



REAL ESTATE
COUNCIL
OF ALBERTA

Hearing and Appeal Practice and Procedures Guidelines

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PART 1 LEGISLATIVE AUTHORITY, PURPOSE AND MANDATE

1. Legislative Authority

The *Real Estate Act* RSA 2000 c. R-5, (“the Act”) authorizes the Real Estate Council of Alberta (“the Council”) to establish standards of conduct for the industry and the business of industry members. The Council is also required to enforce industry standards and any additional requirements outlined in the Act. The Act, Rules and Bylaws are intended to enhance, improve and promote the integrity of the industry and to protect the public interest.

The Council is a self-governing, regulatory body established to carry out the duties outlined in section 5 of the Act. The purposes of the Council are

- (a) to set and enforce standards of conduct for the industry and the business of industry members as the Council determines necessary in order to promote the integrity of the industry, to protect against, investigate, detect and suppress mortgage fraud as it relates to the industry and to protect consumers affected by the industry;
- (b) to provide services and other things that, in the opinion of the Council, enhance and improve the industry and the business of industry members; and
- (c) to administer this Act as provided in this Act, the regulations, the bylaws and the rules.

Throughout the Act, the Council is conferred with broad powers of governance. With these powers, the Council assumes responsibility for the disciplinary process.

Accordingly, the Council and the Executive Director administer all the stages of the disciplinary process. In so doing, the Council and the Executive Director must ensure that:

- the industry and members of the public are informed of the purpose and process of professional discipline and are provided with guidance respecting the making of a complaint;
- an appropriate investigation is conducted; and
- fair and orderly hearings are conducted,

so that the discipline process adequately protects the public, while upholding the principles of natural justice and fairness.

The disciplinary process is set out in detail in Part 3 of the Act. The Executive Director (RECA investigators) is obliged to investigate all written complaints received about the conduct of an industry member. If the industry member’s conduct is found to be deserving of sanction, appropriate disciplinary action must be taken. The Act provides for the finding and disciplining of conduct deserving of sanction through the mechanism of a Hearing Panel.

“Conduct deserving of sanction” is not defined in the Act. Although not defined, it would embody one or more of the following elements:

- a detriment to the best interests of the public or the industry members;
- a contravention of the Act, the regulations or the bylaws;
- harm or potential harm to the public at large;
- harm or tendency to harm the standing of the industry;
- a display of a lack of knowledge or lack of skill or judgment in the practice of an industry member; and/or

- lack of adherence to the normally accepted standards of practice.¹

The Executive Director, Hearing Panels, Appeal Panels and the Courts all have specific and sequential roles in the disciplinary process. A complaint may be concluded in any stage in the process and there must not be a presumption that it will proceed to the next level.

2. Purpose of the Practice and Procedures Guidelines

These are the guidelines to the Council's disciplinary process. The purpose of these guidelines is to ensure that the Council and panels act within their legislative authority. Providing the Council and panels do not exceed their authority, any intervention by the Courts will serve to protect the Council and panels. The Courts will intervene to restrain panels, for example, if it acts outside of its legislative mandate or fails to comply with the rules of Administrative Law.

These guidelines have been designed to ensure that the principles of natural justice and fairness are adhered to. This information provides all those involved in the disciplinary process with an overview of the principles that should be incorporated into the disciplinary process.

3. Council's Objectives

The Council believes that self-governance is a privilege available collectively and individually to the industry and is carried out in the best interests of the public and the industry. The public interest is best served by the self-governance of the Council through an effective disciplinary process.

The Council believes that an effective disciplinary process requires:

- the evolving expertise and continued involvement of RECA panels and staff involved in the disciplinary process as part of the overall legislative scheme;
- the appointment of industry members to Hearing Panels who have experience with the subject matter and an understanding of the principles of natural justice and fairness; and
- the provision of various types of hearing processes to allow for quicker, less costly and more informal hearings.

Notwithstanding this, the Council recognizes the resources available for the disciplinary process are limited. The Council is accountable to industry members for ensuring that the allocation of resources is made on a basis that is rational, justifiable and clearly documented. This is consistent with Council's philosophy to:

- regulate in a responsible, cost effective manner;
- enhance the professionalism of the real estate and mortgage broker industries; and
- protect consumers through effective investigations of conduct proceedings.

The Council believes that the disciplining of its membership must be conducted in a professional manner that recognizes, upholds, and in the best manner possible, balances the Council's underlying and often competing policy objectives. These policy objectives are:

- to protect the public;
- to protect its members and the standing of the profession operating under the scope of the Act generally;
- to respect the rights of the industry member;

¹ The Regulation of Professions in Canada, Casey, J.T., (Scarborough: Carswell, 1994) p. 13-2.

- to uphold the principles of natural justice and fairness;
- to provide transparency to all those involved in the discipline process; and
- to discipline its membership in a timely, fair, cost effective and procedurally sound manner.

In doing so, the maintenance of a high degree of integrity and trust in the discipline process itself and in its inherent fairness will follow.

PART 2 OVERVIEW OF THE PRINCIPLES OF NATURAL JUSTICE

The Courts have an inherent power to review the legality of actions taken by administrative tribunals. This power arises from the Courts' responsibility to interpret the meaning of statutes and determine the scope of the statutes that delegate powers to administrative tribunals such as Hearing Panels or Appeal Panels. The Courts may be called upon to decide which administrative actions are beyond the jurisdiction of the administrative tribunal through an appeal or a process called judicial review.

Under the Act an appeal is not the same as a judicial review. Upon judicial review, the Courts do not have the right to substitute their own actions for any lawful action taken by an administrative tribunal. Rather, a judicial review is generally limited to the power of the Courts to determine whether the administrative tribunal has acted strictly within the powers that have been statutorily delegated. To this end, judicial review concentrates almost completely on jurisdictional questions

A judicial review may occur when an administrative tribunal:

- acts substantively beyond its jurisdiction;
- exercises its discretion for an improper purpose, with malice, in bad faith, or by reference to irrelevant considerations;
- fails to consider relevant matters;
- makes serious procedural errors; or
- makes an error of law, in certain circumstances.

Judicial review of administrative tribunal decisions is typically limited to whether the findings are supported by substantial evidence, or is arbitrary and capricious, or contrary to law.² Common law principles dictating the manner in which administrative decisions are to be made are primarily concerned with the exercise of the decision-making power that is "fair" and consistent with the principles of "natural justice."

There are a number of principles of natural justice. Secondary principles, such as right to counsel, are discussed below, but the three fundamental principles are as follows:

- the person whose interests may be affected by a decision should be given notice of the allegations or case to be made against them (the right to due notice);
- the person should be allowed to present their case and rebut the case against them (the right to be heard); and
- the decision maker should be disinterested and impartial (the right to an unbiased decision-maker). This decision-maker must hear the evidence and argument in order to be eligible to make a decision.

² "How to Write Orders and Decisions that will Stand Up on Appeal" Blair, R.N., Administrative Law Judge, Presentation at the 1997 ARELLO Western Conference, p. 1.

The decision that is made must also comply with all relevant applicable statutes and, to the extent not contrary to the principles of natural justice, the internal rules, bylaws and regulations of the organization.

The principles of natural justice and fairness support the disciplinary process and apply in different ways to those involved in the disciplinary process including Hearing Panels and Appeal Panels.

The consequences of an administrative tribunal failing to follow the required procedures are serious. If there is a breach of the rules of natural justice or fairness, the administrative tribunal is inherently denied its statutory authority and jurisdiction to make a decision. As a result, the decision it makes will be a nullity.

The procedures that are necessary to meet the requisite standard of natural justice and fairness throughout the disciplinary process include the following:

- notice of the allegations of misconduct in the investigation and hearing;
- disclosure of information in the hearing as to the case to be made against the person;
- the conduct of a hearing;
- the right to representation by legal counsel;
- the opportunity for cross examination of witnesses; and
- a panel decision.

In a disciplinary process affecting a person's profession or occupation, procedural requirements are stringent. When livelihood or property rights are at stake, or when a rule is being applied to a specific person, the need for fairness and natural justice is crucial. The following procedural requirements must be carefully noted and complied with.

1. Right to Sufficient Notice

At the investigation stage of the disciplinary process, industry members must be given notice of the complaint made against them.

At a contested hearing of the disciplinary process, the requirement of adequate notice means that industry members must be given written notice with sufficient information as to the nature of the proceedings and sufficient warning of the intention of the case presenter acting on behalf of the Executive Director so that they can:

- prepare arguments and evidence and respond to arguments and evidence anticipated from those maintaining a contrary position; and
- appear at any hearings as required.

Section 41(3) of the Act provides that the Executive Director must give notice of the hearing to industry members at least 15 days before the date set for the hearing. The notice must state the date, time and place of the hearing and must also give reasonable particulars of the allegations of misconduct in respect of which the hearing is held.

2. Right to a Hearing

During a contested hearing, the credibility of witnesses is often a key consideration. By attending the hearing, industry members:

- are given the opportunity to hear the evidence against them; and

- are given the opportunity to test the case against them through cross examination and presentation of their case,

thereby ensuring that just, fair and timely findings are made in consideration of all the evidence.

Section 41(4) of the Act contemplates the option enabling Hearing Panels to make determinations based on written submissions. However, in order to uphold the principle of natural justice that allows industry members to be heard, written hearings should be limited to very specific circumstances. In cases where the facts of the case are not in dispute, written hearings are deemed to be acceptable. Written hearings allow for a more flexible and efficient process under these circumstances.

3. Right to Counsel

At the hearing stage of the disciplinary process, because a decision affecting the livelihood of a person is being made, industry members will be advised of their right to be represented by legal counsel. During contested hearings in particular, it is advisable for industry members to have independent legal counsel for several reasons:

- the seriousness of the allegations and the outcome;
- the formality of the procedure (witnesses, cross-examinations);
- the complexity of legal issues; and,
- the difficulty which industry members may experience in objectively representing themselves respecting a professional conduct matter which, by its very nature, is subjective.

Section 42(g) of the Act provides that the industry member may be represented by counsel at a disciplinary hearing.

4. Disclosure

Disclosure of information prior to and at the hearing is required and the grounds for the panel decision are also required. The Act outlines these responsibilities in sections 42(a) and 44(2).

(i) Prior to and at the Hearing

During the investigative stage, industry members must be given sufficient information to understand the nature of the complaint being made against them. During the investigative stage, the industry member must be advised of the conduct issues of concern and the person under investigation must be given adequate opportunity to present evidence to the investigator. This ensures all necessary and available evidence is available in order to make a decision whether or not to refer the matter to a hearing, issue an administrative penalty or dismiss a complaint.

If there is a referral to hearing, disclosure of investigative materials ensures that all relevant evidence is revealed to the industry member fully, frankly and completely and enhances the possibility of agreements to expedite the disciplinary process.

Should issues of disclosure arise for a panel, the following guidelines may assist. Circumstances may require balance taking into account:

- the importance of the individual's interest at stake;
- the importance of the interest being attempted to be protected;
- the impact on that protected interest by disclosure; and

- the need for the information in order to protect the industry member's interest.

(ii) Reasons for Decision

The written decision with reasons for decision must be provided to the industry member and the case presenter representing the Executive Director at the conclusion of the hearing.

5. Cross Examination of Witnesses

Industry members and the Executive Director's case presenter who are affected by an administrative decision must be given an adequate opportunity to present their side of the case. They must follow the procedures established by the panel and present their case accordingly. This is most often done by presenting documentary evidence or witnesses and by cross-examining adverse witnesses. In disciplinary proceedings where credibility is often at issue, it is important that industry members be given the opportunity to cross-examine adverse witnesses so that they can develop and present their case.

Under the Act, panels are not bound by the rules of law regarding evidence that are applicable to judicial proceedings. However, they are bound by procedural fairness and natural justice requirements. Therefore, the procedure for cross-examination should resemble the practices and follow the principles used by the Courts. Courts have held that in matters affecting a person's livelihood, administrative tribunals should adhere to the underlying principles of accepted rules of formal procedure and evidence to ensure fairness.

