Financial Services Tribunal

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DECISION NO. 2014-FIA-001(a)

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

BETWEEN:	Ashish Kulkarni	**APPELLANT**
AND:	Insurance Council of British Columbia Financial Institutions Commission	**RESPONDENTS**
BEFORE:	A Panel of the Financial Services Tribunal Maurice Mourton, Chair	
DATE:	Conducted by way of written submissions concluding on May 14, 2014	

APPEARING:	For the Appellant:	Matthew J. Jackson, Counsel
	For the Respondent Council:	David T. McKnight, Counsel
	For the Respondent Commission:	Sandra A. Wilkinson, Counsel

APPEAL

[1] This is an appeal of an Order of the Insurance Council of British Columbia (the "Council") dated January 14th, 2014, (the "Order") in which the Council imposed the following penalties against the Appellant (also referred to in this decision as the "Licensee"):

1. The Licensee's general insurance licence is suspended for a period of 18 months.
2. The Licensee is fined $1000.
3. The Licensee is assessed Council's investigative costs of $612.50.
4. A condition is imposed on the Licensee's general insurance licence that requires him to pay the above-ordered fine and investigative costs no later than April 14th, 2014. If the Licensee does not pay the ordered fine and investigative costs in full by this date the Licensee will not be permitted to complete any annual filing until such time as the fine and investigative costs are paid in full.

[2] On January 22nd, 2014 the Appellant filled an appeal with the Financial Services Tribunal (the "FST") and was granted, on consent, a stay of the Order pending review by the FST.

[3] The Order above was made pursuant to sections 231, 236, and 241.1 of the *Financial Institutions Act* (the "Act").

[4] The powers of the FST 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 FST have been made entirely in writing, and I have also been provided with the official transcript of the oral hearing held on October 17th, 2013 between the Appellant and the Insurance Council of British Columbia.

[6] Pursuant to section 242(3) of the Act the Financial Institutions Commission ("FICOM") is a party to an appeal of a decision of the Council to the FST. FICOM appeared by counsel on the appeal and adopts and relies upon the submissions of the respondent Council in this matter.

BACKGROUND

[7] In response to an intended decision made by Council on March 12, 2013 after an investigation into allegations that the Appellant improperly accessed information from a database of the Insurance Corporation of British Columbia ("ICBC"), the Appellant requested a hearing pursuant to section 237(3) of the Act. An oral hearing was held by Council before a 3-person panel (the "Hearing Committee") on October 17, 2013. On January 3, 2014 the Hearing Committee submitted to Council a Report of the Hearing Committee (the "Report") outlining its findings and recommended disposition. Council considered the Report at its January 14, 2014 meeting and made the Order now under appeal.

[8] An agreed statement of facts was reached by the parties involved and the facts in this case are not in dispute.

[9] The pertinent details (as set out in the Hearing Committee Report) are:

> The Licensee has been a Level 1 general insurance salesperson ("Salesperson") since August 2009 and during that period has worked for the same insurance agency (the "Agency"). The Licensee is approximately 22 years old and is currently enrolled as a student at Kwantlen University. Since 2009, the Licensee has worked primarily part-time, with periods of full time employment during the summer months.
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> The Licensee accessed the ICBC database for the purpose of determining the type of motor vehicle driven by the ICBC president. In accessing the ICBC database, the Licensee had access to the telephone number and home address of the ICBC president.
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> The Licensee had no interest in the individual personally, he was curious to see what kind of car an ICBC president drove. The Licensee did not have any intention of disclosing any of the information he acquired, nor is there evidence to suggest otherwise.

Shortly after the Licensee improperly accessed the database, ICBC became aware of the access and commenced an investigation. In February 2013 the Licensee, along with the Agency owner and general manager, met to discuss the database access. At that time, the Licensee provided a statement by email to ICBC in which he stated that he was at the Agency office around 5.45 p.m. on the day in question, but he did not admit to accessing the ICBC database.

The following day the Licensee was requested to provide additional information on such things as his user ID and which terminal he uses to complete ICBC transactions. In response to this request, the Licensee provided a statement which addressed these questions, but again did not admit to accessing the ICBC records of the ICBC president.

