**Financial Services Tribunal**
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**DECISION NO. FST-RSA-21-A003(a)**

In the matter of an appeal under section 54 of the *Real Estate Services Act*, SBC 2004, c 42

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| **BETWEEN:** | Kevindeep Singh Bratch and Bratch Realty Ltd. | **APPELLANTS** |
| **AND:** | Superintendent of Real Estate | **RESPONDENT** |
| **BEFORE:** | A Panel of the Financial Services Tribunal<br>Catherine McCreary | |
| **DATE:** | Heard by way of written submissions<br>closing December 6, 2021 | |
| **APPEARING:** | For the Appellant: Kevindeep Singh Bratch<br>For the Respondent: Jean P. Whittow, Q.C., Counsel | |

## APPEAL OVERVIEW

[1] The Appellants, Kevindeep Singh Bratch and Bratch Realty Ltd. (the "Brokerage"), were licensed under the *Real Estate Services Act* (the "*RESA*")[1]. The Real Estate Council of British Columbia (the "Council") held disciplinary proceedings against the Appellants in relation to allegations that the Appellants committed conduct unbecoming and professional misconduct by involving financially vulnerable individuals in three rent-to-own ("RTO") schemes where Mr. Bratch was found to have:

a) contravened his duty to act honestly and with reasonable care and skill, by failing to clarify his role as adverse to the owners, and by failing to recommend that they obtain independent legal advice;

b) failed to properly complete the required Disclosure of Interest in Trade Forms to disclose the relationship of Mr. Bratch to his wife, Ms. T and her company 1022363 BC Ltd. ("102 BC") who were other parties to the transactions; and

c) filed a false or misleading Brokerage Activity Report dated March 23, 2017.

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[1] SBC 2004, c 42.

[2] At the conclusion of the proceedings, a Committee of the Council (the "Committee") issued two decisions on liability[2] which held that the Appellants had committed professional misconduct and conduct unbecoming a licensee in accordance with section 35 of the *RESA* (the "Liability Decisions"), and a subsequent decision setting out the appropriate penalty (the "Sanction Decision").

[3] The Appellants now appeal the Liability and Sanction Decisions to the Financial Services Tribunal (the "FST") under section 54 of the *RESA*. The remedial authority of the FST on this appeal is set out in section 242.2(11) of the *Financial Institutions Act* (the "*FIA*")[3] as follows:

> The member hearing the appeal may confirm, reverse or vary a decision under appeal, or may send the matter back for reconsideration, with or without directions, to the person or body whose decision is under appeal.

[4] Throughout these proceedings, both before the Committee and before the FST, the Appellants were represented by Mr. Bratch and were not represented by a lawyer. In their appeal, the Appellants claim that the fine, the enforcement expenses, and the suspension imposed by the Council are unfair. This amounts to a dispute of certain factual findings made by the Committee in the Liability Decision, and a number of discretionary assessments in the Sanction Decision.

[5] The Superintendent of Real Estate (the "Superintendent") is the Respondent to this appeal[4]. In response to the Appellants' submissions, the Superintendent submits that the factual findings made by the Committee in both the Liability and Sanction Decisions were reasonable, supported by evidence and appropriately articulated in writing.

## BACKGROUND

[6] In late 2017, the Council opened an investigation after becoming aware of a news report concerning a transaction in which the Appellants were involved. Through the investigation, it was discovered that the Appellants were involved with three RTO transactions involving some combination of Mr. Bratch, his wife, Ms. T, and her company 1022363 BC Ltd. ("102 BC"). That fact was not disputed by the Appellants.

[7] The specific charges arising out of the investigation concerned proper identification of the involved parties on the required Disclosure of Interest in Trade

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[2] The first liability decision was issued on April 30, 2021, and made all major findings of liability against Mr. Bratch, however, the April 30 decision did not make specific findings of misconduct against the Brokerage. As a result, the Committee issued a supplementary liability decision on June 14, 2021, which made liability findings against the Brokerage in relation to Mr. Bratch's wrongful conduct in relation to the RTO Scheme. For the purposes of this decision, I will refer to both decisions together as the "Liability Decisions".

[3] [RSBC 1996] c 141.

[4] Through amendments to the *RESA* after the Committee rendered its decisions, the Council was dissolved and its operations, authorities and affairs were subsumed into the BC Financial Services Authority (BCFSA). As a result, and through transitional provisions in the associated legislation, the Council is now represented in this matter by the Superintendent.

form. There were also issues about what advice was given to the property owners about the need for them to obtain legal or other advice. The investigation also identified that there had been a failure relating to the filing of the March 2017 Brokerage Activity Report that indicated that the Brokerage completed four deals, when the Brokerage records indicated that it had actually completed ten deals in the relevant period.

[8] The three involved properties were the Lombard Property, the Silverthorne Property and the Rogers Property; so identified due to the street address of each property. There were commonalities in the transactions. The mortgages on the properties were being foreclosed. Mr. Bratch and his associates purchased the properties for below the assessed value and the owners stayed on as tenants, with an option to repurchase the property. Some of the rent paid could be credited to the purchase price on exercise of the option. The option was not to be registered on title.

[9] The Council charged the Appellants with conduct unbecoming and professional misconduct regarding aspects of the three RTO transactions in which Mr. Bratch was personally involved.

[10] On October 30, 2017, after an *ex parte* hearing, the Council issued an Order in Urgent Circumstances that suspended the Appellants' licenses to practice. In its reasons, the committee who made the order commented that it expected that it would take "months, if not a year or more" to have a hearing and that the Council's counsel had indicated the intention to continue its investigation and commence a disciplinary proceeding against the Appellants "as soon as possible" and in the public interest.[5] Neither of the Appellants appealed the Order in Urgent Circumstances.

[11] A Hearing Committee (the "Committee") was appointed by the Council, and it held a four-day hearing in late 2020 (over three years after the Order in Urgent Circumstances), following which it issued the Liability Decisions. In the Liability Decisions, the Committee considered evidence that included an Agreed Statement of Facts ("ASF"), documentary evidence concerning the transactions, and oral evidence from five witnesses, including Mr. Bratch. The owners of the Rogers Property did not testify, nor was there evidence from Council investigators arising from statements by the owners of the Rogers Property.

[12] The Liability Decisions found the Appellants guilty of most, but not all, charges laid against them in the amended notice of hearing. In particular, the Liability Decisions determined that the Appellants were guilty of professional misconduct and concurrent conduct unbecoming as follows:

- Mr. Bratch contravened his duty to act honestly and with reasonable care and skill, by his entering a "rent-to-own" arrangement with the owners without first clarifying his role and expressly recommending independent legal advice.

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[5] Order in Urgent Circumstances at para 81.

- Mr. Bratch committed professional misconduct due to improper completion of the Disclosure of Interest in Trade forms setting out his or his associates' interest in the RTO transactions.[6]
- Mr. Bratch and the Brokerage committed professional misconduct by making, or allowing to be made, a false or misleading statement in the Brokerage Activity Report of March 2017.
- Regarding the Silverthorne Property, the Committee was unable to conclude[7] that Mr. Bratch's conduct was either contrary to the estate industry[8], or brought the real estate industry into disrepute[9]. The Committee found that the Silverthorne Owners were more sophisticated and had an opportunity to obtain legal advice. It referred to the evidence of [JB] that "he knew what he was getting into." The Committee held that in these circumstances, the Council did not satisfactorily establish conduct unbecoming a licensee.

[13] On July 29, 2021, following further written submissions, the Committee issued the Sanction Decision, which imposed the following sanctions against the Appellants:

- that Mr. Bratch and the Brokerage be liable for a discipline penalty of $45,000 (the "Fine");
- that Mr. Bratch successfully complete the Real Estate Institute's Ethics in Business Practice course;
- that Mr. Bratch and the Brokerage pay enforcement expenses in the amount of $50,000; and
- that Mr. Bratch and the Brokerage be prohibited from applying for licensing until
  - (a) one year from the date of the order[10] (the "Suspension")
  - (b) Mr. Bratch had refrained from serving as an unlicensed assistant for one year immediately prior to any application for licensing,
  - (c) Mr. Bratch had successfully completed the Real Estate Institute's Ethics in Business Practice course, and
  - (d) Mr. Bratch and the Brokerage had paid both the discipline penalty and enforcement expenses assessed by the Committee.

[14] The Appellants claim the following:

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[6] Sanction Decision at para 6.
[7] April 30, 2021, Liability Decision at para 139.
[8] Section 35(2)(a).
[9] Section 35(2)(c).
[10] At the time the Sanction Decision was issued, the Appellants had already been suspended for a total of approximately 3 years and 9 months pursuant to the Order in Urgent Circumstances.