6. Decision on Basis of Record

In order for the principles of natural justice and fairness to be met, panels must base their decisions only on the factual information presented at the hearing. Information should not be received outside the hearing and should not form any part of the basis for a decision. The evidence presented at the hearing can come from a variety of sources, including witness testimony, documents, and recordings of conversations. To reach a decision based on the record, the panel must make the decision based only on the information admitted in evidence during the hearing.

By virtue of sections 42(d) and 42(e) of the Act, industry members under investigation are compellable witnesses at a hearing. Compellable witnesses are not excused from answering any questions on the grounds that it will incriminate the industry member, subject the industry member to punishment under the Act or establish an industry member's liability.

If a panel is unsure of a response or believes that additional evidence will allow them to make a better decision, the panel may solicit the required response or evidence. However, care must be exercised that the panel does not become an investigative body. Should the panel become part of the investigation process, the industry member's right to a neutral decision-maker may be compromised. This principle is outlined in the following section of these guidelines.

7. Right to a Neutral Decision Maker

In order for the principles of natural justice and fairness to be met, a decision-maker must approach the complaint with an open mind. For this reason, the decision-maker must not be biased and must not make a decision without hearing the evidence presented or upon facts not presented in evidence. This rule of natural justice is known as "he who hears must decide" and means that the decision-maker must be the one to hear the case and direct their mind to the evidence and arguments presented in order to reach a decision.

(a) Bias

At the investigative stage of the disciplinary process, in exercising their powers, investigators must ensure that a reasonable apprehension of bias does not exist, quite apart from whether any bias actually existed. This means that justice must not only be done, but it must appear to have been done. A reasonable apprehension of bias is a basis for a breach of natural justice and may render a decision void.³

Similarly, at the hearing stage of the disciplinary process, a decision reached by the Hearing Panel may not be valid if it can be shown that a reasonable apprehension of bias existed, quite apart from whether any bias actually existed.

Reasonable apprehension of bias exists where a member of the Hearing Panel:

- has a pecuniary (financial) interest in the outcome of the decision;
- has a previous, relevant association with the industry member;
- was involved in both the preliminary investigative stage and the hearing stage of the disciplinary process - for example as a witness at the hearing;
- acts as the investigator, prosecutor and judge;
- acts as if the member's mind is made up prior to or during the hearing or as though matters at issue have been pre-judged or pre-determined. It is not necessary to prove the member's mind was actually made up or that the matters at issue were pre-judged or pre-determined, an appearance of such is sufficient;
- or,
- consults with others who are not members of the particular hearing considering the matter.

A reasonable apprehension of bias will not necessarily exist where a panel member is alleged to have firm views about the regulation of the industry aside from any particular knowledge of the matter at issue in a hearing.

To eliminate any potential for bias at the hearing and appeal stages, industry members are given the names of all the members in the Hearing or Appeal Panels. This will give industry members the opportunity to challenge any of the Hearing or Appeal Panel members prior to the hearing or appeal. Industry members who do not raise an allegation of bias in a timely manner may be held to waive their right to do so subsequently.

On occasion, panel members who become aware of an actual or perceived bias may choose to disqualify themselves from the Hearing or Appeal Panel. It may be prudent for panel members to consider disqualification if they are at all concerned of the probability of an issue of bias.

8. Rules of Evidence

Section 42(h) of the Act provides that the Hearing Panel is not bound by the judicial rules of evidence. The panel should however consider the following:

- evidence can take many forms such as documentary evidence and oral testimony. The form of the evidence will affect the weight attached to the evidence;
- although not bound by the strict rules of evidence, the Hearing Panel's acceptance of unreliable evidence, or evidence introduced for a different purpose may result in a denial of procedural fairness or natural justice, particularly when there is an attempt

³ Principles of Administrative Law, Jones, D.P. and de Villars, A.S. (Scarborough: Carswell, 1985).

- to use unreliable evidence to prove facts central to a matter before the Hearing Panel;
- care must be exercised when admitting evidence to ensure its reliability. This must be balanced with the potential of creating a process that is so judicial in nature that the effectiveness, cost, and time benefits of administrative tribunals are eliminated;
 - for the purposes of Hearing Panels, evidence will be deemed to be reliable unless challenged. If the evidence is challenged, the Hearing Panel must decide what weight they want to attach to the evidence;
 - when determining the weight to be attached to particular evidence, Hearing Panels must keep in mind the purpose of the evidence;
 - the panel should not hear evidence in the absence of industry members because the industry members must know the case against them and be given a fair opportunity to contradict any evidence submitted at the hearing;
 - if the Hearing Panel is faced with an objection regarding the admissibility of evidence, it should hear the evidence and decide the evidentiary issue later. If it decides to rely on the evidence in question, it should incorporate its reasons for doing so in the written decision.

9. Standard of Proof

The onus to prove the allegations rests on the case presenter for the Executive Director. The Act does not impose a standard of proof; but the common law standard of proof in disciplinary proceedings is proof on “a balance of probabilities”. This standard is far less onerous than the standard imposed in criminal proceedings where the offense must be proven beyond a reasonable doubt.

The degree of proof necessary to establish a fact on this standard may vary depending on the circumstances of the case and the possible effect of the outcome on the industry members’ livelihood. This principle of law may be articulated as follows:

The important thing to remember is that in civil cases there is no precise formula as to the standard of proof required to establish a fact.

In all cases, before reaching a conclusion of fact the tribunal must be reasonably satisfied that the fact occurred and whether the tribunal is so satisfied will depend on the totality of the circumstances including the nature and consequences of the fact or facts to be proved, the seriousness of an allegation made, and the gravity of the consequences that will flow from a particular finding.⁴ Thus, the Hearing Panel may require more definite proof of wrongdoing if the consequences would entail depriving industry members of their livelihood (i.e. removing their licence or registration) than if the sanction in question was a fine or reprimand.

10. Waiver of a Procedural Requirement

An industry member has the right to waive any of the procedural requirements that are required. Before such a waiver is effective, it must be shown that the industry member had knowledge of the existence of the right and had a clear intention to waive it. In these circumstances, independent legal advice may be recommended to the industry member.

⁴ Bernstein v. College of Physicians & Surgeons (Ont.) (1977) 15 O.R. (2d) 477.

11. Other Considerations

(a) Fettering of Discretion and Independent Conclusions

Panel members are independent of Council and the office of the Executive Director. The panel makes Hearing Panel decisions at arm's length and independently from each. The panel must not act upon the dictates of another, including the Council, but must analyze the facts and law itself in order to reach its ultimate and independent conclusion.

(b) Relevant Considerations

Panels must use any discretionary power properly and must not rely on irrelevant considerations or refuse to acknowledge relevant considerations. Although not bound by the strict rules of evidence, panels should not consider or admit evidence that is patently irrelevant or improper. Patently irrelevant or improper evidence may include such evidence of misconduct unrelated to the issues before the panel. Evidence considered patently irrelevant or improper will depend upon a consideration of all of the circumstances of the case but generally a fact is relevant if it is pertinent or applicable to the allegations and somehow advances the decision-maker's understanding or belief as to what has occurred.

Further, evidence that is acted on must have cogency/weight at law. Evidence having probative value (i.e. it tends to prove an issue) goes to relevance; the probative value that the evidence is given goes to weight. Any evidence considered by a decision-maker is given the weight that the decision-maker considers appropriate. That is, evidence may be considered relevant but may have very little impact on a decision; or alternately, a piece of evidence may be considered the most important factor in making a decision. This is a matter for the decision-maker to decide.

During the course of the hearing, it may be difficult to determine whether certain evidence is relevant. The admission of irrelevant evidence will not usually of itself invalidate the proceedings if it does not influence the ultimate decision of the panel.

PART 3 HEARING AND APPEAL PANEL COMPOSITION

1. Generally

S. 36 of the Act outlines the requirements for Hearing or Appeal Panels:

- Hearing Panels must consist of at least three members;
- at least one of the Hearing Panel members must be a member of the Council;
- Hearing Panel members who are not members of Council must be industry members;
- all Appeal Panel members must be members of Council;

2. Purpose and Power of Appeal Panel

The purpose of the Appeal Panel is to hear appeals of a decision of a Hearing Panel. Appeal Panels can uphold, modify, or quash decisions made by the Hearing Panel or refer the matter back to the Hearing Panel for further consideration. All members of an Appeal Panel will be Council Members.

3. Location of Hearings or Appeals

The location of hearings and appeals in most cases will be the Hearing Room located at Council's headquarters in Calgary.

4. Selection of Industry Members for Hearing Panels

When opportunities for appointment to the industry member hearing panel roster arise, a formal application and screening process is undertaken.

5. Qualifications of Industry Members Sitting on Hearing Panels

To ensure adequate knowledge and skill and to ensure integrity and fairness in panel work, all industry members interested in being panel members must be knowledgeable industry members who have background and experience in industry practices and standards as well as knowledge of administrative law. Industry members must also be perceived as having a high level of integrity within the industry.

To be eligible to participate in Hearing Panel work, an industry member must meet the following qualifications:

- the industry member must have been actively involved in the industry for a period of at least five years;
- the industry member must have taken the course required as a prerequisite for participating in Hearing Panels. Exemptions may be considered if the industry member can demonstrate equivalent experience or training;
- the industry member must not have been the subject of sanction under the Act;
- the industry member must be regarded as having a high level of integrity within the industry; and,
- the industry member must be prepared to sign a confidentiality agreement and Code of Conduct.

6. Panel Member Training

Before commencing panel activities, panel industry members and members of Council must participate in the Council's panel training program. This program provides exposure to basic and advanced administrative justice courses and RECA disciplinary processes training.

7. Remuneration for Panel Members

Industry members are paid an honorarium and reimbursed for expenses incurred while serving as Hearing Panel members in accordance with Council policy.

8. Termination of Appointments to Hearing Panels

Industry member appointments to the Hearing Panel Roster will terminate upon appointment completion. An industry member whose appointment is terminated may apply for a second term.

9. Hearings Coordinator

Hearing and Appeal Panels require administrative assistance to enable them to carry out their responsibilities. The role of the Hearings Coordinator will include the following:⁵

⁵ Practice and Procedure Before Administrative Tribunals (Vol. 2), Macaulay, R.W. and Sprague, J.L.H. (Scarborough: Carswell, 1997), p. 15-4.

- creating and maintaining a list of standing Hearing and Appeal Panels;
- scheduling dates on which those panels are to convene;
- ensuring that panel members are prepared for each hearing;
- recording the hearing or appeal proceedings;
- maintaining a written record of the proceedings;
- maintaining a record of any transcript undertakings to provide information to either party;
- marking all exhibits introduced during the hearing and ensuring that all exhibits have been properly catalogued and filed in the exhibits binder; and,
- general administration and support.

PART 4 PRE-CONTESTED HEARING PROCEDURES

1. Expedited Hearing Process - Consent Agreements

Before the issuance of a Notice of Hearing, industry members will likely have an opportunity to consider participating in the consent agreement process. In such a case, the industry member and the case presenter for the Executive Director will discuss the case, investigation file disclosure and the facts leading to a conclusion of conduct deserving of sanction and an appropriate level of sanction and costs.

Upon the industry member's request, the case presenter for the Executive Director will draft a consent agreement for the industry member's consideration. If the industry member and the Executive Director are prepared to accept the consent agreement, the Hearing Panel members will review the consent agreement and determine if the terms of the agreement are sufficient and fair. If the decision is to ratify the consent agreement, the Hearing Panel Chair will approve and sign the consent agreement. If the Hearing Panel decides not to ratify the consent agreement, it may informally suggest that the parties discuss a different approach to sanction. This may occur where the panel believes the proposed sanction in the consent agreement is not appropriate in the particular case.

If the consent agreement process does not conclude with a ratified consent agreement, a contested hearing will follow.

