Case 010505

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF Sections 39(1)(b)(ii) and 83(1) of the *REAL ESTATE ACT*, R.S.A. 2000, c.R-5

AND IN THE MATTER OF a Hearing regarding the conduct of **KATHLEEN MARGARET BOWERS**, currently registered with Residential Remedies Inc. operating as 3% Realty Fort McMurray

Hearing Panel Members:	[K.O], Hearing Panel Chair [G.P] [W.R]
Hearing Date:	September 30 and October 1, 2021, by way of video conference
Decision Date:	January 31, 2022
Appearances:	Mitali Kaul, Counsel for the Registrar of the Real Estate Council of Alberta Scott Chimuk, Counsel for the Licensee Kathleen Margaret Bowers

DECISION OF THE HEARING PANEL ON CONDUCT DESERVING OF SANCTION (PHASE 1)

A. Introduction

[1] The licensee, Kathleen Margaret Bowers, appeals an administrative penalty under s. 83.1(1) of the *Real Estate Act* (the *Act*).[1] The Registrar issued an administrative penalty of $4,000 for an alleged breach of s. 41(b) of the *Real Estate Act Rules* (the Rules) by failing to provide competent service to her client NS. We find that the industry member contravened s. 41(b) of the Rules by failing to provide competent service to NS, but not on all the particulars alleged.

[2] This appeal proceeded as a *de novo* hearing. Section 83.1(5)(a) permits the Hearing Panel to "quash, vary or confirm the administrative penalty". Administrative penalty appeals proceed in two phases. This decision relates to phase one of the hearing process and considers whether the Registrar established a contravention of s. 41(b) of the Rules.

[1] *Real Estate Act*, R.S.A. 2000, c. R-5 (Act)

[3] The industry member was a broker with Residential Remedies Inc. o/a 3% Realty Fort McMurray. She provided property management services to clients in the Fort McMurray region. The client, NS, owned a furnished, residential, rental property in Fort McMurray. NS retained the licensee through her brokerage to manage the property. The administrative penalty relates to the licensee's management of this property.

[4] The administrative penalty alleged the following particulars contravened s. 41(b) of the Rules to provide competent service:

a. In or around January 2020, you failed to provide NS the requested inventory list or failed to clearly explain that this service was not being offered.

b. In or around March 2020, you failed to provide a fully completed residential tenancy agreement to NS.

c. In or around March 2020, you failed to provide clear images as part of the move-in inspection.

d. In or around March 2020, you failed to provide a completed pet lease agreement to NS.

e. In or around March 2020, you failed to seek agreement for prorated rent or a reduction in rent due to cleaning fees.

f. You failed to communicate with NS in a timely manner regarding these matters.

[5] The Hearing Panel finds that the following particulars were established, and that each of the particulars was a failure to provide competent service:

a. [not established]

b. In or around March 2020, the industry member failed to provide a fully completed residential tenancy agreement to NS.

c. [not established]

d. In or around March 2020, the industry member failed to provide a completed pet lease to NS.

e. [not established]

f. The industry member failed to communicate with NS in a timely manner regarding these matters.

B. Issues

[6] The following issues arise in this appeal:

a. Was there sufficient evidence of the meaning of "competent service" to find a contravention of the Rules?

b. If so, did the Registrar prove a breach of competent service on each of the particulars alleged?

C. Scope of the Allegations

[7] Early in the hearing, it became clear that the Registrar sought to prove additional particulars not identified in the administrative penalty. The Registrar argued that the additional particulars arose out of the investigation into the complaint and, as such, the licensee was aware of them. During the hearing, the Chair of the Hearing Panel directed that the evidence and argument be limited to the particulars identified in the administrative penalty, which was attached to the notice of hearing.

[8] The reason for this ruling was one of fairness. The licensee had a right to know the case to be met. The accusations against the licensee were set out in the administrative penalty. She retained counsel and prepared her defense, including preparing documents and determining which witnesses to call, based on the particulars in the administrative penalty. While any number of issues may be explored during investigation, the charges the licensee faced in her appeal were those described in the administrative penalty. She was entitled to rely on that notice as the extent of the allegations against her. If the Registrar was of the opinion that there were additional contraventions of the Act, regulation, bylaws or Rules, the Registrar could have issued an additional administrative penalty under s. 83 of the Act. It was unfair to ask the licensee to answer allegations not identified in the administrative penalty.

D. Evidence of Competent Service

[9] The Hearing Panel accepts the Real Estate Council of Alberta's Information Bulletin on "Competent Service" (the Bulletin) as evidence of the professional standard under s. 41(b) of the Rules. The licensee argued that the Registrar failed to establish the professional standard of "competent service" and that expert evidence was required to do so. No expert evidence was called about the professional standard in this case, but the Registrar entered the Bulletin as proof of the professional standard. This was a written standard that addressed much of the conduct at issue. Where the Bulletin did not specifically address the alleged particulars, the Hearing Panel finds that the standard was so obvious that it did not need proof.

[10] Section 41(b) of the Rules states that industry members must "provide competent service". Neither the nor the Rules defines "competent service", although Schedule 3 of the Rules states: "*Competent practice is foundational to maintaining trust, respect and confidence of other professionals and the public*."

[11] The Hearing Panel must identify the applicable standard of competence to determine if there has been a contravention of that standard. We recognize that we

cannot determine the relevant standard after the fact, based on our personal opinions. In *Sussman v College of Alberta Psychologists*, the Alberta Court of Appeal explained that *"[d]isciplinary direction to members of a professional body should be capable of being deduced in advance of an alleged breach."*[2] The rationale for this rule is one of fairness. It ensures that licensees have an opportunity to know, challenge and respond to the evidence upon which the panel makes its decision.

