

THE REAL ESTATE COUNCIL OF ALBERTA
IN THE MATTER OF Section 48 of the REAL ESTATE ACT, R.S.A. 2000, c.R-5
AND IN THE MATTER OF AN application for costs of an Appeal Hearing
regarding certain sanctions and costs imposed on SAMEER KALIA,
Registered at all material times with Century 21 A.L.L. Stars Realty Ltd., Brokerage

Appeal Panel Members: Julia Jones, Chair
 Susan Rabbitte
 Bill Ramsay

Written Submissions Provided by: Murray Engelking, for Sameer Kalia, Industry Member
 Andrew Bone, for the Executive Director of the
 Real Estate Council of Alberta (“RECA”)

Date of Decision: February 18, 2020

DECISION ON COSTS OF APPEAL OF SANCTIONS

UPON considering the written submissions of the Industry Member and the written submissions of the Executive Director; AND UPON reviewing the Appeal Panel’s Decision dated October 17, 2019;

THE APPEAL PANEL HEREBY ORDERS costs of the appeal to be paid by the Industry Member in the amount of \$4,500.00.

Introduction

On October 10, 2018, a Hearing Panel found Sameer Kalia (the “Industry Member”) had breached the *Real Estate Act Rules* and subsequently, the following sanction was imposed:

- a) \$5,000 fine for breaches of Rules 41(d) and 41(f);
- b) \$10,000 fine for the breach of Rule 42(a);
- c) \$2,500 fine for the breach of Rule 53(c);
- d) \$2,500 fine for breaches of Rules 62(1)(a) and (b);
- e) A 3-month suspension of his authorization to trade in real estate under the *Real Estate Act*;
- f) Completion of educational requirements: Unit 4 (Consumer Relationships), Unit 12 (Ethics, Professionalism and Risk Reduction) of the Fundamentals of Real Estate – Real Estate Associates Program, at his own expense; and
- g) Costs of \$13,294.

The Industry Member appealed some of the sanction imposed for the breaches of the *Real Estate Act Rules*, namely the sanction imposed for the breaches of Rules 41(d) and (f) and 42(a). He also appealed the global amount of the sanction imposed, the 3-month suspension and the costs awarded against him.

On October 17, 2019, an Appeal Panel dismissed the Industry Member's appeal and upheld the sanction and costs that were imposed by the Hearing Panel.

The only issue before this Panel is the amount of costs, if any, to be ordered payable by the Industry Member regarding his unsuccessful appeal of a portion of the sanction imposed on him by the Hearing Panel.

The Executive Director's Submissions

The Executive Director submitted that the Industry Member ought to pay the sum of \$20,859.37. This sum was calculated as follows:

- Hearing Panel's honorarium and expenses - \$8,058.12;
- Hearing Panel's lawyer - \$5,376.25; and
- Case Presenter expenses - \$7,425 (74.25 hours at \$100 an hour).

It was submitted that the *Real Estate Act Bylaws* ("Bylaws") Guideline ("Guideline") in 28(3) was not binding on the Hearing Panel. The Executive Director also submitted that in most contested RECA cases, the costs awarded exceeded the Guideline amount. In support of this proposition, the following cases were provided:

- *Ferguson*, Appeal Panel decision, RECA, July 30, 2018;
- *Faria*, Appeal Panel decision, RECA, November 30, 2015;
- *Izzard*, Appeal Panel decision, RECA, November 29, 2017; and
- *Paranych*, Hearing Panel decision, RECA, April 6, 2017.

It was the Executive Director's position that like the situation in *Faria*, this appeal was unnecessary and had a low chance of success. The Executive Director submitted that the Appeal Panel did not find any of the Industry Member's arguments compelling or persuasive.

The Executive Director also submitted that the actual costs of the appeal were significantly higher than in the Guideline and were higher than the costs being proposed by the Executive Director.

