

THE REAL ESTATE COUNCIL OF ALBERTA

Case: 005053

Process: Appeal of Hearing Panel Decision – s. 48 of the *Real Estate Act*

Appellant: Gordon Pethick

Appeal Panel: Robert Telford (Chair)
Krista Bolton
Christine Zwozdesky
David Hicks

Appearances: Christiana Hadzoglou, for Executive Director of the Real Estate Council of Alberta
Steven Robertson, for Gordon Pethick

DECISION OF APPEAL PANEL – COSTS

I. BACKGROUND:

On June 1, 2018 we issued our decision on the merits of this appeal. We concluded that Mr. Pethick's right to a fair hearing was breached. We therefore quashed the Hearing Panel decisions on conduct and sanction, and we directed this matter back for a new hearing before a new hearing panel. We also invited the parties to provide written submissions regarding costs of this appeal.

In their costs submissions both Mr. Pethick and the Executive Director of the Real Estate Council (the "Executive Director") submitted that they were entitled to costs.

The initial submissions also raised a jurisdiction issue. Specifically, whether an appeal panel has jurisdiction to order cost in favour of an industry member. However, neither party provided case law or much other authority for their positions.

Therefore, on July 10, 2018 we asked the parties to provide supplementary submissions with case law support for their respective positions on the jurisdiction issue, which they have now done.

We have now reviewed and considered the parties' written submissions, including the supplementary submissions, and our Decision on costs is set out below.

II. PRELIMINARY MATTER:

Mr. Pethick raised an objection to substantial portions of the supplementary submissions regarding jurisdiction submitted by counsel for the Executive Director of the Executive Director. Generally, Mr. Pethick objects to portions of that submission as being non-responsive to the issue raised in our July 10, 2018 letter; raising evidence or secondary authorities that go beyond “case law support”; raising new arguments that rebut Mr. Pethick’s argument or that could have been raised in the initial costs submission; or repeating arguments already made in the initial submission.

On August 8, 2018 we advised the parties that we agreed certain portions of the Executive Director’s supplementary submission were improper and would therefore not be considered by this Panel (paragraphs 34-37 and paragraph 39).

Despite this, Mr. Pethick continued to object. By email dated August 9, 2018 he provided detailed reasons for his objection and requested an opportunity to “formally respond” to the Executive Director’s supplementary submission.

In light of the conclusion we have reached below on the jurisdiction issue, the objections raised by Mr. Pethick are moot and it is therefore unnecessary to invite Mr. Pethick to formally respond as he has requested.

III. ISSUES RAISED:

There are four issues to be determined:

1. Do we have jurisdiction to make an award of costs in favour of an industry member?
2. If we have jurisdiction, is this an appropriate case for an award of costs in favour of the industry member?
3. In the alternative, should costs be awarded against the industry member?
4. What is the appropriate amount of costs to be awarded?

IV. DISCUSSION & FINDINGS:

1. Jurisdiction:

Positions of the Parties:

The Executive Director argues forcefully that an appeal panel has no jurisdiction to order costs in favour of an industry member. Generally, his arguments can be summarized as follows:

- The Appeal Panel is an administrative body created by legislation. Therefore, the Panel's jurisdiction and authority must be found specifically in the enabling legislation. Since neither the *Real Estate Act* (the "Act") nor the *Real Estate Act Bylaws* (the "Bylaws") expressly give a panel the right to order costs in favour of an industry member, this Appeal Panel does not have jurisdiction to do so.
- Moreover, to the extent that there is any doubt or ambiguity regarding the above, the following should guide the interpretation of the Act and Bylaw provisions as they relate to our jurisdiction to award costs in favour of an industry member:
 - Legislative Purpose: The purpose of the Act is to enforce standards of professional conduct so as to protect members of the public and the integrity of the profession. An award of costs in favour of an industry member is inconsistent with this legislative purpose.
 - Intent of the Real Estate Council of Alberta ("RECA"): Costs are dealt with in s. 28 of the Bylaws and it is clear that, in enacting that section, RECA's intent was only to award costs against industry members, not in favour of them.
 - Headings in Bylaws: To aid in interpreting the provisions we should consider the heading for s. 28 of the Bylaw, which reads "*Recovery of Costs from Industry Members*". This is a clear indication that the intent of s. 28 is to permit costs against, not in favour of, industry members.

