THE REAL ESTATE COUNCIL OF ALBERTA

Case Number:	005053.002
Process:	Appeal of Hearing Panel Decision - s. 48 of the *Real Estate Act, R.S.A. 2000, c.R-5 (the "Real Estate Act")*
Appellant:	Gordon Pethick
Appeal Panel:	[K.K] (Chair, Public Member) [C.W] (Public Member) [S.P] (Licensee) [M.W] (Licensee)
Appearances:	Andrew Bone, Counsel for the Registrar of the Real Estate Council of Alberta Leanne M. Alport, Counsel for the Appellant
Appeal Hearing Date:	October 13, 2021

DECISION OF APPEAL PANEL

INTRODUCTION AND DECISION SUMMARY

1. We were asked to consider whether the Hearing Panel erred by giving no weight to the 25-day suspension, and whether the Hearing Panel erred when assessing costs. Applying the reasonableness standard to our internal review, we find that the Hearing Panel's decision does not contain a chain of analysis or an explanation of how the Hearing Panel weighed the suspension when determining sanctions. As a result, we have determined that the Hearing Panel decision on sanctions shall be amended such that there will be no fines payable in connection with the 2016 and 2020 Hearings. With regard to the payment of costs we find that the Hearing Panel's explanation was transparent and reasonable, and we uphold the Hearing Panel's decision on costs.

BACKGROUND

2. The Appellant appeals the Hearing Panel decision on sanction and costs dated February 25, 2021. The Appellant and the Registrar both provided written submissions in support of their respective positions.

3. Before addressing the appeal, we will provide a brief background of this matter.

4. On September 20, 2016 a Hearing Panel found Gordon Pethick (the "Appellant") breached Rules 41(b) and 41(d) of the *Real Estate Act Rules* (the "Rules").[1] In its November 21, 2016 Decision on Sanction, the Hearing Panel ordered, among other

[1] Pethick (RE), 2016 CanLII 152966 (AB RECA) at pages 8 and 13.

sanctions, that the Appellant's real estate license would be suspended for one month, commencing immediately upon service of the Decision on Sanction on the Appellant.[2]

5. The Appellant appealed the above decision, and on June 1, 2018 an Appeal Panel quashed the Decisions dated September 20, 2016 and November 21, 2016 and ordered that a new Hearing Panel would hear this matter afresh.[3]

6. A re-hearing occurred in October 2020 and the new Hearing Panel (the "2020 Hearing Panel") found that the Appellant breached Rule 41(b) but not Rule 41(d).[4] In the Phase 2 hearing on sanction and costs, the Appellant submitted that it would be fair and reasonable for the 2020 Hearing Panel to consider that the Appellant had served a 25-day suspension arising from the 2016 hearing. The Executive Director countered that it was not relevant because the suspension related to the unproven Rule 41(d) allegation which was overturned on appeal.

7. In its Decision on Sanction and Costs dated February 25, 2021, the 2020 Hearing Panel "acknowledges that the Industry Member has experienced consequences arising from the unsuccessful allegations in this matter and that is a mitigating factor. At the same time, the suspension related to allegations which were not proven, and this sanction relates to different allegations."[5] The 2020 Hearing Panel ordered that the Appellant shall, pursuant to section 43 of the *Real Estate Act* (the "Act"):

    a. pay the Real Estate Council of Alberta ("RECA") a fine in the amount of $6,000 for three breaches of section 41(b) of the Rules;
    b. pay RECA costs in the amount of $6,607.50 associated with the investigation and hearing; and
    c. successfully complete unit five of the Fundamentals of Real Estate Course on consumer relationships within six months of the Hearing Panel's decision.[6]

APPEAL

8. The Appellant filed a Notice of Appeal on February 26, 2021, which contained three grounds of appeal. The Appellant's written submissions narrowed the grounds of appeal to the following:

    a. the 2020 Hearing Panel erred by giving effectively no weight to the Appellant's prior 25-day suspension, and treating it as though it was part of different allegations, when in fact the suspension was part of the punishment for the breaches substantiated in this hearing; and

[2] Ibid at page 19.
[3] PETHICK (Re), 2021 ABRECA 121 at page 11.
[4] PETHICK (Re), 2021 ABRECA 61 at page 17.
[5] Ibid at page 17.
[6] Ibid at page 23.

b. the 2020 Hearing Panel erred by assessing costs at $6,607.50, considering the role of the Executive Director in forcing the Appellant through two entire proceedings, and which amount is disproportionate to the costs awarded in other similar proceedings.[7]

9. We have considered all of the evidence, the Record, submissions and arguments made by the Appellant and the Registrar at this appeal hearing. Our findings and decision are set out below.

