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DECISION NO. 2015-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:	Pritpal Singh Mann	**APPELLANT**
AND:	Insurance Council of British Columbia Financial Institutions Commission	**RESPONDENTS**
BEFORE:	A Panel of the Financial Services Tribunal Patrick F. Lewis, Vice-Chair	
DATE:	Conducted by way of written submissions concluding on May 18, 2016	

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

APPEAL

[1] Pritpal Singh Mann ("Mr. Mann" or "the Appellant") appeals to this tribunal from a December 8, 2015 Order of the Insurance Council of British Columbia ("Council"), which adopted and implemented a November 24, 2015 report of a Hearing Committee ("Committee") struck to consider allegations against Mr. Mann, a licensed insurance agent in British Columbia.

[2] The hearing below occupied one day, on November 4, 2015, and concerned Mr. Mann's conduct in the aftermath of a May 8, 2011 motor vehicle accident ("the Accident") in which he was involved. The only issue was penalty as Mr. Mann admitted having transgressed to some degree. In the result and to paraphrase, Council ordered that:

(a) Mr. Mann's general insurance license be suspended for one year;

(b) following the suspension, Mr. Mann be supervised for one year by a Level 3 general insurance agent who meets Council's approval;

(c) while under suspension, Mr. Mann be prohibited from acting in any supervisory capacity at any insurance agency; and

(d) Mr. Mann pay Council's investigative costs of $1,987.50 by the end of the suspension period, failing which the suspension would continue until the payment was made.

[3] On this appeal Mr. Mann challenges only the first of those Orders, taking the position that no suspension of his license should have occurred. Council seeks to uphold its Order below and the Reasons of the Committee which underlay it. The Respondent, Financial Institutions Commission, while a necessary party to this type of appeal, has adopted the position of Council and not otherwise played a part in the appeal.

[4] The Appellant made an application for a stay of the one year suspension pending this appeal, to which the Respondents did not object. By letter to the parties of January 7, 2016, this tribunal directed that the Order below be stayed until a final determination of this appeal, pursuant to section 242.2(10)(a)(i) of the *Financial Institutions Act*, R.S.B.C. 1996, c. 141 ("the *Act*").

[5] Reflecting the general custom of this tribunal, the appeal submissions have been made entirely in writing, including supplementary submissions I requested on two discrete points, that process ending on May 18, 2016.

[6] The provincial legislature has conferred a broad discretion upon the Financial Services Tribunal ("FST") in adjudicating appeals from decisions of Council, as is apparent from section 242.2(11) of the *Act*:

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

BACKGROUND

(i) General

[7] The evidence before the Committee took the form of an Agreed Statement of Facts ("ASF"), a Book of Documents tendered by Council, an Affidavit of Mr. Mann from a proceeding in the British Columbia Supreme Court, and testimony from Mr. Mann and one of the owners of the insurance agency where he worked, Floyd Murphy.

[8] Mr. Mann is a Level 2 general insurance agent and was first licenced on April 7, 1999 by Council. In 2005 he obtained his accreditation as an insurance broker. On January 1, 2010, Mr. Mann became an owner of Murrick Insurance Services (Delta) Ltd. ("the Agency").

[9] Prior to the events of May, 2011 Mr. Mann had not been the subject of any disciplinary proceedings before Council.

(ii) The Accident and Following

[10] The Accident occurred in Surrey, British Columbia and was the springboard for the difficulties in which Mr. Mann found himself. At approximately 1:00 p.m. on May 8, 2011, a Lexus vehicle being driven by Mr. Mann collided into the rear of another vehicle at a stop light. The Lexus at the time was insured under a storage policy in the name of Mr. Mann's wife, and it bore license plates that had recently been moved from a Volkswagen vehicle owned by Mr. Mann's daughter.

[11] The issue, which ultimately went against Mr. Mann, was whether the Volkswagen plates had effectively conferred insurance upon the Lexus.

[12] Mr. Mann had acquired the Volkswagen for his daughter the previous year from a client and friend of his. Mr. Mann's statement to Council following the Accident was that, on May 6, 2011, he and his family members formed the intention to return the Volkswagen to the previous owner, evidently because of mechanical problems with it, and that this was done on May 7, 2011. The license plates from the Volkswagen were then physically transferred to the Lexus, the ownership of which was then to be transferred from mother to daughter.

[13] Transfer forms (referred to as ABV9T forms) and gift letters were prepared and signed in relation to both the Volkswagen, to be conveyed by Mr. Mann's daughter to the previous owner, and the Lexus, to be conveyed by Mr. Mann's wife to his daughter.

[14] Relative to the Volkswagen, the transfer form and gift letter bear dates of May 6, 2011, being two days before the Accident. Mr. Mann initially advised Council that they were in fact signed on that date, but later admitted as set out in the ASF that they were "processed" on May 8, 2011 and "backdated" to May 6, 2011. Mr. Mann advised Council that the purpose of the backdating was to give effect to his daughter's intention to dispose of the Volkswagen before the Accident, even though the paperwork was not completed on that date, so that there would be insurance coverage in place on the Lexus at the time of the Accident. That thinking appears to have resulted from Mr. Mann's understanding of ICBC's so-called "10 Day Rule", which provides:

> When the owner has sold or otherwise disposed of the vehicle with current license and insurance, he or she may display their previous B.C. vehicle's number plates on a newly acquired B.C. vehicle for up to 10 days from the time of acquiring the new B.C. vehicle ….

[15] The previous owner of the Volkswagen was away for a portion of May, 2011 and did not sign the transfer form or gift letter in respect of that vehicle until late in the month, with the result that the Volkswagen was not again placed into his name until May 31, 2011.

[16] Relative to the Lexus, the transfer form and gift letter were signed and dated by Mr. Mann's wife (as transferor) on May 7, 2011, and were signed and dated by

Mr. Mann's daughter (as transferee) on May 8, 2011. The transfer form states the date of sale as being May 8, 2011.

[17] Mr. Mann advised Council that he had contacted the Agency on May 7, 2011 and requested both the completion of the transfer of the Lexus from his wife to his daughter and the transfer of the Volkswagen insurance to the Lexus. An Agency staff member advised that she had received two telephone calls from Mr. Mann concerning this and, while there appears to be some question whether the first was on May 7 or May 8, 2011, the second of those calls, evidently following up on the first, occurred on May 8. The transfer of the Lexus into Mr. Mann's daughter's name was processed at about 1:04 p.m. on May 8, 2011, being very close to the time of the Accident.

(iii) ICBC Position and Later Sanctions

[18] ICBC concluded, however, that the Volkswagen license plates were improperly displayed on the Lexus and that there was therefore no coverage on the Lexus at the time of the Accident. It denied application of the 10 day rule on the basis that, at the time of the Accident, the owner of the Volkswagen continued to be Mr. Mann's daughter, meaning that the vehicle had not been "sold or otherwise disposed of".

[19] It seems it was precisely such a conclusion that Mr. Mann had tried to avoid by backdating the Volkswagen transfer papers and initially denying having done so.

[20] ICBC wrote the Agency on July 7, 2014 following an investigation and delivered sanctions for what it considered to have been a material breach by the Agency of its Autoplan Agency Agreement with ICBC, including that Mr. Mann be permanently prohibited from dealings in Autoplan Insurance and that the Agency Agreement be suspended until Mr. Mann ceased to be an owner of the Agency and a $23,000 fine was paid.

[21] In consequence of those sanctions, Mr. Mann sold his 1/3 interest in the Agency and ceased dealing in Autoplan, which had previously represented almost 50% of the commissions he brought in. He has since continued to work at the Agency, enjoying the ongoing support of Floyd Murphy, though has earned income only based on commissions without receipt of either salary or dividends. Mr. Murphy spoke in evidence of the "terrible impact" of the ICBC sanctions upon Mr. Mann, as did Mr. Mann himself, explaining how deeply he and his family, who look to him for financial support, have suffered.

(iv) Signature Practices

[22] Unrelated to the Accident, it was also part of the case against Mr. Mann, and he admitted, that on occasions in the past he had signed his wife's and daughter's names on ICBC documents.

