BRITISH COLUMBIA

Financial Services Tribunal

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DECISION NO. 2012-FIA-002(a)

In the matter of an appeal under section 242(1) of *the Financial Institutions Act*, R.S.B.C. 1996, c. 141.

BETWEEN:	Mohamed Alie Jalloh	**APPELLANT**
AND:	Insurance Council of British Columbia Financial Institutions Commission	**RESPONDENTS**
BEFORE:	A Panel of the Financial Services Tribunal Patrick F. Lewis, Panel Chair	
DATE:	Conducted by way of written submissions concluding on November 13, 2012	

APPEARING:	For the Appellant:	Gerhard A. Pyper, Counsel
	For the Respondent Council:	David T. McKnight, Counsel
	For the Respondent Commission:	Sandra A. Wilkinson, Counsel

INTRODUCTION

[1] This is an appeal of an Order of the Insurance Council of British Columbia dated May 17, 2012, by which a licensee's general insurance licence was "cancelled for four years" and he was ordered to pay investigative and hearing costs totalling $28,547.46.

[2] I will refer to the licensee in this case, Mohamed Alie Jalloh, as the Appellant. I will refer to the Insurance Council of British Columbia, in its capacity as a party to this appeal, as the Respondent, though in its earlier investigative capacity in this matter as Council. Finally, I will refer to the three person panel that presided over the hearing below as the Hearing Committee.

[3] The Order below was made pursuant to sections 231 and 241.1 of the *Financial Institutions Act*, RSBC 1996, c. 141 ("the *Act*"), meaning that an appeal may be taken to the Financial Services Tribunal pursuant to section 242(1)(a) of the *Act*.

[4] The powers of this tribunal on such an appeal are set out in section 242.2(11) of the *Act*:

> **"242.2**
> **(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."**

[5] As is generally the case in these matters, the submissions made by the parties to the appeal have been entirely in writing, consisting of an initial submission by the Appellant, a submission by the Respondent, and a reply by the Appellant. That part of the process was complete on September 24, 2012. Pursuant to section 242(3) of the *Act* the Financial Institutions Commission (FICOM) is a party to an appeal of a decision of Council to the tribunal. FICOM appeared by counsel on the appeal and adopts and relies upon the entirety of the submissions submitted by the Respondent.

[6] On November 6, 2012, I requested further submissions on the narrow question of the meaning of the four year cancellation of the Appellant's licence, as ordered by Council. By November 13, 2012, those supplementary submissions had been provided.

[7] The background facts include the following.

[8] The Appellant was first licenced as a level one General Insurance Salesperson in June 2005. He was upgraded to a level two General Insurance Salesperson in June 2007.

[9] In May 2011 the Insurance Corporation of British Columbia ("ICBC") advised Council that the Appellant had inappropriately accessed the ICBC database system on June 28, August 4 and September 21, 2010, and had viewed personal information pertaining to a person with the initials YB. This resulted in Council's investigation of the Appellant.

[10] During that period of June to September 2010 the Appellant was facing criminal proceedings relating to an alleged assault upon YB, who was his former girlfriend. Within those proceedings he had given an Undertaking not to communicate directly or indirectly with YB. That Undertaking was in place during the alleged wrongful access of the ICBC database.

[11] Following its investigation, on November 17, 2011, Council issued an Order pursuant to section 231(1) of the *Act* resulting in a condition being placed on the Appellant's general insurance licence, prohibiting direct or indirect access to the ICBC database and requiring him to be directly supervised by the nominee of any insurance agency he represents.

[12] On December 14, 2011, Council gave an Intended Decision pursuant to section 237(2) of the *Act*, in relation to allegations that the Appellant failed to act in a trustworthy and competent manner, in good faith and in accordance with the usual practice of the business of insurance by:

a) improperly obtaining a third party's confidential information from ICBC's database without the third party's consent; and

b) improperly obtaining a third party's confidential information from ICBC's database during a period when he was subject to an undertaking with the Royal Canadian Mounted Police to abstain from communicating either directly or indirectly with the same third party.

[13] The Intended Decision provided that the Appellant's general insurance licence would be cancelled for two years and that he would be required to pay Council's investigation costs of $1,125.

[14] The Appellant did not accept the Interim Decision but rather exercised his right under section 237(3) of the *Act* to require a hearing.

[15] The hearing occurred on February 15, 16 and 17, 2012. Council called seven witnesses, including an ICBC analyst, an ICBC investigator, two members of insurance agencies where the Appellant had worked, two Council investigators, and YB. The Appellant called a single witness, being a car salesman who had had dealings with the Appellant and YB, and whose Affidavit was in evidence. An Affidavit of a co-worker of the Appellant was also in evidence.