Mr. Pethick, on the other hand, argues as follows:

- Section 50(5) of the Act gives the Appeal Panel discretion to award costs in accordance with the Bylaws.
- Section 28 of the Bylaws gives panels discretion to award costs in 3 circumstances:
 - Costs against a complainant under s. 40(4) of the Act;
 - Costs against an industry member under s. 43(2) of the Act
 - Costs on an appeal under s. 50(5) of the Act.
- Under sections 40(4) and 43(2), there are specific limitations on which party may be assessed costs. However, under s. 50(5) there is no such limitation. Therefore, interpreting section 28 as a whole, it is clear that there is no limitation on an appeal panel's discretion regarding the party to or against whom costs may be awarded or assessed.

Discussion & Finding on Jurisdiction:

Section 50 of the Act outlines the authority of an appeal panel on an appeal from a decision of a hearing panel. Section 50(5) deals specifically with costs and states as follows:

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

Section 28 of the Bylaws states, in part, as follows:

Recovery of Costs from Industry Members

28(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:...

[emphasis added]

Section 11(j) allows RECA to pass Bylaws outlining an appeal panel's power and discretion regarding costs. RECA chose to do this by enacting section 28 of the Bylaws. When drafting s. 28, RECA inserted clear limitations on a panel's discretion when ordering costs under sections 40(4) and 43(2) but, within the same sentence, chose not to insert the same or any limitation for costs under section 50(5).

Therefore, properly interpreted, in a section 50 appeal, the Act and Bylaws clearly give an appeal panel discretion to award costs to either party.

While we recognize that, as an administrative tribunal, an appeal panel's jurisdiction must flow from the enabling legislation, in our view jurisdiction to award costs to either party on a section 50 appeal is clearly conferred.

The Executive Director's arguments regarding interpretation cannot be used to alter the otherwise clear meaning of the wording of s. 28 itself. Moreover, with regard to the argument relating to the heading of s. 28 ("*Recovery of Costs from Industry Members*") even if we were prepared to resort to the heading, it does not support the Executive Director's argument because the first words of the section speak of ordering costs against a complainant (not restricted to an industry member). So, quite clearly the heading is not an accurate reflection of the stated content of s. 28 anyway.

For the above reasons, we conclude that we do have discretion to award costs in favour of an industry member.

2. Costs In Favour Of The Industry Member In This Case:

Having concluded that we have the jurisdiction to award costs, we must now consider whether this is an appropriate case for a costs award.

Section 28(4) of the Bylaws provides some guidance on a panel's costs discretion by listing factors that may be considered when determining a costs order. In addition to the typical cost considerations, the list of factors ends with the following:

- (i) *Any other matter related to an order reasonable and proper costs as determined appropriate by the panel [sic]*

In a case such as this where the industry member is claiming costs against RECA and/or the Executive Director, an important consideration is the nature and purpose of RECA and its disciplinary proceedings.

Like many other self-governing professional organizations, RECA's mandate and purpose is to protect the public who deal with members of the profession. RECA has done this by enacting certain professional and ethical rules and standards of conduct. These rules and standards are designed to ensure the competence and professionalism of its members, and, more importantly, to protect the public when dealing with members of the profession.

Therefore, when credible information comes to the Executive Director suggesting that a member of the profession may be in violation of these rules and standards, the Executive Director can, and, to fulfill RECA's obligation to protect the public, should, pursue disciplinary proceedings.