2. Temporary Orders

Under section 53(1) of the Act, pending the outcome of any conduct proceeding, the Executive Director may recommend to the Chair of the Council that the Chair make an order:

- temporarily suspending the authorization of an industry member; or
- temporarily imposing conditions or restrictions on the industry member and that individual's carrying on of business.

The purpose of this action is to minimize any risk to the public and it may also create incentive for certain industry members to comply promptly with conduct proceeding requirements. However, the industry member may, by Originating Notice served on the Executive Director, apply to the Court for an order staying the decision of the Chair pending the outcome of the proceedings under section 53(2).

3. Notice of Hearing

The guidelines for notices of hearing have been established to ensure compliance with the legislative and common law requirements and with the intent to be as fair as possible to all persons involved in the hearing process.

Notices of hearing and covering letter contain the following:

- the date for the hearing;
- a location for the hearing;
- particulars/facts of the allegations against the industry member;
- allegations of misconduct;
- the names of all Hearing Panel members and one alternate. The notice will also state that if the industry members have any objection to the composition of the Hearing Panel, the Hearings Coordinator must be provided any objections together with reasons within 14 days of the date of receipt of the Notice of Hearing;
- advice to industry members of their right to be represented by legal counsel;
- a reference that the communication contains full disclosure of the investigation file;
- a warning as to the consequences for non-attendance at the hearing;
- an invitation for the industry member to meet with members of the Legal Services staff to consider agreements; and
- contact information.

Section 42(3) requires the Executive Director to provide notice of hearings at least 15 days in advance of the hearing to the industry member and to any other person who may be affected by the subject matter of the hearing notice.

4. Summoning Witnesses

It is likely that witnesses will be required to testify at most contested hearings. To ensure that all facts relevant to the hearing are available to the Hearing Panel, section 42(c) of the Act provides panels with the same powers to summon witnesses that are given to the Court of Queen's Bench for the trial of civil actions. These powers include compelling witnesses to produce books, records and other documents, providing that the attendance and the documents fall within the acceptable limits. If the information is irrelevant to the Council's mandate or if the information is privileged by law, a summons may not be issued.⁶

The panel, at the request of the case presenter for the Executive Director and industry member, may issue summons prior to the hearing. The case presenter for the Executive Director and the industry member will be responsible for ensuring that the provisions of the Alberta Rules of Court relating to the payment of conduct money or witness fees are followed. Whenever there is a finding of conduct deserving of sanction, a Hearing Panel may order recovery of these costs against the industry member whose conduct is found to be deserving of sanction.

5. Objections to the Composition of the Panel

Objections to the composition of the panel may be made prior to the commencement of the hearing or at the hearing. Objections are preferred to be made in writing and must include the reason for the objection. Upon receipt of an objection relating to the composition of the panel, the Hearings Coordinator will provide same to the panel. The panel members must determine the validity of the reasons and if appropriate, the circumstances creating a bias or

⁶ Ibid. at p. 12-78

a reasonable apprehension of bias. If in doubt, the panel member should disqualify themselves from the Hearing Panel.

It is possible that the industry member will object to the entire composition of the panel based for example on the panel members' membership in other organizations, subject matter of industry practice, or geographical area of trade. The Executive Director could also for example object to the composition of the panel if he believes that a panel member would not render a fair decision. These objections are also required to be considered by the panel and decision rendered.

Panel members must disqualify themselves whenever there is a business, family or personal relationship that could be perceived by the industry as being cause for an unfair decision being rendered or a conflict of interest. If in doubt, the panel member should consult with the Hearings Committee Chair.

PART 5 HEARING PROCEDURES

1. Public Hearings

All hearings are open to the public to ensure transparency and accountability by the regulator to the public at large. There may, however, be exceptions when for example, privacy issues far outweigh the desirability of adhering to the principles of open hearings. However, such circumstances will be extremely rare.

(a) Confidential Information

The need to hold portions of a hearing, *in camera*/in private may arise where a party is opposed, for serious reason, to the public disclosure of information. Upon review of the circumstances, the Hearing Panel may decide to hold a part or all of the hearing in camera. In rare cases this might permit confidential business brokerage information, for example, to remain private which if the situation were otherwise might seriously and adversely affect the legitimate commercial pursuits of a brokerage.

In order to have the hearing held in camera, the individual whose conduct is the subject of the hearing must make an application to the Hearing Panel in advance of the hearing. The application must contain convincing information that suggests that evidence given during the hearing will have a relevant effect on competitive advantage. The application should give particulars as to why the evidence will have this effect.

In considering a request, the panel must balance the public and the media's right to know with the individual's right to do business or to a fair trial. If the proceedings or a portion thereof are to take place in camera, the panel must be satisfied:

- that of all hearing alternatives, the in camera session is by and large the best; and
- that the procedure adopted is fair to both parties involved and the public interest, including the public's right to know what goes on.⁷

If the Hearing Panel grants the request, they should decide what portion of the hearing will be in camera. In camera sessions should be kept to a minimum to allow the greatest possible public access to the hearing process.

⁷ Ibid. at p. 16-2

It should be noted that “the decision to hold an in camera hearing is an open invitation to be reviewed by a Court, particularly where the statute is silent regarding this issue.”⁸

As well, section 42(e) provides that any evidence given in the course of a hearing may not be used in any civil proceedings, in a prosecution under the Act, or in any proceedings under any other Act, except in a prosecution for, or proceedings in respect of, perjury or the giving of contradictory evidence. Because industry members are thereby protected against having evidence given during a hearing used in a subsequent civil or criminal proceeding, with the exceptions noted, it would be unlikely that an in camera hearing would be required in the majority of cases.

(b) Media Relations

Like all members of the public, the media may attend hearings and appeals. The media is not permitted to make any independent recordings of the hearing during the hearing but note taking is acceptable. No camera or other recording equipment is permitted. Media should not be disruptive. If their presence is problematic, they should be cautioned and if the disruption continues asked to leave the hearing.

(i) Media Requests for Interviews during Hearing or Appeal Proceedings

Members of the media may approach hearing or appeal panel members, the Executive Director or staff regarding a hearing or appeal. All media requests for interviews to hearing or appeal panel members should be referred to the Communications Coordinator.

Panel members should not participate in media interviews before or during the course of the hearing. Doing so could cause concern over the independence, fairness or effectiveness of the Council’s disciplinary process. If members of the media wish to understand the circumstances or the discipline process, they may want to observe the proceedings which are open to the public. Media requests for general information regarding the Council, its mandate or disciplinary processes, should be referred to the Communications Coordinator.

As a matter of policy, the Communications Coordinator will not grant any media interviews regarding a specific case until the hearing has concluded and a decision by the panel has been rendered.

(ii) Media Requests for Documents during Hearing or Appeal Proceedings

A Notice of Hearing is available to the public and the media may obtain a copy upon request. Copies of documents or evidence will be refused.

(iii) Media Interference with Witnesses

The panel Chair, at the commencement of the hearing, should issue a directive to the members of the media forbidding contact with witnesses until the witnesses’ testimony is complete, including a warning that the member of the media will be barred from the proceedings if they make contact with witnesses before or during their testimony.

⁸ Ibid. at p. 16-3

2. Role of the Chair⁹

The Chair is responsible for all procedural matters during the hearing and for ensuring that a reasonable degree of formality is maintained in order to maintain the credibility of the panel and disciplinary process. Verbal answers to all questions are required.

If the panel is called upon to give a ruling, the Chair will consult with other panel members before making a decision. The Chair may call a recess if uncertain as to how to proceed.

3. Panel Members¹⁰

Panel members should bear in mind that everyone in the hearing room may be looking at them and everything they do shows. They should therefore be and look alert at all times. Panel members must also keep any personal biases or political opinions out of the proceedings completely.

4. Independent Legal Counsel

The purpose of independent legal counsel is to provide a panel with a neutral source of legal advice, either with respect to procedural matters or substantive matters, and to legally assist and guide panels in their decisions, if required.

Panels are entitled to seek the advice of independent legal counsel. If legal issues are first raised at the hearing, the panel may either adjourn the hearing or reserve its decision in order to seek independent legal advice. It is important to note that independent counsel is not a member of the panel and the panel must not delegate its decision making power to independent counsel. The ultimate decision or order given by the panel must be that of the panel and not independent counsel. Should it be found that independent counsel made the actual decision of the panel or even appeared to do so, a court is likely to set aside or quash the decision even if the decision itself was ultimately correct.

Moreover, should independent counsel conduct independent research for a panel or provide advice with respect to a matter not previously or thoroughly addressed by all parties, it is imperative that all parties before the panel have the opportunity to respond and present submissions to any such advice before the panel renders its decision. Independent counsel will not be tasked with providing advice on issues of policy but will provide assistance on legal questions only.

In order to ensure that the hearing is fundamentally fair to all parties, both in appearance and in fact, independent counsel will conduct themselves in the following manner:

- when present at the hearing, independent counsel will sit separate from the panel and not appear to be the decision maker;
- independent counsel will address all comments or questions to the panel Chair;
- independent counsel will refrain from acting or appearing to act as the panel's Chair;
- independent counsel will refrain from interfering with the hearing process including the examination of the witnesses or the presentation of counsel or parties; and
- independent counsel will only give advice after being requested to do so by the panel.

⁹ Ibid. at p. 13-7

¹⁰ Ibid. at p. 13-8

During the hearing process, panel members should not contact RECA staff to question staff on matters before or not before the panel. Questions may be addressed to case presenters in the presence of the industry member at the hearing or appeal.

5. Order of Proceedings

Contested Hearings

(a)Phase One – Conduct Deserving of Sanction

(i) Chair’s Opening Remarks¹¹

A hearing begins when the Chair calls the hearing to order. A brief outline of the hearing procedures will eliminate confusion further on in the proceedings and allows those in attendance to get into “hearing mode.” The outline also establishes that the Hearing Panel is in control of the proceedings.

These opening remarks may be made ad hoc or read from a prepared text. Even if the Chair is comfortable speaking informally, it may be useful to maintain a list of points to be covered in the opening remarks. These points should include:

- a statement that the function of the Hearing Panel is to hold a hearing regarding a matter referred by the Executive Director;
- an introduction of the panel members and advice to the participants how to address the panel members. Also, the Chair will introduce the industry member using their full name and title, and the name under which they do business. Next, the case presenter for the Executive Director should be introduced, stating they are acting on behalf of the Executive Director. Then the lawyer or case presenter for the industry member should be introduced, stating that they are appearing on behalf of the industry member. The Chair will also ask others present in the hearing room to introduce themselves and request that they state their purpose for being at the hearing. If they are witnesses, they should be requested to leave the hearing room;
- a brief introduction of the subject of the hearing;
- a brief explanation of the procedure to be followed during the hearing;
- advise that the panel intends to carry out its function by receiving all evidence and information available, considering all aspects of the matter, reaching their decision.¹²

The Chair should then ask the industry members or their case presenter if they have any objections to the hearing, to the membership of the Hearing Panel or any other objection. If there are no objections, the panel Chair will direct that the record show that no objections were raised and the hearing should proceed.

(ii) Appearance of Witnesses

The Chair will request information regarding appearances of witnesses.

(iii) Dealing with Preliminary Objections

If the industry member or their case presenter raises preliminary objections, the Hearing Panel must take the objection into consideration. The case presenter for the

¹¹ Practice and Procedure Before Administrative Tribunals (Vol. 2), Macaulay, R.W. and Sprague, J.L.H. (Scarborough: Carswell, 1997), p. 12-103.

¹² SMAA Discipline Process (1995) Unpublished, p. 56-7.

Executive Director should be allowed to respond to the objection. If more time is required, the Hearing Panel may take a recess in order to deliberate privately, seek an opinion from outside legal counsel or allow the case presenter for the Executive Director to prepare a response.

(iv) Admission of facts and/or breaches and Section 46 Admission of Conduct Deserving of Sanction

After service of the Notice of Hearing and before the commencement of the hearing, the parties may agree on items required in the hearing. For example, panels may be provided with:

- an agreed statement of facts;
- an agreement on breach;
- an agreement on a finding of conduct deserving of sanction; and/or
- an agreement on sanction and/or costs.