The Industry Member's Submissions

It was the Industry Member's position that some costs associated with the appeal ought to be incurred by the Industry Member as his appeal was dismissed. The Guideline amount set out in Section 28(3) was \$0 to \$4,500 as he appealed the sanction only. It was submitted that there was little point in having a Guideline if departure from the Guideline was urged every time the perceived expenses associated with an appeal exceeded the Guideline amount. He submitted there must be a principled basis to justify the exercise of the Panel's discretion to depart from the Guideline and there was none in this case. Therefore, the costs imposed on the Industry Member should not exceed \$4,500.

It was submitted that section 28(4) of the *Bylaws* enumerated factors which may be considered by the Panel in awarding costs and an analysis of those resulted in no principled basis to depart from the Guideline. The Industry Member's analysis of those factors was as follows:

Cooperation of Industry Member

As this was an appeal of the sanction only, this was not an issue.

Result of the matter and degree of success

Although the appeal was unsuccessful, it did not mean it was without merit. The lack of success justified the imposition of some costs but by itself, the lack of success did not justify departure from the Guideline.

Importance of the issue

The significant suspension of the Industry Member's authorization to trade in real estate was an important issue and launching the appeal did not justify a departure from the Guidelines.

Complexity of the issue

The issues were not complex and did not justify a departure from the Guidelines.

Necessity of incurring the expense; and the reasonable anticipation for the need to incur the expense
The only way to contest the sanction, which was substantial, was by way of appeal.

The cases of *Ferguson* and *Faria* cited by the Executive Director were distinguishable as the industry members were appealing the imposition of a modest administrative penalty. In those cases, having regard to the magnitude of the penalty imposed, the appeals were ill-advised given the costs associated with the appeal.

Reasonable anticipation of case outcome

Despite the lack of success of the appeal, it was not doomed to failure. One of the key issues was the standard of review to be applied by the Appeal Panel when reviewing the sanction and, had the Panel's decision gone the other way, it may have greatly influenced the outcome of the appeal. It was vigorously argued, it was an important issue, it was a live issue and the outcome could have impacted the decision on appeal. This factor was not a basis to justify a departure from the Guidelines.

For the above reasons, *Izzard* was also distinguishable from this case.

Financial Impact to the Industry Member

Having regard to the fines, costs and suspension imposed, an award of costs of this appeal in excess of the Guideline created an undue burden for the industry Member. Proper consideration of this factor militates an award of costs toward the lower end of the Guideline.

In addition to the factors set out in *Bylaw 28(4)*, if the Panel exercised its discretion to deviate from the Guideline, consideration must be given to the costs that can be awarded in section 28(1)(b). The language is mandatory and therefore, only those enumerated components could form part of any cost award to the extent that there was a departure from the Guidelines. The analysis of those components that applied to the appeal were:

28(1)(b)(ii) – General Hearing and Appeal Costs

Total of \$1,708.12 consisting of the expenses submitted by two of the Appeal Panel members.

28(1)(b)(iii) and (iv) Transcript and Administrative Costs

The transcript costs were paid in advance by the Industry Member. Only the honorarium for the Panel members were allowable in this category and they were \$6,350.

28(1)(b)(v) Legal Costs not to Exceed \$250 per hour

Regarding the legal costs of the Appeal Panel's independent legal counsel as proposed by the Executive Director, this expense was entirely discretionary and not a necessity for the appeal. Therefore, those costs should not be borne by the Industry Member. In addition, these costs should not exceed \$250 per hour and without the invoices, the hourly rate could not be ascertained. The appeal hearing lasted less than three hours and allowing for six hours at a maximum of \$250 per hour, the total sum would be \$1,500.

Regarding the legal costs of the case presenter, he was a lawyer but that did not mean that legal costs had to be incurred. The case presenter could equally have not been a lawyer. The case presenter was likely a salaried employee of the RECA and paying his salary for work done in the normal course of his employment did not result in anyone incurring "legal costs". The amount claimed on account of the case presenter should not be awarded against the Industry Member on the basis of the "legal costs" component of *Bylaw 28(1)*.