In this sense, when prosecuting possible disciplinary transgressions, the Executive Director is not litigating some private interest, but is instead fulfilling the RECA mandate to protect the public.

In our view this is a relevant, and, indeed a critical, factor to consider when determining whether or not to award costs to an industry member when the Executive Director is unsuccessful on an appeal.

Having consideration for the purpose and mandate of RECA and the role of the Executive Director in fulfilling that mandate, we conclude that it would not be appropriate to award costs against the Executive Director or against RECA merely

because an appeal is decided in favour of the industry member. Generally, we would only be prepared to consider such a costs award in exceptional circumstances, such where it is clear that the Executive Director pursued disciplinary proceedings to fulfil some private interest rather than to fulfil the broader RECA mandate. Without intending to limit the situations in which such a costs award may be appropriate, exceptional circumstances might exist if, for example, there was evidence that a disciplinary prosecution was being pursued in bad faith or for some ulterior purpose, or where the Executive Director or RECA was guilty of some malfeasance in relation to the proceedings.

Clearly, no such evidence is present in this case.

As a result, in our view, while we agree that we have jurisdiction to award costs to an industry member on a section 50 appeal, this is not an appropriate case for such an award.

3. Costs Against The Industry Member:

The Executive Director argues that most of the time and expense in this appeal was related to issues on which Mr. Pethick was wholly unsuccessful. In essence, he appears to be arguing that our decision to quash the Hearing Panel decisions was not based on Mr. Pethick's evidence and arguments, but in spite of them. On this basis, since he was mostly unsuccessful on the issues raised, Mr. Pethick should be required to pay "at least half the costs of the Appeal".

While we do not entirely disagree with the Executive Director's position, we are mindful of the fact that Mr. Pethick's ultimate goal in this appeal was to quash the decisions of the Hearing Panel. Therefore, regardless of the basis, Mr. Pethick got the outcome he was seeking.

As a result, considering all of the circumstances as well as the outcome, we are not prepared to award costs against Mr. Pethick.

4. Measure of Costs

In light of the above, it is not necessary to make any comment or findings in relation to the parties' submissions regarding the amount of costs either party has claimed in this case.

V. Disposition:

We summarize our findings as follows:

- on a section 50 appeal, an appeal panel has jurisdiction to award costs payable to an industry member
- costs should only be awarded to an industry member if special circumstances exist
- there are no such special circumstances in this case
- the circumstances also do not justify an award of costs against Mr. Pethick
- therefore, in this appeal, costs will not be payable by or to either party.

Dated this 14th day of November, 2018.

Robert Telford, Appeal Panel Chair

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Appeal Hearing Dates: September 12, 2017 (Preliminary Application); April 18 and May 16, 2018

DECISION OF APPEAL PANEL

I. BACKGROUND:

Mr. Pethick appeals the Hearing Panel decisions in this matter on both conduct and sanction.

This appeal has generated several interlocutory issues and as such, a brief background is appropriate.

Hearing:

The conduct in question relates to dealings that occurred in 2014 between Mr. Pethick, [("company")] and PM. In short, Mr. Pethick, an industry member registered with BGB Realty Inc. o/a Re/Max Realty Professionals, was retained by [("company")] to market and sell a commercial property in [("city")]. When PM expressed interest in purchasing the property, Mr. Pethick agreed to represent both parties in the purchase and sale. The transaction required PM to provide a \$100,000 deposit. However, the first deposit cheque was not honoured by the bank. A second deposit cheque was provided, but it was undated and PM indicated he would let Mr. Pethick know when there were sufficient funds in the account so that it could be dated and deposited.

Ultimately, the bank also refused to honour this second cheque. In the interim, the conditions to the deal (including the deposit requirement) had been waived. PM has since disappeared and the transaction was never concluded.

There is uncertainty in the evidence about whether, or to what extent, [{"company"}] was informed of the circumstances surrounding the deposit cheque. However, it is clear that [{"company"}] was not informed in writing.

