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| Case Number: | 007466.002 |
| Name on License: | Farouk Mohamed |
| License Sector and Class: | Real Estate Associate Broker |
| Current Brokerage: | R&D Realty, operating as Maxwell Canyon Creek |
| Conduct Brokerage: | Real Estate Professionals Inc. |
| Process: | An Appeal under Part 3 of the *Real Estate Act* |
| Panel Members: | [G.F] (Chairperson)<br>[A.S]<br>[B.W] |

Counsel for the Licensee: Mr. Todd M. Lee
Counsel for the Registrar: Ms. Gen Zha

## DECISION ON LICENSEE'S APPEAL HEARD MARCH 27, 2024

Background:

This is an appeal pursuant to the *Real Estate Act,* RSA 2000 c R-5 ("the *Act*"), section 48. On August 14, 2017, a complaint was filed against Mr. Farouk Mohamed, the Licensee. RECA investigated the complaint and on December 3, 2021, RECA issued a Notice of Hearing relating to alleged breaches of the *Real Estate Act* (the *"Act"*) s. 17(a) and the *Act's* Rules 53(a) and 53(d).

On April 11, 2022, and April 12, 2022, Phase 1 of the hearing occurred. The Licensee was self-represented at the Phase 1 hearing. RECA appeared with legal counsel at the Phase 1 hearing. on September 1, 2022, a decision finding the Licensee had engaged in conduct deserving of sanction was issued by the Phase 1 hearing panel. The Phase 1 hearing panel found that the Licensee breached s.17(a) of the *Act,* s.53(a) and s.53(d) of the *Act's* Rules.

On February 7, 8 and 9, 2023, Phase 2 of the hearing occurred. The Licensee was self-represented at the Phase 2 hearing. RECA appeared with legal counsel. On February 23, 2023, the Phase 2 decision on sanction was issued, and on May 15, 2023, the Phase 2 decision on costs was issued.

On May 17, 2023, a Notice of Intent to Appeal the Phase 1 and the Phase 2 decisions was filed by the Licensee. On March 27, 2024, a full day hearing of the appeal occurred.

The Licensee's Position on Appeal:

Breach of the principles of natural justice:

1. The Licensee argues that the Phase 1 hearing was procedurally unfair because the chairperson (the "Chairperson") coerced the Licensee to the extent that the Licensee did not voluntarily decide to: 1) curtail his cross-examination of the Registrar's witnesses; and 2) forego his right to lead evidence in response to the Registrar's case. The Licensee argues that the Chairperson refused to allow the Licensee to lead any evidence during the Phase 1 hearing.

   In support of this first argument relating to the principles of natural justice, the Licensee submits that:

   a) The hearing panel Chairperson interrupted and/or curtailed the Licensee's cross-examination of the Registrar's Witness P, on the basis that the questions put to Witness P related to Phase 2 of the hearing, not Phase 1.
   b) The Licensee informed the hearing panel Chairperson that his questions related to the issues of delay and unfairness during RECA's investigation of the complaint.
   c) The Chairperson interrupted and/or curtailed the Licensee's cross-examination of the Registrar's witnesses.
   d) Prior to the Registrar closing its case, and during the Licensee's cross-examination of Witness P, the Chairperson asked the Licensee what conduct he was willing to admit in relation to the allegations in the Notice of Hearing. The Licensee made admissions of fact and of conduct deserving of sanction relating to s.53(a) and s.53(d) of the *Act.* The Licensee denied breaching s.17 of the *Act*.
   e) After the Licensee admitted to breaches of s.53(a) and s.53(d), the Chairperson asked the Licensee if he wanted to continue his cross-examination of Witness P, then cross-examine two witnesses called by the Registrar or proceed to closing argument. The Licensee "did not know what to say". The Chairperson asked the Licensee if, based on his admissions, it was necessary to call evidence. The Chairperson asked the Licensee how he wanted to proceed. The Licensee responded that "I want you to hear my side of the story" and "it's really important that you hear from me". The Chairperson informed the Licensee that the panel will not deal with issues relating to mitigation/sanction, delay and procedural matters upon which the Licensee wanted to examine Witness P.
   f) The Chairperson stated "…I'm disappointed that we don't have an agreement."

g) The Chairperson asked the Licensee about further evidence he wished to call in light of his admissions, and whether the Licensee wanted to cross-examine the Complainant, who had yet to be called as a witness. The Chairperson stated "... I am really at a loss as to where we are going right now". The Licensee responded, "I am at more of a loss".
h) The Licensee informed the Chairperson that he wanted to cross-examine Witness P, the Complainant and Witness S "... for the purpose of mitigate side of it so that you guys hear the entire story ..."
i) The Chairperson asked the Licensee about further evidence to be called at Phase 1, to which the Licensee responded "No, this is just for Phase 1, right?". The Chairperson then indicated the Phase 1 hearing will move to argument with no further evidence being called. The Chairperson asked the Licensee if he agreed; and the Licensee responded, "I am not sure". The Licensee was not prepared to make argument, but he agreed to proceed on the understanding that he could cross- examine Witnesses P and L during Phase 2 (sanction). The Chairperson confirmed that if he is found to have committed conduct deserving of sanction, the Licensee would have the opportunity to cross examine witnesses, or call evidence, during Phase 2. The parties then made their legal arguments and the Phase 1 hearing concluded.

2. The Licensee argues that the Phase 2 hearing was procedurally unfair because the Chairperson changed the hearing procedure after the hearing commenced, by ruling that the Registrar shall call Witness P, the Complainant and Witness S, and by doing so, denied the Licensee the opportunity to lead evidence by calling these witnesses.

   In support of this second argument relating to the principles of natural justice, the Licensee submits that:

   a) Both the Chairperson and the Registrar's counsel were different individuals than appeared at Phase 1.
   b) At the start of the Phase 2 hearing, the Licensee was to call witnesses; however, the Chairperson ruled that the Registrar would call Witness P, the Complainant and Witness S, and the Licensee would cross-examine them.
   c) The Registrar's counsel's opening statement was that the anticipated evidence will show that the Licensee suffered no prejudice due to the investigation, his License suspension or during the Phase 1 hearing process; therefore, there is no basis to mitigate the proposed sanction of $15,000 to $20,000.

d) The Registrar's counsel made an opening statement, entered exhibits from Phase 1, and closed the Registrar's case.
e) The Licensee made an opening statement. Before he called Witness P, the Complainant and Witness S, the Chairperson ruled, and repeated, that the Licensee may only lead evidence relating to sanction, and not relating to conduct.
f) When the Licensee started to question Witness P, a procedural discussion occurred that resulted in the Chairperson directing the Registrar's counsel to call Witness P, the Complainant and Witness S; and the Licensee would cross-examine these witnesses.
g) The Registrar conducted its examination in chief of Witness P, after which the Licensee cross-examined Witness P about a deadline set during the investigation and the suspension of his license.
h) Without objection by the Registrar to the Licensee's questions of Witness P, the Chairperson directed the Licensee that he could not ask any questions that relate to "an audit" of the investigative process. This direction was given a second time. The Licensee was informed that his questions regarding the investigative process were not relevant.
i) During the Phase 2 hearing, the Chairperson ruled, and affirmed four times, that the Licensee's suspension of his license from January 4, 2018, to February 16, 2018, was not relevant to sanction.
j) Witness P responded to one of the Licensee's questions by confirming that RECA did nothing in relation to the complaint against him for three years.
k) The Licensee informed the Chairperson that he intended to make legal arguments relating to the investigative delay; but was denied by the Chairperson on the ground that the argument should have been made in Phase 1 (the opposite of what the Phase 1 hearing determined, in the Licensee's view). The Registrar's counsel informed the Chairperson that delay is relevant to sanction.
l) The Chairperson invited submissions from the parties on the issue of whether a stay of proceedings should be granted due to the delay between the August 2017 date of the complaint and the start of the April 2022 hearing.
m) The Licensee and the Registrar made submissions relating to a stay, on the basis of delay; but the Licensee did not led evidence relating to prejudice arising from the delay.
n) The Registrar's submission on the stay issue pointed out that there was no evidence relating to prejudice to the Licensee, as a result of the delay. Therefore, the Licensee's application for a stay was dismissed.

o) The balance of the Phase 2 hearing consisted of the Registrar's examination of Witness L and Witness S, with the Licensee cross-examining each witness and ultimately confirming he had no further evidence.
p) At the close of the Phase 2 hearing, the Licensee had never been sworn as a witness, to give evidence.
q) The administrative penalties set out in RECA's by-laws do not apply, and have no precedential value, to sanctions imposed at a Phase 2 hearing.

The Licensee makes the following additional arguments:

3. The hearing panel erred in law by dismissing the Licensee's application to grant a stay of proceedings, or dismiss the complaint, on the basis that there was inordinate delay, and as a result, the Licensee was prejudiced due to the Registrar's failure to commence these proceedings between August 14, 2017, the date of the complaint, and December 3, 2021, the date the Notice of Hearing was issued.

4. The hearing panel erred in law when it found that the Licensee's conduct breached s.17(a) of the *Act* when the same conduct was the basis for the breach of s.53(a) of the *Act 's* Rules.

5. The hearing panel erred in law when it ordered sanctions by relying on the administrative penalties as precedents; or the sanctions were disproportionate and excessive to the facts of this case.

