BRITISH COLUMBIA

Financial Services Tribunal

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DECISION NO. 2016-RSA-002(c)

In the Matter of an appeal under the *Real Estate Services Act*, S.B.C. 2004, c. 42

BETWEEN:	Yu-Hsiang (Lester) Lin	**APPELLANT**
AND:	Real Estate Council of British Columbia and Superintendent of Real Estate	**RESPONDENTS**
BEFORE:	A Panel of the Financial Services Tribunal Patrick F. Lewis, Vice-Chair	
DATE:	Conducted by way of written submissions concluding on December 21, 2016	
APPEARING:	For the Appellant:	Wes McMillan, Counsel
	For the Real Estate Council:	Jessica S. Gossen, Counsel
	For the Superintendent:	Joni Worton, Counsel

DECISION ON APPLICATION TO LIFT A STATUTORY STAY

NATURE OF APPLICATION

[1] This is an application by the Respondent, Real Estate Council of British Columbia ("Council"), for an Order lifting a stay of the decision below that was triggered by section 55(2) of the *Real Estate Services Act*, SBC 2004, c. 42 ("*RESA*"). Council's submission in support of the application is adopted by the Respondent, Superintendent of Real Estate ("Superintendent"), aside from on a small point I will mention below. The Appellant, Yu-Hsiang (Lester) Lin ("the Appellant" or "Mr. Lin"), is opposed to the application and maintains that the stay should remain in place.

[2] I earlier directed that written submissions in connection with this motion be delivered on a certain schedule, and that has been done, with the final argument being provided on December 21, 2016.

BACKGROUND

[3] Mr. Lin was a real estate salesperson licenced under *RESA*, having first become so licenced in 2008. On August 17, 2015, Mr. Lin consented to an Order of a Consent Order Review Committee within Council that, among other things, he be suspended for one year and pay a $10,000 monetary penalty, as a result of certain wrongful conduct ("the Suspension Order"). On December 17, 2015, a Discipline Committee within Council ("the Committee") made an Order cancelling Mr. Lin's licence ("the Cancellation Order"), on the strength of a finding that he had performed real estate services while suspended. Mr. Lin was not given advance notice of the latter process and first learned of the Cancellation Order after it had been pronounced. The current proceeding is an appeal from the Cancellation Order.

[4] The Cancellation Order was not, I am told, accompanied by any reasons of the Committee. Council takes the position on this appeal that there was, in the circumstances, no requirement to provide such reasons, just as there was no requirement to give notice to Mr. Lin of the process that led to the Cancellation Order. I understand those issues may figure in the appeal proper.

[5] The Cancellation Order also provided that, pursuant to section 43(5) of *RESA*, Mr. Lin may apply to vary or rescind the order on written notice to Council. Mr. Lin started down that path with the assistance of counsel but over many months was, he has asserted in the early stages of this appeal, stymied by delays on the part of Council. Ultimately, Mr. Lin and Council agreed that in lieu of a return to the Committee an appeal to the Financial Services Tribunal ("FST") would be taken, with the result that a notice of appeal was filed with the FST on September 15, 2016. On November 3, 2016 I allowed Mr. Lin's uncontested application to extend the time to file this appeal, thereby validating the notice of appeal earlier filed.

[6] There is agreement that a stay of the Cancellation Order is currently in place by virtue of section 55(2) of *RESA*, which provides:

> "55(2) Effect of filing notice of appeal
> …
> (2) An appealable decision, other than one referred to in subsection (1), is stayed by the filing of a notice of appeal under section 54 *[appeals]*, but the stay may be lifted under section 242.2 (10) (a) (ii) *[tribunal member hearing appeal may lift stay]* of the *Financial Institutions Act*.

[7] The exceptions set out in section 55(1) do not apply to this case.

