File #2020100637

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 -

ANGELO CHRISTOPHER D'AMICO and DAYANA DAMICO

PENALTY AND REASONS FOR DECISION

ORDER:

Angelo D'Amico

Payment by **Angelo D'Amico** of a fine of Five Thousand Dollars ($5,000.00), payable to RECO within One Hundred and Eighty (180) days of the sending to Mr. D'Amico of this decision regarding penalty; and

Successful completion by Mr. D'Amico of RECO's "MCE Advertising Compliance" course, with confirmation of successful completion of this course, within One Hundred and Twenty (120) days of the sending to Mr. D'Amico of this decision regarding penalty.

Dayana D'Amico

Payment by **Dayana D'Amico** of a fine of Five Thousand Dollars ($5,000.00), payable to RECO within One Hundred and Eighty (180) days of the sending to Mrs. D'Amico of this decision regarding penalty; and

Successful completion by Mrs. D'Amico of RECO's "MCE Advertising Compliance" course, with confirmation of successful completion of this course, within One Hundred and Twenty (120) days of the sending to Mrs. D'Amico of this decision regarding penalty.

WRITTEN REASONS: *attached*

Christopher A.L. Caruana
Christopher A.L. Caruana (Apr 14, 2026 14:41:33 EDT)

Christopher Caruana, Chairperson

Mary Popat
Mary Popat (Apr 14, 2026 14:34:24 EDT)

Mary Popat, Panel Member

Teri-Lynn Harlick (Apr 14, 2026 14:19:39 EDT)

Teri-Lynn Harlick, Panel Member

1. By the decision of this Panel released September 23, 2025, following a 3 day Hearing before the Panel, this Panel determined that the Registrants Dayana D'Amico ("**Mrs. D'Amico**") and Angelo Christopher D'Amico ("**Mr. D'Amico**") had contravened Sections 38 and 39 of the RECO *Code of Ethics* (the "*Code*") for the reasons as set out in the Panel's Discipline Decision and Reasons for Decision in this Matter (the "**Decision**").

2. As noted at the end of the Decision, at the conclusion of the Hearing of this matter, the issue of any Submissions related to penalty (in the event that the Panel determined that there were contraventions of the Code of Ethics) were deferred until after the release of the Decision.

3. Following the release of the Decision, the Manager, Discipline and Appeals Hearings (the "**Manager**"), advised that an issue arose related to the parties making Submissions related to penalty with the result that a Direction was made by the Panel dated October 23, 2025 (the "**Direction**") setting out the procedure for making those submissions.

4. In accordance with the Direction, the Manager received the following from the parties:

    a. Written Submissions of the Registrar dated November 27, 2025;
    b. Responding written Submissions of Mr. and Mrs. D'Amico dated December 18, 2025;
    c. A Book of Authorities of the Registrar dated November 27, 2025; and
    d. A collection of 15 pages entitled "D'Amico – Supporting Document – dated December 31, 2021.pdf" that set out decisions relating to other complaints that are not decisions of the Discipline Committee and will be addressed more fully below.

5. The Panel met on April 9 to consider the parties' written Submissions and the authorities cited by the parties and to determine the appropriate penalty in light of the Decision.

Registrar's Submissions dated November 27, 2025

6. Mrs. Sabharwal, counsel for the Registrar, provided written Submissions totalling six (6) double-spaced pages. After briefly summarizing the background of the matter and the main findings set out in the Decision that the Registrar felt were germane to the issue of penalty, the Registrar proceeded to review the factors set out by the Appeals Committee in its May 31, 2012 decision in *Registrar v. Thompson* ("***Thompson***") that the Registrar submitted this Panel should consider in determining the appropriate penalty when there has been a finding of a breach of the *Code*. The Registrar further reviewed four (4) cases that were suggested to be analogous to the present matter and that set out the range for an appropriate penalty. The Registrar's Submissions can be summarized as follows:

a. The breaches by Mrs. and Mr. D'Amico resulted in the Complainants attending at the property in question at 1549 Holbourne Road, Mississauga, Ontario ("the Property") under false pretenses and that this form of action would undermine public confidence in the profession. In the present age of artificial intelligence, the use of photographs without disclaimers could cause consumers to question the legitimacy of real estate trades altogether;

b. The Respondents' role in editing of the photograph was intentional but they felt that, since there was no rule applying to the situation, no disclaimers were needed;

c. The Respondents gained from their breaches as, if the breaches had not occurred, the Complainants would not have attended at the Property and, ultimately, would not have purchased the Property (and, in turn, implicitly, the Respondents would not have received a commission on the sale);

d. The Complainants testified that they regret purchasing the Property and that this situation has undermined their confidence in the real estate profession; and

e. This Panel should "send a message" to consumers that advertising must be performed in a transparent and ethical manner so that consumers have confidence in the industry and its advertising practices. More specifically, consumers should know that they are not being subjected to “bait and switch” practices and that if photographs are used and modified in some manner, there will be a disclaimer.

