THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF Section 39(1)(b)(i) and s.41 of the *REAL ESTATE ACT*, R.S.A. 2000, c.R-5 (the "Act")

AND IN THE MATTER OF a Hearing regarding the conduct of GORDON WESLEY PETHICK, Registered at all material times hereto with BGB REALTY INC. O/A RE/MAX REALTY PROFESSIONALS

Hearing Panel Members:	[K.O], Chair [G.P] [G.R]
Appearances:	Andrew Bone, for the Executive Director of the Real Estate Council of Alberta Steven Robertson, for Gordon Wesley Pethick
Hearing Date(s):	October 22 and 23, 2020 via virtual hearing with the panel located in Edmonton, Alberta

DECISION

UPON Hearing the testimony of witnesses and considering the evidence submitted at the hearing of this matter; AND UPON reviewing and considering the materials submitted and the arguments made by the parties;

THE HEARING PANEL HEREBY FINDS AS FOLLOWS:

A. Introduction

The Real Estate Council of Alberta ("RECA") received a complaint of conduct deserving of sanction against Gordon Wesley Pethick (the "Industry Member") about his conduct while acting as dual agent in a commercial real estate transaction.

RECA appointed an investigator into the complaint that was made. Subsequently, RECA's Executive Director referred the complaint to a hearing panel under s. 39 of the *Real Estate Act*. The Hearing Panel heard the complaint pursuant to s. 41 of the *Real Estate Act*.

The Executive Director alleged that the Industry Member failed to:

1. provide competent service to the seller; and/or
2. fulfil his fiduciary obligations to the seller.

The Hearing Panel finds that the Industry Member failed to provide competent service to the seller. However, the Industry Member did not fail in his fiduciary obligations to the seller.

B. Relevant Legislation

Between the oral Hearing of this matter and issuing this decision, the *Real Estate Act*, *Real Estate (Ministerial) Regulation*, *Real Estate Act Rules*, and *Real Estate Act Bylaws* were amended. Section 25.5 of the amended *Regulation* directs this Panel to continue with its decision as if Part 3 of the Act had not been amended by the *Real Estate Amendment Act*, 2020.

In this decision, any references to sections 36 to 56 of the Act refer to those sections as they were written in the version of the Act as of October 22 and 23, 2020, which was in force until November 30, 2020. Section 25.7 of the Regulation provides for continuity of the by-laws and rules, insofar as they are not inconsistent with the Act as amended. The rules applicable to this matter are those that were in affect at the time of the impugned conduct. Section 25.8 of the amended Regulation provides for the continuity of licenses and authorizations.

C. Issues

The central issues in this hearing are as follows:

1. Did the Industry Member fail to provide competent service to [CLIENT] contrary to section 41(b) of the *Real Estate Act Rules*?
2. Did the Industry Member fail to fulfil his fiduciary obligations to his client, [CLIENT] contrary to s. 41(d) of the *Real Estate Act Rules*?

D. The Facts

The Hearing Panel makes the findings of fact described below.

The Relationship Between the Industry Member and the Seller

The Industry Member has worked in the industry since approximately 1983 and has been registered with RECA since its inception. He commenced work with the brokerage BGB Realty Inc. o/a Re/Max Realty Professionals (the "Brokerage") in or about 1996 and has worked there ever since.

[R.L] was a director and shareholder of [CLIENT] (collectively, the "Seller"). The Seller invested in commercial real estate in the Province of Alberta, including through the purchase and sale of multiple commercial buildings.

The Industry Member and the Seller had a professional relationship for approximately 25 years prior to the complaint in this matter. The Industry Member assisted the Seller in selling several properties over the years. Normally, the Seller provided the Industry Member with authorization to market a property but did not give the Industry Member an exclusive listing. The Seller would advise multiple realtors of his intention to sell and allow realtors to bring offers to him.

The Subject Property and Letter of Understanding

The Seller owned a retail strip centre in south east Calgary (the "Subject Property"). In 2014, he intended to sell the Subject Property. On February 5, 2014, the Seller signed a letter of understanding to authorize the Industry Member to market the Subject Property, where the Seller agreed to pay the Industry Member 3% commission if the Industry Member brought a buyer for the Subject Property.

The Seller did not give the Industry Member an exclusive listing on the Subject Property; if another industry member were to bring a buyer for the Subject Property, the Industry Member would be paid nothing.

The Industry Member's Relationship with the Buyer

The Industry Member met P.M. through a referral within his Brokerage (the "Buyer"). The Industry Member obtained a copy of the Buyer's driver's licence and he obtained contact information for the Buyer's lawyer.

The Industry Member understood that the Buyer was a builder and interested in developing a commercial property. The Buyer reviewed with the Industry Member several buildings which he had previously developed. The Industry Member showed the Buyer an undeveloped property in Spring Bank in which the Buyer had an interest and contacted owners of other properties in which the Buyer expressed interest. In or about October 2014, the Buyer reviewed the Industry Member's advertised feature sheet of the Subject Property and expressed to the Industry Member that he was interested in purchasing it.

The Industry Member understood that the Buyer intended to develop the Subject Property, including by building five stories above the existing building with a mix of residential and commercial uses. The Industry Member also understood that the Builder would pay cash for the Subject Property from funds held in a family trust.

The Industry Member understood that the Buyer would require financing to develop the Subject Property, but that financing was not required for the purchase. The Industry Member assisted the Buyer in obtaining financing for the

build, including by providing copies of the feature sheet and existing leases to two lenders.

The Agreement for Remuneration

On October 11, 2014, the Seller and the Industry Member entered into an agreement for remuneration, which included agreement to pay to the Brokerage 3% of the sale price of the Subject Property (the "Agreement for Remuneration"). Under clause 1 relating to "Agency Disclosure", the standard form read:

> The seller acknowledges that _____ (Brokerage name) is acting only on behalf of the buyer in this transaction and owes the seller no fiduciary duties.

The Industry member crossed out the last phrase and added text as follows:

> The seller acknowledges that Gordon Pethick of ReMax Realty Professionals (Brokerage name) is acting only on behalf of the buyer and the seller in this transaction.

The Industry Member testified that he prepared this agreement because he did not have the listing for the Subject Property. He stated that he normally used this document when only acting for a buyer and that he amended the language in this case to reflect that he was acting for both buyer and seller. At the time of executing the Agreement for Remuneration, he expected to prepare an offer from the Buyer on the Subject Property.

The Industry Member did not provide the Seller with a copy of RECA's Consumer Relationships Guide.

