BRITISH COLUMBIA

Financial Services Tribunal

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DECISION NO. 2017-FIA-002(a), 003(a), 004(a) 005(a), 006(a), 007(a) and 008(a)

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

BETWEEN:	Financial Institutions Commission	**APPELLANT**
AND:	Insurance Council of British Columbia and	**RESPONDENT**
AND:	Heidi Johnson, Rabjit Singh Johal, Edmund George, Jacqueline Nicole Babcock, Cheryl Lee Das, Ernie Nguyen and Mi Keun Lee	**ADDITIONAL RESPONDENTS**
BEFORE:	A Panel of the Financial Services Tribunal Theodore F. Strocel, Q.C., Chair	
DATE:	Conducted by way of written submissions concluding on July 3, 2018	

APPEARING:	For the Appellant:	Sandra Wilkinson, Counsel
	For the Respondent Council:	David T. McKnight, Counsel
	For the Additional Respondent Rabjit Singh Johal:	Alexander T. Maltas
	For the Additional Respondent Jacqueline Nicole Babcock:	Alison L. Murray, Q.C.
	For the Additional Respondents: Heidi Johnson, Edmund George, Cheryl Lee Das, Ernie Nguyen and Mi Keun Lee	Self represented

I. Introduction

[1] The Appellant Financial Institutions Commission ("FICOM") has filed seven appeals to this Tribunal. FICOM's right of appeal arises from section 242(3)(b) of the *Financial Institutions Act*, R.S.B.C .1996, c. 141 (the *Act*):

242(3) The commission

(a) is a party to an appeal of a decision of the council to the tribunal, and

(b) may appeal a decision of the council to the tribunal.

[2] FICOM's appeals challenge seven decisions of the Respondent Insurance Council of British Columbia ("Insurance Council").

[3] The Insurance Council is a statutory body established under section 220 of the *Act*. The Insurance Council has first instance responsibility under the *Act* for licensing and regulating the conduct of insurance agents, insurance salespersons, insurance adjusters and employed insurance adjusters. It consists of 11 voting members appointed by Cabinet, and any non-voting members appointed by the minister.

[4] FICOM, the appellant, is also a creature of the *Act*: ss. 201-206. FICOM is a unique statutory tribunal. Its members include Cabinet appointees making statutory decisions together with the deputy Minister of Finance: s. 202(1). FICOM acts not only as a provincial regulator in its own right (for example, in respect of credit unions, trust companies and insurance companies), but it has also been given the additional statutory role of exercising the right to appeal Insurance Council decisions. I will discuss the potential implications of FICOM's right of appeal when I discuss the standard of review below.

[5] The Insurance Council's first instance decisions arose from the misconduct of insurance agents who, contrary to the *Autoplan Manual* of the Insurance Corporation of British Columbia ("ICBC"), renewed clients' auto insurance when the governing rules prohibited them from doing so where bridge tolls had not been paid. The renewals were accomplished by taking advantage of a "glitch" in the ICBC computer system that allowed agents to bypass the normal system restriction that was triggered when a bridge toll was unpaid. The bypass was accomplished by entering a combination of any two letters followed by any series of five numbers. The number of times during the relevant 18 month period that each licensee entered false information ranged from 32 to 116.[1] In each case, the Insurance Council found misconduct and imposed a $5000 fine.

[1] The Council identified the number of improper system by-passes as follows: (a) Babcock (50); (b) Das (32); (c) George (34); (d) Johal (as a manager, his individual entries was not identified, but he admitted entering false receipts "over a couple of years" for customers who did not have receipts); (e) Johnson (53); (f) Lee (36); (g) Nguyen (116).

[6] FICOM does not challenge the Insurance Council's underlying findings of misconduct, which findings were not cross-appealed by the licensees. FICOM does however argue that the $5000 fine imposed in each case was unreasonable. FICOM's position is as follows:

> Each of these cases involved the repeated and deliberate creation and or provision of knowingly false information to an insurer in order to process an insurance application. The Respondent Licensees intended for ICBC to rely upon the false information provided as if it were true: the number is submitted as evidence of a receipt for payment of a toll debt. This involves dishonesty. As the Council found, it brings into question each if [sic] the licensees' trustworthiness. Trustworthiness is an essential attribute of an insurance licencee.
>
> If a licensee is prepared to commit a dishonest act for 30 or 50 or 100 clients in the processing of insurance applications, that conduct deserves serious denunciation. A fine is an inappropriate and unreasonable sanction for dishonest conduct, especially when the conduct is repeated and deliberate.

[7] FICOM submits that (a) the Tribunal should substitute a 6 to 9 month suspension in each instance, (b) five of the licensees should also be required to complete an ethics course and (c) one licensee should be prohibited from occupying a position of authority over licensees for at least one year after his period of suspension.

[8] As noted, none of the licensees has appealed from either the Insurance Council's findings or from the penalty it imposed, and none requested a hearing in response to the Insurance Council's notice of intended decision which set out adverse findings and a fine. Several licensees now argue that they would have conducted themselves differently had they known that their fines would be challenged. One of the issues before the Tribunal concerns what if any significance this concern ought to be given in light of the operation of the statute.

[9] In accordance with the *Act* and the FST's *Practice Directives and Guidelines*, the Insurance Council provided the FST with an appeal record. On each appeal, FICOM is the appellant, the Insurance Council is one respondent, and the individual licensee is the other respondent.

[10] Prior to receiving submissions on the merits of the appeals, the Tribunal issued several preliminary rulings, including a ruling that the appeals would be

heard together by the same Tribunal member: *Ruling of Vice-Chair Lewis, November 8, 2017.*

[11] While this compendious decision addresses all seven appeals, I wish to make clear that I have reviewed each individual appeal with care.

[12] For the reasons that follow, FICOM's appeals are allowed.

II. Procedural history

A. The ICBC Investigation

[13] The Insurance Council's decisions originated in an investigation conducted by ICBC. Each Intended Decision described the ICBC investigation as follows:

> *Overview: Toll Bridge Debt*
>
> In June 2015, ICBC commenced an investigation after becoming aware that some insurance licensees may be entering false information relating to ICBC Autoplan in an effort to override outstanding toll bridge debts. Under Volume 1, section 12.5 of the ICBC Autoplan Manual, the *Toll Bridge Restriction* requirements state that "*customers who have unpaid toll bridge fees are subject to a refuse to issue (RTI) by ICBC on their driver licences, vehicle licences, and insurance policies."*
>
> For the period under review, there were two toll bridge administrators, Quickpass for the Golden Ears Toll Bridge ("GETB") and TReO for the Port Mann Toll Bridge ("PMTB"). Since the initial investigation, TReO now has the capacity to administer both bridges.
>
> An RTI restriction related to toll bridge debt was applied differently depending on the bridge. For the PMTB, an RTI restriction was applied if more than $25.00 was owed and the toll was over 90 days past due; and for GETB, an RTI restriction was applied if the toll debt was over 150 days past due.
>
> An insurance licensee was not able to accept payment or make payment arrangements for toll bridge debts on behalf of a customer. In such situations, an insurance licensee was to direct the customer to contact the applicable bridge administrator to pay the outstanding toll bridge debt. An insurance licensee was then required to confirm the customer had paid the toll bridge debt in full before processing an ICBC Autoplan transaction.

ICBC Investigation

An RTI restriction relating to a toll bridge debt could be overridden if an insurance licensee entered a receipt number that was issued by Quickpass or TReO to a customer upon the payment of an outstanding toll bridge debt. Valid receipt numbers contain a combination of letters and numbers.

For the 18-month period from January 1, 2014 to June 15, 2015, ICBC compared all of the valid receipt numbers issued to customers by Quickpass and TReO, to all the receipt number entries made by every insurance licensee into ICBC's system for the same period. This resulted in a list of false receipt numbers, which included details on the insurance licensee who completed the transaction and the name of the customer involved in the insurance transaction.

[14] As noted in the investigation report subsequently provided to the Insurance Council, there was "an apparent glitch" in the ICBC computer system that allowed a "refuse to issue" ("RTI") restriction to be bypassed by entering a combination of any two letters followed by any series of five numbers. This allowed licensees to enter false numbers on behalf of clients. The report noted that this practice appears to have been widespread:

> ICBC obtained a list of all the valid receipt numbers from the GETB and PMTB series and compared the list to all the entries made by every agency in the province, identifying how many entries were false and how many were valid, and created a spreadsheet. The data run covered an 18 month period from January 1, 2014 to June 15, 2015. ICBC identified false transactions at nearly all the agencies on the spreadsheet in relation to both GETB and PMTB debts….