Any agreements will be provided to the panel at the hearing. The hearing may still be required to proceed but only in regard to any outstanding issues, in most cases the appropriate sanction and costs in the case.

Instead of agreements on some or all of the above, the industry member may sign and provide a section 46 Admission of Conduct Deserving of Sanction to the panel. In so doing, the industry member admits to the facts, breaches and conduct deserving of sanction set out in the Notice of Hearing. In such a case, the allegations set out in the Notice of Hearing will have been proven and no evidence, no witnesses or summations, etc. are required. In this process, the industry member admits that their conduct is conduct deserving of sanction as set out in the Notice of Hearing.

When a s. 46 admission of conduct deserving of sanction is entered as evidence before a panel, usually the only issue is the appropriate sanction and costs, if any. The industry member may make a written and/or oral submission on sanction and costs separate and apart from the case presenter for the Executive Director; or a joint written or oral submission on sanction and costs may be provided to the Hearing Panel by the industry member and the case presenter for the Executive Director.

(v) Presentation of the Case against the Industry Member

As the case presenter for the Executive Director is the moving party, the case presenter for the Executive Director will always present first. The presenter should begin by outlining the allegations of misconduct in the Notice of Hearing; make an opening statement and then move on to calling witnesses and presenting the evidence against the industry member. If there is an agreed statement of facts, it should be acknowledged and entered as evidence for the record at this time.

The witness procedure should be as follows¹³:

- witness called by the case presenter for the Executive Director;
- witness sworn by the Hearing Coordinator;
- examination-in-chief by the case presenter for the Executive Director;

¹³ Ibid. at p. 59.

- at the end of the examination-in-chief, the Hearing Panel Chair asks the other case presenter if they wish to cross-examine;
- if there is a cross-examination, the Hearing Panel Chair asks the case presenter if they wish a redirect;
- after redirect, if any, the Hearing Panel Chair asks the other panel members if they have any questions;
- case presenter for the Executive Director and case presenter for the industry member may redirect from questions posed by the Hearing Panel; and
- after all questions are concluded, the witness is excused.

Where a witness has failed to appear before the Hearing Panel or has failed to produce records in compliance with a Summons, the panel Chair may be called upon to consider representations as to whether an adjournment is required for civil contempt of Court proceedings to be brought against the witness.

(vi) Industry Member Presents Case

On conclusion of the Executive Director's case, the Hearing Panel Chair asks the industry member or their case presenter if they wish to present any evidence. Presentation of the evidence should be the same as outlined above.

(vii) Rebuttal

After the industry members or their case presenter has presented their case, the Hearing Panel Chair may ask the case presenter for the Executive Director to rebut the evidence raised. This rebuttal may take place in the form of comments by the case presenter for the Executive Director and additional witnesses may be called.

(viii) Arguments

Both parties will make their summation arguments after all the evidence is before the panel and as the final part of the hearing. The summations should include argument on fact and findings of conduct deserving of sanction.

The Hearing Panel Chair first asks the case presenter for the Executive Director for summation arguments. Upon conclusion of the case presenter for the Executive Director's summation, the Chair will ask the industry member or their case presenter for summation arguments. The case presenter for the Executive Director should be permitted a brief response to new issues raised by the industry member or their counsel.

Generally, each argument should be made with no interruption from any panel member or from the other case presenter. If a panel member however, has a serious concern with a party's position the member may express that concern in a respectful way during the summation and the party will address it.

(ix) Reservation of Decision

Usually upon conclusion of the summations, the Hearing Panel Chair will advise that the decision will be reserved until the Hearing Panel has deliberated in regard to the Phase One issue, being conduct deserving of sanction. The hearing may then be adjourned for deliberations on whether the industry member's conduct is deserving of sanction and the panel will issue a written decision in this regard.

(b) Phase Two – Sanction and Costs

Where the panel finds conduct deserving of sanction as a result of any of the processes outlined in Phase 1 of the hearing, the processes involved in this second sanctioning phase may vary depending on the wishes of the panel. The panel may request that any evidence and submissions on sanction and costs be made in writing or, the panel may request that the parties appear in person before the panel for the provision of evidence and submissions on sanction and costs. As such, the processes outlined above in the Phase One discussion may also apply in Phase Two.

Parties may choose to rely on prior RECA cases or other legal precedents in support of the requested sanction and costs. In accordance with section 43 of the Act, the panel may consider a sanction including authorization cancellation/suspension, fine, and educational requirement, etc.

Council believes that the industry member whose conduct is deserving of sanction ought to be responsible for full costs of the hearing process. Council believes that the industry at large ought not to bear the hearing costs for industry misconduct. Even so in hearings, costs are ultimately at the discretion of the panel. In regard to costs, generally at the hearing the case presenter for the Executive Director will request full cost recovery including the costs of the investigation, costs of the legal counsel case presenter, independent legal counsel costs, the panel honorarium, location costs, hearing coordination costs, conduct money and so on. To obtain full details of the items and amounts that may be recovered in a costs award, see the Bylaws of the Act, s. 30.

(i) Reservation of Decision

Usually upon conclusion of both summations, the Hearing Panel Chair will advise that the sanction decision will be reserved until the Hearing Panel has deliberated in regard to the Phase Two issue, being the appropriate sanction and costs.

The hearing is then complete and the panel will issue a written decision.

6. Behaviour of Panel Members

(a) Setting the Mood for the Hearing

Panel members should promote professionalism through dress and manner at all times and should avoid undue familiarity with witnesses, industry members, case presenter for the Executive Director or industry member.

The panel Chair should request that all pagers and cell phones be turned off before the hearing commences. The Chair should introduce everyone. During the hearing, the Chair should always maintain control of the proceedings. Should they become difficult to manage, the panel may take a short recess to allow time for things to settle down and caution any such individuals that they can be excluded from the hearing should disruptive behaviour continue.

During recesses, breaks and lunch, the panel should have no contact with either side of the case until after they have finished their deliberations and rendered the decision to ensure the neutrality of the decision is above reproach.

(b) Hearings must start on time

Hearings should start on time to avoid inconveniencing any participants to the hearing. Hearing Panel members should arrive 15 minutes ahead of the scheduled start time to ensure that all preparations have been made. They are expected to have read all materials in advance of the hearing.

(c) Taking Notes during the Proceedings

As part of the effort to ensure a good decision, panel members should take notes of the proceedings as they progress. Any questions that occur to the panel should be noted down as they occur so that they may be asked at an appropriate time, rather than interrupting the flow of the proceedings. Note-taking is especially important during complex files, as it will aid panel members in following the proceedings and in its finding of facts once the deliberation for the decision takes place. Panel members should also take note of their observations, as well as the things that are said. At the same time, however, panel members should avoid trying to take verbatim notes as it will distract them from the proceedings.

(d) Disqualification of Hearing Panel Members

Any connection with the industry member that may give a perception of bias should disqualify a member to sit on that particular panel. In addition, all panel members must have a valid appointment throughout the entire hearing process. Any potential members who are nearing the end of their term of appointment should not be appointed to sit on a hearing unless it is certain that they will be able to fulfill the term and fulfill their duties as a panel member.

7. Recording of Proceedings

Under section 42(i) of the Act, all oral evidence received must be taken down in writing or electronically to ensure an accurate record of the proceedings is available. The hearings will be recorded and the Hearings Coordinator will also take notes of the proceedings. Should there be some sort of technological defect in the recording, the incomplete transcript will most likely not invalidate the proceedings unless there is some sort of material harm arising from the defect, such as deprivation of grounds for appeal.¹⁴

Whenever required, the Hearing Panel Chair may, with the consent of all present, ask the Hearings Coordinator to go off the record if the Chair wishes to informally discuss the procedures to be followed or any other matter.

During confidential or in camera portions of the hearing, the panel Chair should clearly announce the beginning and the end of the in camera section for the benefit of the recording. Written transcripts of an in camera hearing segment should be clearly marked and the in camera portions deleted when providing copies to anyone except the parties present at that time.

¹⁴ Practice and Procedure Before Administrative Tribunals (Vol. 2), Macaulay, R.W. and Sprague, J.L.H. (Scarborough: Carswell, 1997), p. 12-100.5.

8. Maintaining Order at the Hearing

(a) Right to Interject

Though to be exercised sparingly, all panel members are permitted to interject at any time during the proceedings in order to clarify or ask questions of witnesses or case presenters for either side. Discretion should be exercised so that interjections are used to further, not delay, the process.

In addition, case presenters for either side may interject to lodge an objection with the Chair during presentation of evidence.

(b) All Objections Should Go to the Chair

All objections should go through the panel Chair, who should allow a response from the other party before ruling on the objection. If the panel is faced with an objection regarding the admissibility of evidence, one of the options is to hear the evidence and decide the evidentiary issue later. If it decides to rely on the evidence in question, it should incorporate its reasons for doing so in the written decision.

(c) Arguing

No arguments should be permitted during the hearing between any parties to the hearing. Hearing proceedings should always take place with the utmost courtesy to all parties involved. All comments must be directed through the Chair, who will recognize the party who wishes to speak. No one should speak until the Chair permits it.

(d) Recesses

There may be instances where a recess is necessary during the proceeding. These include:

- if the hearing is out of control, or if an issue arises that cannot be dealt with within the confines of the hearing, the Chair may call a recess;
- if an unanticipated issue arises that is critical to the case, the case presenters for either side may also request a recess;
- during long and complex hearings, recesses may be helpful to allow both panel members and the other parties to remain more alert and focused during the proceedings;
- if witnesses become upset, a recess may be preferred in order for the witness to regain composure. In such a case, the Chair should remind the witness that they remain under oath and they are not to speak to anyone about the case during the recess; and
- should the panel be ready to hear a witness before the time the witness was scheduled to appear, a recess may be appropriate until the witness arrives.

If the decision to take a recess is made, the Chair should announce the time and place when the hearing will reconvene. In determining the length of time for a recess, the Chair should balance the necessity of maintaining a prompt disciplinary process with the maintenance of order and allowing all parties to be properly prepared.

e) Rude Behaviour

Rudeness such as insults, sarcasm, coarse language and other inappropriate behaviour will not be permitted. If the issue is with the industry member or a case presenter for either side, the Chair will direct the party to desist from the behaviour. If the individual

continues, the Chair may call a recess until the person has regained control of themselves. The Hearing Panel may take extremely rude, disruptive behaviour of the industry member into account during sanctioning as well. In especially serious cases, the panel may consider initiating contempt proceedings.

If other individuals are engaging in rude behaviour, it is suggested that they be given one warning to desist. If they continue, the Chair will ask the person to leave the hearing. The Chair may use discretion to determine whether the individual will be allowed to return at a later time.

The Chair should avoid being drawn into arguments with the angry individual at all times. The most useful way to deal with the situation is to be patient, but firm, while conveying that such behaviour will not be tolerated. If necessary, a short recess may be called to allow tempers to cool.

(f) Argument Not Evidence

Panel members should be careful to consider what is evidence, (what may or may not be accepted as fact) and what is argument, (a presentation by the case presenter for either side or the industry member that attempts to persuade the panel members). Decisions should be based on the evidence, rather than on the arguments made by the case presenter for either side, although panel members may find one interpretation of the facts more persuasive than another and may take that interpretation into account in reaching their decision.

New evidence may not be introduced during the summation argument. The purpose of argument is to summarize the evidence already presented and to attempt to present an interpretation of the evidence that is favourable to one side or the other.

(g) Discourage Repetition

Any time the case presenter for either side makes a point or a witness gives evidence that merely repeats information that has already been presented, the panel Chair should consider stopping the individual and quickly summarize the information that has already been presented to the panel on that matter. If the individual has more to add on the matter, they should be allowed to continue. If, on the other hand, it is simply repetition of what is already known, the Chair should ask the individual to move on to another topic. Leeway for repetition should be permitted in cross-examination.