[16] The record before the Hearing Committee, all of which is before this tribunal together with the transcripts of the *viva voce* evidence at the hearing, included numerous documents.

[17] The Hearing Committee found that the Appellant accessed the ICBC database and in particular YB's personal information thereon, without her consent and for reasons other than to conduct an insurance transaction, on each of June 28, August 4 and September 21, 2010. While the Appellant did not testify before the Hearing Committee, it was found that in interviews of him by an ICBC investigator and then Council investigators he acknowledged having accessed YB's personal information on the database on those dates. His explanation was that he did so on June 28, 2010 as he was trying to learn YB's address so he could return apartment keys to her, and did so on August 4 and 21, 2010, at her request relating to insurance coverage.

[18] The Hearing Committee reported to Council and recommended that the Appellant's general insurance licence be cancelled for four years and that he pay investigative and hearing costs in the aggregate amount of $28,547.46. Council accepted the recommendation and made an Order accordingly.

ISSUES ON APPEAL

[19] While the Notice of Appeal filed June 18, 2012, lists eight separate grounds of appeal, only some of those were taken up in the Appellant's subsequent written appeal submission. I agree with counsel for the Respondent that those grounds not pursued in submissions must be taken as having been abandoned.

[20] The Appellant's submissions are made pithily, with minimal reasoning or development. From his Notice of Appeal and appeal submissions, I extract the following positions:

(a) he was denied natural justice, and/or the Order cannot be supported, given that:

(i) Council's case was based on hearsay evidence in the form of unsworn statements by the Appellant; and

(ii) the Hearing Committee wrongly drew a negative inference from the Appellant's failure to give evidence before it.

(b) the Hearing Committee erred and was punitive in taking into account the Undertaking given by the Appellant to a peace officer, which he did not breach; and

(c) the four year "suspension" is "shocking and manifestly inappropriate in the circumstances".

STANDARD OF REVIEW

[21] The Appellant has said nothing of standard of review, either in his initial appeal submission or in his reply.

[22] The Respondent submits that the applicable standard on the issues raised on this appeal is reasonableness. Citing *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 and *Brewers' Distributor Ltd. v. Brewery Winery and Distillery Workers, Local 300 and Superintendent of Pensions* (Financial Services Tribunal) 2010-PBA-001, it argues that the issues on appeal are a combination of law and fact with elements of discretion and were within the expertise of the Hearing Committee, thereby calling for a measure of deference.

[23] It may be argued that the language of "correctness" and "reasonableness" is not really apt when the issue involves the assessment of natural justice and procedural fairness: *Djakovic v. British Columbia (Workers Compensation Appeal Tribunal)*, 2010 BCSC 1279 at para. 37. The issue is simply whether the procedure was fair in all the circumstances, taking into account the various factors outlined in *Baker v. Canada*, [1999] 2 S.C.R. 817. I do not need to finally decide that point in this case, mainly because I do not think the error on this ground is properly characterized as being an error of natural justice. In asserting that the evidence was hearsay and an adverse inference was wrongly drawn from his failure to testify, the Appellant's underlying point must be that the evidence did not support the Order made, a position in my view that attracts a reasonableness standard. In advancing that position the Appellant cites mixed fact and law, as the Respondent has submitted.

[24] Similarly, and while the Appellant in the opening part of his first appeal submission refers to constitutional principle in relation to the importance of livelihood, he does not develop a constitutional argument at all (leaving aside whether one could even be available), and must be taken to simply be emphasizing the deprivation he suffers by the cancellation of his insurance licence; certainly, he does not even in that opening statement challenge the constitutionality of the

provisions of the *Act* permitting such cancellation. I take those opening words to amount to an attack on the four year period that is the subject of the Order made, which is indeed one of the positions he takes on appeal. The appropriateness of the penalty was a matter within the discretion of the Hearing Committee and, at least in the absence of any submission of the Appellant to the contrary, is one I will regard as subject to the reasonableness standard of review.

[25] Accordingly, I accept the Respondent's submission that the reasonableness standard is to be applied to all issues pursued on appeal.

SUBMISSIONS ON APPEAL

[26] I will take the Appellant's submissions in turn.

(a) Whether Decision Based on Hearsay Evidence

[27] At paragraph 9 of the Appellant's primary appeal submission, it is stated that:

> **"The Insurance Council essentially found the appellant guilty on hearsay evidence derived from interviews by an ICBC investigator and Council investigators".**

[28] In his reply submission, the Appellant argues that where a tribunal relies almost entirely on hearsay evidence to reach its decision it will generally breach the duty of fairness, citing *Bond v. New Brunswick (Board of Management)* (1992), 95 D.L.R. (4th) 733, 8 Admin. L.R. (2nd) 100.