[8] Whether there is a consensus on when the stay began is less clear. Council submits that the Cancellation Order was stayed by operation of section 55(2) on September 15, 2016, being the date the notice of appeal was filed, "… upon the order …" I made on November 3, 2016, extending the time for filing the notice of appeal. I infer that Council was not intending to take a definitive position as to when the stay took effect, lest its submission would have been more precise, and

which is understandable as nothing currently turns on the point. Presumably for that same reason, Mr. Lin has not addressed the question of when the stay began. The Superintendent, however, in the only submission it makes beyond adopting that of Council, has plainly asserted that the stay commenced, not on September 15, 2016, but rather on November 3, 2016, when the extension order was made.

[9] It seems doubtful whether a patently late notice of appeal immediately engages with section 55(2) causing a stay to then commence of the order appealed from. While section 55(2) does not include any modifier such as "timely" or "valid" before the words "notice of appeal", perhaps something on those lines is nonetheless to be implied. If so, and if an order is later granted breathing life into the otherwise invalid notice of appeal, the next question would be whether the stay is retroactive to the filing date or prospective only upon the making of that order. My tentative opinion is that the latter view is the more sensible, and that the Superintendent's position is correct, but I will not make that finding as the issue has not been argued, and it also may well be academic so far as matters between Council and Mr. Lin are concerned (I presume this could change only if there was some apparent conduct between the September 15 and November 3, 2016 dates that later became the subject of concern). In any case, it may be said that at least from November 3, 2016, the Cancellation Order has been stayed.

[10] The jurisdiction of this tribunal to lift that stay is found in section 242.2(10)(a)(ii) of the *Financial Institutions Act*, RSBC 1996, c. 141 ("*FIA*"), which states:

> *Practice and procedure*
>
> 242.2
> …
>
> (10) In respect of an appeal,
>
> (a) on application, the member hearing the appeal may
> …
>
> (ii) lift a stay of a decision under appeal for any length of time, with or without conditions,
>
> …

[11] It is this provision which underpins the present application.

TEST TO BE APPLIED

[12] There is disagreement regarding the test the FST should apply on a motion to lift a stay under section 242.2.

[13] Council's position is that the three part test laid down by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 1 SCR 311,

should govern. While acknowledging that the FST is not bound by its own prior decisions, Council submits that on two past occasions this tribunal has applied that test on a motion to lift a section 55(2) stay, and that the same approach should be taken on this application. In particular, Council submits that in a 2005 decision known as *Chrystale Ashworth et al v. Real Estate Council of British Columbia* (FST 05-012 and 05-015), and a 2006 decision in *Donald Lawrence Tymchuk and New Way Realty Inc. v. Real Estate Council of British Columbia* (FST 06-023), both featuring a request to lift a statutory stay, the FST adopted the following test as enunciated in *RJR-MacDonald*:

(a) whether there is a serious issue to be tried;

(b) whether the appellant would suffer irreparable harm if the stay was lifted; and

(c) whether the potential harm to the public interest caused by the stay outweighs the potential harm to the appellant if it is lifted (i.e., the balance of convenience).

[14] Mr. Lin submits that the burden on Council as applicant is somewhat heavier, and that it must establish at the threshold that the stay creates a risk of harm to the public before the elements identified in *RJR-MacDonald* are considered. If such a risk of harm to the public is shown, the argument goes, Council must then prevail on the branches of the *RJR-MacDonald* test. Mr. Lin submits here that no risk of harm to the public has been made out by Council and that it is accordingly unnecessary to consider the *RJR-MacDonald* criteria, but alternatively that on consideration of them the application should in any case be refused.

[15] Mr. Lin cites *Tymchuk, supra*, as an example of this tribunal's having earlier applied such a "two part test" – with an understanding that the second part encompasses the three *RJR-MacDonald* components – and which, he asserts, is the correct approach to an application of this kind. He submits further that this two part test is consistent with the legislature's decision to provide for an automatic stay in respect of certain appeals from Council, in contrast to situations like that in *RJR-MacDonald* where a stay was not created by statute and accordingly was being sought by application.