- that the Sanction Decision is unfair based on the length of the suspension and the amount of the monetary penalty (inclusive of the Fine and the enforcement expenses);
- that the Suspension was on grounds that RTO agreements should not be conducted by Real Estate licensees when he received training from Council and was not made aware that this was not allowed; and
- that the monetary penalty is "astronomical and much higher than necessary" and that it "includes $50k in legal fees of the council's lawyers".

[15] As of publication of this decision, the one-year suspension has been served in its entirety. As set out in the Sanction Decision, Mr. Bratch has other requirements to fulfill until he can practice again as a realtor, including completion of the educational requirement, and payment of the enforcement expenses and Fine. Those penalties are considered herein.

[16] I note that while the Appellants take issue with the penalties imposed, they do not appear to take issue with several findings of the Committee; particularly the finding that the Brokerage Activity Report was erroneous. They also do not take issue with the direction that Mr. Bratch is to complete the Real Estate Institute's Ethics in Business Practice course.

[17] The Superintendent frames the issues on appeal in this way:

a) What is the appropriate standard of review?

b) Did the Committee err in finding that Mr. Bratch purchased properties well below their actual market value?

c) Did the Committee err by failing to consider that "Rent-to-Own" is a widely used form of real estate transaction to help individuals get into the market, or to keep their homes that are going into foreclosure?

d) Did the Committee err by making an unreasonable penalty order, or a penalty order it was not authorized to make?

e) Did the Committee err by making an unreasonable enforcement expenses order?

## ANALYSIS AND DECISION

[18] I will first address the question of the standard of review to be applied to the Committee's decisions, following which I will address a couple of overarching issues addressed by the parties. Those issues relate to the Liability Decisions, although also have some implications for the Sanction Decision.

[19] As the Appellants focus primarily on the Sanction Decision, the remainder of my decision will address those issues. I will review that decision to determine whether it meets the appropriate standard, and if any parts of the Sanction Decision are found not to meet the standard, I will address the issue of arriving at an appropriate remedy, taking into account the findings in the Liability Decisions.

**Standard of Review**

[20] Mr. Bratch does not specifically make argument about the standard of review. His appeal only states that he believes the decision is unfair and he would like an objective review of the penalty and seeks a more "in-depth" review of the "discipline matter" by the Tribunal.

[21] The Superintendent submits that the FST applies a standard of correctness for questions of law, reasonableness for questions of fact, discretion and penalty, and fairness for procedural fairness: *Kadioglu v Real Estate Council of British Columbia and Superintendent of Real Estate*[11].

[22] The Superintendent also argues that where the FST applies the reasonableness standard of review, it should, apply that reasonableness standard in accordance with the guidance provided by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*[12].

[23] The Superintendent also refers to *TruNorth Warranty Plans of North America, LLC v Superintendent of Financial Institutions*[13], which was decided soon after *Vavilov. TruNorth* comprehensively reviews previous cases at the FST and articulates what has now come to be a consistent and settled approach to standard of review at the FST.

[24] I agree with and adopt the analysis in *TruNorth* which acknowledges that the FST possesses a statutorily acknowledged expertise and has developed its own appellate standard of review jurisprudence. That standard provides the most deference to a first instance regulator where there have been findings of fact. *TruNorth* concludes that the FST's decisions will properly accord deference where an appeal takes issue with evidentiary findings and related assessments.

[25] For those appeals where the first instance regulator has made a finding of law, the FST has generally held that deference is not required. This follows the view that as a specialized Tribunal, the legislature intended that the FST would correct legal errors made by the first instance regulator.

[26] Also pointed out in *TruNorth* was that while the FST is not bound by its prior decisions, it is certainly desirable to strive for consistency wherever it can rightly be found. I agree with the conclusion in *TruNorth* that it is sensible for the FST to adopt a consistent approach to the standard of review applied in all appeals within its jurisdiction.

[27] Consistent with the standards of review set out in *Kadioglu* and *TruNorth*, I will review questions of law on a correctness standard, questions of procedural fairness on the standard of fairness, and questions of fact, discretion, and penalty on the standard of reasonableness.

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[11] *Kadioglu v Real Estate Council of British Columbia and Superintendent of Real Estate,* Decision No. 2015-RSA-003(b) ("*Kadioglu*") at para 32.

[12] 2019 SCC 65 ("*Vavilov*").

[13] Decision No. 2019-FIA-003(a) (*TruNorth*).

[28] With respect to my application of the reasonableness standard, I will be guided by *Bell Canada v Canada (Attorney General)*[14], the companion decision to *Vavilov*, where the majority described a "reasonable" decision as one which is based on a logical chain of reasoning. A "reasonable" decision has to make sense in light of the law and the facts. This analysis recognizes that in such a review, there can be more than one "reasonable" outcome.

[29] While acknowledging the conclusions in *TruNorth* that *Vavilov* does not govern the decisions of the FST, the principles therein that define the reasonableness of decisions are helpful. *Vavilov,* referred to the requirement to arrive at justified and justifiable conclusions as follows (at paras 86-87):

> ...In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.
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> ...that a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome was recently reaffirmed in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6, at para. 12. In that case, although the outcome of the decision at issue may not have been unreasonable in the circumstances, the decision was set aside because the outcome had been arrived at on the basis of an unreasonable chain of analysis. [emphasis in original]

[30] *Vavilov* stated that a review based on reasonableness requires that "where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes"[15]. In particular, where a decision has consequences that threaten an individual's livelihood, the requirement for reasons explaining the result is at the higher end of the spectrum.

[31] In *Baker v Canada (Minister of Citizenship and Immigration)*[16], the Court quoted an earlier decision holding that "a high standard of justice is required when the right to continue in one's profession or employment is at stake"[17]. Similarly, in *Vavilov* the Court held such a principle was applicable both for procedural fairness and on a reasonableness review[18] .

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[14] 2019 SCC 66.
[15] *Vavilov*, at para 133.
[16] [1999] 2 SCR 817.
[17] *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para 25.
[18] *Vavilov* at para 133.

**Did the committee err in finding that Mr. Bratch purchased properties well below their actual market value?**

[32] This issue raises a question of fact, which would be reviewed on a reasonableness standard.

[33] Throughout their submissions in the liability and sanction proceedings, the Appellants argued that it was an error to use the assessed value of the properties at issue, as determined by BC Assessment, as indicative of the properties' actual value. In response to this argument in the Sanction Decision, the Committee pointed out that:

> The values of homes as assessed by the BC Assessment Authority was, in the absence of the parties providing better evidence, the best available indicator of property values.

[34] In my review of the Appellants' submissions before the FST, the appeal record, and the transcripts of the liability hearing I did not find evidence led by the Appellants which undermined or challenged the evidence of the BC Assessment assessed values of the properties in question. I agree with the Superintendent's submission on this point that if the Appellants had wanted to provide their own evidence of the market values of the properties at the liability hearing they could have done so.

[35] The Committee's finding that the Appellants' purchased the properties well below their actual market value was reasonable and supported by the BC Assessment assessed values.

**Did the committee err by failing to consider that "rent-to-own" is a widely used form of real estate transaction to help individuals get into the market, or to keep their homes that are going into foreclosure?**

[36] This issue has to do with findings of fact made by the Committee in relation to the nature of the RTO agreements. As such this issue would be reviewed on a reasonableness standard.

[37] The Appellants make the following submissions on this point:

> Rent-To-Own has been a widely used form of real estate transactions to help individuals get into the housing market or keep their homes that are going into foreclosure. The Liberal federal government also made Rent-To-Own apart of their platform for re-election in the federal October election…

[38] The Appellants appear to be arguing that the Committee penalized them for entering into RTO transactions which are both legal and, potentially, helpful. However, the Appellants appear to misapprehend that the Committee penalized them for their misconduct associated with the RTO's for each property, and not simply the fact that they used RTO's.

[39] In the Liability Decisions the Committee specifically held that "the legality of Mr. Bratch's conduct, apart from the standards and rules applied by the council to

licensees, is not at issue"[19]. The Committee set out the Council's position early on in the decision as follows:

> While the RTO Scheme is not illegal, the Council alleges the RTO Scheme was disadvantageous to the Owners, and in some cases, the Owners did not receive independent legal advice or separate agency representation, and either believed that Mr. Bratch was acting on their behalf, or were at least confused as to his role in the transaction. The Council alleges professional misconduct and/or conduct unbecoming a licensee,

[40] In their submissions in relation to penalty, the Appellants made the same argument as they do here, essentially submitting that an option to purchase is used widely in real estate transactions. In the Sanction Decision, the Committee specifically responded to this point and distinguished between the use of a written option to purchase and specific instances of misconduct arising in the context of the use of such an option[20]:

> The common nature of a written option to purchase does not address the larger issue of a licensee having owners enter into rent-to-own arrangements without first having clarified his role as adverse to the owners and failing to recommend independent legal advice.