Issue

The amount of costs, if any, that should be ordered payable by the Industry Member for having his appeal of a portion of the sanction imposed by the Hearing Panel, dismissed by the Appeal Panel.

Legislation and By-Laws

The Real Estate Act:

Appeal Panel's powers

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

The Real Estate Act Bylaws:

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:

(a) Investigation costs

- (i) investigators' costs at a minimum of \$40 per hour to maximum of \$80 per hour;
- (ii) general investigation costs including but not limited to disbursements, expert reports and travel costs in accordance with Council policy guidelines;
- (iii) transcript production including but not limited to interview transcripts;
- (iv) legal costs not to exceed \$250 per hour; and
- (v) other miscellaneous costs.

(b) Hearing and appeal costs

- (i) investigators' costs at a minimum of \$40 per hour to a maximum of \$80 per hour;
- (ii) general hearing and appeal costs including but not limited to disbursements, process service charges, conduct money, expert reports, travel expenses including but not limited to witnesses and Council representatives in accordance with Council policy guidelines, expert witness fees to a maximum of \$1,000 per diem;
- (iii) transcript production;
- (iv) hearing or appeal administration costs including but not limited to location rental, hearing secretary salary to a maximum of \$15 per hour, honoraria of hearing panel members;
- (v) legal costs not to exceed \$250 per hour;
- (vi) adjournment costs; and
- (vii) other miscellaneous costs.

28(2) Upon the complainant providing notice in writing of an appeal under section 40(4) of the Act, the complainant shall post security for costs with the Council in the amount of \$500.

28(3) Subject to a panel's discretion, the following Guide to Costs may apply: (see Schedule "A")

28(4) The following factors may be considered by a panel in determining any cost 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.

Emphasis added.

Appeal Panel's Reasons

Pursuant to section 50(5) of the *Real Estate Act*, the Appeal Panel may make an award as to the costs of an appeal determined in accordance with the *Bylaws*. The Panel found that the Industry Member ought to pay costs of the appeal as his appeal was fully dismissed. The Panel reviewed *Bylaws* 28(1), (3) and (4) in order to determine the amount of costs that ought to be payable by the Industry Member.

Bylaw 28(1) is mandatory as "the costs payable shall be determined in accordance with the following" factors set out. The Executive Director's submissions focused on this *Bylaw*, submitting specific costs of the Appeal. The investigation costs set out in 28(1)(a) did not apply as these would have been covered in the Hearing costs. However, the Panel did review the other costs set out in 28(1)(b) that applied to this Appeal and determined as follows:

- (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

Of these expenses only the travel expenses of two of the Appeal Panel Members were submitted by the Executive Director and this was \$1,708.12.

- (iii) transcript production;

This expense was paid in advance by the Industry Member and that expense of \$2,426.71 ought to be considered when determining costs payable by the Industry Member.

- (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;

The Executive Director did not submit any expenses that would fit within this category other than the honorariums of the Appeal Panel Members which was \$6,350.

(v) legal costs not to exceed \$250 per hour;

Legal costs of Appeal Panel's Independent Counsel:

The Executive Director submitted that the Appeal Panel's independent legal counsel fees of \$5,376.25 ought to be paid by the Industry Member as part of the costs calculation. The *Bylaws* are not clear whether this expense ought to be considered in the Appeal Panel's determination of costs payable by the Industry Member. One would not typically consider this expense to be a cost payable by an industry member for having his or her appeal dismissed. Retaining independent legal counsel for the Appeal Panel is discretionary and the costs would not likely be anticipated by an industry member when deciding whether to appeal a sanction and the costs that may be awarded against him or her. If the drafters of the *Bylaws* intended for this expense to be included, it ought to be explicit so that appeal/hearing panels and industry members are clear from the outset when making decisions. In addition, if these costs are to be considered, confirmation that the rate was no more than \$250 per hour would be required. The hourly rate was not provided to the Appeal Panel.