[16] I cannot agree that the FST has previously adopted the test as described by the Appellant. Rather, it seems plain to me that in both *Tymchuk* (at page 5 and following) and *Chrystale Ashworth* (at pages 5 and 15) this tribunal expressly adopted the three part test enunciated by the Supreme Court of Canada in 1994 in *RJR-MacDonald*, and later followed by the British Columbia Court of Appeal in *Shpak v. Institute of Chartered Accountants of British Columbia* [2002] BCJ No. 1704. That is the same three part test advanced by Council on this application.

[17] As it happens, though, I have concerns about applying either of the test formulations pressed on this application.

[18] Dealing first with the Appellant's position, teasing out an onus on the applicant to show that the stay creates a risk of harm to the public does not in my view flow from any of the authorities cited on this motion, and I see no good reason to fashion such a precondition. The merits around the public interest will be adequately considered on motions like this without having to sit on the threshold of the entire inquiry, and as a practical matter if what may be said on that score is insufficiently compelling the motion is likely destined to fail.

[19] As to Council's position, and without lightly departing from past FST decisions, I am of the view that the *RJR-MacDonald* approach does not fit comfortably with this particular statutorily-based application. *Chrystale Ashworth* and *Tymchuk* both involved unrepresented appellants and it is apparent from a review of these decisions that the issues with which we are concerned were not fully argued in those cases. As one example, and as the Appellant has pointed out, the FST in *Chrystale Ashworth* (at page 15) observed that the common law (*Shpak, supra*) is used to determine whether a stay should be granted pending an appeal, and stated that it was "prepared to assume" that this test was applicable to a motion to lift a statutory stay. Whether that distinction is in fact more meaningful was not discussed and, if the books of authorities on the current motion are any guide, has apparently not been analyzed in any decision to date. The Appellant here does, however, rely to some degree on the conceptual difference between stay and lift applications.

[20] The test used in *Chrystale Ashworth* and T*ymchuk*, and proposed by the Appellant in this case, actually amounts to a modification of that laid down in the leading judicial authorities on applications for a stay:

(a) under the first part of the common law test, a party's onus when seeking a stay is to show that the appeal – that is, the one the applicant has brought – has an appearance of potential merit. In the case however of an application to lift a stay arising from section 55(2) of *RESA*, the applicant is the regulator, the Real Estate Council, whose interest it will be, if a substantive submission on the merits is to be made at all, to show that the opposing party's appeal is in fact lacking in merit; and

(b) under the second branch of the common law test, and as illustrated by *RJR-MacDonald* and *Shpak*, it must be shown that ***the applicant*** will suffer irreparable harm if the stay is not granted. In all of *Chrystale Ashworth*, *Tymchuk* and the current case, however, the applicant is in fact the regulator, and the second criterion is said to be whether ***the appellant*** will suffer irreparable harm if the stay is not lifted. In other words, by the latter approach, the applicant must prove an absence of irreparable harm to the other party, rather than the more traditional task of having to show the irreparable harm it has experienced and can present on its own behalf. That, of course, is before the balance of convenience is canvassed under the third branch, during which exercise both sides of the ledger are taken into account.

[21] I do not suggest that such adaptations from the one context to the other cannot be made, but the need for them shows that, at minimum, the common law test does not fit naturally upon the *RESA/FIA* landscape, leading one to consider whether other more principled distinctions should be recognized.

[22] I am of the view that there is at least one such principled distinction to take into account.

[23] An application for a stay is a request that a decision of an authoritative legal body be temporarily constrained. Decisions of courts and tribunals take effect from pronouncement and are to be treated as correct unless and until an appellate body holds otherwise. To stay an authoritative order, otherwise in effect and to be accepted as correct and binding, is a serious matter. It is, accordingly, unsurprising that a stay applicant's need to show irreparable harm has come to be accepted. This requirement also makes sense in the context of its origin in the principles around injunction applications, and from which the entire *RJR-MacDonald* test derived: common law courts have traditionally favoured interim maintenance of the *status quo* over the granting of injunctive relief and fixed on the idea that if damages would be an adequate remedy at trial there was no need for prior intercession in the form of an injunction; assuming success at trial, damages would make the claimant whole regardless of what had gone before and all would be as it should. If, however, irreparable harm could be established, damages would clearly fall short and, depending on other considerations, the court might then be persuaded to step in early and alter the state of affairs in some particular way. As the case law evolved, this sort of paradigm was extended in some situations to non-monetary public interest claims, such as in *RJR-MacDonald.*

[24] The foregoing comments surely give short shrift to a large area of jurisprudence but I think them sufficient to support the observation that, historically, there have been very good reasons for the adoption of the irreparable harm principle in matters involving an application for either an injunction or a stay.

