



Real Estate Council of Ontario

**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:

REAL ESTATE COUNCIL OF ONTARIO

- AND -

NADYA MERCHANT LAKHANI

DISCIPLINE DECISION AND REASONS FOR DECISION

APPEARANCES:

For the Registrant: Nadya Merchant Lakhani

For the Real Estate Council of Ontario: Dipak Parmar, paralegal

Heard in Toronto: August 12, 2019

FINDINGS: In violation of Sections 3, 4, 5, 35 and 39 of the Code of Ethics.

ORDER: Fine of \$10,000.00 payable to RECO within 180 days of RECO sending this decision.

Successful completion of the Real Estate Institute of Canada "REIC 2600: Ethics and Business Practice" course and provide RECO with confirmation of successful completion within 240 days of RECO sending this decision.

COSTS AND EXPENSES: N/A

WRITTEN REASONS:

REASONS FOR DECISION
PENALTY & COSTS

INTRODUCTION

This hearing with respect to penalty and costs was held on August 12, 2019 in the presence of Prosecutor, Dipak Parmar, paralegal for the Registrar, *Real Estate and Business Brokers Act, 2002* (“**REBBA 2002**”) and the Registrant, Nadya Merchant Lakhani, representing herself, and proceeded on the basis of an Agreed Statement of Facts executed by Ms. Lakhani on July 12, 2019 and by Kelvin Kucey, Deputy Registrar, on July 23, 2019 (the “**Agreed Statement of Facts**”).

SUBMISSIONS FOR THE REGISTRAR, REBBA 2002

At the commencement of the hearing, the Prosecutor requested that RECO’s Book of Documents, dated August 13, 2018, be entered as evidence in addition to the Agreed Statement of Facts. After consulting with Douglas Cunningham, independent legal counsel for the Panel, the Panel decided not to permit the admission of RECO’s Book of Documents into evidence because the Panel concluded that the facts underlying its decision on penalty and costs against the Registrant would be limited to those outlined by the parties in the Agreed Statement of Facts.

The Prosecutor referred the Panel to the nine (9) factors from the appeal decision in *Registrar, REBBA 2002 v. Suzette Thompson*, as relevant to making determinations on penalty:

1. The nature and gravity of the breaches of the Code of Ethics: The Prosecutor submitted that Ms. Lakhani’s conduct in refusing to rebate a portion of the real estate commission to her purchaser clients, which refusal was contained in an email to her clients on January 17, 2017, was serious, significant, and deliberate and that Ms. Lakhani knew that such a refusal was wrong. The rebate to be paid to Ms. Lakhani’s clients, as she had previously agreed, totalled \$12,207.00.
2. The role of the offending member in the breaches: The Prosecutor submitted that Ms. Lakhani’s conduct and decisions were central to the breach of the Code of Ethics. The breach of the Code of Ethics would not have occurred but for her conduct.
3. Whether the offending member suffered or gained as a result of the breaches: Ms. Lakhani received a more significant real estate commission as a result of the purchase

of 1-A Street, City A (the “**Property**”) than she had agreed with her own clients to receive. Ms. Lakhani obtained a net commission of \$24,089.00 from the brokerage at the time, which was Brokerage A. From that net commission, she had promised to rebate \$12,207.00 to her clients but, instead, she made a decision to retain the entire amount. By refusing to honour the promise she had made to her own clients, Ms. Lakhani preferred her own interests over those of her clients.