6. The hearing panel erred in law by ordering costs against the Licensee in the absence of compelling reasons.

7. The hearing panel erred in law by not dismissing a proceeding against the Licensee, when the *Act* provides that "A prosecution under this *Act* may be commenced within 3 years after the date on which the offence is alleged to have been committed, but not after that date. In this case, the prosecution was commenced after 3 years from the date the offence was alleged to have been committed.

8. The hearing panel erred in law when it failed to dismiss the complaint, on the ground that a person cannot be convicted for the same offence multiple times (the "*Kienapple*" principle). In this case, the Licensee is alleged to have breached

s.17(a) of the *Act* and s.53(a) of the *Act's* Rules. The basis for each alleged breach arises from the same factual nexus and the same legal nexus. Therefore, the more general of the two allegations (section 17(a)) should have been quashed by the Hearing Panel and only the s.53(a) allegation should have been heard at Phase 1.

9. The Orders on sanction from Phase 1 and from Phase 2 should be stayed in relation to count 1 (s.17(a)) and the Orders on sanction and costs relating to s. 53(a) and s. 53(d) quashed due to the Hearing Panel of Phase 2 not adhering to the *Jaswal*[1] factors or the Jinnah[2] principles that established a default rule that no costs are awarded unless there are compelling reasons; and due to inordinate delay. In addition, the suggestion that the Licensee's actions of exercising his right to a full hearing amounts to misconduct is an error of law, without justification. In other words, that the hearing panel erred by ordering costs against the Licensee, and those costs were disproportionate and excessive sanctions.

The Registrar's Position on Appeal:

1. The Licensee did not raise the *Kienapple* principle at the hearing, therefore no ruling was made on this point.
2. New issues cannot be argued on appeal; therefore, leave is required from this appeal panel before a new issue can be raised.
3. The Licensee's application to waive the costs to prepare the record was dismissed.
4. The Licensee provided his written submissions in support of his appeal, and they were received by the Registrar, on December 12, 2023.

The Registrar submits that:

a) At the start of Phase 1, the Registrar's counsel raised a preliminary matter whether the Licensee intended to make an application to quash due to delay; and the Registrar's counsel pointed out that the Licensee must make an application to bring up the subject of "delay". The Licensee confirmed that he will only raise the issue of delay in the context of sanction and penalty (i.e. Phase 2).
b) The Licensee did not exercise his right to appeal RECA's decision to suspend his license during the investigative process, therefore the hearing panel has no jurisdiction to decide this question; it is *ultra vires.*

[1] *Jaswal v Newfoundland (Medical Board)* 1996 Carswell Nfld 32 (Nfld T.D.)
[2] *Jinnah v Alberta Dental Association and College* 2022 Carswell Alta 2836 (Alta C.A.)

c) During the Phase 1 hearing, the Licensee confirmed that he wanted to ask questions relating to factors that may be considered as mitigating, when that panel makes decisions relating to sanction.
d) The Licensee admitted that he acted outside the scope of his brokerage in managing properties, but he has authorization from RECA to do so. He denied breaching s.17(a) of the Act.
e) The Chairperson gave the Licensee opportunity to clarify if his questions to Witness P, and other witnesses, related to sanction as opposed to the breaches alleged in the Notice of Hearing.
f) The Phase 1 hearing panel chair informed the Licensee about the 2 phases of the hearing process; and that if he has questions for witnesses relating to sanction, those questions must be put forward in Phase 2; and only after a finding of breach in Phase 1.
g) The Chairperson of Phase 1 was clear in informing the Licensee of the distinctions between the two phases of the hearing, and the nature of questions to be posed in each phase. For example, the Chairperson informed the Licensee that mitigating evidence goes to sanction rather than whether the alleged breach of conduct was proven.
h) The issue of whether the suspension was lawful was moot, because it was not raised during the proper appeal period.
i) The Licensee stated on the record that he admits to the acts set out in the Notice of Hearing (property management outside his brokerage), but he did not agree the facts equate to a breach of s.17 of the *Act*.
j) During Phase 1, the parties engaged in a "without prejudice" discussion; after which the Licensee stated which facts he agreed were correct, as read from the Notice of Hearing by the Chairperson. The Licensee admitted to breaching s.53(a) and s.53(d) of the *Act*.
k) After hearing the Licensee's admissions, the Phase 1 Chairperson identified that the outstanding issue was whether the Licensee breached s.17(a) of the *Act*; and the Chairperson asked if either of the parties intend to call more evidence.
l) The Chairperson informed the Licensee he is entitled to continue his cross-examination of Witness P and call other witnesses. The Chairperson clarified that the only issue is whether the Licensee was entitled, pursuant to his license, to engage in property management duties; and the issue of mitigation was only relevant to Phase 2.
m) The Licensee raised, during Phase 1, his desire to lead evidence related to the RECA investigation, the fairness of the process, and the legitimacy of the

suspension of his license because these factors were relevant to sanction and penalties.

n) The Chairperson informed the Licensee that the foregoing are Phase 2 issues.
o) The Chairperson confirmed the Licensee has a right for the Phase 1 hearing to proceed, in light of the Licensee admitting to facts, but not to the legal consequences of those facts.
p) The Chairperson made it clear that the Licensee is in control of how he presents his case, not the Chairperson.
q) The Chairperson gave the Licensee opportunity to call further evidence in Phase 1; and in response the Licensee made it clear he wanted to cross-examine in relation to sanction. The Chairperson made it clear that cross-examination in relation to sanction occurs in Phase 2.
r) Prior to making closing arguments, the Licensee confirmed he has no further evidence to call in Phase 1; and he confirmed that his questions on cross-examination relate to mitigation of sanction i.e. Phase 2.
s) Prior to concluding Phase 1, the Licensee was given the opportunity to apply for a stay of proceedings on the basis of delay. The License declined to make a stay application, and by doing so affirmed the Chairperson's understanding that any delay application related to sanction and mitigation.
t) The Phase 1 finding that the Licensee engaged in conduct deserving of sanction was based on extensive evidence.

And regarding Phase 2, the Registrar submits that:

a) The Chairperson determined that the Licensee's interests were best preserved by the Registrar's counsel conducting examination in chief, and the Licensee cross-examining, the Complainant, Witness P and Witness S; and the Licensee did so.
b) After the examination and cross examination of Witness P, the Licensee applied to stay the proceedings due to the three-year delay and the operation of the *Act*, Part 6, s. 81(4) that requires a prosecution be commenced within 3 years of the date of the alleged offence. After being asked if he wanted to continue to examine witnesses or have the stay application heard, the Licensee confirmed he wanted to proceed with the stay application. He also argued that no sanction should be imposed, due to the prosecution of this case outside the three-year limitation period set out in s.81(4).
c) The Registrar's counsel opposed the application on the basis that there was no inordinate delay, no significant prejudice to the Licensee and the *Act,* Part 6, s.81(4) is under the purview of the *Provincial Offences Procedure Act*, not these proceedings under the *Act*, Part 3. The hearing panel denied the stay application.

d) After the Complainant gave evidence, the Licensee requested the panel consider reopening his stay application. The Registrar objected on the grounds that submissions were heard, and a final decision had been made. Both parties made submissions and the hearing panel denied the Licensee's application to re-open his stay application.
e) After 3 witnesses gave testimony, the Licensee closed his case.
f) Closing arguments were heard and the Phase 2 decision was issued on February 23, 2023.
g) The parties were invited to provide submissions regarding costs; and on May 15, 2023, a decision on costs was issued.

The Standard of Review

This appeal panel requested and received oral submissions from the parties regarding the standard of review concerning the issues in this case. The Registrar argues that the standard of review is one of reasonableness for all issues, including procedural fairness, as set out in the *Act,* s. 42.

Section 42 is titled "Rules re Hearing". For example:

> s.42(a) the Hearing Panel shall receive evidence that is relevant to the matter being heard, and the licensee who is the subject of the hearing shall
>
> i) be given a reasonable opportunity to provide relevant evidence;
>
> ii) be informed of the facts before the Hearing Panel or the allegations made to it respecting the conduct of that person in sufficient detail
>
> (A) to permit a reasonable understanding of the facts or allegations, and
> (B) to afford a reasonable opportunity to provide relevant evidence to contract or explain the facts or allegations
>
> and
>
> iii) be provided with copies of all documents, records or other evidence that were considered at the investigation and that relate to the same conduct that is to be the subject-matter of the hearing before the Hearing Panel;

In addition to the expectations set out in Section 42(a), Sections 42(b) to and including 42(k) outline additional hearing rules, such as the Licensee's right to give evidence and

to cross-examine witnesses, the power of the Hearing Panel to compel witnesses to attend and give evidence, the compellability of the Licensee, a witness's duty to answer questions, contempt of court proceedings against a witness, the right to legal counsel, the recording of evidence, the applicability of the laws of evidence and the application of the Alberta Rules of Court.

Although the word "reasonableness" appears in s.42(a) three times, no where in s.42(a) to and including s.42(k) does the Legislature set out any language, nor does it infer, that the standard of correctness required for procedural fairness is overruled. If such a statement was intended by the Legislature, it would need to be more explicitly and strongly stated in Section 42, or elsewhere in the *Act,* which it is not. Therefore, this appeal panel disagrees with the Registrar's submission that s.42 creates a "reasonableness" standard when assessing whether the Phase 1 and Phase 2 hearings were procedurally fair.