Legal costs of the case presenter:

The Executive Director submitted that the Industry Member ought to pay some of the costs of the case presenter in the amount of \$7,425 calculated at 74.25 hours @100 per hour. The *Bylaws* are not clear whether the case presenter expenses are included in the "legal costs" category in the *Bylaw*. The Industry Member's submission that the case presenter would not necessarily be a lawyer therefore those costs should not be included is reasonable. Again, this is a cost that would not likely be anticipated by an industry member when deciding whether to appeal a sanction and assessing the costs that may be awarded against him or her. If the drafters of the *Bylaws* intended for this expense to be included, it ought to be explicit so that appeal/hearing panels and industry members are clear.

Next, the Hearing Panel reviewed *Bylaw* 28(3), the Guideline that "may" apply. The Guideline is subject to the panel's discretion. The Panel finds that the Guideline section that most closely matches this case is in Column 3 (total fine or penalty \$10,000 - \$29,999) with the "item" being identified as "Costs for Hearing and Administrative Penalty Appeal with Agreed Statement of Facts". This finding was because only a portion of the sanction was being appealed and not the findings of the breaches of the *Real Estate Act Rules*. The Guideline costs are \$0 - \$4,500.

The Panel also considered *Bylaw* 28(4) and the factors that may be considered in determining any cost order, as follows:

Cooperation of Industry Member

This was not a matter that would increase or decrease costs in this case as it was an appeal taken by the Industry Member.

Result of the matter and degree of success

The appeal was unsuccessful but there was no indication in the Appeal Panel's decision that it was without merit. This was not a matter that would increase or decrease costs in this case.

Importance of the issue

The Panel found it was an important issue to be heard given the suspension and the amount of the costs and fines. This finding would not increase costs payable by the Industry Member.

Complexity of the issue

The issues were not complex and would neither increase nor decrease the costs to be awarded in this case.

Necessity of incurring the expense

The only way to contest the sanction which was comprised of substantial fines and a suspension, was by way of appeal. This factor would not increase nor decrease costs payable by the Industry Member.

The reasonable anticipation for the need to incur the expense

The expenses proposed by the Executive Director for the case presenter fees and the Appeal Panel's independent legal counsel fees could not have been reasonably anticipated by the Industry Member. The other expenses proposed by the Executive Director could have been anticipated by the Industry Member as were the Guideline costs.

Reasonable anticipation of case outcome

In reviewing the Appeal Panel's decision, there is nothing to suggest that the appeal was destined for failure or that it was in any way frivolous. There appeared to be a live issue, which was the standard of review to be applied to the Hearing Panel's decision on sanction and, had it been decided otherwise, the results of the appeal may have been different.

Not being successful is why costs are imposed but by itself, is not reason to increase costs that would otherwise be imposed.

Financial Impact to the Industry Member

The Panel found this not to be a factor that would increase or decrease costs to be imposed. The sanction imposed was significant but there was no evidence that any award of costs of the appeal would have a financial impact on the Industry Member.

Finally, the Hearing Panel considered the caselaw provided by the Executive Director. It was the Executive Director's position that these cases supported an award of costs greater than those set out in the Guidelines.

In *Faria*, the industry member appealed a \$1,500 administrative penalty. The appeal was unsuccessful. The appeal panel deviated from the Guideline as the appeal was clearly without merit and was ill-advised. The industry member offered no evidence at the hearing to support his appeal. In referring to *Bylaw 28(3)*, the panel stated:

In this case, we have decided to deviate from the Schedule of Costs and we will explain our reasoning below. We do not believe deviation from the Schedule of Costs should occur in all Administrative Penalty appeals. We support the Schedule of Costs. However, as we will explain below, in this case because the appeal was clearly without merit and was ill-advised, we decided to exercise our discretion, apply the factors set out in s.28(4) and arrive at a costs decision different from the Schedule of Costs.