[41] As set out above, the Committee clearly set out that its concern was not the existence of the RTO arrangements, but the Appellants' conduct in failing to clarify his role as adverse to the owners and failing to recommend legal advice. I find that the Committee did not err in its consideration of the nature of the RTO agreements and that its findings in relation to the RTO agreements are reasonable.

## Sanction decision

*Positions of the Parties*

[42] With respect to the monetary penalties (i.e.. the Fine and the enforcement expenses), the Appellants argue that the fine of $45,000 should be substantially reduced, primarily on the basis that Council applied the wrong penalty regime. They argue that "the 3 deals were committed in the old penalty regime and the Council imposed higher than applicable fines in the New Penalty Regime."

[43] The Appellants also argue that the enforcement expenses are excessive and do not reflect that the Appellants had not hired their own lawyer to keep costs reasonable, and that one of their witnesses was originally scheduled to testify for the Council and provided an objective viewpoint about RTO contracts. The Appellants claim that the witness provided clarification on the entire process and gave an objective viewpoint of the RTO transaction and how it worked.

[44] They also point out that the Council requires the payment of the entire discipline penalty in advance to be considered eligible for relicensing. Mr. Bratch argues that: "As a result of not being able to work as a licensed real estate agent

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[19] April 30, 2021 Liability Decision at para 29.

[20] Sanction Decision at para 29(c).

my livelihood to earn has been greatly impacted." Mr. Bratch's personal circumstances were described and he asked for a payment term option to pay off the fine over the course of earning income as a licensed realtor.

[45] With respect to the suspension, the Appellants point out that they have been unlicensed for 4+ years pursuant to the Order in Urgent Circumstances, and that the Council is seeking to add another year to this suspension. They state that they believe this is above and beyond what the original discipline regime would allow.

[46] The Superintendent framed its argument on the issues of property valuation and Rent-to-Own transactions. It also identified and provided comprehensive argument on the issue of whether the penalty ordered by the Committee was reasonable and authorized by the *RESA*. The Superintendent argues that whether the Committee had authority under the *RESA* to make the discipline penalty order it made, may be framed as a question of law attracting a standard of review of correctness.

[47] On the issue of which penalty regime applies, the Superintendent argues that the issue is properly framed as question of law and attracts the standard of review of correctness. The Superintendent argues that the FST is expected to intervene to correct a penalty decision that is based on an "error in principle"[21].

[48] The Superintendent claims that while the Committee did not expressly state that it accepted the Council's argument, concerning the applicable penalty regime, it is clear that it did so[22]. Further it argues that the issue of which penalty regime should apply was specifically addressed in the Council's arguments to the Committee[23]. The Superintendent argues that Mr. Bratch did not take issue with the Council's submission on this point[24]. The Superintendent submits that because the Appellants could have, but did not, raise this issue at the Sanction Hearing, they ought not to be making this argument for the first time on appeal.

[49] Notwithstanding the Superintendent's objection, based on the principle of fairness, I will consider the Appellants' arguments with respect to the applicable regime, especially in view of them being self-represented.

[50] In any event, the Superintendent argues that the Council's submissions with respect to how the old and new penalty regimes should be applied to the appellants' misconduct were correct and there was no error in accepting them, or in ordering a discipline penalty of $45,000. The Superintendent states that some of the misconduct at issue occurred under the new penalty regime (in particular, the misconduct with respect to the Lombard Property).

[51] With respect to the Appellants' argument claiming that discipline penalty amount should be reduced, the Superintendent claims that this amounts to an

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[21] *Financial Institutions Commission v Insurance Council of British Columbia et al*, Decision No. 2017-FIA-002(a)- 008(a) at para. 77. Accordingly, an error of law made in a penalty decision will attract correctness review: *Inglis v Real Estate Council of BC and the Superintendent of Real Estate*, Decision No. 2019-RSA-0Ol(a) (*Inglis*) at para. 107

[22] Sanction Decision at paras 16-17.

[23] Submissions of the RECBC on Penalty at paras 81-83 and 121-122.

[24] Submissions of Mr. Bratch on Penalty, AR, Vol. 8, Tab 6.

assertion by the Appellants that the Committee erred in its findings as to the seriousness of the Appellants' misconduct. The Superintendent submits that this issue attracts the reasonableness standard of review[25].

[52] The Superintendent advances the argument that, here, too, the Appellants are rearguing submissions that were not accepted by the Committee. The Superintendent points out that the Appellants made identical submissions to the Committee and in their submissions here[26]. Of course, it is not unusual for an appellant to advance similar arguments on appeal than they did at first instance. The question is not whether or not I can properly consider those arguments, which I find I can, but which standard of review applies to that consideration.

[53] The Superintendent submits that the Appellants' submissions on penalty amount to an argument that the Committee erred in its findings with respect to the nature and severity of the misconduct, and say that the Committee's rejection of the Appellants' submissions in this respect was reasonable, and is well- explained in the Sanction Decision[27].

[54] The Superintendent further argues that there is no basis for this panel to interfere with the discipline penalty ordered by the Committee because the Appellants have failed to demonstrate that the Committee's findings were unreasonable. The Superintendent also claims that the Appellants have failed to show that the Committee's exercise of discretion in selection of the amount of the penalty was unreasonable.

[55] In reply, the Appellants argue that the reason for the appeal was directly based on the penalty regime and claim that this was the very point of the appeal. They argue that their argument focusses on the findings of the Lombard property misconduct and states a concern about how this property is so heavily weighed upon for the discipline penalty when there was no transaction that even took place.

[56] They also advance arguments about the timeframe of the payment of penalty. Mr. Bratch states that he would like to pay any penalty when he is prepared to be relicensed. He also reiterates his claim that the one-year suspension should be reviewed due to the 4 years he has currently served, and that the Committee had the discretion to do so.

*Sufficiency of Reasons in the Sanction Decision*

[57] Determining the reasonableness of the penalty order requires a review of the reasons provided in the Sanction Decision.

[58] The Sanction Decision imposed four types of penalties. There was a fine, a suspension, the assignment of enforcement expenses and a requirement to complete the Real Estate Institute's Ethics in Business Practice course. The Appellants take no issue with the requirement that Mr. Bratch attend further

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[25] *Kadioglu* at para 73; see also *Siemens v Real Estate Council of BC and the Superintendent of Real Estate*, Decision No. 2021-RSA-20-A00S(a) (*Siemens*), at para 107.
[26] Sanction Decision, AR, Vol. 8, Tab 7, para. 27; and Submissions of Mr. Bratch on Penalty, AR, Vol. 8, Tab 6.
[27] Sanction Decision, AR, Vol. 8, Tab 7, at para 29.

training and accordingly I will not analyze that issue, and that aspect of Sanction Decision is confirmed.

[59] I will now review the content of the requirement to provide reasons, followed by an examination of each of the remaining aspects of the Sanction Decision in turn.

*Requirement to Provide Reasons*

[60] This Tribunal has previously addressed the requirement for hearing committees to provide reasons for their decisions. In the case of *Financial Institutions Commission v Insurance Council of British Columbia* et al (*Bridge Tolls*"),[28] where the imposition of a fine of $5,000 was being appealed. This Tribunal noted that FICOM had argued that (at paras 35-37):

> [35] FICOM relies on Law Society authority (*Law Society of BC v. Nguyen,* 2016 LSBC 21) for the proposition that "the imposition of a period of suspension ... is a significantly more severe penalty than is the imposition of a fine. ... Suspensions are reserved for the more serious demonstrations of misconduct". FICOM argues that the $5000 fines here fail to achieve that goal, send the wrong message and are unreasonable when dealing with conduct which goes to the heart of professionalism or trustworthiness. FICOM submits that public confidence and deterrence (both specific and general) require a suspension.
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> [36] FICOM argues that a period of suspension is warranted whenever the misconduct involves dishonesty; subject to mitigating factors to determine the length of suspension or whether a fine will achieve the goals of licensee discipline. FICOM notes that the Insurance Council has previously imposed a 6-month suspension on an agent in one case for the same conduct, in a single instance, on his own behalf …
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> [37] FICOM notes that each licensee was experienced, knowingly engaged in repeated acts of dishonesty in matters directly related to his or her business, and that … there are no mitigating factors. FICOM also …argues that, … 6 months should be the suspension baseline.

[61] As noted, FICOM appealed the penalty. After a comprehensive analysis of the applicable standard of review, this Tribunal concluded that (at paras 77-78 and 89-90):

> [77] Taking all these factors into account, it is my view that the Tribunal should unapologetically accept that the Legislature expected it to intervene in any penalty appeal where it finds that there has been an error in principle as opposed to an "error" in line-drawing by

[28] Decision No. 2017-FIA-002(a)-008(a).