[29] I pause to note that I have taken the Appellant's entire reply submission into consideration, even though much or all of it is not proper reply as it simply furthers his primary argument with little relation to the submission made by the Respondent.

[30] The threshold difficulty with the Appellant's hearsay argument is that the statements he himself made to investigators prior to the hearing would, certainly as a matter of general practice, be considered admissible in evidence, given that he is a party to the proceeding. It may be that a question of voluntariness could arise but this was not raised on appeal (nor do I suggest it would have been a meritorious argument; I note it was attempted before and rejected by the Hearing Committee). But to suggest that the Appellant's own pre-hearing statements, sworn or unsworn, could not amount to proper evidence at the hearing is fundamentally mistaken. While there may be some debate as to whether a pre-trial (or pre-hearing) admission by a party constitutes hearsay at all or, rather, should be seen as an exception to the hearsay rule, it is well-entrenched in our law that such voluntary statements are admissible in a subsequent trial (or hearing) against the party who made them. The point has been summarized as follows:

> **"6.396 Traditionally, out-of-court assertions made by a party to the proceedings have been regarded as admissible at the instance of the opposite party as an exception to the hearsay rule. …**
>
> **…**
>
> **6.398 Although there is a consensus among the noted writers on the subject of evidence that an admission constitutes admissible evidence, they disagree as to its rationale and its use. According to Morgan, admissions properly fall within an exception to the hearsay rule because *prima facie* they fit within the definition of hearsay, being out-of-court statements, not subject to cross-examination, and introduced as evidence of the truth of the facts contained therein. He added that an exception is justified, not on the usual ground of trustworthiness, but because of the general adversary theory:**
>
> **The admissibility of an admission made by the party himself rests not upon any notion that the circumstances in which it was made furnish the trier means of evaluating it fairly, but upon the adversary theory of litigation. A party can hardly object that he had no opportunity to cross-examine or that he is unworthy of credence save when speaking under the sanction of an oath.**
>
> **Wigmore, on the other hand, does not think that any exception is necessary to permit admissibility of admissions because the mischief, which the hearsay rule was designed to prevent, is non-existent. Wigmore's and Morgan's reasonings, however, follow the same pattern. *The main objection to hearsay evidence is that the declarant is not in court under oath and not subject to cross-examination. It is illogical to suggest that it is objectionable for the admission to be received because there is no opportunity to cross-examine the declarant. If the party made the statement, the party cannot argue that he or she has lost the opportunity of cross-examining himself for herself, nor complain about the lack of personal oath. Moreover, it is always open to that party to take the witness box and testify either that he or she never made the admission or to qualify it in some other way.* Strahorn articulated a different basis of admissibility. To him, admissions are evidence of conduct and are offered as circumstantial, rather than assertive, evidence. These theories are not mutually exclusive. Elements of trustworthiness and the adversary theory and original evidence all combine together to justify the reception of this kind of evidence."**
>
> **Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3rd ed., 2009, at pages 361-363 (emphasis added)**

[31] To demonstrate that the Hearing Committee erred in admitting the investigators' evidence of what they had been told by the Appellant himself would have required a careful and very convincing legal analysis, and certainly more than what has been presented on this appeal.

[32] Whether to take the stand at the hearing, and perhaps explain, place in context, elaborate on or distance himself from the statements he had made to the investigators, was entirely the Appellant's prerogative. He appears to assert on

appeal that Council was required to call him as a witness to rectify the hearsay nature of his pre-hearing statements; if indeed he makes that submission, I reject it. Assuming that Council had the right to compel the Appellant to testify, which I think likely but is a point I need not decide, there is no basis for asserting its obligation to do so – not even a practical obligation, in the sense of what was needed to prove its case, given the clear admissibility of the Appellant's out-of-hearing statements (again, short of a problem with voluntariness) through the evidence of others.

[33] In light of my conclusion on this issue, I do not need to consider the abilities of a tribunal such as the Hearing Committee to admit pure hearsay evidence, though I agree with the Respondent that the law generally affords an administrative tribunal greater flexibility on that score than it does the Courts.

(b) Whether Adverse Inference Drawn

[34] As stated, the Appellant argues that the Hearing Committee erred in drawing an adverse inference from his failure to testify. The first question to consider is whether it in fact drew such an inference.