B. The Review Committee process

[15] While ICBC has authority to limit an agent's access to its database, it has no regulatory jurisdiction over individual licensees. As a result, the matter was referred to the Insurance Council.

[16] At the Insurance Council, the ICBC investigation report was considered first by the Insurance Council's Review Committee. The Review Committee, which is a screening body and not a decision-making body, reviewed the conduct of five insurance agencies identified in the ICBC investigation. The Review Committee also met with agency nominees in person.

[17] The Review Committee determined that the conduct of licensees identified in the ICBC report should be referred to the Insurance Council. The Review Committee recommended that the Insurance Council consider the conduct of licensees who overrode 20 or more toll bridge debts, and/or overrode a toll bridge debt for their own vehicle or a family member's vehicle.

C. The Insurance Council Investigator's Report

[18] An Insurance Council investigator prepared a report on her investigative findings for the Insurance Council's April 11, 2017 meeting.

[19] The Insurance Council investigator set out the history just described, outlined the supporting documentation considered (including statements made by licensees during the ICBC investigation) and discussed each licensee's case on an individual basis.

III. The Intended Decisions

A. Statutory authority

[20] Section 237 of *FIA* provides that before the Insurance Council can take any of the enforcement actions listed in that section (including a fine or license suspension), it "must give written notice in accordance with the regulations of the intended action to any person who will be directly affected by it": s. 237(2).

B. Written notice to each licensee

[21] Each Intended Decision advised the licensee as follows:

> Pursuant to section 237 of the Act, Council must provide written notice to the Licensee of the action it intends to take under sections 231 and 236 of the Act before taking any such action. The Licensee may then accept Council's decision or request a formal hearing. This intended decision operates as written notice of the action Council intends to take against the Licensee.

[22] Each of the seven Intended Decisions made intended findings regarding both conduct and penalty.

C. Findings as to conduct

[23] With respect to the conduct of each licensee, and taking into account the specific circumstances identified in the investigation report, the Intended Decisions included these findings:

(a) *Babcock* (licensed 9 years): "Council determined that given the large number of false toll bridge receipts numbers [50], the Licensee intentionally entered false information into ICBC's system, or at the very least, willingly turned a blind eye to the process and entered false toll bridge receipts so as to facilitate ICBC Autoplan transactions."

(b) *Das* (licensed 17 years): "Council determined that the Licensee intentionally entered false receipt numbers in an attempt to facilitate insurance transactions on behalf of her clients. Council determined that, as an experienced insurance agent, the Licensee should have known that this conduct was inappropriate and that her actions were a serious breach of her responsibilities. …Council noted that, with each of the 32 false receipt number transactions the Licensee entered to facilitate an insurance transaction, the Licensee benefited financially."

(c) *George* (licensed 14 years): "Council determined that given the number of false receipt numbers entered by the Licensee [34], the Licensee intentionally entered false information into ICBC's system, or willingly turned a blind eye to the fact that he was being provided false toll bridge receipts so as to facilitate an ICBC Autoplan transaction."

(d) *Johal* (licensed 11 years): "In an interview with ICBC on August 11, 2015, the Licensee admitted to entering false receipts to bypass GETB debt for customers, stating that if the customer did not have a receipt, he would put in any number. He stated that he has been overriding debt for GETB for a couple of years but denied training Agency staff to do so…. Council determined that the Licensee intentionally entered false receipts, and permitted or turned a blind eye to the entry of false receipts by other Agency representatives who reported to him as the Agency's branch manager. Council determined that for an experienced insurance licensee in a management position, the Licensee's actions were a serious breach of his responsibilities."

(e) *Johnson*: (licensed 25 years): "Council determined that the Licensee intentionally entered false receipt numbers [53] in an attempt to facilitate insurance transactions without inconveniencing her clients. Council

determined that as an experienced insurance agent, the Licensee should have known this conduct was inappropriate and that her actions were a serious breach of her responsibilities."

(f) *Lee* (licensed 13 years): "Council determined that the Licensee intentionally entered false receipt numbers [36] in an attempt to facilitate insurance transactions without inconveniencing her clients. Council determined that as an experienced Salesperson, the Licensee knew or ought to have known this conduct was inappropriate and that her actions were a breach of her responsibilities."

(g) *Nguyen* (licensed 13 years): "Council determined that the Licensee intentionally entered false receipts [116] in an attempt to facilitate insurance transactions without inconveniencing his clients. Council determined that as an experienced Salesperson, the Licensee knew or ought to have known this conduct was inappropriate and that his actions were a serious breach of his responsibilities."

[24] The Insurance Council also set out its intended characterization of the conduct. It found in each case that the actions of the licensee "brought into question [his or her] trustworthiness", stated that the conduct was a "serious breach of [his or her] responsibilities" and found that "it is necessary to send a clear message to both the Licensee and the industry that such a serious breach of practice is unacceptable".

D. Penalty

[25] The Intended Decisions then turned to the issue of intended penalty.

[26] In each case, the Intended Decision was brief:

> Pursuant to sections 231 and 236 of the Act, Council made an intended decision to fine the Licensee $5000.

IV. Opportunity to request a hearing not exercised in any of the seven cases

[27] Each Intended Decision notified the Licensee as follows:

> If the Licensee does not request a hearing by [identified date], the intended decision of Council will take effect.

> Even if this decision is accepted by the Licensee, pursuant to section 242(3) of the Act, the Financial Institutions Commission still has a right to appeal this decision of Council to the Financial Services Tribunal (FST). The Financial Institutions Commission has 30 days to file a Notice of Appeal, once Council's decision takes effect.

[28] No licensee exercised his or her right to request a hearing to contest either the findings of fact or the penalty. Consequently, each Decision went into effect on the day after the deadline set out in the Intended Decision, in accordance with the terms set out in the Notices of Intended Decision.

[29] I note that the time the Insurance Council gave each licensee to request a hearing was considerably shorter than FICOM's 30 day right to appeal.[2] The reason for this is set out in the statutory scheme, discussed further below.

V. The Appeals

[30] On August 11, 2017, FICOM filed the Notices of Appeal.

VI. Positions of the parties

A. FICOM

[31] FICOM takes no issue with the Insurance Council's findings with respect to the conduct of the individual licensees. Rather, it submits that the Insurance Council erred in law by ordering an unreasonable penalty in the circumstances of each of the decisions. FICOM argues that a $5000 fine is not commensurate with the seriousness of the conduct, nor does it fulfil the Council's stated purpose of sending a message to the licensee and industry that the conduct is unacceptable.

[32] FICOM seeks an order that the fines be cancelled, that license suspensions of 6-9 months be substituted, that all of the licensees except Ms. Johnson and Mr. Nguyen be required to complete an ethics course acceptable to the Council, and

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[2] Das, George and Johnson Intended Decisions (cover letters dated June 21, 2017, response required by July 10, 2017), Babcock Intended Decision (cover letter dated June 28, 2017, response required by July 17, 2017); Johal Intended Decision (cover letter dated June 26, 2017, response required by July 17, 2017); Nguyen Intended Decision (cover letter dated July 19, 2017, response required by August 7, 2017); Lee Intended Decision (cover letter dated July 20, 2017, response required by August 7, 2017). As noted FICOM appealed on August 11, 2017.

that Mr. Johal be prohibited from occupying a position of authority over licensees, including acting as an agency general manager, for at least one year after his period of suspension.

[33] Citing *Mann v. Insurance Council* (2015-FIA-002(a)), FICOM submits that the standard of review the FST should apply to the penalty decision is reasonableness, and that the penalty decision was unreasonable because a $5000 fine "is not within the range of possible, acceptable outcomes" (Citing *Dunsmuir v. New Brunswick*, 2008 SCC 9).