(v) Issues Before the Committee

[23] A Notice of Hearing delivered to Mr. Mann by Council set out the nature of the intended inquiry, being to determine whether:

1. The Licensee failed to act in a trustworthy manner, in good faith, and in accordance with the usual practice of the business of insurance:

   a) By backdating an APV9T Transfer/Tax Form to create the appearance that the form was signed earlier than it actually was.

   b) By soliciting the assistance of agency staff in order to conduct a further insurance transaction, which required the presence of another individual who was not in attendance.

   c) By taking the above-mentioned actions for personal gain.

   d) In any other manner.

2. The Licensee is able to carry on the business of insurance in a trustworthy and competent matter, in good faith, and in accordance with the usual practice, as required under Council Rule 3(2) and pursuant to section 231(1)(a) of the Act.

3. The Licensee should be subject to any disciplinary or other action in the circumstances; and if so, whether Council should do one or more of the following in accordance with sections 231, 236, or 241.1 of the Act:

   a) Reprimand the Licensee.

   b) Suspend or cancel the Licensee's general insurance licence.

   c) Impose conditions on the Licensee's general insurance licence.

   d) Fine the Licensee an amount of not more than $10,000.00.

   e) Require the Licensee to cease any specified activity related to the conduct of insurance business or to carry out any specified activity related to the conduct of insurance business.

   f) Require the Licensee to pay the costs of Council's investigation and/or, this hearing.

REASONS OF THE COMMITTEE

[24] Through its seven page report the Committee provided its summary of the facts, the submissions made on behalf of Mr. Mann, the evidence of Floyd Murphy, and ultimately its findings and recommendations.

[25] The Committee commenced its revelation of findings and recommendations by noting what it characterized as "discrepancies" with which it was troubled. The first of those was that Mr. Mann initially stated that the Volkswagen transfer was processed on May 6, 2011 but later conceded that this was done on May 8 and backdated to May 6. The second was that Mr. Mann had said that he contacted the Agency employee concerning the Lexus transfer on May 7, 2011, while the employee told Council that she had spoken with him about this on May 8. The Committee also stated in this connection that it found it curious that the transfer form was signed by Mr. Mann's daughter on May 8, 2011 while he testified that he had requested the change the day before, the implication perhaps being that Mr. Mann lacked credibility on the point. The third discrepancy was that the previous owner of the Volkswagen did not sign the transfer documents until after May 6, 2011, even though they bear that date.

[26] Those views produced this finding:

> These discrepancies have made it difficult for the Hearing Committee to accept any explanations from the Licensee in this matter. The Hearing Committee has concluded that the Licensee backdated insurance documents to bolster a family insurance claim and was not forthright when confronted about the matter. The Hearing Committee finds this misleading and self-serving behaviour to be inexcusable, particularly for someone with the licensee's experience in the industry as both an agency owner and an insurance licensee (Report, page 5).

[27] The Committee proceeded to say that the case raised questions with respect to Mr. Mann's suitability to hold an insurance license given his failure to act in good faith and in a trustworthy manner, being underlying principles of the insurance industry. Had the matter come to Council's attention in 2011 when the problems occurred, the Committee observed, it felt it likely that Mr. Mann could have faced cancellation of his license for "for a minimum period of two years or more". The Committee's concerns about suitability were aggravated by Mr. Mann's admission that he had in the past signed his wife's and daughter's names on insurance documents.

[28] The Committee then stated the following concerning mitigating circumstances and its view of a balanced decision:

> In determining the disposition in this matter, the Hearing Committee considered the above, as well as the fact that it has been more than four years since the transgressions took place and that there have been no further incidents that Council is aware of regarding the Licensee's conduct. The Hearing Committee also noted the Licensee's

> employer and former business partner continues to support him; the Licensee has not been the subject of a previous review by Council; and the Licensee has already been penalized through the action taken by I.C.B.C.
>
> The Hearing Committee concluded it remains necessary for Council to admonish the Licensee's conduct and emphasize to the industry, as well as to the public, that Council will not tolerate conduct by an insurance licensee that is self-serving and intended to mislead others, as in this case. The Hearing Committee is satisfied that a one-year suspension of the Licensee's general insurance licence accomplishes this and appropriately balances all of the factors in this matter (Report, page 6).

[29] The Committee went on to say that it found a prior decision of Council in a case called *Sharpe-Terreault* to be " … somewhat instructive in this matter, as it similarly involved self-serving conduct that was intended to mislead an insurer, and which ultimately brought into question an individual's suitability to hold an insurance licence" (Report, page 6). Ms. Sharpe-Terreault had used her position as a licensee to try to coerce a member of the public to make a false claim to ICBC for her (the licensee's) benefit, causing her licence to be suspended for one year, with direct supervision for a further year to follow any relicensing. The Committee noted that Council considered there that the salesperson was relatively inexperienced and had been forthright during the investigation, both of which points the Committee felt contrasted with the facts before it.

[30] As stated, the Committee in the end ordered that Mr. Mann's general insurance licence be suspended for one year, together with ancillary sanctions.

ISSUES ON APPEAL

[31] Relative to the merits there is only one issue on this appeal, being the reasonableness of the one year suspension levied against Mr. Mann.

[32] On the threshold of that debate lies the question of the standard of review to be applied on this appeal, and on which the parties to some extent diverge.

STANDARD OF REVIEW

[33] Both parties submit that the applicable standard of review in this case is reasonableness. The difference comes with the Appellant's further submission that the degree of deference owed is less in a case such as this where penalty alone is in issue, citing the decision of the FST in *Kulkarni v. Insurance Council of British Columbia*, Decision No. 2014-FIA-001(a). Council demurs on the point, maintaining that there is but a single metric of reasonableness without internal categories.

[34] In *Kulkarni* the only issue on appeal was penalty, as in the present case. Ultimately the FST varied a suspension imposed by the Insurance Council from eighteen months to six months and a fine from $1,000 to $500. After referencing

Dunsmuir v. New Brunswick, 2008 SCC 9 and *Fenelon v. Insurance Council of British Columbia*, FST 08-045, April 12, 2009 regarding the standard of reasonableness and the payment of deference, the FST went on to state the following:

> [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 Estate 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 …
> >
> > [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 those 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. (at page 5)

[35] Council refers to several authorities in resisting the idea that deference is moderated on appeals concerned only with sanction. It submits that *Dunsmuir* fundamentally changed the jurisprudence around standard of review and mandates a single standard of reasonableness. It relies upon two prior decisions of the FST, being *Financial Institutions Commission v. Insurance Council of British Columbia and Branislav Novko*, August 22, 2005, and *Financial Institutions Commission v. Insurance Council of British Columbia and Maria Pavicic*, November 22, 2005, both of which were penalty-only appeals brought by the Commission and which proceeded on the footing simply of whether the Insurance Council could reasonably have reached its decision on consideration of all of the evidence. Council further cites *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436, a tribunal appeal in which the Ontario Court of Appeal concluded that the single reasonableness standard emerging from *Dunsmuir* does not comprise varying degrees of deference potentially yielding different outcomes. Finally, Council relies upon *Ryan v. Law Society (New Brunswick*) [2003] SCJ No. 17 as articulating the correct approach to the application of the reasonableness standard, as follows:

> A decision will be unreasonable only if there is no line of analysis within the given reasons that would reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere … (at page 50).

[36] On the strength of that dictum, Council submits that the FST should not have embraced a lower standard of deference in *Kulkarni*, going on to argue, if a little boldly, that the suspension there would not have been varied had the correct standard of review been applied.