Procedural fairness is a fundamental aspect of administrative hearings. Procedural decisions made by a hearing panel must be reviewed on a standard of correctness. Therefore, this appeal panel must determine if the Phase 1 and the Phase 2 hearing processes satisfied the requirements of procedural fairness. In its deliberations, the only standard of review applied by this appeal panel to questions of procedural fairness was one of correctness.

This appeal panel accepts that the burden of proof is on the Licensee, to demonstrate that by applying a correctness standard, either the Phase 1 hearing, the Phase 2 hearing, or both Phases of the hearing of this complaint were so procedurally unfair that a breach of the principles of natural justice occurred.

Analysis & Findings

Procedural Fairness: Phase 1

This appeal panel finds that any procedural shortcomings or flaws that occurred during the Phase 1 hearing were not sufficiently central and significant to render the process procedurally unfair to the extent that the Phase 1 hearing process breached the Licensee's right to a fair hearing and the principles of natural justice.

The Chairperson's directions during Phase 1 may have unsettled the Licensee, but they did not restrict his capacity to understand, and act upon, the opportunity provided by the Phase 1 hearing Chairperson, to present evidence relating to the conduct of the investigation during Phase 1; nor did the Chairperson's directions interfere with, or disrupt, the Licensee's capacity to consider his legal interests before he made crucial admissions. The Record demonstrates that after taking a break, the Licensee freely

admitted to the factual elements required to prove that the Licensee breached s.53(a) and s.53(d).

At this point during the Phase 1 hearing, the Registrar's counsel could, and possibly should, have requested an adjournment to prepare an Agreed Statement of Facts for the Licensee's signature. If the Phase 1 hearing panel accepted the Agreement Statement of Facts and found it constituted conduct deserving of sanction, the only remaining issue would be the appropriate sanction and costs.

Prior to the hearing of this appeal, the Licensee opted to self-represent at Phase 1 and Phase 2. His right to proceed without legal counsel was exercised at his risk. His decision to proceed without legal counsel was made before the hearing commenced. But for his decision to self-represent, the Licensee might not have made any admissions; or if he made admissions and was represented by legal counsel, his lawyer would have likely required those admissions be reduced to writing, and signed by the Licensee, as required by the Guidelines, to ensure that the Licensee understood the legal implications of his admissions. The Licensee's decisions to self-represent and volunteer factual admissions were made freely and fairly. His decision to make certain admissions occurred outside the Phase 1 hearing room, and apart from the Chairperson's presence. The Licensee's factual admissions were communicated to the Phase 1 hearing panel upon the parties returning to the hearing room.

Even though the Licensee's admissions were made orally to the Phase 1 hearing panel, this appeal panel finds that the Licensee's admissions were made voluntarily and not as a result of any unfairness, irregularities, or coercive comments by the Chairperson during the Phase 1 hearing process.

The hearing procedure that culminated with the Licensee's admissions was not, in this appeal panel's opinion, so compromised by the Chair's directions and comments, that the Licensee was denied procedural fairness protections such as, but not limited to: his right to counsel, adequate time to reflect upon his course of action, the ability to know and respond to the allegations or the exertion of pressure from the Chairperson to make admissions.

This appeal panel finds that the hearing procedure for Phase 1 was, despite its shortcomings, according to the standard of correctness, fair to the Licensee. Having made those factual admissions as part of a fair hearing process, it was neither unreasonable nor incorrect that the Phase 1 hearing panel concluded that the Licensee breached s.53(a), s.53(d) and s.17(a). The Licensee has not challenged those findings, apart from his *Kienapple* argument, as discussed below.

Procedural Fairness Phase 2

This appeal panel finds that the shortcomings or flaws that occurred during the Phase 2 hearing were sufficiently central and significant that according to the standard of correctness, the hearing was unfair and a breach of the principles of natural justice. At the Phase 1 hearing, the Licensee was directed to wait to provide evidence relating to mitigation at the Phase 2 hearing relating to sanction.

The Phase 1 Chairperson's directions would reasonably lead a litigant, and particularly a self-represented litigant, to believe that at the Phase 2 hearing, questions could be put to witnesses, regarding the investigative process, delays relating to the process the suspension of his license insofar as it may affect sanction and prejudice that the Licensee suffered as a result of these factors.

The record from the Phase 2 hearing is clear that the Licensee was not sworn to give evidence. The record is also clear that from the outset, both the Licensee, and the Registrar's counsel, were faced with uncertainty, multiple process disruptions, and conflicting procedural directions, regarding which party would call witnesses, lead evidence in chief, and cross-examine witnesses. The confusion and procedural impact created by the procedural changes and disruptions that occurred during Phase 2 would be difficult for a lawyer, let alone a self-represented Licensee, to grasp.

This appeal panel is not prepared to find that the Licensee engaged in a strategy to avoid cross-examination, by not asking to be sworn as a witness. To the contrary, the Licensee was consistent in trying to put his story to the panel. Self-represented litigants would likely rely upon the Guidelines, and ultimately the Chairperson, to indicate when they should give evidence. In this case, the record demonstrates that the Licensee repeatedly heard, at both hearing phases, that the timing for him to give evidence was wrong.

The Registrar is correct that the Licensee had an opportunity to present his case at both Phases of the process. However, the record is clear that process, and when that opportunity was available, was confusing to the Licensee. It is reasonable to conclude that the Licensee was frustrated, inhibited and constrained in his ability to fully present the evidence he reasonably expected to present during Phase 2, regarding the handling of the investigative process, the fairness and impact of RECA suspending his license, the delay that resulted and its impact and prejudicial effect upon the Licensee; all of which may be relevant to sanction.

The Registrar's submission that the change of witness questioning process mid-way through Phase 2 was to the Licensee's benefit is not accepted by this appeal panel. Parties prepare with the expectation that a particular procedure will be in place during a hearing. To change that procedure mid-way is not only unsettling, it can prejudice a

party's capacity to continue with the remainder of the hearing, and in this case, properly question witnesses.

The record shows that the Licensee, and the Registrar, were taken off guard when the witness questioning process was changed without notice and contrary to RECA's hearing practice guidelines[3]. Both parties expected to adhere to a known procedural sequence of events; and both were denied that sequence of events.

The record indicates that the Licensee was denied the opportunity in both Phase 1, and Phase 2, to present his evidence relating to the investigative process including delay, the imposition of a license suspension, and the impact of same so far as those factors relate to mitigation and sanction. The Registrar's submission at Page 8, Paragraph 94 acknowledges that the Licensee "did not testify as to any prejudice he suffered as a result of delay".

This appeal panel finds that the reason the Licensee did not testify as to any prejudice, was that based on the Chairperson's Phase 1 directions and representations, the Licensee was expected to have the opportunity during Phase 2 to give evidence and call witnesses regarding the investigative process, the imposition of a license suspension, and the impact of same; but that opportunity was denied by the Phase 2 Chairperson. When he attempted to do so, he was thwarted in that attempt, because the Phase 2 Chairperson directed the Licensee to consider how the suspension of his license related to the *Jaswal* factors.

The procedural shortcomings in Phase 2 also impacted the Registrar's opportunity to refute evidence that the Licensee expected to present.

As a result of the lack of procedural fairness during Phase 2, this hearing panel directs that the Phase 2 portion of the hearing be heard by a newly appointed hearing panel. While the Licensee would prefer to have the complaint dismissed, this appeal panel does not consider that outcome appropriate, because the Licensee admitted during Phase 1, to the facts required to reasonably find that he engaged in conduct deserving of sanction.

Other issues:

Delay & the application of the *Act*, Part 6, s. 81(4) Three Year Limitation

Delay was a potential issue in three aspects of this case:

[3] RECA Hearing and Practice Guidelines, Part 4, Section 7, Witness procedure, and in particular parts (a) to and including (h), Section 8, Rules of Examination, Cross-Examination and Re-Examination, and Section 9, Licensee Presents Case including witness procedure, parts (a) to and including (h).

1. was the delay in proceeding with the investigation and the hearing so inordinate that a stay of the proceedings in their entirety is warranted? Answer: "The appeal panel declines to make a decision on this issue".
2. was the delay in proceeding with the investigation and the hearing so egregious that a reduced sanction is warranted? Answer: "Newly formed Phase 2 panel to consider"; and
3. was the hearing of this complaint more than four years after the date on which the offence was alleged to have been committed statute barred due to the three-year limitation prescribed in the Act, s.81(4). Answer:" No".

Phase 1: delay and sanction mitigation

The Licensee's position is that the Phase 1 hearing panel's refusal to allow the Licensee to adduce evidence about delays in the investigation during Phase 1 was procedurally unfair. The Phase 1 hearing panel denied the Licensee's questions relating to the investigation process on the grounds that they were not relevant to a conduct finding, but they were relevant to mitigation and sanction (i.e. Phase 2). The Licensee asserts that the Phase 1 hearing panel's refusal to allow him to question witnesses on delay adversely impacted the Licensee's ability to call evidence relating to prejudice suffered due to the delay.