(h) Redirect Relate to Matters Arising out of Cross Examination

Following a cross-examination of the witness by the opposing case presenter, the case presenter responsible for the examination-in-chief may engage in redirect, in which the witness may be questioned with regard to issues that arose during cross-examination. The case presenter may not introduce any new points. The purpose of redirect is only to allow the witness to respond to issues that arose during cross-examination. If the case presenter attempts to bring up a new point during redirect, the panel Chair should interrupt and instruct them that only questions may be asked that refer to matters raised during cross-examination. It will be left to the panel's discretion to determine if the line of questioning is sufficiently related to cross-examination issues to be permissible. The redirect should not be used to allow a case presenter for the Executive Director or industry member to ask questions they may have otherwise forgotten.

(i) Avoid Technicalities

On occasion, Hearing or Appeal Panels may find that case presenters for either side are unfamiliar with the administrative proceedings of the panel and are behaving as though the hearing was a formal Court proceeding. The case presenter for either side may make objections relating to technicalities that are not applicable to an administrative tribunal, such as points of evidence or procedure. An administrative tribunal may be more time efficient and more flexible than other judicial processes. Constant objections on technicalities will probably negate any benefits conferred.

The panel should be aware that they have considerably more flexibility in the hearing than would be the case in a Courtroom and may remind the case presenters of this fact. If the panel Chair feels that too much time is being taken up with minor objections, the Chair may ask the case presenters to refrain from any further comment on such matters.

(j) Contempt Proceedings

Contempt proceedings should only be considered as a last resort and are very serious in nature. To commit a contemptuous act is to do something which hinders, or obstructs a judicial body in the performance of its duties. In order to secure compliance for civil contempt, a Court may impose a fine or other penalty which will be exacted in the absence of compliance.¹⁵

Under section 42(f) of the Act, a Hearing Panel has the authority to bring civil proceedings for contempt of Court against a witness who fails to appear before the Hearing Panel or to produce books, records, documents or things in compliance with a notice to produce them, or refuses to be sworn or to answer any questions they have been directed to answer. With the exception of failure to appear, these powers generally apply only to actions that take place before the Court. Other powers may be implied if necessary for the panel to carry out its mandate efficiently and effectively. If the panel is unable to apply these powers, they may also request to the Courts for relief "in accordance with the due administration of justice."¹⁶

In contempt proceedings, strict attention must be paid to procedural matters due to the potentially serious consequences. The individual must first be "cited" for contempt, which serves as notice that the individual has been contemptuous. If the ability to continue a hearing is in jeopardy due to the contemptuous behaviour, the panel Chair may act almost immediately to punish the contempt where it is necessary for the hearing to proceed. Otherwise, the individual should be cited and given the opportunity to argue their case later. Possible penalties are as follows: expulsion from the hearing, payment of the costs of the contempt proceedings for a minor breach, or fines. The individual in contempt may "purge" themselves of the contempt by doing what they neglected to do.

9. Rules of Evidence¹⁷

"Evidence" generally means that which tends to establish or prove something. In making a determination on the case before them, the Hearing Panel will make findings of fact based

¹⁵ Practice and Procedure Before Administrative Tribunals (Vol. 3), Macaulay, R.W. and Sprague, J.L.H. (Scarborough: Carswell, 1997) p. 29A-4

¹⁶ *Ibid.* at p. 29A-48.

¹⁷ "Rules of Evidence and Procedural Problems Before Administrative Tribunals", Ratushny, E. (1988) Canadian Journal of Administrative Law & Practice, 2 pp. 157-186.

on the evidence. The rules of evidence should be applied more or less flexibly, depending on the impact on the industry member.

Section 42(h) of the Act provides that the Hearing Panel is not bound by judicial rules of evidence; however a Hearing Panel should still be concerned that it receives the best, most direct and relevant evidence available. The panel should be aware of the general nature of the rules of evidence since evidence that is inadmissible according to the rules of evidence may be unreliable to some degree. The rules of evidence exist to:

- establish a sound factual basis for decisions;
- ensure a proper balance between the harm in accepting evidence and the value in doing so; and
- maintain a fair and effective process.¹⁸

Generally, the panel should hear evidence unless there is a sound reason not to. If an objection is made that admission of certain evidence would be irrelevant, hearsay or prejudicial, the Hearing Panel may still admit it, but should consider whether it will be helpful in coming to a determination and not overly prejudicial to the other side. If it seems likely that admission of the evidence would be contrary to natural justice and fairness, then the evidence should be excluded. If the evidence is admitted, it may be helpful for the panel to state why they did so.

Only evidence presented during the hearing may be taken into account during the deliberations and decision. Any information heard outside the hearing should not be considered.

Evidence that is not admissible may not be presented. Whereas evidence that is admissible must have weight given to it depending on how persuasive it is. The assessment of the persuasiveness of the evidence is usually a matter of logic and experience.

The following three-step process may prove useful in deciding whether to exclude evidence¹⁹:

- is this evidence capable, if believed, of creating a factual basis for the decision in question, and if so, how far can it logically be taken to do so?
- if it is capable of supporting the necessary factual base, is there some other reason why it should be rejected? Will its acceptance lead to some greater social harm than the good likely to be accomplished by accepting it?
- assuming that the evidence meets the first two concerns, is there anything about the way the evidence is coming forward that threatens the fairness or smooth operation of the hearing? And if so, is this threat of sufficient importance in light of Council's mandate to warrant its exclusion?

(a) Examination-in-Chief

(i) Opinion

The witness must testify as to facts. The witness may not draw inferences, opinions, or beliefs from the facts. It is unacceptable for the case presenter to ask the witness's opinion of another witness's testimony.

¹⁸ Practice and Procedure Before Administrative Tribunals (Vol. 2), Macaulay, R.W. and Sprague, J.L.H. (Scarborough: Carswell, 1997), p.17-2.6.

¹⁹ *Ibid.*

The exception to the opinion rule relates to expert witnesses. Persons who are first qualified as an expert by some special skill, training, or experience can be asked their opinion on the matter at issue, with the exception of individuals giving evidence of their opinion upon which they have personal knowledge. This includes the identity of individuals and the apparent age of a person which are among the matters witnesses have been allowed to express an opinion because they have personal knowledge of the subject matter enabling them to form an opinion.

(ii) Hearsay

Hearsay evidence is evidence of a statement made by someone other than the witness testifying at the hearing that is being presented to prove the truth of the statement. Affidavits are considered hearsay evidence as there can be no cross-examination unless the author of the affidavit is summoned. Also documents created by someone not called to testify are hearsay evidence. Hearsay evidence, generally speaking, is any evidence that is not firsthand evidence of what someone else says, heard, or said. This type of evidence can never be considered as reliable as first hand evidence, and therefore should not be given as much weight as firsthand evidence. Caution should be exercised in accepting hearsay evidence because such evidence cannot be subject to cross-examination.

The hearsay rule does not absolutely prohibit testimony that relates to the statement of another. Hearsay may be used to prove that someone made the statement in question. It is the content of that statement that may not be proven through hearsay. Extreme care must be used where hearsay evidence is used to contradict an explanation by industry members as to their innocence. The current approach is a two-part test: hearsay evidence may be admitted provided there is necessity that the evidence be admitted (the maker of the statement or the document is not available to testify) and there is satisfaction with the reliability of the evidence. Panels are not bound by strict rules of evidence but hearsay evidence may not be accepted if it will result in a denial of natural justice.

(iii) Leading the Witness

A leading question is one that suggests the answer desired or which is “loaded” in the sense of requiring an admission of fact if it is to be answered. Such questions may lead the witness to make overly simplified responses without much thought. A leading question does not make the evidence inadmissible; rather, the weight of the answer may be greatly diminished in terms of evidentiary value. The following are the established exceptions to the rule against leading questions:

- introductory matters that are undisputed, such as the introduction of a witness or the focusing of their attention upon a particular subject;
- where the attention of the witness is directly pointed to persons or things for the purpose of identifying them;
- where the goal is to have one witness contradict another as to remarks alleged to have been made, the witness may be directly asked whether or not the remarks were made;
- where a witness is unable to answer questions put in the usual way because of the complicated nature of the matter upon which they are being questioned;
- where a witness is a child, or is ill, or has difficulty with the English language;

- where a witness' memory is so defective that they are simply unable to answer.²⁰

In considering testimony in the above exceptions, the panel should still consider the weight that may be appropriately attached to it.

(iv) Refreshing Memory

A witness may not give evidence by reading a prepared statement but under certain conditions may refer to a document in order to refresh their memory. The document must have been made when the event was fresh in the witness' mind so that it represents an accurate portrayal of what occurred. The notes do not become part of the evidence unless they are used during cross-examination to test the witness' recollection. If they are used for this purpose, the notes should be entered as an exhibit. In addition, the panel may also require that notes that are referred to before testifying be produced.

(v) Previous Consistent Statements

The case presenter may wish to introduce a statement into evidence that was made earlier by their witness, such as where a witness made a statement long before the hearing that is almost identical to evidence given by that witness at the hearing. The basis for excluding the statement is called the rule against self-corroboration. The rationale for the rule is that the testimony would be redundant, would waste the time of the panel and need not be true. The exception is that the witness may make such a self-corroborating statement if the truth of the statement is directly questioned.

(vi) Hostile and Adverse Testimony

It sometimes happens that a party calls a witness who is expected to give favourable testimony but actually gives unfavourable testimony. Generally, the party calling the witness cannot ask leading questions; however, if a witness is determined to be hostile, leading questions are permitted. In such a situation the rules also include the following²¹:

- if the witness displays clear hostility to the party on behalf of whom the witness was called, they may be declared hostile, permitting the full range of cross-examination;
- generally a party calling a witness may not call the witness' character into question;
- the party calling the unfavourable witness may still call other witnesses to give evidence contradicting the unfavourable witness;
- if the case presenter indicates that the witness made an inconsistent statement earlier in the hearing, the witness should be shown the statement to refresh their memory;
- if the statement is still denied by the witness, the case presenter should be permitted to prove the statement, if necessary, and then cross-examine on it.

(b) Admissibility

(i) Relevance

The most important consideration in admissibility is whether the evidence in question is relevant. There are two aspects to "relevance:"

²⁰ Ibid. at p.169.

²¹ Ibid. at p. 173.

- logical connection to what must be proved in the case (sometimes referred to as material), and
- probative value in the sense of actually tending to prove the material matter.²²

(ii) Judicial Notice

The Hearing Panel may take “judicial notice” of facts that are generally accepted to be true among reasonable persons or which may be immediately and accurately demonstrated. Fairness requires that any matters accepted in the absence of proof should be brought to the attention of industry members to allow them to present contrary evidence.

(iii) Character Evidence

Evidence of character is generally inadmissible unless industry members introduce evidence of their good character, because in that case they have put their character at issue and have opened it up to being questioned. The Hearing Panel must decide whether the probative force of the evidence outweighs the fact that it is highly prejudicial.

One exception to the general rule however, is when the panel is making a determination as to the industry member’s overall integrity in the context of their fitness to be authorized and to do business. Character evidence is directly relevant in this situation and so may be heard by the panel even if not raised by the industry member. Prior disciplinary findings of conduct deserving of sanction do not mean that the industry member is again guilty of misconduct. However, the prior findings of misconduct can increase a sanction.

10. Adjournments

All pre-hearing requests to adjourn a hearing must be made in writing to the Hearings Coordinator who will notify the Hearing or Appeal Panel appointed to hear the case.

For a first-time adjournment application, the party requesting the adjournment must submit a written request which includes reasons as well as available dates for a hearing. Opposing council will be provided with the application and will respond accordingly. In most cases if opposing counsel agrees or has no position on the application, a panel decision adjourning is issued in writing and provided to all parties. Should any party have an objection to the adjournment application, a teleconference will be arranged so the parties can present submissions.

For any subsequent adjournment applications, the panel may meet in person or via a conference call in order to receive submissions from both parties as to whether an adjournment should be granted. Submissions should be made as to alternate dates. When a decision has been reached, the panel will provide a decision stating whether the adjournment has been granted, the alternate date, and brief reasons for decision to both parties.