[12] Professional standards may be written or unwritten. In *Prosecuting and Defending Professional Regulation Cases*, the authors explained the role of written standards as follows:

> *Certain professions will have written standards of practice, while others may not. Even where a profession has a written standard of practice, a member can be alleged to have breached a standard of practice that exists beyond the written standards.* [3]

[13] The authors then cite the Nova Scotia Supreme Court's decision in *Morton v Registered Nurses Association of Nova Scotia*:

> *Implicit in the concept of profession is the existence of standards which are benchmarks for the practice of the profession. **The standards may be written or unwritten**. They may or may not be prescribed by the governing statute or regulations.*[4] [emphasis added]

[14] The authors of *Prosecuting and Defending Professional Regulation Cases* then go on to address the challenges that arise in the absence of a written standard. Read in context, the authors' statement that "*courts have found that expert evidence is required … unless the conduct at issue is so obvious or egregious that an expert is not required*" appears to apply where there is no written standard.[5] Later, in seeming contradiction, the authors state, "*Where the standard is a published standard, expert evidence will set out whether the standard was met or not.*"[6] However, the case cited in support of the above proposition does not support the position that expert evidence is always required.[7]

[15] The issue in *Novick v Ontario College of Teachers* was whether the relevant *unwritten* standard was so "ingrained" and "notorious" that evidence was not required.[8] The discipline committee ignored publications by the regulator and ministry, dismissing them as guidelines and not entering them into the record. Although the publications were not before the court, the court found that these

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[2] *Sussman v College of Alberta Psychologists*, 2010 ABCA 300 at para 60

[3] R. Durcan & R. McKechney, *Prosecuting and Defending Professional Regulation Cases* (Toronto: Emond Montgomery Publications Limited, 2020) at p. 116

[4] *Morton v Registered Nurses Association of Nova Scotia*, [1989] NSJ No 270, 92 NSR (2d) 154, cited in *Prosecuting and Defending Professional Regulation Cases* at p. 117

[5] *Prosecuting and Defending Professional Regulation Case* at p. 117

[6] *Prosecuting and Defending Professional Regulation Case* at p. 142

[7] *Novick v Ontario College of Teachers*, 2016 ONSC 508 [*Novick*]

[8] *Novick* at para 26

publications should not have been ignored. Furthermore, the Court noted, "*There is considerable precedent for deference when dealing with what an expert tribunal considers to be unprofessional conduct within its own profession*."[9] The Court quashed the discipline committee's decision due to numerous problems but stated it might have been inclined to defer to the tribunal if the lack of expert evidence on the relevant professional standard had been the only problem with the decision.[10]

[16] The licensee's case of *Naidu (Re)* also does not conclusively determine the issue.[11] In *Naidu*, a RECA Hearing Panel dismissed six of eighteen allegations. The allegations it dismissed related to the licensee's alleged failure to provide adequate disclosure about his role in the industry. The licensee provided a standard disclosure statement but did not disclose his name or his relationship to parties in a transaction. The hearing panel found this conduct offensive or flawed but did not find that the evidentiary threshold had been met to show that it was conduct deserving of sanction. The Hearing Panel noted "*No expert evidence was provided at the Hearing as to what degree of disclosure was required to satisfy the Rule*."[12] The Hearing Panel did not say that expert evidence was always required. In fact, it found that the remaining twelve allegations of conduct deserving of sanction were proven, notwithstanding the lack of expert evidence for those allegations.

[17] In *Walsh v Council for Licensed Practical Nurses*,[13] the Newfoundland Court of Appeal identified three sources a tribunal will look to identify applicable professional standards:

> *...in a written code of conduct; or in evidence of common understandings within the profession as to what is expected of a reasonable professional in the circumstances under consideration; or, perhaps, by way of logical deduction from the fundamental values of the professional body itself*.[14]

[18] The *Walsh* decision emphasizes that a tribunal must "search for a source of standards external to itself"[15] and cannot simply "formulate a standard on their own opinion of what they personally think best practice to be."[16] However, in a footnote the Court notes evidence will not be required "*where a particular standard is so well known and understood, the tribunal may, by way of judicial notice, as it were, declare what the common understanding of the profession is as to the relevant standard of practice*."[17]

[19] Here, the Registrar relies on the Bulletin to establish the applicable standards for competent service. The Registrar's reliance on the Bulletin is consistent with the

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[9] *Novick* at para 82
[10] *Novick*
[11] *Naidu (Re)*, 2006 CanLII 91969 [*Naidu*]
[12] *Naidu* a p. 24
[13] *Walsh v Council for Licensed Practical Nurses*, 2010 NLCA 11 [*Walsh*]
[14] *Walsh* at para 41
[15] *Walsh* at para 43
[16] *Walsh* at para 42
[17] *Walsh* at footnote 1

Court's decision in *Morton*, referenced earlier, in which the Nova Scotia Supreme Court upheld the decision of the discipline committee and the appeal committee that a nurse had failed to maintain the standards of practice of the nursing profession. In assessing the nurse's actions, the discipline committee *"found it useful to assess her actions in the framework of standards set out in a booklet entitled 'Standards for Nursing Practice' which had been circulated to the membership of the Association."* On appeal to the Appeal Committee, the Appeal Committee *"held it was proper for the Discipline Committee to use the "Standards of Nursing Practice" as a guide in determining whether the applicant had [...] failed to maintain the standards of the profession."* This was upheld by the Court.

[20] More recently, the Ontario Court of Appeal considered the status of policies adopted by the Ontario College of Physicians and Surgeons in *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*.[18] The Court noted the policies were not "regulations", nor were they a "code, standard or guideline relating to standards of practice of the profession" adopted pursuant to the governing legislation. Nevertheless, the Court found the policies *"establish expectations of physicians' behaviour and are 'intended to have normative force'"* and as such *"may be used as evidence of professional standards in support of an allegation of professional misconduct."*[19] The Bulletin here is of a similar nature.

[21] The Registrar's cases are of limited assistance because they are civil litigation cases dealing with negligence. Nevertheless, they support the above approach. In both cases, the court had to determine whether there was a breach of the relevant standard of care of a realtor, and the argument that the standard of care could not be determined without expert evidence. Here, the question is whether there was a breach of the rule to provide competent service. These are not identical issues but there are similarities in the concepts. In *Power v Goodram* the Court of Queen's Bench of Alberta commented:

> *While as a general rule a determination of professional negligence requires expert evidence, external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standard, may be used to discover the standard*[.][20]

[22] Similarly, in the Registrar's case of *Khalil v Durant*, the Court of Queen's Bench of Alberta observed:

> *While the case law suggests in some circumstances expert evidence must be resorted to in an effort to determine the appropriate standard of care, the legal authorities do not support the conclusion that expert evidence*

[18] *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 [*CMDSC v CPSO*]
[19] *CMDSC v CPSO* at paras 16-17 and 155
[20] *Power v Goodram*, 2012 ABQB 50 at para 147

> *is always a requirement nor that the lack of expert evidence always constitutes a bar to a finding that the standard has been breached*.[21]

[23] Although these civil cases are of limited assistance, they support the principles arising from the cases discussed above. The cases support that where there is a published written standard, that may be sufficient evidence of the professional standard on its own. Where the written standard provides sufficient details to allow it to be deduced in advance of an alleged breach, expert evidence may not be necessary. This will depend on the specificity of the written standard and the nature of the allegations and other circumstances. Where there is no written standard, expert evidence will be required to establish the standard unless it is so obvious that it does not need proof. Here, there was a written standard for most of the particulars.