> the Insurance Council, and that it is for the Tribunal to determine where an error in principle has occurred. The Tribunal should apply this test not as if it were a court, but should apply it from its specialized institutional vantage point and with a careful eye to the public interest. It is for the Tribunal to arrive at its own specialized judgments about what is a reasonable penalty range. In this way, the Tribunal can grant appropriate respect to Insurance Council decisions and precedents without treating those decisions and precedents as if only the Insurance Council had a legitimate say in how to protect the public interest. The Tribunal is not required to define the range of reasonable outcomes in the same way as would a court.
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> [78] The approach cautions against the Tribunal simply substituting its discretion for that of the body appealed from. However, it also recognizes the special role entrusted to the Tribunal in cases where the debate centres, as it does here, on whether the penalties in question fall below the standard necessary to protect the public interest in cases involving dishonest conduct.
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> …
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> [89] Whether a penalty appeal is launched by a licensee or by FICOM, and whether the remedy sought is a more lenient penalty or a more stringent penalty, the question on appeal is whether the Insurance Council committed a reviewable error based on the record before it. …
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> [90] In making this finding, it is important to note as well that the Tribunal has remedial flexibility on appeal, as made clear in s. 242.2(11) of the *Act*:
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> (11) The member hearing the appeal may confirm, reverse or vary a decision under appeal, or may send the matter back for reconsideration, with or without directions, to the person or body whose decision is under appeal.

[62] This Tribunal then considered whether the fine was reasonable. The Tribunal was particularly influenced by the repetitive nature of the infractions in that case. It concluded that a fine was inappropriate and that the protection of the public demanded a significant suspension.

[63] This Tribunal then quoted from *Financial Services Commission v Insurance Council and Novko*[29], where the Tribunal stated as follows (at p 8-9):

> In instances of misconduct, the Insurance Council must be mindful of the goals which are achieved through the penalty process. In *The Regulation of Professions in Canada*, by James T. Kasey (2003) at page 14-5, the author reviews the factors that are to be taken into account in determining how the

[29] FST 05-008 (August 22, 2005)("*Novko*").

> public is best protected from acts of professional misconduct. These factors include specific deterrence of the licensee from engaging in further misconduct, general deterrence of licensees, rehabilitation of the licensee, punishment of the licensee, the denunciation by society of the conduct, the need to maintain the public's confidence of the integrity of a profession's ability to properly supervise the conduct of its members, and the avoidance of imposing penalties which are disparate with penalties imposed in other cases.

[64] The *Bridge Tolls* decision noted that the Council had made the finding that the individual respondents falsified numbers many times and that those repeated falsifications could only reasonably be viewed as a significant aggravating factor and that (at para 104):

> [104] Trust in the licensee lies at the foundation of the grant of the licence. Repeated conduct that calls into question the trustworthiness of a licensee can only reasonably be addressed by a regulator taking action on the licence. Subject only to mitigating factors evident in the record before the Council at the time of the intended decision or after a hearing , it is only licensing action in the form of a suspension, cancellation or conditions (in addition to whatever other conditions the regulator may wish to attach) that can adequately protect the public, secure its confidence, achieve general deterrence and express the denunciation that such conduct warrants. An economic penalty that allows the licensee to go on practising without interruption when the regulator has called into question that licensee's trustworthiness might achieve specific deterrence in a particular case depending on the financial circumstances of the licensee, but it fails to address the core licensing issue at play. In this regard, I agree with the view expressed in *Law Society of BC v. Nguyen*, 2016 LSBC 21 at para. 40: that "[s]uspensions are reserved for the more serious demonstrations of misconduct". In these cases, I have no hesitation in concluding that it was an error in principle for the Insurance Council to fail to impose licence suspensions in the absence of a clear identification of mitigating factors that might be present in a particular case.

[65] Next, *Bridge Tolls* considered the appropriate remedy to replace that initially imposed. This Tribunal held (at para 123):

> [123] My core finding in this decision is that subject only to clear mitigating factors in a particular case, it is only licensing action in the form of a suspension, cancellation or conditions (in addition to whatever other remedial option the regulator may consider appropriate in a case) that can adequately protect the public, secure its confidence and express the denunciation that such conduct warrants. It is my further view that, subject only to mitigating factors, a suspension of six months and the requirement to take an ethics course acceptable to the Insurance Council represents the minimum or baseline reasonable penalty that the licensee's conduct must attract.

Whether the ultimate penalty is higher or lower depends on a consideration of mitigating or aggravating factors in a given case.

[66] The matter was sent back to the Council to apply the mitigating factors[30].

[67] *Bridge Tolls* was relied on by this Tribunal in the case of *Xing v Insurance Council of British Columbia and British Columbia Financial Services Authority*[31], where the parties had agreed on the penalty and the hearing committee appointed by the Council recommended a suspension. The Council increased the penalty and assessed a suspension. One of the issues considered was whether the Council had erred by failing to provide adequate reasons for its decision to impose the suspension order[32].

[68] In *Xing*, the Tribunal noted that the Council was required to give written reasons for its decision to impose the suspension order. Further, the Tribunal noted that it is generally accepted that the objectives of giving written reasons include the following[33]:

1. To justify and explain the result;
2. To tell the losing party why he or she lost;
3. To provide for informed consideration of the grounds of appeal; and
4. To satisfy the public that justice has been done.

[69] The Tribunal also noted[34] that the parties had both relied on *Law Society (New Brunswick) v Ryan*[35], which holds that a decision will be unreasonable only if there is no 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. It then stated that the Council made many findings that should have been further explored here. It said:

> [125] When considering the reasonableness of the reasons given by Council for imposing the Suspension Order I will be guided by both *Ryan* and *NLNU*[36] as quoted above. Based on *Ryan* I will consider whether the reasons given in support of the Suspension Order are tenable *in the sense that they can stand up to a somewhat probing examination*. Based on *NLNU* I ask if the reasons allow the FST on appeal to understand why the Council made its decision to impose the Suspension Order and if the reasons permit the FST to determine whether that penalty is reasonable as falling within the range of possible, acceptable outcomes.

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[30] *Bridge Tolls* at para 125.
[31] Decision No. 2019-FIA-004(b).
[32] At para 31.
[33] At para 121.
[34] At para 123.
[35] 2003 SCC 20 at para 55 ("*Ryan*").
[36] *N.L.N.U. v Newfoundland & Labrador (Treasury Board) ("NLNU")* 2011 SCC 62.

> …[135] The Appellant submits that …[t]he provision of detailed reasons was necessary, in addition to the statutory requirement of section 235(5) of the FIA, for two reasons in this matter being:
>
> i. The Council's decision *led to the loss of livelihood of the Appellant*; and
>
> ii. Council's deviation from the Joint Submission on Penalty and from the Hearing Committee's recommendation imposing *a more severe penalty necessitated detailed reasons from which insight could be gained* as to why the Council determined that the recommended penalty was unfit, unreasonable, or contrary to public interest as required by the principles of natural justice.
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> …[142] Council is correct to state that the Hearing Committee considered *FICOM*[37] in its penalty analysis and referred to FICOM in its Report. I am also prepared to accept that Council was well aware of the decision in FICOM and that its views of the appropriate penalty may well have been influenced by FICOM. However, to infer, as submitted by Council, that its reason for its decision to impose the Suspension Order was based on its reading of FICOM applied to the particular circumstances of the ASOF and the Joint Submission on Penalty would be a speculative exercise at best that I am not prepared to engage in. I take from my reading of NLNU that when considering supplementing the reasons from the record in the search for reasonableness, I should not substitute my own reasons for those of Council.
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> …[149]… the Council made no attempt to provide an explanation of its decision-making process other than making a bald assertion that the penalty recommended by the Hearing Committee was inadequate. I further agree with the Appellant that Council failed to engage in any meaningful discussion of the applicable sentencing principles, mitigating factors or relevant sentencing authorities to demonstrate why the recommendation of the Hearing Committee or the underlying Joint Submission on Penalty was unfit, unreasonable, or contrary to the public interest.

[70] The reasoning in *Xing* is compelling. Where a licensee has had their license suspended and resulting income has been affected, they are entitled to know the underlying reasons for the penalty imposed.

*Enforcement Expenses*

[71] The Appellants take issue with the imposition of $50,000 for enforcement expenses. The Appellants claim that the Council's legal expenses seem "extremely

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[37] In *Xing* the *Bridge Tolls* case is described as *FICOM.*

high" and they had made it clear to the Council at the outset that they would be self-represented in order to avoid incurring personal legal costs. This issue was also addressed by the Superintendent. This is a question which relates to the Committee's exercise of discretion, which I will review on a reasonableness standard.

[72] I note that in comparison to the rest of the penalty analysis, the analysis undertaken by the Committee with regard to the enforcement expenses was much more comprehensive. The Committee's discretion was noted and the reasons for the exercise were set out. With regard to enforcement expenses, the written reasons provided by the Hearing Committee on this issue were comprehensive and reliant on relevant legal authority.

[73] The expenses were extensively catalogued and identified as related to the expense of conducting the case.

