Financial Services Tribunal

Fourth Floor, 747 Fort Street
Victoria BC V8W 3E9
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

Website: www.fst.gov.bc.ca
Email:
financialservicestribunal@gov.bc.ca

DECISION No. 2018-RSA-002(b) and 003(b)

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

BETWEEN:	Shahin Behroyan	**APPELLANT**
AND:	Real Estate Council of British Columbia and Superintendent of Real Estate	**RESPONDENTS**

BEFORE: Michael Tourigny, Panel Chair

DATE: Conducted by way of written submissions concluding on September 10, 2018

APPEARING: For the Appellant: John Douglas Shields, Legal Counsel
For the Respondent Real Estate Council of British Columbia: Jean P. Whittow Q.C., Legal Counsel
For the Respondent Superintendent of Real Estate: Joni Worton, Legal Counsel

OVERVIEW

[1] In September 2017, a Committee (the "Panel") of the Real Estate Council of British Columbia (the "Council") conducted a disciplinary hearing to determine whether Shahin Behroyan (the "Appellant"), a real estate agent licensed under the *Real Estate Services Act,* SBC 2004, c 42 (the "RESA"), committed professional misconduct contrary to section 35 of the RESA. The alleged professional misconduct relates primarily to a bonus of $75,000 claimed by the Appellant from his client in relation to the sale of residential property in West Vancouver which completed in January 2015.

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

[3] On May 4, 2018 the Panel issued a written decision regarding penalty (the "Penalty Decision"). The Penalty Decision suspended the Appellant's RESA license for a period of 12 months effective June 1, 2018. The 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.

[4] In May 2018, the Appellant appealed both the Liability and Penalty Decisions to the Financial Services Tribunal (the "Tribunal") under section 54(1)(d) of the RESA. By operation of section 55(2) of the RESA, both decisions have been stayed pending final determination of the appeal.

[5] The Superintendent of Real Estate (the "Superintendent") filed a separate appeal under section 54(1)(d) of the RESA from the Penalty Decision.

[6] The parties agreed that these two appeals should be joined and heard together. The parties further agreed that the hearing of these appeals should be bifurcated to allow for the appeal from the Liability Decision to be decided prior to consideration of the Penalty Decision. These agreements of the parties were formalized by order of the Tribunal dated June 15, 2018, which order also provided that the appeals would be heard by a single member of the Tribunal.

[7] Accordingly, this decision is limited to determination of the Appellant's appeal from the Liability Decision.

[8] Section 54(1)(d) of the RESA provides that a licensee subject to a discipline order has the right to appeal to the Tribunal. As mandated by subsection 242.2(5) of the *Financial Institutions Act*, RSBC 1996, c 141, (the "FIA"), the appeal to the Tribunal is "on the record", and based on written submissions. It is not a trial de novo.

[9] Prior to the close of written submissions on the Appellant's appeal from the Liability Decision, the Appellant applied for an order under subsection 242.2(8) of the FIA (the "New Evidence Application") to allow the following facts to be admitted as evidence on the Appellant's appeal from both the Liability and Penalty Decisions:

1. On June 04, 2018, a trust cheque for $75,000 was delivered by counsel for the Appellant to counsel for the seller KH in outstanding civil proceedings between KH and the Appellant.
2. That litigation remains outstanding.

[10] I have considered the New Evidence Application separately and have released my decision in that matter (the "New Evidence Decision"), concurrently with this decision. For reasons set out in the New Evidence Decision, the proposed new evidence is not admitted on either this appeal from the Liability Decision, or the appeal from the Penalty Decision. Accordingly, this appeal from the Liability Decision is being heard based on the record before the Panel at the September 2017 discipline hearing.

[11] Section 242.2(11) of the FIA applies to this appeal, and provides that the Tribunal may confirm, reverse or vary a decision, or send the matter back for reconsideration, with or without directions.

[12] The Appellant asks that the Liability Decision be set aside and that he be awarded costs from the Council pursuant to subsection 242.1(7)(g) of the FIA and section 47 of the *Administrative Tribunals Act,* SBC 2004, c 45 (the "ATA").

[13] The Council, supported by the Superintendent, asks that this appeal be dismissed, with costs.

BACKGROUND

[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.

ISSUES

[31] On this appeal the Appellant has raised issues of general application to all five allegations of professional misconduct found by the Panel to have been proven, as well as issues that relate to one or more but not all of the allegations. I will address the issues of general application, such as the correct standard of proof and the Panel's assessments of credibility and findings of fact, at the outset, and will then address issues pertaining to specific allegations of professional misconduct found by the Panel to have been proven.

[32] For purposes of my analysis I have organized the issues on this appeal as follows:

a. Did the Panel apply the correct standard of proof?

b. Were the Panel's assessments of credibility and findings of fact unreasonable?

c. Did the Panel err by failing to apply principles of contract or tort law?

d. Was the Panel biased against the Appellant?

e. Did the Panel give the Appellant proper notice of the case he had to meet?

f. Did the Panel err by making findings of professional misconduct in the absence of expert evidence on "acceptable professional standards"?

g. Did the Panel err by making findings of professional misconduct in the absence of a proper evidentiary foundation?

h. Did the Panel err by failing to provide adequate reasons or analysis for its findings?

DISCUSSION AND ANALYSIS

Standard of Review

[33] The parties agree that the standard of review, simply stated, 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.

[34] As to the standard of review applicable to issues of procedural fairness, the Council further refers to *Kadioglu* at para 31 where the Tribunal held, (relying on *Seaspan Ferries Corp. v British Columbia Ferry Services Inc* 2013 BCCA 55 (at paras 47-52) that the appropriate question is simply to ask whether the decision-maker under appeal or review acted fairly in all the circumstances. The Tribunal is to ask that question from its' unique perspective with specialized knowledge of the industry sectors that fall within the Tribunal's responsibility.

[35] I will apply the standards of review as set out above in *Kadioglu* on this appeal, (other than with respect to penalty which is not a subject of this appeal.)

Reasonableness & Deference

[36] The parties disagree on two important aspects of the standard of review, being:

i. the standard of "reasonableness" to be applied by the Tribunal in assessing the Panel's findings of fact and discretion, and

ii. whether the Panel should be afforded "deference" by the Tribunal in assessing the reasonableness of Panel's findings of fact and discretion.

[37] Before addressing this disagreement I note that I am not bound by prior decisions of either the Courts or the Tribunal, although as to the latter it is certainly desirable to strive for Tribunal consistency wherever it can rightly be found. The Tribunal may also consider and seek guidance from relevant decisions of the Courts.

[38] The Appellant makes reference in his submissions to the recent decision of the BCCA in *Cooper v BC Liquor Control and Licensing Branch*, 2017 BCCA 451 ("*Cooper*"), as identifying circumstances where the "reasonableness" test is not met. As Council points out, *Cooper* interprets and applies the reasonableness standard as set out in *Dunsmuir v New Brunswick,* [2008] 1 SCR 190 ("*Dunsmuir*"), and it does not consider either a decision of Council or the Tribunal. While this observation of Council is correct, I have found *Cooper* to be of assistance to my analysis.

[39] In referring to the *Dunsmuir* standard of review, the BCCA in *Cooper* held (at paras 32 and 38):

> [32] The law is well-settled that, as stated in *Dunsmuir*, the reasonableness standard is "concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process." But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of facts and law."(at para 47)…
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> [38] It need hardly be said that the *Dunsmuir* standard of reasonableness is highly deferential to the decision-maker. At the same time, it does not require courts to be "subservient", or to show "blind reverence", to their decisions. And, while the standard is "concerned with" whether the decision falls within a range of possible acceptable outcomes, it is not correct to say that a Court on judicial review needs only to determine whether the *outcome* of the decision is reasonable. As acknowledged in *Dunsmuir* itself, the reasonableness standard must be "contextualized", requiring the reviewing court to consider the nature and function of

> the decision-maker, including his or her expertise, the terms and objectives of the governing legislation, and the nature of the issue being decided. (*Per* Binnie J. at para 151). The Court may also consider the evidentiary foundation for, and "route" to, the decision, which may render it unreasonable as a whole.

[40] I find the decision of the Tribunal in *Hensel v Registrar of Mortgage Brokers,* Decision No. 2016-MBA-001(a)("*Hensel*"), to be instructive on both the issue of the "reasonableness" standard to be applied and the "deference" to be afforded by the Tribunal to decisions of first instance decision-makers such as the Panel on questions of fact and discretion (at paras 15-17):

> [15] Because the Tribunal is a specialized appeal tribunal and not a generalist court, it is appropriate to approach with a degree of caution those judicial authorities that, in recognition of the distinct institutional roles of courts of law and tribunals, have addressed the standard of review to be applied by generalist courts to specialized tribunals. I therefore respectfully differ from the Registrar when she submits that given the lack of statutory direction, the "starting point" in determining the standard of review to be applied by the Tribunal to the Registrar's decision is *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. In my view, the correct starting point is to recognize that when the legislature creates a statutory right of appeal, each right of appeal must be considered contextually, on its own terms and in view of its larger purposes. As noted in *British Columbia (Chicken Marketing Board) v. British Columbia (Marketing Board)*, 2002 BCCA 473 at para 15, the words ["may appeal"] do not have a fixed meaning and must be read having regard for the legislative scheme and for the purposes of the Act.
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> [16] In the absence of a legislated standard of review, the Tribunal should not proceed by reflex as if it were a generalist court hearing a judicial review or appeal from a specialized first instance decision-maker. It would make little sense for the legislature to create a specialized administrative appeal tribunal to merely parrot a court. The legislature, by vesting the Tribunal with a strong privative clause, has made clear that the Tribunal, within its exclusive jurisdiction, is deemed to possess expertise that a generalist court does not have: *Administrative Tribunals Act*, section 58(1).
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> [17] In recognition of these principles, the Tribunal has developed its own appellate "standard of review" jurisprudence. It has held that the case for deference to a first instance regulator is most compelling where the first instance regulator has made findings of fact. Since the Tribunal, unlike the Commercial Appeals Commission it replaced, is required to hear appeals on the record rather than conduct hearings *de novo*, the Tribunal's decisions properly accord deference where an appeal takes issue with evidentiary findings and related assessments. The rationale for this deference is the same rationale appellate courts use in granting deference to factual findings of trial judges. As noted by this Tribunal in *Nguyen v. Registrar of Mortgage Brokers*, July 20, 2005, p.9. "Deference must be given to the findings of fact and the assessments of credibility made by the Registrar who actually experienced the hearing procedure, heard the witnesses, saw the documentary evidence and, combined with his experience and knowledge given his position as Registrar of Mortgage Brokers, was in the best position to make the findings of fact found in his decision.

[41] The Council submits that deference is heightened in circumstances where credibility is crucial; relying on *Hensel* and *Kadioglu.* The Tribunal in *Kadioglu*

adopted the findings of the Supreme Court of Canada in *Dr. Q v College of Physicians and Surgeons,* 2003 SCC 19 ("*Dr. Q")* at paras 38-39):

> [38] Finally, however, the need for deference is greatly heightened by the nature of the problem – a finding of credibility. Assessments of credibility are quintessentially questions of fact. The relative advantage enjoyed by the Committee, who heard the *viva voce* evidence, must be respected.
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> [39] Balancing these factors, I am satisfied that the appropriate standard of review is reasonableness *simpliciter*. The reviewing judge should have asked herself whether the Committee's assessment of credibility and application of the standard of proof to the evidence was unreasonable, in the sense of not being supported by any reasons that bear somewhat probing examination.