[35] The following are the Hearing Committee's references to the Appellant's failure to testify (I note that Mr. Elworthy was the Appellant's counsel below):

> **"With regard to the evidence provided by the ICBC investigator and Council investigators concerning their respective interviews, *Elworthy presented no evidence to explain or refute the Licensee's statements to the investigators. …* (at page 6).**
>
> **…**
>
> **"Elworthy's principal argument was the third party was the instigator in this matter and she was trying to get even or frame the Licensee. Elworthy also implied the third party had attempted similar actions previously with another boyfriend. *Unfortunately, Elworthy provided no evidence to support this premise and elected not to have the Licensee give evidence directly at the Hearing* (at page 7).**
>
> **…**
>
> ***The Hearing Committee heard no direct evidence from the Licensee to explain his statements to ICBC and Council.* In fact, the position put forward by the Licensee was that he was deceived by the third party into accessing her data, in a plot by the third party to get even with him. *Unfortunately, the Licensee elected not to testify at the hearing,* resulting in the Hearing Committee being left with two different scenarios: one scenario supported by the testimony of a number of witnesses, and another implied by the Licensee (at page 8).**
>
> **…**
>
> ***The Hearing Committee wished it could have heard directly from the Licensee, particularly in light of the compelling evidence presented against him.* Based on the above, the Hearing Committee found the Licensee had accessed the third party's personal information on ICBC's**

> **database, without the third party's consent and for reasons other than to conduct an insurance transaction. While such access was inappropriate, it was even more egregious because the Licensee was the subject of a voluntary restraining order (at page 8).**
>
> **…**
>
> **In making reference to the hearing costs, the Hearing Committee acknowledged the Licensee was subject to a 238 Order. Under these circumstances, Council has generally been reluctant to assess hearing costs*. In this matter, the Hearing Committee found the Licensee provided no evidence which assisted to a better understanding of the events that resulted in the Intended Decision, nor had he acknowledged the seriousness of his actions.* Instead, the Licensee chose to suggest or imply other motives were at play, without producing any credible evidence to support his position (at page 10).**
>
> ***The Hearing Committee felt this failure on the part of the Licensee to make a reasonable case* should have bearing as to whether he should be assessed some or all of Council's hearing costs. If Council decides hearing costs should be assessed, additional time should be given to both parties to make submissions on hearing costs" (at page 10).**
>
> **(emphasis added)**

[36] The Respondent's submission on this issue is twofold. First, citing *O'Connell v. Yung*, 2012 BCCA 57 it argues it is permissible for a Court or tribunal to infer that the reason a party has not testified is that their evidence would have harmed their case. Second, it argues that, even though the Hearing Committee in this case therefore may have been permitted to draw that inference, it in fact did not do so, but rather was simply commenting on the practical circumstance in which it was left on the available evidence given the Appellant's failure to testify.

[37] I agree with the second of these points. There is no proper basis for concluding that the Hearing Committee inferred the Appellant's evidence would have harmed his case. It expressed plainly enough that it would have preferred the Appellant to have testified, but that is not the same as suggesting that his evidence would have been contrary to his interests. Where an adverse inference from a failure to testify is drawn, the language to that effect is typically plain and unmistakable. There is no such language here.

[38] The Hearing Committee observed that the Appellant's defence "… consisted primarily of an argument that there was a conspiracy to frame him" (page 7). As can be seen from the above excerpts, the position taken by the Appellant's counsel at the hearing (who is not his lawyer on this appeal) was that YB instigated this matter and was behind the alleged framing. It was in that context that the Hearing Committee noted more than once the Appellant's failure to testify or, indeed, to call any evidence to support this defence theory. In light of the evidence against the Appellant in this case, one can readily see that such a theory would have needed persuasive evidence from the defence side, and very likely from the Appellant himself in order to be seriously entertained. As it was, the only witness called by

the defence was a person who spoke of YB's demeanour during discussions around the purchase of a car, and if the transcript is anything to go by, this evidence did nothing to advance the defence.

[39] I reject the Appellant's argument that the Hearing Committee drew an adverse inference from his failure to testify. Therefore, the question of whether it did so wrongly, of which I would have serious doubt, does not arise.

(c) Undertaking to the RCMP

[40] The Appellant submits that the Hearing Committee was punitive and improper in its references to his access to the ICBC database occurring after he had undertaken to a peace officer to refrain from direct or indirect contact with YB.

[41] The findings of the Hearing Committee include the following:

> **"The Hearing Committee found the evidence and testimony to be overwhelmingly against the Licensee. The Hearing Committee found the Licensee did or attempted to access the personal information of a third party for reasons other than to complete an insurance transaction on three separate occasions. These attempts, while serious in themselves, were even more serious as the Licensee was subject to a voluntary undertaking not to have any direct or indirect contact with the third party."**

[42] Similar statements are made at two later points of the Reasons, the last being in the context of penalty.