[24] The Bulletin includes a mix of mandatory language (an industry member *must* do this) and advisory language (an industry member *should* or *may want* to do that). The Bulletin is clearly intended to provide guidance with respect to the requirement to provide competent service under s. 41(b) of the Rules. To the extent the Bulletin uses mandatory language, it is clearly intended to have normative force and can be used as evidence of professional standards. If there is a conflict between the Information Bulletins and any requirements under the *Act*, the regulations, the bylaws or the Rules, however, the latter would prevail.

[25] The Bulletin provided in part:

> Contracts and documents
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> … Drafting contracts is one of the mainstays of competence. Industry professionals must ensure they have the knowledge and skills required for the proper and legal drafting of contracts on behalf of their clients. This includes:
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> - ensuring all signatures and initials are in place
> - contracts contain proper dates
> - the terms and conditions of the offer reflect the client's understanding and are clear to other parties
> - verifying the parties have the legal capacity to contract
> - confirming attachment of all supporting documentation
> - copies of all documents are given to all parties to the contract
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> If unsure of the legal requirements in any situations, industry professionals should obtain or have their clients seek expert advice.
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> Contracts must accurately reflect the terms agreed to by the parties. The terms and conditions of the purchase contracts or offers to lease must

[21] *Khalil v Durant*, 2021 ABQB 241 at para 99

represent the true circumstances and must be clearly written and understood by all parties to the agreement.

RECA's Hearing Panels regularly review contracts industry professionals prepare that contain drafting errors. These errors include:

- the improper naming of parties
- insufficient detail
- lack of clarity in terms and conditions
- no contract completion dates

These deficiencies are serious and can result in confusing or unenforceable contracts. This type of conduct demonstrates a lack of professional care and attention and is a lack of competency. An industry professional must make sure what their client wants included in the contract is included in the contract. Review the terms of any contract carefully with the client, including standard clauses, so there is no misunderstanding. The client's intentions must be clear. Words and phrases must be understood by the contracting parties to avoid any confusion. Practitioners must also take care when amending agreements to accurately reflect any requested changes.

Brokerage responsibility

Brokerages are responsible and accountable for the competence of their industry professionals. ...

The broker who competently supervises his or her brokerage will perform many functions, including but not limited to the following:

- ensure all transactions and clients files are complete and include final signed contracts and other important documents

[26] As outlined above, we accept this as a written standard outlining the meaning of "competent service" within s. 41(b) of the Rules and apply the Bulletin to each of the proven allegations below. Further, we find that expert evidence was not required in this case on the proven allegations.

E. Analysis on the Allegations

a. Inventory List

[27] Allegation (a) of administrative penalty alleged:

In or around January 2020, you failed to provide [NS] the requested inventory list or failed to clearly explain that this service was not being offered. This was a failure to provide competent service.

[28] This allegation is unproven on the balance of probabilities. The licensee argued that she only agreed to provide a move-in inspection report. We agree. Shortly after NS retained the industry member's brokerage to manage her property, she requested an inventory of the furnished property and offered to pay an additional fee for that service. The licensee's unlicensed assistant responded as follows:

> We complete a move in inspection and move out inspection with each tenant which includes pictures of all furnishings, this service is included in the management fee.

[29] It appears that NS accepted that the move-in inspection would likely satisfy her needs. This was supported by her evidence in cross-examination and in her email of March 24, 2020:

> When I signed the contract with Residential Remedies, I had asked for an inventory of furniture, pictures, etc. [Licensee] said that would be done during the move in inspection. Can you please send me that.

[30] The conclusion that NS initially accepted the proposed move-in inspection report for the purpose of an inventory was also supported by her email on March 25, 2020. In that correspondence, NS referred to the move-in inspection interchangeably with her requested inventory list, as the "inventory/move in".

[31] NS received the move-in inspection on April 7 but was not satisfied with the quality of the images or the comprehensiveness of the report. She followed up on April 8 with an email that contained the following:

> Also – I had asked for an inventory of contents which I require for my insurance coverage. I know it's a total pain to do but it is required. Can you please provide this?

[32] The licensee's unlicensed assistant responded to this inquiry in the negative by stating that "the move in report … represents the inventory items." Ultimately the parties disagreed about the adequacy of the move-in inspection report and the industry member, through her assistant, communicated that she was not willing to provide additional services.

[33] The Bulletin on Competent Service states that industry members "must decline to act" where they "are unable to render competent service" and in that case "can refer prospective clients to other practitioners with appropriate expertise". However, the Bulletin does not explicitly address a situation where an industry member chooses not to offer a particular service, nor does the Bulletin explicitly address expectations for communication about refusing to perform a service. The Registrar may be able to demonstrate that a failure to communicate refusal to provide services is a breach of the rule to provide competent service without expert evidence, but only if the standard required is so obvious that the Hearing Panel does not require expert evidence to establish the standard. Here it is not obvious what the standard is or that the conduct is so inappropriate as to be obvious. We do not

condone the nature of the communication here, but the Registrar did not discharge the burden of proving on the balance of probabilities that it was a contravention of Rule 41(b).

b. Residential Tenancy Agreement

[34] Allegation (b) of the administrative penalty alleged:

> In or around March 2020, you failed to provide a fully completed residential tenancy agreement to [NS]. This was a failure to provide competent service.

[35] This allegation is proven on the balance of probabilities. The licensee was responsible for the execution of the residential tenancy agreement with the tenants leasing NS's property. The Registrar identified several issues with the residential tenancy agreement, including:

a. The date of the Agreement was missing from the top;
b. The early move-in date for the pro-rated rent was not stated;
c. The furniture as per the attached schedule was blank;
d. The occupants were not stated;
e. The industry member's and tenant's signature were both not witnessed on two separate pages in the agreement.

[36] We agree that each of these deficiencies existed, although we do not find the last one to be a breach of the rule to provide competent service. For the first four deficiencies we find that when viewed collectively they constituted a breach of the rule to provide competent service. A core part of the real estate profession involves preparing contracts. It is a basic, fundamental expectation that licensee properly complete contracts. Accurate, complete contract drafting is part of the minimum standards expected of the profession. The Bulletin describes some of the minimum standards for drafting contracts.

Date of the Agreement

[37] The Bulletin outlines that part of competent service for drafting contracts is ensuring that the "contracts contain proper dates". The industry member failed to ensure that the residential tenancy agreement contained proper dates. The date is missing from the main agreement. There is a date on Appendix I, the Rules and Regulations, which forms part of the agreement, but it remains unclear when the main agreement was signed.

[38] This deficiency likely did not affect the enforceability of the residential tenancy agreement or significantly impact the client's rights. On its own, this is not a significant contravention. However, it forms part of the larger context of this agreement, which was sloppily executed and noncompliant with the normative expectations set out in RECA's Bulletin on Competent Service.