This appeal panel accepts the Registrar's submission that the Phase 1 record demonstrates that the Licensee's cross-examination and delay arguments related to mitigation, rather than to the issues of whether he breached the *Act* of the Rules. The Phase 1 record also demonstrates that the Chairperson:

a) confirmed the Licensee's intent to address mitigation;
b) on several occasions explained the difference between the two lines of questioning to the Licensee; and
c) became frustrated with the Licensee's repeated attempts to question Witness P on matters that related to the fairness of the investigative process rather than the Licensee's alleged conduct.

However, the Chairperson's frustrations did not result in coercion to qualify the hearing as an unfair process. The evidence that the Licensee wanted to put forward, apart from his admissions, was not relevant to the Phase 1 hearing. The Phase 1 hearing panel's decision not to hear that evidence was procedurally fair at that time.

Also, the Licensee was clear during the Phase 1 hearing that he did not want to make an application to stay the proceedings permanently based on inordinate delay. Instead, he wanted the Phase 1 hearing panel to consider delay as a mitigating factor as it related

to sanction. There was no unfairness to the Licensee arising from the inability to adduce evidence relating to a permanent stay application for inordinate delay.

Phase 2: Delay and sanction mitigation

During Phase 2 the Licensee was denied the opportunity to present evidence relating to delay and its prejudicial impact as it related to sanction. The denial of his request to present evidence compromised the fairness of the Phase 2 hearing.

The record is clear that the Phase 1 hearing Chairperson informed the Licensee that he would have an opportunity to present evidence on delay during Phase 2 of the hearing, if he was found to have engaged in conduct deserving of sanction.

The Registrar submits that the Licensee knew, or should have known, that he could present sworn evidence regarding factors that contributed to delay, and prejudice that arose from delay, in connection with sanction. This appeal panel does not accept the Registrar's argument on this point. This appeal panel prefers, and accepts, the Licensee's submission that his opportunity to provide evidence on the issue of delay, as it relates to mitigation, was curtailed by the Phase 1 hearing chairperson and the Phase 2 hearing chairperson.

This appeal panel's reasons for preferring the Licensee's submissions on this point are that:

a) the Licensee is a self-represented litigant;
b) a self-represented litigant cannot be expected to have the level of knowledge put forward by the Registrar's legal counsel;
c) a self-represented litigant would likely await, and follow, direction from the Phase 1 Chairperson as to when he could call witnesses;
d) the Licensee accepted the Phase 1 Chairperson's direction to call evidence relating to the investigation and its impact on sanction during Phase 2;
e) the process of questioning witnesses confused and frustrated the Licensee;
f) the record is clear that the Licensee wanted to the hearing panel to hear what he had to say; and
g) the Licensee was not sworn in or asked to provide his side of the story under oath at any point during the Phase 2 hearing.

The record indicates that the Licensee's attempts to act on the Phase 1 Chairperson's direction were stopped by the Phase 2 Chairperson, who took the opposite perspective by stating that such evidence should have been elicited in Phase 1. Due to these significantly different procedural approaches, the Licensee was not given a reasonable opportunity during either Phase of the hearing process to provide evidence relating to

sanction, including evidence about prejudice suffered from delay. Regardless which Chairperson's direction was correct, and this appeal panel makes no finding in that regard, the Licensee was caught between two opposite Chairperson directives; and as a result of those conflicting directions, his right to a fair hearing was compromised to the point that this appeal panel must return this matter to a newly appointed Phase 2 hearing panel to consider the issue of sanction and costs.

Phase 2: application for a permanent stay

An application to stay the proceedings permanently was made by the Licensee during the Phase 2 hearing. The Licensee argues that he was not given an opportunity to present evidence relating to this application. Without evidence relating to prejudice before the Phase 2 Hearing Panel, the Licensee had no hope of: 1) proving there was an inexcusable delay; and 2) satisfying the three-part test[4] to determine if the delay amounts to an abuse of process.

The Phase 2 hearing panel exercised its discretion to hear the Licensee's stay application, and a subsequent application to reopen the stay application, during the Phase 2 hearing. The Registrar did not object that the applications were made too late because they came forward during Phase 2.

The Registrar submits that the Licensee knew, or should have known, that he could present sworn evidence regarding factors that contributed to delay, and prejudice that arose from delay.

According to the Registrar's submissions, at Page 11, Paragraph 52, the Phase 2 hearing panel reviewed the submissions and determined that it would not grant the stay for lack of evidence. According to the Registrar's submissions, at Page 11, paragraph 54, the Phase 2 hearing panel denied the Licensee's request to re-open his stay application because "it was not satisfied that the grounds to reopen were relevant or demonstrated prejudice to the Appellant."

The Registrar also submits that the delay in this case did not rise to the high standard required for this appeal panel to find that the delay caused significant prejudice, psychological harm, or brought the administration of justice into disrepute; and therefore, a stay of proceedings due to delay is warranted.

This appeal panel makes no finding as to whether the delay in this case meets the threshold to dismiss the case against the Licensee; whether the delay application ought to have been heard during the Phase 2 hearing because it was made so late in these

[4] *Law Society of Saskatchewan v Abrametz* 2022 Carswell Sask 316 (SCC).

disciplinary proceedings; or whether the manner in which the delay application was heard was fair. These findings are not necessary, given the unfairness of the hearing procedures around mitigation evidence during Phase 2; and in light of this appeal panel's decision to send this matter back to a new Phase 2 panel. The new Phase 2 panel may determine if it will hear any applications around delay and it will assess any evidence around mitigation that is put before it.

The *Act,* s.81(4) and the Three-Year Limitation

The Phase 2 hearing panel heard submissions from both parties regarding the applicability of the *Act,* Part 6, s.81(4). The Licensee submitted during Phase 2 that because the prosecution of this case was not commenced within three years as required by the *Act,* Part 6, s.81(4) that the complaint must be dismissed. The Phase 2 Chairperson ruled that the issue relating to the application of s.81(4) should have been raised at Phase 1; and it was too late to raise it at Phase 2.

The Phase 2 hearing panel heard argument about s.81(4) and found, in its written reasons of February 23, 2023, that in addition to its oral finding that the application was too late, that the *Act,* Part 6, s.81 has no application to proceedings commenced under *the Act,* Part 3. This appeal panel agrees with the Registrar's analysis on this issue.

This appeal panel was asked to consider if section s.81(4) applies to these proceedings. It was not asked to consider the Phase 1 hearing Chairperson's decision that the s.81(4) issue was brought too late. We find that s.81(4) does not apply to these proceedings, therefore, we do not need to consider whether the defence was brought up too late in the hearing proceedings nor do we require submissions on this issue.

The parties made thorough arguments about the applicability of s.81(4) to disciplinary proceedings. In interpreting s.81(4), regard must be given to the ordinary meaning of the words in s.81(4), the organization of the *Act* and the purpose of s.81(4) in the context of the entire *Act.*

This appeal panel's analysis in considering if s.81(4) applied to these proceedings commenced under Part 3 considered that:

a) the *Act* is divided into six parts.
b) the *Act,* Part 3 is titled "Conduct Proceedings". Part 6 is titled "General". Part 3 sets out s.36 to and including s.56; all of which deal with the processes for RECA to address a complaint, investigate a complaint, dispose of a complaint, appeal a disposition of a complaint, conduct a hearing, admit conduct, appeal a hearing panel's decision, and appeal to the Court, withdraw from membership, publish

information and recover costs. Part 3, s. 37(1) refers to a "complaint …about the conduct of a licensee".

c) The *Act*, Part 6 sets out s.73 to and including s.84; dealing with the Registrar's powers regarding Licensee licence cancellation or suspension, business inspections, investigations relating to criminal proceedings (s.75(1)(b)(i)), trust fund directives, Ministerial appointment of Council, Board or Industry Council review, Council dismissal, new Board appointment, the Minister's authority to make policies, service of documents, Ministerial immunity from damage claims, evidentiary certificates, offences and fines for the contravention of enumerated sections of the *Act*, the burden of proof, administrative penalties, appeal of administrative penalties, production orders, investigator appointment and authority to make regulations.

d) In looking more closely at s.81, it provides for certain "offences" if a person is found to have contravened one of the enumerated sections listed in s.81(1) of the *Act,* or if the person failed to comply with an Order as per s.81(1.1)). The consequence for either of these offences is a fine of up to $25,000.

e) The enumerated sections listed in s.81(1) refer to:

   i. s.10(2) Licensee compliance with an Industry Council directive;
   ii. s.17 prohibitions against trade without a license;
   iii. s.17.1 prohibitions against acting as a real estate appraiser;
   iv. s.18(1-3) Licensee restrictions on soliciting funds or accepting money;
   v. s.19 Licensee prohibitions on payments to a seller;
   vi. s.20(2-5) Licensee trust account obligations;
   vii. s.24(1)(a) Real estate broker service agreement payment prohibitions;
   viii. s.25(1-3, 5 or 9) Licensee holding of trust funds and record keeping;
   ix. s.38(4)(a) duty to co-operate with an investigator or answer questions;
   x. s.38(4.1) duty to not withhold records required for an investigation;
   xi. s.69(2) Licensee obligation to pay trust account interest;
   xii. s.73(2) duty to comply with an Order relating to a license suspension;
   xiii. s.74(2) duty to permit Registrar inspection; and
   xiv. s.83.2(7) duty to produce books and records required by a s.83.2(1) Order.

f) Section 81(2) provides for corporate officers to be liable for the commission of an offence "whether or not the corporation has been … convicted". The corporate officer is subject to the same $25,000 fine set out in s.81(1).
g) Section 81(3) requires a person "convicted of an offence" to return all commissions.
h) Section 81(4) states that:

> A prosecution under this *Act* may be commenced within 3 years after the date on which the office is alleged to have been committed, but not after that date.

i) The *Act* does not define the phrase "a prosecution".
j) Part 6, s.82 distinguishes an investigation, from a hearing, appeal "or prosecution" under the *Act.*
k) The *Act* uses the terms "prosecution" "offence" and "charged" very selectively, primarily only in s.81 and s.83.
l) The *Act,* s.55(1)(c) grants the Board authority to publish information regarding both "prosecutions" and "disciplinary actions".

