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 (RECA)
Steven Robertson, for Gordon Pethick

DECISION OF APPEAL PANEL – COSTS

I. BACKGROUND:

This matter has an unusual history and therefore it is appropriate to set out a brief account of the background and steps leading up to this decision.

On September 20, 2016 and November 21, 2016, a hearing panel issued decisions finding that Mr. Pethick was guilty of conduct deserving of sanction and imposing a sanction.

Mr. Pethick appealed both hearing panel decisions on various grounds, including, an argument that his right to a fair hearing was breached on a number of bases.

On June 1, 2018 we issued our decision on the merits of the 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 to a new hearing before a new hearing panel. We also invited the parties to provide written submissions regarding costs of this appeal.

In the written submissions, both parties claimed to be entitled to costs. The Executive Director also argued that under the legislative scheme in place, we have no jurisdiction to award costs to an industry member.

On November 14, 2018 we issued our decision finding that, unlike Hearing Panels, as an Appeal Panel, we have jurisdiction to exercise our discretion to award costs in favour of an Industry Member. In exercising our discretion, we declined to award costs to either party in the circumstances of this case.

Mr. Pethick appealed our costs decision to the Court of Queen's Bench of Alberta pursuant to s.52 of the *Real Estate Act*, RSA 2000, c. R-5 (the "Act"). The appeal was related to our decision to refuse to award costs to Mr. Pethick. The Executive Director did not cross-appeal on costs or jurisdiction. On June 11, 2019 the Court of Queen's Bench of Alberta issued its decision overturning our costs decision and directing this matter back to us for reconsideration with specific directions (*Pethick v Real Estate Council (Alberta)*, 2019 ABQB 431) (the "QB Appeal Decision").

The parties have now supplied further written submissions on costs. We have reviewed and considered the parties' written submissions. Our Decision on costs is set out below.

II. PRELIMINARY MATTERS:

As indicated, our finding on jurisdiction was not appealed and was therefore not referred to in the QB Appeal Decision.

However, since it was raised in the initial submissions, for the sake of completeness, we conclude that, for the reasons set out in our November 14, 2018 decision, we have jurisdiction to exercise our discretion to award costs to an industry member in appropriate circumstances.

Since the Executive Director did not appeal our refusal to award him costs, that portion of our November 14, 2018 decision stands, and indeed, in the new written submissions the Executive Director has not requested costs.

Therefore, this decision deals only with Mr. Pethick's entitlement to costs.

III. DISCUSSION & FINDINGS:

A. Findings and Directions From Court Decision:

For context, it is appropriate to set out the essential findings and directions of the Court as outlined in the following passages from the QB Appeal Decision:

> *[21] In my view the Appeal Panel's decision to deny costs to Mr. Pethiuk* [sic] *was not reasonable. In particular, the Appeal Panel decision was not*

reasonable because it articulated an unreasonably stringent standard for awarding costs to an industry member and as well, it did not consider the factors enumerated in s. 28(4) of the Bylaws *when assessing Mr. Pethiuk's* [sic] *claim for costs.*

[22] As set out above, the Appeal Panel held that an industry member could only be awarded costs where the Executive Director or RECA acted in bad faith. The Appeal Panel said that costs would only be awarded by it 'in exceptional circumstances, such where it is clear that the Executive Director pursued disciplinary proceedings to fulfill some private interest rather than to fulfill the broader RECA mandate'. Notably, it said 'such where', not 'such as *where', so that the pursuit of private interests rather than the public mandate defined exceptional circumstances, rather than being an example of when exceptional circumstances may arise. All of the examples that the Appeal Panel gave of exceptional circumstances – 'the 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' – focus on bad faith or improper motive.*

....

[30] .... The Appeal Panel's exclusive reliance on the improper purpose test, and its failure to consider other circumstances relevant to Mr. Pethick's claim and as set out in s. 28(4) of the Bylaws, *renders its decision unreasonable despite the wide-latitude and discretion it enjoys in making a costs decision pursuant to s. 50(5) of the* Real Estate Act*....*

....