Early Move-In Date and Pro-Rated Rent

[39] The Bulletin outlines that competent service includes ensuring "the terms and conditions of the offer reflect the client's understanding and are clear to the other parties". The residential tenancy agreement outlines a fixed term of lease starting on April 1, 2020. However, the tenants moved into the property early on March 23, 2020. This arrangement was not reflected in the agreement.

[40] The licensee explained that the reason it was not recorded in the residential tenancy agreement was because the tenants and the brokerage came to that arrangement after signing the agreement. However, she did not complete an amendment to the residential tenancy agreement to reflect the changed terms, or even advise NS of the change.

Furniture Schedule Not Completed

[41] The residential tenancy agreement included a schedule outlining furnishing and other items to be supplied by the landlord to the tenant, which was left blank. The Bulletin outlines that competent service includes that industry members must ensure that "terms and conditions [that] reflect the client's understanding and are clear to the parties" and "confirm[] attachment of all supporting documentation".

[42] This was a furnished property and none of the furnishings were identified in the schedule to the residential tenancy agreement. The licensee ensured that a move-in inspection was completed but the move-in inspection report did not form part of the contract. The licensee acknowledged in her evidence that it was an oversight to not include the move-in inspection report as a schedule to the residential tenancy agreement.

[43] The failure to include a list of furnishings and other items in the schedule as anticipated by the residential tenancy agreement was a failure to provide competent service. This failure did not reflect the terms of the agreement between the parties that the lease was for a furnished property. Further, the industry member failed to attach all supporting documentation.

Occupants Not Identified

[44] The residential tenancy agreement identified the signing tenants as the only tenants in the property. These were initially the only tenants. However, at the time of signing the tenants anticipated that they would find an additional tenant or tenants for the basement suite and communicated that to the licensee. It was unclear when the third tenant moved into the property and if the licensee screened him as a tenant under her normal property management screening process. However, it was clear that she was aware of the additional tenant and had approved him to move into NS's property under the residential tenancy agreement. At no time did she amend the residential tenancy agreement to reflect the new occupant.

[45] The residential tenancy agreement included a clause for identifying all occupants of the property. This was important to NS who described her insurance as not covering unregistered guests. The Bulletin on Competent Service requires that

"the terms and conditions of the offer reflect the client's understanding and are clear to other parties." When the industry member agreed to amend the terms of the residential tenancy agreement by adding a third tenant, she had a duty to ensure that the terms of the contract reflected the changed terms.

No Witness Signatures

[46] None of the signatures in the residential tenancy agreement have witness signatures. The Bulletin on Competent Service explains that the licensee's duty in drafting contracts includes "ensuring all signatures and initials are in place". Although there were no witness signatures in place, we do not find this to be a breach of the rule to provide competent service. The agreement was otherwise executed and likely enforceable and signed by the contracting parties. The failure to ensure witness signatures was sloppy but not a breach of the rule to provide competent service.

[47] The remaining issues were however a breach of the rule to provide competent service. The professional standard for competent service in drafting contracts was described in the Bulletin and was discernable in advance of the breach. While any one of the deficiencies on its own may not be sufficiently serious to rise to constitute a breach of the Rules, taken together the licensee's conduct here demonstrated a lack of competence with respect to minimum standards expected of all industry members in preparing contracts.

c. <u>Move-in inspection Photos</u>

[48] Allegation (c) of the administrative penalty alleged:

> In or around March 2020, you failed to provide clear images as part of the move-in inspection. This was a failure to provide competent service.

[49] This allegation is unproven on the balance of probabilities. The Bulletin outlines that "An industry professional must not participate in the creation of contract *or document* they know or ought to know is not legally binding, *confusing*, or does not reflect agreements already in place." Although the images may be documents, we do not find that they were confusing in the circumstances.

[50] The licensee was responsible for the move-in inspection report that took place on March 22, 2020. As part of that inspection, the licensee's assistant took 54 photographs of the property and furnishings. NS and the Registrar complained about both blurry photographs and the labelling of many photographs. The licensee explained that the labels were automatically generated if an appropriate label was not available in the application she used for move-in inspections.

[51] While there were several photographs that were blurry, only a handful of these were confusing about what they intended to show. Similarly, while several photos contained the unhelpful label "power points", the images were generally clear enough to identify the issue being documented. For example, the photographs showed chipped wall paint, furnishings and bedding, and dishes and appliances.

When looked at collectively, the number of undecipherable photographs was not significant and overall, the photographs reflected the general condition of the property.

d. Pet Lease

[52] Allegation (d) of the administrative penalty alleged:

> In or around March 2020, you failed to provide a completed pet lease agreement to [NS]. This was a failure to provide competent service.

[53] This allegation is proven on the balance of probabilities. NS requested that any tenants with pets sign a pet lease and pay a pet fee. NS provided the licensee with a copy of the pet lease form she expected to be used. On February 18, 2020, the unlicensed assistant, for whose conduct the licensee was responsible, confirmed acceptance of this request:

> We have no problem to let tenants know of the lease and pet fee requirement. I'll be sure to add this requirement to your file.

[54] The licensee charged the tenants the pet fee and accounted for that payment to NS. However, the pet lease was never fully completed. NS repeatedly requested a copy of the completed pet lease between March and June 2020. Eventually, the licensee provided her with an incomplete pet lease form. This partially completed form was not entered as an exhibit but was referred to and described in NS' evidence, including:

a. the tenants' first names were printed on the form but there was no record of last names or signatures for the tenants;
b. no identification of who the tenants were making this agreement with (ie neither the industry member's brokerage nor NS were identified);
c. no signature from the industry member's brokerage as agent for NS;
d. incomplete date of March 0/2020.

[55] The licensee argued that she did not have to sign the pet lease on NS's behalf because it was NS's form. However, the licensee acted as NS's agent in managing the property. She undertook to require the pet lease and she managed the property for NS, including signing the residential tenancy agreement with the tenants.

