THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF Section s.48 of the *REAL ESTATE ACT*, R.S.A. 2000, c.R-5 (the "Act")

AND IN THE MATTER OF an Appeal Hearing regarding sanctions and costs determined as a result of findings in the conduct Hearing dated October 21, 2019 of Mehboob Ali Merchant, Registered at all material times hereto with Century 21 Platinum Realty

Appeal Panel Members:	[A.B], Chair [G.P] [J.M]
Appearances:	Mr. Mehboob Ali Merchant, Industry Member Mr. Christopher Davison, for the Executive Director of the Real Estate Council of Alberta
Hearing Date(s):	May 19, 2020 at 9:30 a.m. via teleconference call

DECISION OF APPEAL PANEL – COSTS

I. BACKGROUND:

This application for costs by the Industry Member as against the Executive Director (ED) arises as a result of a series of events that culminated in the provision of an Appeal Panel decision upholding the earlier decision of a Hearing Panel. As concise as it appears at first glance, there were many steps leading to this point, which assist in providing context to Mr. Merchant's application for costs.

In summary the timeline of events is as follows:

October 17, 2019 - Hearing Panel ("HP") decision finding conduct deserving sanction in relation to the actions of Mr. Merchant. At hearing Mr. Merchant admits to conduct deserving sanction.

October 24, 2019 - Mr. Merchant filed his intention to appeal the HP decision. He also applied for a stay of sanction.

October 31, 2019 - ED provided notice of their cross appeal.

December 18, 2019 - HP sets stay application for January 8, 2020 and Appeal for March 17, 2020.

January 3, 2020 - ED signs the Notice of Appeal and cross appeal for March 17, 2020 date.

January 7, 2020 - HP cancelled stay application date and ordered that stay application proceed in writing.

January 24, 2020 - ED provided their written appeal argument; Mr. Merchant also provided his written appeal argument.

January 29, 2020 - HP dismissed Mr. Merchant's stay application.

February 5, 2020 - Mr. Merchant appealed the dismissal of his stay application; ED requested procedure for Stay appeal.

February 14, 2020 - ED provided written response to Mr. Merchant's appeal argument; Mr. Merchant provided written response to ED's appeal argument.

February 24, 2020 - Mr. Merchant applied to the Appeal Panel for advice and direction in regard to procedure for cross appeal.

February 28, 2020 - Appeal Panel provides decision in regard to stay appeal and cross appeal process.

March 3, 2020 - Mr. Merchant applied for further advice and direction in regard to stay appeal.

March 4, 2020 - Appeal Panel declined to provide further advice and direction in regard to stay appeal; Mr. Merchant did not provide stay appeal submissions on the deadline, or afterwards.

March 6, 2020 - At 3:44pm, ED submitted written stay appeal submissions as required by the Appeal Panel; at 4:09pm Mr. Merchant withdrew his stay appeal.

March 13, 2020 - Mr. Merchant's lawyer from Guardian Law, on direction from Mr. Merchant, withdrew his appeal of the HP decision.

March 16, 2020 - The Appeal Panel adjourned the March 17th Appeal hearing to April 14, 2020. Mr. Merchant indicated he had been out of the country and was required to quarantine.

April 10, 2020 - The Appeal Panel adjourned the April 14 Appeal hearing to May 19, 2020. This was to take place via telephone due to COVID.

May 19, 2020 - The Appeal hearing is held virtually, Appellant and Respondent attend.

July 17, 2020 - The Appeal Panel renders its decision on the ED appeal, finding that the HP decision was reasonable, thereby upholding the decision.

October 2, 2020 - Mr. Merchant applies for advice and direction on costs.

October 7, 2020 - The Appeal Panel declines to give advice and directions on costs.

October 13, 2020 - Mr. Merchant applies for further advice and directions on costs; the Appeal panel declines yet again.

On November 11, 2020 – Mr. Merchant makes his application for costs.

