



Real Estate
Council of Ontario

**IN THE MATTER OF AN APPEALS HEARING HELD PURSUANT TO THE
*REAL ESTATE AND BUSINESS BROKERS ACT, 2002***

BETWEEN:

REAL ESTATE COUNCIL OF ONTARIO

- and -

NINA DEEB

DECISION AND REASONS FOR DECISION

The Panel held a videoconference on January 23, 2024, to discuss the written submissions by all Parties with respect to Costs. The Panel decided as follows:

COST AND EXPENSES: Costs and disbursements in the total amount of \$3,000.00 are awarded to Real Estate Council of Ontario and that amount shall be paid by Nina Deeb within thirty (30) days of RECO sending this decision.

WRITTEN REASONS:

REASONS FOR DECISION

COSTS

The Reasons for Decision in this matter were released on October 25, 2023. The Appeal Panel ordered that if the parties could not agree on costs, written submissions could be made. The parties filed submissions and the Appeal Panel met to consider costs submissions on January 23, 2024.

The Registrar seeks an order that costs in the amount of \$3,000.00 be awarded to them, arguing that the Appellant's appeal was unreasonable, frivolous and vexatious. The Appellant in turn asked for an order that each party bear their own costs.

The Appeals Panel heard arguments by the Appellant concerning an interlocutory decision made October 9, 2019; a motion decision concerning abuse of process released October 29, 2020; a decision on a motion for non-suit during the merits hearing on January 25, 2021. The appeal also addressed the Lower Panel's decision on the merits and its decision on penalty.

On the appeal, the Appeals Panel considered the Appellant's grounds of appeal, reviewed her allegations and arguments against the Registrar and the manner in which the Lower Panel analyzed and weighed the evidence. The Appeals Panel found that the evidence did not support her allegations and arguments. After a probing examination of the Discipline Panel's (the "Lower Panel's") Reasons this Panel determined that the Lower Panel's findings were reasonable and, having applied that standard of review, dismissed the appeal.

The Appeal Panel does not have inherent jurisdiction to award costs; rather, its powers to do so are derived from statute. Specifically, sections 17.1 and 25 of the *Statutory Powers Procedure Act* ("SPPA") provide as follows:

17.1 (1) A tribunal shall give its final decision and order, if any, in any proceeding in writing and shall give reasons in writing therefor if requested by a party.

....

(4) A tribunal may make rules with respect to,

- (a) the ordering of costs;
- (b) the circumstances in which costs may be ordered; and
- (c) the amount of costs or the manner in which the amount of costs is to be determined.

25.1 (1) A tribunal may make rules governing the practice and procedure before it.

Clearly, in order to make an award of costs, a tribunal, including this one, must find the conduct of a party unreasonable, frivolous or vexatious or that a party has acted in bad

faith. The SPPA requires that a tribunal must also have crafted rules relating to costs awards. The Rules of Practice for REBBA 2002 Discipline and Appeals Committees, which include R. 17.01, satisfies this requirement and grants this Panel the jurisdiction to award costs.

However, the costs provisions grant limited jurisdiction to the Panel. R. 17.02 of the Discipline and Appeals Committee sets out specific limits to the authority of Panels.

The Rules make it clear that the jurisdiction of a panel to deal with matters not specifically authorized by them are not within the purview of the Panel. The Appellant's attempts to reargue interlocutory matters and motions were unproductive exercises and likely outside the Panel's authority.

R. 7.08 states as follows:

7.08(1) A Motion Participant shall not renew or reargue a matter that has previously been determined on a Motion unless permission has been obtained from the Discipline Committee or Appeals Committee by means of written submissions.

7.08(2) Despite subrule (1), a Motion Participant may renew or reargue a matter that has previously been determined on a Motion if that is provided for in the Order of the Panel hearing the Motion.

Neither the Discipline Committee nor the Appeals Committee has been asked for or *sui motu* given "permission" to revisit the October 9, 2019, October 29, 2020, or January 25, 2021 decisions.

The Appeals Panel's authority to review decisions of a Lower Panel is limited. Also, the Lower Panel itself is given a review power to the extent that the Rules permit it. The intention of the legislature expressed by the Statute is that only a final decision of the Discipline Committee can be appealed. The effect, clearly, is to avoid the retrying of

issues which have been properly determined and even subject to potential or actual review by a Lower Panel:

21.2 (1) A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order.

It is questionable whether this Panel has the jurisdiction to re-determine matters previously adjudicated by the Discipline Committee which were interlocutory in nature or which have been decided on a procedural motion. Indeed, the Statute suggests otherwise.

With regard to the merits decision, the Appeal Panel determined that the Lower Panel provided extensive reasons for its conclusions and that the conclusions were reasonable.

The Appellant's attempt to challenge the complainant's motives and thereby challenge the factual and credibility findings of the Lower Panel was unproductive. For the Panel to attempt to address this issue would, in effect, result in retrying the merits of the discipline hearing. That is neither our function nor do we have authority to do so and it is unreasonable for a party to ask that this be done by the Appeal Panel.

The quantum of costs that a Discipline or Appeals Committee Panel may award is prescribed by R. 17.02 (1) of the Rules, which states as follows:

17.02(1) The amount of costs that may be ordered include the following:

(a) the actual reasonable disbursements or expenses, excluding legal or agent's fees, of the Party related to the Proceeding to a maximum of \$1,000.00.

(b) an amount representing legal fees of the Party equal to a maximum of \$3,000.00 per Hearing Day (inclusive of preparation) by the Party's Lawyers; and

(c) an amount representing agent's fees of the Party equal to a maximum of \$1,000.00 per Hearing Day (inclusive of preparation) by the Party's agent if the Party does not have a Lawyer for that Hearing Day.

This appeal was heard during a single hearing day and thus the Panel is restricted to making an award of \$3,000.00. Costs in the amount of \$3,000.00 are therefore awarded to the Real Estate Counsel of Ontario payable within 30 days of the release of these reasons.

[Released: June 7, 2024]



**IN THE MATTER OF AN APPEALS HEARING HELD PURSUANT TO THE
REAL ESTATE AND BUSINESS BROKERS ACT, 2002**

BETWEEN:

NINA DEEB

Appellant

- and -

REAL ESTATE COUNCIL OF ONTARIO

**Respondent
to the Appeal**

APPEALS DECISION AND REASONS FOR DECISION

APPEARANCES:

For the Registrant:

Lorne Honickman and Nicole Koteff

For the Real Estate Council of Ontario:

Shane Smith and Maya Sabharwal

Heard in Toronto:

February 24, 2023

FINDINGS:

The Appeal is dismissed.

ORDER:

The Discipline Committee Decision is upheld and amended only as to the payment deadline for the monetary penalty and costs by the Appellant.

An Order affirming the Order of the Discipline Committee with respect to its monetary penalty, dated September 15, 2021, and imposing a Fine of \$14,000.00 payable to RECO within one year of RECO releasing this decision.

An Order affirming the Order of the Discipline Committee with respect to its costs order, dated September 15, 2021, which required the

Appellant to pay \$6,000.00 in costs to the Registrar. That costs award shall be payable to RECO within one year of the release of this decision.

COSTS AND EXPENSES OF APPEAL:

If the parties cannot agree on costs, written submissions, not exceeding five double spaced pages may be made. The Registrar, having been successful in this proceeding, shall have 14 days after the release of these reasons to deliver to the Appellant and file its written submissions with RECO (i.e. Manager, Discipline and Appeal Hearings) on the issue of costs. The Appellant shall have 7 days thereafter (i.e. after RECO's delivery of written submissions) to deliver responding submissions to the Registrar, and file a copy of same with RECO. The Registrar shall have the right to reply within 5 days of the delivery of the Appellant's responding submissions. After considering all of the filed submissions, the Appeal Panel will issue a written decision on costs.

WRITTEN REASONS:

REASONS FOR DECISION

This decision relates to an appeal pursuant to the Real Estate and Business Brokers Act, 2002 (REBBA 2002) that was heard on February 24, 2023. The Appellant, Ms. Nina Deeb ("Deeb" or "Appellant") challenged several decisions previously made by the Discipline Committee ("Lower Panel"): one from a motion, released on October 29, 2019 ("Motion Decision"); a decision of the Lower Panel on the merits of this matter released on March 11, 2021 ("Merits Decision"); and a decision of the Lower Panel on penalty and costs released on September 15, 2021 ("Penalty Decision").

The appeal of all three decisions is hereby denied and dismissed for the reasons outlined below.

The Various Decisions being Challenged on Appeal

In the Motion Decision, the Lower Panel determined Deeb's motion to have the disciplinary proceeding stayed because of an alleged abuse of process. The motion to stay the proceeding was dismissed, with the Lower Panel making it clear that "a hearing on the merits will afford both parties with the appropriate forum to canvass, promote, criticize, and challenge the assertions in RECO's allegation Statement."

In the Merits Decision, released on March 11, 2021, the Lower Panel found that the Appellant had violated sections 4, 5 and 37(1) of the Code of Ethics.

In the Penalty Decision released on September 15, 2021, the Appellant was ordered to pay a fine of \$14,000.00 within 12 months and costs of \$6,000.00 arising from the hearing of the abuse of process Motion.

On appeal, the Appellant sought to set aside the three decisions of the Lower Panel on broad grounds outlined in her Notice of Appeal:

1. The Appellant submitted that the Lower Panel made errors of fact and law in the Motion Decision by failing to or refusing to consider relevant evidence before it, which resulted in the Decision being unreasonable;
2. The Appellant submitted that the Lower Panel made errors of fact and law in its Merits Decision by ignoring or failing to consider relevant evidence and the Panel produced a decision that was internally incoherent and untenable given the applicable factual and legal constraints, which resulted in the Decision being unreasonable; and
3. The Appellant submitted that the Lower Panel made errors of fact and law in the Penalty Decision by failing to properly consider evidence before it, and failing to provide adequate reasons to support its findings. Further, the Lower Panel erred by relying on a RECO decision which it knew or ought to have known was under

appeal at the time. Given the foregoing, the Appellant argues that the Lower Panel's Penalty Decision was unreasonable.

The Discipline Hearing and the Merits Decision

By way of background, Deeb had represented the complainants in a transaction that ultimately resulted in the discipline proceeding. With the assistance of Deeb, the complainants had negotiated and purchased the real property at 1-A Street, City A ("Property"), with Deeb also representing the seller in the transaction.

The allegations by RECO against Deeb were threefold:

1. She had failed to protect the best interests of her clients by failing to provide them with accurate information, which adversely affected their decision-making as to the price they offered for the Property, when she knew or ought to have known that they were relying on inaccurate information;
2. In acting for the complainants (as buyers) and the seller of the Property, Deeb was in the best position to know exactly how many offers for the Property were in play at any given time, and certainly by the time that offer presentations were taking place. Deeb also knew that the complainants would be relying on her advice to arrive at an offer price and that, by allowing them to base their decision on inaccurate information – i.e. that they were bidding in a multiple offer situation when, in fact, that was not the case – she failed to provide them with conscientious and competent service; and
3. Deeb made an inaccurate representation in respect of a trade in real estate when she provided the complainants with misinformation about the number of offers in play in the transaction.

In its Merits Decision, the Lower Panel, having reviewed the documentary and oral evidence, arrived at several significant conclusions:

- a. Although Deeb had provided the complainants with the prices of comparable properties to assist them in determining an offer price, they also believed, based on Deeb's representations to them, that they were in a multiple offer situation as of May 9, 2017, when their offer for \$50,000.00 over the asking price was submitted to the seller—who was also being represented by Deeb;
- b. On May 9, 2017 at 12:21 p.m., Deeb also sent an email to the complainants that clearly asserted the complainants were in a multiple offer situation:

Good Afternoon Buyer A and Buyer B, I wanted to let you know that one of the agents that had registered to submit an offer has withdrawn. The Realtor said her client has personal problems, and cannot proceed. I do not have any other new registrations at this Time [sic]. It is one offer and your offer at this point. I will keep you posted.

- c. At the hearing, Deeb could not produce any records from her brokerage showing registered offers on the Property; in fact, she claimed that the brokerage did not keep such records.
- d. The complainant Buyer A was a credible witness, who made it clear that Deeb never told him prior to the complainants' submitting their offer that their offer was the *only* offer for the Property;
- e. Buyer A testified that he believed he was "in competition" for the Property with another bidder and that he wanted "to win" the Property. As a result, Buyer A decided not to change the price in their offer, which was \$50,000.00 over the asking price, because he believed the complainants were bidding in a competitive, multiple offer situation;
- f. Although Deeb claimed that she advised the complainants *verbally* before they finalized and submitted their offer to the seller that they were the only bidders for the Property, the Lower Panel did not accept her evidence as credible and chose, instead, to accept that of Buyer A. Further, at the discipline hearing, Deeb had expressed frustration with Buyer A because he had contacted her several times

about offers relating to the Property. However, Deeb testified that she did *not* send the complainants an email or text message to confirm in writing that there were *no* other offers on the Property as of May 9, 2017. Deeb tried to downplay the verbiage in her May 9, 2017 email where she confirmed there were two offers in play, claiming instead that her choice of words had been unfortunate;

- g. *After* the complainants' offer had been accepted by the seller, Deeb presented them with a Form 127 to sign—to have the complainants confirm in writing that their offer had been the *only* offer for the Property;
- h. The Lower Panel found that Deeb owed her clients—the complainants and the seller – the highest level of duty or obligation in the circumstances because she was double-ending the transaction. In such circumstances, Deeb was obligated to be fully transparent. With respect to Deeb's claim that, despite her own email, she *told* the complainants that they were alone in submitting an offer for the Property, the Lower Panel concluded that it had been incumbent on Deeb to advise the complainants *in writing* before they submitted their offer that they were the only bidders for the Property. In the Lower Panel's view, that was the only reasonable and rational thing for Deeb to do in the circumstances, especially because of her May 9, 2017 email which clearly stated there was more than one bidder for the Property;
- i. The evidence supported the finding that, on May 9, 2017, the complainants maintained the "\$50,000.00 over asking" price in their offer in part because they believed they were bidding against another would-be buyer, which turned out not to be the case;
- j. The complainants had not been properly represented or served by Deeb and she had not provided conscientious service to them. Deeb also acted in a manner that did not demonstrate reasonable skill, judgment, and competence in a dual agency transaction;
- k. Deeb failed to properly relay to the complainants the number of offers that were in play at any given time, that is, before the complainants had finalized and submitted their "over asking price" offer to the seller. There was a lack of transparency and competence by Deeb in the transaction.

- I. Deeb had at least two separate opportunities prior the complainants submitting their offer to the seller to clarify the number of offers at play and to confirm that, by May 9, 2017, the complainants were the *only* bidders on the Property, but she failed to do so. Deeb should have either emailed or texted the complainants to make it clear that there were no other offers—especially after she emailed them at 12:21 p.m. on May 9, 2017 to advise that they were competing with another would-be buyer (which was not true). Alternatively, Deeb could have requested the complainants to sign Form 127 *before* they submitted their offer to confirm in writing that the complainants were the only bidders on the Property. But she did neither;
- m. Deeb failed to complete the proper and necessary paperwork in the transaction not only to protect her clients, but also herself. As a result, Deeb knowingly made an inaccurate representation in respect of a trade in real estate;
- n. The complainants first learned that they had been the only bidders on the Property after their offer had been accepted by the seller because it was only at that time that Deeb presented them with Form 127 and requested that they sign it.

After assessing the evidence, and reviewing the relevant sections in the Code of Ethics, the Lower Panel found Deeb in breach of Sections 4, 5, and 37(1) of the Code. Subsequently, after the Lower Panel had considered penalty and costs submissions from the parties, Deeb was ordered to pay a fine of \$14,000.00 within twelve (12) months, and costs of \$6,000.00 in respect of her unsuccessful stay motion based on RECO's alleged abuse of process.