EXHIBITS

10. The following exhibits were entered in this appeal hearing with the consent of the parties:

Exhibit A: Notice of Appeal
Exhibit B: Record of the hearing of Gordon Wesley Pethick held October 22 - 23, 2020
Exhibit C: Registrar's Submissions
Exhibit D: Appellant's Submissions
Exhibit E: *EZ Automotive Ltd. v. Regina (City)* 2021 SKCA 109
Yee v Chartered Professional Accountants of Alberta, 2020 ABCA 98 (CanLII)
Moffat v Edmonton (City) Police Service, 2021 ABCA 183
Exhibit F: *Merchant (Re)*, 2020 ABRECA 140

ISSUES

11. The issues we must decide are as follows:

a. What is the standard of review to be applied in this appeal?

b. Did the Hearing Panel err in the weight it gave to the Appellant's prior 25-day suspension?

c. Did the Hearing Panel err by assessing costs at $6,607.50?

DISCUSSION AND FINDINGS

What is the standard of review to be applied in this appeal?

12. As an Appeal Panel our task is to review the decision of the 2020 Hearing Panel. The parties disagreed as to the standard on which we should be reviewing the decision for errors. The Registrar submitted that pursuant to *Vavilov* the presumption of the reasonableness standard was applicable. The Appellant however submitted that after a review of the legislation, we should be applying the correctness standard. The reasonableness standard is based in a culture of deference to the decision of the Hearing Panel, while the correctness standard would allow for a more searching

[7] Appellant's written submissions at page 2.

review. We will review the applicable case law relating to the standard of review. The Supreme Court of Canada decision of *Vavilov* is the leading case on the standard of review that a reviewing court should apply to the decision of a tribunal.[8] *Vavilov* established that the presumption of reasonableness applies, unless the legislature expresses an intention that a different standard should apply, or where the rule of law requires the correctness standard to be applied. *Vavilov* emphasizes that "the exercise of public power must be justified, intelligible and transparent".[9]

13. On the day of this appeal hearing, the Appellant and the Registrar provided a number of judicial decisions that were issued after *Vavilov*. In *Yee v Chartered Professional Accountants of Alberta*, a decision provided by the Appellant, the Alberta Court of Appeal addressed the internal standard of review:

> [34] Of central importance in setting the internal standard of review is the role assigned to the appeal tribunal by the governing statute: *Zuk* at para. 71; *City Centre Equities Inc v Regina (City)*, 2018 SKCA 43 at paras. 58-9, 75 MPLR (5th) 179. The wording of the *Act* makes it clear that the appeal tribunal is to conduct "appeals". Its decision is to be "based on the decision of the body from which the appeal is made", signalling that the primary role of the appeal tribunal is to review that decision. It follows that the appeal tribunal is not to re-conduct the entire proceeding *de novo*, a conclusion that is affirmed by the provision in s. 111(1)(b) that the appeal proceeds on the "record": *Newton* at para. 64. The provision allowing the introduction of fresh evidence on appeal is not intended to displace the presumption that the appeal is on the record, and fresh evidence must be allowed with caution in order to avoid undermining the proceedings before the disciplinary tribunal: *Newton* at para. 81.
>
> [35] When reviewing the decision of a discipline tribunal, the appeal tribunal should remain focused on whether the decision of the discipline tribunal is based on errors of law, errors of principle, or is not reasonably sustainable. The appeal tribunal should, however, remain flexible and review the decision under appeal holistically, without a rigid focus on any abstract standard of review: Halifax "Regional Municipality) v Anglican Diocesan Centre Corporation, 2010 NSCA 38 at para. 23, 290 NSR (2d) 361. The following guidelines may be helpful:
>
> (a) findings of fact made by the discipline tribunal, particularly findings based on credibility of witnesses, should be afforded significant deference;

[8] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.
[9] Ibid at para. 95.