[37] The question of variability within the reasonableness standard arose less directly in *Parsons v. Real Estate Council of British Columbia*, 2015-RSA-002, which was both a liability and a penalty appeal to the FST. The parties agreed there that the measure of review was reasonableness, *Kulkarni* being one of the authorities cited in support. I said the following in *Parsons* concerning standard of review:

> [35] In support of application here of a reasonableness standard, the Respondent refers to the Supreme Court of Canada's decision in *Doré v. Barreau of Quebéc*, 2012 SCC 12 at para. 44, quoting with approval the earlier decision of that Court in Law Society of New Brunswick v. Ryan, 2003 SCC 20, as follows:
>
> > "Although there is a statutory appeal from decisions of the Discipline Committee, the expertise of the Committee, the purpose of its enabling statute, and the nature of the question in dispute all suggest a more deferential standard of review than correctness. These factors suggest that the legislator intended that the Discipline Committee of the self-regulating Law Society should be a specialized body with the primary responsibility to promote the objectives of the Act by overseeing professional discipline and, where necessary, selecting appropriate sanctions. In looking at all the factors as discussed in the foregoing analysis, I conclude that the appropriate standard is reasonableness simpliciter. Thus, on the question of the appropriate sanction for professional misconduct, the Court of Appeal should not substitute its own view of the "correct" answer but may intervene only if the decision is shown to be unreasonable. [Emphasis in original.]"
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> [36] Payment of deference to a decision on penalty is consistent with this tribunal's decisions in Atwal v. Real Estate Council of British Columbia, Decision No. 2010-RSA-001(a), (at paras. 24 to 26), and Jalloh v. Insurance Council of British Columbia, Decision No. 2012-FIA-002(a), at para. 24. The Respondent refers to another decision of the FST, Kulkarni v. Insurance Council of British Columbia, Decision No. 2014-FIA-001(a) and the passage reviewed there from the earlier FST decision in Superintendent of Real Estate v. Real Estate Council and Ashworth, FST 05-012; 05-015, January 31, 2007 (at para. 17), and submits that, while there was discussion in those cases of the review standard being less stringent when applied to determination of

> sanction than as relates to findings of fact, such a distinction should not be taken up. I note that in both Kulkarni and Ashworth a reasonableness standard was ultimately applied to the question of sanction.
>
> [37] Is there any basis in law for holding that a reviewing tribunal has somewhat more room to intervene in a penalty decision than in, for example, the assessment of whether a witness before it was a truthteller, even though both questions are to be judged on a reasonableness standard? The Respondent answers this question negatively, referring to authority for the proposition that reasonableness is a single rather than a floating standard. I will not make a general pronouncement on the point here, partly because the opposite side of the issue (if there is one) has not been assumed by the Appellant, and partly because I do not find it necessary to do so in deciding this appeal. I am satisfied here that consideration simply of what was reasonable in the circumstances is sufficient to answer all arguments advanced on this appeal.

[38] In the present case, the issue of whether *Kulkarni* supports less deference to a decision on penalty has pointedly arisen and, unlike in *Parsons*, has been argued by counsel on both sides of the debate.

[39] I have carefully considered the submissions made on the point as well as the authorities raised in support. I have not scoured for other helpful authorities within the rich jurisprudence bearing on standards of review (other than reviewing *Parsons*, *supra*), but rather in light of the cases relied upon have concluded that no downward adjustment within the reasonableness standard should occur by reason that an appeal concerns penalty alone, for these reasons:

(a) it is not apparent from the decision in *Kulkarni* that this issue of variability within the reasonableness standard was actually argued, the adjudicator noting only that the parties agreed that reasonableness was the applicable standard of review (at paragraph 14). It is therefore unclear to what extent the point was explored and potentially opposing considerations laid bare for the benefit of the adjudicator;

(b) it does not appear that the reference in *Kulkarni* to a modified review standard in penalty appeals actually figured in the reasoning or outcome of the case, given the conclusion that the period of suspension which had been imposed "… was clearly unreasonable" (at paragraph 46). It was, therefore, an *obiter* comment;

(c) in relation to this particular issue, *Kulkarni* refers to only one authority, being *Superintendent of Real Estate v. Real Estate Council and Ash*worth, FST 05-012, 05-015 (January, 2007). In neither of the *Ashworth* passages excerpted in *Kulkarni* was it clearly stated that less deference is payable on a penalty appeal. In the first, the tribunal noted that penalty is considered after fact-finding regarding conduct has been completed, but went on to say that "nonetheless" there should be

no interference if the penalty decision was reasonable. In the second, it was said that the Real Estate Council's "… special expertise extends less to the consideration of penalty in circumstances such as these than to the findings of what constitutes negligence or inappropriate conduct …", but that was not accompanied by any indication of greater ability to interfere in the decision below; rather, this was stated alongside references to efficiency and the FST's authority on appeal in support of a view that, following the deeming of a penalty as unreasonable, the FST may vary it rather than remitting it back to the first instance tribunal;

(d) in *Novko, supra*, the FST dealt squarely with the question of standard of review to be applied on a penalty appeal before it, and in the face of a submission suggesting relative freedom to interfere on appeal. That submission was rejected and the reasons given are useful here:

> I disagree with the submissions of the Appellant, the Financial Institutions Commission, that the FST should not hesitate to disagree with the penalty imposed by the Insurance Council if after a careful review of all of the circumstances the FST opines that the sentence imposed was not a fitting one. This submission arises from the *Reed v. British Columbia (Financial Institutions Commission of Insurance)* [1985] B.C.C.O. no. 17 (CAC) (QL) case. Rather, it is my view that the standard of review is that set out earlier in this decision, being a modification of a standard of review referred to in the Supreme Court of Canada decision in *Dr. Q. v. College of Physicians and Surgeons of British Columbia, supra*, and the British Columbia Court of Appeal decision in *Re Galaxy Sports Inc., supra*, namely, the FST must determine whether the Insurance Council could reasonably have reached the decision as to penalty that it has made after considering all of the evidence, the documentation, the assessments regarding credibility, and its findings of fact, all based upon clear and cogent evidence presented to it. Should the FST determine that the Insurance Council could not reasonably have reached its decision on penalty after applying that standard then it is open to the FST in this Appeal to reverse or vary the decision or to send this matter back to the Insurance Council for reconsideration with or without directions. If the FST determines that the Insurance Council could reasonably have reached its decision applying the test set out above, then it is necessary for the FST to confirm the decision of the Insurance Council. (at page 8).

(e) a similar view was taken in the FST decision rendered shortly thereafter in *Pavicic, supra*. As in *Novko*, *Pavicic* was concerned entirely with the appropriateness of the sanction imposed below. Following a careful review of relevant authorities and considerations, it was held in *Pavicic*

that the standard of reasonableness adopted in *Novko* was indeed applicable, not only to matters of fact or credibility, but also to consideration of penalties imposed (at page 8);

(f) both *Novko* and *Pavicic* make reference to the following passage from Casey, *The Regulation of Professions in Canada* (2003):

> Courts are reluctant to interfere with a penalty imposed for professional misconduct unless the disciplinary tribunal has erred in principle or unless the penalty is manifestly excessive, totally disproportionate, or the disciplinary tribunal has misapprehended the evidence. (at page 15-9).

That, of course, is a reference to judicial review rather than a tribunal appeal. I do not propose to adopt that language, as I think it sufficient to now express simply that a reasonableness standard, as it has been described in applicable authority, applies to reviews of penalty, but the incompatibility of the general thrust of that passage with the broader review power advocated for by the Appellant in this case is nonetheless notable;

(g) as I noted in *Parsons, supra*, as set out in paragraph 37 above, in its 2012 decision in *Doré* the Supreme Court of Canada quoted with approval from its earlier decision in *Ryan, supra,* to the effect that the tribunal in that case was intended by the legislator as a specialized body with primary responsibility for promoting legislative objectives and overseeing professional discipline, including, where necessary, selecting appropriate sanctions, all of which pointed to a reasonableness standard of review of its decisions. While the FST has broad powers on appeal, it is also true that the Insurance Council of British Columbia is a specialized tribunal established to, among other things, regulate and in some cases discipline its members, making relevant the foregoing reasoning from *Ryan*. The Insurance Council was established by Regulation under the *Insurance Act*, R.S.B.C., 1979, c. 200, and has continued under Division 2 of the *Act* (again, the Financial Institutions Act). Sections 220 to 241.1 of the *Act*, broadly speaking, contain rules for the composition of Council, delegation by Council of duties to committees, investigation of the conduct of licensees, the sanctioning of licensees for misconduct, and the rules around discipline process including the holding of formal hearings. Unquestionably, Council is responsible for ensuring that its licensees are trustworthy, competent and compliant with the rules that govern them, and for the protection of the public from non-conformance in those areas. With those considerations in mind, it makes eminently good sense that a penalty decision by Council should be maintained by the FST unless unreasonable, as would be the case with an appeal centred on facts or, possibly, mixed facts and law. While it is doubtless the case that an appellate tribunal is less able, for example, to determine whether a

> witness before the hearing below was a truthteller than to select a penalty based on accepted facts and authorities, that does not mean that it should be more active in the latter case than the former, where the matter of penalty has been entrusted by legislation to the first instance, specialist tribunal that bears primary responsibility to deliver it. That is a consideration equally deserving of deference, even if logically sanction is a more comfortable issue for an appeal body than, say, the credibility of a witness it did not see.