Submissions by the Appellant

The Appellant claimed that there were a number of insurmountable errors committed by the Lower Panel at the discipline hearing. At the commencement of the merits hearing, the issue of the Will-Say statements not having been served by RECO within the time period provided by RECO's Rules was raised by Deeb. The Lower Panel had granted an adjournment to RECO in early October 2019, which ultimately permitted RECO to bring

itself into compliance with the Rules relating to the delivery of Will-Say Statements. Thereafter, in early 2020, the COVID pandemic hit Canadian society with its adverse implications for delays in the Courts and administrative process.

However, in 2020, the parties co-operated with each other to re-schedule the hearing on the merits even though the COVID pandemic was in full swing.

Through her counsel at the time, Deeb complained to the Lower Panel in January 2021 that it had not delivered “reasons” to support its October 2019 adjournment decision, and that RECO had not brought a formal motion in October 2019 requesting an adjournment. However, the Lower Panel made it clear at the discipline hearing that it was not going to revisit the adjournment decision that it made in October 2019.

Nevertheless, on appeal, the Lower Panel’s conduct was characterized by Deeb as a reviewable error.

Concerning the specific issue of the adjournment decision made in October 2019, the Appeal Panel has determined that the Lower Panel had the ability to control its own processes to grant an adjournment to RECO. The late filing of Will-Say Statements was addressed at the short hearing on October 9, 2019 and the potential consequences of RECO’s default were outlined by the Lower Panel.

With respect to the granting of the adjournment, the Lower Panel had clear authority to determine the conduct of the proceeding and to control its own processes. In addition to RECO’s Rules of Practice, the *Statutory Powers Procedure Act* states:

21. A hearing may be adjourned from time to time by a tribunal of its own motion or where it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held. R.S.O. 1990, c. S.22, s. 21.

If the hearing had proceeded on October 9, 2019, the Lower Panel indicated that RECO was not going to be permitted to call witnesses to which the late Will-Say Statements

related. After considering the adjournment request by RECO, the Lower Panel gave clear and cogent reasons on the record. The Lower Panel was within its authority to grant an adjournment even if RECO's request had not been the result of a formal, written notice of motion.

On a related note, the Appeal Panel notes that there appears to have been nothing of any substance in the Will-Say Statements of RECO's witnesses that could have been a surprise to Deeb; those Statements were a summary of alleged facts of which Deeb was well aware given the complaint that had previously been filed with RECO.

The Motion Decision released on October 29, 2020 dealt expressly with the events that transpired on October 9, 2019, when RECO was granted an adjournment. That decision also outlines the two Will Say Statements for the complainants that were delivered two weeks late by RECO—but nevertheless two weeks before the parties' appearance before the Lower Panel on October 9, 2019. Those Statements were brief and, by their very nature, their content could not have come as a surprise to Deeb, especially since she had been dealing with the RECO complaint process for some time and the parties had even attended a pre-hearing conference to see whether the matter could be settled without a hearing.

Further, given the level of detail and attention to the issues in the Motion Decision released on October 29, 2020, it is difficult to understand why Deeb would, once again, raise issues about the October 9, 2019 appearance before the Lower Panel in January 2021 at the merits hearing. The abuse of process motion heard by the Lower Panel on August 29, 2020 -- which resulted in the Motion Decision on October 29, 2020 -- raised issues that resulted in a review of the events on October 9, 2019, with Deeb positing that the proceeding should be stayed because of the Lower Panel's adjournment and other decisions made on October 9, 2019. At the outset of the merits hearing in January 2021, Deeb tried again to raise issues that had been thoroughly canvassed and determined not once but twice by the Lower Panel.

The Appeal hearing was used by Deeb to raise the same issues yet again rather than the merits of the proceeding.

Deeb's counsel argued that since the Will-Say Statements were not tendered within the required time period, RECO had run afoul of O. Reg 580/05. The Appeal Panel, however, disagrees. Will-Say Statements are not, in and of themselves, "evidence" as contemplated by the Regulation. They are merely a very brief statement of the evidence that will be tendered—more or less. To suggest otherwise is incorrect.

The Appellant also submitted that, although RECO had the burden of proving the allegations as framed, the Lower Panel erred in finding that RECO had discharged that onus successfully. In particular, Deeb argued that paragraph 5 of the Allegation Statement could not and was not proven; in short, given the way the allegation had been stated, and the available evidence, Deeb asserted it was "impossible" for RECO to prove those allegations. Paragraph 5 in the Allegation stated:

At 12:21 p.m. on May 9, 2017, the Complainants received an email from Deeb, indicating that there were two offers for the Property, including their own. Based on this information, the Complainants decided to insert a purchase price of \$890,000. At this time, they also increased the deposit amount from \$10,000 to \$20,000, as they were advised by Deeb it would make their offer more attractive.

The Appellant argued that since the offer for the Property was signed and completed on May 8, 2017, and the \$890,000.00 offer price and increased deposit terms had been included in the offer by the end of that day, the allegation in paragraph 5 could not possibly be true because the paragraph asserted that, in response to Deeb's mid-day email to them on May 9, 2017, the complainants *thereafter* decided to insert a purchase price of \$890,000.00 and increase the deposit to be paid.

The Appeal Panel agrees that paragraph 5 is worded in a particular way, indicating that the price of \$890,000.00 was inserted into the offer *after* Deeb advised in her mid-day email on May 9, 2017, that there were two offers in play for the Property.

However, the Appeal Panel does not agree with the Appellant's position that the case against Deeb was undermined as a result. Given the actual allegations concerning ethical breaches by Deeb in the Allegation Statement, a significant issue during May 8 and 9, 2017 was the consistent understanding of the complainants that they were operating in a multiple offer situation.

Although the price of \$890,000.00 for the Property had been determined prior to the 12:21 p.m. email (on May 9, 2017) being sent to the complainants, that same message *confirmed inaccurately* that the complainants were still in a competitive bidding situation for the Property. The evidence presented at the discipline hearing was also clear that the complainants *maintained* their \$890,000.00 offer price, which was \$50,000.00 above the list price, because they continued to believe—based on Deeb's own written misrepresentation – that a competitive bidding process for the Property persisted on May 9, 2017.

The key issue is the misrepresentation relating to a competitive bidding situation, its impact on the behavior, reliance and decision-making of the complainants to their detriment, and Deeb's failure to retract that misrepresentation—all of which was prejudicial to the interests of the complainants.

The essence of RECO's allegations was that inaccurate information provided by Deeb about a multiple offer situation caused the complainants to rely on it and act to their detriment. Related to those allegations was that Deeb had *never* corrected her inaccurate information by advising the complainants before they submitted their offer or, alternatively, before their offer was accepted, that they were the *only* bidders for the Property.

The Lower Panel made a factual determination that Deeb never corrected her inaccurate information about a competitive bidding situation. She could have easily sent an email or text to the complainants or had them complete a Form 127 prior to submitting their offer for the Property. Doing so would have confirmed conclusively that they were the sole

bidders for the Property, but Deeb did not do so. Further, Deeb's evidence that she *told* the complainants *verbally* that they were the only bidders for the Property was not accepted as credible by the Lower Panel, which the Panel was perfectly entitled to do. The Lower Panel made legitimate credibility determinations on that issue.

In that respect, the Lower Panel came to a conclusion that was reasonable, as was the manner in which the Lower Panel reached their conclusion. Further, the Lower Panel confirmed that, as a result of the inappropriate actions of Deeb, the complainants continued to believe that they had acquired the Property in a multiple offer situation, only to discover later that they had submitted an offer (which was \$50,000.00 over the list price) as the sole bidder.

On appeal, Deeb submitted that the motion for a non-suit that she brought at the merits hearing in January 2021 should have been granted rather than dismissed by the Lower Panel. However, the record indicates that the Lower Panel considered the evidence after RECO's case had been presented and there is no indication that it erred in applying the proper test in dismissing that motion. The parties have cited *Pacheco v. Ministry of the Solicitor General*, 2020 CanLII 38998 (ON GSB), which re-iterates the principles in *OPSEU (Whan et al.) v Ontario (Ministry of Transportation)* 2007 CanLII 6889, and summarizes them as follows:

1. The Board will not put the moving party to an election of whether or not to call its own evidence as a matter of course. The appropriateness of putting the moving party to an election will be determined based upon the considerations of expedition and fairness in the particular circumstances of each case.
2. In a non-suit motion, the standard of proof expected from a responding party is that of a *prima facie* case, which is significantly lower than the standard of proof on a balance of probabilities.
3. In determining whether a *prima facie* case has been made out, the test is whether some evidence exists to support the claim, which requires an answer or explanation from the other side.
4. In applying the standard of a *prima facie* case, any conflicts in or doubts about the facts must be determined in favour of the party responding to the motion.
5. In assessing the existence of a *prima facie* case, *viva voce* evidence as well as all documentary evidence before the Board must be considered.

6. In examining the evidence before it, the Board will not assess the quality, reliability or the credibility of the evidence.

7. Where a non-suit motion is granted, a written decision with reasons will follow. However, where a non-suit motion is denied, no reasons, oral or written, will be issued.

The Appeal Panel is satisfied that the Lower Panel properly disposed of Deeb's motion for a non-suit in the Merits Decision.

The Lower Panel also clearly indicated that it had considered the issues and concerns raised by the parties at the Merit's Hearing. In doing so, the Panel reviewed the evidence of the discussions between the complainants and Deeb and it made a decision to accept the evidence of the complainants over the Appellant.

The Appellant submitted that the Lower Panel failed to assess conflicting evidence. The Appellant further argued that the Panel failed to consider or properly weigh the evidence of Deeb's witnesses, claiming that the Lower Panel should not have accepted the complainants' evidence in preference to witnesses who did not participate in discussions between Ms. Deeb and the complainants.

The Appellant took issue that the Lower Panel had preferred the complainants' testimony to that of Individual A, who actually testified that his knowledge was limited to what he had learned from Deeb and the seller. The seller had had a single conversation with the complainants and it is clear that no reliable information about the interaction between the Appellant and the complainants was tendered at the merits hearing.

The Lower Panel's reasons address the nature of the evidence and the issues addressed by other witnesses by distinguishing the other witnesses' distance from the transaction with the complainants' direct relationship to the facts in issue. With respect to the Form 127 matter (Transcript, p. 67 ff.; p.174 ff.) there was no direct evidence contradicting the complainants' claim that Form 127 was first presented to them *after* the offer had been accepted. The Appeal Panel finds that the conclusion reached by the Lower Panel on this issue was eminently reasonable.

In its reasons, the Lower Panel described the limited evidence of the seller and the Broker of Record (Reasons, p. 7) and made appropriate inferences as a result.

Counsel for the Appellant stated that the Lower Panel erred in numerous instances in assessing the veracity of the complainants' evidence and in preferring their evidence over that of Deeb. However, the rationale for the Panel doing so is made clear in the Merits Decision.

The Appeal Panel has reviewed the Merits Decision on the basis of the standard of reasonableness. The Appellant's counsel submitted that the Panel's decision was unreasonable as a result of the Lower Panel having accepted the complainants' evidence in the face of Deeb's evidence. However, the Lower Panel clearly set out reasons why it preferred the evidence of the complainants. In *RECO v Gogek*, Appeals Committee, RECO, July 28, 2021, the Appeal Panel confirmed that the reasonableness standard continues to apply, and that the standard of correctness will apply only in limited circumstances depending on the issues that are raised.

In *Ryan v. Law Society (N.B.)*, [2003] S.C.J. No.17 (SCC) the Supreme Court of Canada found that "a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is one that the reviewing court doesn't find compelling." The Federal Court has summarized the guiding principle of the standard in *Aboubakar v Canada (Citizenship and Immigration)* 2020 FC 181 (CanLII) following the reasoning in *Vavilov*:

When the reasonableness standard of review is applied, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov* at para 100). The Court's focus "must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83) to determine whether the decision is "based on an internally coherent and rational chain of analysis and . . . is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). Close attention must be paid to a decision maker's written reasons, and they must be read holistically and contextually (*Vavilov* at para 97). Reasonableness review is not a line-by-line treasure hunt for error (*Vavilov* at para 102). If "the decision bears the

hallmarks of reasonableness—justification, transparency and intelligibility—and . . . it is justified in relation to the relevant factual and legal constraints that bear on the decision”, it is not for this Court to substitute its preferred outcome (*Vavilov* at para 99).

Consistent themes in Deeb’s appeal submissions were that the Lower Panel failed to: (a) provide adequate reasons to support its determinations, (b) explain why it had rejected “competing evidence”, and (c) account for its decision not to refer to other “important evidence” in its reasons.

These submissions were very broad and lacking in particularity. Further, the dealings between Deeb and the complainants in the transaction for the Property were not complicated. Deeb sent an email mid-day on May 9, 2017 that was inaccurate, if not misleading. She had clients – the complainants – who were entitled to rely on her information and, based on the findings of the Lower Panel, the complainants did indeed believe they were still in a multiple bidding situation on May 9, 2017 immediately before their offer was delivered to the seller.

Deeb simply failed to produce credible evidence that she had “set the record straight” with the complainants before they submitted their offer, and it was accepted. She was in the best position to retract or rectify her misrepresentation, which the Lower Panel found she did not do. The Lower Panel did not focus on the limited dealings which Deeb’s witnesses had with the complainants during the transaction. This was not significant. It was Deeb’s responsibility, especially in a double-ended transaction, to ensure that she provided complete and accurate information to all of her clients and that she did not unfairly serve the interests of some clients at the expense of the others. Deeb was adept at sending informative written messages to the complainants. But she neglected to do so at a crucial time—when she had an obligation to correct the misrepresentation in her May 9, 2017 email that the complainants were still in a competitive bidding situation for the Property.

The Appeal Panel was not persuaded by Deeb’s submissions at the appeal hearing about the *motives* that the complainants might have had in providing certain testimony at the

merits hearing. Questioning the motives of witnesses at the appeal stage, however, emerged as a colourable attempt to retry the merits of the discipline proceeding.

The focus of the appeal, by its very nature, had to be on any overriding factual or legal errors allegedly made by the Lower Panel; it was not an investigation into whether one or more witnesses had nefarious motives when they had testified before the Lower Panel; the Appeal Panel is not in any position to make determinations on such motives, especially where the Appellant was raising that issue for the first time on appeal. Deeb was always capable of attacking the motives and credibility of RECO's witnesses at the merits hearing. If she failed to do so in a convincing manner, that cannot be ascribed to the Lower Panel as a reviewable error.

The Appeal Panel rejects the submissions by Deeb that the reasons of the Lower Panel should have contrasted the testimony of RECO's and Deeb's witnesses and provided particulars why one witness's testimony was preferred over that of another. The facts underlying this case showed that the central witnesses who had the most relevant information concerning the Code of Ethics allegations were the complainants and Deeb herself. The Lower Panel certainly summarized their respective evidence and provided reasons for its factual findings based on such testimony.

In challenging the determinations of the Lower Panel, Deeb asserted that the Panel fell "into an easy trap" of making "we find the evidence of witness X credible" statements. With respect, that is the very task with which the Lower Panel was charged. Where possible, the Panel made determinations about the meaning of relevant documents put before it. When competing witnesses were offering different, if not conflicting testimony, the Lower Panel made credibility determinations. Deeb added that the Lower Panel did not follow the "right approach" or properly "explain" its credibility findings.

However, far from being a "trap" that the Lower Panel easily fell into, making credibility determinations where necessary was an essential part of the Panel's mandate. The Appeal Panel has found that there is simply no indication in the record or otherwise that

the Lower Panel's credibility determinations were improper, deserving of review, or lacking in explanation.

RECO's Submissions

Concerning the October 9, 2019 adjournment decision by the Lower Panel, RECO's counsel submitted that it was not properly before the Appeal Panel for review or reconsideration. The Appeal Panel agrees. The adjournment decision was an interlocutory decision that the Lower Panel was entitled to make in October 2019.