[43] The Respondent argues in part that the Hearing Committee did not express any finding that the Undertaking had been breached. I agree that it did not do so.

[44] It did, however, regard the existence of the Undertaking, even if not breached, as an aggravating circumstance in considering the Appellant's wrongful actions in accessing information about YB.

[45] I do not think it unreasonable for the Hearing Committee to have viewed the matter in that way. Indeed, I believe it was correct to do so. While the Undertaking is certainly no proof in itself that the Appellant had previously acted inappropriately in relation to YB, it was an important interdiction, closely related in time and subject matter to the wrongful accessing of YB's personal information, and it called for particular circumspection on the part of the Appellant. No argument has been directed to whether accessing YB's personal information on the database could amount to an indirect attempt to contact her, or could have been a precursor to contact or attempted contact with her, but the Undertaking and the wrongful access are not such distinct events that it was unfair to consider them alongside each other. Counsel for the Respondent rightly points out that the requirement of trustworthiness in a licensee extends beyond insurance business activities, as set out in section 3 of Council's Code of Conduct. The Undertaking and the dissolution of the relationship between the Appellant and YB were part of the immediate backdrop to his having thrice wrongfully looked at her confidential information in

breach of his professional duties. The tribunal members were entitled, and indeed should be expected, to consider such circumstances surrounding the Appellant's improper actions.

(d) Cancellation for a Fixed Term

[46] The crux of the Order made by Council following the report of the Hearing Committee was that the Appellant's general insurance licence be "cancelled for four years". The Appellant submits on appeal that the initial determination in the Interim Decision of a two year "suspension" (it was in fact said to be a cancellation) should not have been changed, and that four years is shocking and manifestly inappropriate.

[47] In its discussion of penalty the Hearing Committee referred to three prior decisions made by Council, being *Derek David Henneberry*, May, 2007, *Jagjit Singh Cheema*, July, 2006, and *Meredith Holly Phendler*, May, 2009, all involving wrongful access to the ICBC database by a licensee where the resultant order was that the licence was cancelled for a minimum period of two years. The Hearing Committee noted that those matters all featured a single instance of wrongful access, in contrast to the present case which involved three such incidents. It also referred to the Undertaking not to have contact with YB and to the Appellant's refusal "to acknowledge his actions and failure to give evidence of remorse or appreciation for the seriousness of what he had done" (at page 10).

[48] The Respondent refers additionally in its submissions to Council's decision in *Jaswinder Singh Gill*, March, 2011, also involving a single instance of wrongful access to the ICBC database, and where an Order was made for a one year licence suspension.

[49] In the present case the language used by both the Hearing Committee in its Reasons and Council in its Order is different from that used in these prior decisions, and not simply in relation to time period. Relative to the other authorities mentioned, the notion of a cancellation of licence for a fixed period is unique. The Hearing Committee had recommended that Council consider a four year licence cancellation without discussion of where the matter would stand at the end of that term. Council followed that recommendation, ordering simply that the Appellant's licence be cancelled for four years from the date of the Order, without elaboration. All of this contrasts with the language used in *Henneberry, Cheema and Phendler*, where the Order referred to cancellation for a minimum period, and that in *Gill* where the Order called for a one year suspension.

[50] In their main submissions on this appeal both parties referred to the Order below being for a suspension rather than cancellation. The Respondent, for instance, submitted (at its paragraph 83) that the "… 4 year suspension is reasonable in the circumstances".

[51] Certain questions arise from this, the most important being whether the effect of Council's Order is that the Appellant would again be licenced at the expiry of the four years, or perhaps would simply be eligible to seek reinstatement. The

point is of course important to the parties and it is one that needs to be clear as this appeal is adjudicated. For instance, the point needs to be clear when the penalty imposed upon the Appellant is considered against those imposed upon other licencees in relevant prior cases. Accordingly, I gave the parties the opportunity to make a supplementary submission in relation to the meaning here of the four year cancellation.

[52] The Appellant's position is that the Order made should be construed as a four year suspension, as both parties seemed to do when making their initial appeal submissions. He submits that the four year time limitation clearly indicates a temporary state of affairs, and the absence in the Order of reference to a minimum period (as, apparently, occurs in some cases) and any need for the Appellant to reapply for his licence means that, when the four years has elapsed, he must be placed in the position he was in before the Order was made. The Appellant argues that it would be wrong and speculative to add restrictions to the Order that Council itself did not impose.