The First Offer

On October 14, 2020, the Seller received an offer to purchase the Subject Property from a third party. This offer was open until 5:00pm on October 16, 2014. The offer was for the full asking price but required significant financing to complete the purchase. The Industry Member did not bring this offer and would not receive any commission if the Seller accepted and closed on that offer.

The Seller asked the Industry Member for advice about this third-party offer. The Industry Member and the Seller discussed the amount of financing required for the deal. The Industry Member advised the Seller that in his experience, lenders require at least 50% cash down for purchases of commercial properties. The Industry Member also advised the Seller that he was working with the Buyer and expected to provide a cash offer shortly. The Seller did not accept the third-party offer.

The Purchase Contract

On October 16, 2014, the Industry Member, Seller, and Buyer entered an agreement to represent both Seller and Buyer. The Industry Member presented to the Seller both the Agreement to Represent Both Seller and Buyer and an offer from the Buyer.

The parties negotiated on the sale price and agreed to a sale price of $4,420,000. This was less than the first offer by the third party, but the Seller preferred this offer because the Industry Member presented it as a cash offer.

The purchase price was to be paid in the form of $100,000 as an initial deposit by October 22, 2014 and the remainder paid at closing on November 26, 2014. The Industry Member handwrote onto the Purchase Contract that the balance owing would be paid through "cash + mortgage". However, he did not indicate how much, if any, would be paid through financing. The Industry Member understood that the purchase would be completed with cash, possibly from a mortgage on an existing property. It was unclear why he wrote on the Purchase Contract "cash + mortgage".

The Buyer did not impose a financing condition. However, he included a due diligence condition which included a review of all existing lease contracts at the Subject Property. The condition day was October 29, 2014. The closing date was November 26, 2014.

The Purchase Contract further provided that the deposit would be forfeit if the offer was accepted and all conditions satisfied or waived, and the Buyer failed to perform.

The First Deposit Cheque

The Purchase Contract required the initial deposit of $100,000 to be deposited within three business days of October 22, 2014. On or about October 22, 2014, the Buyer provided the Industry Member with a cheque in the amount of $100,000 for the initial deposit. The Industry Member took the cheque to the Buyer's bank the following day to have it certified. However, the bank did not certify the cheque, citing insufficient funds in the account.

The Industry Member immediately called the Buyer and arranged to meet for coffee to discuss the situation. At the Buyer's request, the Industry Member gave the first cheque back to the Buyer. He did not keep a copy of that cheque for the Brokerage's file.

The Industry Member understood that the Buyer's lawyer still needed to transfer funds from the Buyer's family trust. The Buyer provided the Industry Member with a company cheque, and the Industry Member understood that the Buyer would advise when the funds were deposited. The Industry Member trusted the Buyer and believed that the second cheque would go through. He observed that the Buyer took the cheque from a stack of similar cheques from his briefcase

and that the cheque bore the name of what the Industry Member understood to be the Buyer's company.

After his meeting with the Buyer, the Industry Member phoned the Seller to discuss the situation. Although the Seller testified that he was not informed about the status of the deposit, the panel accepts that he was, which finding we discuss further below in our conclusions of breach.

However, the Industry Member did not advise the Seller in writing about the first cheque not being deposited. He testified that his long-standing relationship with the Seller did not normally include written correspondence.

The Industry Member trusted the Buyer and assured the Seller that he would get the deposit from the Buyer, but just had to wait until the Buyer indicated that the funds had been transferred. The Seller instructed the Industry Member to attempt to keep the deal together.

Waiver of Conditions

On October 29, 2014, the Buyer waived his only condition, which was due diligence. The Industry Member hand wrote on the notice of the waiver of conditions, "This is now a firm sale." He did so despite knowing that the deposit cheque had not been deposited.

The Second Deposit Cheque

On November 21, 2014, the Buyer phoned the Industry Member and advised that the deposit money would be transferred and ready by November 24, 2014 after 1:00pm, just two days before the Purchase Contract's closing date. The Industry Member dated the Buyer's cheque himself and took it to the bank at approximately 3:00pm on November 24, 2020. The bank advised the Industry Member that it had no record of the account number, the Buyer, or the Buyer's company.

The Industry Member immediately phoned the Buyer but could not contact him. The Industry Member attended the address for the Buyer in his records, but this was merely a mailbox centre for post office boxes. He sought assistance from the police, but they could not provide any further information. The Industry Member also sought assistance from the realtor in his Brokerage from whom he had received the referral for the Buyer. The Industry Member tried to contact the Buyer's lawyer, but they would neither confirm nor deny that the Buyer was their client. The Industry Member was never able to contact the Buyer again.

According to the Purchase Contract, the deposit was forfeit because the Seller had accepted the offer and all conditions had been waived. However, the Industry Member had not obtained the deposit funds from the Buyer and could not provide these to the Seller.

Actions After the Deal Failed

The Seller wrote to the Industry Member on November 25, 2014 expressing concern about the deal and the deposit. The Industry Member sought advice from his Brokerage, which advised him to put everything in writing. The Industry Member wrote an email to the Seller dated November 26, 2014 in which he advised about problems with the second deposit cheque and the apparent disappearance of the Buyer. This was the first time that the Industry Member advised the Seller in writing of the problems with the second deposit cheque.

The Seller replied on November 27, 2014 with questions and comments that he felt the Industry Member had not protected his interests. The Industry Member replied on November 28, 2014 explaining in part that the first cheque did not clear the bank. This was the first time that the Industry Member advised the Seller in writing about the first cheque.

Following these exchanges, the Seller contacted the Brokerage directly and demanded that the Brokerage transfer the deposit amount to him and continued to insist that the Brokerage had the funds in its trust account.

E. Conclusions of Breach

The Executive Director met its burden of proof to establish that the Industry Member failed to provide competent services. The Industry Member failed to provide competent services to the Seller by failing to:

1. provide to the Broker either the original or a copy of the first failed deposit cheque;
2. provide the Seller a copy of the Consumer Relationships Guide; and
3. ensure that there was a record of the circumstances involving the first failed deposit and the Seller's instructions.

However, the Industry Member did not breach his fiduciary duties to the Seller.

Breach of the Duty to Provide Competent Services

The Industry Member failed to provide competent services to the Seller. Section 41(b) of the *Real Estate Act Rules* (the "*Rules*") requires industry members to provide competent service:

> 41 Industry members must:
>
> ...