The propriety of the adjournment granted was raised and challenged repeatedly by Deeb, as described herein. To the extent that the issue of the adjournment was subsumed by Deeb's appeal from the Motion Decision or the Merits Decision, the adjournment decision was indirectly considered by the Appeal Panel but not for any specific relief relating to that decision.

RECO also submitted that, by and large, the appeal by Deeb was an improper attempt by her to re-argue the abuse of process motion that resulted in the Motion Decision as well as the merits hearing, which culminated in the Merits Decision.

In light of the broad brush appeal grounds of Deeb, and her submissions claiming that evidence had not been properly construed by the Lower Panel, and her challenges to the Panel's factual findings including credibility determinations, the resulting canvass was an equally broad request that *different* conclusions be attached to the evidence before the Lower Panel. In that respect, a request was being made that the merits of the Lower Panel's decision be revisited and that the Lower Panel's determinations be significantly altered.

As far as the alleged "unreasonable" nature of the Lower Panel's decision was concerned, the Appellant's submissions were often weak and undeveloped. As counsel for RECO pointed out, an "unreasonable decision", according to the Supreme Court of Canada

decision in *Vavilov*, is a decision that is *not* supported by a tenable explanation or reasonable explanation such that it warrants being altered or overturned by an appeal panel.

While reasonableness is the confirmed standard for appeals from one tribunal to another (appeal) tribunal (absent statutory direction to the contrary), the standard of correctness continues to apply with respect to strict legal issues, and palpable and overriding errors of fact (which essentially go to the jurisdiction of a tribunal because determinations should not be made in the absence of supporting evidence). The decision in *RECO v. Gogek* also confirms the standard of review to be applied by appeal panels from lower panel decisions.

At the appeal hearing, RECO canvassed the issues of delay and other allegations that had been raised in the abuse of process motion before the Lower Panel and noted the Panel's comprehensive Motion Decision. It was submitted by RECO that Deeb's approach before the Lower Panel had been to raise technical arguments to try to avoid any hearing on the merits, and to use an abuse of process motion to appeal from an interlocutory decision (i.e. the adjournment decision) made by the Lower Panel in October 2019. The Lower Panel also rejected Deeb's assertion that RECO had acted with bad faith in the proceeding.

The Appellant's Reply Submissions

In Deeb's reply submissions on appeal, her counsel advised that nothing in this case turned on the distinction between the two standards of review, that is, correctness and reasonableness. It was submitted that even if the reasonableness standard – which provides for considerable deference to the decisions of the Lower Panel – was applied, it was clear that the Lower Panel's decisions should be overturned.

Once again, the adjournment decision of the Lower Panel in October 2019 was raised in Deeb's submissions, with Deeb claiming that the Lower Panel's adjournment in favor of

RECO had been a “game-changer” for Deeb’s rights and interests in the proceeding. Indeed, the adjournment issue figured prominently and repeatedly in Deeb’s factum on the appeal.

Concerning alleged bad faith on the part of RECO, Deeb agreed that the Lower Panel had rejected that submission, but she maintained the Panel had only done so because it had defined “bad faith” narrowly by focusing on the concepts of dishonesty, corruption, and improper motives. Instead, Deeb asserted that evidence of those concepts arising from RECO’s conduct was *not* necessary for the Lower Panel to make a finding of bad faith on RECO’s part.

Finally, the decision in *Hodge v. Registrar Real Estate and Business Brokers Act, 2022 ONSC 7206*, was cited by Deeb to support the assertion that evidence had been relied on by the Lower Panel that was not particularized in the Allegation Statement and, as such, the findings made by the Panel were not legitimate or fair in the circumstances. The Appeal Panel understood this submission to relate to paragraph 5 in the Allegation Statement and the fact that the evidence at the hearing had shown that the \$890,000.00 offer price for the Property had been determined by the complainants before Deeb’s May 9, 2017 email was sent to them.

However, as the Appeal Panel has noted, the allegation of misconduct in the Allegation Statement was always clear that Deeb had persistently, including on May 9, 2017, told the complainants that they were bidding for the Property in a multiple offer situation. The evidence at the merits hearing was that, based on that misunderstanding, which Deeb had promoted in her dealings with the complainants, the complainants decided to *maintain* their offer of \$890,000.00 and have it delivered to the seller during the afternoon of May 9, 2017.

The focus of RECO’s allegation of unethical conduct by Deeb was on the misinformation that had been provided and its impact on the decision-making of the complainants. But

for that inaccurate information, the Lower Panel found that the complainants would not likely have submitted an \$890,000.00 offer to the seller late on May 9, 2017.

Also, the evidence at the merits hearing was that Deeb had not taken adequate measures to retract or correct her inaccurate information about a competitive bidding process. The evidence established that it was not until the evening of May 9, 2017—after the complainants’ offer had been accepted by the seller – that Deeb produced Form 127 and asked the complainants to confirm that they had been the only parties bidding for the Property on May 9, 2017.

Contrary to the appeal submissions of Deeb, the Appeal Panel cannot find any overriding or palpable errors of fact in the three decisions of the Lower Panel. The central evidence for which Deeb never provided a satisfactory explanation was her *own* email sent just after 12 p.m. on May 9, 2017. While Deeb told the Lower Panel that she had used a “poor choice of words” in that email, the words had been chosen by Deeb herself and they certainly relayed the message that the complainants were in a competitive bidding situation for the Property.

Against that background, the decision of the complainants to maintain a proposed offer price \$50,000.00 over the list price for the Property was both understandable and unfortunate. However, the inaccurate if not misleading content of Deeb’s email either caused or encouraged bidding conduct by the complainants that was highly detrimental to them.

Similarly, a review of the three decisions challenged on appeal does not reveal any legal errors that justify intervention by the Appeal Panel.

The Motion Decision

A motion brought by the Appellant seeking dismissal based on abuse of process and unreasonable delay was heard on August 31, 2020, and the Motion Decision was

released on October 29, 2020. The Appellant claimed on appeal that, in rendering the Motion Decision, the Panel made incorrect findings in law and palpable and overriding errors of fact.

The Motion Decision thoroughly canvassed the issues raised by Deeb in respect of the October 9, 2019 appearance. It is clear from that Decision that what Deeb was seeking on the abuse of process motion was a complete reconsideration of the Lower Panel's previous interlocutory/procedural decisions with different consequences being attached to them, namely the permanent stay of the disciplinary proceeding.

No issues raised and no submissions made by Deeb on the abuse of process motion were found by the Lower Panel to have merit. The Lower Panel concluded that some of the issues raised by Deeb had no evidentiary foundation whatsoever such that the Lower Panel was mystified as to why they were even part of the motion. The Appeal Panel agrees with the Lower Panel's determinations on that motion and finds that the appeal grounds to review and revise the Motion Decision are unconvincing.

Having reviewed the detailed Motion Decision of the Lower Panel, the Appeal Panel finds that it *cannot* be said to be (a) lacking in particulars, (b) deficient in reasons to support its findings, and (c) unreasonable in its determinations.

The Motion Decision is thorough and the decision was responsive to a motion that raised many disparate and unsupported allegations claiming that it would be an abuse of process for the proceeding to continue to a hearing on the merits. The Lower Panel provided extensive reasons for rejecting the submissions and assertions of Deeb that an abuse of process had either occurred or would occur if the proceeding continued.

Further, not only were Deeb's claims of unreasonable delay misplaced, but the evidence showed that Deeb and her counsel had been responsible for their unavailability for earlier dates in the scheduling process and that, in the final analysis, they had co-operated with RECO in fixing dates for the merits hearing.

As for other assertions, such that the Allegation Statement contained allegations that were “patently untrue” that could not be found anywhere in the original complaint to RECO, the Lower Panel correctly made the most basic of observations: 1) the Allegation Statement was that of RECO after it had conducted its own investigation into the original complaint and there was no obligation whatsoever that such a Statement had to mirror what had been stated in the original complaint to RECO; and 2) the obligation of RECO proving its allegations—in particular the alleged breaches of the Code of Ethics – lay on RECO and the purpose of a hearing on the merits was to consider the allegations, the evidence produced by RECO, and the response and submissions of the registrant.

The Lower Panel rightly found that there was no substance to Deeb’s allegation that her written evidence had been “doctored” by RECO because eight (8) pages of real property comparables had been placed at the wrong Tab in RECO’s Book of Documents.

On cross-examination for the abuse of process motion, Deeb actually claimed that her written evidence had been “butchered” by RECO. But the Lower Panel noted that the error had been acknowledged in writing between the parties in late January 2019, no alterations had actually been made to that evidence, and it was a non-issue thereafter. Yet, despite that, Deeb claimed that RECO’s mis-organization of eight pages of documents supported her stay motion even though she always had the right to deliver her own book of documents if she so desired. The Appeal Panel concurs with the Lower Panel’s conclusion that to suggest that Deeb’s evidence had been “doctored” or “butchered” by RECO was groundless.

Similar conclusions were made by the Lower Panel on other issues raised by Deeb in support of her unsuccessful abuse of process motion; those conclusions and the supporting reasons are clearly and cogently outlined in the Motion Decision.

The Appeal Panel also notes the repetitiveness by Deeb in raising the same issues. The adjournment that the Lower Panel granted on October 9, 2019 was challenged by Deeb at that appearance. But it was also challenged as part of Deeb’s abuse of process motion

in August 2020, with Deeb claiming the adjournment decision was not only improper but that it also supported a stay of the entire proceeding.

The adjournment decision was also raised by Deeb at the outset of the merits hearing in January 2021 but the Lower Panel, as was its right, did not entertain her complaints. During the appeal hearing, the adjournment decision in October 2019 was also subject to attack in Deeb's appeal submissions, including a broader challenge to the Motion Decision.

There are sound reasons why the Appeal Panel should be reluctant to review and re-determine issues arising from an interlocutory or procedural order. This observation would not only apply to the adjournment decision made on October 9, 2017 by the Lower Panel but also to the Motion Decision, which was soundly dismissed after a thorough motion hearing and the Lower Panel's review of voluminous motion materials and cross-examination transcripts from Deeb and RECO.

The Appeal Panel has considered the grounds of appeal as they relate to the three Lower Panel decisions challenged by Deeb and those decisions include determinations of a interlocutory nature.

However, the Appeal Panel also notes that, in the ordinary course, there are requirements under RECO's Rules of Practice if a party, be it a registrant or RECO itself (as represented by the Registrar), seeks to challenge motion-based decisions made by a Lower Panel or an Appeal Panel.

Rule 7.08 of the Rules of Practice states as follows:

7.08(1) A Motion Participant shall not renew or reargue a matter that has previously been determined on a Motion unless permission has been obtained from the Discipline Committee or Appeals Committee by means of written submissions.

Although Rule 7.08 does not specifically bar an Appeal Panel from reviewing a motion decision made by a Lower Panel, the fact that Rule 7.08 bars the renewal or rearguing of a decision resulting from a motion unless permission has first been obtained from the relevant Panel after written submissions have been made (i.e. by the party requesting re-argument) confirms that revisiting motion-based decisions is the exception rather than the rule.

In the Appeal Panel's view, there should be some compelling and overriding reason for a Panel to revisit motion decisions because they do not ordinarily determine a proceeding on the merits, they are usually procedural in nature, and there must ultimately be some efficiency and finality to the litigation process.

Other reasons why interlocutory decisions by Lower Panels should not ordinarily be reviewable on appeal are that: (a) the Lower Panel is usually in the best position to make procedural or process-related decisions to move a proceeding forward, (b) the appeal process at RECO does not involve a hearing *de novo*; and (c) the appeal process has not been designed to have the Appeal Panel substitute its decision on interlocutory matters after a hearing on the merits before a Lower Panel has been concluded.

Thus, unless an interlocutory decision by a Lower Panel is directly and substantially connected to: (a) one or more proper appeal grounds arising from the Panel's decision on the merits, and (b) alleged errors relating to the merits decision, an Appeal Panel should not ordinarily undertake a review of interlocutory or motion-based decisions made by a Lower Panel.

The requirements of efficiency and finality in the appeal process, and the principles reflected in Rule 7.08 of RECO's Rules of Practice, suggest that there should be limited room or tolerance in the appeal process for the review of interlocutory orders made by a lower panel.

Appeal Panels should exercise considerable restraint when asked, as part of an appeal, to review decisions by Lower Panels on matters of procedure and practice. Appellate interference with interlocutory decisions—which ordinarily reflect the exercise of discretion by Lower Panels – should only take place in (a) exceptional circumstances and (b) where interference is necessary to prevent a manifest miscarriage of justice.

The Penalty Decision

The appeal hearing did not involve many oral submissions by Deeb’s counsel on the Penalty Decision. However, the Appeal Panel was directed to Deeb’s factum on that issue and, accordingly, the Panel has reviewed and considered Deeb’s written submissions relating to the Penalty Decision.

The Appellant argued that the Panel erred in law in determining and imposing the penalty outlined in the Penalty Decision. However, the Appeal Panel has concluded that, on its face, the Penalty Decision confirmed that in determining the appropriate penalty to be imposed on Deeb the Lower Panel had considered the factors set out in *Registrar (RECO) v. Suzette Thompson*.

The Lower Panel also found that Deeb had knowingly made an inaccurate representation in respect of a trade in real estate. After considering that Deeb had been in a dual agency situation, where she owed significant and ongoing obligations to the buyers and the seller in the transaction, the Lower Panel considered the nature and gravity of the Appellant’s breaches of the Code of Ethics, the impact of her conduct on the complainants, her active involvement in the breaches, and whether the Appellant had gained personally from her misconduct.

The Lower Panel considered the need for specific deterrence and general deterrence, the importance of maintaining public confidence in the integrity of the profession, and the degree to which the Applicant’s breaches were regarded as being outside the range of acceptable conduct.

A Lower Panel has broad discretion in determining questions of penalty and costs. Although that discretion should be exercised properly and only after due consideration of factors such as those outlined in the *Suzette Thompson* decision, there is nothing compelling in this case for the Appeal Panel to disturb the penalty and costs decision made by the Lower Panel.

With respect to the legal costs that were imposed on Deeb, the Appeal Panel finds that the Lower Panel properly considered the nature of the Appellant's unsuccessful motion, which it considered to be dilatory and ill-conceived, and imposed a costs award against her. The Lower Panel also provided adequate and cogent reasons to support its penalty and costs decision. As such, the Appeal Panel sees no reason to intervene to revise or amend that decision.

Disposition by the Appeal Panel

For the reasons outlined herein, Deeb's appeal is hereby dismissed. None of the three Lower Panel decisions that were the focus of the appeal warrant interference by the Appeal Panel to overturn them or revise them.

Costs:

If the parties cannot agree on costs relating to the appeal, written submissions not exceeding five double spaced pages may be made. The Registrar, having been successful in this proceeding, shall have 14 days after the release of these reasons to deliver to the Appellant, and file its written submissions with RECO (i.e. Manager, Discipline and Appeal Hearings). The Appellant shall have 7 days thereafter (i.e. after RECO's delivery of written submissions) to deliver responding submissions to the Registrar, and file a copy of same with RECO, and the Registrar shall have the right to reply within 5 days of the delivery of the Appellant's response. After considering all of the filed submissions, the Appeal Panel will issue a written decision on costs.

[Released: October 25, 2023]



Real Estate
Council of Ontario

**IN THE MATTER OF AN APPEALS HEARING HELD PURSUANT TO THE
*REAL ESTATE AND BUSINESS BROKERS ACT, 2002***

BETWEEN:

REAL ESTATE COUNCIL OF ONTARIO

- and -

NINA DEEB

DECISION AND REASONS FOR DECISION

APPEARANCES:

For the Registrant:

Nicole Koteff

For the Real Estate Council of Ontario: Maya Sabharwal

Heard in Toronto:

June 11, 2021

ORDER:

Fine of \$14,000.00 payable to RECO within one year of the release of this decision.