7. With respect to the cases put forward by the Registrar, the decisions of the Discipline Committee in *Dirckx* (dated June 1, 2022), *Chera & Gu* (dated July 20, 2023), *Price* (dated August 25, 2023) and *Chouinard* (dated September 10, 2025) were provided. These cases set out fines ranging from $10,000 to $25,000 (with all but the *Chouinard* decision being in range of $10,000 to $12,000) and two of the decisions (*Dirckx* and *Chouinard*) also requiring the registrants in those cases to take additional education courses. In light of this range, the Registrar sought a penalty of $14,000 for each of Mr. and Mrs. D’Amico but did not ask for a requirement that they take any additional educational courses and did not seek any costs of the proceeding.

Respondents’ Submissions dated December 18, 2025

8. Mrs. and Mr. D’Amico provided responding written Submissions totalling eleven (11) pages. Their Submissions set out the background and context for the matter, responded to various arguments made by the Registrar in its Submissions, addressed the *Thompson* factors, addressed the cases submitted by the Registrar, put forward their own “cases”, put forward mitigating factors, raised issues about alleged breaches of procedural fairness, and made their ultimate submission for what they asserted should be the appropriate penalty. Those Submissions may be summarized as follows:

   a. The Registrar is incorrect in its assertion that there were multiple “photographs” or “marketing materials” that were photoshopped when, in fact, there was only one photograph that was edited to remove the hydro towers in the background. Moreover, this was an isolated incident and there was no pattern of multiple breaches of the *Code*;

   b. The hydro towers are not located directly behind the Property and this should be taken into consideration;

c. The Panel rejected the more serious allegations and "confined its finding to a limited breach under Section 39 (unbecoming conduct) only";

d. At paragraph 232 of the Decision, the Panel "… accepted that the Respondents' purpose in editing the photograph was to [*sic*] attract potential purchasers a legitimate and common marketing objective …";

e. No comparable decisions of the Discipline Committee to the present matter have been found since 2020;

f. Any penalty imposed by the Panel should be proportionate to the nature of the breaches and take into account the fact that there was no intent on the part of the Respondents to breach the *Code* and no harm was suffered by the Complainants;

g. Despite the misrepresentation related to the hydro towers, the Complainants still submitted an offer to purchase the Property (and waived the condition in the offer for the home inspection) and have proceeded to live at the Property and improve it over the years and there was no evidence of financial loss or impairment in their ability to occupy or enjoy the Property. Moreover, the Complainants had their own agent so all responsibility should not lie at the feet of the Respondents;

h. The Registrar's reference to artificial intelligence may have application if the events of 2020 occurred today but it is not proper to impose a penalty today for actions that occurred in a different regulatory and digital environment six years ago. To do otherwise would amount to "hindsight regulation";

i. Punitive sanctions should be reserved for intentional or harmful misconduct and general deterrence can be achieved through guidance and education;

j. Public confidence will not be undermined where the infraction results from "a single edited photo where the feature existed, was visible, buyers attended multiple times, submitted two offers, and voluntarily removed conditions";

k. The Respondents have no history of prior complaints or discipline and have had an excellent professional reputation throughout their lengthy careers. There is no evidence of repeated conduct or disregard for regulatory obligations;

l. In this case, the Complainants suffered no harm or loss and this Panel made no finding of deception or bad faith on the part of the Respondents;

m. Generally, the cases relied upon by the Registrar were materially different, and therefore not proper comparable cases to the present matter and then each of the cases cited by the Registrar were distinguished by the Respondents.

9. The Respondents submitted 5 "cases" which were not decisions of the Discipline Committee and which will be discussed more fully below.

10. With respect to the penalty, the Respondents submitted that the appropriate penalty should be: (i) a formal written warning; (ii) a requirement that the Respondents complete "an advertising or compliance related course"; and (iii) that there should be no "publication on the public register" of any finding of liability on the part of the Respondents or of any penalty.

11. The Panel has considered the parties' written Submissions and has determined for the reasons which follow that the appropriate penalty is the imposition of a fine of Five Thousand Dollars ($5,000.00) to each of the Respondents and mandatory completion of an advertising course by each of the Respondents.

General Comments of the Panel

(a) <u>Irrelevant Positions of the Parties Not Considered</u>

12. One of the positions taken by the Respondents was to submit that there was an inappropriate passage of time between the conduct giving rise to the Complaint and the determination of the penalty and that this should be taken into account to minimize the penalty. The Panel gives no credence to this submission as it is irrelevant.

13. The Respondents were represented by counsel and if they had a complaint that the process was too long, one would have expected that a motion would have been brought for a stay of the Hearing on this basis (due to administrative, constitutional or other legal arguments). That motion was not brought and it is not proper for the Respondents to now try to "sneak in through the back door" such an argument in the penalty phase when it should have been "brought through the front door" at the Discipline Hearing itself. More importantly, however, the delay is not something that the Respondents can complain about.

14. The Allegation Statement is dated November 3, 2023 and the hearing commenced on March 24, 2025 – being approximately 15 months after the issuance of the Allegation Statement. The Panel does not consider this to be an inordinate period of time. Beyond this, however, is the fact that, as mentioned at paragraphs 105 and 109 of the Decision, the Discipline Hearing was adjourned for a period of almost 5 months due to the Respondents' request for an adjournment to present further evidence and then that evidence ended up being, in essence, Mr. D'Amico repeating his evidence already given on the prior Hearing date except with some documentary support that added little to his prior evidence.