(b) provide competent service;

As part of this breach, the panel notes the breach of other relevant sections of the *Rules*. First, s. 53(c)(i) of the *Rules* requires that an associate provide his Brokerage with original documents and copies of original documents:

> 53 A real estate associate broker and associate must:
>
> ...
>
> (c) provide to the broker in a timely manner all original documentation and copies of original documents provided to the parties or maintained by other brokerages:
>
> (i) related to a trade in real estate;
>
> ...

The Industry Member did not keep or provide to his Broker either an original or a copy of the first deposit cheque that failed. The first deposit cheque was a relevant record related to a trade in real estate and competent service included retaining a copy of all relevant records. The Industry Member's failure to keep a record of this document and provide it to his Broker was a breach of s. 53(c)(i) and a breach of duty to provide competent service under s. 41(b).

Second, s. 60.1 of the *Rules* required the Industry Member to provide a copy of the Consumer Relationships Guide to clients:

> 60.1 (1) Subject to the Rules:
>
> ...
>
> b) The Consumer Relationships Guide of the Real Estate Council of Alberta contained in Schedule 1 is mandatory for use when industry members trade in residential real estate.

The Industry Member did not provide the Seller with a copy of the Consumer Relationships Guide, which document outlines the Industry Member's duties, including when acting for both a buyer and seller as facilitator of a transaction. The Industry Member had an ongoing business relationship with the Seller but there was no evidence that he had ever provided the Seller with this document.

The Industry Member testified that he explained his dual role to the Seller when presenting the Buyer's offer and the Agreement to Represent Both Buyer and Seller, as part of his standard practice. At the same time, the Industry Member acknowledged that the Seller felt everybody was representing him, although the reality was that the Industry Member was acting for both parties. This was more reason to ensure that the Industry Member complied with all the *Rules*, including by ensuring that he provided a copy of the Consumer Relationships Guide to the Seller.

Third, the Industry Member failed to provide competent service to the Seller by failing to ensure that there was a record of the circumstances involving the first failed deposit and the Seller's instructions. He should have informed the Seller in writing about the failed deposit cheque and/or kept clear contemporaneous notes of their discussions about the failed deposit cheques. His failure to do so was a failure to provide competent service under s. 41(b).

The content of what constitutes competent service varies depending on the circumstances. In this case, where the Industry Member acted as dual agent and had fiduciary obligations to both the Seller and Buyer, and the deposit cheque failed, the minimum standards of competence expected of the Industry Member included ensuring that there was a written record of the circumstances and the parties' discussions and instructions.

The duty in the *Rules* to inform all parties in writing of a failed deposit falls on the Brokerage, and not specifically the associate, which was the Industry Member's role here. Section 53(f) of the *Rules* requires an associate to notify his Broker if a deposit has not been received and s. 51(1)(l) then places an obligation on the Broker to ensure that all parties to an agreement are notified in writing if a deposit has either not been received or if a deposit cheque is not honoured. Accordingly, the Industry Member did not have an express duty in the *Rules* to inform both parties in writing about the failed deposit. However, he did not take any steps to ensure that the Broker met its obligations or to ensure that there was a record of the circumstances for the Brokerage's file and the Seller's understanding.

The Industry Member also did not keep contemporaneous notes about the failed first deposit cheque. As a result, there was no record about what happened with the first cheque, the Industry Member's information and advice to the Seller, or the Seller's instructions to proceed despite the deposit cheque not being honoured. Contemporaneous notes may not have been necessary if the Industry Member had prepared and kept a copy of detailed written correspondence to the Seller that contained a summary of the full circumstances. However, he did neither.

No Breach of Fiduciary Duties

The Industry Member did not breach his fiduciary duties to the Seller. Section 41(d) of the *Rules* requires industry members to fulfill their fiduciary obligations to their clients:

> 41 Industry members must:
>
> ...
>
> (d) fulfill their fiduciary obligations to their clients;

The relationship between a real estate agent and his client is historically recognized as a fiduciary relationship: *Maclise Enterprises Inc v Grover,* 2014 ABQB 591 ("*Maclise*") at para. 85.

In *Guerin v The Queen*, 1984 CanLII 25 the Supreme Court of Canada explained the nature of the fiduciary obligation:

> …where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

Listing agents and brokers are fiduciaries who owe the "highest obligation of full disclosure and fair dealing to the vendor who pays the commission:" *Knoch Estate v Jon Picken Ltd* (1991), 1991 CanLII 7320 (ON CA), 4 OR (3d) 385 at 395, 83 DLR (4th) 447 (CA), cited in *Trynchy v. Gabriel*, 2012 ABQB 682 ("*Trynchy*") at para. 78.

The Alberta Court of Queen's Bench in *Trynchy, supra* at para. 79 adopted the following principles that apply to real estate agents and sellers:

1. The relationship between a real estate agent and the person who has retained him to sell his property is a fiduciary and confidential one;
2. There is a duty upon such an agent to make full disclosure of all facts within the knowledge of the agent which might affect the value of the property;
3. The price paid must be adequate and the transaction must be a righteous one. The price obtained must be as advantageous to the principal as any other price that the agent could, by the exercise of diligence on his principal's behalf, have obtained from a third person; and
4. The onus is upon the agent to prove that those duties have been fully complied with.

A real estate agent owes both contractual and fiduciary obligations to his principal. These include the duty to make full and fair disclosure of all material circumstances and of everything the agent knows regarding the subject matter to its principal: *Maclise*, *supra* at para. 89; *Trynchy, supra* at para. 80.

The test of what an agent must disclose is objective, determined by "what a reasonable [person] in the position of the agent would consider, in the circumstances, would be likely to influence the conduct of his principal": *Ocean City Realty Ltd v A & M Holdings Ltd* 1987 CanLII 2872 (BC CA) at para. 22; *Maclise, supra* at para. 91.

In this case there was a factual question, did the Industry Member inform the Seller about the failed first cheque? We find that he likely did. In making this finding, we acknowledge that there was conflicting evidence on this point.

The Seller repeatedly insisted that he understood that the Industry Member had the deposit in the Brokerage's trust account and that he did not hear about an

issue with the deposit until November 24, 2014 when the second cheque failed. In contrast, the Industry Member testified that he kept the Seller informed about the situation from the time of the first failed cheque onwards. The Industry Member testified that he advised the Seller that the Seller could abandon the transaction since the deposit had not been received, but that the Seller instructed him to keep the deal together, or words to that effect.