[56] The pet lease was a contract. As outlined above, the Bulletin on Competent Service specifically addresses competency with respect to contracts, as follows:

> *Drafting contracts is one of the mainstays of competence. Industry professionals must ensure they have the knowledge and skills required for the proper and legal drafting of contracts on behalf of their clients. This includes:*
>
> - *ensuring all signatures and initials are in place*

- *contracts contain proper dates*
- *the terms and conditions of the offer reflect the client's understanding and are clear to other parties*
- *verifying the parties have the legal capacity to contract*
- *confirming attachment of all supporting documentation*
- *copies of all documents are given to all parties to the contract*

[57] The Bulletin also identifies "the improper naming of parties", "insufficient detail", "lack of clarity in terms and conditions", and "no contract completion dates" as "conduct [that] demonstrates a lack of professional care and attention, and is a lack of competency." Here there was improper naming of parties (including a complete absence of naming who was contracting on behalf of the landlord), failure to ensure the contract contained proper dates, and failure to ensure that all signatures and initials were in place. NS had reasonable doubts that the tenants had signed the pet lease at all and that it would be enforceable against them.

e. <u>Pro-Rated Rent and Cleaning Fee</u>

[58] Allegation (e) of the administrative penalty alleged:

> In or around March 2020, you failed to seek agreement for prorated rent or a reduction in rent due to cleaning fees. This was a failure to provide competent service.

[59] This allegation is unproven on the balance of probabilities. The licensee acted in NS's interests in charging the tenants pro-rated rent based on the monthly rent. NS agreed to the base monthly rent and the industry member applied this amount when allowing the tenant to move in a week early. NS retained the licensee as her agent to lease and manage the property and the licensee acted within that agency to arrange the early move in. NS wanted the property rented and it was to her benefit to have the tenants move in early.

[60] The licensee also allowed a credit to the tenants for a cleaning fee. The licensee testified that the property needed cleaning prior to move in, which would have cost NS the fee for hiring professional cleaners. Instead, the tenants were allowed to move in and given a credit for the value of approximately 6 hours of cleaning. Again, this was done in NS' interests to allow the tenants to move in early, and under the licensee's authority as NS' agent.

[61] The real issue about the pro-rated rent and cleaning fee is one of communication. The licensee did not tell NS about the early move in, what pro-rated rent was being charged or how she came to the cleaning credit applied. This is addressed below in allegation (f), but the application of pro-rated rent and a credit for cleaning itself was not a breach of the Rule to provide competent service.

f. Failure to Communicate

[62] Allegation (f) of the administrative penalty alleged:

> You failed to communicate with [NS], in a timely manner regarding these matters. This was a failure to provide competent service.

[63] This allegation is proven on the balance of probabilities. The Bulletin on Competent Service requires that "copies of all documents are given to all parties" but does not specify a timeline for doing so. On the other hand, expectations for timely and effective communication are implicit in the requirement that "the terms and conditions of the offer reflect the client's understanding". While we recognize that we cannot simply apply our own opinion as to what the standard should be, we find that the failure to communicate in a timely fashion engages a standard so obvious it does not require proof. There were several areas where the licensee failed to communicate with NS in a timely manner.

[64] The industry member acknowledged in her testimony that she stopped responding to NS's inquiries. Her view was that NS continued to repeat the same questions, which had been answered. However, we find that was not the case. NS repeated many questions because she did not receive an adequate response. We accept that NS was a demanding client, but the failure to communicate was significant and not attributable to NS. While it may not have been an obvious breach of the rule to provide competent service for any one of the communication issues below, when looked at collectively there was an obvious breach of the standard expected.

[65] Communication about the lease and the tenants started off poorly. The licensee did not immediately advise NS that tenants had moved into her property. NS learned that from a third party. This caused her concern because she did not know that had been negotiated or on what terms. The licensee's unlicensed assistant only advised NS of the move in after NS inquired about the situation. She did not provide details about the tenants or the terms or even the move in date. On March 26, 2020, the licensee's assistant provided the move in date of March 23, 2020 after NS indicated she required it for her insurance. This was not a breach of the duty to provide competent service but paved the way for what was to come. The examples below, viewed collectively, were a breach of the rule to provide competent service by failing to communicate with NS in a timely manner.

[66] The industry member failed to communicate with NS in a timely manner about the lease. NS requested a copy of the residential tenancy agreement on March 24, March 25 and April 3, 2020. The licensee finally provided it on April 7, 2020. NS required a copy of the lease for her property insurance and advised the licensee of the same. The residential tenancy agreement was likely signed on March 18, 2020. It took almost three weeks to provide the lease after multiple requests from the client.

[67] The licensee failed to communicate with NS in a timely manner about the prorated rent and cleaning credit. When the licensee finally provided the lease to NS, it did not indicate anything about prorated rent. This caused NS concern because she knew that the tenants had moved into the property approximately one week early. The licensee did not advise NS about the prorated rent until NS made inquiries. On April 7, 2020, the licensee's unlicensed assistant simply advised that there was prorated rent without information about what that was. She did not say anything about a cleaning credit. On April 8, after several more inquiries from NS, the licensee's unlicensed assistant finally provided the amount of the prorated rent, but again did not advise NS about the cleaning credit applied or how the prorated rent was calculated. As outlined above, it was not a breach of competent service to apply the prorated rent, or to credit the tenants for cleaning, but the licensee failed to communicate in a timely way with NS about these issues.

[68] The licensee also failed to communicate with NS in a timely manner about the pet lease. NS requested a copy of the pet lease on multiple occasions, including March 25, April 3, and June 12, 2020. The licensee did not provide a copy of the pet lease until June 23, 2020. The pet lease provided was unsigned and had significant deficiencies as described above. The residential tenancy agreement was signed on March 18, 2020. The licensee had agreed to obtain a pet lease from any prospective tenants at least one month in advance of executing the lease. It took approximately 14 weeks and repeated requests for her to provide a substantially deficient pet lease to NS.

[69] Lastly, the licensee failed to communicate with NS in a timely manner about additional occupants in the property. On March 26, 2020, NS inquired about how many people would be living in the property. The licensee's brokerage advised NS that there were four occupants. NS inquired about the identity of the other tenants on April 8, April 16, April 21, and June 10, 2020. On April 21 the licensee responded to NS's inquiry about additional tenants, "I don't know that they moved in yet". On June 10, 2020, the licensee's unlicensed assistant finally provided the name of one additional tenant after advising that she understood that NS had received it from the tenants directly. NS had not.

[70] NS was reasonably concerned about the identity of the other tenant(s), since she understood that her insurance did not cover unregistered guests and she wanted to know who was in her property. She understood from the licensee that as of March 26 there were four tenants. That was not likely the case, with the two original tenants initially hoping to find an additional two tenants sometime after the lease commenced, but that was never communicated clearly to NS. The only thing that was communicated to NS was that there were four tenants. Repeated requests about additional tenants were not answered. Then when the licensee learned of the additional tenant, she did not communicate with NS to inform her.

[71] Together, these communication failures were a breach of the rule to provide competent services in s. 41(b) of the Rules.

F. Conclusions on Breaches

[72] The licensee contravened s. 41(b) of the Rules to provide competent service to NS. The Hearing Panel finds that the following particulars were established:

(i) In order around March 2020, the industry member failed to provide a fully completed residential tenancy agreement to NS.