COSTS AND EXPENSES:

Costs and disbursements in the total amount of \$6,000.00 are awarded to RECO and that amount shall be paid by the Registrant to RECO within one year of the release of this decision

WRITTEN REASONS:

REASONS FOR DECISION

PENALTY AND COSTS

INTRODUCTION

A Penalty Hearing was held by videoconference on June 11, 2021, to hear the Submissions of the parties on the issues of penalty and costs. Submissions were received from counsel for RECO and Nicole Koteff, Counsel for Nina Deeb (“Deeb” or “the Registrant”).

SUBMISSIONS FOR THE REGISTRAR:

Counsel for the Registrar noted that the Panel determined in its findings on liability that Deeb breached sections 4, 5, and 37(1) of the Code of Ethics.

Counsel for the Registrar began her Submissions by providing the Panel with an overview of the undisputed facts as determined by the Panel in their Decision on Findings:

- a) Deeb had a duty on both sides as this was multiple representation. She was obligated to be fully transparent with the Complainants who were her buyer clients. She failed to clearly inform and advise her clients about the status of offers on the Property. As such, she did not promote and protect the interests of her buyer clients.
- b) The Complainants were not properly represented by Deeb and Deeb did not provide conscientious service to them. She also acted in a manner that did not demonstrate reasonable skill, judgment and competence in this dual agency transaction.
- c) The Panel determined that the number of offers was not properly relayed by Deeb and in all the circumstances, this information should have been given in writing to the Complainants.
- d) The email sent by Deeb to the Complainants on May 9, 2017, at 12:21 p.m. does logically seem to follow from the previous discussion about offers at the meeting with the Complainants.
- e) When in multiple representation, the duty of care should be at the highest level.
- f) Deeb ought to have known to follow up with an email and/or she should have placed a priority on having Form 127 signed prior to the Offer being presented confirming that the Complainants were the only registered offer.
- g) Though this was not a malicious act, Deeb made an inaccurate representation as to the status of offers on the Property in her May 9, 2017, 12:21 p.m. email and that was never corrected. It was, in fact, not an accurate statement of the status of offers when the Offer was presented. The Complainants were left with an understanding that they were in competition and this understanding was never corrected. Deeb failed to complete her

paperwork needed to protect herself and both her clients, by taking one more step to document the number of offers for her clients before the Offer was presented or by having Form 127 signed prior to offer presentation. As a result, Deeb knowingly made an inaccurate representation in respect of a trade in real estate.

Counsel for the Registrar submitted that in determining penalty, in accordance with the Decision in *Registrar v. Suzette Thompson*, Appeals Committee of RECO, May 31, 2012, the following factors should be considered:

- The nature and gravity of the breaches of the Code of Ethics.
- The role of the offending member -in breaches.
- Whether the offending member suffered or gained, as a result of the breaches.
- The impact of the breaches on the complainant or others.
- The need for there to be specific deterrence to protect the public.
- The need for there to be general deterrence to protect the public.
- The need to maintain the public's confidence in the integrity of the profession.

The degree to which the breaches are regarded as being outside the range of typical practice.

Counsel for the Registrar reviewed these factors and discussed their application to the facts in this case. She also referenced the previous decision *Registrar v. Donna Mae Pritchard* (released March 21, 2019).

The Registrar is seeking an Order for a fine of not less than \$14,000.00 payable within 90 days of the Decision of the Panel. The Registrar is also seeking costs of \$3,000.00 for the Motion brought by Deeb to dismiss the proceedings as an abuse of process and \$3,000.00 for the day spent on cross-examinations in relation to that Motion. This request is made pursuant to Rule 17 of the Rules of Practice. Counsel for the Registrar submitted that in bringing the Motion, Deeb's conduct was unreasonable, frivolous and vexatious. She submitted that Deeb had no evidence to support the Motion she brought. Furthermore, Counsel for the Registrar asserted that Deeb made allegations in that Motion that had no merit. While, on one hand, Deeb complained that the proceedings were taking too long, she proceeded to bring forward a frivolous Motion that further prolonged the matter.

Counsel for the Registrar also noted that the Motion included unfounded allegations about the conduct of the Prosecutor, the Panel Members, the Hearings Manager and independent legal counsel, and all of these arguments were dismissed as without merit.

SUBMISSIONS FOR THE RESPONDENT:

Counsel for Deeb disputed RECO's assertion that there was a higher standard of care in cases of multiple representation.

Counsel submitted that the Sellers were not going to accept an offer lower than what the Complainants offered so in effect, the buyers did not pay \$50,000.00 more as a result of the conduct of Deeb.

Counsel for Deeb stated that Form 801(Offer Summary Document) is a useless form that is not required to be used.

Counsel for Deeb proceeded to state that this is a situation where there was a mistake, not a malicious act. She referred to the fact that the Buyers signed Form 127 (Acknowledgement) after the Offer was accepted. She argued that Deeb's mistake was in trusting her clients.

Counsel for Deeb stated that the Buyers are sophisticated buyers with knowledge of investment properties.

Counsel for Deeb referred to the Decision in Registrar v. Arlene Lindsay, (released November 15, 2017) which proceeded on an Agreed Statement of Facts. She argued that this case was analogous and the fine of \$5,000.00 imposed in that case should be applied here.

She also referred to the case Registrar v. Nicolas James Bock (released November 4, 2017) and suggested that it involved a very similar fact situation and, as such, a \$5,000.00 fine (which was also imposed in that case) is appropriate for this case.

Regarding the Donna May Pritchard case, supra, presented by the prosecution, Counsel for Deeb suggested that the case was distinguishable because Pritchard lied 3 times over a span of 5 weeks. She submitted that the Pritchard case is not analogous to this case.

On the issue of costs, Counsel for Deeb indicated that she was seeking costs from RECO. She submitted that RECO's sole allegation was that Deeb's May 9, 2017, email caused the Complainants to pay more than they would have for the property they purchased. She further submitted that she knows of no Rule 17 case where a Registrant was ordered to pay costs and she felt that a costs award against Deeb would cause a chilling effect in the industry and would cause agents to fear to defend themselves when faced with allegations of breach of the Code of Ethics. Counsel for Deeb stated that RECO's Rule 17 related to behaviour and not to who is successful at the Hearing.

She submitted that nothing Deeb did in this proceeding was unreasonable, frivolous, vexatious, or in bad faith but she submitted that RECO's actions in this proceeding could be classified as all of those.

Counsel for Deeb suggested that a penalty of \$5,000.00 was appropriate and that Deeb should be awarded costs of \$9,000.00, \$3,000.00 for the Motion, \$3,000.00 for the cross-examinations, and \$3,000.00 for the first appearance in October of 2019.

Counsel for Deeb submitted that awarding costs to RECO would be a deterrent to other registrants to defend themselves in proceedings and would have a chilling effect. She reasserted that RECO's actions in this case were unreasonable, frivolous, vexatious and in bad faith and that nothing Deeb did in this proceeding was in bad faith.

PANEL'S DECISION ON PENALTY

Having heard and considered the Submissions of both parties, and having taken into account the factors for consideration in determining penalty as set out in the Suzette Thompson case, supra, the Panel unanimously arrived at the following conclusions:

The nature and gravity of the breaches of the Code of Ethics.

The Panel finds that though this was not a malicious act, Deeb made an inaccurate representation as to the status of offers on the property sold in her May 9, 2017, 12:21 p.m. email and that was never corrected. There was, in fact, not an accurate statement of the status of offers when the Offer was presented. The Complainants were left with an understanding that they were in

competition and this understanding was never corrected. Deeb failed to complete her paperwork needed to protect herself and both her clients, by taking one more step to document the number of offers for her clients before their Offer was presented or by having Form 127 signed prior to offer presentation. As a result, the Panel finds that Deeb knowingly made an inaccurate representation in respect of a trade in real estate and though this may not be the most egregious situation, on a gravity scale, this is still a serious breach of the Code of Ethics.

When in multiple representation, the duty of care should be at the highest level and transparency is crucial. Deeb stated she has been licensed for 25 years. With 25 years' experience the Panel finds that she ought to have known to follow up with an email clarifying the number of offers or she should have placed a priority on having Form 127 signed prior to the Complainants' Offer being presented confirming that the Complainants were the only registered offer.

The Panel accepted the evidence of the Complainants that they believed that they were in a multiple offer situation and Deeb's email confirmed that understanding. This is particularly concerning in a dual agency transaction. The Panel finds that based on the above, the Complainants were not properly represented by Deeb and in all the circumstances, including her position as dual agent, her breaches of the Code of Ethics were serious in nature.

The role of the offending member in breaches.

Deeb had all the information and represented both parties. She was the only real estate professional directly involved in this trade. She failed to give the level and quality of service expected of a real estate professional, particularly in multiple representation. Deeb alone is responsible for the breaches of the Code of Ethics.

Whether the offending member suffered or gained, as a result of the breaches.

The Panel agrees that Deeb gained financially as the Complainants paid more for the property they purchased and therefore, her commission increased.

The impact of the breaches on the complainants or others

The Complainants paid \$50,000.00 more for the purchase because of the wrong information given to them by Deeb but monetary impact is not the only consideration. There was a loss of trust here which is not quantifiable but must be considered in determining the appropriate penalty.

The need for there to be specific deterrence to protect the public.

The Panel finds that it is important that Deeb understand that she acted inappropriately and in violation of the Code of Ethics. The Panel finds that Deeb has shown no remorse and has never admitted that she had done anything wrong or that she should have done better.

When in multiple representation, the duty of care should be at the highest level. Deeb was obligated to be fully transparent with the Complainants who were her buyer clients. The Panel finds it appropriate, particularly considering Deeb's lack of acknowledgement of any wrongdoing, that this factor be considered very relevant in this case in determining appropriate penalty.

The need for there to be general deterrence to protect the public.

The public must be protected from these sorts of situations occurring. As well, in determining penalty, consideration must be had to deterring other real estate professionals from engaging in similar conduct. This Panel agrees with the Registrar that imposing a penalty for unprofessional conduct is addressing the collective reputation of the member's peer group and thus the message sent on penalty must be loud and clear to all Registrants.

The need to maintain the public's confidence in the integrity of the profession.

In coming to its conclusions, this Panel considered that beyond the profession, the imposition of penalty must also maintain the public's confidence in the real estate profession. Integrity is crucial. This Panel wishes to send a strong message to the public that the conduct displayed here will not be tolerated.

The degree to which the breaches are regarded as being outside the range.

The Panel found that Deeb, misled the Complainants. The Panel agrees, as described more fully above, that the conduct displayed here fell far below the acceptable standard and is significantly outside the range of what would be acceptable.

The Panel has reached this decision unanimously and has concluded that the penalty imposed is appropriate given the evidence presented at the Hearing and the Panel's findings. In addition, the Panel has considered the recent decision Registrar v. Bakhtiari (released January 23, 2019) in coming to its conclusions on penalty. There are some clear parallels to the facts in this case. That case also went to a full Hearing and it involved failure to properly advise buyer clients about the number of offers in a transaction. As in this case, the Registrant did not admit any responsibility and showed no remorse. The Panel in that case ordered that a fine of \$25,000.00 be paid and further ordered completion of real estate courses.

The Panel, therefore, makes the following Order with respect to Penalty:

The Panel has decided that Deeb shall pay a fine in the amount of \$14,000.00 to RECO, payable within 12 months of this Decision being released to the parties.

COSTS

In addition to the above, Deeb is ordered to pay RECO costs of \$3,000.00 for the Motion Hearing and \$3,000.00 for cross-examinations of witnesses in relation to the Motion Hearing, payable within 12 months of this Decision being released to the parties.

Rule 17.02 of the Rules of Practise provides that the Panel may award costs if the course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith. The Panel finds that the bringing of the Motion seeking an Order that these proceedings were an abuse of process was unreasonable, and frivolous and vexatious. The allegations (which were found to be entirely unsubstantiated) included serious allegations of improper conduct on the part of the Prosecutor, the Panel, the Hearings Manager, and Independent Legal Counsel. These unproven allegations were ill advised to say the least. Not only was the Motion without merit, but it also only served to delay the process in circumstances where Deeb was complaining about delay. These types of ill-conceived, unfounded motions must be strongly discouraged. Rule 17

was designed to provide the Panel with the power and authority to award costs in exactly these types of situations.

[Decision Released: September 15, 2021]



**IN THE MATTER OF A DISCIPLINE HEARING HELD PURSUANT TO THE
*REAL ESTATE AND BUSINESS BROKERS ACT, 2002, S.O. 2002, c. 30, Sch. C***

BETWEEN:

REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*

- AND -

NINA DEEB

DISCIPLINE DECISION AND REASONS FOR DECISION

APPEARANCES:

For the Registrant:

Nicole Koteff, counsel

For the Real Estate Council of Ontario: Maya Sabharwal, counsel

Heard in Toronto:

October 9, 2019, January 22, 25, and 26,
2021

FINDINGS:

In violation of Sections 4, 5, and 37(1) of the RECO Code
of Ethics

ORDER: The parties are directed to contact the Hearings Manager within seven (7) days of receipt of these Reasons to advise if they prefer to do Submissions on penalty orally or in writing.

COSTS AND EXPENSES: If appropriate, submissions to be made on costs and expenses with submissions on penalty.

WRITTEN REASONS:

REASONS FOR DECISION

INTRODUCTION

This Hearing took place on October 9, 2019, January 22, 25 and 26, 2021 in the presence of the Respondent, Nina Deeb (the “Respondent” and/or “Deeb”), Nicole Koteff, counsel for the Respondent. Maya Sabharwal, counsel for the Real Estate Council of Ontario. The Panel was comprised of Mary Popat, Liem Vien and Angela Gill. Nicolette Holovaci was present as independent legal counsel to the Discipline Panel.

CODE OF ETHICS

The Registrant is governed by the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c.30, Schedule C (“*REBBA 2002*”).

This Discipline Committee is established to hear and determine these issues, in accordance with the prescribed Regulations. The Discipline Committee must determine if the Registrant has failed to comply with the Code of Ethics established by the Minister in accordance with Section 21 of the *REBBA 2002*.

Section 50 of the *REBBA 2002* provides that the Minister may make Regulations establishing a Code of Ethics for the purposes of subsection 21(1).

Ontario Regulation 580/05 is the Code of Ethics pursuant to the *REBBA 2002* and is the Code of Ethics that governs these proceedings.

ALLEGATIONS BY THE REGISTRAR, REBBA 2002

In its Allegation Statement the Registrar, *REBBA 2002* alleged that Deeb acted unprofessionally when:

- 1) Deeb failed to protect the best interests of her clients, the Complainants, when she failed to provide her clients with accurate information and allowed them to make a decision as to how much to offer for a property, when she knew or ought to have known that that decision was being made based on inaccurate information. By failing to ensure that her clients had correct information regarding the number of competing offers, Deeb failed in her duty to treat every person in this transaction fairly, with honesty, and integrity. This conduct is in violation of sections 4 and 5 of the Code of Ethics ("Code").
- 2) Deeb, who was acting on behalf of both the Sellers and the Complainants in this transaction, was in the best position to know exactly how many offers were in play at any given time, and certainly by the time offer presentations were being made, she should have known how many offers were going to be presented. Deeb knew or ought to have known that the Complainants would rely on her advice to arrive at an offer price. By allowing the Complainants to base their decision on wrong information, she failed to provide them with conscientious and competent service, which is in violation of section 5 of the Code.
- 3) Further, Deeb made an inaccurate representation in respect of a trade in real estate, when she provided her clients, the Complainants, with misinformation as

to the number of offers in play. This conduct is in violation of section 37(1) of the Code.

The Registrar, *REBBA 2002* alleged that Deeb breached the following sections of the Code of Ethics:

4 – Best interests – A registrant shall promote and protect the best interests of the registrant’s clients.