[53] The Respondent submits that Council's decision to cancel rather than suspend the Appellant's licence indicates it wishes the Appellant to have to reapply for his licence at the end of the penalty period, and that he will then have to demonstrate that he meets Council's education requirements. It also submits that the Appellant's suitability would need to be considered, though this would be limited to conduct occurring following Council's decision and Order. In contrast, the Respondent says that a suspension of the Appellant's licence would have entitled him to automatic reinstatement at the end of the period of suspension, provided he had made his annual filings and fulfilled his continuing education requirements. However, in the Appellant's favour, the Respondent states that the absence of reference to a minimum period means that a re-application by the Appellant would not have to be brought before Council for approval unless new information calls his suitability for licencing into question. Short of that, a re-application could simply be processed by Council staff in accordance with general licencing requirements.

[54] The Respondent did not comment in its supplementary submission on why in its main appeal submission it referred to a four year suspension of the Appellant's licence, but clearly it does not maintain that characterization.

[55] The cancellation Order in this case was made pursuant to section 231 of the *Act*. In particular, section 231(1)(g) confers power on Council to "suspend or cancel the licence of the licencee". While neither counsel referred to them, since inviting submissions on the meaning of the four year cancellation I have noted subsections 231(2) and 231(3.1), which provide:

> **(2) A person whose licence is suspended or cancelled under this section must surrender the licence to the council immediately.**
>
> **…**
>
> **(3.1) On application of the person whose licence is suspended under subsection (1)(g), the council may reinstate the licence if the deficiency that resulted in the suspension is remedied".**

[56] Looking at those subsections together, it is clear that a licence surrendered as a result of suspension may on application by the licencee be reinstated, assuming the deficiency resulting in the suspension is considered to be remedied. There is no provision, however, to seek reinstatement of a licence surrendered as a result of cancellation. That makes sense, given that the ordinary meaning of the word cancellation would connote that the thing ceases to exist. The notion of cancellation for four years seemed on its face internally contradictory, which is in part what prompted my invitation for supplementary submissions.

[57] Based on this case and at least three earlier cases, it is clear that there is a practice by which Council sometimes orders cancellation of insurance licences for particular time periods, whether minimum or, as in this case, fixed. With respect, I would have preferred that counsel discuss in their supplementary submissions how the legislation, and in particular section 231 of the *Act*, bears on that practice. Their not having done so, and in the absence of full submissions on the point, I am reluctant to make a general pronouncement that Council's practice in this regard is flawed. Perhaps, for instance, while it appears from section 231 that a cancelled licence cannot be reinstated, a person whose licence has been cancelled can apply afresh for another licence, and perhaps what Council is indicating in these types of Orders is that it will not permit such an application until a certain time period has passed. If that is the intention in these Orders, in my view the language should plainly reflect that. Indeed, I respectfully recommend that Council review its practice in this regard, consider whether such Orders are compliant with the legislation and, if they are considered to be, henceforth use clear language to convey to licensees the effect of any such Order made.

[58] With respect, I do not find either of the supplementary submissions especially helpful. Firstly, in submitting that he is entitled to automatic reinstatement at the end of the four years as the Order was effectively for a suspension, the Appellant does not address section 231(3.1) which, regardless of the ultimate view taken of its meaning, must enter the discussion.

[59] Secondly, I cannot accept the Respondent's argument that the Appellant is required to reapply for "his licence" at the end of the penalty period, as the legislation does not seem to recognize reinstatement of a cancelled licence, at all. Further, while the Respondent contrasts cancellation with suspension, submitting that the latter would entitle a licensee to automatic reinstatement at the end of the term (subject only to annual filings and continuing education), like the Appellant the Respondent does not account, one way or another, for the language of section 231(3.1).

[60] I say "one way or another" because it occurs to me that section 231(3.1) may possibly be applied in different ways. Council may consider at the end of a suspension term whether the deficiency that led to the Order has been remedied. Alternatively, Council may do that at the onset, immediately determining the passage of time needed for remediation of the deficiency to occur, presumably meaning that, subject perhaps only to administrative matters, an effective right to reinstatement would arise when the time expired.

[61] In other words, it may well be that the consideration of remediation pursuant to the section can occur prospectively or retrospectively. I deliberately use tentative language here as I have not had the benefit of argument on the point.

[62] What *has* been stated in argument here is the position of Council that a somewhat limited inquiry is intended in this case as to the Appellant's suitability for reinstatement when the four years have passed; that is a simple paraphrase of the supplementary submission of the Respondent described in paragraph 53 above. This suggests a review less comprehensive than what I expect could be undertaken on the strength of the language of section 231(3.1), and therefore seems more consistent with the view that Council has already determined what is needed here for the Appellant's remediation, rather than reserving to itself the right to do so in four years' time. On the material I have, that is the best interpretation I can give to the matter. While it would be for Council in the end to consider reinstatement as appropriate and within the bounds of its legislative mandate, the Appellant may take some comfort that the supplementary submission of the Respondent on this appeal portends, as I have said, a limited review of that question.