[34] *.... As such, I would refer back to the Appeal Panel the question of whether Mr. Pethick ought to be awarded costs with the following directions:*

(a) The Appeal Panel may properly consider the public mandate function of the Executive Director and RECA in deciding whether or not costs ought to be awarded to Mr. Pethick;
(b) The Appeal Panel cannot require Mr. Pethick to demonstrate that the Executive Director or RECA (and specifically the Hearing panel) acted with an improper purpose or otherwise in bad faith;

(c) *The Appeal Panel can take into account whether the conduct of the proceedings against Mr. Pethick constituted a marked departure from the standards to be expected in a regulatory proceeding of that type;*
(d) *The Appeal Panel must consider the totality of the circumstances of Mr. Pethick's hearing and appeal, including other factors set out in s. 28(4) of the* Bylaws.

B. Applied to this Case:

Based on the direction in paragraph 34(d) of the QB Appeal Decision we will review costs entitlement by having reference to each of the specific factors set out in s.28(4) of the *Real Estate Act Bylaws* (the "Bylaws"). That section provides as follows:

> *28(4) The following factors may be considered by a panel in determining any costs order:*
> *(a) the degree of cooperation by the industry member;*
> *(b) the result of the matter and degree of success;*
> *(c) the importance of the issues;*
> *(d) the complexity of the issues;*
> *(e) the necessity of incurring the expenses;*
> *(f) the reasonable anticipation of the case outcome;*
> *(g) the reasonable anticipation for the need to incur the expenses;*
> *(h) the financial circumstances of the industry member and any financial impacts experienced to date by the industry member; and*
> (i) *any other matter related to an order reasonable and proper costs as determined appropriate by the panel.* [sic]

The matters referred to in paragraphs 34(a) [public mandate] and (c) [marked departure] of the QB Appeal Decision will be dealt with as part of our consideration of s.28(4)(i) "any other matter".

As a preliminary matter, it should be noted that at least some of the s.28(4) factors appear to have been drafted on the assumption that costs would only be awarded against the industry member, and some factors appear to be related more to hearings than to appeals. For example, s.28(4)(a) refers to cooperation by the industry member only, which is likely intended to refer primarily to the industry member's pre-hearing cooperation during the investigation process leading to a conduct hearing. However, as previously noted, we have concluded that, taken together, the

Act and Bylaws give us jurisdiction to exercise our discretion to award costs in favour of an industry member on an appeal such as this. Therefore, in light of the direction in the Court Decision, where appropriate we will adapt the s.28(4) factors so they can be applied to this case.

C. Bylaw Factors:

(a) Degree of cooperation

While the Bylaw provision speaks only of cooperation by the industry member, we will consider it as cooperation by both parties.

As a starting point, we are aware of no allegation that either party was particularly uncooperative in the process leading up to or during the Appeal hearing. However, as part of this factor, we also consider whether any party unnecessarily or unduly complicated or delayed the process, or otherwise unreasonably made the process more expensive or time consuming.

In this regard, we note the Executive Director's early opposition to Mr. Pethick's new evidence application.

Two central components to Mr. Pethick's appeal were the allegations that during a conversation before the Hearing (the "Prior Conversation"), the Executive Director's counsel, Mr. Bone, misled Mr. Pethick about the formality of the hearing and the importance of retaining legal counsel to represent him, and the allegation that it was unfair to refuse to consider the contextual evidence regarding the prior disciplinary matter (the "Prior Conduct Proceeding").

To advance these arguments, Mr. Pethick applied to adduce new evidence at the Appeal Hearing regarding the Prior Conversation, and regarding the context surrounding the Prior Conduct Proceeding. Without this evidence it would have been impossible or exceedingly difficult for Mr. Pethick to advance either appeal argument.

Despite the obvious necessity of this evidence, the Executive Director opposed the application and forced this matter to a contested application hearing with written and oral submissions.

No doubt one of the reasons for the Executive Director's position regarding the Prior Conversation evidence was that the appeal issue necessitating this evidence involved a very serious and personal accusation against Mr. Bone of professional and

prosecutorial misconduct. Given the gravity of this allegation and the potential consequences to Mr. Bone personally, the Executive Director no doubt felt that he had to vigorously defend.