15. Another position put forward by the Respondents was that they had incurred "costs" in relation to this matter. These costs were said to have taken several forms: (i) they and their brokerage have implemented new procedures to address issues such as the breaches found by the Panel; (ii) they have fully complied with the Registrar's investigation; and (iii) they have suffered the loss of productivity and business due to having to address the Complaint and attend the Discipline Hearing.

16. For the lack of a better phrase, the Respondents are trying to "have their cake and eat it too". They say that the Registrar should not be able to make reference to the current situation with artificial intelligence in support of the Registrar's Submissions on penalty as this would amount to "hindsight regulation" and they state (at Page 3 of their written Submissions): "Penalty assessment must reflect industry norms at the time, not evolving standards." We agree. However, we also agree that any changes or procedures implemented <u>after</u> the events in question similarly should not be considered by the Panel. Whatever changes in procedure have been implemented are not properly a

consideration by the Panel and have not been considered. To do otherwise could lead to a decision by the Panel that this implementation of procedural changes amounts to an admission of liability on the part of the Respondents – a conclusion that they would no doubt <u>not</u> want the Panel to make. Accordingly, both the Registrar's Submissions about the rise of artificial intelligence after 2020 and the Respondents' Submissions about the changes they have implemented since 2020 are irrelevant and have not been considered by the Panel.

(b) <u>Apparent Misunderstanding of the Decision</u>

17. As indicated at paragraph 245 of the Decision, the Panel found that the Respondents had breached <u>both</u> sections 38 <u>and</u> 39 of the *Code*. While the underlying factual basis (that is, the editing of the photograph in question) was the same, it gave rise to two separate and distinct complaints in the Allegation Statement and, thus, two separate and distinct findings of breaches by the Respondents. Despite this, the Respondents' written Submissions focus almost exclusively as if the Panel only made a finding of a breach of section 39 of the *Code*.

18. Only one passing reference is made by the Respondents in their written Submissions at page 1 to the Findings that there was a breach of section 38 of the *Code* where it was stated: "The reference to Section 38 arose solely from the literal wording of the Code and not from any evidence of harm or intent, as expressly acknowledged by the Panel in paragraphs 223 to 225 of it's [*sic*] decision." The Respondents similarly go on at several points in their Submissions to indicate that there was no finding by the Panel of deception or intent on their part. The Panel wishes to reiterate its finding, set out at paragraph 230 of the Reasons, that there was no requirement on the part of the Registrar to show intention or deceit on the part of the Respondents (or any registrant) to find a breach of section 38 of the *Code*. As we wrote in that paragraph, we accepted that "a misrepresentation is a misrepresentation and if there has been an untrue, inaccurate or misleading misrepresentation, this will give rise to a breach of Section 38 of the *Code*." Accordingly, there was no previous finding by the Panel that there was <u>either</u> any intention, or any lack of intention, on the part of the Respondents as this aspect was found to be irrelevant for the reasons as set out in paragraphs 223 to 230 of the Decision. This does not mean that the issue is completely irrelevant for present

purposes and, in fact, this aspect will be addressed for the fifth factor of the *Thompson* test – that of specific deterrence.

(c) Publication Ban Request

19. As indicated above, though no motion for a publication ban was brought, in their Submissions, the Respondents have requested that, in light of (in their view) the relatively minor and technical breaches of the *Code* as found by the Panel, whatever the Panel may decide in terms of the appropriate penalty (preferably, in the Respondents' view, a warning and completion of an educational course), there should be no disclosure of the Decision and the penalty to the general public. In effect, the Respondents have requested a "publication ban" on the Panel's findings. The Registrar, although afforded the ability under the Direction to provide written Reply Submissions, did not reply to this proposal.

20. The Panel is not agreeable to the Respondents' request that the Decision and this decision regarding penalty not be published by the Registrar. The starting point is a consideration of the requirements for publication of decisions by the Discipline Committee and that is found at Subsection 21(15) of the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30, Schedule C (now the *Trust in Real Estate Services Act, 2002* – the "***Act***") which states: "Decisions of the discipline committee shall be made available to the public in such manner as may be prescribed." The emphasis is the Panel's. At first blush, therefore, it would appear that this provision is mandatory and the Panel does not have jurisdiction to ignore. However, the end portion of the provision makes reference to "… in such manner as may be prescribed" – which would be prescription in a regulation (if there is such a regulation). In fact, there is an applicable regulation and it is O.Reg. 367/22, "Discipline Committee Regulation" (the "**Regulation**").

21. Section 15 of the Regulation reads as follows:

> **15.** (1) For the purposes of subsection 21 (15) of the Act, the registrar shall publish the final decisions of the discipline committee, including the reasons if any have been given,

> (a) on the administrative authority's website; and
>
> (b) in at least one other manner that the registrar considers appropriate.
>
> (2) Despite subsection (1), the registrar shall not publish a decision or any part of a decision if the publication or public disclosure of the decision or part of the decision is prohibited by an order of the discipline committee, the Tribunal or a court.
>
> (3) The registrar shall ensure that decisions published under subsection (1) are available to the public for a period of at least 60 months after being published.