[74] The Superintendent submits that the Committee "correctly instructed itself as to the applicable law relating to orders of enforcement expenses, including s. 44(1) of RESA [and] s. 4.2 of the Regulation, and the general principles set out I cases such as *Siemens (Re)*…that confirm the discretionary nature and purpose of such orders"[38].

[75] I find that the Committee comprehensively and correctly reviewed its legal authority to award enforcement expenses, and that it reasonably exercised its discretion in assessing the final amount at $50,000.

[76] The Committee considered the amount of time attributed to both the investigation and the hearing and determined that what Council had set out was reasonable considering the complexity of the case. Further, the Committee considered Council's submission that the enforcement expenses should be awarded on a full-indemnity basis, and expressly rejected that submission, instead finding that 78% of the indemnity allowed by the Regulation would better achieve the goal of "shifting an appropriate portion of enforcement expenses to the Respondent" to account for "some small degree of divided success".

[77] The Committee's analysis was clear, straightforward, based on the appropriate legal and factual considerations and I am easily able to follow the chain of reasoning which led to the ultimate assessment of enforcement expenses. That is all that is demanded on reasonableness review, and I find that the Committee's assessment of enforcement expenses was reasonable in this case.

*Fine and Suspension*

[78] The Committee imposed a further one-year suspension in addition to the 3 years and nine months the Appellants had already been unlicensed due to the Order in Urgent Circumstances. In addition, the Committee imposed a fine of $45,000.

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[38] Respondent written submissions to FST at para 133.

[79] One of the issues identified by the Committee concerned the Penalty Regime under which the Sanctions were to be imposed. The Sanction Decision noted[39] that prior to September 30, 2016, the Act limited monetary penalties to $20,000 in the case of a brokerage or former brokerage, and to $10,000 in any other case. The Committee noted that the Appellants' conduct under investigation occurred from about April 2016 to November 2017. In September 2016, the Legislature amended, section 43(2)(i) of the Act, to allow for monetary penalties of up to $500,000 in the case of a brokerage or former brokerage, and up to $250,000, in any other case.

[80] The issue of the applicability of the penalty regime raises a question of law, which I will review on a correctness standard. I acknowledge that the assessment of the ultimate penalty may also involve the exercise of discretion, and to the extent that it does, I will review the discretionary assessment of the penalty on the standard of reasonableness.

[81] As the Committee noted, the Rogers and Silverthorne transactions occurred under the Old Penalty Regime and the Lombard transaction and the Brokerage Activity Report occurred under the New Penalty Regime[40].

[82] In the Sanction Decision, the Committee accepted the Council's submissions about which regime applied to each of the transactions. However, notwithstanding the Committee's reference to the two different penalty regimes, the Committee imposed a universal penalty that does not differentiate between the matters under consideration. None of the impugned transactions were differentiated with respect to the penalty imposed, nor were any reasons stated as to why the penalty would be imposed in a universal manner.

[83] While the different charges were separately addressed in the Liability Decisions, in the Sanction Decision the Committee did not demonstrate that it considered or applied the different Penalty Regimes, nor did it provide reasons for choosing the size of the fine or suspension. No cases were analyzed with respect to the circumstances and penalties imposed therein. There is no way to know why the Committee chose the penalties in the amounts that it did.

[84] In its argument here, the Superintendent submits that the question of which penalty regime ought to apply to the Appellants' misconduct was set out in Council's submissions to the Committee[41], and that although the Committee did not "expressly state in the Sanction Decision that it was accepting the Council's submissions on the issue, it is clear from the Sanction Decision that it did so." [42]

[85] I have reviewed the Council's penalty submissions to the Committee, including the paragraphs specifically referenced by the Superintendent above, and disagree with the Superintendent's characterization of the findings on this issue in the Sanction Decision. While it is clear from the text of the Sanction Decision that the Committee was alive to the issue of the different penalty regimes and which

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[39] Sanction Decision at para 16.

[40] Sanction Decision at para 17.

[41] In particular the Superintendent references paragraphs 81-83 and 121-122.

[42] Respondent Written Submissions to FST at para 114.

misconduct took place under which regime, it nevertheless undertook no analysis in the decision of how it was assessing penalty in light of the different regimes.

[86] While the Superintendent urges me to find that the Committee "accept[ed] the Council's submissions" on the issue of the applicable penalty regime, the Council's submissions were much lengthier and more detailed than those paragraphs referenced by the Superintendent. In fact, the Council's submissions on applicable precedents spanned seven pages and 40 paragraphs and detailed comparable cases which took place in the Old or New Penalty Regimes. Further, the Council's submissions on the proposed analysis of those precedents outlined a complex assessment of proposed penalties for each element of the misconduct based on either (and sometimes both) of the Old and New Penalty Regimes.

[87] The Council's submission to the Committee was that based on the precedents cited and the facts of the case, it was seeking a global sanction of a $75,000 fine and a further two-year prohibition on reapplying for licensure. However, the Committee ultimately ordered a monetary penalty of $45,000 and a one-year prohibition on reapplying for licensure. In its assessment of the $45,000 fine, the Committee did not in any way describe how it came to such a figure.

[88] In the Sanction Decision, the Committee merely noted that cases had been submitted to it by the Council, and it noted that the penalties that had been imposed in those cases occurred under the old penalty regime and some were imposed under the new penalty regime. It undertook no analysis of which Regime it applied to which elements of misconduct. Further, it did not refer to any of the individual cases provided by the Council, the principles for which they stand, nor how those principles could or should have been applied to this case.

[89] The Committee simply stated that "[s]ubject to the Committee accounting for the interim suspensions already "served" by the Respondents, and a reduction to the monetary penalty imposed, the Committee accepted the submissions of Council"[43]. It did not provide any reasons for why it reduced the monetary penalty proposed by the Council.

[90] As noted above, *Vavilov* states that a review based on reasonableness requires that "where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes"[44].

[91] It was not overtly considered by the Committee that this decision has consequences that threatened Mr. Bratch's rights and livelihood and thus there is a requirement for reasons at the higher end of the spectrum that explain the result imposed.

[92] Thus, it is impossible for me to comprehend how the Committee came to its ultimate determination of penalty. Although it appears as though they correctly identified that some of the Appellants' impugned misconduct occurred under the Old Penalty Regime and some occurred under the New Penalty Regime, I am unable to understand how they decided on the ultimate penalty. Although the Superintendent urges me to accept the assessment as reasonable and based on the

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[43] Sanction Decision at para 29.

[44] *Vavilov* at para 133.

submissions of the Council which were before it, I am unable to reconcile the detailed and complex penalty analysis submitted by Council with the almost complete lack of analysis of the Committee.

[93] I find that the reasons given by Council in support of the Suspension Order and the Fine imposed were not adequate or reasonable. The reasons are not tenable in the sense that they cannot stand up to a somewhat probing examination. I also find that the reasons do not allow me to understand why the Council made its decision to impose the Suspension Order and the Fine such as to permit me to determine whether that penalty is reasonable as falling within a range of possible, acceptable outcomes.

[94] As a result, I set aside the Sanction Decision in part. The Fine and the Suspension Order are set aside, while the enforcement expenses and the training decision are confirmed.

**REMEDY**

[95] The question that remains, is whether I ought to remit the matter back to the Superintendent for reconsideration, or whether I should determine the appropriate penalty myself.

[96] As set out above, section 242.2(11) of the FIA provides the FST with a broad remedial authority, including the power to "confirm, reverse or vary a decision under appeal, or…send the matter back for reconsideration, with or without directions." After careful consideration, I have determined that in the present case, it is most efficient and appropriate that I determine the appropriate penalty.

[97] The Committee stated that its basis for assessing penalty was based on the determinations contained in the Liability Decision[45]. I will use those findings in my analysis, and I will review the submissions, including cases, that were provided to the Committee by the Council and those submitted by the Appellants. Thus, I have the same materials before me on this appeal, and, as a member of an expert tribunal, I find that I am in at least the same position as the Superintendent with respect to the assessment of appropriate penalty. This recognizes the written submissions of the Council concerning the two regimes under which the penalty is to be imposed and does not add to the analysis any new authority of which the Superintendent is unaware.

[98] My decision to determine the matter of the Appellants' penalty on this appeal is also consistent with the application of various factors identified in *Vavilov* regarding whether to remit a matter. Although (as discussed above) some principles from *Vavilov* do not apply to the FST because the FST is an expert tribunal and not a generalist court, the Court's discussion of factors that weigh in the decision to remit or decide provides useful guidance in the present situation (at para 142):

> …An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and

[45] Sanction Decision at para 6.

> subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose … Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed. [emphasis added]

[99] In addition to the factors of concern for delay and avoiding costs to the parties noted in *Vavilov* and previously mentioned, the nature of the regulatory regime here is one where the FST is recognized as a specialized tribunal with the ability to make its own specialized judgments regarding penalty matters[46].