November 4, 2020, the Appeal Panel provides direction to the parties, allowing for written submissions. In the written submissions, Mr. Merchant claims to be entitled to costs and seeks costs in the amount of $18,405.87. ED submits that the mixed results of the matter militate toward each party paying their own costs.

We have reviewed and considered the parties' written submissions on the matter of costs. Our Decision is set out below.

II. PRELIMINARY MATTERS:

This Panel acknowledges that at the close of the six-hour telephone hearing dealing with the merits of the Appeal on May 19, 2020, costs were not addressed. They were also not addressed in the written decision of July 17, 2020. It is noted that the Panel, under s. 50(5) of the Real Estate Act has the jurisdiction to determine costs: (5) *The Appeal Panel may make an award as to the costs of an appeal determined in accordance with the bylaws*.

Upon Mr. Merchant seeking advice and direction on a costs application on October 4, 2020 we declined to provide the requested advice given there was no costs application before us at that time. On October 29, 2020 Mr. Merchant did provide an application for costs following which direction was provided to the parties.

Upon an application for costs being presented by the Respondent, Mr. Merchant on October 29, 2020, on November 4, 2020 this Panel provided procedures and

timelines for the disclosure of the parties' positions and arguments in writing. Those guidelines were as follows:

> Direction 1: The parties have seven calendar days from the date of this direction within which to provide any objection to the matter proceeding before this Panel by written submissions only (November 11, 2020).
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> In the event, that oral arguments are requested, the Panel will direct the Hearings Administrator to schedule a video conference or tele-conference for those purposes.
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> Direction 2: The Industry Member has one week to provide any further documentation the Panel (November 11, 2020). The Panel is of the view that proof of having incurred the legal fees claimed is material to the Cost's Application.
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> For clarity, this does not require nor invite a waiver of privilege over the narratives or dockets on invoices from legal counsel. These may be redacted. However, the invoices should demonstrate dates and amounts charged and paid.
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> Direction 3: The Executive Director shall be given fourteen calendar days to respond to the written request of the Industry Member applicant, (November 17, 2020).
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> Direction 4: The Industry Member shall be given a further seven days to reply to the Executive Director's response. (November 25, 2020).

Without objection to submissions in writing, and having considered the submissions of the parties, this Panel now renders its decision on costs.

DISCUSSION & FINDINGS:

An application for costs by an Industry Member as against the regulatory body, in this case, the Real Estate Council of Alberta, is a rare occurrence, and we are guided, in part, by the recent decision of the Court of Queen's Bench in *Pethick v Real Estate Council (Alberta)*, 2019 ABQB 431 ("*Pethick*"). Mr. Pethick successfully appealed the Appeal Panel's decision to deny him costs. The matter

was remitted back to the Appeal Panel for reconsideration, where the panel, denied the claim for costs.

Of particular note, in *Pethick* are the following statements from the Court:

> *[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.

(a) Applied to this Case:

Based on the direction in paragraph 34(d) of the QB Appeal Decision we will review costs entitlement by referencing each of the specific factors set out in s.28(4) of the *Real Estate Act Bylaws* (the "Bylaws") as they are relevant to the application of Mr. Merchant. 28(4) 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 Queen's Bench *Pethick* Appeal Decision will be dealt with as part of our consideration of s.28(4)(i) in "any other matter".

We can quickly dispose of Justice Woolley's comment at paragraph 34(b) concerning an Industry Member not requiring proof of bad faith or an improper

purpose on the part of the Executive Director for costs to be considered. There is nothing in the actions or submissions of these parties that requires us to address bad faith or improper purpose.

(b) Bylaw Factors:

(a) Degree of cooperation

We acknowledge generally that 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, we would look to the collective cooperation of both parties, the Industry Member and ED in relation to the proceedings. The notion of cooperation or lack of, by ED may bare evidence of a "marked departure" as discussed by Justice Woolley in *Pethick*. The lack of cooperation by an Industry Member in their own application for costs may detract from a cost finding in their favour on that factor.