The leading case on assessing credibility is *Faryna v Chorny*, 1951 CanLII 252 in which the British Columbia Court of Appeal stated at paragraph 11:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, **the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities** which a practical and informed person would readily recognize as reasonable in that place and in those conditions. [emphasis added]

While there was conflicting evidence on this issue, when we look at the whole of the circumstances and what most likely happened, we find that the Industry Member likely informed the Seller about the failed first cheque. Several witnesses, including the Seller, confirmed that the Seller contacted the Industry Member in person or by phone either everyday or every other day during the relevant periods. Both the Industry Member and the Seller stated that the Seller repeatedly asked about the deposit. He was clearly concerned about the deal, and the fact that there was no deposit cheque. If he truly believed that the deposit was being held in trust, there would be no reason to continually question and contact the Industry Member about the deposit.

In addition, the Seller's email of November 27, 2014 suggests that the Industry Member had previously informed the Seller about the lack of deposit. The Seller wrote:

> "3) … you talked with [P.M] on Nov 21 2014 and he told you that you can certify[y] [the] deposit on Nov 24 2014[.] [D]eal will be closed on Nov 26 2014, you have responsibility to collect deposit and return to me. Why are you not doing anything about it?
>
> "4) I told you that I am going to my lawyer's office to sign in order to finish the deal on Nov 21 2014 after you told me [P.M] the buyer told you to deposit money. Who is going to pay lawyer's fee?"

This correspondence suggests that the Industry Member spoke to the Seller on Friday, November 21, 2014 to inform him of the Industry Member's discussion with the Buyer about being able to certify the second deposit cheque on the Monday. Such a discussion between the Seller and Industry Member only makes

sense if the Seller knew that the deposit had not yet been received and they were waiting for confirmation about certifying the second cheque.

Rather than the Seller's suggestion that he did not know about the problems with the deposit, the Seller's conduct suggests that, when the Buyer disappeared, he expected the Industry Member to resolve the deposit issue himself. The Seller expected the Industry Member to find the Buyer and collect the deposit. When that did not occur, the Seller began correspondence with the Brokerage about the Brokerage covering the deposit or making an insurance claim against the Brokerage for not securing the deposit. It was not an issue of being informed, but rather an issue of who was responsible to fix the problem.

Similarly, the Industry Member's evidence that he kept the Seller informed about the circumstances of the deposit makes sense in these circumstances. He had a personal and professional relationship with the Seller over many years that included consultation on deals in which the Industry Member was not involved and regular communication. The Broker also confirmed that he observed frequent in person meetings between the Industry Member and the Seller. This was a long-term relationship that involved frequent communication. It is not likely that the Industry Member withheld information about the status of the deposit.

At the same time, we find that the Industry Member likely assured the Seller that he was working on getting the deposit and that he had faith in the Buyer. The Industry Member had never had a client disappear mid-way through a transaction before and had never had a significant problem with a deposit like this before. He also had a relationship with the Buyer, had shown him several properties, provided records to lenders for financing the build on the Subject Property after purchase, and had assisted with the Buyer's due diligence efforts.

The Industry Member also likely assured the Seller that the Seller would be entitled to keep the deposit if the Buyer did not close the transaction. Both the Seller and Industry Member testified to this effect, although the Industry Member added that he still needed to acquire the deposit. Regrettably, the Buyer's perplexing conduct resulted in the Seller not being able to collect the deposit, although he was entitled to it. The Industry Member's assurances likely gave the Seller comfort in choosing to proceed despite not having the deposit. However, the Industry Member did ensure that he fully informed the Seller about the circumstances. This met his fiduciary obligations to the Seller.

F. Request for Submissions on Sanction and Costs

The Hearing Panel requests written submissions from the parties on the appropriate sanction and costs, as follows:

1. The case presenter must supply their written submissions to the Hearings Administrator within 28 days of receipt of this decision. The Hearings

Administrator will supply those written submissions to the Industry Member immediately on receipt;

2. The Industry Member must supply their written submissions to the Hearings Administrator within 14 days of receipt of the case presenter's written submissions. The Hearings Administrator will supply those written submissions to the case presenter immediately on receipt.
3. The case presenter may supply a rebuttal within 7 days of receiving the Industry Member's submissions.

Once the timelines above have passed, the Hearings Administrator will provide all written submissions to the Hearing Panel for consideration and decision on sanction and costs.

This decision is certified and dated at the City of Edmonton in the Province of Alberta, this 14th day of December, 2020.

"Signature"

[K.O], Hearing Panel Chair

THE REAL ESTATE COUNCIL OF ALBERTA
IN THE MATTER OF Section 39(1)(b)(i) and s.41 of the *REAL ESTATE ACT*, R.S.A. 2000, c.R-5 (the "Act")
AND IN THE MATTER OF a Hearing regarding the conduct of
GORDON WESLEY PETHICK, Registered at all material times hereto with
BGB REALTY INC. O/A RE/MAX REALTY PROFESSIONALS

Hearing Panel Members:	[K.O], Chair [G.P] [G.R]
Appearances:	Andrew Bone, for the Executive Director of the Real Estate Council of Alberta Steven Robertson, for Gordon Wesley Pethick
Hearing Date(s):	October 22, 23, 2020 via virtual hearing with the Hearing Panel located in Edmonton, Alberta, submissions on sanction provided in writing

DECISION
ON SANCTION AND COSTS

FOLLOWING the decision of the Hearing Panel with respect to conduct deserving of sanction (the 'Phase I Decision") and UPON Considering the written submissions of the parties with regards to the appropriate sanction in this matter;

THE HEARING PANEL HEREBY FINDS AS FOLLOWS:

A. Introduction

In the Phase I Decision, this Hearing Panel found that the Industry Member breached s. 41(b) of the *Real Estate Act Rules* to provide competent service in three instances. The Industry Member failed to provide competent services to the Seller by failing to:

1. provide to the Broker either the original or a copy of the first failed deposit cheque;
2. provide the Seller a copy of the Consumer Relationships Guide; and
3. ensure that there was a record of the circumstances involving the first failed deposit and the Seller's instructions.

This decision provides the Hearing Panel's decision and reasons on sanction for the conduct deserving of sanction identified in the Phase I Decision.

B. Parties' Submissions on Sanctions and Costs

Both parties relied on the non-exhaustive factors described in *Jaswal v. Newfoundland (Medical Board)* ("*Jaswal*") for determining a proportionate sanction.[1] The Executive Director requested the following sanction:

1. Fines in the amount of $7,500, representing $2,500 for each breach of s. 41(b);
2. Costs in the amount of $7,929, representing 60% of the low end of the Executive Director's cost estimate for the hearing; and
3. Within six months of this decision, completion of unit five of the Fundamentals of Real Estate Course on consumer relationships.