It will be seen that, despite the apparently mandatory nature of Subsection 21(15) of the Act, Subsection 15(2) of the Regulation does give jurisdiction to this Panel to order that all or part of either the Decision or this decision on penalty not be published or disclosed to the public. Unfortunately, no guidance is provided in the Regulation as to how the Panel is to exercise its authority in this regard and neither the Respondents nor the Registrar have provided any case law or submissions to the Panel on this issue.

22. In *Canadian Broadcasting Corporation* v. *Canada (Attorney General)*, 2011 SCC 2, the Supreme Court of Canada stated (at paragraph 1):

> The open court principle is of crucial importance in a democratic society. It ensures citizens have access to the courts and can, as a result, comment on how courts operate and on proceedings that take place in them. Public access to the courts also guarantees the integrity of judicial processes as the transparency that flows from access ensures that justice is rendered in a manner that is not arbitrary, but is in accordance with the rule of law.

23. Access to the judicial system is rooted in paragraph 2(b) of the *Charter of Rights and Freedoms* and the freedom of expression. The Supreme Court in *Edmonton Journal* v. *Alberta (Attorney-General)*, 1989 CanLII 20 (S.C.C.) stated that members of the public

as “listeners” or “readers” have a right to receive information pertaining to public institutions, and in particular, the judicial system.

24. In *Sherman Estate* v. *Donovan*, 2021 SCC 25, the Supreme Court of Canada stated, at paragraph 38:

> … In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
>
> (1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.
>
> Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments.

The Panel accepts that this test should apply equally to the Respondents’ request for a publication ban related to the Decision and these reasons for decision related to penalty.

25. The first aspect of the *Sherman* test is that a party seeking a publication ban – in this case, the Respondents – must satisfy the Panel that there is an “important public interest” that requires the publication ban to be made. The Supreme Court has held in *Sherman* (at paragraph 34) that this is a “high bar” that must be satisfied. It is possible that “personal” information may give rise to a “public interest” requiring prohibition of disclosure, but such “personal” information must be of such a highly sensitive character that “its dissemination would occasion an affront to [the person’s] dignity that society as a whole has a stake in protecting” or is “said to be at the core identity of the individual

concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings" (at paragraphs 33 and 34). However, "mere embarrassment caused by the dissemination of personal information through the open court process does not rise to the level justifying a limit on court openness" (at paragraph 32).

26. In their written Submissions, the Respondents have stated (at page 8) that they have experienced "reputational strain". Further (at page 10), they submitted:

> Given the technical and inadvertent nature of the finding, publication on the public register would not serve any additional public interest purpose. Comparable matters involving more serious conduct including intentional misrepresentation, factual inaccuracies, public confusion, or consumer risk have routinely been resolved through non published Decision Letters or education only outcomes. In these circumstances, publication would be disproportionate and inconsistent with RECO's established approach.

And then (at the bottom of page 10 to the top of page 11), they concluded:

> In these circumstances, imposing a punitive fine or public journalization would be unjust and disproportionate, particularly given the limited scope of the finding, the absence of consumer harm, and the dismissal of the more serious allegations. …

27. Put another way, the Respondent's submissions are that the breaches of the *Code* were minor, if the Registrar had chosen to handle this complaint via a Section 20 of the Act instead of having this matter determined by the Panel via a Section 21 Hearing under the Act there <u>might</u> have been a publication ban, and any publication could increase existing reputational strain already experienced by the Respondents. Such submissions (even if one were to consider them as evidence on a formal motion for a publication ban) do not, however, give rise to a finding that the release of the Decision or of these reasons for the penalty imposed upon the Respondents constitute "an affront to the personal dignity" of the Respondents and are more closely aligned with being the embarrassment caused by a finding of breach of the *Code* faced by all registrants against whom the Discipline Committee has made such a finding.

28. It is the Panel's conclusion that the Respondents' submissions do not meet the "high bar" for even the first aspect of the *Sherman* test and, as all three aspects of the test must be met to order a publication ban, the Respondents' request for a publication ban is denied. The Decision and this decision regarding penalty shall be published by the Registrar in accordance with the standard procedures set out in the Act and the Regulation.

29. Accordingly, the Panel shall proceed with its consideration of the *Thompson* factors.

Consideration of the *Thompson* Factors

30. As noted by the Appeal Committee in *Thompson, supra*, this Panel's role at the present time is to consider the nature and quantum of the penalty, if any, to be imposed upon Mr. and Mrs. D'Amico taking into consideration the following factors:

   a. The nature and gravity of the breaches of the *Code*;
   b. The role of the offending member in breaches;
   c. Whether the offending member suffered or gained, as a result of the breaches;
   d. The impact of the breaches on the complainant or others;
   e. The need for there to be specific deterrence to protect the public;
   f. The need for there to be general deterrence to protect the public;
   g. The need to maintain the public's confidence in the integrity of the profession;
   h. The degree to which the breaches are regarded as being outside the range of acceptable conduct; and
   i. The range of sanction in similar cases.