[25] But is an application to lift a stay – that is, to reinstate the effect of the order below, and in that sense to allow the administrative justice system to flow unimpeded – also of such a serious ilk that a metric of irreparable harm should be used? That the legislature has presumptively favoured a stay in certain cases is no trifling matter, and surely means that the applicant has a burden to discharge before the stay will be removed, but equally the legislature has conferred jurisdiction to lift the stay. While including that power, the *FIA* gives no hint as to the test to be applied where a stay is sought to be set aside: there is no indication that irreparable harm, or any other particular notion, should be considered on such an application. Rather, the authority is simply and concisely stated, presumably leaving this tribunal to approach the matter in the way it thinks proper and just.

[26] To my mind, the rationale for having to prove irreparable harm is not apparent in the lift application context. As distinct from the injunction and stay situations at common law which I have just briefly discussed, I do not see reason on a motion under section 242.2(10)(a)(ii) of the *FIA* to put the concept of

irreparable harm on any pedestal, particularly as the matter of harm will, in my view, on any proper approach to the question in any event become an important consideration.

[27] The occasions to date for potentially considering such questions have been very few because of the sheer uncommonness of applications to lift statutory stays, and at least when those occasions have arisen before this tribunal, these questions have not been raised. Nor have I had the benefit here of anything like full submissions on this topic, which I say entirely uncritically of the parties: Council understandably submitted that the approach taken by this tribunal in two prior cases also be used here, and for his part the Appellant has pointed up the distinction between stay and lift applications, though while settling on a threshold requirement that I am not persuaded to adopt.

[28] An administrative tribunal is not bound by *stare decisis*, even where decisions of leading Courts are in the frame: *Domtar v. Quebec*, [1993] 2 S.C.R. 75 (paras. 91 and 94). Relevant court decisions will be given careful and respectful consideration where they touch on the topic under consideration, but will not determine the point in issue if their adoption is not sensibly suited to the administrative regime. Similarly, prior decisions of the tribunal will warrant close consideration but will not necessarily drive the result, depending on circumstantial distinctions, whether a particular issue was previously fully argued and considered, and perhaps the need for evolution.

[29] I am not of the view that there is any authority that compels selection of the test to be applied in this case. I consider the constraints upon me, rather, to be in the nature of recognizing that the applicant, being Council in this case, has the onus of showing that the *status quo* should be altered, and further that in discharging that onus it must show that the interests of justice support the order sought. Beneath that general consideration, more specific guidance can be taken from reasoning employed in leading past authorities, adapted as needed to an application of this kind.

[30] I have accordingly concluded that an applicant under section 242.2(10)(a)(ii) of the *FIA* has the onus of showing on a balance of probabilities that the interests of justice warrant the lifting of the stay, and concerning which question this tribunal is to exercise a discretion while making such considerations as it considers important, including the following:

> (a) the apparent merits of the appeal and defence thereof based upon a preliminary review; and
>
> (b) whether the balance of convenience favours the granting of the application, in the sense that the harm or prejudice to be suffered by the public interest if it is not granted outweighs the harm to be suffered by the application respondent if it is granted.

[31] In my view, that approach incorporates important principles from the case law bearing on stay applications, while recognizing the conceptual difference

between them and an application to lift a legislative stay, and preserves an appropriate discretion in this tribunal to arrive at a fair and just result. This is the approach I will take in considering the present application.