The Executive Director of the Real Estate Council of Alberta (RECA) issued a Notice of Hearing in respect of this matter and a Hearing was held on August 23, 2016. This led to Hearing Panel decisions on September 20, 2016 regarding Conduct Deserving of Sanction, and on November 21, 2016 regarding Sanction.

The Hearing Panel held that Mr. Pethick's conduct breached sections 41(b) (Competent Service) and 41(d) (Fiduciary Duty) of the *Real Estate Act Rules* and was therefore deserving of sanction. A sanction was imposed that involved a one-month suspension, a fine of \$19,000, an educational component and payment of Hearing costs.

Appeal:

Mr. Pethick filed a Notice of Appeal. At a high level, his grounds of appeal can be summarized as follows:

- Mr. Pethick was denied his right to procedural fairness on several bases;
- The Hearing Panel made errors in findings of facts and law;
- The Hearing Panel's Sanction decision was unreasonable and excessive.

The procedural fairness allegations raised several issues, at least two of which required consideration of new evidence. As such, following application by Mr. Pethick, this Appeal Panel exercised its discretion to permit the new evidence to be heard as part of this appeal (see this Panel's decision of October 4, 2017). The new evidence generally fell within two categories that the parties and the Panel characterized as the "Conversation Evidence" and the "Prior Sanction Evidence".

The new evidence has now been heard and the parties have made fulsome argument on the merits of appeal. We have considered all of the evidence, the Record and the arguments. This Appeal Panel's findings and directions are set out below.

MERITS OF APPEAL:

1. Duty of Fairness

We will first deal with the issues related to the Duty of Fairness.

Mr. Pethick alleges that his right to procedural fairness was breached on a number of bases, including (in no particular order):

- As a result of conversations with Mr. Bone (the Executive Director's first counsel and case presenter at the original Hearing) Mr. Pethick was misled into believing that the Hearing was informal and that a lawyer was not necessary;
- At the Hearing, Mr. Pethick was represented by Mr. Koop, his broker, who was a witness in the Executive Director's case against him;
- The evidence given by RL, the central witness against Mr. Pethick, was unreliable because he had difficulty with English and yet he did not give his evidence through a translator;
- RL's evidence was also unreliable because much of it was elicited through leading questions by Mr. Bone;
- Mr. Pethick was not afforded a right to cross-examine Mr. Koop after Koop gave evidence in the Executive Director's case;
- The Hearing Panel refused to allow Mr. Pethick to submit evidence explaining the circumstances surrounding a prior disciplinary sanction and yet used this prior sanction as an aggravating factor in determining the appropriate level of sanction in this case;
- The impact of the above matters is magnified in this case because Mr. Pethick did not have a lawyer to ensure that the process was fair and the evidence appropriate; and
- When dealing with an unrepresented party such as Mr. Pethick, Mr. Bone had a duty as a prosecutor to ensure that the Hearing and the procedure was fair. This included an obligation to tell Mr. Pethick that while a lawyer may not be required, it was certainly advisable.

Duty of Fairness: Standard of Review:

The parties and the Panel agree that correctness is the standard of review for matters related to the duty of fairness (*Broers v. Real Estate Council of Alberta*, 2010 ABQB).

On this basis, we must review the procedure from the perspective of whether or not the parties were properly afforded their right to procedural fairness in accordance with the legal requirements. We are not permitted to assess the procedure on the basis of mere reasonableness with deference to Hearing Panel decisions.

Content of Duty of Fairness:

The requirements of the duty of fairness vary with the circumstances of each case.

The Executive Director argues that the *Real Estate Act* “codifies” the content of the duty of procedural fairness and appears to take the position that this replaces the traditional common law requirements. He points specifically to sections 41(g) (a person appearing at a hearing may be represented by legal counsel) and 42(h) (the laws of evidence applicable to judicial proceedings do not apply).