[42] The Appellant submits that little, if any, deference to the Panel is called for as there is an absolute statutory right of appeal which negates such deference. The absence of a privative clause in the RESA is also advanced as a reason to negate deference. The Appellant refers to section 58(a) of the ATA, which provides that where a statutory privative clause is in place the tribunal benefitting from such clause must be considered an expert tribunal in matters over which it has exclusive jurisdiction. The Appellant provides no authority to support his argument that these circumstances lead to the conclusion that "little, if any, deference should be afforded to the Panel". I am not persuaded by the Appellant's argument.

[43] The Appellant raises concerns about the "expertise in fact" of the Panel. I agree with Council's submission that the factual information about the background experience of each of the Panel members is not part of the record on this appeal.

[44] There is no allegation by the Appellant that the constitution of the Panel was not in compliance with the relevant provisions of the RESA.

[45] The Superintendent submits that 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. In this case the subject matter of the discipline hearing and this appeal falls squarely within Council's expertise.

[46] The Superintendent submits that the Council is an expert tribunal. Expertise is not a matter of qualifications and experience of any particular tribunal member; it is institutional in nature and tribunal members are presumed to hold expertise in the interpretation of the legislation that gives them their mandate; in this case the RESA.

[47] The Superintendent finds support for this principle in the decision of the Supreme Court of Canada in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 ("*Edmonton*") (at para 33):

> [33] The presumption of reasonableness is grounded in the Legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing. Expertise arises from the specialization of functions of administrative tribunals like the Board which have a habitual familiarity with the legislative scheme they administer… However, as with judges, expertise is not a matter of the qualifications or experience of any particular tribunal

> member. Rather, expertise is something that inheres in a tribunal itself as an institution: "…at an institutional level, adjudicators…can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions" (*Dunsmuir*, at para 68)…

[48] Both Council and the Superintendent submit that deference is accordingly owed to the Panel's finding of fact and the conclusions drawn.

[49] On the question of the "reasonableness" standard of review to be applied by the Tribunal to questions of fact and discretion I adopt the analysis quoted above from *Hensel.* The distinctions drawn between the Tribunal as a specialized appeal tribunal hearing appeals from statutory first instance decision-makers and a generalist Court reviewing decisions of specialized tribunals are clear. I agree with *Hensel* that care needs to be taken by the Tribunal in its approach to judicial authorities that in recognition of the distinct institutional roles of courts of law and tribunals, have addressed the standard of review to be applied by generalist courts to specialized tribunals.

[50] While *Hensel* points out that the Tribunal has developed its own appellate "standard of review" jurisprudence, I find that the Tribunal's reasonableness standard is consistent with the oft quoted statement in *Dunsmuir* referred to in *Cooper,* which standard I will apply on this appeal (*Cooper* at para 32):

> [32] The law is well-settled that, as stated in *Dunsmuir*, the reasonableness standard is "concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process." But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of facts and law.

[51] On the question of "deference" to be given to the Panel as a statutory decision maker on findings of fact and discretion, I agree with the submissions of the Council and the Superintendent that the Council (and thus, the Panel) is a specialized decision-maker entitled to deference as such by the Tribunal on this appeal.

[52] I agree with the Superintendent that Council's expertise is a function of its statutory mandates. I also agree that its expertise is institutional in nature. I find support for these submissions in the Supreme Court of Canada decision in *Edmonton* relied upon by the Superintendent and quoted above.

[53] I also agree with and adopt the analysis set out above from *Hensel* and *Kadioglu* relating to the deference to be afforded by the Tribunal to findings of fact and the assessment of credibility made by the Panel. This deference is based in large part on the fact that the Tribunal is required to hear appeals on the record while the Panel, itself a specialized decision-maker, actually experienced the hearing live and was accordingly in a better position that the Tribunal to weigh the evidence, particularly the assessment of the credibility of witness testimony.

a. Did the Panel apply the correct standard of proof?

[54] As a question of law, the standard of review on this issue is correctness.

[55] In deciding whether professional misconduct had been proven at the discipline hearing the Panel applied a balance of probabilities as the standard of proof.

[56] In doing so, the Panel relied upon and applied the decision of the Supreme Court of Canada in *F.H. v McDougall,* [2008] 3 SCR 41 ("*McDougall*") which held (at para 40, 45 and 46):

> [40] Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof…
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> [45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.
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> [46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. …

[57] The Appellant argues that the Panel did not apply the high standard of proof applicable to allegations of professional misconduct in disciplinary hearings.

[58] In support of this submission the Appellant refers to a decision of the Ontario Divisional Court in *Reid v College of Chiropractors of Ontario,* 2016 ONSC 1041 ("*Reid*"), at para [62]:

> [62] Allegations of professional misconduct must be proven on the basis of evidence that is clear, convincing and cogent and that supports a finding that there has been a significant departure from acceptable professional standards….

[59] I agree that the authorities referred to by the Appellant hold that professional misconduct must be proven on the basis of evidence that is clear, convincing and cogent. This proposition is consistent with the standard of proof set out in *McDougall* as adopted by the Panel.

[60] I do not agree, other than in the quoted comment in *Reid* set out above, that these authorities call for proof of a "significant departure" from acceptable professional standards.

[61] The Appellant also refers to the decision of the BCSC in *Nguyen v Chartered Professional Accountants of British Columbia,* 2018 BCSC 620 ("*Nguyen*") (at para 58):

> [58] The standard of proof in professional disciplinary hearings is well established and not in dispute:
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> > The standard of proof required in cases such as this is high. It is not the criminal standard of proof beyond a reasonable doubt. But it is something more than a bare balance of probabilities. The authorities establish that the case against a professional person on a disciplinary hearing must be proved by a fair and reasonable preponderance of credible evidence… The evidence

> must be sufficiently cogent to make it safe to uphold the findings with all the consequences for the professional person's career and status in the community… [Underlining added by the Court]

[62] The list of authorities referred to by the Court at the end of paragraph [58] in *Nguyen* does not include *McDougall.* Insofar as the statement in *Nguyen* "it is something more than a bare balance of probabilities" is inconsistent with *McDougall,* the latter decision of the Supreme Court of Canada should be preferred as a correct statement of the law.

[63] I find that the Panel was correct in applying the *McDougall* balance of probabilities standard of proof at the disciplinary hearing.

b. Were the Panel's assessments of credibility and findings of fact unreasonable?

[64] The standard of review on this issue is reasonableness.

[65] In setting out his grounds of appeal, the Appellant variously characterized the alleged errors in the Panel's assessments of credibility and findings of fact in the following terms:

- in making findings of credibility against the Appellant and in elevating the testimony of HG over that of the Appellant;
- in making erroneous, perverse or capricious findings of fact, without regard to the material before it;
- in failing to have regard to the admissible totality of evidence properly before it, improperly rejecting evidence before it, and failing to place emphasis on evidence, including documentary evidence, before it;
- in misapprehending, ignoring or not properly considering the testimony and evidence at the hearing; and
- in not having before it clear and convincing evidence on which to find against the Appellant.

[66] The Council submits that the Panel's assessment of credibility and findings of fact were entirely reasonable.

[67] The disciplinary hearing occupied three days, two of which were taken up by the introduction of evidence. Council led evidence from the complainant, HG, and from BN, a friend of HG and businessman who HG had contacted in relation to the bonus. The Appellant testified on his own behalf.

[68] The key evidence in this case concerned the communications between HG and the Appellant on three occasions in late October and early November 2014. There were no other participants in these communications. Evidence as to what was said was in direct conflict. To determine whether the allegations of professional misconduct had been proven, the Panel was required to weigh the evidence of the Appellant and HG and make an assessment as to the credibility of each. The Panel also had to weigh the documentary evidence and the evidence of BN.

[69] In the Liability Decision, the Panel extensively reviewed the evidence of all the witnesses, and carefully articulated its assessment of that evidence.

Panel's Key Findings of Fact

[70] After assessing the credibility of the evidence given by the Appellant and HG, the Panel made the following key findings of fact in the Liability Decision:

1. On November 7, 2014, the Appellant represented to HG that there was a full price offer, but the buyer's agent would not present it unless HG agreed to pay the buyer's agent a bonus of $100,000, (which was reduced to $75,000). Both of these representations were false.
2. The Appellant caused HG on November 11, 2014 to purport to agree to pay a bonus of $75,000 to the Appellant without disclosing the conflict of interest inherent in the request for a bonus or providing any advice to HG to obtain independent legal advice, apart from that contained in item #7 on page 5 of the Contract of Purchase and Sale.
3. The Appellant failed to disclose to HG at any time his prior agency relationship with Mr. and Mrs. C and that he had sold their home on November 5, 2014. and
4. The Appellant failed to disclose at any time to HG that TD had agreed to split one half of her commission as buyer's agent with him.
5. HG did not, either on October 27, 2014 as claimed by the Appellant or at any other time, volunteer to pay a bonus to the Appellant.

Panel's Assessment of Credibility

[71] After summarizing the evidence, the Panel referred to and applied the leading authorities on the assessment of credibility, *Faryna v Chorny,* [1952] 2 DLR 354 (BCCA) ("*Faryna*"), and *Bradshaw v Stenner,* 2010 BCSC 1398 (aff'd 2012 BCCA 296), ("*Bradshaw*") to its credibility analysis.

[72] In *Faryna,* the BCCA stated that an assessment of credibility, particularly in cases of conflict of evidence, cannot be gauged solely on the demeanour of the witnesses and held (at p 357):

> …In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[73] The Panel, in making its credibility assessment, applied the following methodology suggested in *Bradshaw* (at para 187):

> It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a "stand alone" basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of

> the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions".

[74] The Panel noted that in making its credibility assessment, it could accept all, part, or none of the evidence of HG or the Appellant, and could attach different weights to different parts of their respective testimony.

"Stand alone" assessment of credibility

[75] As suggested in *Bradshaw*, the Panel first assessed the competing evidence on a "stand alone" basis.

[76] The Panel found nothing inherently unbelievable in the evidence of HG that a large bonus was claimed by an agent as a condition of presenting a full price offer for the Property. The Panel observed that such conduct could be explained by greed. The Panel found that the specific details of the rationale for the bonus HG said were provided to him by the Appellant during their discussions on November 7, 2014 added an air of reality to his version of events. These justifications included the following:

- This was how properties with problems, such as being on a busy street, were sold.
- The effect of the bonus was the same as having an offer that was an equivalent amount less than the asking price.
- The buyer's agent was doing them a favour in that the agent had a more expensive house in the neighbourhood to show the prospective purchasers, and in convincing her clients to buy the lower priced property the agent would be making less commission and wanted to be compensated.

[77] In considering the Appellant's evidence on a "stand alone" basis, the Panel found there was initially nothing inherently unbelievable in the Appellant's assertion that HG had reneged on his agreement to pay a bonus and fabricated a story in order to recover the bonus. Again, the Panel observed that such conduct could be explained by greed. However, the Panel found the Appellant's assertion was rendered less believable by the explanations he offered.

[78] The Panel dealt first with the Appellant's evidence that on October 27, 2014, HG had volunteered to pay him a bonus as an incentive to redouble his efforts to sell the Property and obtain a full price offer. The Appellant had testified as to his efforts to sell the Property after getting the listing at the end of September. The Panel found it difficult to imagine what else the Appellant might do. The Panel also noted that there was no evidence that the Appellant, in fact, made any additional efforts or employed a different strategy to sell the Property after the point in time he said the topic of a bonus first arose.