SUBSTANTIVE SUBMISSIONS

[32] I have carefully considered all of the submissions made on this application. While they are naturally directed to the elements of the test said by the respective sides to be applicable, and which are not wholly as I have held them to be, I believe that all of the points advanced may be fitted within the considerations I have concluded should be made. For example, while I have not found it necessary on an application of this sort to require proof of irreparable harm, which topic occupies some of the submissions made, the matter of harm or potential harm is certainly a relevant consideration, and if in a particular instance such harm is shown to be irreparable, it would be all the moreso.

[33] I will now summarize what I take to be the key thrust of the parties' substantive submissions.

(i) Council's Position

(a) Whether a Serious Issue to be Tried

[34] Council has made brief submissions concerning the merits but, having done so, has stated that it would proceed on the assumption that there is a serious question to be tried. I take that to mean that for the purpose of this application only it concedes that such a serious issue exists, in the sense that the appeal is not frivolous or vexatious.

[35] Typically that would be the end of that aspect, but as the Appellant responded by submitting that the strength of the appeal favours maintenance of the stay, I will go on to outline briefly what Council has said at this stage about the merits.

[36] Council refers to the grounds in the notice of appeal as being extremely broad, including bias, procedural fairness and lack of jurisdiction on the part of the Committee, and says no factual support is given for these grounds. In the face of the record below and certain new evidence to be introduced on appeal (pursuant to my Order of December 9, 2016), Council seeks to uphold the Committee's finding that Mr. Lin was providing real estate services while suspended and refers to the deference to be afforded the Committee in that regard.

[37] Following a pressing of the merits issue by the Appellant, Council in reply emphasized the very serious misconduct Mr. Lin admits to having committed, which led to heavy initial penalties of a one year suspension and a maximum $10,000 fine. It then asserts superseding misconduct by Mr. Lin during the suspension period in the form of attendance at an open house with prospective buyers, advertisements for sale of properties on social media and other communications

with prospective buyers. In answer to Mr. Lin's complaint that the Cancellation Order occurred without notice to Mr. Lin, Council refers to a term in the Suspension Order respecting further suspension or cancellation in the event of a breach, and to section 43(4) of *RESA* which empowers Council in a similar way.

(b) The Balance of Convenience

[38] Council refers to the statutory stay as a type of "procedural pause" intended to spare the licensee the harm occasioned by the order below pending determination of the merits on appeal. The need to so pause is not present here, Council argues, because Mr. Lin is not currently able to practice in any event as his brokerage was wound up on December 31, 2015, his licence expired on July 29, 2016, and he would need to be approved for relicencing under *RESA*, which involves satisfaction of the criteria set out in section 10 thereof. Council says that on such an application being made by Mr. Lin, and given that there is clearly an issue as to his qualification to be licenced, it would have authority to refer the matter to a full hearing under its Rule 2-6, and indeed would surely do so, with the spectre, then, of parallel proceedings, likely leading in turn to a deferral of that hearing until after this appeal is adjudicated. This is one of the reasons Council gives for maintaining that there can be no irreparable harm to Mr. Lin if the stay is set aside, as he cannot work as a licensee in any case until the underlying conduct issues are resolved. In its reply, Council refers additionally to the prospect of such parallel proceedings as being potentially harmful to the public interest.

[39] Council also submits that considerable time has passed since Mr. Lin has been licenced, and even if his licence had not been cancelled there would have been a lengthy suspension with the result that he would not be practicing at this time. Council further argues that any reputational harm Mr. Lin may be suffering was caused by the serious wrongdoing he admits to having committed in the first place.

[40] In contrast, Council submits, serious (indeed irreparable) harm will be suffered to the public interest if the statutory stay remains in place, in the form of risk of harm to clients, notional or presumed risk of harm to the public, and actual risk of harm to the public, all in light of Mr. Lin's highly improper past behaviour, including deceptive conduct toward clients, the misleading of Council and the fabrication of evidence, and the potential for recurrence. Following *RJR-MacDonald, supra* (at page 346), Council argues that harm to the public interest is presumed simply upon proof that the applicant authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned action or order was taken pursuant to that responsibility. Council argues further that this reasoning has been applied in the regulatory context in *Pierce v. British Columbia Securities Commission* (2016) BCSECCOM 44 and *Starflick.com v. British Columbia Securities Commission* (2014) BCSECCOM 25, and that it should be applied equally here given that the Cancellation Order was made to protect the public pursuant to Council's mandate to do so as conferred by *RESA*.

