



Real Estate Council of Ontario

DISCIPLINE DECISION

**IN THE MATTER OF A DISCIPLINE HEARING HELD PURSUANT TO
BY-LAW NO. 10 OF THE REAL ESTATE COUNCIL OF ONTARIO**

BETWEEN:

**MANAGER OF COMPLAINTS, COMPLIANCE AND DISCIPLINE
REAL ESTATE COUNCIL OF ONTARIO**

- AND -

RAKESH MADHOK

This document also contains the Appeals Decision: February 1, 2010

DATE OF DECISION: July 24, 2009

FINDINGS: In violation of Rules 1(2), 1(5), 42, and 46 of the RECO Code of Ethics

PENALTY: RECO to deliver written submissions to the Panel and to the Respondent on the issue of penalty and costs within 15 days of the date on which the Panel's decision and reasons are delivered.

The Respondent shall deliver to the Panel and to RECO its written submissions on penalty and costs in response to RECO's submissions within 15 days of the date on which RECO's submissions on penalty and costs are delivered to the Respondents.

RECO shall deliver to the Panel and to the Respondent its reply to the written submission 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 RECO.

Any inquiries relating to the delivery of the above-mentioned documents should be directed to the Hearings Coordinator.

The Panel shall deliver its decision on penalty and costs after considering the written submissions of the parties.

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 was held on July 24, 2009 in the presence of the Respondent, Rakesh Madhok (the "Respondent" and/or "Mr. Madhok"); Paralegal, Paralegal for the Manager of Complaints, Compliance and Discipline ("CCD") of the Real Estate Counsel of Ontario ("RECO"); and independent legal counsel to the Discipline Panel.

ALLEGATIONS BY RECO

In its Allegation Statement RECO alleged the following:

Mr. Rakesh Madhok was at all material times a member of RECO and a Salesperson registered under the *Real Estate and Business Brokers Act* and/or the *Real Estate and Business Brokers Act, 2002* (hereinafter referred to as "REBBA 2002"). At all material times, Mr. Madhok was employed as a salesperson at Brokerage A.

Mr. Madhok and his wife owned a property located at 1-A Street in City A (the "Property"). He listed the Property for sale through Brokerage A (acting as the seller's representative), and on Saturday December 17, 2005, as a seller, he entered into an Agreement of Purchase and Sale with Buyer B1, Buyer B2 and Buyer B3 (the "Buyers") for \$367,000.00, with a closing date of January 16, 2006.

The Buyers were represented by Buyer Representative 1 and Buyer Representative 2, who are registered salespeople with Brokerage B. The Agreement of Purchase and Sale for the Property was made conditional upon the Buyers obtaining financing within 5 banking days.

Buyer Representative 1, Buyer Representative 2 and Buyer B1 submitted complaints to RECO, alleging that Mr. Madhok sold the Property to another buyer within the above-mentioned 5-day period.

The Agreement of Purchase and Sale provided that a deposit of \$10,000 by negotiable cheque be submitted "upon acceptance". Buyer Representative 1 and Buyer Representative 2 provided a \$10,000 cheque when the parties executed the agreement, but Mr. Madhok demanded a certified cheque (which was not a requirement of the Agreement of Purchase and Sale). Buyer Representative 1, Buyer Representative 2 and Mr. Madhok agreed that Buyer Representative 1 and Buyer Representative 2 would drop off a certified cheque by Tuesday December 20, or Wednesday December 21, 2005, at the Brokerage A office. They did drop off the certified cheque on the 21st, and were given a receipt from Brokerage A.

Buyer Representative 1, Buyer Representative 2 and the Buyers later learned from Mr. Madhok that he had accepted an Agreement of Purchase and Sale from another buyer on Monday December 19th for a higher price (\$370,000.00), with an earlier closing date (December 31, 2005).

On December 22nd, the Buyers waived the financing condition and communicated to Mr. Madhok, through Buyer Representative 1 and Buyer Representative 2, that they considered the deal to be firm.

Beginning on December 23, 2005, Mr. Madhok repeatedly contacted Buyer B1 directly, in an attempt to get the Buyers to sign a mutual release. Mr. Madhok also offered to sell the Buyers another property (1-C Street) at a reduced commission rate if they terminated their contract with Brokerage B, represented by Buyer Representative 1 and Buyer Representative 2. On December 30, 2005, Buyer B1 and Buyer B2 did eventually submit an offer on the 1-C Street property through Brokerage B, but it was not accepted.

Mr. Madhok's position was that since no deposit was provided in accordance with the "upon acceptance" clause of the Agreement of Purchase and Sale, then the Buyers' agreement was null and void.

Mr. Madhok took possession of the Buyers' certified deposit cheque and went to Brokerage B twice in an attempt to return it. Mr. Madhok did not indicate on what date or dates he went to Brokerage B. However, the acting broker there would not accept it. Mr. Madhok then mailed a letter, dated December 22, 2005, with the cheque enclosed, to Brokerage B via inter-office delivery. In his letter accompanying the cheque, Mr. Madhok requested a mutual release.

RECO alleged that as a result of the foregoing Mr. Madhok acted unprofessionally when he:

- a. Entered into a second Agreement of Purchase and Sale with respect to the Property when there was an outstanding Agreement of Purchase and Sale already entered into with the Buyers, or in the alternative, failed to cause the second agreement to be conditional upon a release from the first agreement and/or failed to obtain legal advice.
- b. Failed to deal fairly with the other buyer, Members and parties by arbitrarily entering into a second agreement.
- c. Negotiated with the Buyers to terminate their relationship with Brokerage B, represented by Buyer Representative 1 and Buyer Representative 2, in order to get them to deal directly with him on the 1-C Street property without the knowledge, consent or involvement of Brokerage B and/or Buyer Representative 1 and Buyer Representative 2.

RECO alleged that Mr. Madhok breached the following Rules of the RECO's Code of Ethics:

Rule 1 – A Member shall:

- (2) endeavour to protect the public against fraud, misrepresentation or unethical practice in connection with real estate Transactions,
- (3) maintain and enhance the Member's degree of skill and competence,
- (5) deal fairly, honestly and with integrity with the public, other Members and third parties.