However, a vigorous defence of the merits of the misconduct allegations could have been advanced without raising objection to the evidence application.

In our view, opposition to the fresh evidence application at least somewhat unduly complicated this matter.

(b) Degree of Success

Mr. Pethick argues that because we quashed the Hearing Panel decisions on Conduct and Sanction, he was "wholly successful" and therefore ought to recover costs.

The Executive Director argues that while the result of the appeal was favourable to Mr. Pethick, the method by which the result was achieved had little or nothing to do with the appeal arguments Mr. Pethick advanced. In fact, the Executive Director points out that a significant component, if not the majority, of Mr. Pethick's written submission and the application and hearing time was devoted to the allegation of prosecutorial misconduct by Mr. Bone, and on this issue Mr. Pethick was completely unsuccessful.

Essentially, the Executive Director argues that Mr. Pethick succeeded in spite of the time, effort and expense expended at the hearing, not because of it.

In this Appeal, Mr. Pethick requested that we quash the Hearing Panel decisions and remove them from his record, or, alternatively, that we quash the decisions and remit the matter back to a new hearing panel. In this case, we did not grant Mr. Pethick his preferred result, but did grant his alternative.

Mr. Pethick ultimately succeeded on the basis of the Hearing Panel's failure to invite cross-examination of an adverse witness and a refusal to permit the Prior Conduct Proceeding evidence. Both of these matters were raised by Mr. Pethick, however briefly, in argument during the Appeal. Because this is being sent back to a new Hearing Panel, we elected to make no finding on Mr. Pethick's appeal arguments related to errors of fact and law. This does not mean he was unsuccessful on these issues.

However, in our view there is an even more important issue related to costs. As indicated, one of the most central grounds in this appeal (and the issue that took the majority of time, energy and likely expense throughout this appeal) was the allegation that Mr. Bone actively misled Mr. Pethick into believing the hearing was an informal discussion for which he did not need a lawyer, and that he further breached his professional obligations during the Hearing. These are serious allegations of professional and prosecutorial misconduct. Not only did Mr. Pethick fail to succeed on this issue, after hearing from the witnesses, we accepted Mr. Bone's evidence on all points and rejected Mr. Pethick's. Importantly, we concluded that Mr. Pethick's evidence of being misled by Mr. Bone was either not believable or was willfully blind (see page 6 of our June 1, 2018 Appeal Decision). Further, Mr. Pethick's entire argument ignored his admission in evidence that before the Hearing he was concerned enough about possibly needing a lawyer that he sought advice from his broker, Mr. Koop, and that Mr. Koop told him he did not need a lawyer.

Overall, to any reasonable observer, Mr. Pethick's evidence and accusation that he was misled by Mr. Bone was simply not believable. Yet, despite this, Mr. Pethick and his counsel persisted in this accusation and they used significant hearing time and resources to do it. In addition, the accusation meant that Mr. Bone had to give evidence at the Appeal hearing and therefore could not continue to act as counsel. This, in turn, required the Executive Director to retain an external law firm, and, if that firm charged even a fraction of the amount Mr. Pethick's counsel says he charged, then this meritless accusation ended up costing RECA, and the Industry that funds it, significantly.

In our view, Mr. Pethick's persistence in maintaining these very serious allegations on the basis of such flimsy evidence weighs heavily against him in considerations about entitlement to costs.

For clarity, we would add here that we are not in any way suggesting that to be entitled to costs, a party should restrict their appeal to issues on which they are assured success. In this case the Executive Director opposed the Appeal and therefore Mr. Pethick and his counsel needed to pursue all available arguments. However, when it comes to assessing a right to costs we will consider time wasted on completely futile issues, and we will certainly consider completely meritless accusations of misconduct that malign character.

(c) *Importance of the Issues*

This appeal involved issues of procedural fairness to industry members whose conduct is the subject of disciplinary proceedings, and it involved allegations of prosecutorial misconduct on the part of the Executive Director's case presenter.

These issues go to the integrity of RECA's self-regulatory mandate and its disciplinary process and are therefore of significant importance to the parties and to the industry generally.