(b) likewise, inferences drawn from the facts by the discipline tribunal should be respected, unless the appeal tribunal is satisfied that there is an articulable reason for disagreeing;

(c) with respect to decisions on questions of law by the discipline tribunal arising from the profession's home statute, the appeal tribunal is equally well positioned to make the necessary findings. Regard should obviously be had to the view of the discipline tribunal, but the appeal tribunal is entitled to independently examine the issue, to promote uniformity in interpretation, and to ensure that proper professional standards are maintained;

(d) with respect to matters engaging the expertise of the profession, such as those relating to setting standards of conduct, the appeal tribunal is again well-positioned to review the decision under appeal. The appeal tribunal is entitled to apply its own expertise and make findings about what constitutes professional misconduct: Newton at para. 79. It obviously should not disregard the views of the discipline tribunal, or proceed as if its findings were never made. However, where the appeal tribunal perceives unreasonableness, error of principle, potential injustice, or another sound basis for intervening, it is entitled to do so;

(e) the appeal tribunal is also well-positioned to review the entire decision and conclusions of the discipline tribunal for reasonableness, to ensure that, considered overall, it properly protects the public and the reputation of the profession;

(f) the appeal tribunal may also intervene in cases of procedural unfairness, or where there is a reasonable apprehension of bias.[10]

14. The Appellant also provided *Moffat v Edmonton (City) Police Service*. In *Moffat*, the Alberta Court of Appeal quoted the above paragraph from *Yee* and provided direction on applying the reasonableness standard:

> [70] Though in the context of appellate review, *Vavilov* provides guidance (at paras 73ff) on the question of *performing reasonableness review*. Here the focus is on both the reasonableness of the outcome as well as the decision-maker's reasoning process; the standard does not ask what decision the reviewing body would have made.

[10] *Yee v Chartered Professional Accountants of Alberta*, 2020 ABCA 98 (CanLII) at para. 35.

[71] Reasonableness review is concerned with "justification, intelligibility and transparency" in the decision-making process (para 100). Written reasons, where provided, are the "primary mechanism by which administrative decision makers show that their decisions are reasonable" (para 81). A reasonable decision is one based on a "rational chain of analysis" (paras 85, 103), it being necessary to "trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic" such that one can be "satisfied that 'there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived' [citations omitted]" (para 102).

[72] In addition, the decision must also be justified "in relation to the constellation of law and facts that are relevant to the decision" (para 105). There are a number of elements that may operate as a constraint on administrative decision-making, including i) the governing statutory scheme; ii) other relevant statutory or common law; iii) the principles of statutory interpretation; iv) the evidence before the decision maker and facts of which the decision maker may take notice; v) the submissions of the parties; vi) the past practices and decisions of the administrative body; and vii) the potential impact of the decision on the individual to whom it applies (paras 108-135). These elements will vary significantly with context and may push a reviewing court to find that a decision is unreasonable once examined against these considerations.[11]

15. The Court in *Moffat* referred to an earlier Alberta Court of Appeal decision regarding the factors to consider in determining the internal standard of review to be applied by an administrative tribunal (in this case the Law Enforcement Review Board):

[43] The following factors should generally be considered:

(a) the respective roles of the tribunal of first instance and the appellate tribunal, as determined by interpreting the enabling legislation;

(b) the nature of the question in issue;

(c) the interpretation of the statute as a whole;

(d) the expertise and advantageous position of the tribunal of first instance, compared to that of the appellate tribunal;

(e) the need to limit the number, length and cost of appeals;

[11] Moffat v Edmonton (City) Police Service, 2021 ABCA 183 at paras. 70-72.

(f) preserving the economy and integrity of the proceedings in the tribunal of first instance; and

(g) other factors that are relevant in the particular context.[12]

16. The Court in *Moffat* concluded that "*Vavilov* does not alter the internal standard of review to be applied by the LERB as set out by *Newton*."

17. The Appellant also provided *E.Z. Automotive Ltd. v Regina (City)*, where the Saskatchewan Court of Appeal referred to and agreed with some principles delineated in *Moffat*. The Court referred to some Ontario and British Columbia tribunal decisions that applied the reasonableness presumption, and it also agreed that *Vavilov* applies to situations when a court reviews an administrative tribunal's decision, and that the presumption of reasonableness does not apply to internal appeals.[13] We did not find this decision to be helpful, as we accept and are inclined to follow the reasoning of the Alberta Court of Appeal over that of tribunals from other provinces.

18. In *Kalia (Re)*, a RECA decision provided by the Registrar that was issued prior to *Vavilov*, the Hearing Panel applied the *Newton* factors and concluded that the internal standard of review of a hearing panel's decision on sanction and costs was reasonableness.[14] The Registrar also provided the RECA decision of *Merchant (Re)*, where a Hearing Panel briefly referred to *Vavilov* and accepted that the standard of review is reasonableness. This decision did not refer to *Kalia* and did not contain an analysis in its reasons on this point. We did not find *Merchant* to be helpful in determining the standard of review.