[79] Dealing with the discussions and negotiation of a bonus with HG on November 7, 2014, the Panel found the Appellant's version unconvincing. The Appellant testified that, at the time he was discussing the bonus with HG on November 7, 2014, there was no real prospect of a sale because he knew Mr. C would not be interested in the property due to its location. If that were the case, the Panel found the timing of the negotiation to be odd. The Panel went on to find:

> For that matter, we wondered why the bonus needed to be negotiated at all, if this was something HG was not obliged to pay. The type of negotiation that occurred appeared more like something that was part of a deal than some amount that HG had volunteered to pay.

[80] On a "stand alone" basis the Panel found the Appellants evidence to be less inherently believable than HG's evidence. I find that the Panel's "stand alone" assessment of evidence of the Appellant and HG to be reasonable.

BN evidence

[81] The Panel then considered whether the testimony of the principal witnesses was consistent with the other witness testimony. The only other witness was BN.

[82] The key aspect of BN's evidence was that he recalled having a particular conversation with HG in which HG sought his advice about a full price offer on the reduced listing price for the Property in which the buyer's agent had asked for a $100,000 bonus. Although he was uncertain of the time and date of the call, he knew that HG had yet to decide whether he was going to pay the bonus because he had called him first to get his opinion on the matter.

[83] The Panel found that BN had nothing at stake in the proceedings. The Panel found that the conversation BN had with HG fits with taking place on November 7, 2014 just after HG first spoke to the Appellant about the claimed bonus. BN's evidence corroborated that HG had complained to him that the buyer's agent had demanded a $100,000 bonus as a condition to present a full price offer. The Panel observed that BN's evidence was not evidence of what the Appellant said, but rather evidence that HG expressed to him on November 7, 2014 the same version of events as in his subsequent testimony.

[84] I find that the Panel's assessment of BN's evidence was reasonable.

Documentary evidence

[85] The Panel then considered all of the documentary evidence. The following documents all dated November 7, 2014 were considered by the Panel:

i. At 1:00 pm the Appellant received a text message from TD as agent for Mr. and Mrs. C (Exhibit 12) that stated:

"[Mrs. C] wants to offer full price for [the Property]"

ii. At 1:03 pm HG received a text message from the Appellant with the message (Exhibit 12) that stated:

"Call me"

iii. After discussing the $100,000 bonus request by telephone HG sent the Appellant a text message at 3:10 pm (Exhibit 12) that stated:

"Shahin, 100k is a lot! Try to bring it as low as you can! I have to convince my family too!"

iv. At 2:31 pm TD as agent for Mr. and Mrs. C sent Mr. C an email (Exhibit 7) that stated:

"Hi [Mr. C], attached is the offer for [the Property], as I showed it to [Mrs. C]… again, and it's the best value location quality, etc. in area."

v. At 4:15 pm Mr. C sent an email to his agent TD (Exhibit 7) in response that stated:

"Hi [TC], I just spoke to [Mrs. C]. Sorry, but I'm not ready to put an offer on this house"

[86] The Panel found the text message sent by HG at 3:10 pm to be the most significant document. The Panel's plain reading of the message was that the Appellant should try to convince a third party to lower the bonus. This supported the testimony of HG. The Panel also found the language of the message to be inconsistent with the Appellant's evidence that HG had volunteered to pay the bonus. Having heard HG in the witness box, the Panel was unconvinced by the Appellant's assertion on cross examination that the message was not directed towards a third party explaining "If you speak to a lot of Iranians, that is how they speak".

[87] The Panel held that the texts were consistent with HG's evidence that the Appellant told him during their telephone discussions on November 7 that there was a full price offer at that time.

[88] The Panel considered the November 7 text messages in weighing the credibility of the competing versions of what the Appellant said to HG during the bonus discussions that day.

[89] The Panel held that the November 7 texts were inconsistent with the Appellant's evidence that he "knew" when he was discussing the bonus with HG that Mr. C would not be interested in the property as it was on a busy street even though he was advised at 1:00 pm that Mrs. C wanted to "offer full price for [the Property]" and at 1:03 pm he texted HG to "Call me". It was not until 4:15 pm after discussions of the bonus had already taken place that Mr. C advised his agent TD by email that he was not then ready to put in an offer on the house. It would be some time after receipt of this email that TD would have advised the Appellant that Mr. C had passed on the property. The documentary evidence does not support the Appellant's evidence that he "knew" when he was discussing the bonus with HG that Mr. C would not be interested in the property.

[90] While the Panel did not place significant weight on Exhibit 7 containing the above quoted email from Mr. C to TD, they did not ignore that evidence as submitted by the Appellant.

[91] I find the Panel reasonably weighed the witness testimony against the November 7, 2014 documents, including those in Exhibit 7.

Listing Agreement Amendment

[92] The Appellant submits that the Listing Agreement Amendment, being a contemporaneous written agreement signed by the parties directing that the $75,000 bonus was payable solely to the Appellant, is the key document in this case, and argues that the Panel failed to properly take its significance into account in its assessment of the evidence.

[93] In particular, the Appellant submits that in assessing credibility the Panel failed to give adequate weight to the fact that HG signed the Listing Agreement Amendment which clearly stated that the bonus was payable solely to the Appellant, contrary to the evidence of HG that he had been told by the Appellant that it was supposed to be payable to the buyer's agent.

[94] The Listing Agreement Amendment was considered by the Panel, as was the evidence of both HG and the Appellant in relation to it.

[95] In his evidence HG acknowledged that when the Listing Agreement Amendment was presented to him by the Appellant for signature he was aware of the fact that it provided for the payment of the $75,000 bonus to the Appellant, not to the buyer's agent. The Panel accepted HG's explanation that he thought it might be in trust to be paid to the appropriate party at a later date, but ultimately that it was not his business as his only concern was that the bonus was coming out of his pocket. The Panel found this explanation did not undermine the credibility of HG's evidence as to what the Appellant represented to him concerning the bonus on November 7, 2014.

[96] The Panel did not accept the Appellant's explanation for the document being dated November 12 as opposed to November 11, 2014 when it was in fact signed as being a "mistake", given his evidence that he carefully prepared and reviewed the documents. However, the Panel found the November 12 date to be consistent with an attempt by the Appellant to create an evidentiary record to support that the bonus was not wound up with the sale of the property.

[97] I find the Panel reasonably weighed the witness testimony against the Listing Agreement Amendment in its' assessment of credibility.

Prior inconsistent statements

[98] The Appellant submits that the Panel made no proper assessment of the "multiple serious inconsistent positions taken by HG in the Complaint to the Council and his inconsistent testimony" before the Panel.

[99] The Panel considered the fact that there were some inconsistencies between HG's evidence and statements made by his lawyer and the notes taken by counsel during an interview. The Panel found these inconsistencies between HG's evidence and the statements provided by third parties not to be significant. The Panel found there were no inconsistencies on the main points in contention.

[100] The Panel also considered the fact that there were some inconsistencies between the Appellant's evidence and statements made by his lawyer. The Panel found that the same considerations applied to the Appellant's evidence as to HG's evidence in this regard.

[101] I disagree with the Appellant's submissions that the Panel failed to properly assess the inconsistencies between the Complaint and the testimony of HG before the Panel. The inconsistencies relied upon by the Appellant regarding the testimony of HG largely pertained to errors in dates in the Complaint. A review of the record confirms that the assessment of this issue by the Panel was reasonable.

Credibility and the decision in Nguyen

[102] The Appellant submits that it was an error of law to assess witness credibility "without regard to deciding credibility and making a finding on each contested matter and charge." In support of this submission the Appellant refers to the BC Supreme Court decision in *Nguyen.*

[103] *Nguyen* overturned a disciplinary decision made against an accountant. The case was treated as one of procedural fairness. The BC Supreme Court found that the disciplinary panel had acted unfairly:

a. In reversing and placing the burden of proof on Mr. Nguyen.

b. In making findings of guilt against Mr. Nguyen beyond the charge he faced, and

c. In making findings without evidence, ignoring evidence and failing to consider relevant evidence.

[104] In dismissing the application for leave to appeal the decision in *Nguyen*, the BC Court of Appeal held (at para36):

> [t]he expectations placed on administrative tribunals regarding evidence and reasons are well established. In this case, the errors the Judge found are based on the specific way the hearing unfolded, the evidence presented, and the inferences drawn from such evidence: whether there was no evidence on certain matters, whether irrelevant evidence was considered, and whether relevant evidence was ignored. With respect, I see no substantial questions to be argued in respect of that analysis which would warrant leave.

[105] *Nguyen* does not support the Appellant's assertion that it is an error of law to assess witness credibility "without regard to deciding credibility and making a finding on each contested matter and charge." I find this assertion of the Appellant to lack merit.

[106] In any event, *Nguyen* is distinguishable on the facts. The Court in *Nguyen* held "It is plain from the Decision that the Panel decided to disbelieve the appellant's evidence in its entirety because he had lied to the investigator about his relationship with Mai Nguyen prior to the Hearing." No such prejudgment of overall credibility was made by the Panel in the Liability Decision.

[107] On an examination of the evidence and the analysis employed by the Panel, I find no basis to conclude that the Panel prejudged the Appellant's credibility or reversed the onus, as was found to be the case in *Nguyen.*

Conclusion regarding Panel's Assessments of Credibility and Findings of Fact

[108] The Panel concluded its assessment of credibility as contemplated in the *Bradshaw* methodology by determining which version of events was the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions".

[109] The Panel concluded as follows (Liability Decision at para 73):

> [73] …We concluded that the combined effect of BN's evidence, the text messages, and the Appellants unconvincing explanations for the texts, established that HG's testimony was the most consistent with the preponderance of probabilities. In the

> circumstances, we determined HG's evidence should be preferred where it conflicts with the evidence of the Appellant.

[110] I find that the Panel reasonably applied the approach and analyzed the evidence in accordance with the principles set out in *Faryna* and *Bradshaw* in its assessment of credibility.

[111] The Panel carefully considered and weighed the evidence as a whole in assessing credibility. The Panel considered the evidence offered by HG and the Appellant on a stand-alone basis, in relation to the testimony of the other witness BN and in relation to the documentary evidence. It considered the cross-examination of HG and the many arguments made in this appeal. It did not accept the Appellant's version of events.

[112] The Panel extensively reviewed all of the evidence it received, and the testimony it heard. I find that the Panel reasonably and carefully reviewed the evidence before it. The Panel provided an evidentiary foundation for its findings and followed a logical process in doing so. On the key findings of fact which the Panel made in coming to the Liability Decision, the Panel had ample evidence before it.

[113] The Panel was required to assess the credibility of the evidence in relation to all of the material findings it made. I repeat my earlier finding that deference is to be afforded by the Tribunal to findings of fact and the assessment of credibility made by the Panel. The Panel supported its findings with reference to the evidence it relied on and provided reasons which indicate how it assessed the evidence. I find that the Panel's findings of fact are reasonable and I have no basis to interfere with the credibility assessments made in this case.

[114] There is no basis to conclude that the manner in which the Panel assessed the evidence before it was unreasonable.

c. Did the Panel err by failing to apply principles of contract or tort law?

[115] As a question of law, this issue is reviewable on a correctness standard.

Parol Evidence Rule

[116] The Appellant submits, based on a contract law analysis concerning the Listing Agreement Amendment[1], that HG's testimony as to what the Appellant represented to HG on November 7, 2014 concerning the bonus was inadmissible under the parol evidence rule.

[117] G.H.L. Fridman, *The Law of Contract in Canada,* 6th ed. At pp. 440-41 describes the parol evidence rule as:

> The parol evidence rule is that if the language of the written contract is clear and unambiguous, then no extrinsic parol evidence may be admitted to alter, vary, or interpret in any way the words used in writing.