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. We must also acknowledge the impact that COVID-19 has had on these regulatory processes. In relation to the Appeal it was necessary to adjourn to allow Mr. Merchant to isolate after returning to the Country, and then a process to proceed was needed to allow the hearing to take place. 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.

Mr. Merchant submits that the provision of a legal case only seven days before the hearing, which was then not heavily relied upon was a waste of time and resources. Further, Mr. Merchant contends that EDs position on the Aulakh case was purposely misleading and was not supportive of the claim of a lifetime ban request. The panel did not find that ED had purposely mislead the Panel concerning Aulakh, while ED was perhaps overzealous in his characterization of the facts, the Appeal Panel decision did not turn on an analysis of Aulakh, nor was it analyzed for the purpose of addressing reasonableness or sanction. The use of the case does not weigh for or against the awarding of costs under a heading of cooperation.

ED points to the timeline of the entire process to exhibit the lack of cooperation by

the Industry Member. ED submits that the Appeal Panel had to address applications for advice and direction from Mr. Merchant on several occasions, February 28, 2020, March 4, 2020, October 2, and 13th, 2020. Further, ED submits that Mr. Merchant complicated matters by appealing the stay decision of the Hearing Panel, which was subsequently withdrawn, he also appealed the hearing panel original decision, which was also subsequently withdrawn.

Each of the parties was utilizing / accessing accepted processes. Mr. Merchant had the right to appeal any of the decisions of the Hearing Panel to the Appeal Panel. ED had the right to submit case law to the parties, including the Panel, at any juncture in the proceedings, up to and including the day of the hearing. What complicates matters is having a panel adjust / pivot to the matter that must be addressed. In this case at one point, it was an appeal and a cross appeal, it was the appeal of a stay decision, a cross appeal and an appeal and while not overly complex to adjust to, did require nimble adjustments by the Panel to clarify what the issues to be addressed were, in their final form.

In the result, there are no compelling factors that lean toward costs for the Industry Member, or against ED, related to the degree of cooperation.

(b) Degree of Success

Mr. Merchant argues that because the Appeal Panel found the Hearing Panel decisions on Conduct and Sanction to be reasonable, thereby denying ED request for a lifetime ban, he was "wholly successful" and therefore is entitled to recover costs.

The Executive Director acknowledges that a party should not recover costs where they are wholly unsuccessful, but that where there is mixed success, each party should bear their own costs. ED submits that while they were not successful in their appeal, Mr. Merchant chose to withdraw his appeal on the matter prior to hearing, and that should be seen as mixed success, thereby obliging each party to bear their own costs.

When viewing the entire matter of the original hearing, various applications and the Appeal, this Panel agrees that success was mixed. It was only after the commencement of the Hearing before the Hearing Panel that the Industry Member decided he would proceed with an admission of conduct deserving sanction, September 9, 2019, at page 11 of the October 20, 2019 decision. Further, once sanctioned he applied to stay those sanctions pending his own appeal, which was

ultimately withdrawn, leaving only the ED appeal to be addressed by the Appeal Panel. The Industry Member was unsuccessful in his applications for a stay of sanction before the Hearing Panel, decision dated January 28, 2020.

(c) Importance of the Issues

ED submits that the issue is level of sanction to be imposed on an Industry Member and that such an issue is significant to all parties. This appeal further involved a question of reasonableness of the Hearing Panel decision, which is the standard by which all hearing panel decisions are measured. Ensuring that the administrative decision maker achieves a reasonableness standard in its decision-making is paramount to ensuring the underlying public mandate of the regulatory body is maintained.

Mr. Merchant agrees that the issues are of importance, a 12 month suspension versus the requested lifetime ban, this is, of course, of significant importance to the Industry Member and the Industry as a whole, as well as to the general public; the notion that an Industry Member could never be banned for life from trading in real estate regardless of how egregious the behavior should be of concern to the public, in as much as it would also be a concern should an Industry Member be preemptively banned for life without due process.