(a) <u>Nature and Gravity of the Breaches of the *Code*</u>

31. The Panel was struck, at first reading, with the apparent flippant approach of the Respondents to the finding by the Panel. As mentioned above, the Panel's finding of a

breach of Section 38 was all but treated as if it had not been made. Moreover, statements by the Respondents that their breach was a "technical and inadvertent matter" reflect the attitude shown by the Respondents throughout the Hearing that this was essentially a situation of "no harm / no foul". As found by the Panel at paragraph 242 of the Decision, we wrote: "The difficulty is that the Complainants were brought to the Property at the outset under false pretences – and that, in the Panel's view, is neither 'proper' nor 'suitable' nor 'done in good taste'." The Panel does not agree that the editing of the photograph was so technical, inadvertent or minor as to be trifling in nature – as the Respondents submit.

32. To the contrary, however, the Registrar's *in terrorem* argument that breaches of the *Code* similar to the one before the Panel "undermine the public confidence in the profession" and will make the public wary of photo editing and manipulation that will cause the public and registrant relationships to be strained, is excessive in the other direction. The gravity of the breaches of the *Code* falls between the extremes put forward by both parties.

33. As noted by the Panel, as related to the breach of Section 39 of the *Code*, the breach fell into the lowest of the four categories of improper conduct set out in the section. There was a misrepresentation or an error caused through the editing of the photograph and the Respondents did fail to prevent such error or misrepresentation. However, in this specific case, the error or misrepresentation could be, and was very easily, determined by the Complainants within mere moments of their first arriving at the Property. It was stated above that there was no finding by the Panel either that the Respondents had acted intentionally or with deceit, as this was not necessary for the purposes of determining whether a breach occurred of Section 38 of the Code. However, the fact that no evidence was tendered at the Hearing <u>is</u> relevant for a determination of whether the breach was grave and the Panel does note that there was no such evidence put forward at the Hearing. The evidence did show, and Mr. D'Amico freely admitted, that the photograph was edited and this was done on purpose. But the purpose stated by Mr. D'Amico, which was not contradicted by any other evidence, was to show the Property in as positive a light as possible for the benefit of the Respondents' clients – the vendors. No evidence was put forward to show that there was "intent" or "deceptive"

motives on the part of the Respondents, nor was Mr. D'Amico cross-examined on the issue.

34. In the circumstances, then, the Panel has determined that the breaches by the Respondents were not as minor, technical or inadvertent as submitted by the Respondents. However, if the Registrar wished to claim that a finding of "conduct unbecoming" should warrant a sufficiently high penalty as that sought by the Registrar in this case (which exceeds the penalties in three of the four cases relied upon by the Registrar), then some evidence of maliciousness, intent or deception should have been adduced. While it was not necessary for a determination of a breach of Sections 38 or 39 of the Code, it should be adduced for any penalties sought for breach of Section 39 where the only complaint made is that of "conduct unbecoming a registrant".

(b) Role of the Offending Member in the Breaches

35. The misrepresentation or error, as found by the Panel at paragraph 231 of the Decision, resulted from the editing of the photograph to remove the hydro tower that was caused by the Respondents. While Mr. D'Amico was actually involved in the editing of the photograph, it was done with Mrs. D'Amico's knowledge and approval. They were both co-listing brokers for the Property. To the extent that there was a breach of Section 38, it was due to the failure of both of the Respondents to prevent the error or misrepresentation from occurring. Similarly, the conduct unbecoming a registrant was exhibited by both of the Respondents by permitting the photograph to be circulated without any disclaimer or indication that it had been modified.

36. In *Thompson*, the Appeals Committee noted that Ms. Thompson had been a "willing and knowledgeable" participant. It is clear that the Respondents were "willing" in that the editing of the photograph was affected through the exercise of their will to have it occur. The Registrar, however, states that it is no response for the Respondents to claim that there was no rule addressing, let alone prohibiting, the use of edited photographs in listings. The Panel does not disagree with this submission – as it relates to the question of whether a breach of the *Code* occurred – but does question whether this lack of a rule makes the participation of the Respondents in the present case "knowledgeable", as was the situation in *Thompson*. In the Panel's view, this is a mitigating (but not an absolving)

factor that can be taken into account for the purposes of determining the appropriate penalty.

37. Throughout the transaction giving rise to the present matter, and it would appear throughout their practice generally as real estate agents, the Respondents acted as a team. Accordingly, the Panel has determined that it is appropriate that both of the Respondents should face the same penalty as a result of the breaches of the *Code* and it is not appropriate to find one penalty for Mrs. D'Amico and a different penalty for Mr. D'Amico because, for example, Mr. D'Amico was the one who actually arranged for the editing of the photograph. Equally, however, this is not a situation like, for example, the *Chera and Gu* case cited by counsel for the Registrar. In that case, Mr. Chera and Ms. Gu represented, respectively, the seller and the purchaser in the sale transaction and both of them had their own separate failings vis-à-vis their respective clients. In this case, Mr. and Mrs. D'Amico, effectively "worked as one" and it is, in the Panel's determination, not appropriate to impose separate penalties upon them as if they committed separate breaches when the reality was that there was "one and the same" occurrence that gave rise to the breaches of Sections 38 and 39. Just as the Respondents should equally share in the "blameworthiness" of the breaches, they should also share the penalty.