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[1] Insofar as the Listing Agreement Amendment was a written agreement signed by the parties directing that the $75,000 bonus was payable solely to the Appellant.

[118] Council submits that the parol evidence rule has no application in this case. Council also refers to authorities to the effect that the parol evidence rule cannot be used as an instrument of fraud or where there is an allegation that a contract was procured by a deliberately false representation.

[119] I find the Appellant's parol evidence submissions to be of no assistance to the determination of the issues before the Tribunal on this appeal. This is not a contract interpretation case. This appeal is not the forum to address whether the Listing Agreement Amendment is an enforceable contract or what evidence might be admissible to aid in its interpretation. These issues and the other contract law arguments raised by the Appellant would best be addressed in another forum such as the civil proceedings between the parties.

[120] The Panel was tasked with consideration of the relevance, admissibility and weight of the evidence in the context of the allegations that the Appellant engaged in professional misconduct within the meaning of the RESA. This case concerns whether the Appellant sought to secure a bonus in breach of his statutory and fiduciary duties.

[121] Contrary to the argument of the Appellant, HG's testimony as to what the Appellant said to him on November 7, 2014 concerning the bonus was not before the Panel as evidence of an alleged contract to pay the buyer's agent a bonus or to alter, vary or interpret the Listing Agreement Amendment. It was evidence in support of allegations of professional misconduct under section 35 of the RESA.

[122] I find that HG's testimony as to what the Appellant said to him on November 7, 2014 concerning the bonus was properly admissible before the Panel, and relevant to the allegations of professional misconduct addressed by the Panel which are the subject of this appeal. The Panel did not err in admitting this evidence.

Fraudulent or Negligent Misrepresentation

[123] The Appellant separately asserts that HG's testimony as to what the Appellant said to him on November 7, 2014 concerning the bonus, being directly contrary to the Listing Agreement Amendment, could not be a basis for a finding against the Appellant given that there was no evidence of any reliance on the alleged misrepresentation. For this proposition, the Appellant refers to and relies upon *Ban v Keleher,* 2017 BCSC 1132, wherein the BC Supreme Court in dealing with a contract breach and a misrepresentation tort claim recited the well settled law that to succeed in a tort claim for damages for negligent misrepresentation there needs to be proof of reliance, in a reasonable manner, on said negligent misrepresentation, to the detriment of the claimant. I note that the Panel was addressing allegations of professional misconduct under section 35 of the RESA, and not whether a civil tort had occurred. Accordingly, I find the law concerning the tort of fraudulent or negligent misrepresentation to be irrelevant to the issues on this appeal.

[124] As stated above, HG's testimony as to what the Appellant said to him on November 7, 2014 concerning the bonus, in and of itself and regardless of any "reliance", was reasonably admitted by the Panel as evidence of alleged professional misconduct.

d. Was the Panel biased against the Appellant?

[125] Bias is an issue of procedural fairness, and therefore the standard of review for this issue is fairness.

[126] In addition to asserting that the Panel's assessment of credibility and findings of fact were unreasonable, (which I have found above was not the case), the Appellant submits that the Panel acted unfairly in making its findings by being biased against the Appellant. In particular, the Appellant argues that the Panel "made a host of unnecessary, gratuitous and nasty comments in the Decision, which unlawfully coloured its findings and shows and improper, far more than just impolite, and unfair approach to dealing with Mr. Behroyan".

[127] When assessing the credibility of both the Appellant and HG's version of events on a "stand alone" basis, the Panel observed that the conduct each had alleged the other of being engaged in could be "…readily explained by the combination of greed and absence of morality. It is regrettably consistent with human behavior". The Appellant argues that this observation by the Panel reflected an improper bias against those claiming a bonus in general and the Appellant in particular. The Appellant submits that the Panel's comments were "unnecessary, gratuitous and nasty comments" which were unfair to him.

[128] The Council points out that the Appellant was not singled out and that the comment was made in relation to the version of events advanced by both sides and did not cast aspersions against the witnesses personally. Rather, the comment considered the inherent believability of the evidence of each party.

[129] I agree with the Council and find that the observation made by the Panel referred to by the Appellant does not reflect any bias or unfairness, but rather a close consideration of the evidence.

[130] The Appellant submits that other comments made by the Panel in the Liability Decision in relation to its findings of fact were also biased or unfair. Having considered the entire Liability Decision, including the comments specifically referred to by the Appellant, I do not agree that the language used in the Liability Decision showed any bias against the Appellant or that the Panel otherwise acted unfairly in the circumstances.

e. Did the Panel give the Appellant proper notice of the case he had to meet?

[131] The five specific allegations of professional misconduct found by the Panel to have been proven were set out in the Amended Notice of Discipline Hearing in individual sub-paragraphs, which specific allegations I will refer to in this decision as "allegation 1.a.", "allegation 1.b.", "allegation 1.d.", "allegation 1.e.",and "allegation 1.f.".

[132] The Appellant submits as a general proposition that the Panel repeatedly went outside of the scope of the actual allegations of misconduct made against him, and outside the wording of the RESA or the Real Estate Council Rules (the "Rules") referenced in the Amended Notice of Discipline Hearing.

[133] It is a fundamental principle of procedural fairness in an administrative law context that a person who is the subject of disciplinary proceedings that could have an adverse impact on him/her must know the case he/she has to meet in order to present a defense. The standard of review to be applied on this procedural fairness issue is fairness.

[134] The Council submits that the findings of professional misconduct by the Panel were entirely related to the allegations in the Amended Notice of Discipline Hearing and no unfairness occurred.

[135] In *Nguyen* the Court found that the discipline panel had held that Mr. Nguyen was guilty of being "associated" with SG & Associates, when the charge was that he was associated with that firm "for the purposes of the preparation of the audit". The Court held that the discipline panel had breached its duty of procedural fairness in finding misconduct not alleged in the charge.

[136] The Appellant refers to various authorities for the following propositions relating to procedural fairness:

i. that in the context of a professional disciplinary process, where the hearing could result in the loss of the ability to practice one's profession, a high degree of procedural fairness is required;

ii. that a charge of professional misconduct must give the person charged reasonable notice of the allegations that are made against him so that he may fully and adequately defend himself; and

iii. any finding of professional misconduct must conform to the charge as particularized.

[137] The Council did not dispute the accuracy of the preceding statements of the applicable law; it simply submits that on the facts no unfairness occurred.

[138] I agree with and will consider the above elements of procedural fairness in reviewing the individual findings by the Panel that five allegations of professional misconduct had been proven.

[139] I emphasize that these are administrative and not criminal proceedings. The onerous standards of precision imposed on the Crown in the drafting of an Information alleging Criminal Code offences do not apply in the administrative context. However, I find that the wording of the allegations of professional misconduct set out in the Amended Notice of Discipline Hearing must be adequate to give the person charged reasonable notice of the case he or she has to meet.

The specific wording of the charge in allegation 1.a.

[140] Allegation 1.a reads:

> 1.a. In or about November, 2014, Mr. Behroyan caused the seller of the Property and/or HG, her son and power of attorney, to purport to agree to pay a bonus of $75,000 over the remuneration called for in the Listing Agreement (the "Bonus") without HG's and/or the seller's informed consent, contrary to his duty to act in the best interests of his client and/or to avoid conflicts of interest pursuant to section 3-3 of the Council Rules;

[141] Rule 3-3 states the following:

> 3-3. Subject to sections 3-3.1 and 3-3.2, if a client engages a brokerage to provide real estate services to or on behalf of the client, the brokerage and its related licensees must do all of the following:
>
> (a) act in the best interests of the client;
>
> …
>
> (i) take reasonable steps to avoid any conflict of interest;
>
> (j) without limiting the requirements of Division 2 [*Disclosures*] of Part 5 [*Relationships with Principals and Parties*], if a conflict of interest does exist, promptly and fully disclose the conflict to the client.

[142] The Appellant submits that allegation 1.a. is founded on an assertion that HG did not have "informed consent", and that there is no obligation in the Rules to obtain informed consent. The Appellant submits that as a result the charge is improper as it falls outside of the wording of the Rules.

[143] Referring to the provisions of Rule 3-3 concerning the disclosure and avoidance of conflicts, the Council concedes that Rule 3-3 does not prohibit a licensee from obtaining a bonus in all circumstances. The Council submits that the words "informed consent" capture the exceptional circumstance in which a conflict is fully mitigated by disclosure and proper legal advice.

[144] It was in this context that the Council submits it was proper for the Panel to consider whether the Appellant had afforded HG a meaningful opportunity to obtain legal advice, suggesting that could have overcome the conflict.

[145] I agree with the Appellant that the words "informed consent" are not to be found in Rule 3-3, however, I do not read allegation 1.a. as requiring "informed consent" for Rule 3-3 compliance. Rather, the inclusion of the phrase "without HG's and/or the seller's informed consent**"** amounts to a concession by the Council in the wording of the charge that if HG had been properly advised to seek independent legal advice on the conflict arising from the bonus, and with that informed advice decided to pay the bonus, then the Appellant could have overcome the conflict and satisfied his disclosure obligation under Rule 3-3(j).

[146] The Appellant makes extensive submissions relating to the absence of evidence or finding of fact by the Panel relating to "informed consent". On the evidence the Panel found no disclosure of the conflict was made. On the evidence accepted by the Panel no question of "informed consent" arose which explains the absence of findings of fact on that question.

[147] At various points in his submissions the Appellant asserts that the bonus was not in fact paid to him. The record on this appeal includes emails and documents produced by the Appellant's brokerage showing that the $75,000 bonus was taken by the Appellant's brokerage from the purchase price on closing and paid out by the brokerage to the Appellant or his legal counsel. The Appellant's assertion that the bonus was not paid to him is contrary to the evidence, but in any event is irrelevant to allegation 1.a. as it does not allege that the bonus was paid to the Appellant but rather the Appellant "caused HG to purport to agree to pay a bonus of $75,000".

[148] I find that the wording of the allegation of professional misconduct in allegation 1.a. was both consistent with the language of Rule 3-3, and adequate to give the Appellant reasonable notice of the particular allegations being made against him such that he could fully and adequately prepare his defense. It is clear that the charge relates to the Appellant's professional obligations associated with the conflict of interest arising from his claim for a bonus over and above the commission called for in the Listing Agreement.

[149] I also disagree with the Appellant that as a result of the inclusion of the reference to "without HG's and/or the seller's informed consent" the charge was improper. I find no unfairness to the Appellant in the wording of allegation 1.a.

The specific wording of the charge in allegation 1.b.

[150] Allegation 1.b. reads:

> 1.b. Mr. Behroyan represented to HG and/or the seller that the Bonus was required by the representative of persons interested in acquiring the Property, J.C. and A.C., and/or in order to secure an offer for the Property, when one or both of these representations was untrue, which constitutes deceptive dealing pursuant to section 35(1)(c) of the RESA and/or a breach of the duty to act honestly pursuant to section 3-4 of the Council Rules;

[151] Section 35(1)(c) of the RESA states that a licensee commits professional misconduct if he or she does anything that constitutes "deceptive dealing".

[152] The RESA defines "deceptive dealing" in section 1 to include:

> (a) an intentional misrepresentation, by word or conduct, or in any other manner, of a material fact in relation to real estate services, or in relation to a trade in real estate to which the real estate services relate, or an intentional omission to disclose such a material fact;

[153] Rule 3-4 states:

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

[154] I agree with the Panel that this allegation addresses the heart of the misconduct alleged by the Council.