The Executive Director particularly noted the existence of previous discipline, which he characterized as similar to the present instance.

The Industry Member asked for no further sanctions in the circumstances, or in the alternative a sanction of the requirement to complete the proposed coursework. He noted that he served a 25-day suspension in connection with the unproven allegation of breach of fiduciary duty, which suspension was overturned on appeal.

Similarly, if costs are to be awarded, the Industry Member argued that costs should only be awarded in the amount of $1,000. The Industry Member referred to s. 28(3) of the *Real Estate Act, Bylaws* ("*Bylaws*"), which provides a Guide to Costs. He submitted that the Guide to Costs suggested costs of up to $2,500, but that this amount should be reduced by 60% to account for the limited success of the Executive Director.

C. Decision on Sanction and Costs

Aggravating and Mitigating Factors

The Hearing Panel agrees that *Jaswal* is the leading case on sanction in professional conduct matters and that the non-exhaustive factors raised in that decision are appropriate considerations for determining the sanction in this matter. In *Jaswal*, the court identified the following non-exhaustive factors:[2]

1. the nature and gravity of the proven allegations
2. the age and experience of the [industry member]

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[1] *Jaswal v Newfoundland (Medical Board),*1996 CarswellNfld 32, [1996] N.J. No. 50, 138 Nfld. & P.E.I.R. 181, 42 Admin. L.R. (2d) 233 ("*Jaswal*")

[2] *Jaswal, supra* at para 36

3. the previous character of the [industry member] and in particular the presence or absence of any prior complaints or convictions
4. the age and mental condition of the offended [client]
5. the number of times the offence was proven to have occurred
6. the role of the [industry member] in acknowledging what had occurred
7. whether the [industry member] had already suffered other serious financial or other penalties as a result of the allegations having been made
8. the impact of the incident on the [industry member's client]
9. the presence or absence of any mitigating circumstances
10. the need to promote specific and general deterrence and, thereby, to protect the public and ensure the safe and proper [conduct of the profession]
11. the need to maintain the public's confidence in the integrity of the ... profession
12. the degree to which the offensive conduct that was found to have occurred was clearly regarded, by consensus, as being the type of conduct that would fall outside the range of permitted conduct
13. the range of sentence in other similar cases

The relevant factors may vary depending on the circumstances of each case. Below, the Hearing Panel considers each of the relevant factors in this case.

Nature and Gravity of the Proven Allegations

The three proven allegations related to record keeping and communication with the Industry Member's client about his role. While all conduct deserving of sanction is serious conduct that cannot be condoned, these allegations are not the most serious type of conduct and are less serious than the allegation that this Hearing Panel dismissed. The Executive Director conceded that this was a mitigating factor and we agree.

Age and Experience of the Industry Member

The Industry Member started his career in or about 1983. At the time of the incidents leading to the proven allegations, he had over 30 years of experience in the industry. The parties agree that this is an aggravating factor and the Hearing Panel accepts the same.

The Previous Character of the Industry Member

The Industry Member has previous discipline on his professional record. In 1998, the Industry Member entered a Consent Agreement in which he admitted to conduct deserving of sanction. In that matter, the Industry Member acted in a dual capacity for the seller of a property and for the buyer, who was his spouse. He also represented the sellers in the purchase of another property, which purchase was dependent on the sale of the first property.

The Industry Member obtained a trust deposit cheque but did not deposit the cheque into the agent's trust account. In addition, before his spouse removed her financing condition, the Industry Member advised the sellers to remove their conditions on the purchase of the second property. The buyer's financing was not in place on time and both transactions were at risk.

The Executive Director submitted that this previous discipline was similar to the present circumstances and that it is a strong aggravating factor. In contrast, the Industry Member argued that the discipline is 25 years old and that his long career with only one other instance was a mitigating factor.

In addition, the Industry Member submitted an affidavit explaining the circumstances of the 1996 transaction which led to the 1998 Consent Agreement. The Executive Director objected to the affidavit, arguing that it constituted new evidence almost 20 years after the fact and contradicted the 1998 Consent Agreement. In addition, the Executive Director argued that the affidavit should not be given any weight because there was no opportunity to cross examine the Industry Member on it.

The Hearing Panel gives little weight to the affidavit submitted. The 1998 Consent Agreement speaks for itself and the Hearing Panel does not accept new evidence about that matter which contradicts the facts that the Industry Member admitted at the time. In addition, the evidence in the affidavit has not been tested through cross examination and is of little assistance.

The Hearing Panel acknowledges that there has been a considerable gap in time between the 1996 transaction and the 2014 transaction in this case. The Hearing Panel also recognizes that there are differences between these transactions and the Industry Member's conduct, and that the Industry Member's conduct in the 1996 transaction was more serious than what occurred here. However, the Hearing Panel is concerned that there are sufficient similarities between the previous discipline and the current matter, which make the previous discipline relevant.

Considering the time gap, the Hearing Panel does not find that the Industry Member's previous character is a "strong" aggravating factor, but the similarities between the previous discipline and the fact of previous discipline make it an aggravating factor.

Number of Times the Offence was Proven

The Executive Director argued that since there were three breaches, this constituted multiple times the offence was proven and is an aggravating factor. In contrast, the Industry Member noted that all breaches related to a single transaction. The Hearing Panel agrees that the proven conduct related to a single transaction and the Executive Director did not allege or prove a pattern of conduct in other transactions. Nevertheless, there were three breaches. This factor is neither mitigating nor aggravating.

The Role of the Industry Member in Acknowledging His Conduct

The Executive Director argued that it was an aggravating factor that the Industry Member did not admit to wrongdoing or show remorse. The Industry Member argued that he had acknowledged that it was an error not to have contacted the seller in writing regarding the first failed deposit cheque.

The Hearing Panel disagrees with the Executive Director that the intent of this factor in *Jaswal* is to punish industry members for insisting on their innocence. Rather, this factor creates a mitigating circumstance where an industry member admits guilt and enters an agreed statement of facts and admission of conduct deserving sanction. In so doing, an industry member avoids the expense to RECA and the inconvenience to the witnesses of a fully contested hearing. It is appropriate to give credit to an industry member who takes responsibility in this way.

However, the corollary is not true that an industry member who proceeds to a hearing to which they are entitled should risk additional punishment because they asserted their rights. Here, the Industry Member was entitled to a full hearing and to have the Executive Director prove the allegations against him. This factor is neither mitigating nor aggravating.

Whether the Industry Member Has Suffered Other Penalty

The Industry Member argued that he has already served a 25-day suspension arising from these proceedings and that this should be considered in fashioning a sanction. In contrast, the Executive Director argued that it was not relevant since the suspension related to another allegation, which was not found to be meritorious in this hearing.