Mr. Pethick, on the other hand, argues that the *Real Estate Act* does not replace the common law obligations. He argues that, pursuant to the case law, fairness requires a consideration of the context and circumstances of each case.

We agree with Mr. Pethick. The Executive Director’s position takes an overly and inappropriately narrow view of the requirements of the duty of fairness. If we were to accept the Executive Director’s position at face value, the only real question would be whether the parties were given an opportunity to get legal counsel; if so, then any form of unfair hearing would be permissible. We are confident that this is not what the legislature intended when enacting the noted provisions in the *Real Estate Act*.

Findings on Breach of Fairness:

Conversation(s) Between Pethick and Bone:

Mr. Pethick’s argument is that the unfairness commenced with the initial conversation with Mr. Bone in which he alleges he was misled into believing that the Hearing would be short and informal, and that legal counsel was therefore unnecessary. He argues that the other issues must be viewed within the context of this initial discussion. On this basis, the decision to forego legal counsel was not properly informed, and this decision meant Mr. Pethick was subsequently unable to prevent or object to the other issues that transpired at the Hearing.

The Executive Director, on the other hand, argues that Mr. Bone did not mislead Mr. Pethick. Instead, in the circumstances, it is clear that Mr. Pethick made a conscious election to forego counsel. Having made this election, Mr. Pethick cannot now complain that he did not have legal counsel to assist him or that the procedure was otherwise unfair because he did not have the benefit of counsel.

Given the nature of the argument, we must first address the issue of whether or not Mr. Pethick was misled by Mr. Bone. This was the subject of the Conversation Evidence presented during this Appeal.

Mr. Pethick testified that Mr. Bone contacted him by phone on June 2, 2016. Mr. Pethick states that during that conversation Mr. Bone told him that the Hearing was not a court case, but instead was an opportunity to meet with his peers to tell his side of the story; that it would take only approximately 15 minutes; and that while he had the right to a lawyer, having one was not necessary.

From this conversation, Mr. Pethick concluded that he did not need a lawyer and therefore did not retain one to assist or advise him. However, within 10 minutes after the Hearing started he knew he was in over his head and needed a lawyer.

Mr. Bone testified that the main purpose of the June 2 call was to advise Mr. Pethick that he would be receiving a Notice of Hearing. He said that he has been involved in numerous RECA disciplinary cases and he routinely makes these calls to give industry members advance notification of the Notice of Hearing, and to explain the Hearing process generally. He said in this case Mr. Pethick specifically asked about whether he needed a lawyer. Mr. Bone told him that while he was entitled to be represented by a lawyer, he was not required to have one.

Mr. Bone specifically denies telling Mr. Pethick that the Hearing would only take 15 minutes. He says he would have made his usual statements regarding the Hearing process, which included saying the opening statements would take 15 minutes, and then there would be RECA witnesses, and an opportunity for him to cross-examine. Mr. Pethick would then be able to call his own witnesses and then each side would make closing arguments.

Mr. Bone further states that he had a second conversation with Mr. Pethick on August 19, 2016 at which he again explained the Hearing process. The explanation was similar to the first one.

Between these two conversations, Mr. Pethick acknowledges receiving the Notice of Hearing and cover letter. The letter advised Mr. Pethick to read the Notice of Hearing carefully because it contained information about the Hearing Process. The Notice of

Hearing included a statement indicating that Mr. Pethick may obtain legal advice and may be represented by legal counsel at the Hearing. It also referred to the *Hearing and Appeal Practice and Procedures Guidelines* and to the *Information for Unrepresented Industry Members*. Without going through these documents in detail, it is sufficient to note that they include detailed information about a Hearing's process and formality. In addition, they state that it is "advisable" for industry members to have independent legal counsel because of the formality and complexity of the process, which includes the right to examine and cross-examine witnesses.

In addition, prior to the Hearing, Mr. Pethick and his broker, Mr. Koop, both received witness summonses that clearly indicated there was a threat of arrest if they failed to attend as required.