19. In summary, counsel for the Registrar took the position that *Vavilov* required a presumption of reasonableness, based on *Yee* and *Moffat*. We do not agree with the Registrar on that point. We note, however, that the Registrar cited *Kalia*, which applied the *Newton* factors to conclude that the hearing panel's decision on sanction and costs should be reviewed on a reasonableness standard. Counsel for the Registrar emphasized one of the *Newton* factors (preserving the economy and integrity of the proceedings in the tribunal of first instance).

20. Counsel for the Appellant emphasized that the intention of the legislature should be the governing consideration, but only addressed the powers of the appeal panel pursuant to section 50(4) of the Act. Neither party provided much consideration of the factors stated in *Yee*.

[12] Newton v. Criminal Trial Lawyers' Association, 2010 ABCA 399 at para. 43.
[13] *E.Z. Automotive Ltd. v Regina (City)*, 2021 SKCA 109 at paras. 50 and 66.
[14] *Kalia (Re)*, 2019 ABRECA 005 at pages 6-9.

21. The Court of Appeal in *Moffatt*, at paragraph 53, is clear that the *Vavilov* framework applies when the court reviews the decision of an administrative tribunal and does not override *Newton* on an internal review such as this one. We note that *Vavilov* does not refer to the standard that an internal appeal panel should apply when reviewing the decision of a hearing panel. *Yee* and *Moffat* give direction on the internal standard that an appeal panel should apply to the review of a hearing panel's decision. *Yee* and *Moffat* stand for the proposition that the factors in *Newton* continue to apply to determine the internal standard of review, as *Vavilov* applies to the standard that a court applies when reviewing a tribunal decision. After considering the above decisions and the oral submissions of counsel for the Appellant and the Registrar, we find that the standard of review to apply in this appeal is the reasonableness standard.

22. Determining the internal standard of review requires an analysis of the legislation to determine the roles intended for the Hearing and Appeal panels, and in this instance the *Kalia* decision was informative. We concur with the analysis of the *Kalia* appeal panel. It is the role of the Hearing Panel to be the decision maker at first instance, listening to the evidence, weighing the evidence, issuing sanctions if a breach is found – this supports a reasonableness standard. With regard to the nature of the questions and the interpretation of the legislation the Hearing and Appeal panels have equal expertise which would tend toward the correctness standard. However, the need to limit appeals and preserve the integrity of the hearing at first instance tends toward the reasonableness standard. On balance, we will apply the reasonableness standard to a review of the 2020 Hearing Panel's decision on sanctions and costs.

Did the Hearing Panel err in the weight it gave to the Appellant's prior 25-day suspension?

23. The Appellant's submissions on this issue are summarized as follows. The 2016 Hearing Panel's Decision on Sanction dated November 21, 2016 contains at least three incorrect statements about the suspension:

    - the Appellant noted that he served the suspension "in connection with the unproven allegation of breach of fiduciary duty which suspension was overturned on appeal"[15];
    - the Appellant "experienced consequences arising from the unsuccessful allegations in this matter"[16]; and
    - "the suspension related to allegations which were not proven"[17].

24. In the 2020 Hearing, the Executive Director, as it was then known ("ED") had implied in its rebuttal submissions that the suspension had only been imposed for the breach of Rule 41(d) and not for the Rule 41(b) breach, yet the 2016 Hearing Panel imposed a

[15] Pethick (RE), 2021 ABRECA 61 at page 14.
[16] Ibid at page 17.
[17] Ibid.

global sanction suspension that was not broken down by breach. In its decision the 2016 Hearing Panel stated that

> As a result of his conduct, the Panel found that Mr. Pethick breached rules 41(b) and 41(d) of the Real Estate Act Rules (the "Rules"). These provisions require industry members to provide competent service and fulfill fiduciary obligations, respectively.
>
> The only issue to be determined in these reasons is the issue of the appropriate sanction for Mr. Pethick.[18]

25. The 2016 Hearing Panel's Decision imposed global fines of $19,000 and a one month suspension without attributing any portion of the sanction to a particular breach of the Rules. Although the ED had submitted that a suspension had never been found to be an appropriate sanction solely for one or more breaches of Rule 41(b), the Appellant submitted that did not justify the ED inferring that the suspension was imposed solely for the breach of Rule 41(d) when the 2016 Hearing Panel's Decision did not support that inference. It was incorrect and misleading for the ED to submit to the 2020 Hearing Panel that the Appellant was seeking credit for a breach that was not found by the panel. The ED's submissions misled the 2020 Hearing Panel, as it incorrectly found that the Appellant had "experienced consequences arising from the unsuccessful allegations in this matter" and that "the suspension related to allegations which were not proven, and this sanction relates to different allegations."[19] That panel also mischaracterized the Appellant's submissions when it stated he noted that he served a 25 day suspension in connection with the unproven allegation of breach of fiduciary duty when he had not attributed the suspension to that allegation.