Costs of the appeal in the sum of \$6,855.46 were imposed against the industry member. The calculation for this sum was not included in the Decision provided by the Executive Director.

This case before this Appeal Panel is distinguishable because there was no indication in the Appeal Panel's decision that the appeal was clearly without merit or ill advised. In *Faria*, the factors in *Bylaw* 28(4) were in favour of increasing the costs amount while in the case before this Appeal Panel, the importance of the issue was a factor in the Industry Member's favour for reducing costs as the sanction was significant. That cannot be said for the *Faria* case as the administrative penalty was not significant. In addition, in this case the Industry Member provided submissions and there was a live issue to be decided by the Appeal Panel.

In *Ferguson*, the industry members appealed a \$1,000 administrative penalty and was unsuccessful. Costs in the sum of \$4,348.12 were imposed. The appeal panel found the appeal had little chance of success. The Decision did not include calculations showing how the costs were determined. The Panel stated:

The Act Bylaw s.28 sets out criteria which may be considered in any cost order. The RECA Hearing and Appeal Practice and Procedure Guidelines (Page 19) sets out Council's general policy: "The industry member whose conduct is deserving of sanction ought to be responsible for the full costs of the hearing process. Council believes that industry at large ought not to bear the hearing costs for the industry misconduct." This hearing panel supports costs orders and the statement in the RECA Hearing and Appeal Practice and Procedure Guidelines.

The panel in *Ferguson* went on to consider the factors in *Bylaw* 28(4) and concluded that most of the factors were not in the industry member's favour.

The case before this Appeal Panel is distinguishable because there was no indication in the Appeal Panel's decision that the appeal had little chance of success. In this case before the Appeal Panel, the importance of the issue was a factor in the Industry Member's favour as the sanction was significant. That cannot be said for the *Ferguson* case as the administrative penalty was not significant.

The Executive Director did not provide the Appeal Panel with the Council's general policy about industry members paying full costs of the hearing process which was referred to in *Ferguson* and no submissions

were presented in that regard, therefore the Appeal Panel did not consider how that policy would impact a *Bylaw 28* analysis. The Appeal Panel limited its analysis within the parameters of *Bylaw 28*.

In *Izzard*, the industry member appealed a \$10,000 administrative penalty and was unsuccessful. The appeal panel awarded costs in the amount of \$12,605 being the suggested schedule of costs of the Executive Director. The appeal panel stated:

“With respect to costs, the ED provided a schedule of costs for the appeal proceedings only (not the investigation), which the Panel found to be reasonable.

Ms. Izzard argues that because a panel hearing is a right afforded to RECA members, each party should bear their own costs. Ms. Izzard provides no authority in support of that submission.

The Panel does not agree with Ms. Izzard’s position on costs. The award of costs is permitted by legislation, and the industry at large should not be required to pay full costs in cases where an individual has breached the Act, resulting in an investigation and a hearing that finds the member’s conduct deserving of sanction. The Panel believes that the industry member’s failure to acknowledge a clear breach of the Act and the responsibility to pay an administrative penalty resulted in a significant waste of resources.

The Panel has the discretion to award costs as per the submitted schedule of costs, and it chooses to do so here. The Panel accordingly orders Ms. Izzard to pay costs in the amount suggested by the ED’s schedule of costs, being \$12,605.”

The Panel in *Izzard* did not review the factors set out in *Bylaw 28(4)* but reviewed the *Jaswal* factors for sanction. The Decision did not include how the costs were calculated and whether it included costs for the case presenter and independent legal counsel for the panel. It appears that the panel in *Izzard* quotes the general policy of council as set out in *Ferguson* but does not consider its impact in a *Bylaw 28* analysis.