[40] It will follow from the above discussion that I accept the parties' submission that the applicable review standard on this appeal is reasonableness but decline to relax it, effectively to a lower grade, on account of this appeal's sole concentration being penalty.

MERITS OF THE APPEAL

(i) Appellant's Submissions

[41] Mr. Mann submits that the Committee failed to consider factors in mitigation of penalty or the hardship he and his family have suffered by reason of the ICBC sanctions. He also submits that the Committee wrongly relied on the *Sharpe-Terreault* decision which, he maintains, was materially different from this case.

[42] The mitigating factors said to have been unconsidered by the Committee are:

- good character evidence offered by Floyd Murphy, showing his continuing support of Mr. Mann, his view that the event in issue was an aberration, the absence of any client complaints about Mr. Mann, and Mr. Mann's adherence since the Accident to all terms imposed upon him.
- Mr. Mann's admission of guilt and expression of remorse.
- Mr. Mann's reform, shown by the absence of any professional issues since the underlying events despite close monitoring by both the Agency and ICBC, which conduct on his part is consistent with his unblemished record prior to the Accident.
- No third party having been harmed by Mr. Mann's behaviour.
- Mr. Mann's misconduct having comprised a single incident rather than a pattern of concerning behaviour.

[43] The Appellant further submits that the one year suspension amounts to undue hardship when combined with the sanctions imposed by ICBC, a point said to have been missed by the Committee. Reliance is placed upon Mr. Mann's effectively forced sale of his one-third interest in the Agency, depriving him of significant dividends (about $35,000 in 2013), and his having to cease dealings in Autoplan which had represented almost half of his commissions. Mr. Mann was no longer receiving a salary from the Agency but rather was working on commissions

alone. By the time of the hearing below, he had already been prohibited from Autoplan business for about fourteen months, and it must be assumed, Mr. Mann submits, that this will continue indefinitely (while unstated, I take that as a tacit reference to a challenge to the ICBC sanctions Mr. Mann has brought in Court proceedings).

[44] As noted earlier, the hardship suffered was not limited to Mr. Mann, but rather extended to his family, including his wife, his mother and his three university-enrolled daughters, all living in the family home and all generally reliant upon Mr. Mann as the primary bread-winner.

[45] In respect of the law, the Appellant submits that the Committee unreasonably took instruction from the factually dissimilar decision in *Sharpe-Terreault*, and that the one year suspension was otherwise materially out of keeping with a spectrum of earlier decisions of Council. After discussing the facts and outcomes of those cases, the Appellant makes this submission:

> 79. Taking these precedents into account, it is clear that a one-year suspension does not fall within an appropriate range of penalties. Of the five cases cited above, the most significant penalty was ordered in *Tsui*, where the licensee made misrepresentations to ICBC, on five separate occasions over the course of five years, and where the person declared as the principal operator was unaware of the misrepresentation. Despite this repeated misconduct, the Council only gave the licensee a three-month suspension.
>
> 80. The appellant submits that the facts of *Tsui* are on the higher end of misconduct as compared to his own isolated incident, and that more factually comparable cases are *Newton* and *Swerhun*, where a reprimand and two-week suspension were ordered, respectively.

[46] The Appellant submits accordingly that he should not have been suspended at all.

(ii) Council's Submissions

[47] Council commences its argument by referring to its duty to regulate the conduct of licensees and enforce legislation and regulation governing them, thereby protecting the public. It refers to the following passage from *Casey, supra*:

> A number of factors are taken into account in determining how the public might best be protected, including specific deterrence of the member from engaging in further misconduct, general deterrence of other members of the profession, rehabilitation of the offender, punishment of the offender, isolation of the offender, denunciation by society of the conduct, the need to maintain the public's confidence in the integrity of the profession's ability to properly supervise the conduct of its members, and ensuring that the penalty imposed is not disparate with penalties imposed in other cases.

[48] Council also refers to its Code of Conduct for agents, salespersons and adjusters, requiring trustworthiness, good faith, competence and financial reliability as matters of utmost importance. It points out that licensees must conduct all professional activities with integrity and reliability, and must respond promptly and honestly to inquiries from Council.

[49] As to the aims of sentencing, it refers uncontroversially to the need to promote specific and general deterrence for the protection of the public and to maintain the public's confidence as well as the integrity of the profession. It also submits in effect that penalties as between similar cases should be within reasonable range of each other.

[50] As to the facts of the case, Council asserts that Mr. Mann intentionally attempted to mislead ICBC by taking steps following the Accident to create an appearance of facts that would enhance his prospects for coverage. Council says further that despite numerous opportunities to admit this prior to the hearing, it was not until a forthright answer was finally given following evasive evidence in cross-examination that he did so. Council maintains that Mr. Mann used his position of authority as owner of the Agency to solicit the assistance of Agency staff to conduct a further insurance transaction which required the presence of Mr. Mann's daughter.[1] Council also refers to Mr. Mann's past signing of his wife's and daughter's names on insurance documents as an aggravating factor in the analysis.

[51] Council argues that the one year suspension was reasonable in light of the seriousness of the matter, involving the falsification and backdating of documents and an ensuing lack of forthrightness by Mr. Mann, and that any mitigating considerations were taken into account by the Committee. As to such considerations it submits:

- Regarding character evidence: The Committee noted the support of Mr. Mann which Floyd Murphy continues to provide, and on appeal Council says that the weight to be accorded this was a matter for the Committee, not amounting to reviewable error, and did not impede the Committee's right to a certain view of Mr. Mann's conduct in intentionally backdating insurance documents for his own purposes.

- Admission of guilt and statement of remorse: Council submits that Mr. Mann's lack of forthrightness is irreconcilable with his claim to remorse. It notes Mr. Mann's admission in the ASF that he had initially reported that the transfer documents were filled out on May 6, 2011, only to later concede that they were processed on May 8 and backdated, and further argues that he was evasive in his later evidence regarding his purpose

[1] While this was Council's position as expressed in its main submission on appeal (paragraph 72), after I requested a supplementary submission regarding the origin of the asserted requirement that Mr. Mann's daughter be present at the Agency when the Lexus transfer was processed, Council in that supplementary submission stated, among other things, that as the Committee made no finding on the point it was outside the scope of this appeal. That had been my initial impression, and that clarification from Council put the matter to rest.

in backdating the documents, referring in support to transcript of some length.

- Reform: While referencing the Committee's observation that more than four years had passed since the events without further incident, Council also maintains that the reformation argument made by Mr. Mann must be judged against his lack of forthrightness at the hearing.

- No harm to a third party: Council argues that a lack of harm to a third party is not mitigating given Mr. Mann's attempt to mislead ICBC, which simply happened to have been discovered by ICBC.

- Single incident: Council denies this proposition, maintaining that Mr. Mann's scheme of falsifying insurance documents spanned May 8 to 31, 2011, and that the penalty also took into account his admitted past practice of improperly signing insurance documents on behalf of family members.

- Undue hardship: Council points out that it encouraged the Committee to consider the effect upon Mr. Mann and his family of the ICBC sanctions, which topic was referenced in the report of the Committee, but that nonetheless Council must fulfill its own mandate to ensure public confidence through regulation of the insurance industry, and cannot defer its duties to ICBC.

[52] As to the authorities, Council says that the Committee properly referred to *Sharpe-Terreault* as "somewhat instructive" as it "similarly involved self-serving conduct that was intended to mislead an insurer, and (that) the transgressions in both cases reflected on the trustworthiness of the agent and amounted to a direct and deliberate threat to the public founded upon the position as agent". Council also says there was more to the foundation for the one year suspension of Mr. Mann than the *Sharpe-Terreault* case, referring to falsification of insurance documents, the intention to mislead ICBC, the use of staff in the process, an ongoing failure to be forthright and improper past signature practices.

[53] Council seeks to distinguish the cases relied on by the Appellant featuring lesser sanctions and says in conclusion that on consideration of the aims of sentencing, the whole of the Committee's Reasons, and all of the circumstances of the case, the one year suspension cannot be characterized as unreasonable.