The Licensee argues that the phrase "a prosecution", as stated in s.81(4), is not defined under the *Act*; and in particular, not as a prosecution before the Alberta Court of Justice Criminal Division. The Licensee submits that the phrase "a prosecution" should be broadly interpreted to include the issuance of a notice of hearing of a complaint brought under Part 3 of the Act. In other words, the notice of hearing must be issued within three years of the date of the alleged regulatory breach, failing which the proceedings are statute barred and this complaint must be dismissed.

The Licensee relies upon *Bahadar v Real Estate Council of Alberta*[5] wherein the court made no finding whether the s.81(4) phrase "a prosecution" should be interpreted to apply only to the enumerated offences in s.81(1) or to both s.81(1) and a complaint filed under Part 3. *Bahadar* is not persuasive because the Court made no finding on this issue.

The Registrar argues that the phrase "a prosecution" should be interpreted more narrowly, to refer only to an offence arising out of a finding of a breach of one of the enumerated sections listed in s.81(1), therefore, the limitation period does not preclude the issuance of Notice of Hearing outside the three year window. The Registrar distinguishes *Bahadar* from this case on the basis that in *Bahadar* nine years lapsed between the filing of the complaint and issuance of the Notice of Hearing, and therefore

[5] 2021 Carswell Alta 1289

the proceedings were procedurally unfair due to inordinate delay. The *Bahadar* decision did not rely on the s.81(4) limitation.

After reading the words of the *Act,* Part 6, s.81(4) in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act* and its objects, this appeal panel finds that the Legislature's intent was to authorize within three years of the date on which the alleged offence was committed, the commencement of court proceedings against a person who contravened the specific sections enumerated in s.81(1), rather than any and all breaches of the *Act*, including those commenced under Part 3.

Most of the enumerated s.81(1) offences relate to a Licensee's conduct that could impact a member of the public or RECA's capacity to enforce its Orders and directives. By setting out fines of not more than $25,000 for a breach of each of these offences, the Legislature establishes significant consequences for non-compliance with these sections, and by doing so, sets them apart from complaints that arise under Part 3.

It is highly unlikely that the Legislature intended that every complaint proceeding under Part 3 should be considered "a prosecution", as argued by the Licensee. If that was the case, which we find it is not, a contravention of Part 3 could result in the Registrar asking a hearing panel to conclude that section 81(1) is not limited to the contraventions of the cited sections. This appeal panel prefers to accept the Registrar's submission that a hearing panel cannot impose the significant financial fine permitted under s.81, for breach of a complaint commenced under Part 3 of the *Act.*

In drafting s.81(4) the Legislature must have considered, and intended, that the risk of a person facing another set of proceedings such as those that could be referred by the Registrar to the attorney general for criminal prosecution, being found guilty of an offence and subject to a fine of not more than $25,000 are serious matters that due to their gravity and potential consequence, must be commenced within a procedurally fair time (i.e. three years). Also, if the Legislature had intended that prosecutions under s.81(4) include all Part 3 proceedings, it would not have referred to both "prosecutions" and "disciplinary actions" in s.55(1)(c).

The *Kienapple* Issue

The *Kienapple,* or double jeopardy issue, was raised for the first time at this appeal. We disagree with the Licensee's submission that the issue was before the Phase 1 hearing panel, and that the Licensee was fundamentally arguing that he was facing double jeopardy when he admitted to being in breach of Rule 53(a) but not s.17(a) of the *Act.* To the contrary, the Licensee argued at Phase 1 of the hearing that the two provisions were different, and he was only in breach of one, not both. At no point in the Phase 1

hearing did the Licensee state anything to the effect that if the Phase 1 hearing panel finds him in breach of both sections, that he would be punished twice for exactly the same offence.

The Licensee bears the onus of demonstrating that the general rule that new issues should not be raised on appeal. The record supports the Registrar's submission that the Licensee did not raise *Kienapple* at either phase of the hearing. According to *R v Brown*[6] this appeal panel should not consider the *Kienapple* principle, because it was not raised during Phase 1 of the hearing, when it may have been relevant to that hearing. Nor was Kienapple raised at Phase 2. The Licensee's appeal submissions do not provide a reason why this appeal panel should deviate from the general rule not to hear new issues on appeal. For this reason, this appeal panel declines to consider the application of *Kienapple* to the facts of this case.

However, if this appeal panel is incorrect, and it should consider *Kienapple* in relation to the facts of this case, this appeal panel finds that the two provisions, Rule 53(a) and s.17(a) of the Act, do not have identical legal elements.

A finding of breach under Rule 53(a) does not necessarily result in a finding of breach under s.17(a) of the *Act.* A real estate broker or associate who traded in real estate in a name other than as stated on their license, or in the name of a brokerage other than the brokerage to which that real estate broker or associate is registered, would not be in breach of s.17(a), if that real estate broker or associate was not also acting as a real estate broker. In other words, if a person was doing something less than acting as a broker, but still trading in real estate, that person would be in breach of Rule 53(a) but not s.17(a) of the *Act*.

Conversely, a finding of breach under s.17(a) of the *Act* does not necessarily result in a finding of a breach of Rule 53(a). A person acting as a broker but is neither a real estate associate broker nor an associate would be in violation of s.17(a) of the Act, but not Rule 53(a) because Rule 53(a) would not apply to that person.

Remedy

Section 50(4)(c) of the *Act* empowers this appeal panel to refer this matter back to "the hearing panel" for further consideration in accordance with any direction. The wording of s.50(4)(c) suggests the matter should be referred back to the same hearing panel in the first instance i.e. the Phase 2 hearing panel. However, although that may be appropriate in many instances, in this case because we found that the Phase 2 hearing panel did not conduct the hearing in accordance with the principles of procedural

[6] [1993] 2 SCR 918

fairness, there is very likely to be an apprehension of bias if this matter is sent back to the same Phase 2 hearing panel.

If the Legislature intended that the original hearing panel must consider the matter again, even in instances when that would be procedurally unfair, the Legislature would have been more explicit in describing the intent of s.50(4)(c). Therefore, this appeal panel orders that this matter be referred to a newly constituted Phase 2 hearing panel on the issues of sanction and costs.

This appeal panel finds that the Phase 1 hearing was conducted in accordance with the principles of procedural fairness. We confirm the Phase 1 hearing panel's decision on conduct deserving of sanction.

This appeal panel finds that the Phase 2 hearing was procedurally unfair because the Licensee was deprived of his right to respond to the allegations. He was prevented from adducing evidence relating to mitigation. He was deprived of a procedurally fair Phase 2 hearing because of the irregularities around calling witnesses and the change in procedure imposed by the Phase 2 hearing panel. We quash the Phase 2 decision on sanction and costs and order that a new Phase 2 panel be constituted to consider the issues of sanction and costs.

This appeal panel makes no finding relating to sanction or costs, or whether administrative penalties should be taken into consideration when assessing sanction and costs. This appeal panel directs the Phase 2 panel to make the appropriate determinations, after providing the Licensee with the opportunity to participate in a procedurally fair Phase 2 hearing.

This appeal panel directs that pursuant to its authority under the *Act* s.50(4)(b), s.50(4)(c) and RECA's Hearing and Appeal Practice and Procedure Guidelines, Part 6, I, (b) and (c):

1. the February 23, 2023, Phase 2 decision with respect to sanction is quashed;
2. the May 15, 2023, Phase 2 decision with respect to costs is quashed; and
3. the matters of sanction and costs shall be referred back to a newly constituted hearing panel for consideration in accordance with these reasons.

Costs of this Appeal

In light of the Licensee's success on the issue of procedural fairness, this appeal panel intends to exercise its discretion to award costs to the Licensee pursuant to its authority as set out in the *Act,* s.50(5) and *the Real Estate Act By-Laws* Part 10.

The Parties are invited to make written submissions regarding costs. The Licensee's submission shall be due 14 days after the date this decision is served on the parties. The

Registrar's submission shall be due 21 days after the date this decision is served on the parties. The Licensee's Reply shall be due 28 days after the date this decision is served on the parties.

