Council.

[238] The Appellant referred to several Council and Tribunal decisions involving fraud to support his position that the First Penalty Decision was too harsh and that he should suffer a one month suspension at most. The New Panel carefully reviewed each of these authorities and distinguished them on the facts. The New Panel found that the fraudulent conduct of the Appellant was far more serious than the conduct of the licensee's in the decisions relied upon by the Appellant.

[239] The New Panel considered and distinguished the decision in *Davis v British Columbia (Securities Commission)* 2018 BCCA 149 ("*Davis*"), which the Appellant argued stood for the proposition that cancellation of licensure for one instance of fraud was disproportionate and unlawful. The New Panel fully considered and

disagreed with the Appellant's characterization of *Davis* or its application on the facts.

[240] Council's position before the New Panel was that the Appellant's license should be cancelled. The New Panel considered and referred to a number of the authorities relied upon by Council where cancellation of license was found to be the appropriate sanction.

[241] I find that the New Panel carefully analyzed the prior decisions put before it involving similar misconduct. The New Panel clearly set out why cancellation was justified with respect to the nature of the Appellant's underlying misconduct. From my review of the decisions before the New Panel, I find the Penalty Order imposed to be consistent with those prior decisions on similar facts.

[242] In setting out its decision on sanctions, the New Panel referenced the Guidelines that list the factors that may specifically support cancellation. Relying on *Parsons v Real Estate Council of British Columbia,* Tribunal Decision No. 2015-RSA-002(d), the New Panel held that cancellation is reserved for cases of serious misconduct, but it is not reserved for misconduct at or near the extreme of the severity scale, given that the individual to whom it applies may apply for relicensing again at a defined time in the future.

[243] I find that the New Panel clearly articulated its reasons for imposing license cancellation as part of the Penalty Order as follows (at paras. 88-89):

> [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] license 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 [Allegation 1.a] and #2 [Allegation 1.b] 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 license 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. …

[244] Nothing in the issues raised by the Appellant or his submissions on this appeal challenge or diminish the serious nature of his proven misconduct which was considered by the New Panel.

[245] I find that the Reconsideration Decision as a whole is transparent, intelligible and justified. I also find that license cancellation as ordered in the Penalty Order is justified both with respect to the types of penalties prescribed in section 43(2) of the *RESA,* and with respect to the nature of the Appellant's underlying misconduct.

[246] As pointed out earlier in this decision, I am to be guided by *Vavilov* on the proper application of the reasonableness standard on this appeal. In assessing the reasonableness of the Reconsideration Decision and resulting Penalty Order taking their colour from the context, I have considered whether the penalty – including both the rationale given for the penalty imposed as well as the penalty to which it led – was unreasonable. On that standard, I cannot find the Reconsideration Decision and resulting Penalty Order to be unreasonable.

[247] This ground of appeal is dismissed.

## DECISION

[248] In making this decision, I have carefully considered all the evidence before me and the submissions and arguments made by each of the parties, whether or not they have been referred to in these reasons.

[249] Following on my findings above that each ground of appeal advanced by the Appellant fails, I dismiss this appeal in its entirety and hereby confirm the Reconsideration Decision and the Penalty Order.

[250] Both Council and the Superintendent have sought an opportunity to make submissions on costs on this appeal. Both Council and the Superintendent shall be entitled to make submissions regarding costs by **September 13, 2021**, to which the Appellant will have a right of reply until **September 27, 2021**. The right of sur-reply by **October 04, 2021** will exist for both Council and the Superintendent to the extent of dealing with matters raised by the Appellant not already addressed.

"Michael Tourigny"

Michael Tourigny
Panel Chair, Financial Services Tribunal

August 30, 2021