Generally, an adjournment should not be granted except where compelling reasons exist for doing so, or where proceeding would amount to a denial of natural justice and fairness.

²² Ibid. at p. 181.

Adjournments should not be granted lightly, particularly if a person's rights are in suspense. If for good reason, one party cannot put its case squarely before the panel on the day set for the hearing, then natural justice requires that that party be granted its requested adjournment.²³

The panel may not fetter its discretion by adopting a firm policy of no adjournments as a failure to adjourn may result in a violation of the principles of natural justice. Each application for adjournment must be considered on its own merits.

Other factors to consider are²⁴:

- the purpose of the adjournment (is it necessary for a fair hearing);
- has the participant seeking the adjournment acted in good faith and reasonably in attempting to avoid the adjournment;
- the position of the other participants and the reasonableness of holding the hearing at the scheduled time;
- the seriousness of the consequences if the adjournment is not granted;
- whether the request for the adjournment was made in a timely fashion;
- is there some way to compensate for the consequences that have been identified;
- how many previous adjournments have been granted to the party seeking the adjournment;
- had the participants been told that no adjournments would be granted, and if so, were the parties consulted in selecting the date and were they advised of its peremptory nature.

In determining if an adjournment should be granted, the Courts emphasize the importance of:²⁵

- the availability of counsel where there are serious consequences as a result of a finding of conduct deserving of sanction;
- sufficient time to prepare where the events complained of took place a significant time before;
- sufficient notice to prepare against serious allegations brought against the industry member;
- sufficient time to reply to written arguments;
- sufficient time to produce a material witness to testify;
- taking into account physical disability or illness.

11. Exhibits

In order to ensure that evidence is properly marked and preserved, all exhibits must be maintained, catalogued and placed in the binder by the Hearing Coordinator. Making photocopies during proceedings should be avoided due to a desire to reduce interruptions in the proceedings. Confidential documents may be submitted, but should be marked as such. All parties to the hearing should receive a copy of any exhibits.

(a) Undertakings

During a lengthy hearing, a verbal or written undertaking may be made. Undertakings are commitments to produce later in the hearing a document, chart, material (often

²³ The Regulation of Professions in Canada, Casey, J.T., (Scarborough: Carswell, 1994) p.8-9.

²⁴ Practice and Procedure Before Administrative Tribunals (Vol. 2), Macaulay, R.W. and Sprague, J.L.H. (Scarborough: Carswell, 1997), p. 12-132.

²⁵ The Regulation of Professions in Canada, Casey, J.T., (Scarborough: Carswell, 1994) p.8-11.

calculations), or a witness. The undertaking should be fully described and recorded by the Hearings Coordinator in the undertaking list and in the transcript. The case presenter for the Executive Director should follow up on undertakings.²⁶

12. Witnesses

(a) Exclusion of Witnesses

All witnesses in a hearing should be excluded from the hearing room prior to their testimony. In some cases, witnesses may even be separated and all must be cautioned not to speak to each other about the case. For example, witnesses who are to appear on the industry member's behalf may wait in a room different from witnesses to be called on behalf of the case presenter for the Executive Director. This is generally done to maintain testimony integrity.

(b) Sworn Evidence

Witnesses are required to give evidence under oath (swear on the Bible) or make an affirmation. A failure to have evidence taken under oath or affirmed has been found to result in an invalid hearing.²⁷ The affirmation will have the same force and effect as if the person had taken an oath.

(c) Testimony of Witnesses

Individual witnesses do not have to be called in any particular order. Order may be a matter of strategy and will be determined by the case presenter. Witnesses, other than the industry member, may be accompanied by counsel who has no role in the hearing. Since the industry member cannot be excluded from the hearing, it is common for the industry member to testify first on their own behalf. However this is not required. The Hearing Panel should not take this factor into consideration in according weight to the testimony.

(d) Rules of Cross Examination and Redirect

(i) Cross Examination²⁸

In addition to questioning on matters at issue, cross-examination opens up questioning relating to credibility. It is important to remember that the broader range of permissible questioning does not allow the introduction of otherwise inadmissible evidence. Leading questions may be asked, although the extent to which the answers are drawn from the witness may still affect the weight given to the answers.

On cross-examination the questioning must be relevant either to a fact in issue or to credibility. However, in assessing the relevance of the line of questioning, some leeway must be permitted to allow for uncertainty as to where the cross-examination may lead but the Hearing Panel has a duty to protect the witness from abusive cross-examination.

²⁶ Practice and Procedure Before Administrative Tribunals (Vol. 2), Macaulay, R.W. and Sprague, J.L.H. (Scarborough: Carswell, 1997), p. 12-117.

²⁷ The Regulation of Professions in Canada, Casey, J.T., (Scarborough: Carswell, 1994) p. 11-10.

²⁸ "Rules of Evidence and Procedural Problems Before Administrative Tribunals", Ratushny, E. (1988) Canadian Journal of Administrative Law & Practice, 2 p. 174.

A case presenter is prohibited from misleading a witness by misstatement of facts. Thus if a case presenter states to the witness that the evidence establishes a certain fact, which it actually does not, the question is not permissible.

The general rule with regard to questioning the credibility of the witness is as follows:

A witness may upon cross-examination be asked any question concerning his [background]... which although irrelevant to the issue would be likely to discredit his testimony or degrade his character but he cannot always be compelled to answer and his answers cannot, unless otherwise relevant to the issue, be contradicted.²⁹

A witness may also be asked on cross-examination about facts that suggest the witness is biased or partial. Cross-examinations as to previous convictions form a second exception to the rule that evidence may not be introduced to contradict a witness on a collateral matter. If the witness denies the fact or refuses to answer, the opposing party may prove the conviction. Evidence of previous convictions goes only to credibility of the witness.

Generally, the Hearing Panel will only have to be concerned about the following in cross-examination of previous statements:

- whether the alleged inconsistent statement is relevant to the subject matter of the hearing;
- whether the content of the statement, time and circumstances of making the statement are put fairly so that the witness may identify them.

(ii) Redirect Examination

Following the end of cross-examination, redirect examination may occur following the end of the cross-examination. The witness may be re-examined by the case presenter responsible for the examination-in-chief in order to clarify or rebut issues that arose during cross-examination. The redirect should not simply repeat previous matters but may also serve to improve the witness's credibility with the panel in matters covered during cross-examination. It may not be used to introduce totally new issues and the Hearing Panel Chair should intervene if a new issue is raised.

(e) Expert Witnesses

Expert testimony may be admissible, as an exception, to give personal opinions. Initial questions will establish the education, experience, and professional distinction, which qualify the witness as an expert. The Hearing Panel must rule on whether it accepts the witness as an expert prior to the witness being permitted to give opinion evidence. The expertise must contribute something special to the opinion that is offered. The Hearing Panel should be cautious not to give undue weight to the opinion of "experts" and should always keep the distinction between actual evidence and opinion. The Hearing Panel should also be cautious about accepting expert opinion on the ultimate issue to be decided, since they should come to their decision as independently as possible.³⁰ Fairness may also require that notice of the expert witness be given to the other side.

²⁹ Ibid. at p. 177.

³⁰ Ibid. at p.184.

(f) Witness Credibility

Assessing the credibility of a witness is one of the most important and difficult tasks of a Hearing Panel. The following are some criteria that may be helpful:

- manner of testimony and performance under cross-examination;
- capacity and opportunity to perceive, recollect, and communicate matters on which they give evidence;
- the clarity and consistency of their testimony with the rest of their own testimony and the testimony of other witnesses;
- the inherent probability and reasonableness of the account;
- the presence or absence of bias, interest, or some other ulterior motive;
- the individual's character.

It is important to remember that finding that a witness is not credible does not necessarily mean that the witness is lying. The witness may have a faulty memory or was mistaken. It is possible to accept some parts of a witness' testimony and not other parts.³¹

(g) Questioning by the Panel

The panel Chair is the spokesperson for the hearing, but panel members may also ask questions to clarify the proceedings. It is preferable that panel members' questions be asked following the cross-examination of witnesses. Panel members should never examine a witness aggressively or try to discredit them.

The purpose of the questions is to allow the panel to draw out essential points of the case. Panel members must remain as neutral as possible during this process and should avoid questions that appear to side with one side or the other. In general, if a party is represented by a case presenter, it is preferable for the Hearing Panel to leave questions until the end of all of the questioning of witnesses. If the party is not represented, the panel should try to draw out essential points but should not act as case presenter or cross-examine the witness.

In addition, panel members should keep in mind that it is not their role to investigate the case. Questions should be asked in such a way as to clarify any ambiguities but members must be careful not to open any new areas.

Finally, a Hearing Panel must not hold private interviews with witnesses or hear evidence in the absence of the party whose conduct is under scrutiny.³²

(h) Longer Hearings

In longer (multi-day) hearings, panel members may wish to meet at the end of each day to discuss the evidence received to date and discuss potential findings of fact and decisions.

³¹ "Evidence for Administrative Tribunals: A Practical Approach", Oakley, J. Presentation notes from a Canadian Institute for the Administration of Justice Seminar, May 5, 1997.

³² The Regulation of Professions in Canada, Casey, J.T., (Scarborough: Carswell, 1994) p. 7-3.

PART 6 DECISION MAKING

1. Panel Caucus

After hearing arguments from the case presenters for either side, the Hearing Panel will retire in camera for its deliberations on each allegation of misconduct. The Hearing Panel must essentially make a decision with regard to:

- the facts;
- the breaches;
- conduct deserving of sanction; and
- sanction and costs.

In order to make the best decision, the Hearing Panel must be as fully informed as possible as to the circumstances and events which relate to the allegations. This information will come from agreements, testimony and exhibits presented by witnesses. It is on this basis that the panel must make its decision.

The Hearing Panel Chair will decide how to proceed through the deliberations. Generally, each allegation of misconduct is dealt with individually. The panel should begin by reviewing all reasonable points raised during the hearing. As each piece of evidence is brought forward, each panel member must indicate whether, on a balance of probabilities, the evidence should be accepted as fact. Where the Hearing Panel members do not unanimously agree, discussion should be encouraged. After all discussion is finished, a vote should be held on whether to accept the evidence as fact.

2. Determining what is conduct deserving of sanction

“Conduct deserving of sanction” is not defined in the Act. Conduct should be measured “by the judgment of the individual’s fellow professionals of good repute and competency.”³³ An industry member may be found to have engaged in conduct deserving of sanction where the conduct does not relate to a specific breach of the written code.³⁴

The generally accepted definition is as follows: “a want of ability suitable to the task, either as regards natural qualities or experience, or a deficiency of disposition to use one’s experience and ability properly.”³⁵ It is important to note, however, that an exercise of professional judgment that turns out to be incorrect is not necessarily incompetent, but may be in the category of errors that a reasonably competent practitioner might make.

3. Legal Advice

If during deliberations the panel has a question of a legal nature, they should seek legal advice immediately. This advice may come from outside independent legal counsel. If it is possible to continue with other matters while waiting for the answer, the panel should do so in order that the decision may be reached with the least possible delay. Additionally, if a new legal issue arises, they are required to go back to the parties.

³³ Ibid.

³⁴ Ibid. at p. 13-4.

³⁵ Ibid. at p. 13-13.

4. Decisions Decided by a Vote on a Simple Majority

All decisions made by the Hearing Panel should be based on a simple majority. If there is not unanimous agreement as to whether there was conduct deserving of sanction, there should be discussion. It is the Chair's responsibility to ensure that the discussion remains focused on the facts under consideration. Once discussion is finished, a vote should be held as to whether the industry member engaged in misconduct and the majority decision must be accepted.

5. No Dissenting Opinions

Once the majority decision has been made, the Hearing Panel should present a united front. No dissenting opinion should be released with the decision and there should be no indication that the decision was not made unanimously.