"Signature"

[G.F], Appeal Panel Chairperson

May 6, 2024

| | |
|---|---|
| Case Number: | 007466.002 |
| Name on License: | Farouk Mohamed |
| License Sector and Class: | Real Estate Associate Broker |
| Current Brokerage: | R&D Realty, operating as Maxwell Canyon Creek Real Estate Professionals Inc. |
| Process: | An Appeal under Part 3 of the *Real Estate Act* |
| Hearing Panel: | Dr. Gail H. Forsythe, Appeal Panel Chair<br>Mr. Brad Woodward<br>Ms. Aaron T. Scraba |

## DECISION ON COSTS

The Appeal Panel's unanimous decision is that no costs shall be awarded to either party.

Jurisdiction: The *Real Estate Act*

The Appeal Panel's jurisdiction to award costs arises under the *Real Estate Act, s.50(5) that states:*

> An Appeal Panel may make an award as to the costs of an appeal determined in accordance with the bylaws.

The legislation is clear that by using the word "may", rather than "shall", an Appeal Panel's power to award costs is discretionary. This Appeal Panel's statement that "this Appeal Panel intends to exercise its discretion to award costs to the Licensee pursuant to its authority as set out in the *Act,* s.50(5) and the *Real Estate Act* Bylaws Part 10" is an acknowledgement of this Appeal Panel's intent to invite and consider both counsel's written submissions, the Bylaw factors and the case law, in deciding if, and how, it will exercise its discretion in making an award as to costs; rather than fettering its discretion. The Appeal Panel rejects the Licensee's submission that it already made a decision to award costs to the Licensee and is *functus* in that regard.

Background

On May 6, 2024, this Appeal Panel issued its decision regarding Farouk Mohamed's (the

Licensee's) appeal of the Phase 1 conduct decision issued by the Hearing Panel on September 1, 2022, the Phase 2 sanction decision issued by the Hearing Panel on February 23, 2023, and the costs decisions issued by the Hearing Panel on April 17, 2023 and May 15, 2023.

On May 6, 2024, this Appeal Panel found that the Licensee's appeal on procedural fairness grounds was meritorious. The Licensee was successful on the issue of Phase 2 procedural fairness.

The Registrar was successful in its appeal on the issue of Phase 1 procedural fairness. The Registrar was also successful on several other appeal issues: the s.81 limitation issue; the application of the *Kienapple* principle, as well as on preliminary applications seeking a stay of enforcement, a stay of publication, waiver of costs of transcript preparation and the presentation of video evidence. The delay issue was sent back to the newly constituted Phase 2 Hearing Panel to assess if delay evidence relates to sanction mitigation and to determine if it will hear any permanent stay or other applications around the issue of delay.

Due to procedural irregularities that adversely affected the procedural fairness of the Phase 2 hearing, this Appeal Panel quashed the Phase 2 decision, including the decisions on costs. This Appeal Panel directed that a new Hearing Panel be appointed to conduct a procedurally fair Phase 2 hearing to determine sanction and costs.

The Appeal Panel's decision to quash the Phase 2 Hearing Panel's costs award was based upon the fact that:

a) the Phase 2 Hearing Panel decision did not allocate costs between the Phase 1 conduct hearing and the Phase 2 sanction and costs hearing;
b) the newly constituted Phase 2 Hearing Panel may admit evidence that was deemed inadmissible by the former Phase 2 Hearing Panel; and
c) the newly constituted Phase 2 Hearing Panel will exercise its discretion to award and allocate costs relating to Phase 1 and Phase 2, in light of the evidence and arguments before it, including any previously excluded evidence and arguments.

In its May 6, 2024 decision, the parties were directed to provide written submissions regarding costs; and having reviewed their submissions, this Appeal Panel caucused on June 20, 2024 to exercise its discretion in making a costs award.

On June 21, 2024, and on June 24, 2024, the Appeal Panel received information, including links to two articles and a 1987 Supreme Court of Canada case relating to costs (the "additional materials"), from independent legal counsel. On July 17, 2024, this Appeal Panel caucused further, and after doing so, asserted its solicitor client privilege while disclosing to the parties that it had received the additional materials from independent legal counsel.

On July 17, 2024, in the interest of transparency and fairness, the parties were informed of the Appeal Panel's receipt of the additional materials; and invited to comment upon "how the conduct of each party, in contrast to the conduct of the Hearing Panel, should be assessed in awarding costs." Counsel for the Licensee requested, and without objection from the Registrar's counsel, was granted an extension of time to provide the Licensee's comments.

On August 7, 2024, each party's additional written submissions on costs was provided to this Appeal Panel. On August 13, 2024, the appeal panel caucused to consider the additional written submissions. On August 22, 2024, the appeal panel caucused to review, and unanimously approve, this decision.

Each Party's Position on Costs:

The Licensee's position on costs is that:

1. In 2017, when the complaint in this matter was made to RECA, the Licensee immediately admitted to having provided property management services outside his brokerage and immediately took steps to stop providing property management services to his clients;
2. In 2018, the Licensee offered to admit to conduct deserving of sanction, a six month suspension of his license, and pay $1,500 in costs; and this offer was rejected by RECA.
3. RECA failed to move the investigation forward in a timely manner; and fifty-two (52) months passed before the hearing of the complaint commenced.
4. The hearing required five (5) days over a thirteen (13) month period. The Hearing Panel decision did not include a suspension of the Licensee's license.
5. The evidentiary record consisted of thirty (30) hours of video recording and hundreds of documents; all of which required counsel's review.
6. The Notice of Appeal raised seven grounds of appeal; all of which required extensive legal research and extensive written argument;

7. The Appeal required a full day of oral argument; and extensive written submissions from counsel for the parties; and
8. Based on the Licensee's counsel's description of services rendered (described as the Settlement Statement dated May 15, 2024), his counsel provided 138.5 hours @ $500 per hour plus GST, and an articling student provided 17.2 hours @ $175 per hour plus GST; and $48.30 in other charges plus GST was incurred; for a total costs claim of $39,567.47 inclusive of GST and based on a $250 hourly rate.
9. The Licensee's additional written submission on costs asserts that:

    a. *Pethick v. Real Estate Council (Alberta)* 2019 Carswell Alta 1176 (QB) confirms that the conduct of the Hearing Panel, the Registrar and the Licensee are all factors to be assessed when awarding costs;
    b. RECA's Hearing and Appeal Practice and Procedures Guidelines, the "Guidelines", focus on a Licensee's conduct; they do not contemplate the possibility that costs may be awarded against the Registrar even though *Pethick* determined that costs may be awarded against RECA where conduct proceedings were dismissed on the basis of the Licensee being denied the right to a fair hearing;
    c. the Bylaws, s.28(4) set out factors that must be considered;
    d. a substantial costs award ought to be granted against the Registrar to send a clear message that the Registrar's conduct in delaying prosecution of this case fifty (50) months and denying procedural fairness during a hearing will have serious financial consequences;
    e. the Licensee was suspended for six (6) weeks, for delaying proceedings four (4) months therefore he should not be punished again for the same conduct when assessing costs;
    f. the Registrar ought to have alerted the Hearing Panel to the fact that significant procedural irregularities occurred during Phase 1 and that the Licensee's right to a fair hearing was denied at Phase 2 of the hearing process;
    g. the Licensee's claim for costs is amended to $43,399.97 in legal fees; and
    h. this Appeal Panel's finding that procedural fairness was denied is sufficient to warrant a significant costs award.

The Registrar's position on costs is that:

1. The Licensee's submission seeking $79,129.22 in costs is excessive and unreasonable.
2. Each party should pay their own costs because:
    a. the parties had divided success on the Appeal. The Licensee was not successful on all grounds of appeal;
    b. both parties incurred costs to advance their arguments;
    c. there is no evidence of an undue financial burden on the Licensee;
    d. case law indicates that costs are not automatically awarded, even when procedural fairness is at issue;
    e. the Registrar did not act in a manner that is a "marked and unacceptable departure from the reasonable standards expected of a prosecution; therefore, the general rule of no award of costs should apply";
    f. RECA has a public mandate to fulfill; and
    g. this Appeal Panel found that the Registrar was also adversely affected by the procedural shortcomings at Phase 2 of the hearing process, therefore no award of costs should be made against the Registrar.
3. In assessing the Bylaw factors, costs should only be awarded if doing so results in a fair and reasonable outcome. In this case, it is unreasonable to award costs to the Licensee.
4. *Pethick* (ABRECA) analyzed the Bylaw factors and declined to award the Licensee costs.
5. *Bowers (Re)* 2022 ABRECA 37, an appeal with mixed success, considered *Pethick (QB)* and the Bylaw factors. *Bowers* resulted in no award of costs to the Licensee.
6. There is no evidence that the Licensee paid for any legal services related to the Appeal;
7. The Settlement Statement includes work done for:
    a. unsuccessful applications put forward by the Licensee;
    b. reviewing video-audio recordings of the hearings (incurred due to the Licensee's dismissed application that the Appeal Panel waive the costs to produce a transcript of the record of the hearings); and
    c. grounds of appeal that were not successful;
8. The Licensee's requests for an additional $39,516.75 in costs, based on the Registrar's refusal to accept the Licensee's settlement offer, is unreasonable because at the time the offer was made, the Registrar had not concluded its investigation, the Licensee had failed to produce documents requested by the Registrar and the offer sought credit for time the Licensee had "served". The Licensee failed to admit to his misconduct immediately; instead, a multiple day Phase 1 hearing was required, because he did not immediately admit to his

misconduct. On appeal, the Licensee argued that he was coerced into making admissions of misconduct during the Phase 1 hearing. The Appeal Panel upheld the Phase 1 hearing, that included the Licensee's admissions.