[34] FICOM submits that all of the licensees knew or ought to have known that the conduct in which they engaged would, as the Insurance Council found, reflect adversely on their trustworthiness, and breach their duties to the insurer, "since this is all specifically set out in the *Code of Conduct for Insurance Agents, Salespersons & Adjusters* and in the ICBC Autoplan Manual. It is also plain on its face". FICOM submits that primary purpose of professional regulation is public protection, and that the goal of discipline is ensuring public confidence and taking into account specific deterrence, general deterrence, rehabilitation of the licensee, punishment and denunciation and avoiding penalties that are disparate with penalties imposed in other cases. As noted above, FICOM submits:

> Each of these cases involves the repeated and deliberate creation and or provision of knowingly false information to an insurer in order to process an insurance application. The Respondent Licensees intended for ICBC to rely upon the false information provided as if it were true: the number is submitted as evidence of a receipt for payment of toll debt. This involves dishonesty. As the Council found, it brings into question each if [sic] the licensee's trustworthiness. Trustworthiness is an essential attribute of an insurance licencee.
>
> If a licensee is prepared to commit a dishonest act for 30 or 50 or 100 clients in the processing of insurance applications, that conduct deserves serious denunciation. A fine is an inappropriate and unreasonable sanction for dishonest conduct, especially when the conduct is repeated and deliberate.

[35] FICOM relies on Law Society authority (*Law Society of BC v. Nguyen,* 2016 LSBC 21) for the proposition that "the imposition of a period of suspension … is a significantly more severe penalty than is the imposition of a fine. … Suspensions are reserved for the more serious demonstrations of misconduct". FICOM argues that the $5000 fines here fail to achieve that goal, send the wrong message and are unreasonable when dealing with conduct which goes to the heart of professionalism

or trustworthiness. FICOM submits that public confidence and deterrence (both specific and general) require a suspension.

[36] FICOM argues that a period of suspension is warranted whenever the misconduct involves dishonesty; subject to mitigating factors to determine the length of suspension or whether a fine will achieve the goals of licensee discipline. FICOM notes that the Insurance Council has previously imposed a 6 month suspension on an agent in one case for the same conduct, in a single instance, on his own behalf (*Re Kanesaratna Sharma Sivagnana Iyer* July 11, 2017), and a one year suspension where a licensee processed a new plate transaction for a friend, falsely stating that she received an ICBC debt payment *(Re Karishma Christina Jetha Beharry*, April 18, 2016).

[37] FICOM notes that each licensee was experienced, knowingly engaged in repeated acts of dishonesty in matters directly related to his or her business, and that except in the cases of Nyugen and Johnson who took ethics courses before the decisions were issued, there are no mitigating factors. FICOM also points out that the situation was particularly serious in the case of Johal, who engaged in the conduct while having oversight responsibilities. FICOM argues that, based on *Iyer,* 6 months should be the suspension baseline.

B. The Insurance Council

[38] The Insurance Council agrees that the standard of review on this appeal is reasonableness, but it otherwise parts company with FICOM. The Insurance Council submits:

> In each of the decisions under appeal, Council recognized that Respondent licensees faced significant pressure from their customers to complete insurance transactions in a timely manner, and that the Respondent licensees were attempting to facilitate those transactions for their customers, albeit improperly.
>
> There is no suggestion in the undisputed factual findings … that the Respondent licensees pose an ongoing risk to the public or to ICBC in the circumstances.
> …
> Council submits that a fine of $5000 represents a significant deterrent and sends a strong message to the industry, while allowing for more serious penalties for more egregious cases in which public risk or deceptive conduct, or conduct for personal financial gain are identified.

[40] The Insurance Council submits that its past decisions reflect a principled distinction between (a) improper breach of ICBC procedure for customer convenience and not for personal gain, in which fines were imposed (*S. Kearns*; *E Dela Cruz*; *H. LeFlour*; *D. Zanatta*; *D. Mosberian)* and (b) cases involving personal gain and deception (*Iyer*, where the licensee conducted his own autoplan renewal; and *Beharry*, where the suspension was not due to the underlying conduct, but to the licensee's repeated attempts at cover up to mislead the employer and the Council).

[41] The Insurance Council argues that considered in this light, the fine of $5,000 each is significant and sends a clear message to the licensees and to the industry as a whole.

C. Licensee Babcock

[42] Licensee Babcock, who is represented by counsel on this appeal, submits that the Insurance Council penalty was reasonable and that a suspension would be unreasonable and excessive. Citing this Tribunal's decision in *Superintendent of Financial Institutions v. Special Risk Insurance Brokers Ltd. et al*, FST 06-026 and the principles of sentencing, Ms. Babcock submits that the Insurance Council's penalty determinations are entitled to deference because a self-governing profession is uniquely qualified to appreciate the severity of the misconduct and the appropriate sanction.

[43] Ms. Babcock submits that the Insurance Council was aware that she was under significant client pressure to complete insurance transactions, that her case involved only 50 transactions out of more than 8000 she processed for the relevant period, and that she had given evidence that she had not always viewed receipts and had at times accepted codes from clients by texts or verbally over the phone, which supported the "finding that her conduct may have constituted willful blindness and not intentional fraud". She had no prior record, she acknowledged her conduct, and her practice changed once all this was brought to her attention.

[44] Ms. Babcock relies on additional Insurance Council decisions, including *Leung* and *Bustillo*, where fines were imposed and where the conduct was more serious. She submits that those cases, together with the sentencing factors, "demonstrate a line of analysis within the Council's decision which reasonably led it to its conclusion that a $5000 fine was appropriate punishment."

[45] Ms. Babcock argues that if her position is rejected and if I were to consider varying the penalty, I should consider new evidence she has tendered in the form of an affidavit. She grounds this position not on s. 242.2(8)(b) of the *Act*, but on the principle that where parties have agreed on penalty in a disciplinary matter, it would be unfair to deny a party the opportunity to present their case fully if a different penalty was being sought. She cites *Economical Mutual Insurance Company v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 903, and *Gavrilko v. The College of Dental Surgeons of British Columbia*, 2004 BCSC 1506, and argues that if she had known the penalty was going to be a suspension, she would have sought a hearing before the Council and now seeks to tender evidence to show that a suspension would not be appropriate in her case.

D. Licensees Johnson and Nguyen

[46] Licensees Johnson and Nguyen, who work in the same office, are self-represented and wrote a joint letter. They submit that they paid their fines in good faith prior to the due date and they describe various personal and professional impacts they have experienced since the appeals were filed. They argue:

> We were told from ICBC and the Golden Ears/Treo many different answers and were told by a couple agents that if we put any 5 digits after the two letters, it'll override the debt. This is how it came to light. This whole confusion on the bridge tolls affected hundreds of agents.
>
> We have also been in contact by many agents who have done the exact same thing as us, they are wondering when they'll be contacted. Why is it just us? Can we not wait until all the other hundreds of agents have been called upon and all be judged at the same time?

E. Licensee Das

[47] One day after the final extended deadline for submissions, the Tribunal received an email from Ms. Das to advise that she should have been included in the Johnson and Nguyen joint submission as she works in the same office. Her email stated that due to a medical condition she required an extension of time to provide her submissions as she was in no position to pay for counsel at this time and cannot defend herself with her brain injury. She stated "I have previously forwarded you a doctor's letter stating that I am not in a position to make any decisions or defend myself due to my brain injury…." On March 9, 2018, the Tribunal wrote to Ms. Das advising her that it had no record of the referenced physician's letter and giving her an opportunity to provide it by March 12, 2018. No

response was provided and on March 13, 2018, I wrote to Ms. Das notifying her that in the circumstances her request for an extension of time to provide a written submission was refused.

F. Licensee Johal

[48] Licensee Johal is represented by counsel on this appeal. He has filed a submission together with a new evidence application designed to address FICOM's position that the $5000 fine was not reasonable.

[49] Mr. Johal argues that the Insurance Council developed a reasonable, transparent and intelligible framework for determining the appropriate sanction, that the $5000 fine is reasonable and consistent with that framework, and that Mr. Johal has taken responsibility for his conduct and the Agency has taken concrete steps to address the managerial oversight issue. Mr. Johal notes that he was a Level 1 agent at all times and that he was only an office manager who had very little involvement in the Autoplan business. He submits that while he did not supervise any licensees, he accepts responsibility for the fact that he may have inadvertently set the wrong example for other agents. He also notes that while he admitted to entering false numbers, there is no evidence that he entered a high number of false transactions.