Rule 42 – Competence

A Member shall render conscientious service with the knowledge, skill, judgment and competence, in conformity with this Code of Ethics and the standards which are reasonably expected of Members. When the Member is unable to render such a service, either alone or with the aid of other Member, the Member shall decline to act.

Rule 46 – Unprofessional Conduct

A Member shall not engage in an act or omission relevant to the practice of the profession that, having regard to all the circumstances, would reasonably be regarded by Members or the public as disgraceful, dishonourable or unprofessional.

EVIDENCE OF THE PARTIES

Certain documents were marked as Exhibits for use at the hearing.

1. Notice of Hearing, dated May 27, 2009
2. RECO's Book of Documents
3. Copy of Buyer B1's Cheque Stub re: cheque #216 and #217
4. Excerpt of REBBA, R.S.O. 1990, section 23 of Regulation 986

In his opening remarks, the Prosecutor for RECO led the Panel through the Allegation Statement, and confirmed that RECO was ready to proceed.

The Respondent was given the option of presenting his opening remarks when the Prosecutor finished or waiting until the Prosecutor had concluded his case. Mr. Madhok chose to make his opening remarks at the outset of the hearing. Mr. Madhok informed the Panel that he was representing himself in this matter because he thought lawyers were too expensive. He proceeded to outline his version of events in this case and, in effect, present his own evidence. On the advice of Independent Legal Counsel, the Chairperson reminded Mr. Madhok that there was a difference between making an opening statement and giving evidence and that if he wished to give evidence, he would have to be sworn in as a witness and also be willing to subject himself to cross-examination by RECO. Mr. Madhok concluded his opening remarks and the hearing proceeded with the presentation of evidence from various witnesses.

WITNESSES FOR RECO

1. Buyer B1

Examination-in-Chief

Buyer B1 testified that he first met the Respondent in December 2005. He then identified a letter of complaint and stated that he first saw the house at 1-A Street ("Property") on either the 10th or 12th of December 2005 in the company of his agent, his mother, his brother, and his sister. The witness identified Tab 2A as his offer to purchase the Property.

The witness testified that he chose to initially offer \$360,000 for the Property because of a telephone conversation with his agent prior to attending the Property on December 17, 2005. The offer was prepared with three parties named as buyer, but only two of the would-be buyers signed the offer. When questioned about this, Buyer B1 stated that his brother was unable to

attend to sign the offer due to work commitment, but that he had been in phone contact with his brother at all material times.

The offer was presented to the Sellers in the kitchen of the Property by the Buyers' Agent, with the Buyers waiting upstairs. The ultimate selling price of \$367,000 was arrived at after three "sign backs", which Buyer Representative 1 (the Buyers Agent) co-ordinated between the parties.

Buyer B1 further testified that after the price had been agreed to and the offer had been accepted, he came downstairs to the kitchen and met the Sellers. The witness confirmed that Mr. Madhok signed the confirmation of execution at 4:00 PM on December 17, 2005. According to Buyer B1, Mr. Madhok asked that the \$10,000 deposit cheque be certified. Given the time of day, it was too late to get a certified cheque from the bank but there was a general agreement between the parties that the cheque would be certified the following week and delivered to the Respondent/Seller's office.

Buyer B1 stated he gave a certified cheque to his agent, and that his agent called him to verify that he had delivered the cheque. The witness identified Tab 2G as the waiver which he had signed to remove all conditions, thus making the agreement between the parties firm. The waiver was delivered to the Respondent/Seller's office at 8:15 PM on December 22, 2005.

Buyer B1 explained that the Respondent/Seller called him to explain that the house was sold, asking him not to send the complaint to RECO and that if he would dispense with the services of his agent that he would find him a similar house at a better price. He testified that he told the Respondent/Seller not to call him anymore. He also testified that Mr. Madhok told him if he did not sign the mutual release he could lose his \$10,000 deposit.

Cross Examination

On cross-examination, the witness advised that he made a complaint to the Real Estate Council of Ontario on January 10, 2006. When asked why the Respondent/Seller would not take a personal deposit cheque, he stated that the Respondent/Seller was simply adamant that he wanted a certified cheque and, toward that end, everyone agreed in the kitchen at the Property (when the offer was signed and accepted on December 17, 2005) that a certified cheque would be delivered by the Buyers early the following week.

When asked if he recalled a meeting on January 1, 2006 regarding the offer on 1-C Street, City A, the witness replied that the meeting took place at the Temple.

There was no redirect and the witness was excused from further questioning.

2. Buyer Representative 1

Examination-in-Chief

Buyer Representative 1 testified that he has been a broker for approximately one year and a salesperson for approximately 4 years prior to becoming a broker. The witness identified his letter at Tab 2 in the Book of Documents and testified that his partner, Buyer Representative 2, had shown the Property on two occasions prior to December 17, 2005. He testified that he attended the Property with Buyer B1 and family on December 17, 2005. Buyer Representative 1 testified that there had been no disclosure by the Respondent as seller either in the listing or by direct statement to him. When he was referred to Tab 2E of the Book of Documents, Buyer Representative 1 identified it as a receipt, dated December 22, 2009, for the certified cheque he had given to Brokerage A on the same date. He further stated that one hour after delivering the cheque, the Respondent/Seller called him to say that he could not deposit the cheque because the house had been sold to someone else. Buyer Representative 1 testified that he was very surprised by this information.

When questioned about the waivers from the purchasers, Buyer Representative 1 advised that he delivered the waivers at 8:15 PM December 22, 2005, and that the Respondent/Seller called both him and his clients to get mutual releases signed, which his clients refused to execute.