(ii) In or around March 2020, the industry member failed to provide a completed pet lease to NS.

(iii) The industry member failed to communicate with NS in a timely manner regarding these matters.

[73] Taken as a whole, the proven particulars here were sufficient to constitute a failure to provide competent service.

G. Request for Submissions on Sanction and Costs

[74] The Hearing Panel requests written submissions from the parties on whether the administrative penalty should be confirmed or varied considering our findings above. The parties may also make submissions on costs. The deadlines for written submissions are as follows:

a. within 14 days of receipt of this decision, the Registrar shall provide submissions to the Hearings Administrator and to the licensee;

b. within 14 days of receipt of the Registrar's submissions, the licensee shall provide submissions to the Hearings Administrator and to the Registrar;

c. within 7 days of the licensee's submissions, the Registrar may provide a rebuttal submission to the Hearings Administrator and to the industry member.

[75] Once the above timelines have past, the Hearings Administrator will provide all written submissions received to the Hearing Panel for our consideration and decision on the amount of the administrative penalty and costs.

This decision is certified and dated at the City of Edmonton in the Province of Alberta, this 31st day of January, 2022.

"Signature"

[K.O], Hearing Panel Chair

Case 010505

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF Section 83.1 of the *REAL ESTATE ACT*, R.S.A. 2000, c.R-5 (the "***Act***")

AND IN THE MATTER OF a Hearing regarding the conduct of KATHLEEN MARGARET BOWERS, currently registered with Residential Remedies Inc. operating as 3% Realty Fort McMurray

Hearing Panel Members:	[K.O], Hearing Panel Chair [G.P] [W.R]
Hearing Date:	September 30 and October 1, 2021, by way of video conference
Decision Date:	April 13, 2022
Appearances:	Mitali Kaul, Counsel for the Registrar of the Real Estate Council of Alberta Scott Chimuk, Counsel for the Licensee Kathleen Margaret Bowers

SANCTION AND COSTS DECISION

A. Overview

[1] This decision makes findings on the amount of an administrative penalty issued against the Licensee, Kathleen Margaret Bowers, and addresses costs. The Licensee is a broker who provided property management services in the Fort McMurray region. The client, NS, owned a furnished, residential, rental property in Fort McMurray. NS retained the Licensee to manage the property. The administrative penalty relates to the Licensee's management of this property and her communication with NS.

[2] The Hearing Panel issued a decision on January 31, 2022 (the "Phase I Decision") that found the Licensee breached rule 41(b) of the *Real Estate Act Rules* (the Rules) by failing to provide competent service to her client NS. The Registrar alleged six particulars relating to the Licensee's conduct with client NS. The Hearing Panel found that three of the particulars were established as a breach of rule 41(b) and the Licensee's duty to provide competent services to NS:

a. In or around March 2020, the Licensee failed to provide a fully completed residential tenancy agreement to NS.

b. In or around March 2020, the Licensee failed to provide a completed pet lease to NS.

c. The Licensee failed to communicate with NS in a timely manner regarding these matters.

[3] The Registrar issued an administrative penalty of $4,000 relating to the six alleged particulars. At the conclusion of the Phase I Decision, we asked for submissions on whether we should vary or confirm the administrative penalty considering our findings on the particulars of the breach. The Registrar requested that we increase the amount of the administrative penalty to $5,000 while the Licensee requested that we decrease it to $1,500. We vary the administrative penalty to $2,500. Further, both parties requested costs. In the circumstances we decline to award costs to either party.

B. Issues

[4] The following issues arise in this decision on penalty and costs:

a. What is the appropriate administrative penalty for the Licensee's breach of rule 41(b) to provide competent service to NS?

b. Should costs be awarded to either party?

C. Administrative Penalty

[5] Section 83.1(5) of the *Real Estate Act* gives the Hearing Panel discretion to "quash, vary or confirm the administrative penalty" on an appeal. Here it is appropriate to vary the administrative penalty to $2,500.

[6] The amount of an administrative penalty must account for the unique circumstances of the appeal by considering both aggravating and mitigating factors. In *Jaswal v Newfoundland (Medical Board)* ("*Jaswal*"), the court identified the following non-exhaustive factors that are relevant to fashioning professional penaltys:[22]

- the nature and gravity of the proven allegations
- the age and experience of the Licensee
- the previous character of the Licensee and in particular the presence or absence of any prior complaints or convictions
- the age and mental condition of the offended client
- the number of times the offence was proven to have occurred
- the role of the Licensee in acknowledging what had occurred

[22] *Jaswal v Newfoundland (Medical Board)* ("*Jaswal*"), 1996 CanLII 11630 (NL SC), at para 36

- whether the Licensee had already suffered other serious financial or other penalties as a result of the allegations having been made
- the impact of the incident on the client
- the presence or absence of any mitigating circumstances
- the need to promote specific and general deterrence and, thereby, to protect the public and ensure the safe and proper conduct of the profession
- the need to maintain the public's confidence in the integrity of the profession
- the degree to which the offensive conduct that was found to have occurred was clearly regarded, by consensus, as being the type of conduct that would fall outside the range of permitted conduct
- the range of sentence in other similar cases

[7] These are non-exhaustive factors and may be adjusted and applied to the circumstances of each case. There were several mitigating factors in this matter:

a. *COVID-19 Pandemic and Fort McMurray Floods*

The breach occurred in or around March 2020. This was the beginning of the COVID-19 pandemic in Alberta, including significant disruption to many businesses, including the Licensee's. We heard evidence about that disruption, including the Licensee's difficulty in managing multiple properties and coordinating with staff while working from home during the uncertainty of the initial lock down.

Further, in April 2020, during the time in which the Licensee was communicating with NS about her property, the Fort McMurray region experienced significant flooding, evacuation of some areas of the region, and a state of emergency. This affected many residential properties, including several the Licensee managed. It was an uncertain and devastating time for the entire province, but for Fort McMurray particularly. We accept that the combination of the pandemic and the floods caused additional strain and difficulty for the Licensee in operating her property management brokerage.

While we do not excuse the Licensee for breaching her obligation to provide competent service to NS, the combination of the initial stage of the pandemic and the regional flooding that occurred at relevant times for the third particular is a significant mitigating factor.

b. *Impact on the Client*

The impact on NS was not significant. She suffered no financial losses. The residential tenancy agreement was incomplete and had portions, like the furniture schedule, that likely could not have been enforced if there had been a dispute with the tenants, but enforcement was not necessary and the tenants stayed for the duration of their lease. NS received all payments

she was entitled to under the lease. Similarly, the pet agreement was incomplete and would have been unenforceable, but the tenants paid the pet fee and NS received that.