[50] Like other respondents, Mr. Johal emphasizes the deference due to the Insurance Council, submits that cases relied on by FICOM are distinguishable from the facts here, and reiterates many of the points advanced by the Insurance Council regarding the distinction between the "personal benefit" cases and his case. He notes that the Insurance Council's decisions are consistent with the policy it published on May 12, 2017 which stated:

> Depending on the quantity of false receipt numbers used by a Licensee to complete ICBC Autoplan transactions, as well as whether the Licensee performed such transactions on their own or another family member's behalf, Council is recommending $5000 fines, six month license suspensions and/or licence cancellations.

[51] Mr. Johal notes that since he did not have a high number of transactions or benefit himself or a family member, neither aggravating factor referenced in the policy was present here, and there were numerous mitigating factors. He also emphasizes that insofar as FICOM has emphasized his "management" function, his role was confused with that of the Agency nominee and the Agency has, in any event, addressed the issues.

[52] Mr. Johal acknowledges that his submission contains new evidence, but he argues that he must be allowed to adduce it both because FICOM has made new arguments on appeal (e.g., that there are no mitigating factors in his case, and that he is the general manager of the Agency) and, based on s. 242.2(8)(b) of the *Act*, to adduce evidence regarding the steps taken by the Agency and Mr. Johal post-incident to address RTI issues. Mr. Johal argues that there were numerous mitigating factors, that he was not the Agency's general manager, and that he did not engage in "enabling behavior". Mr. Johal also states that prior to being fined by the Insurance Council, he obtained his Level 2 licence and he has also taken an ethics course.

G. Licensee George

[53] Licensee George, who is self-represented, argues that he paid the fine even though he did not agree with the decision, as he could not afford the cost of disputing its findings.

[54] Mr. George argues that contrary to many other aspects of his work regarding ICBC, no training or competency testing was ever administered by ICBC in respect of the procedures surrounding RTIs. He states:

> Mr. George is a former programmer and analyst who immigrated to Canada and was previously employed as a Quality Assurance Analyst at Ethical Funds Inc. for 11 years. Mr. George is very much aware that fiddling with data is not honest. Moreover, Mr. George had four vehicles in his household at the time… Why would Mr. George help strangers evade toll bridge payments when he himself has been diligently paying over $350 annually on toll charges for his personal vehicles?

[55] Mr. George refers to evidence of several clients whose transactions he processed to "prove his innocence". He relies on the decision in *Iyer* and takes issue with the Insurance Council's underlying findings in his case. Mr. George argues:

> The Insurance Council of BC is aware of the difficulties Autoplan agents face on a daily basis while processing ICBC Autoplan transactions. Mr. George works in an office with a serving area that is barely 72 square feet and is regularly crowded with customers that expect agents to complete transactions in as short a time as possible. There is not a single customer Mr. George has spoken to that has had positive things to say about ICBC. Tying RTIs for toll bridge debts to their

> insurance has only infuriated them further and they frequently take their anger out on agents….
>
> Difficulties in processing transactions are further compounded by not being privy to the amount of toll debt or the ability to collect these fines on behalf of the bridges. Instead, agents must endure a long hold on the phone… Once connected to a customer service representative, the issue doesn't end there. It often takes them even more time to navigate through the customer's multiple vehicle accounts to figure out and process the accurate amount due. To avoid this, in the past, Autoplan agents used to advise customers to pay over the phone on their own time and simply present agents with the receipt number, which is how this issue arose. It is truly disappointing that a Crown Corporation cannot devise a foolproof, properly tested computer system for the efficient handling of bridge toll debts.

[56] Mr. George also notes that he completed the Insurance Council Rules course in January 2018. He also seeks an order cancelling the fine.

H. Licensee Lee

[57] Licensee Lee is represented by counsel. Licensee Lee submits that the standard of review is reasonableness and that the $5000 fine was reasonable. Licensee Lee "agrees and accepts that despite her intention to provide timely and efficient services to her customers, her professional misconduct represented a serious breach of her responsibility to ICBC and the actions brought into question her trustworthiness as well as her ability to act in good faith". However, she contends that there is a "remarkable difference" between this case and the self-serving conduct at issue in *Iyer*, and also a significant difference between this case and *Beharry* where there was a cover-up.

[58] Ms. Lee argues that she admitted her wrongdoing, she had an unblemished record prior to this, and she is only a Level 1 agent. She points out that her circumstances are akin to those of Licensee George and Licensee Nguyen, and less serious than four of the other licensees who were Level 2 agents and who had aggravating factors such as denying wrongdoing, being in a position of responsibility or committing a far greater number of infractions. She argues that the $5000 fine is well within the range of reasonable outcomes based on her specific set of aggravating and mitigating circumstances.

I. FICOM's Reply

[59] In reply FICOM rejects the submission that the distinction between acting for the convenience of clients and acting for personal gain is reasonable as it pertains to the $5000 fines. FICOM relies on the FST Decision in *British Columbia (Superintendent of Financial Institutions) v. Insurance Council of British Columbia,* Decision No. FST 06-029 (February 8, 2007), to submit that an insurance agent "cannot be said to not be acting for personal gain … just because they are not receiving a commission". FICOM submits:

> We have no evidence in the records as to whether or not commissions were receivable on any of these sales directly to the Respondent Licensees. However, like Ms. Ciocan, all were employed in their capacity as an insurance licensees for the purposes of selling insurance. Respondent Johal was also the office manager of the agency. The actions of the Respondent Licensees were undertaken in furtherance of their employment in order to complete the sale if insurance or otherwise assist in the sales of insurance.
>
> The Appellant submits that, like with Ms. Ciocan, the characterization of the transactions as having been completed for no personal financial gain is a misnomer.

[60] FICOM also opposes the admission of the new evidence tendered by Ms. Babcock, Mr. Johal and Mr. George:

(a) With regard to Ms. Babcock's application, FICOM submits that there was no breach of procedural fairness that would warrant new evidence because this was not a joint submission situation; she had the opportunity to contest the findings and was well aware that FICOM could appeal.

(b) With regard to Mr. Johal's application, FICOM submits that the evidence does not meet the discoverability test in s. 242.2(8)(b)(ii) of the *Act*, the evidence is not substantial and material, and that even if admitted, the evidence would not have had an impact on the decision of the Council or this Tribunal. FICOM takes issue with the argument that Exhibit "A" to the Johal affidavit ought to have been part of the record in this matter. FICOM also argues that the evidence is not necessary to enable a proper reasonableness review, and that a policy statement relied on by Mr. Johal has no relevance to the underlying decisions as it was issued later.

(c) With regard to Mr. George, FICOM submits that while he has not made a new evidence application, his submissions "are mostly in the form of new evidence". FICOM notes that he could have raised all this at first instance.

VII. Standard of Review

[61] Unless the governing statute prescribes the internal standard of review to be applied by a specialized appeal tribunal, it is for the tribunal to determine the standard of appellate review it will apply. On a subsequent judicial review on that issue, the question for the reviewing court is whether the internal standard of review selected by the appeal tribunal was reasonable or patently unreasonable, depending on whether the tribunal is governed by the common law (*Harding v. Law Society of British Columbia*, 2017 BCCA 171) or by section 58 of the *Administrative Tribunals Act*: *Westergaard v. Registrar of Mortgage Brokers,* 2011 BCCA 344. These cases recognize that it is part of a specialized appeal tribunal's "home territory" to decide what standard of review it should apply from a first instance decision.

[62] This reflects the fundamental distinction between courts and specialized appeal tribunals. Courts grant curial (judicial) deference because of the unique constitutional and institutional roles of generalist supervisory courts: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 27-33. By contrast, a legislature creating a specialized appeal tribunal within a regulatory statutory scheme is not creating a court; it is creating a specialized body that is an alternative to a court to resolve a dispute, an independent body with subject matter expertise of its own that remains part of the specialized institutional framework established by the legislature to regulate the sphere of conduct in question: *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52.

[63] Unless the legislature expressly prescribes the standard of review the tribunal must apply, the relevant question for an appeal tribunal is not "what would a court do?" but "what standard of review would be most consistent with the legislature's intent in creating the tribunal given its purpose and the larger purposes of the statute?" There is and should be no starting assumption that *Dunsmuir* applies.