Cross-Examination

The Respondent asked Buyer Representative 1 about the sequence of events relating to the \$10,000 deposit cheque and Buyer Representative 1 testified that the buyer gave the cheque to him, which he in turn gave to the Respondent/Seller at the meeting at the Property. The witness was then asked how he found out that the Property had subsequently been sold to someone else and he testified that the Respondent had provided that information to him. Mr. Madhok then asked Buyer Representative 1 questions about the number of copies of the agreement to purchase and sale; Buyer Representative 1 responded that there were four copies. For his part, Mr. Madhok disputed that response by stating that only one copy was made. When asked to

confirm whether all parties to the offer were present at the meeting at the Property, Buyer Representative 1 confirmed that one of the named parties on the offer was unable to attend due to a work commitment. Buyer Representative 1 added that it was his partner Buyer Representative 2 who called to make arrangements to present the offer on December 17, 2005 and he only discovered when the offer was being presented that the Respondent/Seller was also a registrant under the *Real Estate and Business Brokers Act*.

When questioned about the phone calls during which it was learned that the Property had been sold to someone else, Buyer Representative 1 testified that he understood that the Respondent/Seller had told his client that if they did not sign a mutual release for the transaction that they risked losing their \$10,000 deposit.

Redirect

On redirect during the examination of Buyer Representative 1, the Prosecutor asked about the \$10,000 (uncertified) personal cheque and Buyer Representative 1 testified that he had tried to give the Respondent/Seller the personal cheque when the offer was signed but that it was refused because the Respondent/Seller insisted that he wanted a certified cheque.

WITNESSES FOR THE RESPONDENT

1. Rakesh Madhok (Respondent)

Mr. Madhok took the witness stand in his own defense and gave the following testimony.

He testified that it was Buyer Representative 1 who called to arrange the offer presentation, not his partner Buyer Representative 2, and that he had asked Buyer Representative 1 to bring disclosure forms with him showing him (Madhok) as both a registrant and owner of the Property. The Respondent also asserted that Buyer Representative 1's clients wanted an amendment to the transaction to delay the proposed closing date by two months because they had a house to sell and had financial constraints. The Respondent/Seller testified that because of his own interests, he could not accommodate such a time frame.

Mr. Madhok also asserted that he had informed the people who made the subsequent offer on the Property (which offer he also accepted) about the previous offer he had signed but he advised them that the original offer was dead because one of the parties had not signed the offer, and also because he had not received the deposit cheque upon acceptance of the offer,

as per the agreement of purchase and sale. The Panel notes, however, that these purported communications occurred between the Respondent and the persons (who did not testify at the hearing) who eventually purchased the Property.

In giving his testimony, the Respondent referred the Panel to Tab 5 page 28, which was a photocopy of messages received at his brokerage, one of which showed that the \$10,000 deposit cheque for the Property had indeed been delivered by the agent for the Buyers et al. Another document confirmed that the offer for the Property had been delivered by Buyer Representative 1.

The Respondent/Seller also initially testified that his lawyer had told him that the agreement of purchase and sale executed by Buyer B1 et al was invalid because it was missing a signature from one of the named parties. However, he was unable to produce any written legal opinion to that effect or proof that he had relied on such an opinion in subsequently conducting himself in the manner which is under review here. Notwithstanding these statements, the Panel was also referred to Tab 5 pages 19 and 21, which are letters from two different lawyers advising the Respondent of the intention and desire of the original purchasers (i.e. Buyer B1 et al) to close the transaction.

Cross-Examination

The Prosecutor referred the Respondent to Tab 2H, which was the listing for the Property and asked him if there was any notation therein relating to the deposit cheque, including any requirement that a certified cheque be provided. The Respondent confirmed that there was no such notation in the listing.

The Respondent was also asked about the agreement of purchase and sale and how many sign-backs there had been, and he eventually agreed that there had been three. The Respondent confirmed that the closing date was negotiated at the same time as the sign backs and that he signed the offer at 4:00 PM on December 17, 2005.

The Respondent was asked about the \$10,000 personal deposit cheque which had been rejected by him on December 17, 2005 and the testimony of previous witnesses that he had demanded that the buyers provide a certified cheque. Despite the testimony of Buyer B1 and Buyer Representative 1, the Respondent denied having ever seen a \$10,000 personal deposit

cheque on December 17, 2005. The Respondent was referred to Exhibit 3, which contained copies of Buyer B1's chequebook showing a \$10,000 personal cheque made out to the Respondent's company and which indicated that it was a deposit cheque for the Property.

The Respondent was also asked to turn to Tab 7 page 4 of the Book of Documents, which he identified as the second offer for the Property (from the persons who eventually received the Property) at a purchase price of \$370,000 with a closing date of the 31st day of December 2005. The Respondent confirmed that the terms of that transaction were more favorable to him than the terms which he had negotiated with Buyer B1 et al.

Finally, the Respondent confirmed under cross-examination that the Property at 1-C Street, City A, which was the alternative property which he had offered to the Buyers after he had sold the Property to other persons, was, in fact, partly owned by his own wife. As noted above, the proposed transaction did not go anywhere because the offer submitted by the Buyers was not accepted.

SUBMISSIONS BY RECO

In its Submissions on Findings, RECO asserted that it had proven, on the balance of probabilities, principally through documentation and credible witnesses, that the Respondent had indeed requested a certified cheque from the Buyers after first rejecting a \$10,000 personal cheque from them. The thrust of RECO's submissions were that the Respondent had acted improperly by entering into a second transaction for the Property in circumstances where the first transaction (involving Buyer B1 et al) was proceeding as the parties had agreed. RECO also submitted that, after the Respondent had entered into an agreement to sell the Property to other persons, he had also tried to deal with Buyer B1 et al directly by encouraging them not to involve their agent in a transaction involving the alternative property which the Respondent had identified.

SUBMISSIONS BY THE RESPONDENT

For his part, the Respondent submitted that the evidence showed that he believed that the first offer had died because only two parties of the three named parties had signed the offer. He also stated that the deal with Buyer B1 et al was not binding on the basis that the \$10,000 deposit cheque had not been deposited in his firm's trust account within 48 hours. The

Respondent also claimed that he had received legal advice indicating the original agreement of purchase and sale was “dead” because of certain deficiencies in that agreement.