(c) Whether the Offending Member Suffered or Gained as a Result of the Breaches

38. The evidence is quite clear that the Respondents gained from their breaches of the *Code*. The evidence of Mr. McGee, one of the Complainants, as found at paragraph 74 of the Decision, was that he did not see the hydro towers in the background of the online photographs and, if he had known that they were present, he would have never gone to view the Property. The result of editing the photograph was that the Complainants attended at the Property, ultimately purchased it, and the Respondents received their commission for the sale. The Respondents clearly gained from the misrepresentation caused by the editing of the photograph. The Respondents do not contradict this submission by the Registrar – let alone address it – in their written Submissions.

(d) The Impact of the Breaches on the Complainants and Others

39. There was no evidence of any nature during the Hearing as to any impact of the breaches on any persons other than the Complainants and, accordingly, the Panel has focused solely on the evidence of the Complainants.

40. The Registrar's submission on this point was quite sparse. Counsel simply stated: "The Complainants' [*sic*] testified that to this day, they regret purchasing the Property. They indicated that this situation undermined their confidence in the real estate profession as a whole." With respect, this statement is overstated.

41. The evidence of Mr. McGee, discussed on this point at paragraph 78 of the Decision, was that he and his wife were experiencing certain health issues at the time of the purchase of the Property and that he had been "unsatisfied" with the purchase (not that he "regretted" the purchase) and that the real estate professionals had not looked out for their best interests. Ms. Jiwa, the other Complainant, gave evidence, discussed at paragraphs 55, 57 and 60 of the Decision, that "all" agents has misled her and that this included Mr. D'Amico but she denied on cross-examination that she was suffering from "buyer's remorse". Moreover, as found at paragraph 53 of the Decision, Ms. Jiwa's evidence was that she had "trusted her agents and had been let down". The Respondents were not her agents.

42. Against the Complainants' evidence, however, is the fact that despite the existence of the hydro tower being said by Ms. Jiwa to be a "deal breaker" and Mr. McGee saying that, if he had known of the tower, he would have never even gone to Property and that their presence was a "red flag", and their evidence that almost immediately upon arrival for the first time at the Property that they saw the hydro tower, they still made an offer to purchase the Property, have lived there for numerous years since that time and have made improvements to the Property.

43. While the evidence of the Complainants was clearly that they were unhappy with the purchasing process and with the failures of <u>all</u> of the real estate professionals involved – including their own agent, Mr. O'Brien – this does not lead the Panel to accept the Registrar's submission that the Complainants have been impacted to the extent suggested by the Registrar.

(e) The Need for Specific Deterrence to Protect Members of the Public

44. The Registrar's submission is that it is important for this Panel to "send a message to consumers that advertising must be done in a transparent, ethical manner" and this is said to be the submission for this factor as set out in *Thompson*. Unfortunately, the Registrar has missed the mark on this factor.

45. In *Thompson*, the nine factors for the test were adopted from the same factors listed by the Newfoundland Supreme Court (Trial Division) in *Jaswal* v. *Newfoundland Medical Board* (1996) CanLII 11630. At paragraph 36 of that decision it is clear to the Panel that Justice Green in *Jaswal* treated the fifth factor as if it read "the need for specific deterrence [applied to the defendant / respondent in order] to protect members of the public." In other words, the Panel in considering the appropriate penalty should have regard to whether there is a need to impose a more significant penalty as against the Respondents in order to minimize the possibility of a future recurrence of the conduct that gave rise to the breaches as found by the Panel. In this regard, again at paragraph 36 of *Jaswal*, Justice Green considered factors such as: the age and experience of Dr. Jaswal, whether he cooperated in the investigation, the effect of the allegations against him on his license, and whether the incident was solitary or part of a series of similar incidents. To considerations such as these can be added, as mentioned above, the issue of whether there was any proof that the breaches were intentional or that there was some element of deceit.

46. The Respondents have submitted that they have no prior history of either complaints against them by their clients or of prior disciplinary findings against them. They have also submitted that the editing of the photograph was an isolated incident and that there was no evidence that it was part of multiple misrepresentations on their part. They have further asserted that they have suffered costs, both financially and reputationally, as a result of the Complaint brought against them. Although the Direction provided an opportunity for counsel for the Registrar to reply to the penalty Submissions of the Respondents – including these Submission just mentioned – she chose not to avail herself of that opportunity and, as such, these Submissions stand uncontradicted. To this, again as stated above, should be added the fact that no evidence was put forward

at the Hearing that the editing of the photograph was performed for the purpose of either intentionally misleading potential purchasers or to deceive such purchasers.

47. In the circumstances, the Panel is satisfied that this process has shown the Respondents the need for them to be more careful and prudent in their actions and with regard to their responsibilities as set out in the *Code*. There does not appear to be any need to impose a more stringent penalty upon the Respondents for the purposes of dissuading them from engaging in similar activities in the future.