[64] I undertook a similar discussion in *Hensel v Registrar of Mortgage Brokers* 2016 MBA-001(a) (October 19, 2016), where I noted that the Tribunal has, for the most part, settled its approach to the standard of review:

[15] Because the Tribunal is a specialized appeal tribunal and not a generalist court, it is appropriate to approach with a degree of caution those judicial authorities that, in recognition of the distinct institutional roles of courts of law and tribunals, have addressed the standard of review to be applied by generalist courts to specialized tribunals. I therefore respectfully differ from the Registrar when she submits that given the lack of statutory direction, the "starting point" in determining the standard of review to be applied by the Tribunal to the Registrar's decision is *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. In my view, the correct starting point is to recognize that when the legislature creates a statutory right of appeal, each right of appeal must be considered contextually, on its own terms and in view of its larger purposes. As noted in *British Columbia (Chicken Marketing Board) v. British Columbia (Marketing Board)*, 2002 BCCA 473 at para 15, the words ["may appeal"] do not have a fixed meaning and must be read having regard for the legislative scheme and for the purposes of the Act.

[16] In the absence of a legislated standard of review, the Tribunal should not proceed by reflex as if it were a generalist court hearing a judicial review or appeal from a specialized first instance decision-maker. It would make little sense for the legislature to create a specialized administrative appeal tribunal to merely parrot a court. The legislature, by vesting the Tribunal with a strong privative clause, has made clear that the Tribunal, within its exclusive jurisdiction, is deemed to possess expertise that a generalist court does not have: *Administrative Tribunals Act*, section 58(1).

[17] In recognition of these principles, the Tribunal has developed its own appellate "standard of review" jurisprudence. It has held that the case for deference to a first instance regulator is most compelling where the first instance regulator has made findings of fact. Since the Tribunal, unlike the Commercial Appeals Commission it replaced, is required to hear appeals on the record rather than conduct hearings de novo, the Tribunal's decisions properly accord deference where an appeal takes issue with evidentiary findings and related assessments. The rationale for this deference is the same rationale appellate courts use in granting deference to factual findings of trial judges. As noted by this Tribunal in *Nguyen v. Registrar of Mortgage Brokers*, July 20, 2005, p. 9. "Deference must be given to the findings of fact and the assessments of credibility made by the Registrar who actually experienced the hearing procedure, heard the witnesses, saw the documentary evidence and, combined with his experience and knowledge given his position as Registrar of Mortgage Brokers, was in the best position to make the findings of fact found in his decision".

> [18] On the other hand, where the first instance regulator has made a finding of law, the Tribunal has generally held that deference is not required. Indeed, just as our court system proceeds based on the institutional premise that an appeal judge knows as much about the law as does a trial judge, the Tribunal is also entitled to proceed on the premise that the legislature intended that the specialized Tribunal would correct legal errors made by the first instance regulator. I note that the British Columbia Court of Appeal has considered this position to be a reasonable one in *Westergaard v. British Columbia (Registrar of Mortgage Brokers),* 2011 BCCA 344.

[65] The sticking point for the Tribunal has remained: what standard of review to apply in appeals from penalty determinations?

[66] In *Pritpal Singh Mann and the Insurance Council of BC* Decision No. 2015-FIA-002(a) (July 12, 2016), Vice-Chair Lewis undertook an admirably comprehensive review of the issue at paragraphs 33-40 of his decision. The Vice-Chair considered the competing perspectives reflected in previous decisions of the Tribunal, and concluded as follows at paragraph 39(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.

[67] Three months after *Mann*, I posed the question in *Hensel* whether given the Tribunal's specialized legislative role, our application of a "reasonableness" test to a question of penalty might differ from the test as applied by a generalist court: *Kulkarni v. Insurance Council of British Columbia,* Decision No. 2014-FIA-001(a) (May 29, 2014); *Parsons v. Real Estate Council of British Columbia*, Decision No. 2015-RSA-002(d) (November 13, 2015). I will note as well that I recently applied the reasonableness standard of review on a licensee's appeal from a penalty determination of the Real Estate Council in *Schoen v. Real Estate Council*, Decision No. 2017-RSA-002(b) (April 19, 2018).

[68] The configuration of this appeal has, however, once again brought the issue to the fore – is it really appropriate for the FST to apply a reasonableness test as applied by a generalist court where the *Act* grants FICOM, a statutory body designed to act in the public interest, the right to appeal to the specialized FST to challenge a penalty determination issued by the Insurance Council, another body designed to act in the public interest? Where, as here, the statutory framework contemplates two public interest bodies in dispute over a penalty, is it not more sensible for the Tribunal to adopt an approach that differs from that of a court on judicial review, and shouldn't that approach, in the interests of consistency, apply to all penalty appeals?

[69] *Mann* emphasizes the Supreme Court of Canada's decisions in *Ryan* and *Dore*. However, I see two significant differences between those cases and this case.

[70] First, *Ryan* and *Dore* both involved Law Society statutes conferring final decision-making authority on Law Society discipline panels, whose decisions could only be challenged in a court of law.[3] Neither case involved an internal right of

[3] In *Ryan*, the New Brunswick statute in question gave a member affected by a Discipline Committee decision a right to appeal directly to the Court of Appeal on a question of law or fact (para. 28). In *Dore*, the Discipline Committee's decision was subject to judicial review.

appeal to a specialized internal appeal tribunal as exists in the *FIA*. In this regard, I note in British Columbia, Law Society discipline decisions are subject to review by a specialized statutory review body composed of lawyers and members of the public. Significantly, the internal standard of review the review board has selected to review discipline decisions is straightforward correctness on all issues (including penalty), except where the hearing panel has heard *viva voce* testimony and had the opportunity to assess witnesses' credibility, in which case the review board shows deference to the hearing panel's findings of fact: *Harding*, *supra.*

[71] Second, FICOM's right of appeal must have some significance. In my view, it must mean at least that the legislature was sufficiently concerned about the spectre of inappropriately parochial decision-making to create a special right of appeal for FICOM to bring such cases to the specialized Financial Services Tribunal for resolution from a broader perspective.

[72] It is not clear to me that the legislature conferred that specialized right of appeal only to require the Tribunal to adjudicate a public interest challenge by stepping back and adopting the understandably passive posture of a court. While I admit that adopting a judicial posture can be more familiar for some, I am far from convinced that this is the approach the legislature intended in penalty appeals.

[73] In *Harding*, the Court of Appeal held that the remedial power to "substitute a decision the hearing panel could have made" is a "potent indicator" that "correctness" is a reasonable internal standard of review: para. 28. In the *FIA*, the governing remedial provision allows the Tribunal to "confirm, reverse or vary a decision under appeal, or may send the matter back for reconsideration, with or without directions, to the person or body whose decision is under appeal": *FIA*, s. 242.2(11). I find it difficult to see any substantive difference between the power to "substitute" and the power to "reverse or vary".

[74] In *Harding*, the Court noted that review panels include members of the public, but they also include lawyers, and it noted that no Law Society review panel had so far been established with a majority of public members. However, it is difficult to see how the legislature's intention regarding the Tribunal's institutional role or expertise can be said to turn on the composition or potential composition of a particular panel: *City of Edmonton v. Edmonton East (Capilano) Shopping Centres Ltd.,* 2016 SCC 47 at para. 33.

[75] I note as well that while the current members of the FST are members of the Bar, this has not always been so. As for the Insurance Council, its voting members

are appointed by Cabinet, not elected, and there is no legal requirement that they come from the insurance industry. And even if such a requirement or custom were in place, FICOM's special right of appeal was clearly created precisely to enable it to raise issues of public interest before an independent FST and thereby avoid the spectre of deference to decisions that might be unduly influenced by narrow industry thinking. Indeed, FICOM's challenge to the Insurance Council's approach to dishonest conduct on a penalty appeal raises precisely the kind of question with which the Tribunal should be willing to actively engage, particularly where, as here, the Insurance Council's intended decision provided no proposed rationale. All this speaks to a more active than passive role for the Tribunal on penalty appeals.

[76] These points made, there are valid arguments in favour of a measure of restraint in penalty appeals. The most convincing to me is that there is rarely "one right answer" when it comes to assessing penalties, and that it is not in the interests of consistent adjudication or finality for the Tribunal to engage in excessively narrow line drawing on a determination that involves weighing multiple factors.