FINDINGS BY THE PANEL

Having carefully considered the testimony of the witnesses at the hearing, and the documentary evidence, the Panel has concluded that Mr. Madhok breached subrules 1(2) and 1(5), Rule 42, and 46 under RECO’s Code of Ethics.

REASONS FOR FINDINGS/DECISION

The Panel has concluded that Mr. Madhok acted unprofessionally when he entered into a second agreement of purchase and sale for the Property. The evidence at the hearing indicated that both the Respondent and the Buyers (i.e. Buyer B1 et al) acted as if they were entering into a binding transaction. There were significant negotiations between the parties involving the Buyer’s agent at the Property on December 17, 2005, such that the offer was the subject of three sign-backs. The Panel notes that at no time during the negotiation process did the Respondent suggest that there was no point in conducting negotiations because one of the persons named in the offer was not present to sign the offer at that time. Nor did the Respondent ever advise the Buyers immediately after their execution of the offer (which was accepted by the Respondent on December 17, 2009) that he did not consider himself bound by any transaction because Buyer B1’s brother had not signed the original offer (especially after the three sign-backs). The fact is that the Respondent realized he had created a big problem for himself when the Buyers under the agreement of purchase and sale executed on December 17, 2005 delivered the certified deposit cheque to the Respondent’s office and they waived any conditions drafted for their benefit. The unfairness to Buyer B1 et al because of the Respondent’s decision to enter into a second agreement more advantageous to the Respondent was manifestly unfair to the first set of Buyers.

The Panel also accepts that a \$10,000 personal cheque was provided to the Respondent upon the acceptance of the offer on December 17, 2005 and that it was the Respondent who demanded a certified cheque even though the transaction did not require same. By demanding a certified cheque, however, the Respondent was at the same time indicating his willingness and intention to be bound by the transaction, subject to any conditions in favour of the Buyers.

The Respondent acted improperly in entering into a second agreement while the first agreement was still in place. At the very least, the second offer (which resulted in a sale of the Property to other persons) should have contained a clause confirming that the proposed transaction was conditional upon the Respondent being released from the previous agreement of purchase and sale with Buyer B1 et al. Further, even if Mr. Madhok had obtained legal advice that the first agreement was “dead” or no longer binding, he should have communicated his understanding to the Buyers and their agent under the first agreement. By failing to do so, the Respondent acted unfairly and improperly. Further, the Respondent, as a real estate professional, should have known what was required in the circumstances. Mr. Madhok failed to deal fairly with all parties by arbitrarily entering into that second agreement when the parties had not agreed that the first agreement was no longer effective.

The Panel notes that at no time prior to executing the second agreement did the Respondent request Buyer B1 et al to execute a mutual release relating to the agreement of purchase and sale executed on December 17, 2005. It is also clear to the Panel that Buyer B1 et al certainly proceeded in a manner after December 17th as if they had a valid agreement for the purchase and sale of the Property. They took measures to get a certified deposit cheque, as requested by the Respondent, and to subsequently waive conditions in the agreement which had been included for their benefit.

The allegation that the Respondent improperly encouraged Buyer B1 to terminate his relationship with his agent was not contested at any time by the Respondent. The Panel found the witnesses for RECO to be very credible and the documentary evidence in support of RECO’s allegations to be substantial.

PENALTY

Having found that the Respondent breached the Rules cited above, the Panel has decided to deal with the issue of penalty in the following manner. RECO shall deliver written submissions to the Panel and to the Respondent on the issue of penalty and costs within 15 days of the date on which the Panel’s decision and reasons are delivered to them.

The Respondent shall deliver to the Panel and to RECO its written submissions on penalty and costs in response to RECO’s submissions within 15 days of the date on which RECO’s submissions on penalty and costs are delivered to the Respondent.

RECO shall deliver to the Panel and to the Respondent its reply to the written submission 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 RECO.

Any inquiries relating to the delivery of the above-mentioned documents should be directed to the Hearings Coordinator.

The Panel will deliver its decision on penalty and costs after considering the written submissions of the parties.



Real Estate Council of Ontario

DISCIPLINE DECISION

**IN THE MATTER OF A DISCIPLINE HEARING HELD PURSUANT TO
BY-LAW NO. 10 OF THE REAL ESTATE COUNCIL OF ONTARIO**

BETWEEN:

**MANAGER OF COMPLAINTS, COMPLIANCE AND DISCIPLINE
REAL ESTATE COUNCIL OF ONTARIO**

- AND-

RAKESH MADHOK

The Panel held a teleconference on October 9, 2009 to discuss the written submissions by all Parties with respect to Penalty and Costs. The Panel decided as follows:

DATE OF DECISION: October 9, 2009

PENALTY: Administrative Penalty of \$10,000.00 payable to RECO within 6 months of sending this decision.

COSTS AND EXPENSES: N/A

WRITTEN REASONS:

REASONS FOR DECISION PENALTY AND COSTS

In reviewing the submissions on penalty and costs from both parties, and the subsequent reply to submissions from the Manager of Complaints, Compliance and Discipline, the Panel has decided that the following order concerning penalty is appropriate:

1) Mr. Madhok shall pay a fine of \$10,000 to RECO within 6 months of sending this decision.

The Panel found that Mr. Madhok's submissions were largely irrelevant because they attempted to re-argue the hearing on its merits and to blame other persons for the consequences which were visited upon the complainants in this case. In this respect, the Panel believes that Mr. Madhok has simply not appreciated the seriousness of the allegations against him and the inappropriate and unprofessional nature of his conduct.

In considering the penalty submissions from the parties, the Panel is not in a position to hear alleged new evidence or to re-open the debate between the parties concerning the merits of RECO's case.