[63] While, again, I will not in these circumstances pronounce on the propriety of Council's practice of sometimes ordering cancellation for a particular period, I will now consider whether the Order to this effect was reasonable in this case.

[64] I have concluded it was not reasonable to so order in this case and that a suspension should be substituted here for cancellation, for these reasons:

a) licence cancellation for four years, to the extent the phrase contemplates possible reinstatement of a cancelled licence, appears inconsistent with section 231 of the *Act*;

b) the meaning of a licence cancellation for four years is at best unclear and this term of the Order is therefore problematic;

c) as explained above, I cannot accept either of the parties' supplementary submissions attempting to clarify the point; and

d) an Order for suspension will be much clearer in its articulation and implementation than the Order made.

[65] I would vary the cancellation term of the Order accordingly. The remaining question to consider is whether the four year period is reasonable.

(e) Reasonableness of the Four Year Period

[66] I will begin by considering the cited case law in more detail.

[67] In *Henneberry, supra,* the licencee accessed the ICBC database at the request of someone he had known since childhood and who asked him to check on a licence plate of a vehicle he was thinking of purchasing. The licencee did not question the request and provided the information, assuming it would not be used

for an unlawful purpose, despite his knowledge that the other individual had some prior involvement with law enforcement authorities. Also, and entirely separately, the licencee over a period of about two years processed at least seventeen transactions, two for himself and about fifteen for friends and acquaintances, in the form of altered ratings of motor vehicles to improperly avoid the need for an AirCare inspection. Council noted that these transactions prejudiced ICBC and could have been detrimental to the policyholders had claims arisen, as material misrepresentations had been made to the insurer. Council referred to the licensee's conduct as amounting to a serious breach of trust. As in the present case, Council found that the licencee was not forthright when questioned and showed no remorse. In the form of an Intended Decision, Council found that the licencee was not suitable to hold an insurance licence for a minimum period of two years (and that costs be paid). It also noted that, combined with an earlier period in which the licencee did not hold his licence following its cancellation by his employer, the total period in which he would not have a licence would be a minimum of about three years, which Council indicated it hoped would be sufficient for his rehabilitation.

[68] Council in *Henneberry* stated that the facts there were more serious than in *Cheema, supra*. The Hearing Committee in the present case noted that, in *Cheema*, the licencee had accessed ICBC's database to obtain information on a vehicle with the intention of sharing it with an acquaintance known to be involved in criminal activity and further that, while the information was not ultimately shared with that person, this was only because the licencee noticed that the vehicle was registered to ICBC itself. In *Henneberry*, it was noted that the acquaintance in the *Cheema* case had recently been released from prison for a weapons offence and had been convicted of other criminal offences in the past (I note that the parties to this appeal have not submitted a copy of the decision in *Cheema*, other than the decision of the Financial Services Tribunal overturning an initial outright cancellation of the licence essentially due to the lack of reasons given, before remitting the matter for reconsideration by Council).

[69] *Phendler, supra,* also involved a single instance of access to the ICBC database, in that case for the purposes of the licencee herself after she had been involved in a road rage incident. A number of facts were in conflict and the complainant's version of them was accepted over that of the licencee. While the licencee did show remorse, Council thought the matter roughly analogous to the facts in *Cheema*, in part because in both cases the information accessed was not ultimately used.

[70] The misconduct in *Gill, supra,* was clearly less serious, as reflected by the Order for a one year suspension. There, the licencee provided confidential information from ICBC's database to a person to whom a client had introduced him and who said he wanted the information to place a lien on a vehicle. The licencee was not aware of any improper purpose to which the information would be put, had no personal interest in accessing the information, said that he had been caught off guard by the request and was found to be remorseful.

[71] The misconduct in the present case was certainly serious. The Hearing Committee noted the following aggravating factors in relation to the Appellant's behaviour:

(a) he wrongfully accessed the ICBC database on three occasions over a period of roughly three months;

(b) the private information he accessed on those occasions concerned YB, a former girlfriend of the Appellant, after the relationship had ended very badly and while a criminal charge against the Appellant in relation to his behaviour toward YB was pending;

(c) all of that occurred when an Undertaking he had given to a peace officer to refrain from any kind of contact with YB was in effect; and

(d) The Appellant was distinctly lacking in remorse, accusing YB (through counsel) of having framed him, which allegation was baseless.