Said differently, the issues go to the integrity of RECA's self-regulatory mandate and its disciplinary process and is therefore of significant importance to the parties and to the industry generally. The process of Appeal is the check and balance on the exercise of regulatory authority. The importance of the issues weighs equally between the parties in this case, Industry Member and the Regulator.

(d) Complexity of the issues

The Industry Member argues that complexity arose as a result of the actions of ED, suggesting that ED is departing from the norm in regulatory matters. There is also a suggestion that the technical language and analysis created further complexity.

ED submits that the matter would be complex to someone who is not legally trained and that it would be common for a layperson to require assistance. ED also argues that the complexity is also heightened by the Industry Member's stay applications.

The issues before the Appeal Panel were not unduly complex, being narrowed to the issue of reasonableness in relation to the HP decision and indirectly the sanction decision. There were no witnesses in the Appeal; the legal tests being addressed by

the parties were not overly complex. The volume of material presented by the parties was also not unduly substantial. While the telephone hearing lasted six hours, all materials and issues, save costs, were addressed.

(e) Necessity of Incurring Expense

It was necessary for Mr. Merchant to incur legal expense to pursue justice. Arguing an appeal based on the standard of reasonableness is not something a layperson could readily do without effort. Mr. Merchant did engage counsel intermittently over the course of the appeal process.

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. Merchant 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

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.

The Industry Member submits several times in his submission that the ED should have known that they had a losing case, that they were doomed to failure. He claims that to maintain the appeal under those circumstances was a waste of time and resources and required him to defend the Hearing Panel decision unnecessarily. Those comments are hindsight, at no juncture during the appeal did the Industry Member request a summary dismissal or propose that ED's appeal was without merit.

Given that the Appeal Panel was tasked with determining the reasonableness of the decision of the Hearing Panel, and that the range of reasonable is determined on numerous factors, only in the clearest of cases could the outcome be reasonably anticipated. This was not such a case; we cannot suggest that either party could have reasonably anticipated the outcome such that the now successful party is entitled to costs under this heading.

(g) Reasonable Anticipation of Need to Incur Expense

We have already concluded there was a need for Mr. Merchant 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

There is some information regarding the legal fees Mr. Merchant says his lawyer billed for his services in this matter, as well as payment to a paralegal. As indicated, some legal expense was necessary and would therefore be expected in pursuing this appeal. Mr. Merchant employed the services of the paralegal and lawyer on an ad hoc basis, choosing to use services only when he believed they were necessary, we can infer that this was done to keep his costs down.

While Mr. Merchant was successful in that the HP decision was upheld, the result was that he would necessarily continue with the sanctions imposed therein, due to his conduct. That would mean that he would be unable to reapply to work in the industry except in accordance with the guidelines set out in the Act. The financial impact would not be altered by having to address the appeal.

Therefore, this factor does not weigh heavily in favour of Mr. Merchant obtaining costs.

(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).

The Appeal Panel in *Pethick* made the following comments in their November 14, 2018 Decision (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.

What is a "marked departure"? The concept of marked departure is discussed by Justice Woolley in *Pethick* at paragraph 27 & 28:

> *[27] Similarly, in awarding costs against a prosecutor, the Ontario Court of Appeal has emphasized that the relevant standard is whether the prosecutor has shown "a marked and unacceptable departure from the reasonable standards expected of the prosecution":* ***R v Fercan Developments Inc*** *2016 ONCA 269 at para 74. Unlike the test for malicious prosecution, which requires that a prosecutor have had an improper purpose (****Miazga Estate*** *at para 81), costs decisions focus on the relationship between the prosecutor's conduct and the conduct that ought normally to be expected of a prosecutor. Costs are awarded when the prosecutor has acted in a way that is a marked and unacceptable departure from those normal expectations.*
>
> *[28] Focusing on a party (or counsel's) conduct and its effects, rather than on the party's motives or intentions, makes sense in the context of costs. Costs awards are not primarily punitive; rather, they allocate the costs of legal proceedings fairly, and in light of who caused the costs to be incurred. They are "a tool in the furtherance of the efficient and orderly administration of justice":* ***British Columbia (Minister of Forests) v Okanagan Indian Band*** *2003 SCC 71 at para 25. The efficient and orderly administration of justice requires that improper conduct be discouraged, not merely improper motives.*

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.