We recognize that NS experienced frustration, stress, and inconvenience from the lack of communication from the Licensee, but thankfully, there were no serious financial or property loss impacts on her.

c. *Nature and Gravity of the Proven Allegations*

While there were three particulars proven of failing to provide competent service to NS, these were not particularly serious contraventions. There was sloppiness and lack of attention to detail in the contracts, and a failure to communicate adequately with the client. We do not condone this behaviour. However, on a relative scale of seriousness, this conduct falls on the lower end of the spectrum.

[8] In contrast, the following were aggravating factors:

a. *Previous Character of the Licensee*

The Licensee has two previous disciplinary events on her record. In 2010 she received a letter of reprimand for breaching rule 41(b) for failing to provide competent service and for breaching rule 41(d) for failing to fulfill fiduciary obligations to a client. In 2016 the Licensee received an administrative penalty of $2,500 for breaching Rule 41(b) for failing to provide competent service.

These two previous disciplinary events include breaches of the same rule that was breached here. This is a significant aggravating factor.

b. *Age and Experience of the Licensee*

At the time of the conduct, the Licensee had been in the industry for 16 years, and a broker for 13 years. She was experienced with significant training and experience that indicates she should have known better.

c. *Need for Specific Deterrence*

Specific deterrence relates to the need for the penalty to sufficiently impact the individual Licensee. It ensures that similar conduct will not occur in the future. Considering the Licensee's past professional discipline combined with her age and experience, there is a need for specific deterrence in this matter.

[9] We have considered the following additional factors, which are relevant but neither aggravating nor mitigating on the facts of this appeal:

a. *Number of times the breaches occurred*

The breaches occurred during a relatively short time in the spring of 2020. They involved the management of one property with one client. The Registrar argued that because multiple particulars were found that this is

aggravating and shows a pattern. We disagree. While there were three proven particulars breaches, they arose out of one set of circumstances. There is no factual basis to suggest that the Licensee engaged in a pattern of conduct in numerous transactions that breached the governing legislation. Her breach appears to be limited to this one property and this one client in a relatively narrow period.

The reason that this factor is neutral instead of mitigating, however, is that there were two different contracts that had problems and there was the additional issue of communication. Collectively we view that as part of the same incident but there were still three particulars at issue.

b. *Role of the Licensee in Acknowledging What Occurred*

When a licensee admits guilt and avoids the necessity of a contested hearing, it is appropriate to acknowledge that in the penalty as a mitigating factor. The Licensee here did not admit wrongdoing and went to a full hearing. This was her right. She should not be punished for it. However, she should also not get a lighter penalty as a mitigating factor.

c. *Need to Maintain Public Confidence in the Industry*

The public's confidence in the industry is compromised when a licensee breaches the Rules. Although the nature and gravity of the offences here were not of the highest level of seriousness, there is still an impact on the public's confidence in the profession and the administrative penalties must adequately address that impact, while dealing proportionally with the Licensee. This is a relevant factor in our considerations, but it is neither mitigating nor aggravating given the relative lack of seriousness of the breach and other mitigating circumstances.

d. *Need for General Deterrence*

General deterrence refers to the effect of the penalty on others, including to the industry generally. It deters other industry members from engaging in similar conduct. The award in this matter is designed to communicate the importance of competent service, including the importance of providing accurate contractual documents that reflect the client's understanding and are clear to the other parties, and of the importance of adequate communication with clients. Again, this is an important consideration for the protection of the public, but it is neither aggravating nor mitigating here.

e. *Financial Penalties the Licensee Suffered*

The Licensee argued that she suffered financial consequences because of having to retain legal counsel in this appeal, including legal fees related to written submissions. Her submissions related to factors relevant to costs, including allegations about the Registrar's conduct during the hearing process. There was no evidence adduced at the hearing about any impacts

on the Licensee's business because of the circumstances here. This is neither an aggravating nor mitigating factor.

[10] The Registrar presented several cases relating to breaches of rule 41(b), with a range of penalties between $1,500 and $5,000. The parties agreed that these are not binding but are of assistance in demonstrating the range of penalties. The Registrar noted that all the cases were uncontested administrative penalties and that they should therefore be read as being on the low side of reasonable. In addition, the Registrar noted the absence in the cases of aggravating factors that are present in this case, including the absence of previous discipline and the licensees had less training and experience than the Licensee here who was a broker.

[11] In contrast, the Licensee argued that the lower range of penalties, in the $1,500 - $2,000 range, reflected matters where there was minimal harm to the complainant or third parties, while the upper end of the range involved cases where there was either harm or a financial gain to the breaching licensee.

[12] Below we review the comparable cases, involving administrative penalties in breaches of Rule 41(b):

a. *Carbage*: $1,500 for numerous documentation errors in four transactions.

b. *Raj*: $2,000 for failing to disclose that he was one of the principals in a transaction, failing to draft addendums extending a contract.

c. *Harding*: $3,000 for failing to ensure that paperwork was complete in 33 instances over 12 transactions.

d. *Neal*: $3,000 against a property manager for failing to review existing contracts for compliance when assuming the role of broker and for charging an administration fee without contractual authority to do so.

e. *Best*: $3,000 when a property manager failed to have a lease agreement with tenants and failed to collect or remit rent.

f. *Mele*: $5,000 against a real estate associate who failed to inform his buyer client that he was the seller. He also failed to provide documents to the buyer and the brokerage.

[13] None of these cases are directly analogous to the facts here. *Neal* and *Best* are the closest because they involve property management. However, the circumstances of both were more serious than the circumstances here. *Best* involved failing to obtain any kind of contract or to collect any rent. This would have had a significant impact on the client, which impact was absent here. Similarly, *Neal* involved charging unauthorized fees on multiple transactions while here there was only one client impacted and no financial gain to the Licensee. We acknowledge that there are aggravating circumstances here that were not present in those cases, including relevant past discipline and the age and experience of the Licensee, but overall the

nature and gravity of the breaches, and the number of times the breaches occurred were greater than the circumstances here.

[14] The Registrar requests that we vary the administrative penalty by increasing it to $5,000. They note that an appeal is a *de novo* process, and the Hearing Panel has discretion under s. 83.1(5) of the Act to vary the administrative penalty. The Registrar relied on the decision in *Phipps* where the Hearing Panel increased an original administrative penalty from $5,000 to $7,500.[23] With respect, the circumstances of *Phipps* were different than those here. In *Phipps*, all the alleged conduct was proven. In addition, the Hearing Panel was concerned about the severity of the conduct in that case, involving repeated and blatant failure to cooperate with RECA, and the licensee's governability and lack of insight into his actions.