PART 7 ADMINISTRATION OF DISCIPLINE

1. Purpose of Discipline

Disciplinary action against members involved in conduct deserving of sanction should achieve these objectives:

- encourage a positive change in the industry member's behaviour;
- act as a deterrent to other industry professionals from carrying out conduct deserving of sanction;
- satisfy the demands of the public that the industry members must carry out their responsibilities competently and with the utmost integrity; and
- recover the costs incurred in the discipline process.

To determine what would be considered an effective sanction, it must be understood why the misconduct occurred. The behaviour giving rise to conduct deserving of sanction can occur as a result of:

- the intentional actions of the industry member;
- reckless actions by the industry member;
- incompetence; and/or
- unintentional actions but nonetheless a contravention of the legislation.

The sanction necessary to bring about a positive change in behaviour will be different for industry members who acted intentionally than for those who were incompetent in their behaviour. To ensure that the sanctions serve as a deterrent to other industry members, the sanction must be substantial and remove all profit gained as a result of the sanctioned conduct.

2. Sanction³⁶

(a) Duty of Fairness

Natural justice requires that an industry member whose conduct is conduct deserving of sanction has the right to call evidence and make submissions relating to sanction. The panel must take these submissions into account in their sanction deliberations.

³⁶ The Regulation of Professions in Canada, Casey, J.T., (Scarborough: Carswell, 1994), Chapter 14.

(b) Type of Sanction

Under section 43(1) of the Act, if a Hearing Panel finds the conduct of an industry member to be deserving of sanction, the panel may order one or more of the following:

- cancellation/suspension of any authorization issued to the industry member by Council;
- a reprimand to the industry member;
- conditions/restrictions on the industry member license, as deemed appropriate;
- a monetary penalty of not more than \$25,000 per contravention; and/or
- any other order agreed to by the parties.

“Where the legislature has entrusted the disciplinary process to a self-governing body, the legislative purpose is regulation of the profession in the public interest. The emphasis must clearly be on the protection of the public interest, and to that end, an assessment of the degree of risk, if any, in permitting a practitioner to hold himself out as legally authorized to practice his profession. The steps necessary to protect the public, and the risk that an individual may represent if permitted to practice, are matters that the professional’s peers are better able to assess than a person untrained in the particular art or science.”³⁷

It is important that the Hearing Panel takes into account a variety of factors in assessing the sanction to be ordered, including specific and general deterrence, punishment of the individual who contravened the legislation, as well as mitigating and aggravating factors in the actual order. Once they have made the decision, under section 44 of the Act, the Hearing Panel must inform the Executive Director of their decision and forward the record of the hearing. Upon receipt of this information, the Hearings Coordinator will then serve a notice of the decision on the industry member, on the Council, and on the complainant.

3. Costs

Panels have discretionary authority under the Act and Bylaws to order costs arising from conduct proceedings including investigation, hearing and appeal costs. Council’s general policy is to attempt to recover full costs from an industry member who was involved in conduct proceedings and who, by their conduct, gave rise to the investigation, hearing and other conduct proceedings costs in cases where their conduct is found deserving of sanction. However, ultimate discretion rests with the panel.

While the legislation provides general authority to recover costs Council has, in Section 30 of the Bylaws set out the costs to be considered for order against industry members. These include the range to be recovered in regard to investigators’ time, legal counsels’ time, Hearing Coordinator’s time, Hearing Panel honoraria as well, costs incurred for travel, photocopying, transcriptions and various other costs.

When panels consider ordering costs, they may wish to consider a recent decision, *Murti Goll v. the Real Estate Council of Alberta*.³⁸ In that case, the Court stated that when ordering costs, clear accounting must be provided and the process of assessment is similar to a taxation of costs under the Rules of Court.

³⁷ The Regulation of Professions in Canada, Casey, J.T., (Scarborough: Carswell, 1994), p. 14-4.

³⁸ *Goll v. The Real Estate Council of Alberta* (5 April 2006), Calgary, 0601-00448 (A.B.Q.B.)

The case presenter for the Executive Director will usually make a request for costs as part of the Phase Two sanctions portion of a hearing. The panel must ensure that the industry member being sanctioned has the opportunity to make submissions on the request, following which they must make a decision. In so doing they should have regard to the legislative provisions set out below along with Council policy and past practice but ultimately the decision on costs rests with the panel based on the circumstances of the case in front of them. The legislative provisions relating to costs that apply are set out below:

Real Estate Act, R.S.A. 2000, c.R-5

(a) Complainant Appeal

40 (4) If the Hearing Panel determines that a complaint is frivolous or vexatious, it may by notice in writing order the complainant to pay to the Council the costs of conducting the investigation and of the appeal determined in accordance with the bylaws.

(b) Decision of Hearing Panel

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

(c) Appeal Panel's powers

50 (5) The Appeal Panel may make an award as to the costs of an appeal determined in accordance with the bylaws.

(d) Appeal to Court

52 (6) The Court may make any award as to the costs of the appeal that it considers appropriate.

(e) Recovery of fine, costs

56 A fine ordered under section 43(1)(d) and costs ordered or awarded under section 40(4), 43(2) or 50(5) are a debt due to the Council and may be recovered by the Council in an action in debt.

(f) Bylaws Made pursuant to the *Real Estate Act*

30 (1) Where a complainant is ordered to pay costs under section 40(4) of the Act or an industry member is ordered to pay costs under section 43(2) of the Act 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' salaries at a minimum of \$20 per hour to a maximum of \$50 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 fees not to exceed \$250 per hour; and
- (v) other miscellaneous costs.

(b) Hearing and appeal costs

- (i) investigators' salaries at a minimum of \$20 per hour to a maximum of \$50 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 fees not to exceed \$250 per hour;
- (vi) adjournment costs; and
- (vii) other miscellaneous costs.

- 30 (2) Upon the complainant providing notice in writing of an appeal under section 40(4) of the Act of the Executive Director's direction that no further action be taken on a complaint due to his determination that the complaint is frivolous or vexatious, the complainant shall post security for costs with the Council in the amount of \$500.
- 31 The Council shall indemnify each member against all costs, charges and expenses that the member incurs in respect of any civil, criminal or administrative action or proceeding to which the member is made a party by reason of any thing done or permitted by the member in the execution of the duties of office as member, except things that are occasioned by the member's own willful neglect.
- 35 (4) A person who wishes to appeal an administrative penalty must provide security for costs in the amount of three times the penalty imposed, up to a maximum of \$1,000 along with the notice of appeal.
- (7) On an appeal of an administrative penalty, a Hearing Panel may
- (a) quash, vary or confirm the administrative penalty; and
 - (b) make an award as to the costs of the investigation resulting in the administrative penalty.

4. Security for Costs

In addition to circumstances outlined in the legislation, panels may be requested to order security for costs. When considering such requests panels should consider the following:

- the viability of cost recovery should the matter not be successful;
- the industry member's status;
- the merits of the matter. e.g. If the matter is perceived to be frivolous in nature or beyond the power of the panel and the party wishes to proceed, security for costs may be recommended.

PART 8 REASONS FOR DECISION

Once the decision has been made, panels must provide a written decision on the matter. The decision must describe each finding of fact and conduct deserving of sanction, state the reasons for each finding, and state any orders so that the party who is adversely affected by the decision knows the reasons for the decision. Reasons are to assist parties to assess grounds for appeal. Panel members are responsible for writing decisions.

If the parties arguing the case have missed an important point, the panel may still take it into account in their decision, with certain limitations. Ignored facts may be incorporated into the decision. Ignored arguments are more troublesome. If the ignored argument is closely related to the parties' theory of the case, it may be incorporated. The danger in so doing is that the panel may develop an entirely different argument of which the parties have not had notice. This may greatly increase the chance of error. The safest method is to work from

the evidence and argument presented at the hearing and to refrain from constructing other theories from the evidence and it is better to err on the side of caution.³⁹

1. Drafting Reasons

The reasons should describe the findings of fact, each finding of conduct deserving of sanction, the reasons for each finding and state any sanction. Reasons for decision enable the parties whose rights may be adversely affected by the decision to know the reasons for that decision. Reasons may also assist in correcting inappropriate conduct not only for the particular industry member, but the industry as a whole. The reasons must be proper, adequate and intelligible. They must also enable industry members to assess whether they have grounds of appeal.

The following are guidelines for the preparation of reasons⁴⁰:

- reasons should contain a review of the key evidence and the significance attached by the tribunal to the various matters considered by them;
- where there are disputes over facts, the tribunal should make specific findings of fact indicating the accepted and rejected evidence;
- when the tribunal makes a finding of credibility, it should state the reasons for that conclusion;
- a determination should be made as to whether the specific allegation of misconduct against the member has been proved and whether that conduct amounts to conduct deserving of sanction. The reasons should state which conduct was deserving of sanction, rather than just generally stating that the member has been found guilty of conduct deserving of sanction;
- the reasons should deal with the substantial points raised by the parties;
- it is crucial that the reasons must disclose the reasoning process used by the tribunal to arrive at its conclusion.

It is considered improper for the case presenter for the Executive Director or anyone aligned with the Executive Director to have a role in the preparation of reasons.

The following is a more detailed guide to writing strong and persuasive decisions and reasons drawn from a presentation at the 1997 ARELLO Conference⁴¹, as well as from Council materials about writing of decisions:

(a) General

Decisions should be written in a uniform format for ease of reading for the parties and any reviewing body.

(b) General Organization of the Decision

The decision should be organized as follows:

- title page with case name and file number (if applicable);
- informational section containing the date(s) of hearing, names of parties appearing, witnesses, and the panel members;

³⁹ "The Art of Opinion Writing", Proceedings of the Thirty-fifth Annual Meeting – National Association of Arbitrators. Mittenthal, R. p. 4.

⁴⁰ The Regulation of Professions in Canada, Casey, J.T., (Scarborough: Carswell, 1994) p. 10-3.

⁴¹ "How to Write Orders and Decisions that will Stand Up on Appeal" Blair, R.N., Administrative Law Judge, Presentation from the 1997 ARELLO Western Conference.

- introduction - introduce the reader to the subject and briefly summarize the circumstances leading to the hearing/appeal;
- allegations - Set out the issues as determined by the panel;
- evidence - Outline the relevant evidence and make the necessary findings of fact;
- submissions;
- relevant legislation, case law and precedent decisions - Set out the relevant law, including sections of the Act, Rules, Bylaws, etc. and procedural considerations;
- findings - Link the facts with the law and briefly state the conclusion;
- order - Make the order as to sanction, if applicable;
- signature of Panel Chair and members and date of signature.

(c) Writing the Decision: In brief: Tell a story ... apply the law ... draw a Conclusion

(i) Introduction

This is a basic review of the facts of the case to enable the reader to understand the decision. It should be written in a neutral manner, but should not include facts that are irrelevant to the decision.

(ii) Allegations

The Notice of Hearing will be reiterated in this section to clearly show what conduct was the subject of the hearing.

(iii) Evidence

- relevant evidence and witness' testimony should be summarized in this section. This section should not attempt to discuss every exhibit admitted or every witness' testimony;
- if conflicting testimony exists, explain the discrepancies in testimony and explain why the panel found one witness more credible. Review bodies will defer to panel determinations concerning the credibility of a witness;
- if conflicting evidence exists in the record, clearly state which evidence was the basis for the findings of fact;
- evidence of rehabilitation may be set out as a finding of fact, especially in matters involving the denial of an authorization;
- findings of fact may be chronological or may be summarized by witness name;
- the finding of the fact must be phrased in terms of a fact and not the conclusion to be drawn from the fact. A basic finding to support the conclusion that John Doe was negligent would be "John Doe failed to obtain his client's written authorization before listing the property for sale";
- there must be reliable, probative (i.e. evidence that proves) and substantial evidence in the record to support each finding of fact, or the finding must be a reasonable inference from findings made from other evidence;
- summaries of testimony or contentions of parties are not findings of fact;
- address and resolve credibility. Credibility is the quality in a witness that renders the witness' testimony worthy of belief;
- explain what testimony you believed and why contrary evidence was rejected;
- Identify any disputed facts, summarize the evidence, and explain why the chosen witness' version was believed in preference to the contrary version;
- be aware of whether the witness has an apparent interest in the outcome of the hearing; e.g. family relationship, financial interest;
- other factors: inconsistent statements, testimony contradicted by other evidence, inherent improbability of the witness' testimony, and demeanor of the witness.