(f) The Need for General Deterrence to Protect Members of the Public

48. In the Panel's view, this has become a non-factor. It was agreed by all parties at the Hearing that at the time of the sale of the Property there were no rules in place regarding the editing of photographs for use in listings for property. However, since 2020, there are now such rules in place to, for example, require disclaimers to be used if a photograph has been modified to alert potential purchasers to this fact. (In this regard, see paragraphs 123 and 179 of the Decision).

49. This factor requires the Panel to consider whether a more stringent penalty is required to ensure that breaches of the *Code* by one registrant are penalized sufficiently to ensure that other registrants will appreciate the risks they could face if they were to act in a similar manner in the future. This is the factor (and to some extent the next factor) in which the Panel must consider whether to "send a message" to the rest of the real estate profession and to consumers that certain activities will not be condoned but, instead, will be sanctioned.

50. Were it not for the implementation of the now-existing rules regarding modifications to photographs in listings, the Panel would be more inclined towards an increase in the penalty imposed against the Respondents to act as a general deterrent. However, the relatively recent implementation of these new advertising rules and the requirements for disclaimers has "sent the message" more broadly and clearly than this penalty decision could realistically achieve. Accordingly, we do not see a particular need to impose a penalty against the Respondents that will serve any general deterrence purpose.

(g) Need to Maintain Public Confidence in the Integrity of the Profession

51. This factor, in our view, is effectively the "opposite side of the coin" from the prior factor. In the prior factor, the focus is upon "sending a message" to the real estate professionals to have them know that certain conduct will not be condoned and will be sanctioned. For this factor, the focus is on considering whether the nature and scope of any penalty to be imposed will "send a message" to the public that certain conduct will not be condoned and will be sanctioned.

52. As stated by the Registrar: "Consumers need to know that they are not being sold a 'bait and switch' and that if enhancements to photos are being used, that disclaimers will be made, so the transparency is there." We agree with this submission. The question is whether this knowledge by consumers will be affected in any manner by the Panel's determination of the penalty as imposed upon the Respondents. Again, as for the prior factor (or side of the coin), the implementation of the new advertising rules and their requirements for disclaimers, coupled with penalties imposed under those new rules if and when such cases should arise, provide sufficient comfort to the Panel that public confidence in the integrity of photographic advertising will be maintained and this factor, therefore, does not militate towards a higher penalty against the Respondents than would otherwise be imposed by the Panel.

(h) The Degree to Which the Breaches Are Regarded as Being Outside the Acceptable Range of Conduct

53. This eighth factor is, admittedly, quite close to the first factor. In determining the nature and gravity of the breaches of the *Code*, one will undertake a determination that is quite close to the determination to be made under this eighth factor. In both factors, a determination has already been made that a breach of the *Code* was performed by the registrant. This Panel is at pains to think of any instances where conduct would be said to give rise to a breach of the *Code* but then still be found to be "within the acceptable range of conduct" since such a breach would, by definition, constitute conduct outside of the range of acceptable conduct to at least some minimal extent. Determining that extent would appear to be the role of the consideration of the first factor as it relates to the gravity of the breach.

54. As the finding itself implies for any breach of at least Section 39 of the *Code*, such a breach will be, at a minimum, a finding of conduct that is "unbecoming" of a registrant and, therefore, is "outside of the acceptable range of conduct". However, as indicated in our consideration of the first factor, this is the lowest end of the range and the actions of the Respondents in removing the hydro towers from one photograph – which would have been (and in this case were) immediately noticed on the attendance by any potential purchaser to view the Property – while outside of the acceptable range of conduct did not deviate too far away from that range.

(i) Range of Penalties in Similar Cases

55. The final factor for consideration by the Panel is the range of sanctions in similar cases to the present case. While both parties have provided the Panel with "cases", all of them are of limited assistance, at best.

56. The "cases" relied upon by the Respondents are of no use to the Panel. The Respondents have provided a series of letters in which the Registrar conducted an investigation, determined that the merits of the complaint did not justify the commencement of a disciplinary hearing, and the Registrar then wrote to the applicable registrant to either advise that the allegations in the complaint had not been substantiated or to advise that the matter was completed and gave a warning, with or without a requirement to do something else (such as taking an educational course). These are not cases as determined by the Discipline Committee. Moreover, these are decisions made by the Registrar pursuant to Section 20 of the Act. Under that section of the Act, the Registrar has the power (among several powers) to give a registrant a "written warning, stating that if the registrant continues with the activity that led to the alleged contravention, action may be taken against the registrant" and/or require a registrant to take additional education or, if so warranted, refer the matter to the Discipline Committee for a hearing and determination of whether breaches occurred and, if so, the appropriate penalty. These letter decisions, presented by the Respondents are neither binding upon this Panel nor are they helpful since they involve minor infractions determined unworthy of even submission to the Discipline Committee.

More importantly, while the Respondents wish to have these decisions used by the Panel for a penalty of a "warning to them", this is not permitted under the Act.