The Hearing Panel acknowledges that the Industry Member has experienced consequences arising from the unsuccessful allegations in this matter and that is a mitigating factor. At the same time, the suspension related to allegations which were not proven, and this sanction relates to different allegations.

Specific Deterrence

Specific deterrence relates to the need for the sanction to sufficiently impact the individual Industry Member to ensure that similar conduct does not occur in the

future. The Industry Member submitted that the arguments for specific deterrence, including previous discipline and failure to admit wrongdoing, are duplicative.

The Hearing Panel finds that specific deterrence is important in this matter, as it is in many cases and particularly where there is similar past misconduct. We do not find this to be an additional aggravating factor since we have already considered the Industry Member's past conduct, but acknowledge that specific deterrence is one of the goals of the sanction process, and that the sanction needs to address the conduct in a way that is meaningful to deter the Industry Member in the future.

General Deterrence

General deterrence refers to the effect of the sanction on others, including to the industry generally. Both parties conceded that general deterrence is an appropriate consideration. The Hearing Panel agrees. Again, this is not a specifically mitigating or aggravating factor, but a factor that the Hearing Panel considers relevant for the purpose of protecting the public. Other industry members need to be able to look to this decision and know that there are consequences for failing to provide competent services to clients.

The Need to Maintain the Public's Confidence in the Profession

The Hearing Panel agrees with the Executive Director that the public's confidence in the industry is compromised when an industry member does not act competently or otherwise breaches the *Act*. Although the nature and gravity of the offences here were not of the highest level of seriousness, there is still an impact on the public's confidence in the profession and the sanction here must adequately address that impact, while dealing proportionally with the Industry Member.

Similar Cases

The parties provided several precedents to illustrate sanctions in similar circumstances.

1. *Freisz* Consent Agreement, 2011

   There were two breaches of s. 41(b), failure to provide competent service, resulting in fines totaling $4,500 for both breaches. The property at issue was jointly owned by two individuals, who were separating. In the first breach, the industry member failed to confirm that there was a legal agreement between the two owners to sell the property and did not obtain a copy of such an agreement. This attracted a fine of $3,000. In the second breach, the industry member failed to indicate an expiry date on a counteroffer. This attracted a fine of $1,500.

   The Executive Director argued that the circumstances here were more serious than those in *Freisz*, with two breaches rather than three. The

Industry Member argued that since this was a consent agreement, it should be given little precedential weight.

2. *Gardner* Administrative Penalty 2013

   A fine of $1,500 was issued for a single breach of failing to put a condition date or an expiry date on a counteroffer from his client.

   The Executive Director submitted that this case was not as serious as the present circumstances and included only one breach of s. 41(b).

3. *Assef* Administrative Penalty 2018[3]

   This was a single breach of s. 41(b), which attracted a fine of $1,500. The industry member released keys to buyer clients, despite having signed a key release trust letter.

   The Executive Director submitted that this case was not as serious as the present circumstances and included only one breach of s. 41(b).

4. *Campbell* Administrative Penalty 2020[4]

   This was a single breach of s. 41(b), which attracted a fine of $1,500 for failing to take an accurate measurement of a property.

   The Executive Director submitted that this case was not as serious as the present circumstances and included only one breach of s. 41(b).

5. *Cockrell* Administrative Penalty 2016

   There were three breaches of s. 41(b) in this matter, attracting cumulative fines of $1,500. The industry member had been targeted by a person with fraudulent intent.

   The Industry Member argued that this case was similar to the current circumstances because there were multiple breaches of s. 41(d). In contrast, the Executive Director submitted that this case was not representative of typical sanctions.

The Hearing Panel agrees with the Executive Director that the breaches in *Gardner, Assef,* and *Campbell* were not as serious as the circumstances here and that they contained only one breach of s. 41(d). The Hearing Panel also agrees that the *Cockrell* case appears to be an outlier on the range of fines normally imposed. The fact that the industry member was a victim of a serious fraudulent scheme in that case may have been a mitigating factor in the fines awarded.

The Hearing Panel accepts that the *Freisz* case is of assistance. The fact that it was a consent order does not detract from its precedential value. If anything, the fact that it was a consent agreement suggests that the fines imposed might be lower than they would have been at a fully contested hearing, recognizing the

[3] *Assef (Re),* 2018 ABRECA 21
[4] *Campbell (Re),* 2020 ABRECA 110

additional mitigating factor that the industry member acknowledged his conduct. Nevertheless, the Hearing Panel finds that the first breach in *Freisz*, which attracted a fine of $3,000, was more serious than any of the breaches here.

Fines

Section 43(1)(d) authorizes the Hearing Panel to make an order requiring the Industry Member to pay fines for each finding of conduct deserving of sanction:

> 43(1) If a Hearing Panel finds that the conduct of a licensee was conduct deserving of sanction, the Hearing Panel may make any one or more of the following orders:
>
> ...
>
> (d) an order requiring the licensee to pay to the Council a fine, not exceeding $25 000, for each finding of conduct deserving of sanction;

As outlined above, the Executive Director asked for fines in the amount of $7,500, which represents $2,500 per breach. The Industry Member submitted that no fines are necessary. We agree with the Executive Director that it is appropriate to issue fines for each breach of the *Act*. However, the requested amounts were not proportionate to the Industry Member's conduct.

Taking into consideration all the factors above, including the nature and gravity of the offences, the Hearing Panel finds that the following fines are appropriate in this matter:

First breach (deposit cheque):	$2,000
Second breach (Consumer Relationships Guide):	$1,500
Third breach (records or communication in writing):	$2,500
TOTAL:	**$6,000**

These amounts reflect the Hearing Panel's view of the relative seriousness of each substantiated allegation and the mitigating circumstances present in this case.

Costs

Section 43(2) of the *Act* authorizes the Hearing Panel to make an award of costs:

> (2) The Hearing Panel may, in addition to or instead of dealing with the conduct of a licensee under subsection (1), order the licensee to pay all or part of the costs associated with the investigation and hearing determined in accordance with the bylaws.