[41] Council also refers to the importance of maintaining public confidence in the administration of justice, and submits that such confidence would be eroded if a stay of the Cancellation Order were in place despite (to paraphrase) the alarming factual background to it. In that regard Council relies in part on the decision in *Law Society of Upper Canada v. Hoskinson* (2016) ONLSTA 15.

[42] Council stresses that there is no reliable way to monitor Mr. Lin's conduct, were he to resume practice as a licensee.

(ii) Position of the Appellant

(a) Whether a Serious Issue to be Tried

[43] Mr. Lin goes beyond submitting that his appeal raises a serious issue, arguing (as I have stated) that the appeal is particularly strong and that this militates against the lift application.

[44] Mr. Lin indicates he will submit on the main appeal that Council lacked jurisdiction to take the action it did and in numerous respects (which he lists) violated principles of natural justice and procedural fairness. He maintains that the Cancellation Order was unreasonable and is attackable both procedurally and substantively. He emphasizes Council's failures to notify him of the process leading to the Cancellation Order, and to provide reasons for the Cancellation Order. Mr. Lin also refers briefly to evidence, asserting the dishonesty of Council investigators, and tacitly previews a position that he had done no more while suspended than act as an unlicensed assistant.

(b) The Balance of Convenience

[45] Mr. Lin's argument about the harm he will suffer if the stay is removed is brief. He states that he would thereby be rendered unable to practice or to rebuild his reputation, and he would be denied the opportunity to earn an income, with no prospect of recovering interim monetary losses in the event his appeal succeeds. He does not refer to his current occupational or financial circumstances, other than perhaps implicitly through the submissions I have just mentioned.

[46] Mr. Lin refutes all of the submissions of harm to the public interest made by Council. As to the abeyant licence and the risk of parallel proceedings, he characterizes Council's position as speculative and unsupported by evidence, while also stating that denial of the mere opportunity to resume practice amounts to irreparable harm. In relation to public confidence, Mr. Lin argues that reasonable, well-informed people will know of the unfairness he has endured and of the automatic stay of orders such as this Cancellation Order that the legislature favours. As to delay in the legal process, Mr. Lin says that Council is to blame and references my earlier observation (in December 9, 2016 Reasons allowing an extension of time to appeal) that he had consistently and diligently attempted to pursue the matter through Council.

[47] In answer to the submission that Council is not able to monitor his conduct, Mr. Lin points out the conditions within the Suspension Order that would still be in place if the stay were set aside and that would require his supervision by a managing broker.

[48] In general, the Appellant rejects in argument all of Council's assertions of harm and potential harm and cites a lack of evidence to support any of these positions.

DISCUSSION AND ANALYSIS

[49] Applications of this type are rare. The only British Columbia examples of motions to remove a stay brought to my attention are the prior decisions of the FST in *Chrystale Ashworth, supra*, and *Tymchuk, supra*. Counsel for Mr. Lin also refers to certain authorities to lift stays against monetary judgments in Ontario, but I do not find these to be sufficiently factually similar to be instructive here.

[50] In *Chrystale Ashworth* the lift application was allowed, as it was in *Tymchuk* except in relation to certain order terms intended for member remediation and which clearly were not adverse to the public interest. As I have said, the licensees in both of these cases were unrepresented. In *Chrystale Ashworth*, the presiding member of this tribunal referred to the appeal generally as being an "uphill battle" and noted that the appellant did not make any substantive arguments in opposition to the application to lift the stay. In *Tymchuk*, which had to do with the wrongful handling of trust funds, the FST observed that the grounds for appeal were "… at best, not compelling". Reference was also made to the fundamental importance to the public interest of proper handling of client funds and the particular risk associated with non-compliance in that area.