[155] A reading of the allegation of professional misconduct in allegation 1.b. is consistent with the language of the RESA definition of deceptive dealing and the duty to act honestly in Rule 3-4.

[156] I find that the charge clearly particularizes the deceptive dealing and dishonesty allegation being advanced against the Appellant, being that he represented to HG that the bonus was required by the buyer's agent and/or to secure an offer for the Property, when one or both of these representations was untrue, contrary to his professional obligations not to engage in deceptive dealing or to otherwise act dishonestly toward his client HG.

[157] I also find that the wording of this charge was adequate to give the Appellant reasonable notice of the particular allegations being made against him such that he could fully and adequately defend himself.

[158] I find no unfairness to the Appellant in the wording of allegation 1.b.

The specific wording of the charge in allegation 1.d.

[159] Allegation 1.d. reads:

> 1.d. Mr. Behroyan permitted the seller and/or HG to enter the contract for the purchase and sale of the Property to Mr. and Mrs. C which contained a term that the seller had been advised to seek independent legal advice, when Mr. Behroyan had not so advised the seller and when it would have not been reasonable to obtain such advice in the period between presentation of the offer and its expiration, contrary to Mr. Behroyan's duty to act in the best interests of his client pursuant to section 3-3(a) of the Council Rules and/or to act with reasonable care and skill pursuant to section 3-4 of the Council Rules;

[160] Allegation 1.d. alleges that it was professional misconduct for the Appellant to permit HG to enter into the Contract of Purchase and Sale that contained a term that stated HG had been advised to seek independent legal advice ("term #7") when he had not been so advised and when it would have not been reasonable to obtain such advice in the period between presentation of the offer and its expiration. The charge alleges this was contrary to the Appellant's duty to act in the best interests of HG (Rule 3.3(a) quoted above) and with reasonable care and skill (Rule 3-4 also quoted above).

[161] While allegation 1.d. could benefit from some punctuation changes, I find the wording provided the Appellant with fair notice of the specific allegations of professional misconduct he faced and the Rules alleged to have been breached such that he could fully prepare his defense.

[162] I find no unfairness to the Appellant in the wording of allegation 1.d.

The specific wording of the charge in allegation 1.e.

[163] Allegation 1.e. reads:

> 1.e. Mr. Behroyan failed to disclose to the seller and/or HG at any material time that he had signed a Working with a Realtor form indicating that he was to provide agency services to Mr. and Mrs. C, contrary to his duty to disclose all material information to his client pursuant to section 3-3(f) of the Council Rules;

[164] Rule 3-3(f) requires the brokerage and its related licensees to:

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

[165] I find that the wording of this charge was adequate to give the Appellant reasonable notice of the particular allegations being made against him such that he could fully and adequately prepare his defense. It is clear that the charge relates to the Appellant's alleged professional obligation under Rule 3-3(f) to disclose to HG the fact that he had acted as designated agent for Mr. and Mrs. C in relation to the sale of their home which completed on November 5, 2014.

[166] I find no unfairness to the Appellant in the wording of allegation 1.e.

The specific wording of the charge in allegation 1.f.

[167] Allegation 1.f. reads:

> 1.f. Mr. Behroyan failed to disclose to the seller and/or HG at any material time that he expected to receive or did receive one half of the selling agent's commission, contrary to his duty to disclose all material information to his client pursuant to section 3-3(f) of the Council Rules and/or to disclose all remuneration pursuant to section 5-11(2) of the Council Rules.

[168] Rule 3-3(f), (quoted above), calls for disclosure by the licensee to his/her client of all known material information relating to the real estate transaction in question.

[169] Rule 5-11(2) sets out that:

> (2) Subject to subsection (3), the licensee must promptly disclose to the client all remuneration paid or payable to the licensee's related brokerage in relation to the real estate services provided, and the disclosure must include all of the following:
>
> (a) the source of the remuneration,
>
> (b) the amount of the remuneration or, if the amount of the remuneration is unknown, the likely amount of the remuneration or the method of calculation of the remuneration, and
>
> (c) all other relevant facts relating to the remuneration.

[170] I find that the wording of this charge was adequate to give the Appellant reasonable notice of the particular allegations being made against him such that he could fully and adequately prepare his defense. It is clear that the charge relates to the Appellant's alleged professional obligation under Rules 3-3(f) and 5-11(2) to disclose to HG the fact that TD had agreed to split her commission with the Appellant.

[171] I find no unfairness to the Appellant in the wording of allegation 1.f.

f. Did the Panel err by making findings of professional misconduct in the absence of expert evidence on "acceptable professional standards"?

[172] The Appellant submits that expert evidence is required in a professional discipline case such as this to prove the relevant "acceptable professional standards" and that its absence is an error of law fatal to the allegations of professional misconduct advanced against the Appellant by the Council. I will address this issue as a question of whether, as a general principle, expert evidence is always necessary in order to prove the relevant "acceptable professional standards" in a professional discipline case.

[173] This alleged error of law attracts a correctness standard of review.

[174] The Appellant submits that the Panel (which he emphasizes did not include a realtor) found various breaches of professional obligations "behind closed doors" without any expert evidence of the requisite standard, or any opportunity for the Appellant to hear or challenge such.

[175] The Council responds that it was not an error for the Panel to make its findings of professional misconduct in the absence of expert evidence. While the Council agrees that expert evidence may on occasion be admissible or helpful to the

trier of fact, it submits that as the case under appeal does not turn on a fine point of technical evidence or practice in the industry, expert evidence was unnecessary.

[176] In support of the assertion that the absence of expert evidence was fatal to all of the allegations of professional misconduct, the Appellant relies upon the Ontario Court of Appeal decision in *Hanif v College of Veterinarians of Ontario,* 2017 ONSC 497 ("*Hanif*").[2] *Hanif* involved an appeal by a veterinarian from findings of a disciplinary committee that he was guilty of professional misconduct. Mr. Hanif submitted on appeal that the disciplinary committee should not have considered expert opinion evidence on professional standards of practice. The Court rejected this ground of appeal and held that the use to be made of an expert opinion was up to the adjudicator.

[177] In *Hanif* the Court observed (at paras 88-90):

> [88] Expert evidence is generally required in order to establish the relevant standard of practice of the profession and is important evidence helpful to the adjudicator in making findings in relation thereto. The Discipline committee panel in most cases would be in error in finding a failure to maintain a standard of the profession in the absence of expert opinion as to that standard. In addition, just because an expert offers an opinion on whether the standard was breached does not require the Discipline Committee panel to accept it. It will make its own determination on that central issue.
>
> [89] Among the several reasons for this requirement is the fact that there may be lay persons on the panel who do not have the requisite intimate knowledge or understanding of the professional practice issues. In many cases even the professional members on a panel may lack deep understanding of the particular area of specialization involved and the standards that prevail within it.

[178] I note that the quoted obiter from the Court in *Hanif* refers to expert evidence being "generally required" to establish the relevant standard of practice of the profession. It does not state that such evidence is mandatory as submitted by the Appellant.

[179] In further support of his argument that the absence of expert evidence is fatal to the Liability Decision, the Appellant refers to the decision of the Newfoundland and Labrador Court of Appeal in *Council for Licensed Practical Nurses v Walsh,* 2010 NLCA 11 ("*Walsh*") (at para. 19):

> [19] In the absence of a document setting out the standard of practice, resort may be had to evidence as to the applicable standard within the profession. Such evidence was neither adduced in this case nor discussed by the tribunal. As noted in *Dunne*, it is not sufficient for the tribunal to simply state "there is sufficient evidence that Ms. Walsh failed to abide by the Standards of Practice and Code of Ethics of the profession" without reference to a provision in either document which would guide a licensed practical nurse in determining when a report is required, and when a failure to report an incident would result in a charge of professional misconduct. The tribunal referred to the requirement to report "any circumstances that are out of the ordinary". There is no explanation of what kinds of situations would fall within this

[2] Leave to appeal to SCC denied, 2018 CanLII 58467 (SCC), at paras 87-90.

> category and which Standard of Practice or provision in the Code of Ethics would set what appears to be a very high and imprecise standard.

[180] In response, the Council points to the concurring reasons of Green C.J.N.L. in *Walsh,* wherein the Chief Justice suggested several ways by which the standard expected of the profession could be identified (at para. 41):

> [41] With respect to the identification of the standard of conduct to be applied, the tribunal will generally have to look to one of three sources for the standard: in a written code of conduct; or in evidence of common understandings within the profession as to what is expected of a reasonable professional in the circumstances under consideration; or perhaps, by way of logical deduction form the fundamental values of the professional body itself.

[181] The Appellant further references the decision of the BC Court of Appeal in *Sheddy v Law Society of British Columbia,* 2007 BCCA 96 ("*Sheddy*"). In that case, Mr. Sheddy had appealed a finding of professional misconduct in the form of incompetence. The Court held (at para. 18):

> [18] It is not necessary to decide on this appeal what sort of evidence if any must be adduced to establish an allegation of incompetence in a citation against a member of the Law Society. In this case there is an absence of evidence which could reasonably support a finding of incompetence. There is no rule, either in the Law Society's Rules, or in the Supreme Court Rules governing the facts that gave rise to this citation. To make a finding of fact on no evidence in the absence of a clear rule is an error of law. In my opinion this ground of appeal should also succeed.

[182] I note that in *Sheddy* there was no Law Society rule in evidence addressing the specific allegation of incompetence whereas in the present case, the Panel had before it the relevant provisions of the RESA and Rules.

[183] I have already held in this decision that the Panel is a specialized decision-maker entitled to deference by the Tribunal relating its findings of fact.

[184] The Council, (including the Panel), is vested with institutional expertise in the interpretation of the RESA and the Rules. I agree with the submissions of the Superintendent that the subject matter of the discipline hearing and this appeal fall squarely within the Panel's institutional expertise.

[185] A tribunal such as the Panel may take notice of commonly accepted and generally recognized facts within its specialized knowledge. Further, a tribunal such as the Panel can apply its institutional expertise in drawing inferences from primary facts. However, the expertise of the Panel should not be the basis of an essential finding of fact upon which a decision turns. Evidence tending to prove essential facts should be adduced.

[186] Based on my interpretation of the authorities referred to by the Appellant and in the context of the proceedings before the Panel I find that the nature of the evidence required to prove primary facts is dependent upon the nature of the specific allegation being considered. For instance, where the language of the RESA or the Rules is clearly applicable to the events proven to have occurred, no further evidence of standards of practice is required in order for a Panel to decide the issue. In allegations of professional misconduct of a more technical or complex

nature, either factual or expert opinion evidence of industry or regulatory standards of conduct under the RESA and Rules may be required by the decision-maker in order to properly interpret the language of the applicable provisions of the RESA and Rules.

[187] In result, I reject the Appellant's submission that as a general principle, expert evidence is always necessary in order to prove the relevant "acceptable professional standards" in a professional discipline case.

[188] I will now consider, (based on my finding that the nature of the evidence required to prove primary facts is dependent upon the nature of the specific allegation being considered), whether the Panel had a proper evidentiary foundation for its specific findings of professional misconduct.

g. Did the Panel err by making findings of professional misconduct in the absence of a proper evidentiary foundation?

[189] The Appellant further asserts as a general proposition that there was "no evidence" before the Panel of any purported "acceptable professional standards" that the Appellant was alleged to have departed from.

[190] The Appellant refers to *Nguyen*[3] and *Allard v The Owners, Strata Plan VIS 692,* 2018 BCSC 1066 ("*Allard*"),[4] for the proposition that making findings of fact in the absence of evidence is, in effect, the application of an incorrect legal standard and constitutes an error of law. I note that this legal proposition is not contested in the Council's submissions.