[15] While specific deterrence is needed here, these concerns are largely absent. Although the Licensee did not admit to the breaches, she presented as thoughtful and regretful about the circumstances. She was largely cooperative with the hearing process. We are not concerned about her governability going forward. The Licensee was successful in dismissing 3 of 6 particulars. Nothing came out of the evidence that suggested the remaining 3 circumstances were more serious than the Registrar initially observed. There is no reason to increase the administrative penalty.

[16] Conversely, the Licensee asked us to vary the administrative penalty by reducing it to $1,500. We do not agree. That was the penalty in *Carbage*, a decision from 2013 approximately 7 years prior to the conduct in issue and involved a licensee with no prior discipline and without the broker and other experience of the Licensee here.

[17] The original administrative penalty of $4,000 is also not appropriate given the result in this matter where half the particulars were dismissed. Looking at all the *Jaswal* factors in light of the circumstances of this appeal, the appropriate administrative penalty is $2,500.

D. Costs

[18] Section 83.1(5)(b) gives the Hearing Panel discretion to make an award of costs:

> The Hearing Panel on an appeal may
>
> ...
>
> (b) make an award as to costs of the investigation that resulted in the administrative penalty and of the appeal in an amount determined in accordance with the bylaws.

[19] Both parties requested costs in this matter. The Licensee requested $5,000 in costs while Registrar requested $3,000 in costs. The Licensee relied on the decision of the Court of Queen's Bench of Alberta in *Pethick v Real Estate Council (Alberta)* (*Pethick*

[23] *Phipps*, 2020 ABRECA 500053 (CanLII)

QB), in which the court found that RECA's Appeal Panel had applied an unreasonably stringent test for ordering costs to the licensee.[24] It sent the costs application back to the Appeal Panel, directing:

> a. The Appeal Panel may properly consider the public mandate function of the [Registrar] and RECA in deciding whether or not costs ought to be awarded to [the licensee];
>
> b. The Appeal Panel cannot require [the licensee] to demonstrate that the [the Registrar] 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 [the licensee] 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 [the licensee's] hearing and appeal, including other factors set out in s. 28(4) of the Bylaws.

[20] The Registrar relied on the Appeal Panel's decision in *Pethick (Re)* (*Pethick Appeal Panel*), which followed the *Pethick QB* decision. The Appeal Panel reviewed each of the factors in s. 28(4) of the *Real Estate Act Bylaws* (the Bylaws) and declined to award costs to the licensee. [25]

[21] Section 28(4) of the Bylaws provides factors that the Hearing Panel must consider in determining an order for costs. Considering each of these factors, we decline to award costs to either party.

> a. *Degree of cooperation*
>
> In *Pethick Appeal Panel*, the Appeal Panel explained that this factor analyzes the degree of cooperation by both parties, including consideration of whether either party unnecessarily or unduly complicated the process.
>
> The Registrar acknowledged that the Licensee was cooperative in the hearing process. The Licensee on the other hand argued that the Registrar was not cooperative, including by attempting to bring additional allegations at the hearing for which there was no notice and by requesting to make written submissions. We disagree.
>
> The attempt to raise additional particulars in the hearing was dealt with efficiently and caused no prejudice to the Licensee. Although the Hearing Panel agreed with the Licensee that it was a fairness issue to focus the hearing on the particulars set out in the formal administrative penalty, the

[24] *Pethick v Real Estate Council (Alberta),* 2019 ABQB 431 (CanLII) (*Pethick QB*)
[25] *Pethick*, 2019 ABRECA 118 (CanLII) (*Pethick Appeal Panel*)

Registrar had a different legal interpretation and brought that forward in good faith.

Similarly, the Registrar's application to file written submissions in closing should not attract costs. The Hearing Panel agreed with the Registrar's application that it was appropriate to proceed in the manner suggested. The Licensee raised a complex and nuanced legal argument that the Registrar was not prepared to speak to. This was not a straightforward or foundational principle, but rather a technical and complex legal defence that required additional research and response. The Licensee did not provide the Registrar with copies of the authorities she relied on in advance of closing arguments and the Registrar cannot be faulted for being unprepared to speak to the nuanced technical defence in the circumstances. The Hearing Panel is grateful to both parties for their comprehensive submissions on that argument, which were necessary.

b. Result in the matter and degree of success

The result in this matter was entirely mixed success. There were 6 particulars. The Registrar proved 3.

c. Importance and complexity of the issues

The issues, including the issue of the evidence required to prove the professional standard, was both important and complex, as discussed above. We also agree with the Registrar that enforcing minimum standards of competence is an important issue in regulating the profession.

d. Necessity of Incurring the Expense

The expenses incurred in running the hearing, including the additional written submissions, were reasonably necessary. So were the costs that the Licensee incurred in defending herself.

e. Reasonable Anticipation of the Outcome

As the Appeal Panel in *Pethick Appeal Panel* noted, this factor does not require us to second guess the parties' pre-appeal opinions about their positions but is relevant 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. That was not the case here. As noted above, there were mixed results. The particulars that were dismissed depended on interpreting the evidence and making careful findings of fact based on what most likely happened. It was not plain and obvious that either party was unreasonable in pursuing the positions they took during the hearing.

f. Reasonable anticipation of the need to incur the expense

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

g. Financial circumstances and impacts on the licensee

There was little if any evidence of financial impacts of the circumstances on the Licensee. Of course, we can see that she retained legal counsel and those costs can be significant for a contested hearing. The Registrar also retained legal counsel and incurred similar expenses. As noted above, these expenses were reasonably necessary.

h. Other matters relevant to costs

The Licensee argued that the Registrar's position on penalty was offensive since it was higher than the comparable cases. Similarly, the Licensee argued that the Registrar's position on costs was unreasonable given the mixed results in the matter.

While we were concerned about the Registrar's position in asking for an increased administrative penalty in a matter with mixed success and no new evidence that suggested that the severity of the matter changed from the Registrar's initial assessment, the argument did not increase the amount of time, the complexity of the submissions, or the effort in responding.

The Registrar's position on costs was not offensive either. Again, we disagree with the Registrar's position on the costs award, but they framed their application in accordance with legal principles and requested significantly less than their actual costs.

[22] Based on all the above factors, and particularly the mixed success, the importance and complexity of the issues, and the reasonable necessity of incurring expenses on both sides we decline to award costs to either party.

E. Order

[23] We vary the administrative penalty and make the following order:

a. The Licensee shall pay to the Registrar an administrative penalty of $2,500.

b. Each party shall pay their own costs.

Dated at the City of Edmonton in the Province of Alberta, this 13th day of April 2022.

"Signature"

[K.O], Hearing Panel Chair