Around the same time, the Agency commenced its own internal investigation to determine who could have accessed the ICBC database. During this investigation, it was determined that a power outage at the Agency office had occurred at the time of the access, meaning it could not have happened at the Agency office. Once this was determined, the Agency spoke with the Licensee again; reminding him of the power outage and that it was not possible for anyone to have accessed the ICBC database from the Agency location at the time in question. Again, the Licensee did not admit to accessing the ICBC president's information.

Shortly after this discussion, the Licensee's father called the Agency to advise that the Licensee acknowledged that he did access the ICBC president's data. Shortly afterwards, the Licensee acknowledged in writing, that he had looked up the personal information of the ICBC president.

For his part, the Licensee explained that he understood that he could not divulge any client information without a client's consent, but felt there was no harm in accessing the data on the ICBC database as long as he kept it confidential.

The Licensee testified that, as the power was out at the Agency office, he went to one of the automobile dealerships serviced by the Agency with the purpose of completing an ICBC renewal for a friend. He was unable to process the renewal because the vehicle was required to go through AirCare first. While there, he took the opportunity to access the president's information.

When asked why he was attempting to conduct an insurance transaction at a dealership, the Licensee stated he was not aware that, as a Salesperson, he could not conduct insurance transactions at a dealership location if that transaction was not related to a sale of a vehicle at that dealership.

When asked why he had not previously disclosed where he had conducted the transaction, the Licensee stated he was never asked.

[10] The Hearing Committee found that there was no dispute that the Licensee only improperly accessed the ICBC database once for personal reasons, that the Licensee had no intention of disclosing any of the information accessed, that it was not shared with any other individual, and was only accessed to see what type of vehicle was driven by the ICBC president. However, the Hearing Committee nevertheless found that the Licensee's actions represented a significant breach for a person with as much experience as the Licensee.

[11] The Hearing Committee was also concerned that if the Licensee truly believed he had done nothing wrong, why did he go to such lengths to deny the access when asked about it? Accordingly the Hearing committee found that his denials, lack of forthrightness, and his attempts to cover up his actions raised serious flags, seriously brought into question his trustworthiness and his ability to act in good faith and in accordance with the usual practice of the business of insurance and accordingly were serious factors requiring a substantial penalty.

[12] The Hearing Committee considered that there were a number of cases where Council has found similar or more serious conduct occurred but the penalty was limited to fines and conditions. However, the Hearing Committee stated that confidentiality of client information is a cornerstone of the insurance industry that the Insurance Council has been communicating to the industry through Notices and disciplinary decisions. Therefore the Hearing Committee found that a strong message to both the Licensee and the industry in general needs to be sent that breaches are unacceptable and attempts to cover-up, mislead, or lie about one's actions will not be tolerated.

[13] The Hearing Committee found that the cases *of D. Henneberry, J. Cheema,* and *J. Gill* (these cases will be discussed further below) were most representative of this matter and that *D. Henneberry* had "a similar fact pattern".

ISSUE

[14] The sole issue for consideration on this appeal is whether Council could reasonably conclude that the penalty imposed was an appropriate penalty in the circumstances based on the evidence before it. The parties agree that the standard of review in this case under section 242 of the Act is one of reasonableness.

[15] In adjudicating this matter I am cognizant of my responsibility not to retry the case but rather ensure the penalty meets the standard of reasonableness. To support the content of reasonableness I look to the well known decision of the Supreme Court of Canada in *Dunsmuir v New Brunswick,* 2008 SCC 9, [2008] 1 SCR 190 which held:

> 47. Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the justification, transparency and intelligibility within the decision making process. But it is also concerned with whether the decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[16] The standard of review entails some measure of deference to Council's decision below as set out in *Fenelon v. Insurance Council of British Columbia*, FST 08-045, April 12, 2009, at pg. 15:

> The Tribunal should be reluctant to intervene where the sentencing body has turned its mind to the relevant considerations, unless a particular penalty falls outside an acceptable range and there are no extenuating circumstances.

[17] However, as set out by the FST in the case *of Superintendent of Real Estate v. Real Estate Council and Ashworth; Ashworth v. Real state Council and Superintendent,* FST 05-012;05-015, January 31, 2007, the degree of deference owed is less in considerations of penalty than to findings of fact and as to what constitutes inappropriate conduct:

> [59] The penalty imposed should not be disparate with regard to penalties imposed in other cases….While some deference should be afforded the decisions of the Professional Body as indicated by decision such as *Jones*…I note that the consideration of penalty is something done after fact-finding has been completed regarding the conduct of the professional. Nevertheless, I accept that in reviewing penalty, I should not interfere with it, if it is reasonable…
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> [89] …While legislation establishing the Real Estate Council, and other such organizations, created such bodies with a view to them applying their own special expertise to the issues before them, that special expertise extends less to the considerations of penalty in circumstances such as these than to findings as to what constitutes negligence or inappropriate conduct. Moreover, the authority of this Tribunal when determining an appeal is to confirm, reverse or vary a decision under appeal.