[100] I will impose the penalty for the transgressions found in the Liability Decisions, on the basis of the findings in the Liability Decisions and with regard to the cases argued by the Council regarding penalties sought.

**Brief review of liability decisions' findings including references to cases submitted by the Council in support of its arguments regarding penalty**

[101] The allegations concerning the false Brokerage Activity Report were under the New Penalty Regime, as was the Lombard Property transaction. The Silverthorne and Rogers Properties transactions were subject to the Old Penalty Regime.

[102] I have determined that it is appropriate for me to now review the Committee's findings in the Liability Decisions from the perspective of how they impact the penalty that ought to be imposed. I have accepted those findings as reasonable.

[103] I will also make note of the cases that the Council submitted were relevant to each issue.

*Brokerage Activity Report*

[104] The Liability Decision findings[47] were that Mr. Bratch and the Brokerage committed professional misconduct by making, or allowing to be made, a false or misleading statement in the Brokerage Activity Report of March 2017.

[105] The Committee found professional misconduct due to a statement in the Brokerage Activity Report dated March 23, 2017, that falsely indicated that the Brokerage completed four deals, but the Brokerage records indicate that it had actually completed ten deals in that time.

[106] The Committee noted the Council's concession that the fact that Mr. Bratch acted on the advice of his accountant was a mitigating factor, but the Council urged that this mitigating factor be given little weight because Mr. Bratch had been the

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[46] See *Financial Institutions Commission v Insurance Council of BC et al* ("*FICOM*") at para 77.

[47] Sanction Decision at para 6(e).

sole managing broker of the Brokerage since 2011 and would have had to prepare the Brokerage Activity Report for many years at that point. The Appellants do not appear to take issue with this finding of the Committee.

[107] Mr. Bratch has not challenged any of the underlying facts or the findings leading to the decision about the Brokerage Activity Report. He says he relied on his accountant who completed the reports. However, Mr. Bratch does raise concerns regarding the penalty imposed.

[108] Authorities tendered by the Council included *Peck and Royal Pacific Realty Corp. (Re)*[48], where the brokerage's brokerage activity reports were filed late and were deficient. In particular, the brokerage activity reports did not contain required information, including the approximate number of transactions by type of business. The managing broker and brokerage were ordered to pay a discipline penalty of $5,000. The managing broker was also ordered to complete remedial education.

[109] The Council also submitted the case of *Tak Kun (Ed) Fung and Royal Pacific Realty (Kingsway) Ltd. (Re)*[49], where there were a number of breaches including failing to include the number of transactions conducted by the brokerage. The managing broker and brokerage were ordered to jointly and severally be responsible to pay a discipline penalty of $5,000. The managing broker was ordered to take remedial education.

[110] I note that both of these cases were under the Old Penalty Regime. No cases were tendered by the Council that concerned deficiencies in a Brokerage Activity Report under the New Penalty Regime.

[111] The Council submitted argument based on *Hays (Re)*[50] and *Su (Re)*,[51] where penalties were imposed with penalties that ranged from $18,000 - $20,000. However, those cases included other charges and not only breaches of Rule 3-4. The Council claimed they were illustrative of the Council's trend in increasing discipline fines for professional misconduct that occurred in the New Penalty Regime.

*Involvement in RTO Transactions*

[112] The finding of the Committee for all three transactions was that Mr. Bratch contravened his duty to act honestly and with reasonable care and skill, by his entering a “rent-to-own” arrangement with the owners without first clarifying his role and expressly recommending independent legal advice. Each transaction is briefly described below.

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[48] 2009 CanLII 25553 (BC REC).
[49] 2009 CanLII 25551 (BC REC).
[50] 2020 CanLll 63613 (BC REC).
[51] 2017 CanLll 73797 IBC REC).

*Lombard Property*

[113] The owner of the Lombard property was CM's mother's estate and CM was the Executor. The mortgagee had commenced foreclosure proceedings. CM approached Mr. Bratch and discussed his situation.

[114] According to the Committee[52], on July 17, 2017, CM signed agreements with the Appellants, and Ms. T to complete an RTO transaction. As of July 1, 2016, the Lombard Property had an assessed value of $2,175,700. The purchase price was $500,000.

[115] After CM consulted legal counsel, to whom he was referred by Mr. Bratch, the RTO transaction was cancelled by CM.

[116] In September 2017, Mr. Bratch and Ms. T filed a Notice of Civil Claim against CM in his personal capacity and as Executor of the Estate, claiming financial damages for the failure to execute the Contract.

[117] The ASF notes that in November 2017, CM filed a Response to Civil Claim. In December 2017, the parties settled the legal action by way of a consent order dismissing the action.

[118] The Committee accepted[53] the submissions of the Council that CM had come to believe, due to Mr. Bratch's initial assistance to look for short- term financing, that Mr. Bratch was *on his side*. When they began discussing the RTO Scheme, that situation and, Mr. Bratch was then in an adverse position at which time, he should have clarified that, and expressly recommend that CM seek the independent advice of a licensee or a lawyer.

[119] The Committee expressly agreed with the Council's submissions in the absence of his first clarifying his role and expressly recommending that CM obtain independent advice, Mr. Bratch acted in a way that is (a) contrary to the best interests of the public, (b) undermines public confidence in the real estate industry, and (c) brings the real estate industry into disrepute.

[120] Concerning the imposition of penalties under the New Regime, the Council submitted argument relying on *Hays (Re)*[54] and *Hui (Re)*[55] which imposed penalties that ranged from $18,000 - $20,000 for similar conduct. It is important to note that both cases included other charges and not only breaches of Rule 3-4.

[121] The Council also relied on *Su (Re)*[56] where Ms. Su had entered into a consent order admitting that she committed conduct unbecoming a licensee. Ms. Su was suspended for 120 days and was required to complete remedial education and have enhanced supervision conditions on her licence.

*Silverthorne Property*

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[52] Liability Decision at para 89.
[53] Liability Decision at para 128.
[54] 2020 CanLll 63613 (BC REC), BOA Tab 9.
[55] 2020 CanLll 103120 (BC REC), BOA Tab 10.
[56] 2017 CanLll 73797 IBC REC), BOA Tab 19.

[122] JB and his partner KD owned the Silverthorne Property along with JB's father. JB was the person who had all the dealings with Mr. Bratch and Ms. T.

[123] Early in 2016, the mortgagee had foreclosed against Silverthorne Owners. JB met with Mr. Bratch, who raised the RTO Scheme and later asked if JB would sell the property to him and his wife, Ms. T. personally.

[124] Mr. Bratch presented him with an RTO option to keep the Silverthorne Property from being foreclosed by the bank.

[125] In July 2016, Silverthorne Owners signed an RTO transaction to sell the Silverthorne Property to Mr. Bratch and Ms. T for the purchase price of $715,000. The Assessed Value, as of July 1, 2016, was $869,000.

[126] As part of the RTO, the Silverthorne Owners entered into a tenancy agreement. Some of the rent was to be credited to the purchase price, should they exercise the option to purchase.

[127] In October 2017, JB sought an extension of the date to repurchase the Silverthorne Property. Mr. Bratch did not extend the Silverthorne Option Agreement. JB and KD continued to rent the Silverthorne Property on a month-to-month basis until December 2018, when they vacated the Silverthorne Property.

[128] JB testified at the hearing after being called by Mr. Bratch.

[129] The Committee majority determined that Mr. Bratch contravened Rule 3-4 and committed professional misconduct by contravening that duty of reasonable skill and care owed to the Silverthorne Owners[57].

[130] Following the conclusion that the Silverthorne Owners were more sophisticated and had an opportunity to obtain legal advice, the Committee also determined that the Council had not established that Mr. Bratch engaged in conduct unbecoming a licensee with respect to the dealings with the Silverthorne Owners. The Committee stated that it had been unable to conclude that Mr. Bratch's conduct, as it related to the Silverthorne Property, met any of the requirements. Under section 35 i.e., that Mr. Bratch's conduct. "(a) is contrary to the real estate industry", or "(c) brings the real estate industry into disrepute."

*Rogers Property*

[131] It was the Rogers Property that was the subject of the newspaper article that instigated the Council's investigation. This was the first transaction in the chronology. Mr. Bratch and Ms. T purchased the Rogers Property for $370,000 by way of an RTO transaction[58] with the Rogers Owners. The assessed value was $603,000, as of July 1, 2016.

[132] The Rogers Owners signed a tenancy agreement with some of the rent to be credited to the purchase price, should they exercise the option to purchase.

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[57] Liability Decision at para 137.

[58] A description of the RTO options offered by the Appellants is found at Ex 1, v.1, at p 181.

[133] The Rogers Owners missed many rent payments, starting in December 2016, and they were evicted after a hearing at the Residential Tenancy Branch in October 2017.