Mr. Madhok was found to be in contravention of Rules 1(2), 1(5), 42, and 46 of the RECO Code of Ethics and the Panel found in its decision and reasons that the breaches in this case were serious. Accordingly, the Panel believes that a strong message must be sent to Mr. Madhok personally as a matter of specific deterrence and more generally to all other realtors that misconduct which infringes the rights and interests of parties to a real estate transaction will not be tolerated under RECO's Code of Ethics.

There shall be no costs to either party in this proceeding.



Real Estate Council of Ontario

APPEALS DECISION

IN THE MATTER OF AN APPEALS HEARING HELD PURSUANT TO
BY-LAW NO. 10 OF THE REAL ESTATE COUNCIL OF ONTARIO

BETWEEN:

RAKESH MADHOK

- AND -

**MANAGER OF COMPLAINTS, COMPLIANCE AND DISCIPLINE
REAL ESTATE COUNCIL OF ONTARIO**

DATE OF DECISION: February 1, 2010

FINDINGS: The Appeal is dismissed.

PENALTY: The Discipline Committee penalty is upheld.

Administrative Penalty of \$10,000.00 payable to RECO within 6 months of sending this decision.

COSTS AND EXPENSES: N/A

WRITTEN REASONS:

REASONS FOR DECISION

Background

This is an appeal to the Appeals Committee of the Real Estate Council of Ontario (“the Appeals Committee” or “this Panel”) from a Discipline Committee (“the Lower Panel”) decision made on July 24, 2009. The Appellant is Rakesh Madhok. The Appellant was, at all material times, a member of the Real Estate Council of Ontario (“RECO”) and a salesperson registered pursuant to the *Real Estate and Business Brokers Act, 2002* and registered with Brokerage A.

The matter before the Lower Panel originated from a complaint filed by Buyer B1 dated January 2, 2006. The complaint related to a property, 1-A Street in City A, Ontario, that was owned by the Appellant and his wife. The basis of the complaint was that the Appellant sold 1-A Street (“the property”) to the complainant and two other buyers and within two days, and while the

complainant's Agreement of Purchase and Sale ("the Agreement") was still in play, sold the property to another buyer for a higher price. The complainant also alleged that the Appellant contacted him directly on a number of occasions concerning another property (1-C Street in City A) and to execute a mutual release notwithstanding that the Appellant knew that the complainant and the other buyers were represented by two other salespersons.

The background to the complaint and this appeal can be summarized as follows.

The Appellant and his wife listed 1-A Street in City A for sale. The property was listed by the Appellant's brokerage, Brokerage A. The Appellant acted as the listing agent and representative of the seller for the property. On Saturday, December 17, 2005, as a seller, he entered into an Agreement of Purchase and Sale with Buyer B1, Buyer B2, and Buyer B3 ("the buyers") for \$367,000, with a closing date of January 16, 2006.

The Buyers were represented by Buyer Representative 1 and Buyer Representative 2, two sales representatives registered with Brokerage B. The Agreement of Purchase and Sale was conditional on the buyers obtaining financing within five (5) banking days.

The Agreement of Purchase and Sale provided that a deposit of \$10,000.00 was to be submitted by negotiable cheque upon acceptance. The sales representatives for the buyers provided a \$10,000.00 cheque when the Agreement was executed however, the Appellant refused to accept it and demanded that a certified cheque be provided. It was agreed by the buyers, the buyers' agents and the Appellant that the agents would provide a certified cheque to the Appellant by Tuesday, December 20 or Wednesday, December 21, 2005 at the Brokerage A office. A certified cheque for \$10,000.00, being the amount of the required deposit, was provided on December 21 and a receipt was provided by the Brokerage A.

It was later learned by the buyers and their sales representatives that on Monday, December 19, the Appellant had accepted another Agreement of Purchase and Sale from another buyer. This second agreement was for \$370,000.00, being a higher price than the buyers' Agreement, and with an earlier closing date, December 31, 2005.

On December 22, the buyers waived the financing condition and communicated to the Appellant through their agents that they now considered the Agreement to be firm.

Beginning on December 23, 2005, the Appellant repeatedly contacted one of the buyers, Buyer B1, directly in an attempt to convince the buyers to execute a mutual release for the 1-A Street property. In addition, the Appellant offered to sell the buyers another property (1-C Street) at a reduced commission rate if they terminated their contract with their agents, Buyer Representative 1 and Buyer

Representative 2. On December 30, 2005 two of the buyers, Buyer B1 and Buyer B2, did submit an offer on the 1-C Street property through the Appellant's brokerage, but it was not accepted.

Upon discovering that the buyers had dropped off a certified deposit cheque, as agreed, the Appellant took possession of the cheque and went to the brokerage office representing the buyers (Brokerage B) and attempted on two occasions to return it. The acting broker would not accept it. The Appellant then mailed a letter dated December 22, 2005 with the certified cheque enclosed to Brokerage B by the inter-office delivery system. In the accompanying letter the Appellant requested a mutual release.

It was the Appellant's position that since no deposit was provided in accordance with the "upon acceptance" provision in the Agreement of Purchase and Sale for the property, the Agreement had become null and void and he was free to accept the second offer.

The complaint letter submitted by Buyer B1 dated January 2, 2006 led to RECO issuing an Allegation Statement against the Appellant dated March 19, 2009. The Allegation Statement alleged that the Appellant's conduct in relation to the Agreement of Purchase and Sale for the 1-A Street property and his conduct as it related to his attempt to sell the 1-C Street property to the buyers amounted to a breach of Rules 1(2), 1(5), 42 and 46 of RECO's Code of Ethics.

Rule 1(2) and Rule 1(5) required Members of RECO to endeavour to protect the public from fraud, misrepresentation or unethical practice in connection with real estate transactions, and to deal fairly, honestly and with integrity with the public, other Members and third parties.

Rule 42 required Members of RECO to render conscientious service with the knowledge, skill, judgement and competence, in conformity with the Code of Ethics and the standards which are reasonably expected of Members. If a Member is unable to render such service, either alone or with the aid of another Member, the Member shall decline to act.

And finally, Rule 46 states that a Member shall not engage in an act or omission relevant to the practice of the profession that, having regard to all the circumstances, would reasonably be regarded by Members or the public as disgraceful, dishonourable or unprofessional.