The Executive Director argues that regardless of what was discussed with Mr. Bone, the Notice of Hearing and other documents noted above should have made it apparent that the Hearing was a formal matter and consequences could be significant.

Mr. Pethick does not deny receiving or being aware of the content of the above documents. However, he says he largely ignored the indicia of formality because he placed more weight on his conversation with Mr. Bone.

It is difficult to understand how a 32-year veteran of the real estate profession could be so careless or reckless about his career as to ignore all of the written material sent or formally served on him outlining the formality and potential seriousness of the disciplinary process, and choose to instead rely upon a short discussion with Mr. Bone.

Moreover, Mr. Pethick's response does not in any way address or explain the fact that there was a subsequent conversation in August 2016 (prior to the Hearing) during which Mr. Bone says that he again reiterated the formal Hearing process.

At some point, the formality of the Hearing ought to have been apparent to Mr. Pethick and his decision to instead rely upon the initial call with Mr. Bone is either not believable or it is willfully blind. At minimum, at some point all of the signals regarding the formality of the Hearing process ought to have at least prompted Mr. Pethick to question what he thought he understood from the conversation with Mr. Bone.

Finally, as the Executive Director points out, in testimony Mr. Pethick admitted that he was influenced by a conversation with his broker, Mr. Koop, in which Mr. Koop

expressed the opinion that a lawyer was not necessary. This conversation occurred after Mr. Bone's discussion with Mr. Koop about attendance as a witness. This occurred in August 2016. The fact that this conversation even occurred indicates that by August 2016 Mr. Pethick must have been having second thoughts about whether to involve legal counsel. To some extent, this undermines Mr. Pethick's claim that he relied on and was misled by the June conversation with Mr. Bone.

As a result, we have two conflicting versions of events: Mr. Pethick says he was misled by Mr. Bone's statements on June 2 and in reliance on this he failed to retain counsel to assist him, and this, in turn, compromised his right to a fair hearing. Mr. Bone denies that he downplayed the formality of the Hearing or indicated it was merely a 15-minute meeting with peers.

Mr. Pethick's counsel made much of the fact that Mr. Bone's phone note of the June 2 conversation does not mention the explanation of the Hearing process and that without notes it is not reasonable to believe that Mr. Bone could actually recall the conversation he had years earlier. Mr. Bone explains that the note mentioned only the Notice of Hearing because that was the primary purpose of the call. He was not intending to record each element of the conversation in the note.

In the circumstances and considering the evidence as a whole, we accept that the conversation occurred as Mr. Bone has described it. He has had this conversation numerous times with other industry members and the overall content is the same. As such, it is not surprising that he would not bother to include this in his phone note. Also, it is not reasonable to believe that Mr. Bone, with all his experience, would have said the Hearing would only take 15 minutes (in fact, Mr. Koop admits that Mr. Bone told him it could take approximately 30 minutes for his participation just as a mere witness). It is, however, believable that Mr. Pethick, having heard the comment about opening statements taking 15 minutes, would not recall the other details clearly and mistakenly recall or interpret the conversation as he has described, particularly when Mr. Koop later reinforced the initial thought that a lawyer was unnecessary.

Regardless, to establish a breach of the duty of fairness on this basis, Mr. Pethick has the onus of proving, on the balance of probabilities, that Mr. Bone made the statements alleged; that those statements reasonably misled Mr. Pethick; and that in reliance on these statements, Mr. Pethick elected not to have legal counsel.

Not only has Mr. Pethick failed to discharge the onus, where the evidence of Mr. Pethick and Mr. Bone conflict, we prefer and we accept the evidence of Mr. Bone.

However, this does not end the duty of fairness inquiry.

RECA Case Presenter's Duties as Prosecutor:

Mr. Pethick argues that in prosecuting disciplinary cases for RECA, the Executive Director's case presenter (Mr. Bone in this case) owes a duty to unrepresented industry members to ensure that the proceedings are fair. This means the case presenter should not focus on succeeding in the prosecution, but rather should focus on ensuring that the truth comes out and that entire process is fair to the industry member.