[134] The Rogers Owners sued Mr. Bratch, Ms. T and 102 BC and their dispute was settled. There was a non-disclosure agreement, and the Rogers Property was transferred back to the Rogers Owners for $375,000. The Rogers Owners soon sold the Rogers Property to a new buyer for $685,000.

[135] The Rogers Owners did not testify, nor was either Investigator able to obtain statements from them. In its Liability Decision, the Committee stated that it had relied on documentary evidence relating to the Rogers Property, as authenticated by a Council investigator[59].

[136] In the Liability Decision, the Hearing Committee concluded[60]:

> **Professional Misconduct**: Mr. Bratch owed a duty of honesty, reasonable skill and care to the Rogers Owners, pursuant to Rule 3-4. Mr. Bratch should have at least clarified his role as adverse to the Rogers Owners, and recommended that they obtain independent legal advice. He did not. The Committee determines that Mr. Bratch contravene Rule 3-4, and committed professional misconduct.
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> **Conduct Unbecoming:** given all the circumstances, as with the Silverthorne Property, The Committee was unable to conclude that Mr. Bratch's conduct, as it related to the Rogers Property, met any of the criteria under S. 35(2) of the Act. Based on the evidence before the Committee, the Council **did not** establish conduct unbecoming a licensee to the satisfaction of the committee.

[137] The Committee made no express finding that the Rogers Owners were vulnerable. In fact, it held:

> With respect to the vulnerability of the Rogers Owners, the Rogers Owners did not provide any evidence about the extent to which they trusted Mr. Bratch or otherwise viewed him as acting in their interests. The Rogers Owners did not raise any such issues in their Notice of Civil Claim against 102 BC, Mr. Bratch or Ms. T. However, they were clearly facing a bank foreclosure against the Rogers Property. Mr. Bratch initially acted as a mortgage broker for the Rogers Owners, by trying to find them re-financing.
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> Although Mr. Bratch testified that he advised the Rogers Owners to obtain legal advice, there was no such clause noted in any documentation as between the parties to make sure the Rogers Owners were aware and understood this. Further, Mr. Bratch himself

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[59] Liability Decision at para 28.

[60] Liability Decision at paras 144-45.

was unsure of the meaning of some clauses in the agreement at the hearing.

[138] The Council submitted argument concerning both transactions under the Old Penalty Regime. It argued that concerning the nature, gravity and consequences of the misconduct, the Council asserted a pattern of misconduct which included taking advantage of vulnerable homeowners in financial distress, resulting in them entering into a scheme that was disadvantageous to them and at the same time very advantageous to Mr. Bratch. The Council submitted that while he and the Brokerage had no discipline history prior to the issuance of the Order in Urgent Circumstances, this factor should be given little weight, given the nature and gravity of the misconduct.

[139] With respect to public confidence in the profession and the discipline process, the Council submitted that Mr. Bratch operating a "scheme" with "vulnerable, or less sophisticated real estate market participants, without representation by their own real estate agents or legal advice" shows "a lack of integrity and good character".

[140] The Council submitted the cases of *Gasser (Re)*[61], *Yin (Re)*[62], *Klop (Re)*[63], *and Liu (Re)*. Each of these cases involved a conflict of interest[64]. The fines imposed ranged from $3,500 to $5,000. The conflict of interest here needed to be explicitly disclosed to the Owners while Mr. Bratch transitioned from Mortgage Broker to Purchaser.

[141] In *Yin*, there were no findings of a conflict of interest and a $3,500 fine was imposed. The remaining cases found a conflict of interest and imposed a $5,000 fine. The facts of these cases are similar to the situation of the Appellants regarding the Rogers and Silverthorne Properties.

[142] *Parsons (Re)*[65] concerned conduct unbecoming a licensee. The Council's discipline committee had cancelled Mr. Parson's licence with no right to reapply for five years, and ordered a $10,000 fine, remedial education, and $22,487 in enforcement costs. The matter was appealed to this Tribunal which upheld the decision but adjusted the sanction to licence cancellation with right to reapply in 20 months, and a $5,000 fine, and $7,500 in enforcement costs.

[143] The circumstances in *Parsons* were much more serious than those here. Mr. Parsons was found to have "failed to represent the interests of his client adequately or at all, in a systematic manner and while in a conflict of interest, and when he knew or ought to have known that his client was in a highly vulnerable state due to her personal circumstances and mental status when he knew or ought to have known that his client was an inpatient at a psychiatric hospital." He also failed to avoid a conflict of interest (his son was representing the seller)[66].

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[61] 2020 CanLll 103125 (BC REC), Book of Authorities ("BOA") Tab 8.
[62] 2020 CanLll 95931 (BC REC) BOA Tab 21.
[63] 202O CanLll 103127 (BC REC) BOA Tab 11.
[64] 2019 CanLll 37500 (BC REC), BOA Tab 15.
[65] Decision, December 12, 2014; See also Decision No. 2015-RSA-002(d).
[66] *Parsons (Re)* Decision, December 12, 2014 at para 148.

[144] None of the cases cited by the Council involved transgressions in overlapping penalty regimes.

[145] The most severe penalty previously imposed for similar behaviour was $5,000.

*Disclosure of an Interest in Trade*

[146] The Committee found a failure by the Appellants which it described as:

> Mr. Bratch committed professional misconduct due to improper completion of the Disclosure of Interest in Trade forms setting out his or his associates' interest in the RTO transactions.[67]

[147] I do not discount the importance of properly filling out these documents.

[148] There were common considerations regarding findings of professional misconduct arising from the Appellants' improper completion of the Disclosure of Interest in Trade forms of the Appellants and their associates' interest in the RTO transactions.[68]

[149] The Sanction Decision described a common failure to properly complete the required Disclosure of Interest Forms. Submissions of the Council on this point acknowledged that the Owners "may or may not" have been aware of the relationship but it wasn't correctly identified on the form[69]. The Appellants do not contest that the forms were improperly completed.

[150] The cases relied on by the Council included *Croft*[70]*,* where a penalty of $5,000 was imposed when the licensee had failed to make proper disclosure to the seller that he was an "associate" of the buyer and had an interest in trade. In that case there were also other instances of misconduct.

[151] Also cited was *Lin (Re)*[71]*,* a consent order which noted that the buyer was the licensee's immediate family member and that he had properly disclosed this to the sellers. The decision also noted that the sales contract contained an assignment clause giving the right to the buyer to assign the contract without further notice to the seller. Once the sale of the property completed, Mr. Lin was identified as the owner. He was disciplined for his misconduct in failing to provide the sellers with a disclosure of interest in trade in relation to the assignment from the original buyers to himself. He was fined $5,000.

[152] The case of *Li (Re)*[72]*,* was another consent order. In that case, Ms. Li acted as buyer's agent in relation to the purchase of a property where the buyer was the wife of the owner/director of the brokerage of which Ms. Li was also a shareholder. She failed to provide to the seller a disclosure of interest in trade disclosing she was providing services on behalf of an "associate" (i.e., the wife of the owner of the

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[67] Sanction Decision, at para 6.
[68] Sanction Decision, at para6.
[69] Hearing Transcript Vol 4 pp 543-545.
[70] 2020 CanLll 28288 (BC REC).
[71] 2018 CanLII 126920 (BC REC).
[72] 2017 CanLII 77271 (BC REC).

brokerage). She told the Council she was unaware that the buyer was in fact an "associate" within the meaning in section 5-7 of the Rules. She received discipline of a $1,000 penalty.

**Principles from the sanction guidelines applied by the Committee**

[153] The Council argued[73], and the Committee's reasons in the Sanction Decision accept, that the relevant principles to be applied were those found in the Sanction Guidelines and those set out in the cases of *Law Society of British Columbia v Ogilvie*[74], and *Law Society of British Columbia v Dent*[75], which set out these classes of factors to consider in imposing a penalty:

- Nature, gravity and consequences of conduct
- Character and professional conduct record of the respondent
- Acknowledgement of the misconduct and remedial action
- Public confidence in the legal profession including public confidence in the disciplinary process

[154] In its reasons, the Committee referred to what it said was a variety of mitigating and aggravating factors. It noted the submissions of the Council and those of Mr. Bratch. In making its decision, the Committee merely stated that it had accepted the submissions of Council. The Committee also stated that it was largely unpersuaded by the Respondents' submissions concerning the nature and extent of their conduct. The Committee's findings before it imposed a penalty were[76]:

> With respect to the Respondents not targeting homeowners in foreclosure, they may have sent their mailings out to a broad audience, but the recipients interested in the rent-to-own arrangement would be those homeowners facing financial difficulties.
>
> The values of homes as assessed by the BC Assessment Authority was, in the absence of the parties providing better evidence, the best available indicator of property values.
>
> The common nature of a written option to purchase does not address the larger issue of a licensee having owners enter into rent-to-own arrangements without having clarified his role as adverse to the owners and failing to recommend independent legal advice.
>
> The arrangement relating to the Lombard Property terminated due only to fortuitous legal advice from lawyers retained to carry out an arrangement after the owner signed agreements without independent legal advice. Furthermore, Mr. Bratch and his wife filed a Notice of Civil Claim seeking

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[73] AR Vol 8, Tab 5 Council Submission on Penalty at paras 86-93.
[74] 1999 LSBC 17.
[75] 2016 LSBC 5.
[76] Sanction Decision at para 29.