57. The ability to issue a warning is given solely to the Registrar under Section 20 of the Act. The powers of this Panel following the Hearing are those set out in subsection 21(3) of the Act which are, in summary, requiring a registrant to take additional educational courses, pay fines or costs; or otherwise affecting a registrant's registration through conditions, a suspension or revocation. The powers available to this Panel do not include the ability to give a warning. Accordingly, even if the Panel had concluded that a warning was an appropriate penalty, which it has not so concluded, it does not have the jurisdiction to give such a penalty. It follows, then, that the letter decisions, which are not cases, put forward by the Respondents are of no use to the Panel for this aspect of the *Thompson* considerations.

58. Similarly, the Registrar's cases are all immediately distinguishable as they related to factual situations where the complainant was put in a position that he or she could not readily determine that there had been a misrepresentation and had to rely upon his or her real estate professional to protect his or her interests in the transaction. Thus, in *Dirkx*, there was an unopened road allowance; in *Chera and Gu*, the problem was whether a duplex was compliant with municipal by-laws; in *Price*, the listing indicated that the property could be used as a "hunt camp" and there was a failure to determine if the zoning allowed for this use; and in *Chouinard*, the real estate professional failed to warn of the risks of waiving an inspection condition, failed to confirm the size of the property, terms of a rental contract and that the property had deeded lake access when these facts all turned out to be false. These decisions are qualitatively different from the current case where the misrepresentation was the removal from a photograph of a hydro tower that was somewhere between 80 and 150 feet tall and both of the Complainants indicated that they immediately noticed it when they first attended at the Property (with Ms. Jiwa indicating that she was "shocked" when she saw the tower). This was not a situation where either of the Complainants was unaware of the existence of the problem and would not learn of its existence until after closing, or that they relied upon the real estate professionals to inform them of something that their own eyes had not already informed them about.

59. It does not follow, however, that the cases cited by the Registrar have no use for the Panel because, if nothing else, they establish what the Panel considers to be a “cap” for any penalty that could be imposed upon the Respondents. In the Panel’s view, the cases cited by the Registrar all dealt with more serious breaches of the *Code* than those of the Respondents in this case – and, the *Chouinard* decision is an “outlier” since its significantly higher penalty was given in a situation where there were multiple breaches of the *Code* involving multiple failings by the real estate professional. Since the range for the other three cases relied upon by the Registrar (*Dirkx*, *Chera and Gu*, and *Price*) is between $10,000 and $12,000, any fine to be imposed should be below this range in light of the lesser gravity of the breach of the *Code* by the Respondents in the present case.

Conclusions and Order for Penalty

60. Having regard to the factors quoted above from *Thompson* and considered by the Panel, it is the Panel’s decision that the breaches of the Code were not conducted intentionally or deceptively but arose, instead, from a misguided appreciation of the Respondents’ obligations under the *Code* and an improper focus upon attempting to put their clients’ Property in the best light possible but doing so, even if unintentionally, in a manner that gave rise to error or misrepresentation and resulted in conduct unbecoming of a registrant. The consideration of the *Thompson* factors would not lead the Panel to the issuance of a warning (even if it had jurisdiction to do so – which it does not as stated above) and do require the imposition of a penalty.

61. The Registrar has sought a penalty in the form of a fine against <u>each</u> of the Respondents in the amount of $14,000. This amount exceeds the majority of the cases relied upon by the Registrar for conduct which, in the Panel’s view, was more serious than the conduct of the Respondents. Moreover, the Registrar has not provided submissions satisfactory to persuade the Panel that separate fines should be imposed even in the range of cases such as *Dirkx, Chera and Gu* and *Price*. In the Panel’s determination, the lower end of the range of these cases is appropriate – namely $10,000 – but, in light of the facts that the Respondents acted as a team and the Panel has determined that it is not appropriate to impose a higher penalty upon one

Respondent than that imposed upon the other Respondent, it is our view that the fine of $10,000 should be shared equally by the Respondents.

62. Whether through inadvertence, negligence or otherwise, the breaches of the *Code* did occur and it is the Panel's view that the interests of the public would be served by requiring the Respondents to take a mandatory course related to the ethical obligations for advertising for registrants.

63. Accordingly, it is the Panel's determination that the appropriate penalty as against Mr. D'Amico is:

   a. Payment by Mr. D'Amico of a fine of Five Thousand Dollars ($5,000.00), payable to RECO within One Hundred and Eighty (180) days of the sending to Mr. D'Amico of this decision regarding penalty; and

   b. Successful completion by Mr. D'Amico of RECO's "MCE Advertising Compliance" course, with confirmation of successful completion of this course, within One Hundred and Twenty (120) days of the sending to Mr. D'Amico of this decision regarding penalty.

64. Similarly, it is the Panel's decision that the appropriate penalty as against Mrs. D'Amico is:

   a. Payment by Mrs. D'Amico of a fine of Five Thousand Dollars ($5,000.00), payable to RECO within One Hundred and Eighty (180) days of the sending to Mrs. D'Amico of this decision regarding penalty; and

   b. Successful completion by Mrs. D'Amico of RECO's "MCE Advertising Compliance" course, with confirmation of successful completion of this course, within One Hundred and Twenty (120) days of the sending to Mrs. D'Amico of this decision regarding penalty.

65. The Registrar in its Submissions did not seek costs and, accordingly, no costs are awarded for this proceeding.

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