26. The ED's submissions helped the 2020 Hearing Panel reach the incorrect assumption that the suspension was imposed only for the breach of Rule 41(d), which it did not find to be substantiated in the 2020 Hearing. In effect this led to the 2020 Hearing Panel applying no weight to the 25 day suspension the Appellant had served for the same facts and breaches that the 2020 Hearing Panel found were substantiated. This produces the unfair result of the Appellant having to serve two sentences for the same breaches.

27. The ED acknowledged, according to the Appellant's submissions, that the Appellant should receive credit for the 25 day suspension already served if the ED was seeking a suspension for a breach of Rule 41(d). The Appellant further submitted that "[w]hen one extrapolates from the *actual* November 2016 Decision (not the ED's characterization thereof), which imposed the Suspension in respect of all of the breaches found, the conclusion one is led to is that the ED must agree that credit should be given for the 25-day suspension already served, because it was served in respect of not only the breach of Rule 41(d) *but also* the breach of Rule 41(b). One

[18] Pethick (RE), 2016 CanLII 152966 (AB RECA) at page 16.
[19] Pethick (RE), 2021 ABRECA 61 at page 17.

cannot infer otherwise based on the wording of the November 2016 Decision, and it was an error for the 2020 Hearing Panel to do so."[20]

28. The 2020 Hearing Panel relied on *Jaswal*[21] in determining the appropriate sanction for the Appellant. In *Jaswal*, one factor the court held ought to have been considered by the Newfoundland Medical Board was whether the regulated member, in that case a physician, "had already suffered other serious financial or other penalties as a result of the allegations having been made."[22] The Appellant submitted that when considering this factor, an actual sanction imposed and served by a regulated member regarding the same set of charges must be considered when determining the appropriate sanction. The criminal context of presentence custody has informed the sentencing process for professional conduct matters and can be useful when no standard of comparison exists in the administrative context.[23] The Appellant cited the *Criminal Code* regarding a court's discretionary power for sentencing, which the Appellant submitted is followed as a matter of course:

> In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.[24]

29. The Appellant submitted that many Canadian courts including the Court of Appeal of Alberta, BC and Ontario accept that the words "as a result of the offence" is broader than a direct causal connection between the present custody and the offence for which the offender is being sentenced. Although this appeal is not a criminal case, and the Appellant's suspension was not presentence custody as his real estate license was suspended, and it was imposed after sentencing imposed in the first hearing, the suspension fits within the meaning of "as a result of the offence". The suspension was imposed as part of a global sanction the 2016 Hearing Panel imposed for its findings that the Appellant breached Rules 41(b) and 41(d), and the allegations arose out of the same transaction. Therefore, the 2020 Hearing Panel should have considered, and it erred by not applying proper weight and consideration to, the suspension when it arrived at the appropriate sanction. [25]

30. The Appellant further submitted that the rule against multiple convictions applies in professional disciplinary proceedings taken against members of a self-regulated profession, to prevent multiple findings of guilt where the offence consists of the same or substantially the same elements. In *Carruthers v. College of Nurses of Ontario* the Ontario Court of Justice held that

---

[20] Written Submission of Appellant at para. 18.
[21] *Jaswal v Medical Board (Nfld),* [1996] NJ No 50 (NL SC).
[22] Ibid at para. 35.
[23] Written Submission of Appellant at para. 21.
[24] *Criminal Code*, RSC 1985, c C-46 at section 719(3).
[25] Written Submission of Appellant at paras. 23-24.