9. RECA's additional written submission on costs asserts that:
    a. The *Act*, s.50(5) requires that costs be determined in accordance with the Bylaws;
    b. Bylaw factors look to the conduct of the person against whom costs are sought, and the effect of that conduct on other parties and the administration of justice;
    c. It would be unreasonable to place the burden of costs on the Registrar, given the Registrar was successful on six of the seven grounds of appeal;
    d. There was no finding that the Registrar showed a "marked and unacceptable departure from the reasonable standards expected of a prosecutor" therefore the conduct of the Registrar is not at issue;
    e. The conduct of the Hearing Panel may fall under "any other matter …" as contemplated by the Bylaws s.10.4(i);
    f. It would be an error of law to focus solely on the conduct of the Hearing Panel; the Hearing Panel's conduct must be assessed holistically in assessing costs;
    g. The Phase 2 Hearing Panel acted in good faith throughout the Phase 2 process, and met the statutory and Guideline requirements; there was no marked departure from the standards to be expected of a regulatory proceeding of this type;
    h. All costs awards are discretionary even in cases with a finding of breach of procedural fairness; and
    i. The totality of circumstances must be assessed, and in this case, those circumstances do not warrant an award of costs to the Licensee.

Analysis:

The Appeal Panel declines to award costs for the Appeal to either party. In assessing costs, this Appeal Panel must consider the factors enumerated in the *Real Estate Act*, Bylaws, s.10.4, as noted below:

a) the degree of co-operation by both parties:

The Licensee's position: the Licensee's co-operation is not relevant to costs. The Registrar's fifty-two (52) month delay is relevant and justifies a substantial cost award.

The Registrar's position: the co-operation of both parties must be assessed, not merely that of the Licensee. The timing of co-operation must also be assessed; and that is, in terms of the appeal process, not in terms of the investigation or the conduct proceeding phase. The Registrar co-operated in the process leading to the appeal hearing, and during the appeal hearing. There was no finding of delay or prejudice in terms of the Registrar's conduct in relation to the appeal. The *Act,* s.48(8) and RECA's *Hearing and Procedural Guidelines* require that an appellant pay the costs for RECA to prepare a transcript of the proceedings. RECA did not have the legal authority to waive transcript preparation costs. The Registrar did not fail to co-operate, nor did the Registrar complicate the Appeal proceedings, by opposing the Licensee's application to have the costs of producing a transcript waived by the Appeal Panel. Without evidence of the Registrar delaying or acting unreasonably in the appeal process, costs should be borne equally by the parties, rather than awarded against the Registrar.

Finding: when assessing the co-operation of the parties, this Appeal Panel has jurisdiction to assess the actions of the parties in relation to the appeal; not the actions of the parties in relation to events prior to the appeal. This Appeal Panel struck down the findings, and the costs awards, of the Phase 2 Hearing Panel. It is within the jurisdiction of the newly constituted Phase 2 Hearing Panel to determine sanction; and if sanction is appropriate, the question of costs. The newly constituted Phase 2 Hearing Panel may consider the actions of the parties during the investigation and Phase 1, when considering the issue of costs at the newly constituted Phase 2 hearing. The Licensee's concerns about a fifty (50) month delay, in contrast with a four (4) month delay cause by the Licensee, can be addressed with a costs award, if the newly constituted Phase 2 Hearing Panel finds that it is appropriate to do so.

Both parties co-operated in moving this appeal forward. Neither party contributed to delay of this appeal. Neither party created prejudice for the other party in the hearing of this appeal. The degree of co-operation by both parties was equal; therefore, this factor has a neutral impact when regarding costs.

b) the result of the matter and degree of success:

The Licensee's Position: the Licensee's success on appeal strongly favours an award because the Appeal Panel quashed the Hearing Panel's decision on the grounds that the Licensee was denied his fundamental right to procedural fairness.

The Registrar's Position: the appeal had divided success. A number of the Licensee's arguments were dismissed; other arguments resulted in no finding and a referral to a new Phase 2 Hearing Panel. The fact that the Licensee had success on the procedural fairness ground as it related to Phase 2, does not justify overlooking the Licensee's lack of success on other grounds, to award costs in his favour. The general principle is that if a matter has mixed or divided success, each party should be ordered to pay their own costs. Of the seven grounds put forward by the Licensee, one ground, procedural fairness, was successful.

Finding: it is correct that the Licensee had success on the procedural fairness of the Phase 2 hearing. It is also correct that the Licensee's remaining six grounds of appeal resulted in being remitted or had no success. The result of the matter was that the Phase 1 hearing decision was upheld; whereas the Phase 2 hearing decision was not upheld. If one considers the number of grounds of appeal that were not decided or not overturned, the Registrar had a higher degree of success than the Licensee. If one considers the result of the matter (the Phase 2 hearing decisions on sanction and costs), the Licensee had a high degree of success. These outcomes are relatively equal and therefore this factor does not warrant an award of costs for either party. This Appeal Panel agrees with the existing jurisprudence, including the RECA specific cases of *Pethick* and *Bowers*, that a finding of procedural unfairness does not automatically warrant a costs award against the Registrar or RECA.

c) the importance of the issues:

The Licensee's position: there is no issue more important than RECA's duty to adhere to the principles of procedural fairness in exercising its extraordinary powers under the Act to discipline licensees and conduct disciplinary proceedings.

The Registrar's position: the appeal involved issues of mixed fact and law, of law, of procedural fairness and of statutory interpretation; all of which are of importance to both parties and to the real estate industry. This factor is neutral and does not support one party or the other being required to pay costs.

Finding: all of the issues were of importance to the Appellant, and to members of the real estate profession. While procedural fairness is highly important, so are issues of inordinate delay, double jeopardy, and adherence to limitation periods, to name but three of the additional six grounds of appeal. This factor is also neutral and does not support an award of costs against either party.

d) the complexity of the issues:

The Licensee's position: the appeal proceedings were exceptionally complex with thousands of pages of documents, materials and case law, dozens of hours of video transcripts, over thirty (30) pages of written submissions by each counsel, and three (3) pre-hearing applications.

The Registrar's position: the issues raised had varying complexity and as a result, each party should pay their own costs.

Finding: many of the issues appealed were complex. It is also true that there were dozens of hours of video transcript to review. The task of reviewing the hearing proceedings could have been simplified if the Licensee had purchased the transcript of the hearing proceedings. The Licensee opted not to purchase the hearing transcripts; and as a result of his choice, the Licensee incurred the time and expense to put forward two pre-hearing applications, that required a response from the Registrar and were denied. The Licensee also opted to put forward seven grounds of appeal. The Registrar was required to respond to each ground. The complexity of the appeal impacted both parties and is therefore a neutral factor.

e) the necessity of incurring the expenses:

The Licensee's position: given the denial of fairness at Phases 1 and 2, and the complexity of the issues under appeal, it was reasonable and necessary for the Licensee to retain legal counsel for the appeal.

The Registrar's position: both parties incurred time and expense to argue seven grounds of appeal. If each ground had merit, then each party needed to incur the expense associated with arguing those grounds.

Finding: in light of the Licensee's lack of success in being fairly heard at the Phase 2 hearing, along with several other issues of concern to the Licensee, it was reasonable that the Licensee retain legal counsel to advocate his appeal. It was also reasonable and necessary that the Registrar retain legal counsel, to respond to the Appeal. This factor is also neutral in terms of awarding costs.

f) the reasonable anticipation of the case outcome:

The Licensee's Position: the Registrar should have anticipated the hearings were deeply flawed and the decision would be quashed on appeal.

The Registrar's Position: this factor is considered in the context of whether it would be plain and obvious that a party is destined to lose a particular ground of appeal; thereby, causing wasted time, energy and expense for all parties. In this case, the Registrar had an honest and reasoned belief that the Licensee's arguments advanced at appeal did not have merit. Even though the Registrar was not entirely successful on all grounds, it was not so plain and obvious that the Registrar's arguments were without principle or destined to lose; and as a result, each party should bear their own costs.

Finding: the Registrar has a duty to ensure that all hearing proceedings are procedurally fair, to the extent that it has the power to do so. There were procedural issues during each hearing phase; but, it was the impact of the Phase 2 procedural shortcomings upon fairness, rather than the Phase 1 procedural irregularities, that caused this Appeal Panel to sustain the Phase 1 decision, overturn the Phase 2 decision and remit this case to a new Phase 2 hearing panel.

In view of this Appeal Panel upholding the Phase 1 decision, yet striking down the Phase 2 decision on sanction and costs, each party's genuine belief in their decision to appeal, or to oppose the appeal, is credible. There were also six other grounds of appeal to consider, the outcome of which was not clearly obvious from the written submissions of the parties. There were no issues that ought to have been so plain and obvious that either party ought to have conceded. Given there were multiple and complex grounds of appeal at stake, the outcome of

which was not clearly predictable, it would not be a marked and unacceptable departure from the reasonable standards expected of the Registrar's counsel for the Registrar to oppose the appeal in its totality. This factor does not support an award of costs for either party.

g) the reasonable anticipation of the need to incur expenses:

The Licensee's Position: the Registrar should have anticipated that significant legal costs would be incurred by the Licensee to appeal.