4. The impact of the breaches on the complainant or others: The failure of Ms. Lakhani to refund a portion of the real estate commission to her clients resulted in a financial loss to her clients in the amount of \$12,207.00. Ms. Lakhani did not refund any amount to her clients as initially promised.
5. The need for there to be specific deterrence to protect the public: The Prosecutor argued that any penalty imposed against Ms. Lakhani by the Panel should be meaningful. The Prosecutor acknowledged that Ms. Lakhani admitted, as per the Agreed Statement of Facts, that she failed to comply with the Code of Ethics by not honouring her agreement to refund a portion of the real estate commission to her clients. Although Ms. Lakhani accepted responsibility for her actions, the Prosecution submitted that Ms. Lakhani’s prior conduct and the lack of professionalism exhibited to her clients should not be accepted lightly by the Panel. The Prosecutor submitted that Ms. Lakhani’s actions fell below the standard to be expected from a registrant and urged the Panel to levy a “regular” or “mid-range” fine against Ms. Lakhani.
6. The need for there to be general deterrence to protect the public: The Prosecutor submitted that sanctions imposed by the Discipline and Appeals Committee of RECO act as guidelines to registrants in terms of what constitutes misconduct under the Code of Ethics, and that diligence, competence, and professionalism are required by all registrants.
7. The need to maintain the public’s confidence in the integrity of the profession: The Prosecutor argued that RECO’s role is to protect the interest of the public and that any member of the public would be surprised and disappointed with Ms. Lakhani’s conduct in failing to honour her financial promise to her clients.

8. The degree to which the breaches are regarded as being outside the range of acceptable conduct: In failing to honour her agreement with her clients, the Prosecutor submitted that Ms. Lakhani's breach of the Code of Ethics was serious.
9. The range of sanction in similar cases: After briefly summarizing similar cases in the Registrar's Book of Documents, dated July 15, 2019, the Prosecutor submitted that any penalty imposed against Ms. Lakhani by the Panel should meet or exceed the gain realized by Ms. Lakhani, in this case \$12,207.00. The Prosecutor urged the Panel to levy a monetary penalty against Ms. Lakhani in the range of \$10,000.00 to \$15,000.00 payable within ninety (90) days of the release of the Panel's decision and to require Ms. Lakhani to complete the business and ethics course offered by the Real Estate Institute of Canada within one-hundred and eighty (180) days of the release of the Panel's decision. The Prosecutor did not seek costs against Ms. Lakhani for the short hearing based on the Agreed Statement of Facts.

SUBMISSIONS REGARDING PENALTY – RESPONDENT

Ms. Lakhani advised that she accepted the facts outlined in the Agreed Statement of Facts and submitted that this was her first involvement in a disciplinary matter with RECO. She testified that she suffers from medical conditions which affect her mood and behaviour.

Ms. Lakhani provided the Prosecutor and the Panel with email correspondence between her and her clients from June 2014 that she wished to rely on in order to suggest that, at the time, she felt she was being forced to agree to her clients' request for a commission rebate. Although the same email correspondence had been included in the RECO's Book of Documents-- which the Panel had decided should not be entered as additional evidence at the commencement of the hearing -- the Panel, after consulting with their Independent Legal Counsel, determined that the proposed email correspondence would be considered because it was being offered for mitigation purposes by Ms. Lakhani to explain but not excuse her (unacceptable) conduct. However, because of the latitude granted to her by the Panel, fairness dictated that the Prosecutor would have a right to cross-examine Ms. Lakhani on her evidence going to mitigation.

Ms. Lakhani stated that she had represented the same purchaser clients in prior transactions and that she had provided real estate commission rebates to them every time. With respect to the matter before the Panel, Ms. Lakhani submitted that when the Agreement of Purchase and Sale between her clients and the seller became firm and binding with all conditions waived, her clients told her that they would refuse to close the subject transaction if she did not agree to refund them Two and One-Half (2.5%) Percent of the purchase price of the Property (i.e. \$12,207.00).

Ms. Lakhani submitted that, in those difficult circumstances, she agreed to provide a rebate to her clients because she felt she had no other option.

On cross-examination by the Prosecutor, Ms. Lakhani subsequently admitted that she had the option of not agreeing to her clients' request for a rebate.

Ms. Lakhani also submitted that she was not in a financial position to pay her clients the agreed upon rebate amount owing to personal and financial matters that had worsened between the time she promised the rebate to her clients and the closing of the subject transaction on August 31, 2016.

Although Ms. Lakhani admitted that her conduct breached the Code of Ethics, she did not agree with the recommendations of the Prosecutor and urged the Panel not to: (a) levy any monetary penalty against her and (b) require her to complete any educational courses.