Therefore, Mr. Pethick submits that in this case Mr. Bone had a duty to ensure that the Hearing was fair and this included an obligation to advise Mr. Pethick to retain legal counsel to assist him, even though counsel is not strictly required.

The Executive Director argues that this is tantamount to asking case presenters to give industry members legal advice, which is contrary to their obligations to RECA.

We agree that when dealing with an unrepresented industry member, a case presenter does have certain obligations. During the pre-Hearing stage, this would include an obligation to not take advantage of or mislead the unrepresented industry member regarding the nature or formality of the proceedings.

However, when it comes to the Hearing itself, the primary obligation to ensure fairness is on the Hearing Panel, not the Executive Director's case presenter. Particularly where the Hearing Panel has the benefit of independent legal counsel (as it did in this case), the case presenter's obligation is to act honorably and fairly. We cannot set out an exhaustive list of what is or is not included in this obligation. Each case must be evaluated on its own merits, context and circumstances.

In the circumstances of this case, actively attempting to mislead or trick Mr. Pethick into foregoing his right to legal counsel would certainly have breached Mr. Bone's obligations. However, as already indicated, the evidence does not support any such finding in this case.

We cannot agree that Mr. Bone had an obligation to actively encourage Mr. Pethick to retain legal counsel. Mr. Pethick knew or ought to have known about the formality of Hearing and the potential consequences based on the material that was sent to him. We cannot agree that Mr. Bone's obligations went further than sending this material and ensuring Mr. Pethick was not verbally misled.

If it became apparent at the Hearing that Mr. Pethick was in over his head and that his right to a fair hearing was compromised, then it ought to have been apparent to the Hearing Panel, and they would have had an obligation to intervene. We have commented more on this below.

Hearing Panel's Obligation to Ensure a Fair Hearing:

As indicated above, the Hearing Panel has a positive obligation to ensure the Hearing is fair to an accused industry member. This obligation is particularly important when the industry member does not have the benefit of legal counsel to assist in protecting his or her right to procedural fairness.

In this case, we find that the Hearing Panel breached its obligation to ensure the Hearing was procedurally and substantively fair to Mr. Pethick:

- Mr. Koop represented Mr. Pethick even though he was being called as a witness in the Executive Director's case against him. While Mr. Bone did his job by identifying the issue for the Panel, the Hearing Panel seems not to have explored it, beyond allowing a brief adjournment for Mr. Bone to confer and ensure Mr. Koop was comfortable proceeding as both representative and witness.
- However, there is nothing in the record to indicate that anyone explained to Mr. Pethick the implications of being represented by a layperson who was also being called as a witness in the Executive Director's case against him.
- Moreover, the Hearing Panel did not at any point (and particularly when it became apparent that Mr. Pethick might be in over his head by having Mr. Koop represent him) ask Mr. Pethick whether he knew he had a right to legal counsel and whether he needed an adjournment to retain or consult counsel.
- Significantly, the Hearing Panel did not offer Mr. Pethick an opportunity to cross-examine Mr. Koop after he testified for the Executive Director. This is despite the Panel Chair indicating at the outset that he would have the opportunity to cross-examine the Executive Director's witnesses. While it may have been assumed that Mr. Pethick would not care to cross-examine his broker and advisor, the right to cross-examine adverse witnesses is fundamental to the right to a fair hearing and cannot be merely assumed away.
- Also significantly, the Hearing Panel refused to allow Mr. Pethick to submit contextual evidence regarding his previous sanction (previously referred to in

these proceedings as the "Prior Sanction Evidence"). The Executive Director referred to the prior sanction as an aggravating factor in relation to the level of sanction appropriate in this case. The Executive Director's argument was that the circumstances were sufficiently similar to demonstrate that Mr. Pethick was a repeat offender guilty of a pattern of behavior that justified a more severe sanction. Mr. Pethick attempted to submit additional contextual evidence (the Prior Sanction Evidence) to explain why the prior incident was not sufficiently similar to this case, but the Hearing Panel ruled it irrelevant and refused to consider it. However, they then relied on the prior sanction as an aggravating factor in setting the Sanction in this case. Therefore, while the Executive Director was permitted to argue that the prior sanction created a pattern of behavior, the Hearing Panel tied Mr. Pethick's hands in attempting to rebut it.