[191] The Council agrees that there is no doubt that a panel must act on the basis of articulable or ascertainable standards of conduct and not on a private whim. The Council asserts that in the present case, the Amended Notice of Discipline Hearing clearly identified the Rules and provisions of the RESA relevant to each allegation and that there was a proper evidentiary foundation for all of the Panel's findings.

[192] There is no dispute that a proper evidentiary foundation was required upon which the Panel could make its findings of fact, the dispute is over whether that requisite evidentiary foundation was before the Panel.

[193] In considering the specific allegations of professional misconduct the Panel was required to both interpret the RESA and Rules as well as to assess the relevant factual circumstances in evidence before it. In result, this issue one of mixed fact and law.

[194] I agree with the finding by the Tribunal in *Robert Bruce Schoen v Real Estate Council of British Columbia and Superintendent of Real Estate,* Decision No. 2017-RSA-002(b) that (at para 34):

> …Although the standard of review for issues of mixed fact and law may vary based the particular context of each case, the more fact-intensive and the less law-focused the issues are, the more deference this Tribunal should give to the original decision-maker.

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[3] at paras. 108-109.
[4] at para. 62.

[195] I find that the factual matrix weighed heavily in the Panel's assessment of professional misconduct in this case and accordingly, the standard of review I will apply on the question as to whether the evidence before the Panel amounted to a proper evidentiary foundation for the Panel's findings of professional misconduct is reasonableness.

[196] I will now consider each specific allegation of professional misconduct to determine whether a proper evidentiary foundation was before the Panel upon which the Panel could apply its expertise as a specialized tribunal in reaching the conclusions it did on the allegations of professional misconduct.

Adequacy of evidentiary foundation for the Panel's finding that allegation 1.a. was proven.

[197] Essential findings made by the Panel in relation to allegation 1.a. included findings that the Appellant's claim for a bonus created a conflict of interest and that he did not properly disclose this conflict to HG.

Claim for a bonus created a conflict of interest

[198] The Panel referred to authorities *Mulligan v Stephenson,* 2016 BCSC 1941, and *Re Crackle,* 1983 CanLII 296 (BCCA), and in reliance thereon held that the nature of the relationship between a realtor and his client is that of a fiduciary, and as a fiduciary the agent must act at all times in the best interest of his client and with the utmost good faith. I agree. The fiduciary duties owed by the Appellant as agent to HG as his client are codified in the Rules.

[199] The Panel referred to *Nathanson, Schachter & Thompson v Inmet Mining Corp.,* 2009 BCCA 385, and held that a request for a bonus requires that particular care be exercised to ensure the interests of the client, as beneficiary of the fiduciary relationship, are protected. I again agree.

[200] The Panel held that the Appellant's demand for a bonus created a conflict of interest between himself and HG based on the fact that the amount of commission had been agreed upon in the Listing Agreement and the payment of a bonus would benefit the Appellant at the expense of HG and/or the seller. The Appellant in his submissions states: "Obviously, any remuneration to the Licensee is a conflict. Hence, a requirement for just reasonable efforts to avoid same, and an obligation to make disclosure." I read this to include an acknowledgment by the Appellant that the request for a bonus by the Appellant created a conflict of interest between himself and HG. The Panel's finding of the existence of the conflict was reasonable on the evidence.

No disclosure of the conflict of interest

[201] The relevant language of Rule 3-3(j) that a licensee must "if a conflict of interest does exist, promptly and fully disclose the conflict to the client", makes clear the obligation of full and timely disclosure of a conflict of interest to the client. The Panel found that no disclosure of the conflict in fact took place. Accordingly, no factual issue arose as to the clarity, fullness or timeliness of disclosure on the evidence.

[202] In these circumstances, I find that no additional factual or expert opinion evidence interpreting the Rule or industry standards was required in order for the Panel to decide whether the specific provisions of Rule 3-3(j) had been breached.

[203] The Panel found that the Appellant did not provide HG with any information at any time that might have alerted HG to the nature of the problem created by the bonus. Contrary to the submissions of the Appellant, this is a finding that the Appellant did not promptly and fully disclose the conflict to the client as required by Rule 3-3(j).

[204] The Appellant suggests in submissions that the negotiation and signing by HG of the Listing Agreement Amendment dealing with the bonus amounted to an effective disclosure of the conflict of interest, without the need for more. I find this submission to lack substance and to ignore the fiduciary and statutory obligations of full and timely disclosure owed by the Appellant to HG in the circumstances.

[205] The Panel found that during their discussions about a bonus on November 7, 2014 the Appellant misrepresented to HG that the bonus was demanded by the buyer's agent as a condition of presenting the offer. No disclosure of the Appellant's conflict of interest occurred at that time. When the Appellant presented HG with the Listing Agreement Amendment on November 11, 2014, which stated the bonus was solely for the benefit of the Appellant and the conflict clearly existed, the Panel again found that the conflict was not disclosed to HG.

[206] At the discipline hearing, the Appellant argued that HG's initial of the term of the Contract of Purchase and Sale that stated "Buyers and Sellers have been advised to seek independent legal advice" showed he had been advised to obtain legal advice in relation to the conflict. The Panel found otherwise. The Panel further found that the time pressure in the circumstances made getting any legal advice impractical. The Panel found that the Appellant's insistence that HG's initial of the above-noted term represented sufficient notice of the conflict was more consistent with sharp practice than a genuine intent to protect HG's interests. I cannot say the Panel's findings in this regard were unreasonable.

[207] On the evidence, the above-noted term of the Contract of Purchase and Sale was inserted by the buyer's agent, not the Appellant. It was not found in the Listing Agreement Amendment wherein the bonus was being claimed.

[208] On appeal, the Appellant submits that the Panel erroneously focused on Independent Legal Advice and improperly imposed an obligation on the Appellant to advise HG to get such advice in the absence of such obligation being set out in the Rule or in allegation 1.a. I find that the Panel did no such thing. The Panel addressed arguments from counsel for the Appellant on the above referenced term of the Contract of Purchase and Sale. The Panel did not misdirect itself as submitted by the Appellant.

[209] I find that there was a proper evidentiary foundation before the Panel upon which it applied its expertise as a specialized tribunal in reasonably reaching the conclusion that the allegations of professional misconduct in allegation 1.a. had been proven.

Adequacy of evidentiary foundation for the Panel's finding that allegation 1.b. was proven.

[210] Essential findings made by the Panel in relation to allegation 1.b. included the finding that the Appellant made the particularized misrepresentations relating to the bonus to HG.

[211] As reviewed in detail when considering the Panel's assessment of credibility and findings of fact, I find there was more than an adequate evidentiary foundation in the record to support the Panel's finding of fact that the Appellant made the misrepresentations to HG particularized in allegation 1.b. The Panel's finding in that regard was reasonable.

[212] I find that the RESA definition of deceptive dealing and the normal meaning of "honesty" as used in Rule 3-4 referred to in allegation 1.b., on any reasonable interpretation, are applicable on their face to the particularized events that were found by the Panel to have occurred. The allegation is not of a complex or technical nature. The applicable provisions of the RESA and Rules speak for themselves.

[213] In September 2014 concurrent with entering into his first listing agreement with HG, the Appellant provided HG with a "Working with a Realtor (Designated Agency)" form that was exhibited in the record. This form confirms in material respects the duties owed by the Appellant to HG as his client. In summarizing the duties owed to HG as his client by the Appellant as designated agent the form stated:

- The designated agent is bound by ethics and the law to be honest and thorough in representing you.
- The designated agent must provide undivided loyalty to you by protecting your negotiating position at all times.
- The designated agent must disclose to you all known facts which may affect or influence your decisions.
- The designated agent must use reasonable care and skill in performing all assigned duties in the role as agent.

[214] Of particular relevance to this allegation of professional misconduct is the acknowledgment in the "Working with a Realtor (Designated Agency)" that the Appellant was duty bound by ethics and the law to be honest in representing HG as his client.

[215] No expert evidence was required to supplement the evidence in the record in order for the Panel to interpret these provisions of the RESA and Rules.

[216] I find that there was a proper evidentiary foundation before the Panel upon which it applied its expertise as a specialized tribunal in reasonably reaching the conclusion that the allegations of professional misconduct in allegation 1.b. had been proven.

No offer from Mr. and Mrs. C on November 7, 2014

[217] Specifically in relation to allegation 1.b., the Appellant made submissions to the effect that as there was no offer on the table from Mr. and Mrs. C for the

Property as of November 7, 2014 there could be no proper finding that the Appellant told HG that he would not present the offer unless the bonus was agreed to. I find this argument to ignore the particular allegation of misconduct being advanced against the Appellant.

[218] The case the Appellant had to answer in allegation 1.b.was that he represented to HG that there was a full price offer available and that the purchaser's agent was demanding the bonus as a condition of presenting or securing the offer - when one or both of these representations was untrue. Council did not allege that TD had in fact demanded the bonus or that there was a written offer at that time. In result, whether or not there was in fact an offer or a demand for a bonus from the other agent on November 7, 2014 is not relevant to the issues on this appeal. What matters was what the Appellant represented to HG.

[219] The Appellant argues that Council carried an obligation to call both TD and Mr. and Mrs. C to lead evidence as to whether or not there was in fact an offer at the time the Appellant and HG were discussing a bonus on November 7 or whether TD had demanded a bonus. For the reasons set out in the preceding paragraphs, I disagree with the Appellant.

[220] The Panel did not either assume or conclude that TD demanded a bonus. The Panel's findings were in relation to what the Appellant said to HG. I find there was no obligation on Council to call either TD or Mr. and Mrs. C to prove its case.

Adequacy of evidentiary foundation for the Panel's finding that allegation 1.d. was proven.

[221] It is alleged in allegation 1.d. that it was contrary to the Appellant's duty to act in the best interests of HG (Rule 3-3(a)) and with reasonable care and skill (Rule 3-4) to permit HG to enter into the Contract of Purchase and Sale that contained a term that stated HG had been advised to seek independent legal advice ("term #7") when he had not been so advised and when it would have not been reasonable to obtain such advice in the period between presentation of the offer and its expiration.

[222] I have already held, when considering the Panel's assessments of credibility and findings of fact, that the Panel reasonably found on the evidence that the Appellant did not provide any advice to HG to obtain independent legal advice, apart from that contained in term #7.

[223] I also find there was a proper evidentiary foundation for the Panel's reasonable finding of fact that it would have not been reasonable to obtain such advice in the period between presentation of the offer and its expiration.

[224] A question remains as to whether further evidence was required for the Panel to find these facts constituted a breach of the Appellant's duty to act in the best interests of his client and with reasonable care and skill as particularized in allegation 1.d.

[225] Allegation 1.d. as worded seems to be predicated on assertions that when a Contract of Purchase and Sale contains a term that states the client had been advised to seek independent legal advice, a licensee's duties under Rules 3-3(a) and 3-4 include a duty, before permitting his client to enter into the contract, to in

fact do so, with the nature of this duty being subject to the time that the offer in question is open for acceptance.

[226] I note that allegation 1.d. does not allege that the Appellant breached a duty to advise the client to seek independent legal advice in face of the conflict of interest inherent in his request for a bonus, nor does it allege a breach of Rule 3-3(d) which obliges a licensee to:

> (d) advise the client to seek independent professional advice on matters outside of the expertise of the licensee;

[227] In support of its finding that allegation 1.d. had been proven, the Panel, at paragraph 93 of the Liability Decision, held that the simple inclusion of term #7 "without anything else, fell far short of what was required by the circumstances. [HG] had not been alerted to any facts that might require legal advice, and in any event, it would have been impractical to obtain that advice within a few hours on a holiday."