(iii) Appellant's Reply

[54] The Appellant refutes the argument that he was evasive in evidence, and says that the record demonstrates more than anything his lack of facility in the English language.

[55] Regarding the regulator's mandate and the purposes of sentencing, the Appellant submits that Council has overlooked important factors, such as specific deterrence, rehabilitation and the particular circumstances of the offender, all of

which militate against the one year suspension on these facts. He particularly stresses the hardship he will suffer if that suspension is carried out, in addition to all of that already occasioned by the ICBC sanctions. Factors such as general deterrence and public protection are not to be considered in a vacuum and may, in a particular case, be trumped by other necessary considerations, so submits Mr. Mann in reply. He closes by asserting that the Committee's failure to consider the impact of a suspension upon him is in itself a reversible error warranting allowance of the appeal.

DISCUSSION AND ANALYSIS

[56] I have carefully considered all of the submissions, documents and authorities provided to me on this appeal, and have arrived at the following view of the matter.

(i) Evidence

[57] Mr. Mann's misconduct was serious. He was an experienced agent, used to the ways of dealing with his Agency's client, ICBC, and he saw to the processing of insurance transfer documents dated May 6, 2011 but in fact signed by different persons on two or three later dates, without disclosure of the discrepancy to ICBC and for the purpose of trying to obtain coverage for an intervening motor vehicle accident. He engaged a staff member in the process and at least once in the resulting investigation by Council wrongly denied that the documents had been signed after May 6. Later, in the ASF adduced as evidence at the hearing below, he effectively admitted that wrongful denial and the fact of the backdating.

[58] As to Mr. Mann's evidence before the Committee, I am not persuaded to assume a linguistic problem affecting what he said as to his motivation for so acting. He chose to give evidence without an interpreter, I see no indication from him in the relevant exchange that he was having difficulty understanding the questions put to him, and nor is there such a mention in the Committee's report.

[59] Equally, however, I do not think it appropriate to draw a conclusion about Mr. Mann's asserted evasiveness while testifying. I have closely read the related passage and, while I can understand Council's submission on the point, the whole of the exchange is not sufficiently clear in black and white to comfort me in making such a serious finding -- particularly and importantly, where the Committee itself did not say anything of the kind in its report, even though the matter of Mr. Mann's forthrightness was a live issue at the hearing. To the contrary, the Committee appears to have accepted Mr. Mann's expression of remorse.

[60] The "discrepancies" referred to by the Committee have received considerable attention on this appeal. The first concerned Mr. Mann's change of story, from initially maintaining that the Volkswagen transfer documents had been signed on their date to later admitting that this was not so. I agree with Council that the Appellant's challenge to that finding is without merit, as the base inconsistency is apparent within the ASF itself (at paragraphs 25 and 26), and I think this an appropriate consideration for the Committee to have made. The second discrepancy in part concerned whether a mild conflict existed between Mr. Mann's

evidence and that of the Agency employee as to when he instructed her regarding the transfers, though that point is equivocal as he put the date at May 7 and she referred to a conversation with Mr. Mann on the topic occurring on either May 7 or 8. The other aspect of this, and perhaps the Committee's real point, was that it "found it curious" that Mr. Mann would give an oral instruction on May 7 when the documents that were the subject of the instruction were not signed until the following day. Perhaps that is mildly curious, but I cannot attach much importance to it, and therefore sympathize with the Appellant's challenge on the point. The third discrepancy related to the signing of transfer documents by the previous Volkswagen owner beyond May 6, 2011, and was undoubtedly relevant, important and fairly set out by the Committee.

[61] The Committee expressed the view that in light of these discrepancies it was difficult for it to accept any explanations from Mr. Mann. The second of the so-called three discrepancies is uncompelling, but the first and third are matters of substance and I cannot fairly override the Committee's consequent professed difficulty in accepting what it heard from Mr. Mann. It did not say that it rejected all of his evidence, and it does refer to points in mitigation arising from his evidence; rather, it simply refers to a difficulty.

[62] A key passage from the Committee's report is this:

> These discrepancies have made it difficult for the Hearing Committee to accept any explanation from the Licensee in this matter. *The Hearing Committee has concluded that the Licensee backdated insurance documents to bolster a family insurance claim and was not forthright when confronted about the matter. The Hearing Committee finds this misleading and self-serving behaviour to be inexcusable, particularly for someone with the Licensee's experience in the industry as both an agency owner and an insurance licensee* (emphasis added).

[63] The portion of that reasoning I have highlighted is, to my mind, unassailable on the facts of this case.

[64] That said, while there may well be no excuse for Mr. Mann's conduct in the normal sense of that word, there are ameliorating circumstances outside of that conduct. That in fact was the view of the Committee, opining as it did that Mr. Mann could have faced cancellation of his licence for two years or more were it not for his unproblematic performance following 2011. A key question on the appeal, as I have indicated, is whether mitigation (which I intend here as including the hardship submission) was sufficiently considered by the Committee.

[65] Turning to those factors cited by the Appellant in mitigation of penalty, I first say that I do not accept that the absence of harm to a third party here is in fact mitigating. Had ICBC not discovered the impropriety it would have suffered harm, as would have the premium-paying public (one might infer that the resources ICBC has devoted to this matter is itself a form of harm, but I will not take that into

account as nothing has been said about it). I do not see this as a point in Mr. Mann's favour.

[66] I next say that the reference to this having been a single incident is not compelling. While the case is distinguishable from those involving a pattern of misbehaviour over time, this was not a momentary or acute lapse but rather one involving different acts spanning about three weeks. For Mr. Mann, I regard the associated fact that his professional record prior to May, 2011 was unsullied as the more significant.

[67] There is also significance in Mr. Mann's remorse and admission of wrongdoing. He has cooperated in the compilation of agreed facts that admit the wrongdoing and has consistently through the legal proceedings limited his position to the matter of sanction properly flowing from his actions. His admissions and remorse would have been more persuasive had they been immediate on being questioned – instead, he at first compounded his misconduct – but they still have a value in the disciplinary context. As I have explained, I am not able to accept Council's submission that the remorse is negated or eroded by evasive evidence at the hearing, as the Committee did not express that finding though perfectly positioned to do so if the observation were fair. Instead, the Committee noted Mr. Mann's remorse without suggesting it was insincere or unacceptable.

[68] It is common ground that the matter of the ICBC sanctions and their effect upon Mr. Mann and his family is a proper consideration going to penalty; indeed, Council encouraged the Committee to take this into account. Unquestionably on the evidence, the impact of the removal of Mr. Mann's right to engage in Autoplan business, and the effectively forced sale of his interest in the Agency, have severely affected the Manns. Mr. Mann is challenging the Autoplan prohibition as excessive in a Court action against ICBC and, while nothing has been expressly said on the point during this appeal other than an inclusion in the record of Mr. Mann's Affidavit sworn in that proceeding, in light of the lawsuit I cannot be certain that the prohibition will remain permanent as ordered. However, I can be certain that it has been a heavy burden until now, and that it may well continue indefinitely.

[69] Finally in respect of factors raised in mitigation, I will consider together the character evidence from Mr. Murphy and the absence of complaints or disciplinary issues regarding Mr. Mann beyond the events in issue. As did the Committee, I regard Mr. Mann's compliant subsequent practice, over several years and while under scrutiny, as a point of real significance, and I agree with him that it bears on sentencing principles such as specific deterrence and rehabilitation. Nor, I will add, does such a consideration undermine general deterrence, which is or should be aimed at persons having some reasonable knowledge of the facts of the matter.