In *Paranych*, the Hearing Panel awarded costs in the sum of \$31,500. This was one half the costs submitted by the Executive Director. The Hearing Panel did review the factors in *Bylaw 28(4)* and found that four affected the costs to be awarded as follows:

Favouring an increased amount of costs:

- The Importance of the issues
- Financial circumstances of the industry member and any financial impacts experienced to date by the industry member

Favouring against a higher amount or reduced costs:

- Complexity of the issues
- Necessity of incurring the expense

The hearing panel did not review of the Guidelines and how it compared with the costs submitted by the Executive Director. The schedule of costs considered by the panel was not included in the Decision therefore the type of expenses accepted is unknown, other than the case presenter's legal fees at \$100 per hour.

In conclusion, for the reasons set out above, the Appeal Panel does not find the cases provided by the Executive Director to be of assistance in determining costs in this case. The cases are distinguishable and are not of assistance when determining the particular issue before this Appeal Panel:

The costs presented by the Executive Director pursuant to *Bylaw 28(1)* are \$20,859.37 and the costs in *Bylaw 28(3)*, the Guideline, are \$0 - \$4,500. This is a significant discrepancy. Some of the costs submitted by the Executive Director are not explicitly included in *Bylaw 28(1)* and therefore could be denied which would reduce the discrepancy. However, a discrepancy would remain. The Appeal Panel found no factors in *Bylaw 28(4)* that would reduce this discrepancy.

This Appeal Panel was persuaded by the Industry Member's submission that there was little point in having a Guideline for costs if departure from the Guideline was urged every time the perceived expenses associated with an appeal exceeded the Guideline amount. The Industry Member's submission that there must be a principled basis to justify the exercise of the Panel's discretion to depart from the Guideline was also persuasive.

The Appeal Panel considered the position of the Industry Member and the Executive Director when deciding to pursue or defend this appeal. Certain factors and considerations would be weighed, including possible costs awarded against the unsuccessful party. Although the exact costs are not known with the Guideline, it is more certain than the costs for the Appeal Panel's honorarium, expenses, independent legal counsel, case presenter fees and so on. The relative certainty provided by the costs in the Guideline allow the parties to more properly assess the risks and benefits of different approaches to be taken in the matter.

The *Bylaw* provides for a principled variation from the Guideline by setting out factors in *Bylaw 28(4)* which can be used to increase or decrease costs in some situations. These factors are known and available to the parties before decisions on how to proceed are finalized. This is a principled basis to justify the exercise of the Panel's discretion to depart from the Guideline. There were no factors in this Appeal to justify a departure from the Guideline.

Therefore, pursuant to section 50(5) of the *Real Estate Act* and in accordance with *Real Estate Act Bylaw 28*, the Appeal Panel makes an award for costs payable by the Industry Member in the amount of \$4,500.00.

This Decision is dated this 18th day of February, 2020.

Julia Jones, Appeal Panel Chair

Schedule "A"

ITEM	COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
Total fine or penalty	\$0 - \$4,999	\$5,000 - \$9,999	\$10,000 - \$29,999	\$30,000 - \$69,999	Over \$70,000
Costs for fully Contested Hearing, including Administrative Penalty Appeal	\$0 - \$2,000	\$0 - \$2,500	\$0 - \$5,000	\$0 - \$7,500	\$0 - \$10,000
Costs for Hearing and Administrative Penalty Appeal with Agreed Statement of Facts	\$0 - \$1,500	\$0 - \$2,000	\$0 - \$4,500	\$0 - \$7,000	\$0 - \$9,500
Costs for Hearing and Administrative Penalty Appeal with Agreed Statement of Facts and Admission of Conduct Deserving of Sanction	\$0 - \$1,000	\$0 - \$1,500	\$0 - \$4,000	\$0 - \$6,500	\$0 - \$9,000
Costs for Hearing and Administrative Penalty Appeal with Agreed Statement of Facts, Admission of Conduct Deserving of Sanction and Agreement on Sanctions	\$0 - \$750	\$0 - \$1,250	\$0 - \$1,750	\$0 - \$2,250	\$0 - \$2,750
Costs for Consent Agreement	\$0 - \$500	\$0 - \$1,000	\$0 - \$1,500	\$0 - \$2,000	\$0 - \$2,500