[228] The Appellant submits that there was no expert or factual evidence before the Panel as to "what was required in the circumstances". No evidence was before the Panel to support a finding of any duty requiring a licensee to advise a client to seek independent legal advice in the circumstances alleged in allegation 1.d.

[229] The Appellant points to the fact that term #7 was included in the offer by the buyer's agent and not by him, as was the short time allowed for acceptance of the offer. The Appellant submits that he had a duty to present the offer as written and that there was no evidence before the Panel as to what his duty of "reasonable care and skill" or to "act in the best interest of his client" called for him to do in the circumstances. He submits that the Panel's finding was patently at odds with his obligation to present the offer as drafted.

[230] I agree with the Appellant that more evidence was required in relation to allegation 1.d., and in particular in regard to the professional duties applicable in the circumstances.

[231] I have held earlier in this decision that the nature of the evidence required to prove primary facts is dependent upon the nature of the specific allegations being considered. I have also held that where allegations of professional misconduct are not straightforward but are of a more technical or complex nature, either factual or expert opinion evidence of industry or regulatory standards of conduct under the RESA and Rules may be required by the decision maker to interpret the language of the applicable provisions of the RESA and Rules in the context of the events proven to have occurred.

[232] I find that the underlying assertions upon which this charge is based cannot reasonably be implied simply from the language of the Rules in question. This is a charge of a technical nature that I find called for the introduction of factual or expert opinion evidence of industry standards required to interpret and apply the Rules in question to the proven events. Such evidence was required as a foundation for a finding by the Panel as to whether "the simple inclusion of this term without anything else, fell far short of what was required by the circumstances" or that the specific provisions of the Rules in question had been breached in the circumstances. No such evidence was before the Panel. Making the

finding of professional misconduct on allegation 1.d. in the absence of a proper evidentiary foundation was unreasonable. In result, I find that the Panel was in error in finding that allegation 1.d. had been proven.

Adequacy of evidentiary foundation for the Panel's finding that allegation 1.e. was proven.

[233] Proof of allegation 1.e. required a finding that the Appellant failed to advise HG that he had acted as designated agent for Mr. and Mrs. C in relation to the sale of their home, and that such information was material information for purposes of Rule 3-3(f).

[234] The Panel found that the Appellant did not, at any time, advise HG that he had acted as designated agent for Mr. and Mrs. C in relation to the sale of their home. I have already held in this decision that this finding was reasonable on the evidence before the Panel.

[235] The Panel having found that the Appellant did not disclose his prior agency relationship with Mr. and Mrs. C, the issue became whether such information was "material" information that the Appellant must have disclosed under Rule 3-3(f).

[236] The Appellant submits that the Panel's finding that the Appellant breached Rule 3-3(f) was made in the absence of any evidentiary foundation as to what constitutes "material" information or that his recent agency relationship with Mr. and Mrs. C was material information for purposes of Rule 3-3(f).

[237] Evidence in the record includes the Working with a Realtor (Designated Agency) form between the Appellant and HG which confirmed, in lay terms, the duties owed by the Appellant to HG as his client in relation to the sale of the Property. The summary of the Appellant's duties owed to HG included the duty that "the designated agent must disclose to you all known facts which may affect or influence your decisions".

[238] I have already held in this decision that where the language of the RESA or the Rules is clearly applicable to the events proven to have occurred, no further evidence of standards of practice in addition to the language of the applicable provisions of the RESA and Rules should be required in order for the Panel to decide the issue.

[239] A tribunal such as the Panel may take notice of commonly accepted and generally recognized facts within its specialized knowledge. I find that the Working with a Realtor (Designated Agency) form evidences the meaning generally recognized in the residential real estate industry of what constitutes "material" information that must be disclosed by the agent to his client to include all known facts that "may affect or influence" the client's decisions in relation to the transaction subject to the agency relationship.

[240] I find that no further factual or expert opinion evidence interpreting the Rule or industry standards was required in the circumstances.

[241] I find that the Panel had a proper evidentiary foundation before it upon which it applied its expertise as a specialized tribunal in reasonably reaching the

conclusion that the allegations of professional misconduct in allegation 1.e. had been proven.

Adequacy of evidentiary foundation for the Panel's finding that allegation 1.f. was proven.

[242] When considering the adequacy of the evidentiary foundation in relation to this allegation, I do so being cognizant of the fact that the Panel made its finding that the allegation had been proven solely on the basis of its conclusion that there was a clear failure by the Appellant to comply with Rule 5-11(2). The Panel made no finding in relation to Rule 3-3(f) in its consideration of this allegation. Accordingly, there is no need for me to consider whether there was an adequate evidentiary foundation for a finding in relation to Rule 3-3(f).

[243] Proof of allegation 1.f. required a finding that TD had agreed to split her commission with the Appellant, that the Appellant did not disclose this fact to HG, and that this was a breach of his duty to disclose remuneration he had received to HG pursuant to Rule 5-11(2).

[244] The Appellant submits that the actual commissions payable to the Appellant, (including the split commission from TD), were disclosed in a document included in the record. The document was provided to the Council by the Appellant's brokerage. No submission is made by the Appellant that this document was provided to HG. The Council submits that it was not.

[245] The Appellant also refers to evidence that HG was generally aware that TD and his original listing agent RM would be receiving some commissions in relation to the sale of the Property. I find this fact to be irrelevant to the alleged obligation of the Appellant relating to disclosure of TD's agreement to split her commission with him in accordance with Rule 5-11(2).

[246] The Panel accepted the evidence of HG that he did not discover until long after the transaction had completed that TD had given half of her commission to the Appellant. The Panel found as a fact that the Appellant did not advise HG that TD had agreed to split her commission with him. I have already held this finding by the Panel was reasonable on the evidence.

[247] The question remained as to whether these facts constituted a breach of Rule 5-11(2).

[248] I find that the Panel had a proper evidentiary foundation before it upon which it could reasonably consider whether the Appellant's failure to advise HG that TD had agreed to split her commission with him constituted a breach of Rule 5-11(2). Given my findings below relating to the Panel's analysis and reasons in relation to allegation 1.f. I have intentionally not made a finding as to whether the Panel acted reasonably in reaching the conclusion that the allegations of professional misconduct in allegation 1.f. had been proven.

h. Did the Panel err by failing to provide adequate reasons or analysis for its findings?

[249] The Appellant argues that the Panel did not adequately express reasons for its decision either in general or when addressing the specific allegations of professional misconduct.

[250] The Appellant submits that that Panel simply determined as a conclusion that there was professional misconduct without a proper objective and persuasive analysis. In making this argument, the Appellant refers to the decision in *Dunne v Law Society of Newfoundland,* 2000 CanLII 28785 (NLSCTD) (*"Dunne*"), where the Newfoundland Supreme Court held (at paras. 51-52):

> [51] The position advanced by counsel for the Law Society amounts to this: professional misconduct is whatever the Benchers say that it is and, their having said that Ms. Dunne's actions constitute professional misconduct, such actions therefore must be professional misconduct. The Benchers cannot pull themselves up by their own bootstraps. They must exercise their authority by reference to the relevant legal framework.
>
> [52] In my view, the Benchers have failed to set out any proper legal test and to apply any such test to their findings of fact. That is not reasonable. While I am inclined to show deference by not disturbing the decision of the Benchers in this regard, I cannot.

[251] The Council submits that the standard required in the issuance of reasons is set out in *McDougall* as follows (at paras 98-99):

> [98] The meaning of adequacy of reasons is explained in *R. v Sheppard,* [2002] 1 SCR 869. In *R. v Walker,* [2008] 2 SCR 245 Binnie J. summarized the duty to give adequate reasons:
>
> 1. To justify and explain the result;
> 2. To tell the losing party why he or she lost;
> 3. To provide for informed consideration of the grounds of appeal; and
> 4. To satisfy the public that justice has been done.
>
> [99] However, an appeal court cannot intervene merely because it believes the trial judge did a poor job of expressing herself. Nor, is a failure to give adequate reasons a free-standing basis for appeal. At para. 20 of *Walker,* Binnie J. states:
>
> > Equally, however, *Sheppard* holds that "[t]he appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself" (para. 26). Reasons are sufficient if they are responsive to the case's live issues and the parties' key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue…The duty to give reasons "should be given a functional and purposeful interpretation" and the failure to live up to the duty does not provide "a free-standing right of appeal" or "in itself confe[r] entitlement to appellate intervention" (para. 53).

[252] The Council submits that the Panel's analysis both generally and on the individual allegations meets this test.

[253] I agree with and will apply the criteria regarding the issuance of reasons as set out in *McDougall.* I will consider whether that standard was met in the context

of each of the five specific allegations of professional misconduct found to have been proven by the Panel.

[254] Where, as here, there are reasons given but the adequacy of those reasons is challenged, reasonableness is the standard of review to be applied.

Adequacy of Panel's analysis and reasons for finding allegation 1.a. to have been proven.

[255] Contrary to the allegations of the Appellant, I find that the Panel conducted a proper, objective and persuasive analysis of the allegation of professional misconduct in allegation 1.a. The Panel's reasons canvassed the basis for the finding of the conflict inherent in the request for a bonus and the absence of any reasonable notice of that conflict from the Appellant. In addressing the specifics of allegation 1.a., the reasons reviewed the regulatory framework, the legal basis for the finding that a conflict existed, as well as arguments raised and evidence given by the Appellant in transparently making its relevant findings of fact. The Panel's reasons for its finding that allegation 1.a. had been proven met the standard for adequate reasons set out in *McDougall.*

[256] I find the Panel's reasons and analysis leading to its finding that allegation 1.a. had been proven to have been reasonable.

Adequacy of Panel's analysis and reasons for finding allegation 1.b. to have been proven.

[257] At paragraph 89 of the Liability Decision, the Panel summarized the facts succinctly, and related the facts to the allegations of professional misconduct in allegation 1.b.as follows:

> [89] [The Appellant] 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 [the Appellant's] actions constituted deceptive dealing within the meaning of the RESA and was a breach of his duty to act honestly. This allegation has therefore been proven.

[258] The Appellant submits in relation to this charge that the Panel failed to properly weigh or analyze the evidence in relation to the misrepresentation particularized in allegation 1.b., arguing that the Panel's analysis of the evidence was limited to paragraph 89 quoted above. I find that this submission lacks merit and ignores the extensive weighing and analysis of the evidence by the Panel, which I have referred to in this decision when addressing the Panel's assessment of credibility and findings of fact. I have already found that assessment to have been thorough and reasonable.

[259] I agree with the submission of the Council that there was no requirement for the Panel to repeat its analysis in relation to each particular charge addressed in the Liability Decision.

[260] The Appellant refers to *Nguyen* for the proposition that a blanket statement about earlier accepting HG's evidence generically was not sufficient in law in respect

of the specific charges. I agree with the Council's submission that *Nguyen* is distinguishable on the facts. The Panel did not fail to properly analyze and weigh the evidence as was found to be the case on the facts in *Nguyen.*

[261] The Panel referred to the provisions of the RESA and Rules referred to in allegation 1.b., including the definition of deceptive dealing, and weighed the evidence in relation thereto in concluding that allegation 1.b. had been proven.

[262] I find that the Panel conducted a proper, objective and persuasive analysis of the allegation of professional misconduct in allegation 1.b. and that its reasons for its finding that allegation 1.b. had been proven met the standard for adequate reasons set out in *McDougall.*

[263] I find the Panel's reasons and analysis leading to its finding that allegation 1.b. had been proven to have been reasonable.