SUBMISSIONS ON APPEAL

[18] The Appellant is of the opinion that while the facts of the transgression are not in dispute, the discipline imposed is inappropriate and submits that any licence suspension should be removed and the penalty should be varied as follows:

- A fine of $500
- A requirement that the Licensee take the ICBC's "Privacy Please" course and any other course on ethics Council deems appropriate.
- A requirement that the Licensee not be permitted to apply for a higher level of licence for 12 months
- Pay the investigative costs of Council of $612.50.

[19] To support his argument the Appellant refers to mitigating factors which he submits Council should have given more consideration, namely:

- The Licensee's age (20 years old at the time of the incident), relative inexperience (3 years mostly part time), and low level of insurance licence (Level 1),
- The Licensee's good character before and after the misconduct, as demonstrated by his good work ethic (balancing being a full-time student and working 3-4 days a week) and the evidence that his employer believes the Licensee to be trustworthy and a good employee both before and after the incident; further supported by the Agency continuing his employment during this hearing process,

- The Licensee's lack of training in, lack of knowledge of, and misunderstanding of privacy laws pertaining to access of ICBC records at the time of the incident, which factored into his mistaken belief that it was wrong to disclose private information, but it was not wrong to access it as long as he kept it to himself and thus confidential to others, and
- Other factors which I will summarize as: lack of intent, questionable harm by learning the information he gleaned, his subsequent rehabilitation acts and financial hardship.

[20] In addition, the Appellant submits that Council's reference to prior discipline cases, that in the view of the Appellant are not representative of suitable comparisons for the purpose of establishing like or defensible penalties, was unreasonable.

[21] The Respondents on the other hand make a case that this is a serious breach of confidentiality, compounded by the devious behavior of the Appellant, following discovery of the incident in which he purposely misled the investigation. Also the Respondents submit that there is a growing need to set an example that this type of behaviour is totally unacceptable as the Insurance Council has flagged this on several occasions. A further transgression was noted during the investigation in that the Appellant accessed the information on a computer of a dealership which he should have known was not allowed.

[22] The Respondents also rely on several precedent cases, (referred to later in this decision), in support of the position that the analysis of the relevant precedents by the Hearing Committee was reasonable. Council submits that in light of the range of penalties from fines to licence suspensions of one to two years in duration for a single instance of improper ICBC database access/breach of privacy, the discipline imposed on January 14th, 2014 was within the bounds of what is reasonable.

DISCUSSION AND ANALYSIS

[23] The Insurance Council of British Columbia Code of Conduct states that where a breach of the rules has occurred the Council will take into account a number of factors to determine the appropriate penalty, one of which is the general deterrence of other members of the industry. Mitigating factors may include age and experience of the Licensee, character, and previous disciplinary record. While the Council is not strictly bound by its previous decisions it does use precedents as a guide for consistency and fairness in decision making.

[24] The Insurance Council has imposed an 18 month suspension and the Appellant is requesting none. The Council imposed a fine of $1000 and the Appellant is requesting $500. The balance of the penalty is agreed by both parties.

[25] The Respondent has made reference to several previous cases in support of the decision. The Appellant largely disagrees with the Respondent's submissions as to the applicability and characterization of the cases and raised additional cases for consideration. The cases referenced illustrate a broad range of penalties and circumstances of misconduct.

[26] I will review some of these.

[27] In the Respondent's Book of Authorities on the appeal, the first case presented is *Moore v College of Physicians and Surgeons of Ontario*, [2003] O.J. No 5200. However, counsel for the Respondent did not specifically reference this case in his submissions to the FST. In this case the physician stole $75,000 from OHIP over 3 years and was sentenced by the Court to 15 months to be served in the Community. The College, his governing body, imposed a licence revocation of 12 months and a fine of $5,000, and if paid the revocation would be reduced to 6 months. I did not find this case to have any relevance to this case other than to observe what appears to be a very lenient revocation for such an egregious act.