[70] I have found it useful to record above my own views on the merits of the different mitigation arguments in order that I may assess whether the Committee took sufficient account of them. Much of what the Appellant has said in argument is in the vein that the Committee did not consider these various factors and that, while at certain points there was reference to a mitigating consideration, they or it

nonetheless did not figure in the ultimate reasoning. I have carefully reviewed the Appellant's argument in that regard and I am unable to accept it, for these reasons:

(a) the Committee was well aware of Mr. Mann's cooperation in reaching the ASF, which document it referenced near the start of its report, and of course that the only issue in the matter was the penalty to be imposed, Mr. Mann's having admitted his misconduct. At page 4 of its report, it stated that Mr. Mann acknowledged that it was inappropriate for him to "backdate transactional documents in an attempt to support an insurance claim" and that he had "expressed remorse for doing so";

(b) also at page 4 of the report, the Committee summarized Mr. Mann's evidence concerning the impact of this matter upon him and his family, who all rely on him for support. Particulars are there referenced regarding the ICBC sanctions and their financial effect upon the Mann family;

(c) at pages 4 and 5 of the report, the Committee noted Mr. Murphy's evidence that Mr. Mann has been under close supervision at the Agency since the subject incident occurred and that no issues had been identified with his conduct. It also referred to Mr. Murphy's evidence regarding the ICBC sanctions against the Agency and his advice that he continues to support Mr. Mann's representation of the Agency in the insurance business;

(d) on page 6 of the report, the Committee noted (as I have indicated) that if this matter had come to Council's attention in 2011, there could have been a licence cancellation for two years or more, clearly showing that the Committee thought the penalty should be much less in light of the circumstances of the matter;

(e) in an important passage summarizing the core of its Reasons (also reproduced above), the Committee stated:

> In determining the disposition in this matter, *the Hearing Committee considered the above, as well as the fact that it has been more than four years since the transgressions took place and that there have been no further incidents that Council is aware of regarding the Licensee's conduct.* The Hearing Committee also noted the Licensee's employer and former business partner continues to support him; the Licensee has not been the subject of a previous review by Council; and the Licensee has already been penalized through the action taken by I.C.B.C.
>
> The Hearing Committee concluded it remains necessary for Council to admonish the Licensee's conduct and emphasize to the industry, as well as to the public, that Council will not tolerate conduct by an insurance

> licensee that is self-serving and intended to mislead others, as in this case. The Hearing Committee is satisfied that a one-year suspension of the Licensee's general insurance licence accomplishes this *and appropriately balances all of the factors in this matter* (emphasis added; at page 6);

(f) accordingly, with the exception of the Appellant's arguments that no harm was done to a third party and what occurred was a single incident, which points I have not found persuasive, the Committee adequately summarized all of the factors cited by Mr. Mann in mitigation, and gave strong indication (as shown by the words I have just highlighted) that it took them into account; and

(g) while in light of all of that I think the following an unnecessary observation, a decision-maker is not required to discuss in his or her Reasons ***all*** of the elements that entered into the reasoning, and frequently that does not occur. Even without the clarity I have just described and which I think prevails here, it would not necessarily follow that the Committee had failed to consider the points the Appellant has raised. As it happens and in light of the Committee's report as I have just reviewed it, I consider this submission by the Appellant to in any case be untenable.

[71] The real issue is not whether the Committee considered those various points, which it clearly did, but rather whether the penalty is in any case unreasonable in light of them, other relevant evidence and applicable authorities. I turn now to a consideration of those authorities.

(ii) Authorities Cited

[72] As I have stated, the Appellant challenges the Committee's reliance upon the *Sharpe-Terreault* decision of Council, saying among other things that the Committee referred to it as being "instructive".

[73] In fact, the Committee referred to the *Sharpe-Terrault* decision as being "somewhat instructive", suggesting it was guided by it to some degree.

[74] The licensee in *Sharpe-Terreault* damaged another vehicle while leaving a parking lot in her own vehicle. The other driver was not in her vehicle at impact but as it happens was walking toward it and witnessed what occurred. The parties then spoke and exchanged relevant information. In a subsequent text message exchange, the licensee tried to persuade the other party to report the damage as being the result of a hit and run, while offering to pay privately to have it fixed. The other owned balked on the basis that such a report would be dishonest. The licensee through the exchange repeatedly mentioned the alternative prospect that ICBC would have to assess fault as between the two drivers, with the likely result that they would both lose their safe driving discounts – even though the other vehicle was stationary at the time of the collision. The licensee also stated in

essence that as an agent herself she knew how the system worked. Ultimately ordering a one year suspension and costs, Council found that the licensee had attempted to commit a fraud while threatening and trying to coerce another consumer. In mitigation, it noted that the licensee was relatively inexperienced at the time, this had been a lapse when her motivation to save money had clouded her judgment, and she was suffering personal issues for which medical support was tendered.

[75] In the course of its Reasons, Council referred to its two earlier decisions in *Yang* and *Orr*, both of which featured a six month suspension as the primary penalty. In *Yang,* the licensee had affixed a decal to conceal a lack of insurance and driven his vehicle uninsured while displaying that decal for at least seven months. In *Orr*, the licensee had made a false statement to ICBC during an insurance review, and knowingly allowed the false representation to persist until ultimately directed by her employer to correct it. Council found that the *Sharpe-Terreault* facts were more serious as they involved a direct and deliberate threat to a member of the public.

[76] In the present case the Committee said in part about *Sharpe-Terreault* that it "… similarly involved self-serving conduct that was intended to mislead an insurer, and which ultimately brought into question an individual's suitability to hold an insurance licence" (report, at paragraph 6). Council on this appeal supports that analogy. In contrast, the Appellant disputes the relevance of *Sharpe-Terreault* as Mr. Mann did not coerce anyone and his conduct did not involve a direct and deliberate threat to a consumer or the public, which were factors Council in *Sharpe-Terreault* found to be "especially inexcusable".

[77] The Appellant also refers to Council's earlier decision in *Tsui*, where the licensee was suspended for three months for having five times over a course of years misstated the principal operator on applications for insurance of her vehicle, four times without the knowledge of the person so designated, and for the purpose of reducing her insurance premiums given an accident in her driving history. A $5,000 fine was also levied and for a year post-suspension Ms. Tsui's licence was to be downgraded from level 2 to level 1, on specified conditions.

[78] The Appellant submits that the facts in *Tsui* leading to a three month suspension are more egregious than in his own case which led to a one year suspension, and that more factually comparable cases are Council's decisions in *Swerhun* and *Newton*. In *Swerhun*, Council imposed a two week suspension after the licensee had signed another person's name on a re-transfer of a vehicle to the licensee. While this amounted to misconduct, Council noted that the other person had approved the signing of his name and that this was an isolated matter arising out of a difficult personal relationship. In *Newton*, the licensee had accessed the ICBC computer system and caused a debt he owed to be shown as paid so that he could renew insurance just prior to expiry, and on later being questioned by an agency employee provided a cheque in payment of the debt that he knew could not be negotiated. The licensee, Council found, knew that non-payment of the debt would be discovered, as indeed it was. Council noted that the licensee was a

salesperson with limited authority and ordered, along with a reprimand, a disclosure condition on his licence concerning the incident, a $200 fine and an obligation to pay costs. There was no suspension.

[79] The Appellant also relies upon *Insurance Council of British Columbia v. Bustillo*, 160108-1895 (November, 2011), which concerned the creation of a false document purporting to confirm property insurance coverage following a series of unfortunate circumstances through which the licensee tried in vain to secure such coverage for her clients. It was, accordingly, a serious matter. Evidence was tendered as to the licensee's good character and otherwise sound judgment in support of a submission that the creation of the false document was a major aberration from her normal practice, occurring when she felt overwhelmed and "outside of her comfort zone". She did not, however, seek to excuse her conduct and, according to Council, appeared genuinely remorseful. Council found that she had deliberately created the false document and in so doing acted without honesty and decency of purpose, being key indicators of good faith. Nonetheless, in light of the surrounding circumstances and the licensee's submissions, Council … "ultimately did not review the Licensee as untrustworthy. This conclusion was based on Council's finding that the Licensee did not set out to cause harm to her clients or further her own interests. Rather, she reacted very poorly" (at page 8). In the result, Council found that a $2,000 fine would satisfy the need for a punitive measure and that protection of the public would be served by conditions including that the licensee's salesperson status could not be upgraded for one year.

[80] In respect to *Bustillo* Mr. Mann has submitted that, "The investigation found that similar incidents had been perpetrated by the licensee in the past. She was found guilty of deceiving others on several occasions". In fact, Council noted only that the agency discovered another instance where a client had submitted a premium for a policy which the licensee did not procure, having failed to follow up with the client on a request for further underwriting information, with the eventual result that the agency refunded the premium to the client. It was not said that this had entailed dishonesty rather than carelessness, and no other prior incident, whether involving deception or not, was mentioned.