Section 28(1) of the *Bylaws* addresses recovery of costs, and how costs are to be determined on a recovery basis:

> 28(1) Where a complainant is ordered to pay costs under section 40(4) of the Act, a licensee is ordered to pay costs under section 43(2) of the Act, or a licensee or the Council is ordered to pay costs under section 43(2.1) or costs are awarded pursuant to section 50(5) of the Act, the costs payable shall be determined in accordance with the following:
>
> (a) Investigation costs
>
> (i) investigators' costs at a minimum of $40 per hour to maximum of $80 per hour;
>
> (ii) general investigation costs including but not limited to disbursements, expert reports and travel costs in accordance with Council policy guidelines;
>
> (iii) transcript production including but not limited to interview transcripts;
>
> (iv) legal costs not to exceed $250 per hour; and
>
> (v) other miscellaneous costs.
>
> (b) Hearing and appeal costs
>
> (i) investigators' costs at a minimum of $40 per hour to a maximum of $80 per hour;
>
> (ii) general hearing and appeal costs including but not limited to disbursements, process service charges, conduct money, expert reports, travel expenses including but not limited to witnesses and Council representatives in accordance with Council policy guidelines, expert witness fees to a maximum of $1,000 per diem;
>
> (iii) transcript production;
>
> (iv) hearing or appeal administration costs including but not limited to location rental, hearing secretary salary to a maximum of $15 per hour, honoraria of Hearing Panel members;
>
> (v) legal costs not to exceed $250 per hour;
>
> (vi) adjournment costs; and
>
> (vii) other miscellaneous costs.

Section 28(3) of the *Bylaws* provides the Hearing Panel with a Guide on Costs, of which the relevant portions include:

Subject to a Hearing Panel's discretion, the following Guide to Costs may apply:

Item	Column 2
Total fine or penalty	$5,000 - $9,999
Costs for fully Contested Hearing, including Administrative Penalty Appeal	$0 - $2,500

Section 28(4) of the Bylaws provides factors that the Hearing Panel may consider in determining an order for costs:

> The following factors may be considered by a Hearing Panel in determining any cost order:
>
> (a) the degree of cooperation by the licensee;
> (b) the result of the matter and degree of success;
> (c) the importance of the issues;
> (d) the complexity of the issues;
> (e) the necessity of incurring the expenses;
> (f) the reasonable anticipation of the case outcome;
> (g) the reasonable anticipation for the need to incur the expense;
> (h) the financial circumstances of the licensee and any financial impact experienced to date by the licensee; and
> (i) any other matter related to an order reasonable and proper costs as determined appropriate by the Hearing Panel.

The Executive Director asked for costs in the amount of $7,929. The Executive Director's case presenter provided a table of estimated actual costs of the investigation and hearing, including the estimated low end and high end of the actual costs. The amount requested was calculated based on 60% of the low end of the Executive Director's estimate of actual costs. The Executive Director acknowledged that s. 28(3) of the Bylaws recommends costs up to $2,500 where the fine is between $5,000 and $9,999. However, the Executive Director noted that the Hearing Panel has discretion to determine the amount of a costs order.

In addition, the Executive Director argued that in most fully contested hearings, Hearing Panels have ordered costs more than the amounts outlined in s. 28(3) of the *Bylaws*. It referred to *Paranych* Hearing Panel decision April 2017,[5] *Macrae* Hearing Panel decision September 2013, and *Fung* Hearing Panel decision September 2013.

[5] *Paranych (RE),* 2017 CanLII 147872 (AB RECA)

The Industry Member, on the other hand, argued that the Hearing Panel should restrict itself to the amount recommended in s. 28(3) of the Bylaws, and that we should further reduce that amount to $1,000, if any, to account for the mixed success in the result, including dismissal of the most serious allegation.

The Industry Member argued that the Executive Director had not proven the amounts in its costs estimate, noting that they were estimates and there was no documentation to verify the hours worked. The Executive Director's case presenter replied that he used conservative figures and that the real costs were likely much higher than the estimates. Further, he noted that no costs had been included for written submissions.

The Hearing Panel accepts the Executive Director's estimates of the costs in this case. The estimates include detailed summaries of the actual time spent. For example, the case presenter recorded 73.15 hours in this matter. The Executive Director's cost estimate appears to be prepared in accordance with the cost recovery approach described in s. 28(1) of the *Bylaws*. For example, the low end of the range estimates investigator costs at $40 per hour and the high end estimated investigator costs at $80 per hour. Similarly, legal fees were estimated at $100 per hour at the low end of the range and at $250 per hour on the high end.

The *Bylaws* give the Hearing Panel discretion to order costs and in what amount. In the circumstances here, the Hearing Panel finds it appropriate to fashion a costs award in accordance with the recovery model proposed in s. 28(1) of the *Bylaws* and based on the Executive Director's cost estimates. The Hearing Panel considers the relevant factors under s. 28(4) below.

Degree of Cooperation

The Industry Member argued that he had fully cooperated throughout a long process, including a previous hearing that was overturned on appeal. The Hearing Panel accepts that this is the case.

Result of the Matter and Degree of Success

There was mixed success in this hearing. The Hearing Panel found that the Industry Member had engaged in conduct deserving of sanction on three issues of competence but dismissed the most serious allegation of breach of fiduciary duties. This factor favours the Industry Member and a reduction in the costs award.

Importance of the Issues

The Industry Member argued that there was no proof of harm to public confidence in or the reputation of the industry. The Hearing Panel agrees with the Executive Director that specific proof harm to the industry's reputation is not required. Every time there is a breach of the *Act*, this affects the reputation of the industry. These were important issues, even if not the most serious instances of fraud or deceit. In light of the relative seriousness of the allegations that were

proven, this factor does not influence the costs decision in favour of any side.

Complexity of the Issues

The Industry Member argued that this was not a complex matter. The Hearing Panel agrees that this was not the most complex of matters, but it was a difficult hearing with significant dispute on the facts and long cross examinations. This factor does not influence the costs decision in favour of any side.

Necessity of Incurring the Expenses

The Hearing Panel accepts the Executive Director's submissions that the cost estimates reflect conservative estimates for only expenses that were reasonably necessary. The Hearing Panel did not observe any conduct by the Executive Director that unduly prolonged the hearing to suggest that any of the expenses were not reasonably incurred. This factor weighs in favour of a cost recovery approach.

Reasonable Anticipation of Outcome

The parties agreed that this matter was not appropriate for an agreed statement of facts. There was no clear anticipation of outcome, and the hearing was necessary to hear and weigh evidence, including credibility. This factor does not influence the costs decision in favour of any side.

Financial Circumstances of the Industry Member

The Industry Member submitted that he had lost $60,000 in commissions during his suspension after the first hearing. The Executive Director argued that no evidence was given to substantiate this amount. The Hearing Panel accepts that there was likely financial impact on the Industry Member during his 25-day suspension. However, we do not give much weight to the uncorroborated assertion of a $60,000 loss. This factor does not influence the costs decision in favour of any side.