[28] *Financial Institutions Commission v. Insurance Council of British Columbia and Maria Pavicic,* FST 05-009, November 22, 2005: In this case the licensee procured insurance coverage for applicants under her name to conceal the fact that coverage had been solicited and negotiated by an unlicensed person. She also signed as witness to applicants' signatures without in fact doing so and paid compensation to an unlicensed person who carried on insurance activities on behalf of the licensee. The penalty was a 30-day suspension, a fine of $1000 and costs of $1237.50. Again, this case was included in the Respondent's Book of Authorities but was not specifically referenced in argument.

[29] *In the Matter of Derek David Henneberry*, Intended Decision, May 11, 2007: Henneberry, a former licensee, accessed the ICBC database to assist a friend in a road rage incident. In addition he improperly rated his own vehicle on two occasions and 15 additional times for friends in order to circumvent AirCare. He initially lied by denying involvement. The penalty was being forbidden from holding a licence for 2 years and costs of $887.50.

[30] *In the Matter of Jagjit Singh Cheema*, Intended Decision, July 11, 2006: Cheema, a level 2 Licensee of 5 years experience, accessed the ICBC database to conduct a search on a vehicle at the request of an individual with a known criminal background. He was found not to have been honest having made many misleading statements. He claimed not to have shared the information. The penalty was a 2 year suspension, no fine and costs of $1375.

[31] *In the Matter of Jaswinder Singh Gill*, March 15, 2011: A level 2 licensee of 8 years experience accessed the ICBC database to obtain confidential information on a third party without authority on behalf of a client. The penalty was a 1 year suspension and costs of $1175. (Also prohibited from being an officer, director, partner or majority shareholder of an insurance agency for 2 years.)

[32] *In the Matter of Meredith Holly Phendler*, 2009: A level 1 general insurance salesperson with 5 years experience obtained personal information regarding the ownership of a vehicle, the driver of which she had had an altercation. She used that information to confront and threaten the driver. She also lied to the Investigators on several key elements of the case. The penalty was a licence suspension for 2 years and costs of $2125.

[33] *In the Matter of Tak-Ling Rachael Li*, December 19, 2012: A level 1 salesperson with 8 years experience assessed the ICBC database to provide an agency client with the telephone number of a third party with whom he had had a

motor vehicle accident. The third party then received calls in the evening from the agency client and he found out that his home number had been provided by the licensee. The penalty was a fine of $1000, costs of $387.50, and she was restricted from upgrading her licence for 12 months.

[34] The Appellant provided the following additional cases.

[35] *Re C.T. Bustillo*, November 22, 2011: A licensee with many years experience deliberately falsified a document to cover up her negligent processing of an application for house insurance. The investigation found similar incidents had been perpetrated by the licensee in the past. She was found guilty of deceiving others on several occasions. The penalty was a fine of $2000, prevention of upgrading her licence for 12 months and the requirement to take an errors and omissions course.

[36] *Re B.I.S.B. Ketchen*, Coquitlam B.C., 2007: The licensee accessed and used client information from the ICBC database for the purpose of prospecting. The penalty was a fine of $500, costs of the investigation and a requirement to successfully complete the ICBC Autoplan "Basics for Brokers" course.

[37] *Re T.A. Cantin*, February 28, 2013: A licensee with 8 years experience disclosed private information of a client to a former supervisor who worked at another agency for the purpose of acquiring that client's business. The penalty was restricting the licensee from being able to upgrade from a level 1 salesperson for 1 year, take the ICBC "Privacy Please" course, a fine of $1000 and costs.

[38] Turning to the matter currently before the FST, we have in this case a young man having entered the industry straight out of high school who at 20 years old, with limited experience, was caught snooping to find out the make of a car owned by the president of ICBC. To make matters worse he initially lied about it in an effort to avoid being caught when he realized the matter was indeed considered serious.

[39] The Respondent states he benefited from gaining this information by in fact learning the make of the car. This point is factually true but I conclude no one was harmed by the Appellant learning this information which is largely in the public domain. The record shows he did not share the information with anyone.

[40] The cases referred to above ALL involve third parties and yet the penalties we see in this case are very near the top end of the spectrum, particularly for a single incident.