(d) Complexity of the issues

The issues that resulted in quashing the Hearing Panel decision were not complex. Failure to offer cross-examination of a witness and the refusal to permit contextual evidence were both obvious breaches of natural justice and were apparent on the record.

The issues surrounding the prosecutorial misconduct allegations were less straight-forward, but were ultimately not the basis for impugning the Hearing Panel decisions.

(e) Necessity of Incurring Expense

It was necessary for Mr. Pethick to incur legal expense to pursue justice. Arguing an appeal based on the legal principles of natural justice is not something an ordinary layperson could readily do.

Balanced against this is the fact that, as we have already commented, much of the expense incurred was in pursuit of meritless allegations that went beyond simply being unsuccessful; specifically, a misconduct allegation based on evidence from Mr. Pethick that we concluded was either not believable or was willfully blind. It resulted in unnecessary expense to both parties in this Appeal.

(f) Reasonable Anticipation of Outcome

We do not believe this factor requires us to fully second-guess the parties' pre-Appeal opinions about the merits of success.

In our view, this factor would primarily be relevant in a case where it was plain and obvious to one of the parties that they were destined to lose but they persisted anyway, thereby necessitating wasted time, energy and expense for all parties. It is likely more relevant to a conduct hearing than to an appeal.

One might argue that the two issues on which Mr. Pethick succeeded should have been plain and obvious to the Executive Director on the record and he should therefore have consented to the appeal. However, in this case, the plain and obvious issues were, at least to some extent, overshadowed by the other issues on which there was no success, and in particular the accusation of prosecutorial misconduct that the Executive Director understandably had an interest in vigorously opposing.

In this case, we cannot suggest that the Executive Director ought to have anticipated the outcome and therefore avoided the hearing.

(g) Reasonable Anticipation of Need to Incur Expense

We have already concluded there was a need for Mr. Pethick and for the Executive Director to incur expense. Therefore, it makes sense that they would reasonably anticipate the need to incur them.

(h) Financial Circumstances of, and Financial Impacts to, the Industry Member

We start by noting that Mr. Pethick indicates he has already served the one month suspension ordered in the original Hearing Panel decision. He argues (without evidence) that this has cost him $60,000 to $100,000 in income.

We have not rendered any decision on whether Mr. Pethick's conduct was deserving of sanction, and therefore whether the one month suspension was justified. This is a matter for the new Hearing Panel to decide. In our June 1, 2018 Appeal Decision (see pp. 10-11) we specifically directed the new Hearing Panel to consider this fact, and we therefore expect that it will be considered as it becomes relevant, either as part of a sanction decision or a costs award following the new Hearing.

Therefore, for the purposes of costs in this Appeal, it would be inappropriate for us to consider any income Mr. Pethick may or may not have lost during the suspension.

In written argument, the Executive Director references an Alberta Real Estate Association (AREA) Fund that may be available to industry members, but he candidly admits that he does not know whether Mr. Pethick has benefitted from that Fund or is even a member of AREA.

There is no evidence before us regarding the AREA fund and Mr. Pethick's potential to benefit from it. It is improper for the Executive Director to attempt to raise this issue in this fashion without any evidence. As such, we will not consider this portion of the Executive Director's submissions.

There is some information regarding the legal fees Mr. Pethick's lawyer says he billed for his services in this matter. As indicated, some legal expense was necessary and would therefore be expected in pursuing this appeal. However, much of the expense would have been related to the ill-conceived prosecutorial misconduct issue that occupied so much time and energy during the appeal and the proceedings leading up to it. We cannot tell what proportion of the fees relate to this issue because Mr. Pethick's counsel has not provided copies of his dockets, claiming such information is privileged.

In the end, there is no actual evidence of financial circumstances or impact. There is a possibility that, despite the lack of evidence on point, Mr. Pethick may have incurred some legal expense. But even if this were the case, it is off-set to some extent by the fact that the misconduct allegation resulted in the Executive Director also incurring legal expense that could otherwise have been avoided.

Therefore, this factor does not weigh heavily in favour or against Mr. Pethick.