5 – Conscientious and competent service, etc. – A registrant shall provide conscientious service to the registrant’s clients and customers and shall demonstrate reasonable knowledge, skill, judgment and competence in providing those services.

37 (1) – Inaccurate representations – A registrant shall not knowingly make an inaccurate representation in respect of a trade in real estate.

PRELIMINARY MATTERS

At the commencement of the Hearing, Deeb’s counsel raised a preliminary issue. She sought an Order disallowing the admission into evidence of the Will Say Statements of the Complainants and she objected to the Complainants testifying on the basis of late delivery of information from the Prosecution. The Panel considered the request and made an oral Ruling on the record pursuant to which the Hearing was ordered to proceed.

EVIDENCE OF THE PARTIES- EXHIBITS

1. Allegation Statement dated July 3, 2018
2. Notice of Hearing dated December 2, 2020
3. RECO Book of Documents dated January 16, 2019
4. Supplementary Disclosure of Nina Deeb

WITNESSES FOR THE REGISTRAR, REBBA 2002

1. Buyer B
2. Buyer A

WITNESSES FOR THE RESPONDENT

1. Individual A
2. Individual B
3. Individual C
4. Nina Deeb

Salient Evidence of Witnesses

The Panel carefully considered all evidence including oral testimony. Below is a summary of some of the key points from witness testimony.

PROSECUTION WITNESSES

Buyer B

Buyer B testified that she was of the belief that she and her husband were competing with other offers on the purchase of 1-A Street (“the Property”) and she stated that that is why they offered \$890,000.00 which was significantly above the Listing price (“the Offer”). She testified that Deeb told her and her husband that there were multiple offers on the Property and she stated that the first time she became aware that this was not the case was on the evening when they signed back the accepted Offer and they were asked to sign a Form 127. In cross examination, she acknowledged that Deeb provided comparables to her and her husband when she came to their house, and she said this was one of the reasons they chose to offer \$890,000.00.

Buyer A

Buyer A testified that before they chose an offer price, he and his wife were told by Deeb that there were 3 offers on the Property. He testified that Deeb called him on May 9 after

the Offer had been signed and asked if he wanted to increase the price. He said he told her his price was final. He testified that when he spoke to Deeb on May 9 he was still of the belief that they were in competition. He stated that if he had been told that they were not in competition they would not have offered \$50,000.00 above asking. He agreed that Deeb showed them comparables on May 8 which they did rely upon but he testified that the price he and his wife chose to offer was directly affected by the number of other offers. He said he wanted to “win” the Property.

MOTION FOR NON SUIT

After the Prosecution closed its case, Deeb made a motion for non suit. The Panel heard submissions from both counsels, retired for consideration, and made a Ruling on the record dismissing the motion.

DEFENCE WITNESSES

Individual A

Individual A testified that he was Deeb’s Broker of Record. He stated that he did not deal directly with the Complainants and all of his evidence related to his communications with Deeb. In cross examination he admitted that he only knows what Deeb told him.

Individual B

Individual B testified that she was one of the sellers of the Property. She only had one interaction with the Complainants. She said they came to her house after the deal had been firmed up and told her that they did not have a problem with her but they had a problem with Deeb.

Individual C

Individual C testified about his dealings with Deeb but he had no direct dealings with the Complainants.

Deeb

Deeb confirmed that she acted for both buyers and sellers on this transaction. She testified that she met with the Complainants at their home on May 8 and an Offer was signed. She said she brought comparables with her and reviewed them with the Complainants. She said she told them there seemed to be a lot of interest in the Property. She said Buyer A came up with the price of \$890,000.00. She said she did not tell the Complainants there were other offers on the Property. She did say that Buyer A contacted her constantly asking about offers and that he asked her to “break the rules”. She identified an email she sent to the Complainants on May 9, 2017 at 12:21p.m. (Exhibit 3, page 28) where she said the following:

“...I wanted to let you know that one of the agents that had registered to submit an offer has withdrawn. The Realtor said her client has personal problems and cannot proceed. I do not have any other new registrations at This (sic) time. It is one other offer and your offer at this point. I will keep you posted.”

Deeb stated that she thought there would be another offer on the Property. Her evidence was that she told Buyer A on a telephone call on May 9, 2017 after her email of 12:21 p.m. that the Complainants were the only offer. She testified that Buyer A wanted to submit the Offer as it was regardless. On cross examination, Deeb could not identify the agent referred to in her email who had apparently registered an offer and then withdrawn. She said her office had no records regarding the agent or registered offers on the Property. She acknowledged that she did not send anything in writing to the Complainants before their Offer was presented advising that they were the only offer on the Property.

Submissions – Prosecution

The Prosecution submitted that the Complainants were consistent and credible in their testimony. She said that Deeb’s email of May 9, 2017 at 12:21 p.m. was a continuation of the discussion from the night previous which, according to the evidence of the Complainants was that there were 3 offers on the Property. She submitted that for a consumer in this situation they would have understood that there were 3 offers on the table including the buyers and one subsequently was withdrawn. She argued that a

Registrant must be as transparent as possible and provide all information to her clients. She highlighted the Complainants' evidence that they only became aware that they were the only offer when they were asked to sign the Form 127 after the deal was done.

Submissions – Deeb

Deeb's counsel submitted that the Prosecution failed to prove the allegations as set out in the Allegation Statement. She stated that the Complainants gave changing stories about why they wanted out of the transaction and only later was the issue of multiple offers raised as the reason. She said Deeb used a "poor choice of words" in her email of May 9, 2017.

She submitted that the Complainants would have left their Offer at the price they chose regardless of whether there were other offers. She argued that the Complainants signed the Form 127 confirming that they were aware that there was only one offer.

Findings of the Panel

Having carefully considered the testimony of the witnesses at the Hearing, and the documentary evidence, the Panel has arrived at the following conclusions.

The Allegation Statement alleges, inter alia, that the Complainants relied upon Deeb's misrepresentation that there were two offers in play in order to determine how much to offer for the Property. The Allegation Statement also alleges that Deeb failed to provide her clients with accurate information and failed to ensure they had the correct information regarding the number of competing offers. The Panel has found that the evidence has proven these allegations.

It is alleged that Deeb breached sections 4, 5, and 37(1) of the RECO Code of Ethics. The Panel finds that Deeb breached sections 4, 5, and 37(1) of the RECO Code of Ethics. Each of these breaches will be addressed in turn.

Section 4 - A registrant shall promote and protect the best interests of the registrant's clients.

The Panel heard evidence from Buyer B and Buyer A, that when they met with Deeb, she had provided them with comparables in the same neighborhood showing that other properties had sold in the range of \$890,000.00. Buyer B and Buyer A stated in evidence that it was not just the comparables that they relied on in determining how much to offer. They testified that as a result of their communications with Deeb, they also believed they were in a multiple offer situation and this was a factor on which they based their offer price.

The Panel reviewed the email sent by Deeb to Buyer B and Buyer A on May 9, 2017 at 12:21 p.m. which stated the following:

*Good Afternoon Buyer A and Buyer B, I wanted to let you know that one of the agents that had **registered to submit an offer has withdrawn**. The Realtor said her client has personal problems, and cannot proceed. I do not have any other new registrations at this Time (sic). **It is one offer and your offer at this point**. I will keep you posted. (Emphasis added)*

The Panel notes that it is not disputed that this is the only written communication Deeb sent to the Complainants about the number of offers. It says a number of things;

- (a) That an offer had been **registered** and was then withdrawn (Emphasis added);
- (b) That there were **no other new registrations** (“Emphasis added”);
- (c) That “it is **one offer and your offer** at this point” (Emphasis added)

Firstly, Deeb has produced no records regarding registered offers on the Property and, if fact, when asked said that her brokerage did not keep such records.

The Panel finds that this email does logically seem to follow from the previous discussion at the meeting with Deeb where Buyer A says she told them there were 3 offers. The Panel heard evidence about a subsequent conversation that Deeb had with Buyer A on May 9 but Buyer A's evidence was that he did not come away from that conversation with an understanding that there were no other offers on the Property. To the contrary, his evidence was that at no time did Deeb tell him he was the only offer. The Panel finds Buyer A to be a credible witness and accepts his testimony. Regardless of what Deeb says she imparted to Buyer A in terms of oral information, he was still firmly of the understanding after their discussion that there was another offer in play. He had this understanding until he was asked to sign the Form 127 after his Offer was accepted. It is the view of this Panel that another email should have been sent to the Complainants clarifying and confirming that they were the only offer. If Deeb had given this information to Buyer A on the phone, there would be no reason not to follow up in writing particularly since she had already emailed him twice that day and she specifically addressed the number of offers in her 12:21 p.m. email. Deeb in her evidence stated that she had many calls/emails with Buyer A during the day on May 9th. She expressed frustration with him constantly contacting her about Offers and yet she did not clearly advise the Complainants that they were the only offer. The Panel agreed that to ensure no inaccurate information was given to the Complainants, Deeb should have followed up on her call with Buyer A on the afternoon of May 9, 2017 with an email confirming that the Complainants' Offer was the only one being submitted. As it stood, the Complainants were of the belief that they were in competition until they were asked to sign the Form 127. This resulted in a price for the Property significantly higher than the asking price.

When in multiple representation, the duty of care should be at the highest level. Deeb stated she has been licensed for 25 years. With 25 years' experience the Panel finds that she ought to have known to follow up with an email and or she should have placed a priority on having Form 127 signed prior to the Offer being presented confirming that the Complainants were the only registered offer. Evidence was also heard, regarding the telephone conversation between Deeb and Buyer A that Buyer A said he wanted to "win"

the Property. It is the Panel's assessment that Buyer A believed he was in competition. The Panel finds that one would not use the word "win" if they did not believe they were in competition.

Deeb had a duty on both sides as this was multiple representation. She was obligated to be fully transparent with the Complainants who were her buyer clients. She failed to clearly inform and advise her clients about the status of offers on the Property. As such, she did not promote and protect the interests of her buyer clients.

Section 5 - A registrant shall provide conscientious service to the registrant's clients and customers and shall demonstrate reasonable knowledge, skill, judgment and competence in providing those services.

The evidence tendered did not establish that the price of \$890,000.00 and the deposit increase from \$10,000.00 to \$20,000.00 was done on May 9th. The evidence given by the Complainants was that everything was signed on May 8th. However, the evidence was also that Deeb emailed the Complainants on May 9, 2017 telling them that there was a registered offer that was withdrawn and that there was one offer other than theirs. There was evidence that Deeb spoke with Buyer A on May 9th at which time Deeb had asked if they wanted to change anything in their Offer and Buyer A's evidence was that he told her that they wanted to leave the Offer as is. He said this was based on his understanding that they were in competition. The evidence was clear as stated by the Complainants that they wanted the Property. The evidence was undisputed that the Complainants signed Form 127 but the Panel finds that even though they signed Form 127 as part of the transaction, this was after their Offer had been submitted and accepted and their evidence, which is found to be credible, was that this was the first time they became aware that there were no other offers.

In her email of May 9, Deeb told the Complainants that one agent with a registered offer had withdrawn and there was one offer and their offer. Per Deeb's own testimony she was not able to provide the Panel with a clear indication of how registered offers were handled through her office. She presented no paperwork about registered offers. Deeb was unclear how offers were handled and, therefore, the Panel can easily understand how the Complainants were at the very least unclear about offers and how they were handled. Registered offers were not made clear to the Complainants and this should have been documented prior to the offer process. The email that was sent by Deeb did indicate that there was one other offer and the Complainants relied on that information. The Panel is of the view that another email should have been sent to the Complainants confirming they were not in competition. Deeb took the time to write the email at 12:21 p.m. but failed to follow up in writing to confirm that there were no other offers. The evidence showed that she corresponded with her broker in writing that afternoon about Form 127 and yet she failed to document anything to the Complainants that day confirming that they were the only offer. The Panel accepts the evidence of the Complainants that they believed that they were in a multiple offer situation and Deeb's email confirms that understanding. This is particularly concerning in a dual agency transaction. The Panel finds that based on the above, the Complainants were not properly represented by Deeb and Deeb did not provide conscientious service to them. She also acted in a manner that did not demonstrate reasonable skill, judgment and competence in this dual agency transaction.

Section 37(1) - A registrant shall not knowingly make an inaccurate representation in respect of a trade in real estate

The Panel has determined that the number of offers was not properly relayed by Deeb and should have been in writing to the Complainants. The only written indication of offer status was the email of May 9, 2017 and at the time of the Offer presentation, that information was not accurate. When in multiple representation, the duty of care should be at the highest level. Deeb, being licensed for 25 years, ought to have known to make certain both her clients had complete transparency regarding the offers registered.

Deeb testified that she communicated with her Broker at 3:00 p.m. on May 9th, regarding the forms to be used to confirm the number of offers. The Panel concludes that Deeb had all the paperwork in place with her Brokerage and had taken the time and effort to communicate with her broker about the issue that day but she failed to confirm the number of offers in writing to the buyers. Furthermore, the evidence showed that Deeb had at least 2 separate opportunities to make the number of offers clear, but the evidence discloses she did not do so. She should have emailed the Complainants or delivered the Form 127 to them in person for signatures before the Offer was presented. Instead, she left the information set out in her May 9, 2017, 12:21 p.m. email -the only written indication about the status of offers without change or correction and this information was an inaccurate representation. This led to the Complainants continuing to understand that there was another offer. As well, when asked about the Form 801 used with registered offers, Deeb stated that her office does not use that form. The Panel found this unusual.

The Panel finds that though this was not a malicious act, Deeb made an inaccurate representation as to the status of offers on the Property in her May 9, 2017, 12:21 p.m. email and that was never corrected. It was, in fact, not an accurate statement of the status of offers when the Offer was presented. The Complainants were left with an understanding that they were in competition and this understanding was never corrected. Deeb failed to complete her paperwork needed to protect herself and both her clients, by taking one more step to document the number of offers for her clients before the Offer was presented or by having Form 127 signed prior to offer presentation. As a result, the Panel finds that Deeb knowingly made an inaccurate representation in respect of a trade in real estate.

PENALTY

Regarding penalty, the parties are directed to contact the Hearings Manager within seven (7) days of receipt of these Reasons to advise if they prefer to do Submissions on penalty orally. If either party so chooses, they will be contacted to arrange a date for a virtual Penalty Hearing before the Panel.

Should neither party chose to proceed orally, Counsel for the Registrar shall deliver written Submissions to the Panel and to the Respondent on the issue of penalty and costs within 20 days of the date on which the Panel's Decision and Reasons are delivered.

The Respondent shall deliver to the Panel and to Counsel for the Registrar its written Submissions on penalty and costs in response to Counsel for the Registrar's Submissions within 15 days of the date on which Counsel for the Registrar's Submissions on penalty and costs are delivered to the Respondent.

Counsel for the Registrar shall deliver to the Panel and to the Respondent its Reply to the written Submissions on penalty and costs of the Respondent within 5 days of the date on which the Respondent's Submissions on penalty and costs are delivered to Counsel for the Registrar.

Any inquiries relating to the delivery of the above-mentioned documents should be directed to the Manager, Discipline and Appeals Hearings.

[Released: March 11, 2021]

**DISCIPLINE COMMITTEE OF THE
REAL ESTATE COUNCIL OF ONTARIO**

Mary Popat, Liem Vien
Angela Gill

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Thursday, the 29th day of October 2020

B E T W E E N:

**REAL ESTATE COUNCIL OF ONTARIO
("RECO")**

- and -

**NINA DEEB
("Registrant")**

This motion was brought by the Respondent Nina Deeb ("Ms. Deeb") and heard by the Discipline Committee ("Panel") on August 31, 2020. At the motion, Ms. Deeb was represented by Mr. Lorne Honickman. Co-counsel for Ms. Deeb in this proceeding, Ms. Koteff, along with Ms. Deeb, had sworn an affidavit in support of the abuse of process motion and thus she was disentitled to act as counsel on the motion itself.