> There would seem no reason in principle to permit the application of the doctrine in respect of "regulatory" offences under provincial law, yet deny it to members of self-regulated professions in the case of prosecutions for alleged misconduct. There is about such prosecutions, after all, a "public" aspect. The discipline and/or disqualification of members of a self-regulated profession affords protection to members of the public who, by choice or otherwise, engage their services. Prosecutions for professional misconduct ensure that those who undertake the regulated activity are fit to do so. The public is protected by disqualification of those who fail to achieve or maintain such standards. There can be no quarrel with the proposition that a registrant/member ought be held liable for each breach of the governing rules of the profession. No one, however, should be twice punished for the same delict or matter. It is as much the case for professional discipline as it is for a regulatory offence.[26]

31. The Registrar's submissions on this issue are summarized as follows. The ED's characterization of the Appellant's prior suspension in their rebuttal submissions did not contribute to a misinterpretation by the 2020 Hearing Panel. The ED stated in its 2016 rebuttal submissions that the 2016 Hearing Panel imposed a suspension because it found that the Appellant breached Rules 41(b) and (d). In RECA's entire history a suspension has never been found to be an appropriate sanction solely for one or more breaches of Rule 41(b). The ED used these facts to draw a logical inference about the suspension portion of the sanctions. The 2016 Hearing Panel appeared to agree with the ED's inference. The ED further argued that the Appellant did not apply for a stay of the suspension under section 48(10) of the Act, and the monetary and educational sanctions requested by the ED are entirely different from a suspension. The Registrar further submitted that the ED's statements are factually accurate and they gave the 2016 Hearing Panel justification for not awarding time served as the sanction in this hearing.[27]

32. The Registrar further submitted that for its treatment of the prior suspension, "the Hearing Panel's inference on its application to Rule 41(d) is based on a rational chain of analysis given the facts provided by the Registrar in his Rebuttal Submission."[28] The 2020 Hearing Panel gave the prior suspension due weight and attention when it acknowledged the Appellant served a prior suspension and applied it as a mitigating factor. That panel did not set a precise monetary amount to the mitigation, but it is similar to most of the other *Jaswal* factors considered, and it would be difficult to set a monetary figure based on a licensee's age, experience or previous character. Also, a suspension is entirely different than a fine. The 2020 Hearing Panel did not treat the suspension unreasonably, and its treatment of the suspension should stand unless this Panel finds the flaws relied on by the Appellant are sufficiently central or significant to render the entire decision unreasonable.

---

[26] *Carruthers v. College of Nurses of Ontario,* [1996] O.J. No. 4275 at para. 87.
[27] Reply Submissions of the Registrar at paras. 22-26.
[28] Ibid at para. 29.

33. The above paragraphs have summarized the parties' positions regarding whether the Hearing Panel erred when it failed to consider the 25 day suspension. We will now apply the reasonableness standard to that question. *Vavilov* provided that "a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an unreasonable chain of analysis."[29] Based on this direction our focus will be on the reasons of the Hearing Panel.

34. After reviewing the submissions of the Appellant and the Registrar, the Record and legal authorities cited by the parties, and the 2020 Hearing Panel's Decision on Sanction and Costs, we find that:

    - that Decision did not reveal a rational chain of analysis in relation to the 2020 Hearing Panel's consideration of the time the Appellant served toward the suspension;
    - that Decision does not mention whether the 2020 Hearing Panel took into consideration as a mitigating factor that the Appellant served 25 days of the suspension, and that the 25 days served factored into its decision to reduce the sanctions;
    - that Decision did not provide sufficient reasons about how the 2020 Hearing Panel considered the Appellant having served 25 days of the suspension;
    - that Decision did not provide any insight into how much weight the 2020 Hearing Panel applied to the Appellant serving 25 days;
    - the 2020 Hearing Panel did not consider the 25 days served by the Appellant when it reached its decision and when it imposed $6,000 in fines;
    - a suspension of a licensee's license is the second most severe sanction that can be imposed on a licensee, next to a license cancellation;
    - imposing $6,000 in fines after the Appellant had served 25 days of the suspension is unreasonably severe; and
    - the 2020 Hearing Panel erred in the weight it gave to the Appellant's prior 25 day suspension.

35. In reaching the above findings we reviewed the two paragraphs on page 5 of the Hearing Panel's decision under the heading "Whether the Industry Member has Suffered Other Penalty". There are two short paragraphs under that heading, and the first paragraph summarizes the parties' positions and does not contain the Hearing Panel's reasoning. The second paragraph states a conclusion without an explanation. We also had regard for the Hearing Panel's single sentence at the conclusion of their review of other cases just above the heading "Costs". That sentence also states a conclusion without any explanation of how the suspension mitigated the fines imposed.

[29] *Vavilov* at para. 103.

36. Having concluded that the 2020 Hearing Panel's reasons do not disclose a chain of analysis illustrating that they considered the 25 day suspension, under the reasonableness standard, that aspect of the decision is overturned on appeal. A license suspension is a severe sanction, and in our estimation that sanction is appropriate in this situation and a fine is not warranted.