(i) Any Other Matter Related to an Order for Reasonable and Proper Costs

As indicated above, under this factor we consider the issues outlined in paragraph 34(a) and (c) of the QB Appeal Decision (RECA's public mandate, and whether there was a marked departure from the standards expected in a regulatory proceeding).

In our November 14, 2018 decision we outlined the nature of the public mandate issue as it applies to RECA in this case. We do not read the QB Appeal Decision as disagreeing with our general statements regarding the public mandate. Therefore, for context, we repeat here those general comments from our November 14, 2018 Decision (see page 5):

> *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.*

The impact of a public mandate on entitlement to costs is aptly summarized in Mr. Pethick's written submission (paragraph 63):

> *…. It is generally accepted in criminal law that the Crown's public interest function restricts costs awards against it. However, the* [sic] *this public interest function does not offer complete protection. Costs awards may be made against the Crown where there has been misconduct, which is defined as a marked and unacceptable departure from the reasonable standards expected of the prosecution* [R v Fercan Developments Inc., 2016 ONCA 269 *("*Fercan*") at paras 37 and 74 [TAB 8]]. Such costs awards are available because once the prosecution deviates from the standards it is expected to meet, it is no longer acting in the public interest [*Fercan *at para 86 [TAB 8].*

In our view, given RECA's public mandate, the reasoning from *Fercan* applies equally to an industry member's entitlement to costs in a disciplinary matter such as this.

Therefore, in this case, if the proceedings represented a marked departure from the reasonable standards expected of the prosecution in a RECA disciplinary matter, this would be a significant consideration in favour of awarding costs to Mr. Pethick.

Mr. Pethick argues that because the Hearing Panel's conduct was found to constitute a breach of procedural fairness, and because the Executive Director opposed this appeal, there is a marked departure from the reasonable standards expected in a RECA disciplinary proceeding.

Effectively, Mr. Pethick's argument appears to be that because regulatory bodies and disciplinary tribunals are required to adhere to the principles of natural justice and

procedural fairness, any breach of those rules combined with opposition to an appeal will constitute a marked departure from the expected reasonable standards.

In our view, this is not the correct approach. Something more than mere errors and opposition to an appeal is required to establish a marked departure.

The factors enumerated in s.28 of the Bylaws shed some light on what will constitute a marked departure and justify costs in favour of an industry member. As is apparent from the discussion above, on balance, these factors do not weigh significantly in favour or against either of the parties. As such, by themselves we do not see these as constituting a marked departure.

Apart from strict consideration of the s.28 factors, in this case the Hearing Panel failed to invite Mr. Pethick to cross-examine Mr. Koop, and refused to allow context evidence regarding the Prior Conduct Proceeding. There is no evidence to suggest that these were anything but errors in judgment by the Hearing Panel. To find that such errors in judgment constitute a marked departure would be to impose a standard of perfection on Hearing Panels that would essentially frustrate the special considerations arising from the public mandate.

As noted, the Executive Director's opposition to the two successful grounds of appeal may be criticized. However, this appeal was much broader than that. It sought to quash the Hearing Panel decisions and remove them from the record without referring the matter back for a new hearing (which we refused). More importantly, the appeal focused on many more contentious issues than just the two errors on which it succeeded. These other issues called into question the integrity of the disciplinary process generally. In these circumstances, for reasons outlined above, it is difficult to criticize the Executive Director for opposing this appeal. In our view, in doing so, he was merely fulfilling his public interest mandate.

Therefore, the circumstances are not sufficient to constitute a marked departure.

D. Conclusion:

Having considered all of the factors enumerated in s.28(4) of the Bylaws, together with the public mandate and reasonable standards expected of a disciplinary proceeding such as this, and applying all of those considerations to the circumstances of this case, we conclude that Mr. Pethick is not entitled to costs.

In light of this conclusion, it is unnecessary for us to address the arguments regarding the amount of costs claimed in this case.

IV. 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;
- Having considered the circumstances here, Mr. Pethick is not entitled to costs
- Therefore, in this appeal, costs will not be payable by or to either party.

Dated this 21st day of August, 2019.

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Robert Telford, Appeal Panel Chair