[72] In considering penalty, the Hearing Committee noted that trustworthiness is a fundamental element of the professional requirements set out in Council's Code of Conduct. It also discussed the need for licencees to adhere to strict standards regarding personal integrity, reliability and honesty, and that it is a cornerstone of the insurance industry that when members of the public provide private information to licencees and insurers, they must be able to do so with confidence that the information will be protected. None of those propositions can be disputed, nor have been disputed by the Appellant.

[73] Apart from challenging the relevance of the Undertaking, a point on which I have already expressed my views in paragraphs 40 to 45 above, the Appellant emphasizes in relation to the four year penalty period that it was a substantial increase over the two year period set out in the Intended Decision, which he chose not to accept. He does not go so far as to say that a hearing panel cannot impose a penalty greater than that contained in an Intended Decision. While the licencee has the undoubted right to reject an Intended Decision and have his or her day in Court, so to speak, what comes with that is the possibility that the hearing committee, which is mandated to render a fair and just decision in light of the evidence and submissions given before it, will ultimately take a sterner view of the licencee's conduct than did Council at the pre-hearing, Intended Decision stage. If there was a rule that a hearing committee could not impose a result less favourable to the licencee than an earlier Intended Decision, there would be little for the licencee to lose (other than time and cost, perhaps) in requiring a hearing, and such hearings would presumably become far more common than they are presently.

[74] In fairness to the Appellant, it should be pointed out that there does not appear to have been any evidence that he actually used the information he wrongfully reviewed on the ICBC database. His reason for accessing the information is unknown, as the explanation he gave to investigators (essentially, to know where to return keys and later at the request of YB) was not accepted by

either the investigators or the Hearing Committee, and there of course was no evidence from the Appellant on the point. Whether reviewing the information was preliminary to intended contact with YB, or arose from mere curiosity as to where she was living, or was driven by some other purpose, is pure conjecture. What is clear, however, is that these reviews were repeated and were serious breaches of duty on the part of the Appellant. His lack of remorse and unfounded allegations against YB at the hearing only compounded matters for him.

[75] But is the four year penalty period reasonable? Based on the prior cases submitted by counsel it would seem to be the high water mark for penalties in matters of this kind. The misconduct in this case is more serious than that in all of the cases cited, with the arguable exception of *Henneberry*, in which the licencee wrongfully accessed the ICBC database on only one occasion but on about seventeen other occasions dishonestly processed altered vehicle ratings. That was, as Council noted in that case, misconduct of a very serious kind, even without the overtones as in this case of criminal assault proceedings and an Undertaking to stay away from the very person whose privacy was violated. Reasonable people could differ over which of the two cases features more egregious conduct.

[76] As indicated earlier, Council in *Henneberry* considered that the cumulative period of time within which the licencee would not be practicing insurance, both before and after the Order was made, was three years. The implication is that but for the pre-Order period without a licence the Order would have stipulated a penalty period of greater than two years. That is consistent with Council's expressed view in *Henneberry* that the facts were more serious than in *Cheema*, where the imposed penalty period was two years. *Henneberry* can fairly be seen as in effect featuring a three year penalty period.

[77] There are two other points of distinction between *Henneberry* and the present case. The first is that *Henneberry* was an Intended Decision, made without the benefit of a full hearing. What would have resulted had there been a hearing in that case is of course unknown. Secondly, the penalty period in *Henneberry* was a minimum, the possibility of a longer prohibition period therefore clearly contemplated. Whether, in the end, the prohibition period would have spanned the intended minimum aggregate of three years, four years or more, is also unknown.

[78] All of that being so, I do not regard the four year period in the present case as necessarily any greater than the penalty period in *Henneberry.* Apart from that, while previous similar cases certainly provide guidance as to appropriate penalty, circumstantial distinctions will always exist; the process of comparing and applying penalties is certainly not, and is not intended to be, a precise exercise. Having taken the guidance offered by those earlier decisions, and on consideration of the circumstances of the present case, including the factors listed in paragraph 71 above, I consider the four year period to be within the bounds of what is reasonable.

DISPOSITION

[79] Accordingly, I confirm the decision of Council in this case except for the variation from a cancellation to a suspension. The paragraph numbered 1 in Council's Order of May 17, 2012 shall therefore be changed to:

> **"1. The licensee's general insurance licence is suspended for four years from the date of this Order,"**

and the balance of the Order is unchanged.

[80] While my present inclination is that no costs of this appeal should be awarded, if either party wishes to make a submission on costs they may do so by December 21, 2012.

"Patrick Lewis"

Patrick F. Lewis, Panel Chair
Financial Services Tribunal

December 7, 2012