(iv) Submissions

- a brief summation of each party's submissions at the hearing should be included;
- any requests made of the panel (e.g. request for suspension, request for education as part of a fine) should be clearly outlined, which should also include any mitigating or aggravating factors that both party's raised to support their position, as this forms part of the panel's consideration when deliberating;

(v) Relevant Legislation, Case Law and Precedent Decisions

This should be included under Submissions, as precedent decisions are used to demonstrate reasonableness (e.g. that the sanction being requested is reasonable or that the conduct being tried at the hearing was not deemed to be deserving of sanction).

The relevant law is generally expressed in the language of the Act and states whether or not the law or applicable standard has been violated; e.g. "Failure to disclose dual agency in a sale constitutes conduct deserving of sanction under the meaning of section 43(1) of the Act."

(vi) Findings

- discuss the relevant arguments raised by the parties and provide a short explanation of the panel's decision by referring to the evidence;
- when appropriate, consider including a brief statement as to whether or not the burden of proof was sustained;
- make specific findings as to what the evidence or testimony shows in the reasons given for the decision. Refer to the testimony or other evidence in your findings, but do not merely summarize, restate or paraphrase testimony;
- issues raised by parties that are determined not to be relevant should be mentioned in a summary fashion so the parties understand that the issue was not overlooked.

(vii) Orders

Factors in mitigation and aggravation which were considered by the panel in making the Order should be clearly identified. It will outline what the Hearing Panel has determined to be an appropriate sanction.

2. Notice of Decision

When the panel has finished the writing of its decision and reasons, under section 44 of the Act it should forward a copy of the decision and the record of the hearing to the Executive Director. The Hearings Coordinator will serve a copy of the decision on the industry member, Council and the complainant.

PART 9 PUBLICATION OF DISCIPLINARY ACTIONS

Pursuant to section 55 of the Act, the Executive Director may publish information regarding a refusal, cancellation or suspension of an authorization, a withdrawal from industry membership, information regarding prosecution and disciplinary actions taken under the Act. For transparency, the policy is to publish all disciplinary actions and withdrawals from the industry. The publication demonstrates actions taken to protect the public and to promote the integrity of the industry. All enforcement actions will be published in the Regulator, on the Council Website and other media.

PART 10 POWER TO REHEAR OR RECONSIDER

The power to rehear or reconsider a decision can be very useful in ensuring that all decisions are accurate and in the public interest. Following various Court decisions, administrative agencies only have the authority to reopen a decision once made:

- where there is legislative authority to do so, which may be:
 - found in an express legislative power to reconsider;
 - implied by the other provisions or from the overall structure of the legislation;
 - or
 - implied by the nature of the decision-making power in question;
- when it is necessary to correct a clerical error, an accidental error or omission, or an ambiguity in the decision;
- when the decision mandated by statute has not yet been made, or the decision made is void or voidable for lack of jurisdiction (including breaches of the principles of natural justice or fairness), or there remains an issue outstanding; or
- where the decision in question was procured by reason of fraud, mental disability or some other circumstance which calls its integrity into question.⁴²

With the exception of the circumstances above, a panel decision should be considered final. If the panel makes an error within its jurisdiction, its decision is unreasonable with respect to the evidence on record, circumstances change, or contractual or other financial reliance has been placed on the decision, it may not reopen the decision.⁴³ An appeal is likely more appropriate in those circumstances.

PART 11 APPEAL PROCESSES

1. Conduct Proceedings

(a) Appeal of Hearing Panel Decision to Appeal Panel

Section 48 of the Act allows industry members to appeal findings or orders made by Hearing Panels. To appeal a finding or an order of a Hearing Panel, the industry member must provide a written notice of appeal within 30 days after the date on which the decision of the Hearing Panel is served on the industry member. Section 49 of the Act requires the Executive Director to provide notice of the hearing of the appeal to the industry member outlining the time, date and location of the appeal hearing.

Costs for preparation of the record of the hearing are required in advance of any appeal. If not paid and no panel order addresses these costs, the appeal will not proceed. In such a case, the case presenter for the Executive Director will bring an application to the panel to dismiss any appeal.

The section 48 appeal process is as follows:

- the appellant will provide written notice of the appeal to the Hearings Coordinator;

⁴² Practice and Procedure Before Administrative Tribunals (Vol. 3), Macaulay, R.W. and Sprague, J.L.H. (Scarborough: Carswell, 1997), p. 27A-4.

⁴³ *Ibid.* at p. 27A-7.

- as indicated above, the appellant is required to pay the costs for preparation of the hearing record to the Hearings Coordinator in advance of the appeal;
- these costs will include transcription of the hearing, photocopying, binder preparation, etc.;
- costs for preparation of the record may range from \$550 - \$2000 or more, depending on length and complexity of the original hearing;
- an appeal panel will be appointed and an appeal date scheduled;
- the Hearings Coordinator will provide the Appeal Panel with a copy of the Notice of Appeal within 5 days of their appointment;
- upon the record of the hearing being completed, the record will be provided to the industry member, the case presenter for the Executive Director and the Appeal Panel;
- the appellant will have no more than 3 weeks to prepare a written Summary of Argument to the Appeal Panel. The written Summary of Argument should not exceed 10 pages in length and may address the grounds of appeal, substance of the argument as it relates to those grounds of appeal, identification of the evidence being relied upon and the identification of case law, if any, and a short discussion on its relevancy;
- 5 copies of the written summary of argument will be served on the Hearings Coordinator for distribution to the Appeal Panel and the case presenter for the Executive Director;
- the respondent will have no more than 3 weeks to prepare a response to the appellant's Summary of Argument. The written Summary of Argument should not exceed 10 pages in length and may address the grounds of appeal, substance of the argument as it relates to those grounds of appeal, identification of the evidence being relied upon and the identification of case law, if any, and a short discussion on its relevancy;
- 5 copies of the respondent's response summary of argument will be served on the Hearings Coordinator for distribution to the Appeal Panel and case presenter for the industry member;
- Without special leave from the Appeal Panel, no new evidence will be considered by the Appeal Panel;
- the appeal will proceed by way of oral argument on the scheduled date;
- the Appeal Panel will issue its written decision with reasons upon completion of the appeal.

Without special leave, no new evidence will be considered by the appeal panel. Under section 50(4) of the Act, the Appeal Panel may:

- make any finding or order that in its opinion should have been made by the Hearing Panel;
- quash, vary or confirm the finding or order of the Hearing Panel or substitute or make a finding or order of its own; or
- refer the matter back to the Hearing Panel for further consideration in accordance with any direction that the Appeal Panel makes.

(b) Appeal of Appeal Panel Decision to Court of Queen's Bench

Section 52 of the Act allows an industry member to appeal the decision of the Appeal Panel to the Court of Queen's Bench. The appeal will be commenced by an Originating Notice describing the decision appealed and the reasons for the appeal. The notice must be filed with the clerk of the Court within 30 days after the industry member is

served with the decision of the Appeal Panel. The Executive Director must receive a copy of the Originating Notice and the supporting documents not less than 15 days before the date set for the hearing.

Costs for preparation of the record of the appeal are required in advance of any appeal. If not paid and no panel or Court order addresses these costs, the appeal will not proceed. In such a case, the case presenter for the Executive Director will bring an application to the panel or Court to dismiss any appeal. These costs will include transcriptions of the hearing and appeal, photocopying, binder preparation, etc. Cost for preparation of the record may range from \$550 - \$2000 or more, depending on length and complexity of matter.

The Court's decision will be based on the record of the Appeal and a copy of the Appeal Panel's decision

(c) Appeal of Court of Queen's Bench Decision to Court of Appeal

Once legislative appeals processes are complete, Court of Appeal procedures may have application.

2. Complainant Appeal

Under section 40 of the Act, a complainant may appeal the Executive Director's decision to dismiss a complaint. The complainant must provide a notice of appeal in writing to the Executive Director (Hearings Coordinator) and pursuant to section 30(2) of the Bylaws security for costs in the amount of \$500 may be required.

The section 40 appeal process is as follows:

- once the notice of appeal and any security for costs have been paid, a Hearing Panel for the appeal will be appointed and a date scheduled. Because the investigation contains sensitive and private material, only the Hearing Panel and the case presenter for the Executive Director will have disclosure of the investigation file;
- the complainant will have no more than 3 weeks to prepare the written Summary of Argument for the appeal to the Hearing Panel. The written Summary of Argument should not exceed 10 pages in length and may address the grounds of appeal, substance of the argument as it relates to those grounds of appeal, identification of the evidence being relied upon and the identification of case law, if any, and a short discussion on its relevancy;
- 5 copies of the complainant's Summary of Argument will be provided by the complainant to the Hearings Coordinator for distribution to the case presenter for the Executive Director and to the Hearing Panel;
- the case presenter for the Executive Director will have 2 weeks to prepare a response to the complainant's Summary of Argument;
- 5 copies of the case presenter for the Executive Director's Summary of Argument will be provided by the case presenter for the Executive Director to the Hearings Coordinator for distribution to the complainant and to the Hearing Panel;
- the complainant may prepare a written rebuttal to the case presenter for the Executive Director's response Summary of Argument within 1 week of its receipt. If a rebuttal is prepared, 5 copies will be provided by the complainant to the

Hearings Coordinator for distribution to the case presenter for the Executive Director and to the Hearing Panel;

- the Hearing Panel will convene for oral argument on the scheduled date. The decision of the Hearing Panel is final.

Once a Hearing Panel considers the matter, in accordance with s. 40 of the Act, the Hearing Panel will determine whether

- the complaint is frivolous or vexatious or there is insufficient evidence of conduct deserving of sanction; or
- there is sufficient evidence of conduct deserving of sanction to warrant a Hearing by a Hearing Panel.

3. Appeal of Administrative Penalty

A person to whom the Executive Director has issued a Notice of Administrative Penalty may appeal the Notice of Administrative Penalty to a Hearing Panel appointed pursuant to section 35 of the Bylaws. The notice of appeal must be received within 30 days after the date on which the administrative penalty is served on the person. The notice of appeal must be in writing and must

- describe the administrative penalty appealed;
- state the reasons for the appeal; and
- the person who wishes to appeal an administrative penalty must provide security for costs in the amount of 3 times the penalty imposed, up to a maximum of \$1000 along with the notice of appeal.

The appeal of an administrative penalty process is as follows:

- upon receipt of the notice of appeal, grounds for appeal and security for costs, a Hearing Panel for the appeal will be appointed;
- the case presenter for the Executive Director will issue a notice of appeal and make disclosure of the investigation file to the industry member;
- the parties will prepare for the hearing, including the summoning of witnesses, preparation of documents, etc.;
- the appeal hearing will be held on the scheduled date when witnesses may be called, documents may be entered as evidence, arguments may be made and processes similar to those set out in the contested hearing section above may apply;
- a Hearing Panel may quash, vary or confirm the administrative penalty and may make an award as to the costs of the investigation resulting in the administrative penalty;
- the decision of the Hearing Panel is final.

4. Stay of Proceedings⁴⁴

An industry member whose conduct has been found deserving of sanction by a Hearing Panel and who is appealing the Hearing Panel's decision to an Appeal Panel may wish to have the decision of the Hearing Panel stayed pending the outcome of the appeal. Such a stay application may be brought before the Hearing Panel which decided the matter or the Courts.

⁴⁴ The Regulation of Professions in Canada, Casey, J.T., (Scarborough: Carswell, 1994), p. 15-2.

An industry member whose appeal was unsuccessful and who is appealing the Appeal Panel's decision to Court of Queen's Bench may wish to have the decision of the Appeal Panel stayed pending the outcome of court. Such a stay application may be brought before the Appeal Panel which decided the matter or the Courts.

NOTES