[81] The Appellant also refers to *Fenelon v. Insurance Council of British Columbia*, FST 08-045 (April, 2009), and the discussion therein of the earlier Council decision in *Takhar*. The particular point Mr. Mann extracts from those authorities is that "a total ban" on all insurance practice – that is, a general cancellation or suspension – should not occur where, as is argued to be the case here, there is no ongoing threat to the public. In *Fenelon*, the licensee took and misused decals on his vehicles to create an appearance of insurance that did not exist, driving one of those vehicles without insurance for at least seven months, and then made a material misstatement in answer to an ICBC inquiry. He was also complicit in the backdating of a policy in an effort to circumvent a traffic ticket issued to him for driving without insurance. Along with a $5,000 fine and a costs Order, a three year suspension of any form of insurance licence was imposed on Mr. Fenelon as was a cancellation of his life, accident and sickness insurance ("life insurance") licence. On appeal to the FST, the life insurance licence cancellation and the three year

prohibition on the general insurance licence were upheld (though the time period for the latter was ordered to include seven months pre-hearing during which Mr. Fenelon was not working), and the three year suspension was reduced to two years so far as other types of insurance work were concerned (presumably, other than general insurance and life insurance). One of the issues the FST considered was whether a general prohibition on licencing was appropriate on the facts of the case. In referencing Council's earlier decision in *Takhar*, it said in part that:

> … With respect to the severe penalty of a general prohibition against holding all insurance licences, Council explained that it is warranted where the agent poses an ongoing risk to the public. It then went on to explain that Mr. Takhar posed a continuing risk because he still wanted to deflect blame on others even though he had admitted some of his wrongful actions (at page 18).

[82] The FST went on to note the "very serious misconduct" the case involved and stressed that Mr. Fenelon continued to deflect blame to others, suggesting he was an ongoing risk to the public calling into question his suitability to hold a licence. It was therefore concluded that a general prohibition upon him was appropriate, though on the terms prescribed.

(iii) Analysis

[83] I again state the uncontroversial proposition that Mr. Mann's misconduct was serious. He caused the submission of transfer documents bearing dates earlier than when signed for the purpose of heightening the chance of obtaining covering for an accident he had caused. If the misfeasance had not been discovered, presumably ICBC, and indirectly those who contribute premiums to ICBC, would have paid for all property damages and, if any, all personal damages arising out of the Accident. Mr. Mann then compounded his problems by initially reporting that the (Volkswagen) transfer forms were processed at the Agency on their date of May 6, 2011, whereas in fact the signatures came later, and in the case of the previous Volkswagen owner, not until near the end of the month. The impropriety was therefore sought to be carried out over at least a few weeks.

[84] As I have said, there is no basis for disturbing the following finding by the Committee:

> The Hearing Committee has concluded that the Licensee backdated insurance documents to bolster a family insurance claim and was not forthright when confronted about the matter. The Hearing Committee finds this misleading and self-serving behaviour to be inexcusable, particularly for someone with the Licensee experience in the industry as both an agency owner and an insurance licensee (report, at page 5).

[85] The Committee also referenced as an aggravating factor Mr. Mann's admitted past signatures of his wife's and daughter's names on insurance documents. No mention was made of whether the signatures occurred with the approval of Mr.

Mann's wife and daughter. Perhaps Mr. Mann did this as an expedient and in the family's interests, but as a trained insurance agent he should have known, and presumably did know, that doing so was wrong.

[86] I have described above my views concerning those facts led in desired mitigation of penalty. Mr. Mann's admission of misconduct and expression of remorse are meaningful, even if they should be expected on these facts, but the effect upon him and his family of the ICBC sanctions, and his clear professional record since these events, are particularly significant.

[87] Rarely are two cases materially identical in their facts, and there is no decision cited here that is so factually close to the present case as to suggest the same result.

[88] I have considered carefully all of the authorities submitted on this appeal, analyzing for points of comparison and contrast, for the purpose of assisting an assessment of whether the result below falls on a spectrum of what is reasonable, and leaving aside the precise result I may have delivered had I been the original decision-maker. Before weighing those authorities against the case under appeal, I wish to make the following general comments.

[89] Firstly, the FST, to state the obvious, is not bound by decisions of Council, and nor is it even bound by its own prior decisions: the doctrine of *stare decisis,* while robust in the Court system, is not applicable to administrative tribunals: see *Domtar v. Quebec*, [1993] 2 S.C.R. 756 at para. 91 and 94. Past authorities are considered in the tribunal context for guidance, of course, and in some circumstances will be thought instructive or persuasive but they do not rise to the level of compulsion.

[90] Secondly, I am aware that decisions rendered by Council, which is an active tribunal, are very numerous. Looking at the previous two calendar years alone, I have seen from Council's website that the disciplinary decision in this case was its 44th of 2015, following a total of 56 such decisions in 2014.[2] I raise this to say that it is unrealistic to expect a string of consistency among decisions of such great number, even if that may be the ideal. If each constitution of a hearing committee was bound to consider all decisions in even the previous few years bearing upon the range of penalties within the frame of a case, the task would be formidable. As a practical matter, each animation of the tribunal will be dependent upon the parties (including Council's representative) to place relevant authorities before it, while possibly also benefitting from applicable past decisions which happen to be within its own knowledge. But the richness of the subject could as a practical matter seldom be fully mined, and I venture to say that the fast accumulating body of decisions will always show inner discrepancies if put under scrutiny. Where called

[2] Lest there be concern that I have stepped outside the record in glimpsing that website, I clarify that my having done so has played no role in the outcome of this appeal, the related point being simply an observation that reconciliation of the many Council decisions touching a particular penalty range is a challenging and probably unrealistic exercise.

upon, the FST can provide an important role as overseer in redirecting the course of the case law if necessary, but only of course if it first identifies the particular penalty decision under appeal as having been unreasonable, thereby engaging its right to consider change.

[91] I will now juxtapose the authorities referred to on this appeal against the present facts.

[92] Starting with *Sharpe-Terreault*, I well understand how the decision would be thought somewhat instructive and how a limited analogy could be drawn between it and the present case. Council in *Sharpe-Terreault*, however, was clearly influenced by the licensee's shocking behaviour toward a third party, effectively pressing her to conspire to present the insurer with a fictional account of what had occurred, and that sort of dimension is absent here. For that reason, in my view the misconduct in *Sharpe-Terrault* was markedly more serious than in the case under appeal.

[93] I have noted the transcripts of the submissions below and seen that Mr. Mann did not refer before the Committee to any prior decisions, other than to seek to distinguish the *Fenelon* authority referenced by Council. On this appeal, however, he introduces past Council decisions in *Swerhun, Newton, Tsui* and *Bustillo*. In fairness to the Committee it should be noted that I have therefore received a fuller exposition of the case law than it enjoyed before having to pass on penalty.

[94] That said, I do not accept the Appellant's submission that the *Swerhun* and *Newton* decisions are the more factual comparable to this case. Neither case featured an intention to mislead an insurer so as to alter the outcome of a claim. While the reprimand in *Newton* seems surprising given the conduct involved (the FST in *Fenelon* referred to it as an "aberration"), the facts in both cases are obviously less egregious than in Mr. Mann's case, taking into account the nature and purpose of his impropriety, his initial lack of forthrightness when questioned and his (unrelated) past signature practices.

[95] *Tsui* involved repetitive misleading behaviour in the form of wrongful designation of a principal operator, which had the *potential* to affect a coverage decision. It might be queried whether *actual* backdating of documents so as to influence a decision on an accident that has occurred is more direct, morally questionable behaviour. Still, the question of whether the misconduct in *Tsui* or in this case is the more serious could be reasonably debated. Beyond that it should be noted that the three month suspension in *Tsui* was only part of the penalty levied: on expiry of the suspension Ms. Tsui's licence was to be downgraded from level 2 to level 1 for a period of twelve months, and then on various conditions, and she was fined $5,000.

[96] The *Bustillo* decision seems remarkable given that it involved the creation of a false document and related misleading of a client whose property was left uninsured, and yet did not lead to any suspension, Council not finding the licensee to have been untrustworthy. The licensee was a level 1 salesperson and Council

clearly preferred terms designed to remediate and educate to an interruption of her career.