> specific performance or damages. The fact that the arrangement did not complete does not address the conduct at issue.

[155] The Committee has already addressed the circumstances surrounding the Silverthorne Property by declining to find conduct unbecoming a licensee by Mr. Bratch, or misconduct and conduct unbecoming by the Brokerage. These circumstances do not, however, eliminate the Committee's finding of professional misconduct by Mr. Bratch. These factors were not further analyzed. Nevertheless, in the Sanction Decision, the Committee made findings about Mr. Bratch's conduct[77]. The Committee referred to the requirement in *Dent* that it should consider the nature and gravity of the misconduct, including the vulnerability of affected persons, or the general public, e.g., due to lower sophistication, or to a relationship of trust. The Committee found that the Appellants took advantage of the Owners for their own benefit and did not clarify their position, nor did the ensure that they were separately represented before documents were signed.

[156] Concerning Mr. Bratch's character and professional conduct record, the Sanction Decision agreed with the Council that this factor should be given little weight, given the nature and gravity of the misconduct. However, no factors were identified by the Committee that particularly differentiated the behaviour here from other sanctioned behaviour.

[157] While the Committee relied on *Dent* to examine the factor of whether Mr. Bratch had failed to acknowledge the misconduct and take remedial action, the Committee noted "no finding by the Committee that Mr. Bratch has taken responsibility for his actions or expressed any remorse or accountability for his misconduct."[78]

[158] In respect of this comment, I observe that there appears to have been no consideration of the extent of Mr. Bratch's admissions of misconduct that are contained in his agreement to a 10-page statement of agreed facts that later caused the Committee to comment:

> Most of the facts relating to the Properties and the RTO Scheme are not in dispute. Furthermore, the legality of Mr. Bratch's conduct, apart from the standards and rules applied by the Council to licensees, is not at issue.[79]

[159] In addition, Mr. Bratch was partially successful in his defense of the charges. This was recognized by the Committee in its assessment of Enforcement Expenses of 78% of total. However, this requirement of the Council that Mr. Bratch must acknowledge his own "wrongdoing" appears to be at odds with both his right to defend himself and his limited success in doing so.

[160] The Committee reached a conclusion that the Appellants had reduced public confidence in real estate licensees and accepted that as an aggravating factor in the disciplinary penalty.

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[77] Sanction Decision at paras 21- 24.
[78] Sanction Decision at para 22.
[79] Liability Decision at para 29.

[161] The Committee determined that, Mr. Bratch's conduct amounted to professional misconduct in all cases and that it amounted also to conduct unbecoming in the Rogers and Lombard cases.

**Suspension**

[162] The Appellants argued that the extent of the suspension already imposed by the Order in Urgent Circumstances should be considered when imposing a further penalty. Mr. Bratch submitted that the suspension already served by himself and the Brokerage should be sufficient, as their licenses were suspended on October 30, 2017[80]. The Committee declined to apply what it characterized as a "mathematical formula" to the issue but said that "a prohibition against Mr. Bratch reapplying for a substantial period is appropriate"[81], and then in July 2021, imposed a further one-year prohibition. The effect is that the licenses have now been suspended for almost five years

[163] It is my view that accounting for the number of years that the Appellants had already been suspended is an appropriate consideration and does not require some complicated mathematical analysis. At the time of the Sanction Decision the Appellants had already been suspended for almost four years. The precedents cited by Council in their submissions set out a range of suspensions in similar cases in both the Old and New Penalty Regimes, which Council submitted "in some cases ranged from a two-month to three-year suspension". The Committee failed to reference or consider any of those cases, nor did it explain why it was appropriate to impose a suspension of one year beyond the approximately four years already served by the Appellants. No cases were advanced by the Council that imposed a suspension of more than 120 days[82].

[164] The Appellants did not appeal the Order in Urgent Circumstances and accordingly the appropriateness of that penalty is not before me. However, it is my view that a suspension of three years and nine months (like that served by the Appellants by the time the Sanction Decision was rendered) is likely an excessive penalty to be imposed on the Appellants. In my view, an appropriate penalty in this case would be a suspension of three years. I base this finding on a review of the cases, in particular, the case of *Parsons (Re)*[83]*,* where the FST substituted a suspension of 20 months, a case that has facts that are much worse than those presented in these matters. However, *Parsons* involved only one individual and there are three other parties here.

[165] Many cases advanced were as the result of consent orders and thus do not amount to precedents. For example, the Council relied on *Parente (Re)*, 2018 CanLII 122721 (BC REC)[84] where Mr. Parente engaged in conduct unbecoming in relation to repeated instances of inappropriate and offensive communications, inappropriate and unprofessional conduct (including comments of an offensive,

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[80] Sanction Decision at para. 28.
[81] Sanction Decision at para 30.
[82] *Su (Re)*, 2017 CanLII 73797.
[83] Decision, December 12, 2014.
[84] AR Vol 8, Tab 5 Council Submission on Penalty at paras 152-3.

racial, and sexual nature), and further repeated communications that were unwanted and of a harassing nature. His actions were part of a pattern of conduct directed at numerous different individuals (both while providing real estate services and outside the provision of real estate services) over a 3-year period. He entered a consent order where he was prohibited from applying for relicensing for 21 months. The Council acknowledged that while the conduct in *Parente* is not similar to that in the present case, the three-year licence prohibition period illustrates how the Council considers the harm and potential harm to the public when assessing penalty.

[166] While most precedents for conduct unbecoming are in the Old Penalty Regime, there are two recent New Penalty Regime cases: *Li (Lee) (Re),* 202O CanLII 103122 (BC REC), resulted in a three-month suspension and a $15,000 fine. In the case of *Dolecki (Re),* 2020 CanLII 107020 (BC REC) a fine of $25,000 was imposed as well as a suspension of two months.

[167] The Council submits that Mr. Bratch's conduct in relation to the Lombard Property is much more serious than both the *Li* and *Dolecki* cases. Those cases did not involve a licensee taking advantage of a vulnerable consumer who was in a relationship of trust. None of the cases involved situations where there was more than one client involved. The Council argued that there were three similar transactions is justification for an increased penalty.

[168] Notwithstanding that, I have set aside the one-year suspension imposed by the Committee, thus reducing the overall suspension period to three years, the Appellants have now had their licenses suspended for almost five years. As a way to account for this significant difference and the impact it must have had on the Appellants, I shall consider it when reviewing the overall sanction imposed.

### Fine

[169] I agree with the reasoning in *Bridge Tolls* and *Xing* where a suspension was considered to be the most important penalty to be imposed. In my view, the appropriate penalty here is a three year suspension with no fine. Accordingly, the Fine is set aside in its entirety, and the overall penalty is varied accordingly.

[170] I would also add that the loss of income that must have occurred in that part of the suspension that has now been overturned is another factor in support of the elimination of the Fine. In that respect, I note that the Order in Urgent Circumstances highlighted the need to address these issues within one year, and there is no suggestion that the Appellants were in any way responsible for the delays that occurred which extended the time they were unlicensed.

### Relicensing

[171] Finally, the Sanction Decision requires the Appellants to fully pay[85] the enforcement expenses and the fine before the licenses will be reinstated. Given the circumstances highlighted by the Appellants, I vary that order to a requirement that

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[85] Sanction Decision page 12 para 30(c)(iii)

the licenses shall be reinstated upon an undertaking by the Appellants to pay the outstanding enforcement expenses within one year from the reinstatement of the licenses. The condition to complete the educational requirements prior to reinstatement is upheld.

## CONCLUSION

[172] The Sanction Decision is set aside in part and the following penalty is imposed:

- The requirement to successfully complete the Real Estate Institute's Ethics in Business Practice course prior to being eligible for relicensing is upheld.
- The Committee's decision to assign enforcement expenses of $50,000 is upheld. The requirement to pay the enforcement expenses prior to relicensing is varied to provide that the enforcement expenses must be paid within one year of being relicensed.
- The additional one-year suspension imposed by the Committee is set aside, and a suspension of three years, inclusive of the Order in Urgent Circumstances, is substituted. For greater clarity, the Appellants' suspension is limited to the three years and nine months already served pursuant to the Order in Urgent Circumstances, and they are eligible to be reinstated immediately upon completion of the remaining conditions.
- The fine of $45,000 is set aside in its entirety, and no additional fine is imposed.

"Catherine McCreary"

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Catherine McCreary
Member, Financial Services Tribunal

September 9, 2022