On behalf of RECO, Mr. Shane Smith acted as counsel on the motion.

Prior to the hearing of the motion, the Panel received and reviewed the voluminous motion records of the parties, including their factums.

In Ms. Deeb's Notice of Motion, the following relief was sought:

1. A Declaration and Order that the proceedings brought against Ms. Deeb by RECO constitutes an abuse of process;
2. An Order that the proceedings against Ms. Deeb be permanently stayed.

The grounds cited in support of the stay of proceedings are varied and they relate to the actions/inaction of three different actors:

- a. the conduct of RECO as prosecutor in this proceeding;

- b. the conduct of Independent Legal Counsel (“ILC”) to the Panel at the October 9, 2019 hearing which was adjourned by the Panel shortly after it commenced; and
- c. the conduct of the Panel itself in making certain (interlocutory) decisions on October 9, 2019, as well as the Hearings Manager.

These grounds, supporting evidence, and argument of the parties were canvassed in detail during the motion heard by videoconference on August 31, 2020 and they are discussed herein.

For the reasons outlined below, the Respondent’s motion is dismissed. Further, the Panel has made certain procedural orders at the end of its reasons to move the proceeding toward a hearing on the merits.

Background relating to the Disciplinary Proceeding

In August 2017, RECO received a complaint from a couple who had used Ms. Deeb’s services to prepare and submit an offer to purchase the real property at 1-A Street, City A (“Property”). At the time, Ms. Deeb also had the listing for the Property and was thus acting on behalf of the sellers.

Generally speaking, the complainants allege that Ms. Deeb failed to represent their interests in the transaction by advising them there was a competing offer for the Property when, in fact, there was none. They assert that Ms. Deeb led them to believe that there was at least one competing offer for the Property and that they should, as a result, offer a higher amount for the Property than they otherwise would have (i.e. had no competing offer existed).

Somewhat ambiguously, the complainants also identified another reason why they offered \$890,000 for the Property even though it was listed for \$839,000. They claim that Ms. Deeb provided them with comparables in the same neighbourhood showing that other properties had sold in the range of \$890,000.00.

In their complaint to RECO, the complainants also cited an email, dated 12:22 p.m., May 9, 2017, from Ms. Deeb that stated:

Good afternoon Buyer A and Buyer B, I wanted to let you know that one of the agents that had registered to submit an offer has withdrawn. The Realtor said her client has personal problems, and cannot proceed. I do not have any other new registrations at this time. It is one other offer and your offer at this point. I will keep you posted.

The complainants were ultimately successful in purchasing the Property for \$890,000.00 and after their successful bid they used Ms. Deeb's services, for a limited time, to try to sell the residential property in which they were living at the time.

The gist of their complaint against Ms. Deeb, however, is that she misrepresented facts relating to another offer on the Property and that she had not advised them properly, such that they substantially overbid and overpaid for the Property.

After conducting whatever investigation, it considered appropriate, RECO issued an Allegation Statement against Ms. Deeb on July 3, 2018 and it was served on her in early August 2018. RECO alleges that Ms. Deeb violated Sections 4, 5, and 37(1) of the *Code of Ethics*.

Although RECO provides various particulars in support of alleged *Code* violations by Ms. Deeb, those in paragraph 5 of the Allegation Statement are especially pertinent to Ms. Deeb's motion to stay the proceeding. Paragraph 5 reads:

At 12:21 p.m. on May 9, 2017, the Complainants received an email from Ms. Deeb, indicating that there were two offers for the Property, including their own. Based on this information, the Complainants decided to insert a purchase price of \$890,000. At this time, they also increased the deposit amount from \$10,000 to \$20,000, as they were advised by Ms. Deeb it would make their offer more attractive.

Shortly after the Allegation Statement was served on Ms. Deeb, the parties canvassed dates for a Pre-Hearing Conference. RECO suggested the Conference be held in mid-February 2019 but, owing to the unavailability of Ms. Deeb's counsel, it was ultimately held on March 1, 2019.

RECO delivered its Book of Documents to Ms. Deeb in January 2019. Those documents included documents that Ms. Deeb had delivered to RECO in response to the complaint. However, as is discussed below, not all of Ms. Deeb's documents were organized at the same Tab. Eight (8) pages of Ms. Deeb's documents containing comparables in the neighbourhood where the Property is located were included at a different Tab in RECO's Book of Documents.

After the Pre-Hearing Conference did not result in a resolution of some or all of the issues in the Allegation Statement, the Presiding Officer scheduled the disciplinary hearing to take place on October 9 to 11, 2019 inclusive. The Officer also confirmed in her Report that there were no applicable pre-hearing motions to be brought nor were any motions to be argued at the hearing.

From January 2019 onwards, there was considerable correspondence between Ms. Deeb's counsel and RECO's prosecutor concerning the allegations against Ms. Deeb.

From the Panel's perspective, it appears that the approach of Ms. Deeb's counsel was to try to argue the merits of the Allegation Statement by correspondence with a view to convincing RECO that the proceeding should either be terminated or substantially narrowed in scope. The prosecution, as was its right, declined to deal with the substantive, merit-based issues raised by Ms. Deeb's counsel.

It is beyond controversy that RECO did not comply with the requirement under s. 11.01 of *RECO's Rules of Practice*, and Section 46 of O. Reg. 580/05 (i.e. the *Code of Ethics*). Those provisions required RECO to provide at least thirty (30) days before the commencement of the hearing on October 9, 2019 the identity of any witness who would be giving oral evidence at the hearing along with a *written statement containing the substance of the witness' anticipated evidence*. In other words, Will Say Statements from RECO were due at least thirty (30) days before the commencement of the hearing on the merits.

RECO was two weeks late in providing Will Say Statements for the two complainants and those statements were delivered only *after* Ms. Deeb had made her own disclosure as required by the *Rules* and the *Code*. Ms. Deeb served four (4) Will Say statements on RECO by email on September 23, 2019.

RECO's Will Say statements were delivered within two (2) weeks, rather than thirty (30) days, of the October 9th hearing. The content of those Will Say Statements, which are brief and relate to the anticipated evidence of the complainants, bear mention.

Buyer B's Will Say Statement read as follows:

My husband and I were the buyers for...[the Property]. We saw the [P]roperty was for sale and that Nina Ms. Deeb was the selling agent, so we signed an agreement with her to represent us. On May 9, 2017, sent myself and my husband an email stating that one other agent who had registered to submit an offer had withdrawn. She then said that there were two offers remaining, ours and one other. Based on our belief that we were competing with another buyer, we decided to offer \$890,000. The house was listed for \$839,000. Around 9 pm on May 9, 2017, came to our home to go over the paperwork after our offer for...[the Property] had been accepted. She asked us to sign a document confirming that we were the only offer. This was the first time we were hearing that was the case. If we had known we were the only offer, we would have changed our price to the asking price.

Buyer A's Will Say Statement read as follows:

My wife, Buyer B and I purchased...[the Property] using the services of , as she was the selling agent. The house was listed at \$839,000, advised us by email on May 9, 2017 that one offer had dropped out and there were two left, including ours. Based on that information, my wife and I decided that we would offer \$890,000 for the house. Around 9 pm on May 9, 2017 came to our home to go over the paperwork, as our offer had been accepted. At this time she asked myself and my wife to sign a document acknowledging that we had the only offer on this house. This was the first time we were hearing this and had we known that was the fact, we would have offered to pay the listing price instead.

It appears that the document referred to in these Will Say Statements was Form 127. In that Form, which the complainants appear to have executed on May 9, 2017, the complainants acknowledged that they understood that there was only one offer (i.e. their own) that was presented to the sellers of the Property. In other words, the bidding process for the Property did not involve a multiple offer situation.

The Panel notes that although the complainants advised in their complaint and Will Say Statements that they were asked to sign the document, they do not make it clear that they actually executed it. The record in this proceeding, however, contains a duly signed Form 127 from the complainants.

When RECO failed to deliver the two Will Say Statements at least thirty (30) days before the hearing, Ms. Deeb's counsel wrote to the prosecutor on September 23, 2019 and stated in part "I have received no "Will Says" from you at all, which would prohibit you from calling any witnesses."

In addition, Ms. Deeb's lawyer provided copies of various emails that she had sent at the beginning of 2019 requesting copies of RECO's Will Say Statements. At the end of February 2019, the prosecutor advised that she was "in communication with the complainant and...[would] have her Anticipated Evidence Statement to...[Ms. Deeb] in accordance with the rules." However, at the outset of the hearing on October 9, 2019, it was clear that RECO had failed to provide its Will Say Statements within the timelines set by the Rules and the Code of Ethics.

Commencement of the disciplinary hearing on October 9, 2019

The hearing began on October 9, 2019, as scheduled, at which time certain preliminary matters were raised by the parties. Prior to the hearing, Ms. Deeb's counsel had raised the possibility of

one or more witnesses testifying by telephone instead of in person. The specific witnesses were not identified in communications between counsel. The record, however, indicates that Ms. Deeb's counsel made inquiries with the office of Manager, Discipline & Appeals Hearings and was advised by her assistant that the request to have a witness testify via telephone at a hearing "should be raised as a preliminary matter at the Discipline Hearing for the panel's consideration."

At the hearing, the prosecutor objected to any witness testifying over the telephone and also asserted that a motion to support Ms. Deeb's request should have been brought under Rule 7 of RECO's Rules of Practice. For her part, Ms. Koteff, Ms. Deeb's counsel, stated that there was no such motion requirement under the Rules. She also responded to the three points from the prosecutor as to why testifying by telephone should not be permitted in this case: 1) It is impossible to assess credibility; 2) it is not possible to swear an oath or provide affirmation over the telephone; and 3) it would be difficult to verify the identity of the witness. Ms. Koteff indicated that she wanted to have one of the sellers, Seller A, testify over the telephone because his job took him to Country A for most of each work week.

Concerning any requirement for a formal motion to have a witness testify by electronic means, Ms. Koteff pointed out that there was no such Rule and that the *Statutory Powers Procedure Act* actually provides for a hearing to be held partially by electronic means *if the Panel so decides*.

After hearing submissions on the above-mentioned issue, the Panel took a brief recess and reconvened to deliver its procedural decision. After considering the issues, the Panel decided that it would not allow Ms. Deeb's witness, one of the sellers, to testify by telephone. In so exercising its discretion, the Panel also added that a motion should have been brought by Ms. Deeb but that, regardless of that issue, the Panel had decided that having the witness testify *by telephone* would cause RECO significant prejudice *and* in order for the Panel to properly determine the issues before it, the witness should testify in person.

After indicating that the hearing should proceed, Ms. Koteff raised another issue, that of RECO's failure to provide Will Say Statements at least 30 days before the commencement of the hearing. Ms. Deeb's counsel went through numerous communications to the prosecutor in which she had requested such disclosure well before the actual 30-day time requirement.

Although the prosecutor indicated that she intended to comply with the Rules, the record clearly showed that RECO was ultimately 16 days late in providing Will Say Statements.

The prosecutor's response was that, despite the late delivery of the Will Say Statements, they disclosed no surprises to Ms. Deeb. The complaint, the Allegation Statement, and a lengthy pre-hearing conference provided all the particulars needed for Ms. Deeb to be in a position to defend the proceeding on the merits. The two Will Say Statements are noted above. They are not lengthy and, in the Panel's view, they are generally consistent with the complaint that was made to RECO.

Ms. Koteff submitted at the short hearing on October 9, 2019 that there were severe problems with the timeline in RECO's case and that she had repeatedly asked the prosecutor to explain when the buyers actually signed the offer they had made on the Property. Despite the documentary disclosure in this case, Ms. Koteff claimed that she had never received an answer and that the answer is *not* in the anticipated case. As a result, she maintained that Ms. Deeb did not know the case she had to meet.

In addition, Ms. Koteff took issue with whether there were two complainants in this case and stated that Buyer A should not be permitted to testify. She reiterated that prior to the hearing she required RECO's position on when the Agreement of Purchase and Sale (i.e. the offer from the buyers) was signed by the buyers and that Ms. Deeb had received no disclosure on what RECO's witnesses were going to say on that issue.

Shortly thereafter, Ms. Koteff advised that it was Ms. Deeb's position that neither Buyer B nor Buyer A should be entitled to testify at the hearing because RECO was late in delivering their Will Say Statements. However, if the Panel was disposed to permit one of them to testify, only Buyer B should be allowed to testify. Once again, Ms. Deeb's counsel claimed that she had no idea what these two witnesses were going to say if they were permitted to testify.

The Panel notes that these submissions were made even though Ms. Deeb and her counsel had been in possession of the short Will Say Statements for two weeks by the time the hearing commenced on October 9, 2019.

After hearing submissions, the Panel recessed to consider the issues that had been raised, including Ms. Koteff's submission that both of RECO's witnesses should be barred from providing testimony at the hearing.

When the Panel reconvened, the parties were told that Rule 46 under Regulation 580/05 had not been complied with by RECO and, as a result, *if the hearing were to proceed that day*, both RECO witnesses could not be called to testify. At that point, the prosecutor was asked whether RECO was prepared to proceed with the hearing or whether any other relief was being sought.

As a result of the Panel's decision not to permit the two *complainants* from testifying if the hearing were to proceed on October 9th, the prosecutor requested that the hearing be adjourned "to allow for the time" and added that RECO would be highly prejudiced if the complainants could not testify.

Ms. Koteff objected on behalf of her client. The prosecutor added that there had been no surprises for Ms. Deeb because she knew through discussions between counsel and the pre-hearing conference the case that she had to meet. When Ms. Koteff indicated that she wished to speak, most likely in response to the prosecutor's remarks, independent counsel said "no" and that it was the "end of the submissions". However, such counsel also added that "unless the Panel had any questions we can adjourn." At that point, the Chair of the Panel made it clear: "No, no questions".

The Panel adjourned again, this time to consider the adjournment request of the prosecutor. After resuming, Ms. Koteff advised that she had no idea there would be a motion for an adjournment and, as a result, she wished to provide the Panel with a document she had sent to the prosecutor.

Despite that request, the Panel proceeded to advise that it had considered the issue of an adjournment and noted that it was in the discretion of the Panel whether to grant the request. The Panel also advised that given (a) it was the first time the parties were before the Panel, (b) serious prejudice would befall RECO if its witnesses were not permitted to testify, (c) all of the witnesses for Ms. Deeb were not available on October 9, 2019, and (d) Rule 1 of RECO's Rules of Practice, an adjournment was being granted.

Ms. Koteff submitted that, in light of RECO's position that Ms. Deeb should have brought a motion prior to the hearing to have a witness testify electronically, the prosecutor should have brought a pre-hearing motion for an adjournment since she knew that RECO had failed to comply with the Rules in delivering RECO's Will Say Statements. In response, independent legal counsel advised that the Panel had already made a decision granting the adjournment. Immediately thereafter, the Chair of the Panel confirmed, "We are adjourned today. Thank you." Upon further objection by Ms. Koteff, the Panel Chair confirmed that the Panel had made its decision.

Despite the Panel's decision and confirmation, Ms. Koteff advised that her client wanted to proceed with the hearing that day. The Panel took a short recess, returned, and once again confirmed that RECO's request for an adjournment had been received and granted, and that a new date for the hearing would be scheduled. That confirmation took place after Ms. Deeb's counsel did not advise the Panel whether Ms. Deeb was willing to withdraw the objection to RECO calling its witnesses such that the parties would proceed with the hearing on October 9, 2019.

Motion to have the proceeding stayed on the basis of abuse of process

In mid-January 2020, Ms. Deeb brought this motion for the relief outlined above. Both counsels provided thorough and articulate factums explaining their client's positions. The Panel has made use of Ms. Deeb's factum to identify the issues required to be determined on this motion.