[51] In my view the appropriate outcome in this case is less clear than, at least in retrospect and on reviewing reasons, it appeared to have been in both *Chrystale Ashworth* and *Tymchuk*. Certainly counsel on both sides of the debate are engaged here and have made extensive submissions, even if the incorporation of actual, specific evidence in those submissions has on both sides been limited.

[52] Upon careful consideration I have decided to allow the application, upon a reasoning process that I will summarize as follows:

(a) I accept on a preliminary review that the appeal raises serious issues, as is conceded for the purpose of this motion by Council. I cannot, however, go farther and accept Mr. Lin's submission that the appeal is particularly strong and that this favours dismissal of the application. I will not say that a merits consideration on an application such as this must always be confined to the mere question of whether there is a serious issue; perhaps a situation would arise where, even on the surface-level analysis that an interlocutory occasion permits, it seems highly likely that the decision below is unsupportable, and I do not see why this tribunal should be prevented from giving effect to such a

consideration in cases where it can fairly be made. As a general matter, however, I would think such a circumstance to be very uncommon, and I do not feel that this case is an example of it. It would have taken extensive and carefully developed arguments on the merits, tied to specific evidentiary references in support, to compel a view that the strength of the appeal on its face was so apparent as to be a factor on this application. I will say no more about the merits at this interim stage, other than to observe that this is not the conclusion I have drawn or could draw on the limited material before me (which of course is not to say the appeal mightn't succeed, but that is for another day);

(b) Mr. Lin has admitted to serious misconduct which led by his consent to stringent penalties. While again acknowledging that this appeal raises serious issues, I cannot ignore that Mr. Lin was also found (*ex parte*, it must be said) to have breached the Suspension Order, which suggests recurring misconduct. It is the very prospect of further recurrence, together with the serious nature of the transgressions in issue, that brings Council to argue that there is a risk of serious (Council says irreparable) harm to the public interest if the stay is not set aside. Against that, the evidence of the risk of harm to the Appellant if the stay is set aside is quite thin: there is no affidavit, for example, from Mr. Lin, detailing the hardship he has endured as a result of the Cancellation Order, including in relation to the opportunity to earn income. Mr. Lin does argue that revived operation of the Cancellation Order would deny him the opportunity to earn income, but there is no elaboration or description of his actual life circumstances. Why the hardship point was not further developed in evidence is unknown to me, and I draw no inference about that, but I am in any case of the view that on the score of risk of harm Council's case is the more compelling on the material presented;

(c) that said, an unusual feature here is that, according to Council, regardless of what happens on this application the Appellant will likely not be able to resume practice until his qualifications have been established to the regulator's satisfaction. That seems a two-edged consideration: if this is so, where is the risk of harm to Council if the stay is maintained, but on the other hand where is the risk of harm to Mr. Lin if it is not? If Council's prediction that the qualification issue would lead to a deferral of a relicencing decision until after this appeal is heard were to be accepted – and Mr. Lin certainly does not accept it – this application would appear moot. Clearly, however, Council does not think it to be moot, lest it would not have been brought, and presumably it would acknowledge that the outcome of any parallel proceedings cannot be known at this stage. In the end, Council's submission on this point influences me to a modest extent only and strictly in the respect that parallel proceedings (for which, I accept, there is some prospect) would be mutually inconvenient and are to be avoided if possible; and

(d) on balance, I consider it to be in the interests of justice to allow the Cancellation Order to operate pending disposition of this appeal, which raises potentially arguable issues but on a foundation of serious professional misconduct.

DECISION

[53] I have, accordingly, concluded that Council has met its onus of showing that the section 55(2) stay should be lifted in accordance with section 242.2(10)(a)(ii) of the *FIA*, and I so order.

"Patrick F. Lewis"

Patrick F. Lewis, Vice-Chair
Financial Services Tribunal

February 7, 2017