The Discipline Committee, after hearing and considering the evidence before it, found that the conduct of the Appellant was in breach of Rules 1(2), 1(5), 42, and 46.

Motion to Dismiss

Prior to the commencement of submissions, the paralegal for RECO made a preliminary motion. RECO's paralegal made a motion to dismiss the appeal. The Appeals Panel heard submissions on the preliminary motion to dismiss.

The paralegal for RECO submitted that the Appellant's grounds of appeal, as set out in his December 3, 2009 letter, were meritless. Rather the Appellant was attempting to introduce new evidence in his grounds of appeal in an effort to have the Appeals Panel consider the matter de novo. In particular the paralegal for RECO cited the third ground of appeal in the Appellant's December 3, 2009 letter. In that ground of appeal the Appellant states: "The copy of the personal cheque provided by the buyer to RECO was never offered to the Seller's representative." The Lower Panel, however, found (Decision of the Discipline Committee Page 10 of 12) that a personal cheque in the amount of \$10,000.00 was provided to the Appellant.

Similarly in Paragraph 5 of the grounds of appeal, the Appellant states that: "So there is no question of contacting them (the buyers) or asking them to terminate their contract with Brokerage B." The Lower Panel found however that the Appellant did attempt to have the buyers terminate their relationship with their agents and further that this finding "... was not contested at anytime by the Respondent (Appellant)" (Decision of the Discipline Committee Page 11 of 12).

The paralegal for RECO argued that allowing these grounds of appeal to go forward amounted to the introduction of new evidence which the paralegal for RECO would have no ability to meet or refute. The paralegal for RECO cited Sara Blake, Administrative Law in Canada, 4th Edition, pages 166-167 in support of his position that the Appellant's grounds of appeal were inappropriate. The appeal must be based solely on the Record before the Appeals Panel, and nothing else. It would be an abuse of process for new evidence to be introduced indirectly as part of the grounds of appeal.

The Appellant, who was not represented by counsel, took the position that he had no intention to introduce new evidence, but merely to reinterpret the evidence in the Record before Appeals Panel. It was his submission that the evidence was vague and ambiguous and he should not be denied the right to review it before this Panel.

Finding of the Appeals Panel on the Motion to Dismiss

It was the finding of the Appeals Panel that RECO's motion to dismiss the appeal should be denied. Although the Appeals Panel was not convinced by the submissions of the Appellant it was the Panel's finding that in order for the Panel to dismiss the appeal it was necessary to have before it a test as it relates to dismissal and convincing submissions by RECO that the test had been met. The paralegal for RECO, although making submissions related to the possible introduction of new evidence, was unable to connect these submissions to a recognized test that would have enabled this Panel to determine if a dismissal was warranted.

It is this Panel's determination that in order to dismiss the Appellant's appeal, the grounds of appeal would have to be manifestly devoid of merit, or that the appeal could not possibly succeed, or that the grounds of appeal were frivolous, vexatious, or capricious. The Appellant's grounds of appeal, on their face, cannot be categorized as devoid of merit, without the possibility of succeeding or frivolous, vexatious or capricious. As for RECO's submissions that the grounds of appeal attempts to introduce new evidence, this Panel has notice of the Record and in the event the Appellant does attempt to introduce new evidence, it will be disregarded. The Appeals Committee concurs with the paralegal for RECO that permitting new evidence to be introduced under the circumstances and in the form of grounds of appeal would amount to an abuse of process as the prior permission of the Appeals Committee has not been obtained pursuant to Section 59 of By-Law No. 10.

Grounds of Appeal

Rakesh Madhok's grounds of appeal are set out in a letter he provided to the Real Estate Council of Ontario date December 3, 2009. Notwithstanding that the letter sets out ten matters in issue, the Appellant consolidated these various positions into three grounds of appeal and made his submissions on that basis.

The Appellant's first submission related to the Agreement of Purchase and Sale that he entered into with the buyers for 1-A Street on December 17, 2005. It was the Appellant's position that the Agreement was not a firm and binding agreement, and therefore, he was at liberty to enter into a second agreement of purchase and sale with other buyers for the same property. If the first Agreement was not binding, but rather was null and void, then the Appellant could not have breached his professional responsibilities and the sections of the Code of Ethics that he was found to have violated by the Lower Panel.

In support of his position the Appellant drew the attention of this Panel to the following. He argued that the Agreement in question indicated that three buyers were involved. It is not disputed that one of the three buyers, Buyer B2, did not execute the Agreement of Purchase and Sale. Further, the Appellant submitted that the waiver he received dated December 22, 2005, similarly only contained two of the three buyers' signatures. Again the signature of Buyer B2 was missing, even though he is shown as one of the buyers on the waiver. Lastly, the Appellant submitted that at no time did he receive an amendment to the Agreement adding Buyer B2 as a buyer. He argued that since time was of the essence in the Agreement of Purchase and Sale the buyers' failure to secure Buyer B2's written commitment to the Agreement rendered it void before he accepted the second offer for the property. The Appellant reiterated that that being the case, he owed no obligation to the buyers and by accepting the second offer for 1-A Street he did not breach Rule 1(2), 1(5), 42, or 46 of the Code of Ethics, and further that the Lower Panel erred in law in so finding.

The Appellant's submissions on his second ground of appeal focused on the deposit cheque related to the 1-A Street Agreement of Purchase of Sale. Although the Appellant made submissions on this matter as if it were a separate ground of appeal from his earlier submissions related to the formation of a contract for the sale of 1-A Street, his submissions related to the deposit cheque at the end of the day reiterated his position that no enforceable Agreement for the property had been entered into between the buyers and the Appellant. In this regard the Appellant made some cumbersome and at times difficult to follow submissions.