Any Other Matter Related to Costs

The Executive Director submitted that the nature of the third proven allegation, failure to keep records or to advise the seller in writing of the failed deposit, is relevant to a costs order. If he had taken these steps, the contested hearing on the dismissed allegation, breach of fiduciary duty, would have been unnecessary. The Hearing Panel agrees and finds that this factor weighs in favour of a costs recovery approach.

Conclusion on Costs

The Executive Director requested 60% of the low end of its cost estimate. The Hearing Panel finds that this amount is too high considering the mixed success in the hearing. We award 50% of the low end of the Executive Director's cost estimate. The low end of the Executive Director's costs was $13,215.00. Half of this amount is $6,607.50.

Coursework

The Executive Director requested that the Industry Member complete coursework described as unit five of the Fundamentals of Real Estate Course on consumer relationships.

The Hearing Panel agrees that unit five of the Fundamentals of Real Estate Course on consumer relationships is rationally connected to the proven allegations and that this is an appropriate part of the sanction to educate the Industry Member and protect the public going forward.

D. Conclusion

The Hearing Panel makes the following orders under s. 43 of the *Act*:

(a) the Industry Member shall pay to the Real Estate Council of Alberta a fine of $6,000, representing:

  (i) $2,000 for the first breach of s. 41(b) of the *Real Estate Act Rules*;

  (ii) $1,500 for the second breach of s. 41(b) of the *Real Estate Act Rules*;

  (iii) $2,500 for the third breach of s. 41(b) of the *Real Estate Act Rules*; and

(b) the Industry Member shall pay to the Real Estate Council of Alberta costs associated with the investigation and hearing in the amount of $6,607.50;

(c) within six months of this decision, the Industry Member shall successfully complete unit five of the Fundamentals of Real Estate Course on consumer relationships.

The Hearing Panel retains jurisdiction to deal with any issues in implementing the award.

This decision is certified and dated at the City of Edmonton in the Province of Alberta, this 25th day of February, 2021.

"Signature"

[K.O], Hearing Chair

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF Section 39(1)(b)(i) and s.41 of the *REAL ESTATE ACT*, R.S.A. 2000, c.R-5 (the "Act")

AND IN THE MATTER OF a Hearing regarding the conduct of GORDON WESLEY PETHICK, Registered at all material times hereto with BGB REALTY INC. O/A RE/MAX REALTY PROFESSIONALS

Hearing Panel Members:	[K.O], Chair [G.P] [G.R]
Appearances:	Andrew Bone, for the Executive Director of the Real Estate Council of Alberta Steven Robertson, for Gordon Wesley Pethick
Hearing Date(s):	October 22, 23, 2020 via virtual hearing with the Hearing Panel located in Edmonton, Alberta, submissions on sanction and new evidence provided in writing

ADDENDUM TO THE DECISIONON SANCTION AND COSTS

A. Introduction

This Addendum addresses new evidence submitted after the release of the Hearing Panel's Decision on Sanction and Costs.

The Industry Member's written submissions on sanction and costs included an affidavit sworn by the Industry Member. The Executive Director objected to the inclusion of the affidavit because the affidavit evidence:

- [was] provided approximately 20 years after the events;
- Change[d] the nature of the 1998 Consent Agreement and in some cases contradict it; and
- was provided improperly to the Hearing Panel without the ED able to cross examine on the evidence for the purpose of this hearing

The Hearing Panel did not give much weight to the affidavit evidence, observing in the Decision on Sanction and Costs:

> The Hearing Panel gives little weight to the affidavit submitted. The 1998 Consent Agreement speaks for itself and the Hearing Panel does not accept new evidence about that matter which contradicts the facts that the Industry Member admitted at the time. In addition, the evidence in the affidavit has not been tested through cross examination and is of little assistance.

The Hearing Panel retained jurisdiction to deal with any issues in implementing the award in the Decision on Sanction and Costs.

B. Parties' Submissions on New Evidence

After the release of the Decision on Sanction and Costs, the Industry Member submitted a partial transcript of a cross examination on the affidavit. This transcript appears to relate to a cross examination that occurred during the appeal of the Industry Member's first hearing. Since this was a *de novo* hearing, it was not before this Hearing Panel. The Industry Member did not expressly apply for reconsideration or consideration of new evidence but submitted as follows:

> I also attach a copy of the transcript of Mr. Pethick's cross-examination on the affidavit provided in support of the submissions on costs, for which Mr. Bone was present. I would ask that this be brought to the attention of the hearing panel.

The Executive Director responded to the Industry Member's submissions arguing that cross examination for an appeal is different than cross examination for a hearing. The case presenter for the Executive Director denied that his previous submissions on the affidavit were misleading or incomplete and noted that he had referred to cross examination "for the purposes of this hearing".

C. Decision on New Evidence

The Real Estate Council of Alberta (RECA) has published Hearing and Appeal Practice and Procedure Guidelines (the Guidelines). Part 13 section G of the Guidelines addresses the finality of decisions once issued:

> Once a hearing panel has made its decision, the decision is final. A hearing panel may only rehear or reconsider a decision when:
>
> (a) it is necessary to correct a clerical error, an accidental error or omission, or an ambiguity in the decision
>
> (b) the decision mandated by statute has not yet been made, the decision made is void or voidable for lack of jurisdiction (including breaches of the principles of natural justice or fairness), or an issue remains outstanding

(c) the decision in question was obtained by fraud, mental disability, or some other circumstance which calls the decision's integrity into question

This section of the Guidelines accords with the common law principle of *functus officio.* The Supreme Court of Canada provided direction on this doctrine in *Chandler v Assn. of Architects (Alberta):*[1]

> As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances.

The doctrine of *functus officio* exists to ensure finality in the decision-making process and prevents decision makers from reconsidering final decisions, except to clarify or to address issues in the implementation of the award. Once a final decision is issued, there is no authority for a decision maker to revisit its findings and change substantive rights or obligations awarded in its final decision.

In this case, none of the circumstances described in the Guidelines is present. The Decision on Sanction and Costs was final and based on the evidence before the Hearing Panel at the time of issuing the award. The Hearing Panel declines to reconsider its Decision on Sanction and Costs.

This decision is certified and dated at the City of Edmonton in the Province of Alberta, this 3rd day of March 2021.

"Signature"

[K.O], Hearing Chair

[1] *Chandler v Alberta Association of Architects,* 1989 CanlI 41 (SCC), [1989] 2 SCR 848, at para 20