The Registrar's Position: See e) above. Both parties incurred time and expense to argue seven grounds of appeal. If each ground had merit, then each party needed to incur the expense associated with arguing those grounds. Both parties had a reasonable anticipation of incurring legal expenses; and as a result, each party should pay their own costs.

Finding: it should have been obvious to each party that significant legal costs would be incurred, in order to advance, and to oppose, seven grounds of appeal; many of which were complex or involved volumes of material. Both parties had a reasonable anticipation of incurring legal expenses. This factor is neutral in considering costs.

h) the financial circumstances of the licensee and any financial impacts experienced to date by the Licensee:

The Licensee's Position: the Licensee's sworn July 18, 2023 declaration is evidence of the Licensee's limited financial means, and the Licensee incurred tens of thousands of dollars in legal expenses.

The Registrar's Position: the Settlement Statement (record of time incurred by legal counsel and counsel's student-at-law) is not an invoice nor is there any reliable proof of the payment of legal fees, or of the quantum paid, by the Licensee. Some of the legal expenses claimed relate to unsuccessful appeal grounds, and to unsuccessful applications. The Licensee's 2023 sworn statutory declaration, along with his current income earning capacity as a licensed member of RECA, his associate brokerage status, his income from car sales, and his status as sole shareholder and director of his company, do not provide

evidence to demonstrate why the Licensee's annual $70,000 income should be considered limited financial means to warrant an award of costs.

Finding: the Licensee did not provide a current sworn declaration as to his financial status; nor did the Licensee provide proof that he paid any legal expenses. While it is highly likely that he incurred legal fees, so did the Registrar in opposing the appeal. The Settlement Statement is not proof of payment of legal fees. If evidence of the Licensee's financial status had been provided, which it was not, the Licensee's financial status could have been taken into consideration, along with the impact of the costs paid by the Licensee to appeal, if the Licensee was successful on all grounds of appeal, or at least a high number of grounds of appeal; which is not the case.

i) Any other matter related to an order reasonable and proper costs as determined:

The Licensee's Position: this Appeal Panel needs to send a clear message to RECA that RECA has an obligation to provide Licensees with a fair hearing without delay; and that failure to do so will result in financial and reputational consequences to RECA. The Licensee offered to settle on more severe terms than the sanctions ordered, and ultimately quashed, on appeal. But for the Registrar's refusal to accept the Licensee's settlement offer, RECA's resources would not have been wasted, the Licensee would not have suffered an extra six (6) years, and the Licensee would not have incurred extraordinary time and legal costs to defend against proceedings that could have been resolved six (6) years ago. An award totalling $79,129.22 in costs, is warranted.

The Licensee submits that *Pethick*, (QB) should be interpreted to recognize that:

- the Registrar and RECA's public mandate to discipline members must be carried out in a manner that does not breach obligations to conduct investigations and hearings in accordance with the governing principles of natural justice and procedural fairness.
- If the principles of natural justice and procedural fairness are breached, the Registrar and RECA must face significant financial and reputational consequences to deter future breaches of this nature.
- This Appeal Panel cannot require the Licensee to demonstrate that the Executive Director or RECA acted with an improper purpose or otherwise in bad faith.

- This Appeal Panel can take into account whether the conduct of the proceedings was a marked departure from the standards to be expected of a regulatory proceeding. Given this Appeal Panel found that the Licensee's opportunity to provide evidence relating to delay and sanction compromised the fairness of the hearing process, it is reasonable to conclude that the procedural irregularities were a marked departure and the Licensee is entitled to costs.
- The totality of the circumstances relating to the conduct of the hearing, and the impact of the deficiencies upon procedural fairness, warrant an award of costs to the Licensee.

The Registrar's Position: the *Pethick v Real Estate Council (Alberta)* 2019 ABQB 431 test, set out at page 10, is whether there was "a marked and unacceptable departure from the reasonable standards expected of a prosecution". It is critical to consider that in opposing the Licensee's appeal, if the Executive Director was litigating a private interest, or fulfilling RECA's mandate to act in the public interest. A "marked departure" requires something more than mere errors or opposition to an appeal. The factors in the Bylaws, s.10.4 would be rendered meaningless if every breach of procedural fairness constituted a marked departure from the standard expected of a regulatory proceeding. The Appeal Panel found a breach of procedural fairness. Independent legal counsel for the Phase 1 and Phase 2 hearings did not raise any procedural fairness concerns during either phase. The Appeal Panel found that both parties were adversely affected by procedural shortcomings. Even though there was procedural unfairness, the Registrar acted reasonably, and within its legislated authority, in opposing the appeal; the Registrar's counsel did not act in a manner that was a "marked and unacceptable departure from the reasonable standards expected of a prosecution"; therefore, the general rule that each party should bear their own costs should be applied.

The Registrar submits that *Pethick (QB)* should be followed by this Appeal Panel, to award no costs to the Licensee, on the basis that:

- Even though on appeal it was found that procedural unfairness had occurred in RECA's hearing of the complaint against Mr. Pethick, after reviewing the factors in *s.10.4* of the *Real Estate Act* Bylaws, no costs were awarded to the Licensee.
- In *Pethick (QB),* the Honourable Madam Justice A. Woolley directed the RECA Appeal Panel that it consider the public mandate function of the

Executive Director and RECA in deciding whether or not costs ought to be awarded. This Appeal Panel must not look at the Registrar's intent, but at its actions, to take into account whether the conduct of the proceedings against the Licensee constituted a marked departure from the standards to be expected in a regulatory proceeding of that type.

- In fulfilling its public mandate, cost awards in criminal cases may be made against the Crown where there has been a marked and unacceptable departure from the reasonable and normal standards of conduct expected of the prosecution; and on the basis that once a deviation of this degree occurs, the Crown is no longer acting in the public interest to fulfil its mandate.

This Appeal Panel's *Pethick* (QB) analysis:

Procedural fairness is one of the cornerstones of the principles of natural justice. There is no doubt that the Registrar has a duty to ensure, to the extent that is within its power, that hearings are conducted in a procedurally fair manner. This Appeal Panel's decision to quash the Phase 2 decision on sanction and costs communicates the importance of that duty, and the principles of procedural fairness. This Appeal Panel is bound by the test set out in *Pethick v Real Estate Council (Alberta)* 2019 ABQB 431, the leading case regarding the award of costs in administrative proceedings that requires a "a marked and unacceptable departure from the reasonable standards expected of a prosecutor".

According to *Pethick* (QB), focusing on a party's, or counsel's, conduct and its effects, rather than on a party's motives or intentions, makes sense in the context of costs. Costs are not primarily punitive; rather, they allocate the costs of legal proceedings fairly, and in light of who caused the costs to be incurred. Costs are a tool to encourage the efficient and orderly administration of justice; and to discourage improper conduct, not merely improper motives.

Few statutes require the demonstration of bad faith in order for a practitioner to receive a costs award. This Appeal Panel cannot require the Licensee to demonstrate that the Registrar, or the lower tribunal, acted with an improper purpose or otherwise in bad faith in order to receive an award of costs.

RECA's rules and standards are designed to ensure the competence and professionalism of its members, and to protect the public. In this appeal, the public's interest was protected, by bringing forward multiple issues of importance to the public.

The Appeal Panel concluded that "the hearing was procedurally unfair specifically because the Licensee was deprived of his right to respond to the allegations. He was prevented from adducing evidence relating to mitigation." *Pethick* (QB) is specific in that a costs award should be considered "in light of who caused the costs to be incurred". This statement from *Pethick* (QB) weighs heavily in finding that it was the Licensee who put forward a complex appeal, with seven grounds of appeal, and of those grounds, all but one, procedural fairness, were dismissed or remitted by this Appeal Panel.

This Appeal Panel may take into account whether the conduct of the proceedings against the Licensee constituted a marked departure from the standards to be expected in a regulatory proceeding of that type. The Registrar makes the point that the decision maker's ruling during a conduct proceeding, even if ultimately determined to be wrong, does not in itself mean there was a marked departure to the extent that the Registrar was no longer acting in the public interest by opposing the appeal. This Appeal Panel agrees with the Registrar's submission on this point.

This Appeal Panel is also mindful of the importance of judicial independence. When considering costs, a Hearing Panel's decisions in managing its hearing process should not be confused with a Registrar's decisions to oppose an appeal. It is the conduct of the parties that determines if costs should be awarded; not the conduct of the Hearing Panel. Even though the Licensee's appeal was ultimately successful on the ground of procedural fairness as it related to Phase 2, the procedural errors that occurred during the Phase 2 hearing did not amount to such a "marked departure" that the Registrar's conduct in opposing the appeal warrants a costs award against the Registrar.

This Appeal Panel accepts the Registrar's assertion that it must consider the totality of the circumstances in assessing whether costs should be awarded to the Licensee. Holistically, the conduct of each party, in proceeding with the appeal, and in opposing the appeal, was fair and reasonable.

The Appeal Panel's unanimous decision is that no costs shall be awarded to either party.

This decision was issued on August 23, 2024

"Signature"

[G.F], Appeal Chair