[77] Taking all these factors into account, it is my view that the Tribunal should unapologetically accept that the Legislature expected it to intervene in any penalty appeal where it finds that there has been an error in principle as opposed to an "error" in line-drawing by the Insurance Council, and that it is for the Tribunal to determine where an error in principle has occurred. The Tribunal should apply this test not as if it were a court, but should apply it from its specialized institutional vantage point and with a careful eye to the public interest. It is for the Tribunal to arrive at its own specialized judgments about what is a reasonable penalty range. In this way, the Tribunal can grant appropriate respect to Insurance Council decisions and precedents without treating those decisions and precedents as if only the Insurance Council had a legitimate say in how to protect the public interest. The Tribunal is not required to define the range of reasonable outcomes in the same way as would a court.

[78] The approach cautions against the Tribunal simply substituting its discretion for that of the body appealed from. However, it also recognizes the special role entrusted to the Tribunal in cases where the debate centres, as it does here, on whether the penalties in question fall below the standard necessary to protect the public interest in cases involving dishonest conduct.

VIII. The "intended decision" process, FICOM's right to appeal and the application to tender new evidence as a matter of procedural fairness

[79] Before turning to consider FICOM's ground of appeal, I will address a preliminary issue arising from the concern expressed by several licensees in various forms - namely that they accepted the Insurance Council's intended findings and the fine to bring an end to this whole episode, and that if they had known that they might face a potential licence suspension, they would have exercised their right to request a hearing and have now been prejudiced by the fact that FICOM subsequently filed an appeal requesting suspensions.

[80] I sympathize with the position in which the respondents find themselves. However, the reality is that this is part of the regulatory system they signed up for when they were granted the privilege of becoming licensed insurance agents. As licensees, they should have been aware that a third party – FICOM – had been assigned the public interest role of "looking over the shoulder" of the Insurance Council, with a right to appeal Insurance Council findings and penalties. And if the licensees were not aware of this as part of their training prior to these events, they were specifically reminded of it in each Intended Decision:

> If the Licensee does not request a hearing by [identified date], the intended decision of Council will take effect.
>
> Even if this decision is accepted by the Licensee, pursuant to section 242(3) of the Act, the Financial Institutions Commission still has a right to appeal this decision of Council to the Financial Services Tribunal (FST). The Financial Institutions Commission has 30 days to file a Notice of Appeal, once Council's decision takes effect. [emphasis added]

[81] This is the structure set out by statute – an Intended Decision[4], a licensee's right to decide no later than 14 days after that whether to request a hearing or live with the decision[5], the intended decision coming into effect if no hearing has been requested[6], and FICOM's right of appeal which only starts to run after the Council's final decision[7]. I acknowledge that 14 days is not a long time for a licensee to make up his or her mind and take any necessary legal advice. But that is the period licensees have been given, and it is clearly intended to ensure that licensees take intended notices seriously, move diligently to consider their options and take any advice they require.

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[4] *FIA*, s. 237(2)
[5] *FIA,* s. 237(3)
[6] *FIA*, s. 237(6)
[7] *FIA*, s. 242(3)

[82] The advantage of this system is that it allows a licensee in many cases to accept a penalty and get on with his or her life without having to go through the cost of a hearing process. However, the caveat is the outcome is not "final" until FICOM's 30 day appeal period has expired and a licensee who has misgivings about whether to seek a hearing must recognize that reality. While a licensee might well prefer to know in advance whether FICOM "would" appeal an intended outcome if they accepted it, that is not how the system is structured – a licensee has to decide within 14 days, and FICOM's right of appeal does not start to run until after the Council's decision is final.

[83] If FICOM appeals, the licensee does not then gain a new right of cross-appeal, or a "redo" from the findings it never challenged because it "would have" challenged them had it known the position FICOM was going to take. The findings and penalty are final, subject only to any objections to the findings and/or the penalty that FICOM may advance on its own appeal. On this appeal, FICOM has not challenged the findings, but it does submit that the penalty should be set aside and varied upward. That is the only issue properly before the Tribunal on this appeal. The findings are not in issue.

[84] Ms. Babcock has argued that where, as here, FICOM argues that the *Tribunal* should replace the $5000 fine with a 6-9 month suspension, the Tribunal, as a matter of procedural fairness, must consider any additional argument and evidence she wishes to tender on appeal that speaks against imposing such a penalty. Ms. Babcock argues the Tribunal should allow the additional evidence, even if it was previously available, in order "to allow for a full understanding of the underlying circumstances and to make submissions addressing the new penalty being sought". She relies on *Gavrilko* and *Economical Mutual Insurance Company*, cited above. In *Gavrilko*, the Court held that it was procedurally unfair for a discipline committee to reject a joint submission on penalty and impose a more stringent one without giving the parties the opportunity to make submissions on why the more stringent penalty was appropriate. In *Economical Mutual Insurance*, an adjudicator under the *Personal Information Protection Act* breached procedural fairness by making "Orders without giving the parties the opportunity to make submissions on those remedies in light of the conclusions that she had reached."

[85] While I agree with Ms. Babcock's position insofar as it applies to the right to make *submissions*, there are two reasons I disagree with it insofar as it seeks to support a right to adduce *new evidence*.

[86] First, *Gavrilko* and *Economical Mutual Insurance* both refer to the right to make submissions, not the right to adduce further evidence. In both those cases, the evidence was in. The problem was that the parties were taken by surprise on remedy. The Court did not suggest the tribunal had to reopen the evidence to provide procedural fairness. What procedural fairness required was fair notice and the right to make submissions on penalty. While one such submission could in some cases be that further evidence should be heard, that would be for the decision-maker to determine on the facts of each case. Procedural fairness does not create a general right to reopen the evidence where a party exercises a right to appeal a proposed penalty that has been accepted by a person subject to regulation.

[87] Second, the law is clear that procedural fairness is subject to statute.[8] Here, even if procedural fairness did include a general right to reopen the evidence on a FICOM penalty appeal, the *FIA* lays out a clear and comprehensive code governing the test for admitting new evidence on appeal:

> 242.2 (8) On application by a party, the member considering the appeal may do the following:
>
> (a) permit oral submissions;
>
> (b) permit the introduction of evidence, oral or otherwise, if satisfied that new evidence has become available or been discovered that
>
> (i) is substantial and material to the decision, and
>
> (ii) did not exist at the time the original decision was made, or, did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered. [emphasis added]
>
> (9) If oral submissions or new evidence are permitted under subsection (8), the member considering the appeal may
>
> (a) require the parties to participate in any proceeding that might assist in clarifying or narrowing the facts or issues, or otherwise facilitating the appeal,
>
> (b) make any order in respect of matters arising from a proceeding held under paragraph (a),
>
> (c) subject to this Act, the regulations and any rules set by the chair under section 242.1 (5) (c), determine the manner in which a proceeding held under paragraph (a) or an appeal is conducted,

[8] *Ocean Port Hotel v. British Columbia (General Manager, Liquor Control and Licensing Branch),* 2001 SCC 52 at para. 22.

> (d) require the party requesting the attendance of a witness to pay the costs in connection with the attendance of that witness, and
>
> (e) proceed with a proceeding held under paragraph (a) or an appeal in the absence of the appellant, if the appellant has been given at least 10 days notice of the proceeding or the appeal, as applicable.

[88] The limited grounds on which the FST can consider new evidence is consistent with the purpose and structure of the reforms creating the FST. It will be remembered that the FST replaced the Commercial Appeal Commission which used to conduct full *de novo* evidentiary hearings. In place of the former Commission, the legislature created an appeal to the FST "on the record", subject only to subsection (8):

> 242.2(5) Subject to subsection (8), an appeal is an appeal on the record, and must be based on written submissions.
>
> (6) For the purposes of subsection (5), the record consists of the following:
>
> (a) the record of oral evidence, if any, before the original decision maker;
>
> (b) copies or originals of documentary evidence before the original decision maker;
>
> (c) other things received as evidence by the original decision maker;
>
> (d) the decision and written reasons for it, if any, given by the original decision maker.