The Appellant made reference to Section 23(3) of Regulation 986 pursuant to the *Real Estate and Business Brokers Act, 1990*. That provision required every deposit received by a real estate broker to be deposited in the broker's trust account within two banking days of its receipt. The Appellant submitted that this provision in the Regulations required the buyers' agents, Buyer Representative 1 and Buyer Representative 2, to ensure that their clients' deposit was deposited in Brokerage A's trust account within two business days following acceptance of the Agreement of Purchase and Sale. There is no dispute that the Agreement was accepted on December 17, 2005. Section 23(3) required that the deposit related to the Agreement be deposited in Brokerage A's trust account by no later than the end of business on December 20, 2005. No such deposit was made. In his submission the Appellant took the position that the buyers' agents should have arranged for the deposit cheque to be deposited in Brokerage A's

trust account even though they were registered with Brokerage C. The fact that this did not occur was a breach of Section 23(3), but more importantly, from the Appellant's perspective it demonstrated that there was no contract between the buyers and the Appellant, and further that it demonstrated that the buyers had no intention of proceeding with the Agreement of Purchase and Sale. Under these circumstances the Appellant was on solid ground in proceeding to accept the second offer on the property, which he did on December 19, 2005.

The Appellant's third ground of appeal related to the finding by the Lower Panel that notwithstanding that the buyers were represented by agents, namely Buyer Representative 1 and Buyer Representative 2, the Appellant contacted Buyer B1, one of the buyers, directly in an effort to get him to sign a mutual release for the 1-A Street Agreement of Purchase and Sale. The Lower Panel also found that he tried to sell the buyers another property at a reduced commission if the buyers terminated their agency relationship with Brokerage C.

The Appellant's submissions on this ground of appeal were difficult to follow and at times incomprehensible. The Appellant drew the attention of this Panel to two solicitors' letters, both of which form part of the Record. The first letter was from Lawyer A, a solicitor representing the buyers, to the Appellant dated December 29, 2005. In that letter the solicitor representing the buyers states "My clients were told by their real estate agent that Mr. Madhok have (sic) sold this property to some one else as well as through Brokerage D". It was the Appellant's submission that this letter, from the buyers' solicitor, confirms that communication with the buyers was through their agents and not from the Appellant directly.

The Appellant also referred to a letter from Lawyer B, also solicitor for the buyers, to the Appellant dated January 10, 2006 in support of his position that he did not contact the buyers directly. The Appellant's submissions as they related to this matter and the letter from Lawyer B were not clear and difficult to follow. Presumably it was the Appellant's intent to convince this Panel that the statement in Lawyer B's letter, which read in part, "... he (being one of the buyers) learned that the said property was sold to another buyer..." supported the Appellant's position that he did not contact the buyers directly.

Based on the foregoing submissions it was the Appellant's position that the Lower Panel erred in finding him in breach of the RECO Code of Ethics. He suggested that it would be correct and appropriate for the Panel to review and modify the findings of the Lower Panel.

The paralegal for RECO then made submissions on the grounds of appeal raised by the Appellant.

The paralegal for RECO submitted that notwithstanding the Appellant's submission that no contract for the sale of 1-A Street was ever created, throughout the Appellant acted as if there was a valid agreement. This is evidenced by his attempt to have the buyers execute a mutual release. If there was no contract, a mutual release would not have been necessary. Even though on one hand the Appellant took the position that the Agreement was null and void, on the other hand in his letter to Brokerage B, he was still demanding receipt of a mutual release related to the sale of 1-A Street from the buyers.

The paralegal for RECO then turned to the deposit cheque presented by the buyers at the time of acceptance of the Agreement of Purchase and Sale for the 1-A Street property. RECO submitted that it did not rest with this Panel to overturn the findings of the Lower Panel. The Lower Panel, having heard the witnesses and considered all the evidence before it, concluded that the buyers had presented a deposit cheque to the Appellant at the time of acceptance. On Page 10 of 12 of the Lower Panel's Decision it found:

“The Panel also accepts that a \$10,000 personal cheque was provided to the Respondent (the Appellant) upon the acceptance of the offer on December 17, 2005 and that it was the Respondent who demanded a certified cheque even though the transaction did not require same. By demanding a certified cheque, however, the Respondent was at the same time indicating his willingness and intention to be bound by the transaction...”

This finding contradicts the Appellant's submission that a deposit cheque was never received, and as a result the Agreement was therefore null and void.

RECO further submitted that this finding by the Lower Panel speaks to the submissions made by the Appellant with respect to the statutory requirement to have deposit cheques deposited in a broker's trust account within two business days of receipt. The Appellant by his own actions, that is unwarrantedly refusing receipt of the personal uncertified deposit cheque and demanding a certified cheque as a replacement, made it impossible for the initial deposit cheque to be deposited in the Appellant's broker's trust account as required by the Regulations. The

Appellant himself made compliance impossible, especially since it was his responsibility and not the buyers' agents' responsibility to deposit the deposit cheque in Brokerage A's trust account.

The paralegal for RECO took the position that if this Panel accepted the submissions of the Appellant with respect to the deposit cheque it would effectively be accepting, on appeal, new evidence, contradicting the finding of the Lower Panel. In this regard the paralegal for RECO cited the 2000 New Brunswick Court of Appeal decision in Ryan v. Law Society of New Brunswick. In Paragraph 13 of that decision the Court of Appeal, referencing Workmen's Compensation Board (N.B.) and Alyes v. McCarthy and Eastern Paving Ltd (1982), stated its views as to when new evidence could be permitted:

"The requirements which must be met to justify the reception of fresh evidence were considered by this court in Kenny v. Ross E. Judge Transport Ltd. et al. (1970), 2 N.B.R. (2d) 430, and depend upon whether special grounds must be shown. If special grounds are required to be established, three conditions must be fulfilled:

- 1) It must be shown the evidence could not have been obtained with reasonable diligence for use of the trial;
- 2) The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and
- 3) The evidence must be such as is presumably to be delivered, or in other words, it must be apparently credible, although it need not be incontrovertible.

If special grounds are not required to be established, a substantial case must be made out to justify this court in exercising its discretion in favour of the reception of fresh evidence."