Did the Hearing Panel err by assessing costs at $6,607.50?

37. The Appellant's submissions on this issue are summarized as follows. The 2020 Hearing Panel imposed costs far in excess of the amount suggested by the guide provided in the *Real Estate Act, Bylaws* (the "Bylaws"). Rather than follow the suggestions in the guide, that Panel imposed costs that are in line with fines in the range of $30,000 - $69,999.

38. The Appellant cited the decision of *Abrametz v. The Law Society of Saskatchewan*, where the Saskatchewan Court of Appeal discussed the purpose of costs in disciplinary proceedings:

> 43 Costs are at the discretion of the Discipline Committee, with discretion to be exercised judicially.
>
> 44 Before turning to the factors that have been considered relevant by other courts, I begin with the theory or purpose underlying costs in a professional disciplinary setting. As explained in "Trends in Costs Awards before Administrative Tribunals" (2014) 27 Can J Admin L & Prac 259 (WL) by Robert A. Centa and Denise Cooney ["Trends in Costs"], the purpose of costs in this context differs from the approach taken in the courts. The focus is not to indemnify the opposing party but for the sanctioned member to bear the costs of disciplinary proceedings as an aspect of the burden of being a member (at 263), and not to visit those expenses on the collective membership:
>
> > [W]hile the costs awarded by a professional discipline body will partially compensate the opposing party for its expenses, the purpose is not for the member to indemnify personally an adverse party for its expenses. Rather, the disciplined member is ensuring that the other members of the profession do not bear the full costs of her misconduct. The costs award thus reflects one of the burdens of being a member of a profession and represents a corresponding theory regarding the allocation of costs in a proceeding.[30]

35. *Abrametz* provided factors for courts to consider when assessing the reasonableness of a costs award. The Appellant submitted that these are largely similar to the factors listed in section 28(4) of the Bylaws. Despite finding that many factors weighed in the Appellant's favour or were neutral, the 2020 Hearing Panel imposed costs which

[30] *Abrametz v. The Law Society of Saskatchewan*, 2018 SKCA 37, 2018 Carswell Sask 253 at paras. 43-44.

according to the Appellant corresponds to fines between five and eleven times higher than the guide amounts in section 28(3) of the Bylaws. The costs imposed are excessive and not justified, given the relative success of the parties and considering that the Appellant was subjected to two full hearings for this matter, and when compared to other cases involving contested hearings:

a. *John William Wade*[31] involved a complex case with mixed success, where total fines of $8,000 and costs of $2,500 were imposed;

b. *Thomas Darrol Cowley*[32] resulted in fines of $37,500 and costs of $8,020 after a full hearing; and

c. *Warren Contantine Phipps*[33] involved a complex case with mixed success, where total fines of $7,500 and costs of $1,650 were imposed.[34]

36. The Registrar's submissions are summarized as follows. While there was mixed success in this matter, the burden on the collective membership can only be limited by tying costs to the actual cost of a hearing. *Abrametz* is distinguishable because it focused mainly on an individual losing the right to practice.

37. The Bylaws require a hearing panel to determine costs arising from a hearing in accordance with Bylaw 28(1)[35]. This includes the range of costs for investigations, hearings and appeals. The Registrar submitted that:

- it provided a detailed breakdown of costs in accordance with Bylaw 28;
- the range for costs was a low end of $13,215 and a high end of $26,987;
- the Registrar substantially reduced its estimated costs by not including the costs of the interpreter, witness costs, and the costs of writing any of its submissions;
- the 2020 Hearing Panel accepted the Registrar's estimated costs and the Appellant did not appeal the accuracy of those estimates.[36]

38. The Registrar continued that the 2020 Hearing Panel considered several factors listed in Bylaw 28(4). We will list all factors that may be considered by a panel in determining any cost order under Bylaw 28(4).

39. The Registrar further submitted that the 2020 Hearing Panel considered that the Appellant's actions led to the dismissed allegation of breach of fiduciary duty, only two of eight factors weighed in the Appellant's favour, and the Appellant did not appeal the

---

[31] *WADE (Re)*, 2021 ABRECA 113 at para. 2.
[32] *COWLEY (Re)*, 2021 ABRECA 86.
[33] *Phipps (Re)*, 2020 ABRECA 500053.
[34] Written Submission of Appellant at paras. 30-31.
[35] The Registrar refers to section 28 of the Bylaws in its submissions. The Record and the parties' submissions
Includes section 28 of the Bylaws that were in effect when this appeal was heard. We note that the Bylaw were updated after the Registrar and Appellant provided their submissions on sanction and costs. The applicable subsections of the current RECA Bylaws are subsections 10.1, 10.3 and 10.4, which are largely
similar to the former Bylaws 28(1), 28(3) and 28(4). The Appeal Panel will refer to Bylaw 28 in this decision.
[36] Registrar's Written Submissions at paras. 40-42.