In our view the latter two issues (right to cross examine, and refusal of Prior Sanction Evidence) are fatal and by themselves either or both are sufficient to justify a finding that Mr. Pethick's right to procedural fairness was compromised.

We have already ruled on the Prior Sanction Evidence and determined that the Hearing Panel was in error (see this Panel's decision of October 4, 2017). We permitted the contextual evidence to be called during the hearing of this Appeal. If this were the only issue that caused an unfair hearing, we would have been prepared to exercise our discretion under the s.50 of the *Real Estate Act* to substitute our own decision on Sanction. However, we cannot undo the prejudice and potential harm caused by the other failures, and we certainly cannot speculate on what the evidence would have looked like if the breaches of procedural fairness had not occurred.

Mr. Pethick has asked that we quash the Hearing Panel's decision without referring the matter back to a new hearing panel. However, in our view, this would be an inappropriate remedy in this case. In our view, the appropriate result is to quash the Hearing Panel's decisions on Conduct Deserving of Sanction and on Sanction and refer this entire matter back to a new Hearing Panel so the Hearing can proceed afresh.

2. Other Grounds of Appeal:

Mr. Pethick has raised several other grounds of appeal, including errors of fact and law by the Hearing Panel.

Given our findings and directions above regarding breach of the duty of fairness, we do not need to address the other grounds of appeal. Moreover, it would be inappropriate to consider them in the alternative so as not to risk pre-determining or otherwise influencing the outcome of the new hearing, with this one exception: We note that Mr. Pethick has already served the one month suspension previously imposed by the prior Sanction Decision, which is now quashed. In the event that the new Hearing Panel determines that Mr. Pethick's conduct was deserving of sanction (and we do not suggest an outcome in this regard one way or the other), the previously served one month suspension should be accounted for in any subsequent sanction decision.

II. COSTS:

Costs were not argued or spoken to during the hearing of this Appeal.

Therefore, we invite the parties to provide written submissions on costs of this Appeal. If either party objects to proceeding by written submission only, they may raise it within the time noted below. Otherwise, written submissions shall be submitted within the time frames outlined below.

III. DECISION & FURTHER DIRECTION

Based on the foregoing, our decision and directions are as follows:

- The Decisions of the Hearing Panel dated September 20, 2016 (Conduct) and November 21, 2016 are quashed;
- A new Hearing Panel shall be convened to hear this matter afresh. To be clear, the new Hearing Panel shall not include any members of the original Panel nor any member of this Appeal Panel.
- Unless an objection is made by either party within the time outlined below, costs of this Appeal will be dealt with by written submission only, with submission dates as follows:
 - Mr. Pethick's written submission shall be supplied to the Hearings Coordinator and to counsel for the Executive Director by no later than June 15, 2018.
 - The Executive Director's submissions in response shall be supplied to the Hearings Coordinator and to Mr. Pethick's counsel by no later than June 22, 2018.

- Mr. Pethick's rebuttal submission, if any, shall be supplied to the Hearings Coordinator and to the Executive Director's counsel by no later than June 29, 2018.
- If any party objects to costs being determined by written submission only, or to the dates outlined above, any such objection must be declared by delivering an objection in writing to the Hearings Coordinator and to opposing counsel by no later than June 15, 2018.

Certified and dated this 1st day of June, 2018.

Robert Telford, Appeal Panel Chair