Ms. Deeb submits that the improper actions of RECO prosecutor (Maya Sabharwal); ILC to the Panel (Nicolette Holovaci); and this Panel hearing the matter, had resulted in circumstances so unfair to Ms. Deeb that it would be contrary to the interests of justice to allow the proceedings to continue. It was also submitted that proceeding with this case would bring the administration of justice, and the reputation of the RECO disciplinary process, into disrepute.

The Panel notes that, so far as abuse of process motions are concerned, Ms. Deeb's motion was unusual because three different sources of alleged improprieties were identified to support a stay of proceedings. They were (1) the actions or inaction of the prosecutor on behalf of RECO; (2) the conduct of ILC on October 9, 2019; and (3) the Panel's procedural decisions made on October 9, 2019.

As noted below, Ms. Deeb's decision to use an abuse of process motion to challenge the procedural decisions of the Panel raises issues of jurisdiction and whether the Panel can sit in judgment of its own decisions with a view to staying the proceedings because of the Panel's own conduct. This issue is discussed in more detail below.

The individual and collective grounds relied on by Ms. Deeb, and the decision of the Panel on each are as follows:

1. Significant delay of 34 months in bringing these proceedings

Ms. Deeb asserted that there had been significant and unacceptable delay of thirty four (34) months since the complaint had been received by RECO. Doing the math, 34 months would actually take the parties from August 2017 to May 2020.

The abuse of process motion was heard on August 31, 2020; it had originally been scheduled to take place on March 4, 2020. As has been the case with other administrative and court proceedings, the COVID-19 pandemic has recently resulted in delay in judicial and quasi-judicial proceedings. It hardly bears mention that the circumstances underlying the pandemic are outside the control of the parties and the Panel.

The Panel rejects the assertion that there has been significant delay in these proceedings.

This proceeding began *not* with the receipt of the complaint by RECO in early August 2017 but with the issuance of the Allegation Statement in July 2018.

Moreover, the Panel finds that the issuance of an Allegation Statement eleven (11) months after the receipt of a complaint, especially after RECO had conducted its investigation in the ordinary course, was certainly not an inordinate period.

Just over a month after the issuance of the Allegation Statement, which commenced this proceeding, the Manager, Discipline and Appeal Hearings wrote to the parties on August 24, 2018 and notified them that a pre-hearing conference (“PHC”) in this case was scheduled to take place on February 15, 2019.

However, because of scheduling conflicts facing Ms. Deeb’s counsel, the PHC did not take place until March 1, 2019. Although the PHC was not successful in resolving the issues in this proceeding, the hearing on the merits was scheduled with the consent of the parties for October 9 to 11, 2019.

The hearing on the merits commenced, as scheduled, on October 9, 2019 but, as noted above, it was adjourned by the Panel. New hearing dates were set for May 14, 15 and 19, 2020 to continue the hearing. Earlier dates in March 2020 were canvassed with the parties but Ms. Deeb was not available to have the hearing continue that month.

Everyone knows what happened from mid-March 2020 onwards because of the COVID-19 pandemic. The Panel finds that there has not been any inordinate, undue, or significant delay in this proceeding.

In fact, the proceeding on the merits *commenced* on October 9, 2019 but it was adjourned for the reasons and on the terms determined by the Panel on that date.

Apart from whether there has been inordinate, unacceptable, or significant delay, there has been no prejudice to any party given the passage of time, including the suspension of proceedings during the COVID-19 pandemic, and new hearing dates will be scheduled. No witnesses have died or become unavailable and no documents or other evidence has been lost.

The abuse of process motion was filed by Ms. Deeb on January 14, 2020. At no point prior to filing of the motion, including any time during the discussions to set hearing dates, did Ms. Deeb assert that there had been significant or unreasonable delay or that any prejudice had been caused to her as a result.

The Panel has concluded that a party cannot voluntarily schedule and participate in steps in a proceeding only to claim later that the party has been prejudiced by delay covering the same period.

As an organization, RECO has responded to the COVID-19 pandemic by arranging for video-conference proceedings, as was the case for the within motion.

2) Alleged failure to provide the required disclosure despite numerous written requests for such disclosure over the span of months, contrary to the RECO Discipline and Appeals Committee Rules of Practice (the "Rules") and s. 46(1) of O. Reg 580/05, including anticipated evidence statements ("Will Say Statements") for RECO's witnesses according to required timelines. Further, RECO failed to bring a formal motion for an adjournment when it was known two weeks before October 9, 2019 that such a request would be made. Finally, the Panel acted improperly by not dismissing the Allegation Statement outright for lack of evidence and, instead, inappropriately granting RECO's improper adjournment request, and in (allegedly) refusing to hear Ms. Deeb's submissions opposing the adjournment request

The issues above are identified as five separate factors in Ms. Deeb's factum but they can be dealt with together. They all relate directly or indirectly to the Will Say Statements that were delivered by RECO on or about September 24, 2019, that is, over two weeks late given the regulatory deadline for such delivery.

Based on the evidence presented at the October 9, 2019 hearing, and during this motion, it is clear that RECO failed to deliver the said Statements within thirty (30) days of the October 9, 2019 hearing. Further, there were also many requests by Ms. Deeb's counsel for such Statements long before the required thirty day deadline presented itself. However, despite those many requests before October 2019, deadlines for the delivery of Will Say Statements were not created by Ms. Deeb's repeated requests in early 2019. There was only one deadline for RECO to meet, and it was thirty (30) days before the commencement of the hearing on October 9, 2019.

The Panel confirmed on October 9, 2019 that RECO had failed to comply with the 30-day deadline. Further, the Panel found in the circumstances of this case that *if the hearing were to proceed on October 9th*, RECO's witnesses would not be permitted to testify. Nevertheless, after RECO requested an adjournment and the Panel heard submissions from counsel, the Panel exercised its discretion to grant the adjournment.

The Panel finds that the late disclosure of RECO's Will Say Statements did not constitute an act of bad faith on the part of RECO, nor was it part of broader conduct that would warrant a stay of this proceeding on the basis of abuse of process.

There was no evidence put before the Panel on October 9, 2019 that the process itself had been intentionally misused by RECO to prejudice Ms. Deeb or that the failure of RECO to deliver Will Say Statements in a timely manner had been motivated by some nefarious motive.

At best, RECO's conduct after repeated requests/reminders for the Will Say Statements can be characterized as carelessness. At worst, it was sloppy conduct.

The Panel also finds that the late delivery of the Will Say Statements alone or in conjunction with other factors identified by Ms. Deeb do not support a stay of this proceeding for a number of reasons.

First, although the Will Say Statements were delivered late, the content in the Statements cannot be said to have been surprising or unexpected. The Statements themselves were brief and they outlined general circumstances with which Ms. Deeb should be intimately familiar given that she acted for the complainants and the sellers in the purchase and sale of the Property.

Second, whether the assertions in those Statements, and any timing issues with respect to the execution of documents and the reasons for their execution, will be borne out by the evidence remains to be seen. Ms. Deeb has raised basic timing and evidentiary issues to which RECO will have to respond (or fail to respond) at its peril.

Third, the Panel notes that the parties had a pre-conference hearing in March 2019, which is ordinarily an opportunity for the parties to put their respective narratives and positions forward on a without prejudice basis.

Fourth, there was considerable correspondence between counsel before the October 9, 2019 hearing. That correspondence was unusual in the sense that Ms. Koteff explained in detail her client's position on the very issues that were later raised in the Will Say Statements, including Ms. Deeb's view of evidentiary problems for RECO because of the assertions in its Allegation Statement.

In fact, there were implicit demands in the correspondence from Ms. Koteff that RECO should prove its case before the hearing to justify key assertions in its Allegation Statement. As was obvious from RECO's lack of response to those requests, RECO declined to argue the merits of the proceeding by way of correspondence, as was RECO's right.

Fifth, the pre-hearing correspondence from Ms. Koteff to the prosecutor makes it clear that nothing in the Will Say Statements would have been a surprise to Ms. Deeb. The fact that Ms. Deeb and RECO differ on whether key assertions in the Allegation Statement can be proven is the very reason there is going to be a hearing on the merits.

Sixth, based on the documents put forward on this motion, including pre-hearing correspondence from Ms. Deeb and her counsel, none of the central issues in this proceeding has been unclear or ambiguous, nor has there been any confusion over the case that Ms. Deeb has to meet *and which RECO has to prove*. Also, no material issues were raised by Ms. Deeb's counsel that prejudice would be visited upon Ms. Deeb based on the anticipated evidence outlined in the Will Say Statements.

Seventh, and contrary to the suggestions of Ms. Deeb and her counsel, there is no prohibition in the Rules that late-delivered Will Say Statements are *prima facie* inadmissible or that the witnesses to which the Statements relate will automatically be barred from testifying. The sanction for failing to comply with any requirement imposing a deadline, unless it is clearly stated in the Rules or the Code of Ethics, lies in the discretion of the Panel.

In this case, the Panel indicated that if the hearing *were to proceed on October 9, 2019*, RECO's witnesses would not be permitted to testify. That indication prompted RECO to request an adjournment given the significant prejudice posed to the entire proceeding. It was open to RECO to request an adjournment and for Ms. Deeb to oppose it, which she did. It was also open to the Panel, upon hearing submissions from the parties, to make a determination on the adjournment request, which the Panel did, and to make that decision regardless of whether a formal adjournment motion had been brought prior to the hearing. The Panel has the authority under the Rules to waive compliance or non-compliance with any Rule.

The Panel's indication that RECO's witnesses would not be permitted to testify on October 9, 2019 *if the hearing proceeded on that date* underscored the seriousness with which the Panel was treating disclosure deadlines in the Rules and under O. Reg. 580/05. The adjournment was granted *after* the Panel had considered the submissions of counsel.

The adjournment gave Ms. Deeb additional time to consider any and all issues in the Will Say Statements and, if necessary, revise her defence strategy or tactics. Also, RECO was put on notice that the Panel was treating deadlines seriously and that it would not tolerate any further carelessness or disregard for them.

As for the assertion that the *Panel* acted improperly by not dismissing the Allegation Statement outright and that it inappropriately granted the adjournment to RECO on October 9, 2019, the Panel has determined that it cannot and should not sit in judgment of its own procedural decisions. In its factum, RECO has, in the Panel's view, correctly outlined the legal framework and limitations associated with revisiting and re-assessing procedural decisions made on October 9, 2019. The Panel also adds its own comments to RECO's submissions:

- a) they were decisions made with the advice of ILC that were within the Panel's purview and authority;
- b) raising issues about the propriety or correctness of such decisions by characterizing them as factors to be considered in an abuse of process motion is a colourable attempt to appeal those decisions or, alternatively, to have the Panel attach different consequences to such decisions (e.g. stay the proceeding in its entirety);
- c) the Rules prohibit the renewal or rearguing of an issue/motion except where permission from the Panel has been sought and granted. For obvious reasons, there is no review of the adjournment decision being sought on this motion because the hearing on the merits had already been rescheduled (and subsequently suspended because of COVID-19); and
- d) neither the Rules nor the Real Estate and Business Brokers Act, 2002 provides for appeals from procedural (i.e. interlocutory) orders of the Panel.

In her email to RECO's prosecutor on September 23, 2019, counsel for Ms. Deeb asserted that since she had not received any Will Say Statements from RECO, it would prohibit RECO from calling any witnesses at the hearing. In the Panel's view, that assertion was incorrect. There is no sanction mandated in the Rules, the Code of Ethics, or the *Statutory Powers Procedure Act* of which the Panel is aware that would automatically bar or prohibit a party from calling a witness for which a Will Say Statement had not been delivered in a timely manner or at all.

Such a sanction is a draconian one and the proper relief or remedy for a party who has not received a Will Say Statement lies in the discretion of the Panel depending on the circumstances of each case.

At the outset of the motion, the parties confirmed that no motion was being brought alleging bias or a reasonable apprehension of bias on the part of the Panel. It was pointed out by RECO's counsel that the remedy for a successful motion founded on bias of the decision-maker is not the

stay of the proceedings. Rather, it is the recusal/removal of the decision-maker and the appointment of a new decision-maker.

For these reasons, the Panel has concluded that none of the above-mentioned factors, individually or collectively, support the relief sought in Ms. Deeb's Notice of Motion.

Finally, the Panel notes that in January 2020 RECO delivered *Amended Will Say Statements*. Given the suspension of RECO proceedings as a result of the COVID-19 pandemic, there can be no dispute that the 30-day deadline has not been met with respect to such Statements.

Any discrepancies or dissimilarities between the Amended Statements and those which RECO delivered in late September 2019 will no doubt be the subject of scrutiny on cross-examination, and possibly Panel questions, when the hearing resumes.

3) Creating an allegation in the Allegation Statement that is patently untrue and cannot be found anywhere in the Complaint

This factor relates to paragraph 5 in the Allegation Statement, which is cited above. The Panel has concluded that it is not a proper factor to be considered in an abuse of process motion for several reasons. First, allegations *on their face* are neither true nor false. Whether an allegation can ultimately proven or whether it lacks substance depends on the fact-finding process exercised by the Panel at a hearing on the merits.

Second, the assertion by Ms. Deeb that RECO has "created an allegation...that is patently untrue" is something that will be proven or disproven based on the evidence at the hearing. It is not helpful to employ conclusory language to describe an allegation and then rely one's conclusory description to make an assertion of impropriety on the part of RECO. RECO will have the onus at the hearing of proving its allegations and Ms. Deeb will be able to present any evidence of her own and make submissions to challenge RECO's allegations.

Third, Ms. Koteff in pre-hearing correspondence has already raised concerns about timing issues relating to the execution of the complainants' offer, and RECO's allegation of their reliance on the May 9, 2017 email from Ms. Deeb to determine their offer price. The hearing on the merits will provide Ms. Deeb with the opportunity to explore such issues, challenge any assertions about the proper sequence of events, and present arguments relating to RECO's case.

It would be inappropriate for the Panel to make binding determinations prior to a hearing on the merits for assertions in an Allegation Statement; the Panel is not in any position at this point to adjudge whether RECO has "created an allegation...that is patently untrue".

Fourth, with respect to Ms. Deeb's submission that paragraph 5 in the Allegation Statement cannot be found "anywhere in the Complaint", there is no legal requirement in disciplinary proceedings that an Allegation Statement must mirror and/or be restricted to the issues raised in the underlying complaint to RECO. Responsibility for the content and for proving the assertions in an Allegation Statement lies with RECO as a regulatory body. The complainant is not responsible for framing the issues in a disciplinary proceeding; the Registrar is. The disciplinary hearing is not the complainant's proceeding. It is litigation commenced by the Registrar on behalf of RECO.

RECO, as represented by the Registrar, has the authority to add allegations that are not in a complaint. Also, how RECO decides the issues should be characterized and presented is up to RECO. In the final analysis, however, RECO has the burden of proving the allegations as framed. That burden includes convincing the Panel that the stated facts underlying an allegation can be proved, and that the facts, if proven, also constitute a breach of one or more sections in the Code of Ethics.

In summary, the fact that RECO may have included allegations against a respondent that were not in the original complaint to RECO does not, in and of itself, support an assertion that the proceeding is marked by an abuse of process such that it should be stayed.

Also, whether an allegation is "patently untrue", in other words, whether it can be proven as being true, is a matter for the hearing on the merits. The Panel has no obligation to accept the conclusory description used by Ms. Deeb that paragraph 5 in the Allegation Statement is "patently untrue" and then use that conclusion to find that the proceeding to date has been marked by an "abuse of process".

Nor would the Panel be warranted on this motion to enter into an inquiry about the evidence supporting the Allegation Statement and then proceed to make findings on the merits of RECO's case. Once again, that is the proper role of the Panel in the context of the hearing on the merits.

4. Submitting an inappropriately doctored version of 's materials in RECO's Book of Documents to be relied upon at the Hearing

The Panel finds that there is no substance to this allegation as a factor on the abuse of process motion.