The paralegal for RECO then turned to the matter of whether the Appellant contacted the buyers directly. On Page 5 of 12 of the Decision of the Lower Panel, the Lower Panel found:

"Buyer B1 explained that the Respondent/Seller (the Appellant) called him to explain that the house was sold, asking him not to send the complaint to RECO and that if he would dispense with the services of his agent that he would find him a similar house at a better price. He testified that he told the Respondent/Seller not to call him anymore."

And at page 11 of 12

"The allegation that the Respondent (Appellant) improperly encouraged Buyer B1 to terminate his relationship with his agent was not contested at anytime by the Respondent."

Based on the foregoing submissions RECO's paralegal submitted that the Lower Panel found that the allegations set out in RECO's Allegation Statement were substantiated and that none of the submissions made by the Appellant support the position that the Lower Panel made on error in fact or in law.

Findings of the Appeals Committee

After reviewing the Book of Documents, the Record of Documents, the transcript of the Discipline Hearing, and after considering the Appellant's and RECO's submissions on the grounds of appeal, it is the finding of the Appeals Committee that the decision of the Discipline Committee be upheld and that this appeal be dismissed. Specifically this Panel finds that by accepting a second unconditional offer on the 1-A Street property while the buyers' offer may still have been valid and enforceable, and by contacting Buyer B1, one of the buyers, directly, knowing he was in an agency relationship with Brokerage B, the Appellant engaged in conduct that resulted in breaches of the RECO Code of Ethics, as found by the Lower Panel.

This Panel was not convinced by the submissions made by the Appellant. It is apparent in the Record before this Panel that at the time the Appellant accepted the buyers' offer, notwithstanding some of its irregularities, he acted as if it was good and binding. His submission that the failure of the third buyer to execute the Agreement and the fact that the deposit did not get deposited in the trust account within the required two banking days rendered the Agreement null and void were ex post facto justifications for the Appellant accepting the second offer. This Panel concurs with the finding of the Lower Panel, that even if the first offer by the buyers was null and void, there was sufficient controversy surrounding its validity that it would have been irresponsible to accept a second offer for the same property without ensuring that the second offer was conditional on being released from the buyers' Agreement. The Appellant's submissions disingenuously disregard his irresponsible behaviour at the time of accepting the second offer, no doubt because it was three thousand dollars more than the buyers' purchase price and with an earlier closing date.

This Panel accepts the submissions made by the paralegal for RECO regarding the introduction of new evidence on appeal indirectly in the form of the grounds of appeal. This Panel has refused to accept any new interpretations of the evidence before it that amounted to the introduction of new evidence. As set out in Ryan v. Law Society of New Brunswick, for new

evidence to be admitted by this Panel it must be shown that it could not have been obtained with reasonable diligence for use before the Lower Panel and that such evidence must be such as is presumably to be believed, apparently credible even though not necessarily incontrovertible. The indirect evidence submitted by the Appellant could have been obtained and presented to the Lower Panel, but more importantly this Panel finds that the Appellant's submissions were simply not credible. For this reason the Panel rejects the Appellant's submissions that no cheque was presented with the Agreement by the buyers and that he did not contact Buyer B1, one of the buyers, directly.

The Appeals Panel does not accept that the Lower Panel erred in how it arrived at its findings. The Lower Panel had before it facts that supported its findings. This Panel has no authority to disturb the findings of the Lower Panel given that the Appellant has not demonstrated that there was a palpable and overriding error related to the facts that the Lower Panel accepted and from which it drew inferences. A review of the Record makes it clear that the conclusions and inferences drawn by the Lower Panel are all supported by the Record.

The Appeals Panel finds that the Appellant's behaviour and actions breached Rule 1(2), Rule 1(5), Rule 42 and Rule 46 of RECO's Code of Ethics.

Findings as the Penalty

Following the submissions on the grounds of appeal, the Appellant and RECO made submissions as to penalty.

The Appellant submitted that even if the Appeals Committee dismissed his appeal the administrative penalty of \$10,000.00 imposed by the Lower Panel was excessive. The Appellant offered no support for his assertion as to the excessive nature of the administrative penalty. Rather the Appellant downplayed the seriousness of the allegations and suggested that under the circumstances an appropriate administrative penalty would be that he be ordered by this Panel to take various unspecified real estate educational courses to improve his professionalism and understanding of appropriate behaviour while conducting real estate transactions.

RECO submitted that the administrative penalty of \$10,000.00 was appropriate in this matter. The paralegal for RECO emphasized the seriousness of the Appellant's breaches and the

impact they had on the buyers who in good faith thought they had purchased 1-A Street. The Appellant's conduct was self-serving, designed to achieve a higher purchase price for the property at the expense of the buyers. It is important to the industry that a message be sent that this form of conduct is unacceptable and to ensure future compliance of RECO's Code of Ethics.

In support of RECO's position on penalty, RECO's paralegal submitted a recent Discipline Decision (Manager of CCD, Real Estate Council of Ontario v. Doris Simon-Shatz and Kimberly Thorne, October 28, 2009). This decision was based on an Agreed Statement of Fact and Joint Submission as to Penalty. One of the agreed to allegations was that one of the Respondents "failed to provide competent representation to the seller client by allowing her to sign back a second offer, causing the seller client to effectively sell her property twice in one day when both sign backs were accepted." RECO submitted that although the facts in the case at hand are not identical there are sufficient similarities in the facts agreed to in the Agreed Statement of Fact and Joint Submission as to Penalty to guide this Panel. The agreed penalty in the Discipline Decision was \$11,000.00.

This Panel finds that given the seriousness of the Appellant's Code breaches and the necessity to ensure compliance by all Members of RECO an administrative penalty of \$10,000.00 is reasonable and appropriate. The Appellant's self-serving conduct seriously impacted the rights of third parties to a real estate transaction. The administrative penalty must be appropriate to the breaches of the Code of Ethics. Accordingly the Appellant shall pay an administrative penalty of \$10,000.00 to RECO within six months of this decision.