No submissions on costs were made by Ms. Lakhani.

CODE OF ETHICS

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

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.

FINDINGS BY THE PANEL

The Panel has carefully considered the facts outlined in the Agreed Statement of Facts as well as the submissions of the Prosecutor and Ms. Lakhani. In doing so, the Panel has arrived at the following conclusions and determinations:

The Panel agrees with the Prosecutor's submissions concerning the seriousness of the unethical conduct of Ms. Lakhani and the recommendation that a significant monetary penalty be imposed in the circumstances of this case. Ms. Lakhani promised, in writing, to give her clients a Two and One-Half Percent (2.5%) rebate based on the purchase price of the Property, being \$12,207.00; however, once the subject transaction had closed, Ms. Lakhani informed her clients in writing that she would not be honouring that promise. Ms. Lakhani agreed with the Prosecutor that she broke her promise to her clients. In doing so, and as stated in the Agreed upon Statement of Facts, Ms. Lakhani breached various provisions of the Code of Ethics.

While a lengthy hearing on the merits was avoided because of the Agreed Statement of Facts between RECO and Ms. Lakhani, Ms. Lakhani did not appreciate the seriousness of her unethical and unprofessional conduct vis-à-vis her own clients. In fact, it appeared to the Panel that Ms. Lakhani had concluded that she could admit her transgressions while submitting that there should be no adverse consequences flowing from them.

Even though Ms. Lakhani admitted to breaching the Code of Ethics and she confirmed her agreement with the Agreed Statement of Facts, she submitted forcefully at the hearing that no penalty, monetary or otherwise, should be imposed against her.

In the Panel's view, a clear and resolute message to Ms. Lakhani is warranted to sanction her unethical conduct and prevent her from repeating such conduct. General deterrence should also play a role in this case to make it clear to other registrants that they should refrain from

acting in a similar manner. A financial promise made to one's clients is a promise that should always be kept. After-the-fact excuses will not find a receptive audience in disciplinary hearings.

A significant monetary penalty along with the requirement to complete an educational course is needed in this case to ensure that Ms. Lakhani understands the importance of maintaining acceptable and ethical conduct in trades in real estate, including one's dealing with clients. Ms. Lakhani's conduct amounted to self-dealing and a complete disregard for the rights, interests, and legitimate expectations of her own clients.

In making its determination on the issue of penalty, the Panel reviewed and took into account the non-exhaustive factors as enunciated by Justice Green in Jaswal v. Newfoundland Medical Board in Proceeding 1993 St. J. No. 225 of the Supreme Court of Newfoundland, Trial Division, and the often-cited RECO Appeal Panel decision in *Registrar, REBBA 2002 v. Suzette Thompson*.

These factors are as follows:

1. The nature and gravity of the breaches of the Code of Ethics.
2. The role of the offending member in the breaches.
3. Whether the offending member suffered or gain as a result of the breaches.
4. The impact of the breach on complainants or others.
5. The need for there to be specific deterrence to protect the public.
6. The need for there to be general deterrence to protect the public.
7. The need to maintain the public's confidence in the integrity of the profession.
8. The degree to which the breaches are regarded as being outside the range of acceptable conduct.
9. The range of sanction in similar cases.

Having reviewed and considered the Agreed Statement of Facts and the submissions of the parties, the Panel has concluded that as a result of the Registrant's breach of Sections 3, 4, 5, 35 and 39 of the Code of Ethics, the following penalty is appropriate in the circumstances:

PENALTY

1. Nadya Merchant Lakhani is ordered to pay a fine in the amount of \$10,000.00 to RECO within one hundred and eighty (180) days of RECO sending this decision to her; and
2. Ms. Lakhani is also ordered to successfully complete the Real Estate Institute of Canada "REIC 2600: Ethics and Business Practice" course and provide RECO with confirmation of successful completion within two hundred and forty (240) days of RECO sending this decision to her.

[Released: March 5, 2020]