Collins English Dictionary defines “doctoring” as altering a document “in order to deceive, tamper with, falsify, or adulterate”. Similarly, the on-line Oxford Dictionary defines the term “doctor” as to “change the content or appearance of (a document or picture) in order to deceive; falsify.”

There were no documents that were “doctored” by RECO and this serious allegation was, from the outset, without any foundation. On cross-examination, Ms. Deeb actually claimed that her evidence had been “butchered” by RECO.

Prior to and during the motion, Ms. Deeb produced *no* evidence of any intention on the part of RECO to doctor any of her evidence. There was certainly no alteration of any document, that is, leaving aside the requirement of having to prove alteration with an intent to falsify, deceive, or adulterate.

What was the focus of this allegation? It was that eight (8) pages of documents that Ms. Deeb had provided to RECO which documents provided comparables of other properties in the neighbourhood where the Property was located, had been put in RECO’s Book of Documents at the wrong Tab, such that all of Ms. Deeb’s document were not together in one Tab.

This oversight by RECO was *recognized and acknowledged by the parties* in late January 2019 *in writing*.

Thereafter, it was a non-issue, that is, until Ms. Deeb included it as a factor going to the alleged abuse of process in this proceeding.

Given that RECO had acknowledged by late January 2019 that the eight (8) pages of comparables were Ms. Deeb’s documents, the Panel is bewildered that this allegation was even raised as part of an abuse of process motion. There was never any substance to it, and the suggestion that evidence had been “doctored” or “butchered” was completely groundless.

There was no evidence that the mis-organization of eight (8) pages of Ms. Deeb’s documents in RECO’s Book of Documents had been intentional, that it reflected improper or ulterior motives on RECO’s part, or that it had prejudiced Ms. Deeb’s defence in any way.

If this issue had actually been a continuing one for Ms. Deeb after January 2019, she was always at liberty to re-copy all of her own documents (or simply the eight (8) pages of comparables), put them in a Respondent’s Book of Documents, serve that Book on RECO, and file it with the Panel. But Ms. Deeb did nothing. In the Panel’s view, that is not surprising because the mis-organization of any documents was a dead issue after January 2019, and it would certainly not cause any problems for Ms. Deeb at the hearing on the merits.

5. Failure to post public notice of the Hearing, contrary to Rule 6.04

Ms. Deeb asserted that the failure of RECO to post a public notice of the hearing, as provided for in Rule 6.04 of RECO's Rules of Practice, was also a factor that the Panel should consider in determining that there had been an "abuse of process" in this matter. Rule 6.04 reads in part:

6.04(1) The Hearings Coordinator will give public notice of Proceedings that are open to the public including, where practical, posting a notice on the website of RECO.

6.04(2) The public notice shall contain the name of the Registrant, a brief summary of the provision in the Code of Ethics alleged to have been breached by the Registrant, the nature of the Proceeding (e.g., a Motion, a Hearing) and the date, time and place of the Proceeding.

The evidence before the Panel at the motion established three things: (1) RECO had failed to post notice of the hearing on its website prior to and during October 2019; (2) RECO had actually failed to post the October 2019 schedule for any and all RECO hearings being heard that month; and (3) neither the Registrar nor the prosecutor had any responsibility for this administrative task because the Manager, Discipline & Appeals Hearings (formerly called the Hearings Coordinator) ("Manager") who provides administration services for the Panel, ordinarily performs the notification function. The Manager does not report to the prosecutor or to the Registrar. Further, the Panel does not oversee the day-to-day administrative activities of the Manager.

The evidence also showed that Ms. Deeb, who knew that her RECO hearing had been scheduled in March 2019 to commence on October 9, 2019, was checking the RECO website regularly to see whether notice of the hearing had been posted. By September 2019, when Ms. Deeb knew that no notices for October had been posted, she did nothing. There were no communications from, or concerns raised by Ms. Deeb with RECO, including the Manager.

By early October, no such posting on RECO's website had occurred and the hearing proceeded on October 9, 2019, only to be adjourned as noted above. There was no complaint from Ms. Deeb relating to the lack of a public notice of her hearing with RECO.

It was not until early November 2019 that Ms. Deeb made inquiries about there having been no notice of her hearing posted on RECO's website. By that time, posting the October 2019 schedule for RECO's hearing during that month had become a moot point, and Ms. Deeb's hearing had already been adjourned.

The Manager failing to post the October 2019 schedule on RECO's website was an administrative oversight. Equally important, that failure was not and is not rationally connected to (a) the actual conduct of the hearing on the merits in October 2019, (b) any prejudice allegedly suffered by Ms. Deeb (or suffered by the Prosecution for that matter), and (c) the doing of justice on the merits in respect of any assertions in the Allegation Statement.

In short, the Panel finds that the failure of RECO to post public notice of the hearing on RECO's website is not a relevant factor to be considered on this abuse of process motion. No authority was produced by either party suggesting that this administrative oversight, which had nothing to do with the conduct of the parties, was in any way connected with the manner in which the hearing on the merits had proceeded on October 9, 2019 or it would proceed in the future.

6. Independent counsel allegedly exceeding his or her permissible role

Ms. Deeb submitted that ILC had intervened or interfered inappropriately at the hearing on October 9, 2019 and, in fact, that ILC had usurped the role of the Panel by asking questions, directing the proceedings without being called upon to do so, and by overruling the Chair of the Panel on the issue of a recess.

The Panel has determined that these assertions are without merit. The decisions made on October 9, 2019 by the Panel, with the advice of ILC, were decisions within the Panel's purview and authority. There was never any instance where ILC usurped the proper role of the Panel. Any issues raised by ILC, as evidenced by the transcript from the October 9, 2019 hearing, were confirmed by the Panel itself. The Panel acted within its discretion.

ILC did not make any rulings that were binding on Ms. Deeb or which purported to bind Ms. Deeb. On a factual basis alone, the allegations of Ms. Deeb are not supported by the transcript from the hearing. There was no "manifest unfairness" created by ILC's conduct, the circumstances of the October 9, 2019 cannot accurately be described as "intolerable" with respect to the rights and interests of Ms. Deeb, and ILC did not "descend into the arena" of the Panel by directing the conduct of the hearing or making decisions that were the proper function of the Panel itself.

The Panel was always in control of the process at the October 9, 2019 hearing and it made the decisions that bound the parties.

Legal principles relating to Abuse of Process motions

The general legal principles relating to abuse of process claims, as previously applied by a RECO Panel, can be found in the decision of *RECO v. Steven Bailey* (2019). In that case, the Panel wrote in part:

On the general concept and doctrine of “abuse of process”, the decision in *R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659, as cited in *Blencoe v. B.C. Human Rights Commission*, [2000] 25.C.R. 307, is particularly instructive. In *Conway*, L’Heureux Dubé J. explained at 1667 the underlying purpose of the doctrine of abuse of process as follows:

Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge. The prosecution is set aside, not on the merits (see *Jewitt*, supra, at p. 148), but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. The doctrine is one of the safeguards designed to ensure “that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society” (*Rothman v. The Queen*, 1981 CanLII 23 (SCC), [1981] 1 S.C.R. 640, at p. 689, per Lamer J.) It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings. [Emphasis added.]

In *Blencoe*, the B.C. Court of Appeal continued:

In order to find an abuse of process, the court must be satisfied that, “the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted” (*Brown and Evans*, supra, at p. 9-68). According to L’Heureux Dubé J. in *Power*, supra, (*R. v. Power*, [1994] 1 S.C.R. 601) at p. 616, “abuse of process” has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the proceedings must, in the words of L’Heureux Dubé J., be “unfair to the point that they are contrary to the interests of justice” (p. 616).

So far as the authority of disciplinary panels at RECO is concerned, the *Statutory Powers Procedure Act*, R.S.O. 1990, c.5.22 (the “SPPA”) provides in part:

4.6(1) Subject to subsections (5) and (6), a tribunal may dismiss a proceeding without a hearing if,

(a) the proceeding is frivolous, vexatious or is commenced in bad faith... .. 23(i)

A Tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its process.

These SPPA provisions and R. 4.02(6) of the Discipline and Appeals Committee Rules of Practice provide the Panel with sufficient authority to hear and determine motions based on the doctrine of abuse of process and, where warranted, to permanently stay or dismiss a proceeding.

On the issue of alleged delay, the case law clearly establishes there must be proof of significant prejudice which results from an unacceptable delay in a proceeding. In this case, the Panel finds that there has been no unacceptable or inordinate delay and that Mr. Bailey failed to provide any proof of prejudice arising from any alleged delay.

Concerning applicable legal principles, the Panel has considered the discussion in the *Blencoe* case where Bastarache, J. stated:

101 In my view, there are appropriate remedies available in the administrative law context to deal with state-caused delay in human rights proceedings. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period (see: *R. v. L. (W.K.)*, 1991 CanLII 54 (SCC), [1991] 1 S.C.R. 1091, at p. 1100; *Akthar v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 32 (C.A.)). In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay.

102 There is no doubt that the principles of natural justice and the duty of fairness are part of every administrative proceeding. Where delay impairs a party’s ability to

answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy (D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf), at p. 9-67; W. Wade and C. Forsyth, *Administrative Law* (7th ed. 1994), at pp. 435-36). It is thus accepted that the principles of natural justice and the duty of fairness include the right to a fair hearing and that undue delay in the processing of an administrative proceeding that impairs the fairness of the hearing can be remedied (see, for example, J. M. Evans, H. N. Janisch and D. J. Mullan, *Administrative Law: Cases, Text, and Materials* (4th ed. 1995), at p. 256; Wade and Forsyth, *supra*, at pp. 435-36; *Nisbett*, *supra*, at p. 756; *Canadian Airlines*, *supra*; *Ford Motor Co. of Canada v. Ontario (Human Rights Commission)* (1995), 24 C.H.R.R. D/464 (Ont. Div. Ct.); *Freedman v. College of Physicians & Surgeons (New Brunswick)* (1996), 1996 CanLII 4828 (NB QB), 41 Admin. L.R. (2d) 196 (N.B.Q.B.)).

The jurisprudence makes it clear that bad faith “refers to a subjective state of mind, that is conduct which has been motivated by “ill will”, hostility, dishonesty, malice, personal animosity or even “sinister purpose”: *Collins v. Transport & Allied Workers Union (Teamsters, Local 855)*, [1991] N.J. No. 307 (Nfld. S.C.T.D.). The Panel finds no evidence of any such motivations on RECO’s part in this proceeding.

The Panel believes that the observations made by Southin, J.A. of the B.C. Court of Appeal in *MacMillan Bloedel Ltd. v. Galiano Island Trust* [1995] B.C.J. No. 1763 at para. 182 apply equally to Mr. Bailey’s situation:

Once it is determined that the trustees acted within the scope of their legislative authority, I do not think it matters that they attempted to support their conduct on grounds other than those found to be the true basis for their actions. Both their expressed motives, and their true motives, were directed towards furtherance of the objects of the Islands Trust Act. An ulterior purpose that is within the ambit of the delegated power is not an improper purpose.

Having considered the foregoing, the Panel reiterates that the thrust of Bailey's claim of bad faith is the alleged conduct of RECO during the investigation, that is, prior to the issuance of the Allegation Statement.

In Sommers v. Ontario Civilian Commission on Police Services, 2005 Can LII 15466 (Ont. Div. Ct), the Ontario Divisional Court adopted a very similar view. In that case, several police officers were referred to discipline hearings or informal resolution by the Ontario Civilian Commission on Police Services and they sought judicial review of that decision. The Court wrote:

[17] The main thrust of the Applicants' submissions flows from the application of the doctrine of procedural fairness. We accept the duty of fairness applies not only to judicial or quasi-judicial decisionmakers, but also to "administrative" decisionmakers. (*Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, 1978 CanLII 24 (SCC), [1979] 1 S.C.R. 311; *Martineau v. Matsqui Institution Disciplinary Board (No. 2)*, (1980), 1979 CanLII 184 (SCC), 106 D.L.R. (3d) 385 (S.C.C.))

[18] Procedural fairness is applied in varying degrees of strictness, depending on the circumstances of the case. *In Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at paras. 2128, the Supreme Court of Canada identified five factors as affecting the level of procedural fairness in a specific situation. These factors are as follows:

- (i) The nature of the decision;
- (ii) The statutory context;
- (iii) The significance of the decision;
- (iv) The legitimate expectations of those affected by the decision; and,
- (v) The choice of procedure.

[19] The nature of the decision is the requirement that the officer proceed to a hearing or informal resolution. There is no suggestion that the officer's substantive rights are in any way compromised by the requirement. At its highest, the Commission's decision is a review of an investigative process.

A hearing on the merits will afford Bailey the opportunity to mount a robust defence and the hearing will also serve the public interest. The Panel has not found any abuse of process indicating that the proceeding was commenced or, to date, conducted in bad faith or that the extraordinary remedy of a stay or dismissal of the proceeding is warranted.

The additional case law and legal sources cited by the parties in Ms. Deeb's motion articulate the same or similar principles. In *Collins v. Transport & Allied Workers' Union*, the definition of "bad faith" was reviewed and the Court decided that "bad faith refers to a subjective state of mind, that is conduct which has been motivated by 'ill-will', hostility, dishonesty, malice, personal animosity or even 'sinister' purposes. Conversely, 'good faith' has been described as 'honesty of purpose'.

Further, in *Enterprises Sibeca Inc. v. Frelighsburg (Municipality)*, the Supreme Court of Canada confirmed that acts of bad faith are not limited to acts committed deliberately with an intent to harm, but they cover acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith.

In the *MacMillan Bloedel Ltd.* case, the B.C. Court of Appeal determined that bad faith included "dishonesty, fraud, bias, conflict of interest, discrimination, abuse of power, corruption, oppression, unfairness, and conduct that is unreasonable. The words have also been held to include conduct based on an improper motive, or undertaken for an improper, indirect or ulterior purpose."

The Panel finds that nothing in the conduct of the prosecution in Ms. Deeb's case reflected "bad faith" based on the various judicial definitions of that concept. To be sure, RECO's failure to meet the timeline relating to the delivery of Will Say Statements could have been avoided but the evidence on the motion did not reveal dishonesty, corruption, or improper motives on the part of RECO in not meeting that deadline. As the Panel has found, RECO's conduct was either careless or sloppy in the circumstances.

Having reviewed the various authorities provided by the parties, the Panel finds that the evidence before it on this motion did not satisfy the legal criteria required to show there has been an abuse of process such that the remedies requested by Ms. Deeb are warranted.

As was the situation in the *Bailey* case, the Panel finds that a hearing on the merits will afford both parties with the appropriate forum to canvass, promote, criticize, and challenge the assertions in RECO's Allegation Statement, as the case may be.

Procedural Directions of the Panel

Given the Panel's dismissal of Ms. Deeb's motion, and in order to move this proceeding forward, the Panel provides the following procedural direction to the parties:

1. The parties shall co-ordinate and co-operate with the Manager, Discipline and Appeals Hearings, to schedule new hearing dates for the continued hearing on the merits on a set of three consecutive dates to be provided by the Manager;
2. Given the game-changing nature of the current pandemic, the hearing on the merits will take place by way of video-conference and thus the parties and other witnesses shall testify remotely. Since RECO delivered *Amended Will Say Statements* in January 2020 for the two complainants, there should be no issues relating to the 30-day deadline in RECO's Rules and the *Code of Ethics* for the delivery of same. Ms. Deeb shall also be entitled to deliver *Amended Will Say Statements* in accordance with the deadline for same if she so desires;
3. Any issues relating to costs on the abuse of process motion shall be dealt with after the hearing on the merits in accordance with such further direction as the Panel may provide; and
4. Any other procedural issues that the parties wish to raise should be raised at the earliest possible opportunity with the Manager, who will in turn contact the Panel for further direction.

[Released: October 29, 2020]