Registrar's analysis in this regard. The 2020 Hearing Panel followed the legislation, thoroughly analyzed the above factors, and based on the degree of success it assessed costs at 50% of the lower end of the Registrar's estimate. The costs award is less than 25% of the high-end estimate.

40. The Registrar also submitted that the 2020 Hearing Panel considered the discretionary costs guide in the Bylaw 28.3 and did not apply it in this matter. Read holistically, the 2020 Hearing Panel's costs award was thorough, prudent and reasonable and it was based on a rational chain of analysis.[37]

41. The Registrar cited *Law Society of Alberta v Schuster* which discussed when an appeal panel should determine if a hearing committee's sanction was reasonable. In that decision the appeal panel stated that

> In assessing the question of whether a sanction imposed by a hearing committee was reasonable, an appeal panel should only intervene where the sanction imposed: (a) was based on application of the wrong principles; or (b) if the sanction was demonstrably unfit (that is, is the sanction "clearly unreasonable"). The test is not whether the appeal panel itself would have imposed a different sanction.[38]

42. Section 43(2) of the Act gives a hearing panel the discretion to, "in addition to or instead of dealing with the conduct of a licensee under subsection (1), order the licensee to pay all or part of the costs associated with the investigation and hearing determined in accordance with the bylaws."

43. Bylaw 28(1) provides direction on recovering and determining costs:

> 28(1) Where a complainant is ordered to pay costs under section 40(4) of the Act, a licensee is ordered to pay costs under section 43(2) of the Act, or a licensee or the Council is ordered to pay costs under section 43(2.1) 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 disbursement, 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

[37] Ibid at paras. 47-48.
[38] *Law Society of Alberta v Schuster*, 2017 ABLS 24 (CanLII) at para. 40.

(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.

44. Bylaw 28(3) provides the factors a panel may consider in determining an order for costs:

(a) the degree of cooperation by the licensee;
(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 licensee and any financial impacts experienced to date by the licensee; and
(i) any other matter related to an order reasonable and proper costs as determined appropriate by the panel.

45. Pursuant to section 43(2.1) of the Act, the Appeal Panel may do the following:

43(2.1) In the case of a hearing in respect of an appeal under section 40.1, the Hearing Panel may

(a) quash, confirm or vary the decision that is the subject of this appeal,
(b) order the licensee to pay all or part of the costs associated with the investigation and hearing determined in accordance with the bylaws, and
(c) order the Council to pay the licensee all or part of the costs associated with the investigation and hearing determined in accordance with the bylaws.

46. From our review of the 2020 Decision, we find that the 2020 Hearing Panel:

- considered the submissions presented by the Appellant and the Registrar (then known as the Executive Director) regarding how costs should be determined, the range of costs, as well as the parties' recommendations for the amount of costs to be imposed;
- considered the factors outlined in Bylaws 28(1) and 28(3);
- noted that the Registrar requested 60% of the low end of its costs estimate;
- made a finding that the Registrar's amount was too high considering the mixed success in the 2020 Hearing;
- determined the low end of the Registrar's costs was $13,215.00; and
- awarded 50% of the low end of the Registrar's costs estimate, which amounts to $6,607.50.[39]

46. We find that the 2020 Hearing Panel followed a rational chain of analysis in determining the amount of costs it imposed, and its costs in the amount of $6,607.50 was reasonable.

CONCLUSION

47. For the reasons stated above, the 2020 Hearing Panel's Decision is varied as follows:

a. No fines will be payable by the Appellant to the Real Estate Council of Alberta in connection with the previous hearings of this matter and this appeal.
b. The Appellant shall pay to the Real Estate Council of Alberta costs associated with the investigation and hearing in the amount of $6,607.50.
c. The Appellant shall successfully complete unit five of the Fundamentals of Real Estate Course on consumer relationships within six months of the date of this decision.

This decision is certified and dated at the City of Calgary in the Province of Alberta this 27th day of April 2022.

"Signature"

[K.K], Hearing Panel Chair

[39] PETHICK (Re), 2021 ABRECA 61 at pages 19-23.