[89] Whether a penalty appeal is launched by a licensee or by FICOM, and whether the remedy sought is a more lenient penalty or a more stringent penalty, the question on appeal is whether the Insurance Council committed a reviewable error based on the record before it. New evidence will be considered to support or oppose an appeal only where it is substantial and material to the decision and the evidence did not exist at the time the original decision was made, or, did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered. The rules are the same for everyone, and there is nothing unfair in that. Where, as here, FICOM argues that the FST should replace the $5000 penalty with a licence suspension, FICOM has to make its case based on the record subject to subsection (8) (upon which it has not relied), and the licensees are given a full right to oppose that argument on the record, subject of course to subsection (8). A generalized right to adduce evidence that would have been adduced in the first instance had the licensee challenged the intended decision, or had the licensee known FICOM was "going to" appeal, is simply not consistent with the nature and purpose of FICOM's right of appeal.

[90] In making this finding, it is important to note as well that the Tribunal has remedial flexibility on appeal, as made clear in s. 242.2(11) of the *Act*:

> (11) The member hearing the appeal may confirm, reverse or vary a decision under appeal, or may send the matter back for reconsideration, with or without directions, to the person or body whose decision is under appeal.

[91] Cases may well arise where the Tribunal is persuaded that the Council has committed an error in principle, but there is insufficient evidence in the record to tailor an individual remedy that takes account of all the relevant information. In such cases, it is open to the Tribunal to send the matter back to the Council for reconsideration with appropriate directions, including the direction to receive additional evidence pertaining to penalty.

IX. WAS THE $5000 FINE IN EACH CASE REASONABLE?

[92] This issue lies at the centre of this appeal.

A. FICOM's case

[93] FICOM begins by concurring with the Council's findings regarding the conduct of the respondent licensees. To reiterate, in each case the Council found that the licensee's actions "brought into question [his or her] trustworthiness", that the conduct was a "serious breach of [his or her] responsibilities" and that "it is necessary to send a clear message to both the Licensee and the industry that such a serious breach of practice is unacceptable". For the reasons outlined above, those findings are not open to challenge on this appeal.

[94] FICOM points to the penalty options that were open to the Council under s. 231(1)(f)-(k) of the *Act*:

> 231 (1) If, after due investigation, the council determines that the licensee or former licensee or any officer, director, employee, controlling shareholder, partner or nominee of the licensee or former licensee…
>
> then the council by order may do one or more of the following:
>
> (f) reprimand the licensee or former licensee;
>
> (g) suspend or cancel the licence of the licensee;
>
> (h) attach conditions to the licence of the licensee or amend any conditions attached to the licence;

> (i) in appropriate circumstances, amend the licence of the licensee by deleting the name of a nominee;
>
> (j) require the licensee or former 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;
>
> (k) in respect of conduct described in paragraph (a), (b), (c), (d), (e) or (e.1), fine the licensee or former licensee an amount
>
> (i) not more than $20 000 in the case of a corporation, or
>
> (ii) not more than $10 000 in the case of an individual.

[95] In this context, FICOM argues that the $5000 penalty imposed in each case was unreasonable:

> The Council decided to fine the individual licensees each $5,000. That is one half of the maximum amount of the fine permitted. No period of license suspension or outright cancellation was ordered. No education was ordered (although two licensees did take an ethics course before the orders were made).
>
> Each of these cases involves the repeated and deliberate creation and or provision of knowingly false information to an insurer in order to process an insurance application. The Respondent Licensees intended for ICBC to rely upon the false information provided as if it were true: the number is submitted as evidence of a receipt for payment of a toll debt. This involves dishonesty. As the Council found, it brings into question each if [sic] the licensee's trustworthiness. Trustworthiness is an essential attribute of an insurance licensee.
>
> If a licensee is prepared to commit a dishonest act for 30 or 50 or 100 clients in the processing of insurance applications, that conduct deserves serious denunciation. A fine is an inappropriate and unreasonable sanction for dishonest conduct, especially when the conduct is repeated and deliberate.

[96] FICOM argues that while the Insurance Council in each case stated that it is necessary to send a "serious message", the uniform $5000 fine it imposed "fails to achieve that goal. Not only does it fail in achieving the goals of sentencing, it sends the wrong message. A fine is wholly inappropriate and unreasonable when dealing with conduct which goes to the heart of professionalism and trustworthiness: repeated acts of dishonesty in order to achieve completion of insurance transactions." FICOM argues "Serious misconduct involving dishonesty warrants a significant period of suspension in order to achieve the goals of the Council's

mandate: to ensure public confidence in the regulator and regulated industry, together with the need for specific and general deterrence". FICOM argues that a period of suspension is warranted whenever there is dishonest conduct, "subject to mitigating factors to determine the length of suspension or whether a fine will achieve the goals of licensee discipline." FICOM argues that, with the exception of two licensees who took ethics courses before the decisions were rendered, "there appear to be no mitigating factors which would favour a short period of suspension or a fine alone".

B. Error in principle

[97] In *Financial Services Commission v. Insurance Council and Novko*, FST 05-008 (August 22, 2005), the Tribunal stated as follows (at p. 8-9):

> In instances of misconduct, the Insurance Council must be mindful of the goals which are achieved through the penalty process. In *The Regulation of Professions in Canada*, by James T. Kasey (2003) at page 14-5, the author reviews the factors that are to be taken into account in determining how the public is best protected from acts of professional misconduct. These factors include specific deterrence of the licensee from engaging in further misconduct, general deterrence of licensees, rehabilitation of the licensee, punishment of the licensee, the denunciation by society of the conduct, the need to maintain the public's confidence of the integrity of a profession's ability to properly supervise the conduct of its members, and the avoidance of imposing penalties which are disparate with penalties imposed in other cases.

[98] I agree that the $5000 fines – which were not accompanied even by a tentative explanation which considered the factors that informed the nature of the remedy selected and the amount selected - should be set aside because they fail to adequately or reasonably reflect the values of public protection, specific and general deterrence and denunciation where a licensee has engaged in repeated conduct that has brought that licensee's trustworthiness into question.

[99] I note that under the heading "Trustworthiness", the Insurance Council *Code of Conduct* states as follows:

> In an industry where trust is the foundation for all dealings, you must meet rigorous standards of personal integrity and professional competence. These characteristics speak to the essence of what a licensee does. Failure to adhere to these standards reflects not only on you, but also on the profession. Trustworthiness is a fundamental element of each requirement in the Code.

> REQUIREMENT
>
> You must be trustworthy, conducting all professional activities with integrity, reliability and honesty….

[100] Under the heading "Good Faith", the *Code of Conduct* provides:

> The insurance industry is based on fiduciary relationships. Accordingly, the exercise of good faith by licensees in the practice of the business of insurance is essential to public confidence in the industry. Good faith is a fundamental aspect of your conduct and a key element in each of the Code's requirements.
>
> REQUIREMENT
>
> You must carry on the business of insurance in good faith. Good faith is honesty and decency of purpose and a sincere intention on your part to act in a manner which is consistent with your client's or principal's best interests, remaining faithful to your duties and obligations as an insurance licensee.
>
> You also owe a duty of good faith to insurers, insureds, fellow licensees, regulatory bodies and the public.

[101] It is my view clear beyond debate that repeated licensee conduct that causes the regulator and the public to question that licensee's trustworthiness strikes at the heart of the licence itself. The importance of trustworthiness cannot be understated. Nor should we forget what this term actually means.

[102] The work of insurance agents is regulated for a reason. Insurance agents find themselves in a position of trust in relation to important financial transactions that have implications for their clients, for insurers and for the public. The insurance licence is a solemn obligation granted on the trust that the agent will work in accordance with the rules and standards created for licensees. Trustworthiness means honouring that trust by doing the right thing even when it is inconvenient, even when no one is looking, even when an agent might not agree with the rules, even when an agent is under pressure to do the convenient thing and even when other agents are engaging in the same conduct. Anyone with the means to do so can do the easy thing or the expedient thing. The regulatory system would be meaningless if its participants, the public and the regulator could not have confidence in a licensee to act in a trustworthy fashion.

[103] I have not been asked to review a penalty for a single case of falsifying toll bridge receipts, and I will not comment on how a single instance would properly be regarded if it was an isolated instance of poor judgment or a temporary lapse. The Council in this case made the broader intended finding, not challenged by the licensees, that each licensee's repeated conduct brought into question his or her trustworthiness. Thus, it must be accepted on this appeal that the individual respondents falsified numbers many times. Those repeated falsifications could only reasonably be viewed as a significant aggravating factor.