[41] I would like to reference the case of *Henneberry* in particular, which the Hearing Committee found had a similar fact pattern. I note at the hearing of October the 17th, 2013 the Hearing Committee charged with making a decision in this case, may have been misled by their counsel when he stated on page 86, line 6-18 in the transcript of the hearing:

> And I will also stop here to make a point that you may hear that , well, in *Cheema* and in *Gill* they provided information to a third party. They got it and provided it to a third party. Henneberry didn't, Henneberry used that information for his own purpose. So in this case we have we don't have Mr. Kulkarni giving the information to somebody else. We have him keeping it to himself. But in my submission that doesn't distinguish a penalty in this kind of case. Gill gave it to somebody else, so the guy could place a lien. That was

> deemed to be improper but in the circumstances a one-year penalty. Henneberry and Cheema give it to somebody-Henneberry kept it himself, it was two years.

[42] While the last sentence is confusing, Henneberry did in fact obtain information for a third party that he initially denied. I assume from the final Report of the Hearing Committee that the Committee was informed of this error of fact, but it is not clear that they were fully apprised of the fact that he also, on no less than 17 occasions, accessed the ICBC database to commit fraudulent acts on behalf of himself and 15 friends for financial gain. No doubt this additional act contributed significantly to the two year penalty he was given and yet scant mention was made of this nefarious act. In my opinion this is a very poor case with which to create disciplinary comparisons.

[43] I conclude in summary:

[44] In every example above a third party was involved and the experience level was greater than that of the Appellant. In some cases there was also a higher level of registration than the Appellant.

[45] Examples where the penalty was much less for comparison purposes would be *Ketchen, Li, Gill, Bustillo*, and *Cantin*. In *Li, Bustillo* and *Ketchen*, all cases dealing with ICBC database access, there was no finding that the licensees attempted to hide their misconduct or mislead investigators once identified.

[46] I agree it is worth emphasizing that by lying and misleading the investigation the Appellant has worsened the breach of conduct. I also agree that the Appellant's conduct during the investigation distinguishes this case from those where no suspension was imposed, and I agree that in light of such conduct some period of suspension is warranted. However, in light of the Appellant's circumstances and the nature of the access/breach, the period of suspension imposed by Council was clearly unreasonable.

[47] I further find that the actions of the Appellant during that one week period where he denied and misled the investigators are not sufficient to move the case into the same category of offence as those cases where a suspension of 1-2 years was imposed, given the nature of the access/breach. Therefore, I dismiss *Henneberry, Cheema* and *Gill* as fair comparisons to the transgression of the Appellant.

[48] I also find that, while it is necessary at times to set an example to deter others, it is questionable to choose an individual with limited experience and training, a low level of licence, a lack of any ill intent and 20 years old at the time of the transgression. I agree that general deterrence of privacy breaches arising from unauthorized access of the ICBC database is important, but there must also be some element of proportionality in assessing the penalty.

[49] I am also influenced by the desire of his employer to retain his services and the favourable comments she makes as to his character.

[50] I do not wish to imply the matter is not serious, does not require a substantial penalty or that general deterrence is not appropriate but rather, I find

that the penalty imposed was simply too harsh and not reasonable for consistency and fairness in all the circumstances of this particular case.

[51] Having reviewed the comparative authorities considered by Council in determining the penalty to be imposed upon the Appellant, I am satisfied that the situations in those cases are sufficiently distinguishable from the circumstances surrounding the Licensee's actions in this case that a variation of the penalty imposed is warranted. The evidence in this case reasonably supports a shorter period of suspension and a reduced fine than was assessed by Council, which in my view, is still a substantial penalty in the circumstances of this Licensee.

DECISION

[52] Accordingly the appeal is allowed in part and I am varying the penalty to:

1. The Licensee's general insurance licence is suspended for a period of 6 months,
2. The Licensee is fined $500,
3. The suspension is to commence July 1st, 2014,
4. The Licensee is assessed Council's investigative costs of $612.50, and
5. A condition is imposed that the fine and costs must be paid in full before completing any annual filing.

[53] Both the Appellant and Council made a request in their written submissions for an order for costs in regard to the appeal. FICOM does not seek its cost on this appeal. No further costs will be awarded to either party as success on the appeal is divided and none of the other factors outlined in section 3.24 of the FST Practice Directives and Guidelines are applicable in this case.

[54] In making this decision, I have considered all of the information and submissions before me, whether or not they are specifically referred to in these reasons.

"Maurice Mourton"

Maurice Mourton, Chair
Financial Services Tribunal

May 29, 2014