[97] Finally, with *Fenelon* in mind, I have given close consideration to the Appellant's submission that a one year suspension is inappropriate here as Mr. Mann poses no ongoing risk to the public and should therefore not be generally prohibited from holding a licence. The Committee did not find that Mr. Mann was an ongoing risk to the public; indeed, as I have stated, it specifically noted that more than four years had passed since the transgressions occurred without, to Council's knowledge, further incident regarding Mr. Mann's conduct, and it referenced Mr. Murphy's evidence that Mr. Mann had been under close supervision without professional issues being identified. Nonetheless, the Committee felt that it was necessary to penalize Mr. Mann for his conduct and to emphasize to the industry, as well as to the public, that Council will not tolerate conduct by insurance licensees that is self-serving and intended to mislead (report, page 6). Those are proper goals of sentencing, to be balanced against other relevant considerations, but as to the present point there is, again, no indication of a view that Mr. Mann posed an ongoing risk to the public, just as the evidence would seem to be against that proposition.

[98] I pause to say that I do not construe the FST's earlier decision in *Fenelon*, or for that matter Council's earlier decision in *Takhar*, as suggesting that no general prohibition of licencing for any length of time should ever result in the absence of an ongoing risk to the public. It would be easy to conjure circumstances where the misconduct was of such a serious kind that even an apparent subsequent reformation could not trump the need to denounce and generally deter in the form of a removal from practice for an appropriate period. To conclude otherwise would be to put the sentencing authority in a straitjacket, fettering the very exercise of judgment the process demands. What can be extracted from *Fenelon* and the various authorities to which it refers is that where removal from practice is merited the absence of an ongoing risk of harm promotes a limited rather than a general order. I would not take the point farther than that.

[99] I have come to the view that a one year suspension of Mr. Mann's insurance licence is unreasonable and should be replaced with a two month suspension and a further term that for an additional period of one year he shall be prohibited from any professional dealings in Autoplan business. I lay particular stress on the following circumstances in coming to that conclusion:

(a) as I have explained, while there are points of comparison between this case and *Sharpe-Terreault*, I regard the misconduct there to have been of a more severe form. While the facts in all of these cases are distinguishable one from the other, I consider Mr. Mann's general level of misconduct to be closer to what occurred in *Tsui*, which featured a three month suspension and other significant terms, and *Bustillo*, where no suspension was ordered, though it seems on a uniquely broad perception of the licensee;

(b) Mr. Mann and, inevitably, his family have already paid a heavy price for his highly improper behaviour in the form of the ICBC sanctions. The parties are in agreement that this is a relevant consideration, and I have seen no mitigating circumstance in any of the cases cited that even approximates the scale of this unique adversity suffered by the Manns;

(c) a general suspension for a period of one year would superimpose on that adversity considerable hardship, which I regard as disproportionate to Mr. Mann's failings, as significant as they were. It is not a stretch in light of Mr. Mann's and Mr. Murphy's evidence to think that such a lengthy suspension could end or radically diminish Mr. Mann's career. That sort of consequence may be necessary in some cases, but is not on the facts of this one;

(d) by the time of the hearing below, more than four years had passed since the events in issue with no further professional incidents, despite the scrutiny under which Mr. Mann was placed by his Agency and, apparently, by ICBC. This, too, is an uncommon and possibly unique circumstance, providing insight here as to the appropriate penalty;

(e) against Mr. Mann's entire professional history from April 7, 1999 to November, 2015, when the hearing below occurred, the events of May, 2011 must be considered aberrant;

(f) Mr. Mann's past signing of his wife's and daughter's names was certainly inappropriate, but there is no reason to expect a recurrence following his admonition for this, even if the admonition should not have been necessary; and

(g) all of Mr. Mann's professional difficulties here occurred in connection with automobile insurance, commending a condition that for an additional year he shall not practice in that sphere.

[100] The restraint I am ordering from Autoplan dealings is not consonant with the *Fenelon* line of authority, which concerned whether a prohibition on a licensee holding more than one insurance licence should extend to both or all licences held or be restricted to the one in which the indiscipline occurred. Mr. Mann holds only a single licence, being a general insurance licence, and I am carving out for special disciplinary treatment one practice area within that licence. I am confident that Council would have had authority to make such an Order, given its ability to impose conditions on the holding of a licence under section 231(1)(h) of the *Act*, and I consider the FST in turn to have authority to do so in light of its broad powers set out in section 242.2(11) of the *Act*, and reproduced at paragraph 6 above. I also note that Council advocated below for a condition to be placed on Mr. Mann's general insurance licence prohibiting him from conducting "ICBC Autoplan business following completion of his licence suspension", showing that it believed it had authority to tease out a practice area from the otherwise general right to work

under a single licence (as it happens, the Committee did not make that recommendation and Council did not order it).

[101] Mr. Mann has already been permanently enjoined by ICBC from professional dealings in Autoplan, as set out in his Affidavit filed in the Court action within which he is challenging that prohibition. What, if anything, has become of that action is unknown to me; I am aware only that the action was extant at the time of the November 4, 2015 hearing. If Mr. Mann succeeds in that Court challenge, perhaps (I will put it no higher than that) that prohibition will be removed or softened. If, however, the prohibition continues, the condition I am placing on his licence will merely overlap with the ICBC sanction to no immediate practical effect. Even in that event, however, I regard it as important that the Order be made, given that it may have precedential value either as concerns others or in the (theoretical) event of future misconduct on the part of Mr. Mann. I also agree with Council's submission that its mandate must not be deferred to ICBC, a party not charged with regulation of insurance agents in this province. Council cannot control what ICBC does or what a Court may do in the face here of a review of ICBC's action, but must make its own decision according to the merits of the case presented to it and the imperatives of its duty. The same is true of the FST.

[102] In my view, a two month suspension together with the condition I have described and the remaining terms ordered by Council not challenged on appeal put the penalty in this case onto the spectrum of reasonableness, which object a one year suspension had frustrated. I expect even a two month suspension will be difficult for Mr. Mann to bear, but it is deserving, it is as roughly consistent with illustrative precedent as I can approximate it while accounting for circumstantial differences, and together with the remaining sanctions it balances the aims of sentencing, which include denunciation, rehabilitation, specific deterrence and general deterrence, the latter being concerned with persons having basic knowledge of the important facts. Both a two month suspension and a one year removal from a practice area are significant censures on a professional's record, reflecting conduct that was manifestly awry. Once again, the condition I am ordering to be placed on Mr. Mann's licence may, for him personally and leaving the value of precedent aside, prove merely symbolic or it may have imminent tangible consequences, but neither Council nor the FST can control this and, in any event, its logic appeals to me on consideration of the origin of these difficulties, and on borrowing, if adapting, some of the thinking apparent in *Fenelon, supra*.

DECISION AND ORDER

[103] Accordingly, I uphold the five terms of the Order made by Council below, with the exception of varying the first term as I have indicated, and altering the deadline for payment of costs to align with the end of the now two month suspension period. In the result I make the following Order:

(a) the Licensee's general insurance licence is suspended for a period of two months, commencing on July 13, 2016 and ending at midnight on September 12, 2016;

(b) a condition is imposed on the Licensee's general insurance licence that upon completion of the Licensee's suspension, and for an additional twelve months ending at midnight on September 11, 2017, he shall be prohibited from any dealings, direct or indirect, in Autoplan business;

(c) a condition is imposed on the Licensee's general insurance licence that upon completion of the Licensee's suspension, and until such time as the Licensee has an additional 12 months of active licensing, the Licensee is required to be supervised by a Level 3 general insurance agent who meets Council's approval;

(d) a condition is imposed on the Licensee's general insurance licence that while the Licensee is under supervision, he is prohibited from acting in any supervisory capacity at an insurance agency;

(e) the Licensee is assessed Council's investigative costs of $1,987.05; and

(f) a condition is imposed on the Licensee's general insurance licence that requires him to pay the above-ordered investigative costs no later than September 12, 2016. If the Licensee does not pay the ordered investigative costs in full by this date, the Licensee's general insurance licence will remain suspended and the Licensee will not be permitted to complete any annual filing until such time as the ordered investigative costs are paid in full.

[104] Without the benefit of submissions, and given the partial success of this appeal, my present inclination is that no costs of the appeal should be awarded. If, however, either party wishes to make a submission regarding costs, they may do so within 14 days, in which case the opposing party will have 7 days to reply.

"Patrick Lewis"

Patrick F. Lewis, Vice Chair
Financial Services Tribunal

July 12, 2016