Adequacy of Panel's analysis and reasons for finding allegation 1.d. to have been proven.

[264] I repeat that allegation 1.d. asserts that it was professional misconduct for the Appellant to permit HG to enter into the Contract of Purchase and Sale that contained a term that stated HG had been advised to seek independent legal advice ("term #7") when he had not been so advised and when it would have not been reasonable to obtain such advice in the period between presentation of the offer and its expiration. The charge alleges this was contrary to the Appellant's duty to act in the best interests of HG (Rule 3.3(a) quoted above) and with reasonable care and skill (Rule 3-4 also quoted above).

[265] The Appellant submits that the Panel failed to provide any adequate analysis for its finding that allegation 1.d. was proven.

[266] The Council submits the Panel's reasons at para 93 of the Liability Decision were adequate.

[267] I again quote paragraph [93] of the Liability Decision:

> [93] As reviewed in the discussion of allegation 1a at paragraph [76] above, the simple inclusion of this term without anything else, fell far short of what was required by the circumstances. [HG] had not been alerted to any facts that might require legal advice, and in any event, it would have been impractical to obtain that advice within a few hours on a holiday. As we have previously discussed, [the Appellant's] presentation of an offer that was only open for acceptance until 9 pm that day created a pressured environment. We found as a consequence, [the Appellant] failed to act with reasonable care and skill and did not act in the best interests of [HG]. This allegation was therefore proven.

[268] In the above quoted excerpt of the Liability Decision, the Panel referenced its earlier analysis of term #7 which was made in the context of allegation 1.a. In that earlier analysis, the Panel found the Appellant engaged in professional misconduct by failing to promptly and fully disclose to HG the conflict of interest inherent in his request for a bonus in breach of his duty to do so under Rule 3.3(j), and that term #7 did not constitute disclosure of the conflict as argued by the Appellant. It is not apparent how this earlier reference to term #7 in the context of the Appellant's

failure to disclose the conflict of interest constitutes an analysis by the Panel of how the Appellant's failure to advise his client to seek independent advice in the face of term #7 in the time pressured circumstances amounted to a breach of Rules 3-3(a) and 3-4 as asserted in allegation 1.d.

[269] I have held earlier in this decision that for the Panel's analysis and reasons to be adequate the criteria for the issuance of reasons as set out in *Mcdougall* need be met and they must be reasonable. The Panel provided no proper, objective or persuasive analysis to justify and explain the result reached. The reasons were not responsive to facts raised by the Appellant in submissions that the offer containing term #7 and which created the time pressured circumstance was drafted by the buyer's agent and not the Appellant. Accordingly, I find that the Panel's reasons on allegation 1.d. did not meet the standard for reasons set out in *Mcdougall,* and that the analysis and reasons did not meet the standard of reasonableness. I find this constitutes a further error by the Panel in its finding that allegation 1.d. had been proven.

Adequacy of Panel's analysis and reasons for finding allegation 1.e. to have been proven.

[270] I repeat that proof of allegation 1.e. required a finding that the Appellant failed to advise HG that he had acted as designated agent for Mr. and Mrs. C in relation to the sale of their home, and that such information was material information for purposes of Rule 3-3(f).

[271] The Panel concluded its analysis of allegation 1.e. as follows (Liability Decision at paras 96-97):

> [96] We have found that [the Appellant] failed to advise [HG] that he had acted for [Mr. and Mrs. C] and had sold their home on November 5, 2014. This was clearly material information that could have signaled to [HG] that there was a need for further inquiry in the circumstances.
>
> [97] Based on the authority of *Ocean City Realty*, we found that this allegation also had been proven.

[272] The Appellant submits that the Panel did not set out any explanation or analysis of how the historic information of a previous relationship involving the separate and independent sale of Mr. and Mrs. C's home was "clearly material information".

[273] To address the question of whether the prior agency relationship was material information that the Appellant was obliged to disclose to HG, the Panel referred to the decision of the BC Court of Appeal in *Ocean City Realty v A&M Holdings Ltd.,* 1987 CanLII 2872 (BCCA) ("*Ocean City*") which decision, the Panel noted, considered whether a real estate agent is "obliged to disclose to its principal the fact that it has agreed to rebate to the purchaser a portion of its real estate commission from the sale."

[274] In *Ocean City* the BC Court of Appeal was dealing with a civil dispute between a real estate brokerage ("Ocean City") and its seller client ("A&M") over the client's refusal to pay commission on the successful completion of the sale. The basis advanced by A&M for its refusal to pay commission was that their Ocean City

designated agent had made an agreement with the purchaser to split $46,000 of her commission (approximately ½ of the total payable by A&M) without disclosing this unusual arrangement to A&M. The analysis undertaken by the Court was framed within the law governing the fiduciary relationship between a real estate agent and a person retaining him to sell property.

[275] The Panel quoted from paragraph 20 of *Ocean City* regarding the fiduciary obligation of the agent to make full disclosure to his client to include "everything known to him respecting the subject-matter of the contract which would be likely to influence the conduct of his principal", or "everything which would be likely to operate upon the principal's judgment", concluding "that in such cases the agent's failure to inform the principal would be material nondisclosure" (emphasis added).

[276] The Panel also referred to paragraph 23 of *Ocean City,* which began:

> [23] I would emphasize that the agent cannot arbitrarily decide what would likely influence the conduct of his principal and thus avoid the consequences of non-disclosure. If the information pertains to the transaction with respect to which the agent is engaged, any concern or doubt that the agent may have can be readily resolved by disclosure of all the facts to his principal.

[277] The Panel's references to *Ocean City* preceded their finding that the fact that the Appellant had acted for the purchasers and had sold their home on November 5, 2014 was material information that could have signaled to HG that there was a need for further inquiry in the circumstances, and accordingly should have been disclosed to HG under Rule 3-3(f).

[278] The Appellant advances various semantic arguments about differences between the wording used by the Court in *Ocean City* and that used by the Panel in the Liability Decision. The reference by the Panel to *Ocean City* did not oblige the Panel to apply everything in that decision in order to rely on parts of the Court's analysis. The Panel was addressing disciplinary proceedings in a regulatory environment, not an action for the payment of money as was being addressed in *Ocean City.*

[279] I repeat my earlier reference to the Working with a Realtor (Designated Agency) form between the Appellant and HG in evidence before the Panel which confirmed, in lay terms, that the duties owed by the Appellant to HG as his client in relation to the sale of the Property included the duty that "the designated agent must disclose to you all known facts which may affect or influence your decisions".

[280] The Appellant submits that the Panel relied on "pure speculation" in making its findings on this point. I disagree. The Panel applied its institutional expertise and reasonably drew inferences from primary facts in concluding that the information was material and that as such it could have signaled to HG the need for further inquiry in the circumstances.

[281] I find that the Panel conducted a proper, objective and persuasive analysis and that its reasons for its finding that allegation 1.e. had been proven are sufficient as being responsive to the issue and the arguments before it and met the criteria for reasons set out in *McDougall.*

[282] I find the Panel's reasons and analysis leading to its finding that allegation 1.e. had been proven were reasonable.

Adequacy of Panel's analysis and reasons for finding allegation 1.f. to have been proven.

[283] I repeat that proof of allegation 1.f. required a finding that TD had agreed to split her commission with the Appellant, that the Appellant did not disclose this fact to HG, and that this was a breach of his duty to disclose remuneration to HG pursuant to Rule 5-11(2).

[284] The Panel's reasons for finding that allegation 1.f. had been proven were brief. After referring to their finding that the Appellant had failed to advise HG that TD had agreed to split her commission with him, the Panel set out the wording of Rule 5-11(2). The Panel then referred briefly to submissions from the Council that the information "could have been material" to HG's assessment of the purchase price, and then ultimately held (Liability Decision at para 101):

> [101] As previously stated, we found that Mr. Behroyan did not advise [HG] of his agreement with [TD]. This is a clear failure to comply with Rule 5-11(2). This allegation has therefore been proven.

[285] As noted above, the Panel did not make a finding of a breach of Rule 3-3(f) by reason of this non-disclosure by the Appellant.

[286] I find that the Panel's brief statement in para 101 in relation to the non-disclosure by the Appellant of his agreement with TD that "This is a clear failure to comply with Rule 5-11(2)" falls far short of the criteria for reasons set out in *McDougall.* Any reasons or analysis as to why the Panel found it to be a clear failure to comply with Rule 5-11(2) are absent. The Panel provides no proper, objective or persuasive analysis to justify and explain the result reached. I find this was unreasonable. In result, I find that the Panel was in error in finding that allegation 1.f. had been proven.

[287] I am also troubled by the fact that while the introductory words of Rule 5-11(2) are that it is subject to subsection (3), the Panel makes no reference to Rule 5-11(3). I find this latter subsection should have been considered by the Panel as part of a proper reasoned analysis of whether the Appellant's non-disclosure of his agreement with TD was subject to Rule 5-11(2) in light of Rule 5-11(3).

[288] Rule 5-11(3) states:

> (3) If trading services are provided by a licensee who has been designated to provide those services as a designated agent to or on behalf of only one party to a trade in real estate, the only remuneration that must be disclosed is the remuneration paid or payable to the licensee's related brokerage in relation to the services provided by that licensee to or on behalf of that party, and the disclosure must be made in accordance with subsection (2).

[289] I am aware from my review of the record and the submissions of the Appellant and the Council on appeal that the Panel did not have the benefit of any submissions in relation to the relevance of Rule 5-11(3) to this particular allegation under appeal. I am therefore left in the dark as to whether the Panel did or did not consider as part of its analysis, whether Rule 5-11(3) was applicable on the facts,

or whether Rule 5-11(3) exempted the commissions TD split with the Appellant from the Rule 5-11(2) disclosure obligation.

DECISION

[290] In making this decision, I have carefully considered all of 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.

[291] Following on my conclusions above, I confirm the Panel's findings of professional misconduct under section 35 of the RESA in relation to allegations 1.a., 1.b. and 1.e. of the Amended Notice of Discipline Hearing, and hold that the Panel's findings of professional misconduct under allegations 1.d. and 1.f. of the Amended Notice of Discipline Hearing were made in error.

[292] Given that the Appeal has been bifurcated and I have yet to address the penalty portion of the hearing, and given my decision that the Panel's findings in the Liability Decision in regard to allegations 1. d. and 1. f. were made in error, an issue arises as to the appropriate way to move this appeal forward.

[293] The parties have not provided submissions on remedy applicable to the circumstance of my finding that the Panel was in error in relation to two of the five specific allegations of professional misconduct found by it to have been proven in the Liability Decision. Accordingly, as a matter of procedural fairness, I invite the parties to provide submissions on appropriate remedy and on whether and how to proceed with the penalty portion of the appeal on the following submission schedule:

> Appellant: Must provide electronic submissions to the Tribunal, and must serve the other parties, by no later than **September 10, 2019**.
>
> Respondents: Must provide electronic submissions to the Tribunal, and must serve the other parties, by no later than **September 24, 2019**.
>
> Appellant: may provide any final reply submissions electronically to the FST, and must serve the other parties, by no later than **October 1, 2019**.

[294] Both the Appellant and the Respondents have sought costs of this appeal in their submissions. Success on this appeal from the Liability Decision was divided. If either the Appellant or the Respondents wish to pursue their claim for costs in relation to this part of the appeal, notice of that intention should be provided in writing to the Tribunal and a schedule for the exchange of submissions will be set.

"Michael Tourigny"

Member, Financial Services Tribunal

August 27, 2019