There is also the earlier case of *Broers v. Real Estate Council of Alberta,* 2010 ABQB 774 (CanLII) where a claim for costs was successfully made against RECA. In that case the court also provides insight into "marked departure" through secondary sources at paragraph [20]…

> *There are costs principles specific to administrative decision-makers, principles on which the Board and the Director rely and to which the Applicant does not advert. The costs principles specific to administrative decision-makers are summarized by Donald J.M. Brown and the Honourable John M. Evans in Judicial Review of Administrative Action in Canada, looseleaf (Toronto: Canvasback, 2003) at para. 5:2560:*
>
> > *Generally, an administrative tribunal will neither be entitled to nor be ordered to pay costs, at least where there has been no misconduct or lack of procedural fairness on its part….*
> >
> > *However, costs have been awarded against an administrative tribunal where it cast itself in an adversarial position, acted capriciously in ignoring a clear legal duty, made a questionable exercise of state power, effectively split the case so as to generate unnecessary litigation, manifested a notable lack of diligence, or was the initiator of the litigation in question, or where bias among tribunal members had necessitated a new hearing. [Footnotes omitted.]*
>
> *and by the Honourable William A. Stevenson and the Honourable Jean E. Côté in Civil Procedure Encyclopaedia (Edmonton: Juriliber, 2003) at 79-56:*
>
> > *A court may decline to award costs against a tribunal where it has acted in good faith, there was no suggestion of malice, and the enabling legislation is unclear; or if it made no submissions, except on jurisdiction…. Costs do not necessarily follow the event. They are awarded against tribunals in unusual or exceptional circumstances such as*

> *capricious or arbitrary conduct or a lack of good faith or circumstances otherwise contrary to rules of natural justice. [Footnotes omitted.]*

The matter in *Broers* is somewhat distinguishable from the case at hand, as this was not judicial review before the courts with ED's role limited to simply clarifying the record. As the Appellant it was expected and necessary for ED to advance their position and argument. The case is helpful for informing us on the concept of marked departure.

If the proceedings in this case 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. Merchant.

Mr. Merchant agrees that RECA has a duty to protect the public and where transgressions occur RECA must pursue and prosecute. Mr. Merchant argues that ED in their appeal exceeded their mandate and pursued the appeal with a personal and private interest in furthering a policy change.

ED submits that proper sanctions are "important and vital" under RECA's mandate at s. 5 of the *Real Estate Act.* That it acted reasonably in appealing the sanction imposed by the HP in light of the conduct admitted to by the Industry Member.

In our view, pursuing an appeal where there is legislated authority to do so in and of itself is not a marked departure. While ED may have been seeking the sanction of a lifetime ban through their appeal, that request was consistent throughout the proceedings, at the Hearing Panel level and the Appeal level, we do not see this as constituting a marked departure, there was no arbitrary conduct or the advancement of a private interest, we agree that sanctions are of interest to the regulator and industry alike. Mr. Merchant submits that as the Appeal Panel found that HP was not bound by a change in policy, and that the policy was not law, that translates the appeal into a private pursuit, that was not for the purpose of protecting the public – we disagree, the law is evolving and it is often the case that changes are only made when parties test changes in a legal forum.

We are not satisfied that the circumstances here are sufficient to constitute a marked departure resulting in costs against the regulatory body.

(c) Conclusion:

Having considered 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; applying all of those considerations to the circumstances of this case, we conclude that Mr. Merchant 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.

III. DISPOSITION:

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

Dated in the City of Calgary this 16th day of February 2021.

"Signature"

[A.B], Appeal Panel Chair