[104] Trust in the licensee lies at the foundation of the grant of the licence. Repeated conduct that calls into question the trustworthiness of a licensee can only reasonably be addressed by a regulator taking action on the licence. Subject only to mitigating factors evident in the record before the Council at the time of the intended decision or after a hearing[9], it is only licensing action in the form of a suspension, cancellation or conditions (in addition to whatever other conditions the regulator may wish to attach) that can adequately protect the public, secure its confidence, achieve general deterrence and express the denunciation that such conduct warrants. An economic penalty that allows the licensee to go on practising without interruption when the regulator has called into question that licensee's trustworthiness might achieve specific deterrence in a particular case depending on the financial circumstances of the licensee, but it fails to address the core licensing issue at play. In this regard, I agree with the view expressed in *Law Society of BC v. Nguyen*, 2016 LSBC 21 at para. 40: that "[s]uspensions are reserved for the more serious demonstrations of misconduct". In these cases, I have no hesitation in concluding that it was an error in principle for the Insurance Council to fail to impose licence suspensions in the absence of a clear identification of mitigating factors that might be present in a particular case.

C. Past decisions of the Insurance Council

[105] The submissions of the Insurance Council and the respondent licensees did not in my opinion offer any meaningful answer to the argument of FICOM as a matter of principle, having regard to the nature of the Council's findings regarding trustworthiness and the remedial significance of a fine versus a licence suspension. Their submissions focused almost exclusively on the factor *Novko* described as "the avoidance of imposing penalties which are disparate with penalties imposed in other cases."

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[9] For a list of mitigating factors that may be considered in determining penalty, see Casey, *The Regulation of Professions in Canada (Looseleaf, 2018)*, ch. 14-9.

[106] The Insurance Council has brought to my attention several of its previous decisions in which it determined that a fine was appropriate for dishonest behavior where an agent had breached ICBC procedure for "customer convenience" where "no personal financial gain was sought or obtained by the licensee". It argues that the $5000 fines imposed here, arising from repeated conduct, can be put in proper perspective in light of these previous decisions:

> *Kearns* (January 22, 2013) – where the Council fined a licensee $1000 plus investigative costs and imposed 12 months supervision and required the licensee to take a course, where the licensee forged signatures of two clients when executing insurance transactions for them.
>
> *E. Dela Cruz* (June 26, 2013) – where the Council fined a licensee $1000 and assessed investigative costs where the licensee allowed a customer to forge an ex-husband's signature on documents.
>
> *H. Le Flour* (June 19, 2013) – where the Council fined a licence $1000, assessed investigative costs, required the licensee to take a course and required supervision until she obtained 12 months of active licensing, where the licensee processed an ICBC transaction without the proper authority of the registered owner, for the convenience of a third party and in the absence of evidence that the owner objected.
>
> *D. Zanatta* (March 07, 2017) – where the Council fined the licensee $1000, required him to take a course and imposed a condition that he provide Council's decision to any agency he worked with for two years, where the licensee executed an ICBC cancellation document by signing the document on behalf of the client without the client's knowledge or consent.
>
> *R. Mosberian* (August 18, 2015) – where the Council fined the licensee $1000 and assessed investigative costs where the licensee forged a client's signature when completing an insurance application form, which was done for "client convenience and not for personal benefit".

[107] Ms. Babcock cites additional Insurance Council decisions including *Leung* (October 6, 2009 - $5000 fine in a case where the licensee had altered over 20 signature application pages) and *Bustillo* (November 22, 2011 - $2000 where the licensee had, among other things, created a fake policy and had acted improperly

on another occasion), and argues that her client's conduct does not rise to the level of those cases.

[108] The Insurance Council, supported by other licensees, also argues that its decisions *Iyer* (July 11, 2017) and *Beharry* (April 18, 2016) are consistent with the decisions above. It submits that the suspension in *Iyer* arose because the licensee acted for personal benefit in by-passing his own Autoplan debt. He was not acting under "pressure" to assist clients. In *Beharry*, the conduct that was considered most serious and deserving of suspension was the licensee deceiving the employer and the Council rather than the improper transaction itself. Mr. Johal also cites the *Cheema* decision (FST 05-019) as an example of a personal benefits case.

[109] With regard to these Insurance Council decisions, I make three comments.

[110] First, while previous Insurance Council decisions are legitimately taken into account in assessing whether a penalty is unreasonable, those decisions are only one factor to be considered in assessing whether there was an error in principle. They are not binding, and that is particularly so where, as I find to be the case here, they are being used to support a position that I find to reflect an error in principle by the regulator. I do not wish to comment on the validity of the outcome of any individual decision, particularly since each has its own circumstances and constellation of mitigating and aggravating factors. However, insofar as they are being advanced in support of a broad statement that being untrustworthy for the convenience of others warrants a fine instead of a suspension, those decisions should, for the reasons of principle expressed above, be given limited weight. If an Insurance Council jurisprudence built on an error in principle was not subject to correction by the Tribunal, the appeal function would have little meaning.

[111] Second, as pointed out by FICOM, it is not appropriate to draw a bright line between acting for "personal benefit" and acting for "customer convenience" given the realities of business. As this Tribunal noted in *Ciocan* at p. 9:

> In its decision of August 8, 2006, the Council has noted that Ciocan was a salaried employee of the Agency and obtained no personal benefit by accepting the signed applications from Nukmanovic. This is an important finding because Council uses it as one of the features that distinguishes this case from the *Novko* and *Pavicic* decisions.

> While it is acknowledged that Ciocan did not receive a commission on the sales of the policies in question, I believe that it is unreasonable for the Council to conclude that Ciocan obtained no personal benefit from the sale of these policies.
>
> It is obvious that the Agency that employs Ciocan is a commercial enterprise with the objective of producing income for its owners. This income is derived from the sale of insurance policies. Ciocan was hired by the Agency to oversee the Agency's life insurance business. If the Agency sold no life insurance policies there would be no need for a life insurance department and no need for Ciocan to oversee the life insurance activities of the Agency. It is obvious that Ciocan's employment is predicated on the Agency making positive net income from the sale of life insurance policies. In fact, in her interview with Investigator Hess, Ciocan indicated that her employer wanted her to "grow this department". In this sense, every policy sold by the life insurance department provides a small personal benefit for Ciocan. Even though she does not obtain a specific commission on each policy, it is incorrect to conclude that she does not obtain personal benefit from the Agency's sale of these policies.
>
> In this case, the Agency received commissions on the eight policies that were sold and positive net income in the form of commissions. In the absence of wrongful conduct, these increased sales would reflect favorably on Ciocan in the eyes of her employer and in the longer term certainly result in continued employment and likely result in increased salary levels.

[112] I agree with FICOM that insofar as the Insurance Council has persisted in basing discipline decisions on a distinction that views “personal convenience” as being so far removed from “personal gain” that it removes the necessity of licensing action, its previous decisions have failed to properly integrate the guidance provided in *Ciocan.*

[113] As the Council’s own findings make clear, the presence or absence of personal gain does not bear on the trustworthiness or good faith of a licensee. Whatever the motives of the licensees, they were willing to repeatedly sacrifice their personal integrity and responsibility in order to convenience their customers. The number of times that the individual respondents engaged in falsifying numbers is an indication that they can turn improper behaviour into a habitual business practice. This habituation clearly informed the intended finding that they could not be trusted, firstly, to refrain from the practice, and secondly, to critically evaluate and stop the practice by any process of reflection.

[114] This approach taken by the Insurance Council, as regulator of the insurance industry, gives the public an ambiguous impression. It tends to support an approach that values customer service on a par with a licensee's integrity. It implies that when a licensee compromises his or her integrity for the convenience of a customer, and does so repeatedly, this is not really a serious matter deserving of action on the licence.

[115] With this situation, how much confidence can insurers, underwriters or the public have in the agents licensed by the Insurance Council? How is the public interest protected?

[116] The proper course of action for these licensees is to decline to falsify numbers. The problem belongs to their customers, not them. The customers can deal with this directly. It is better for the insurance industry that they decline to act and blame an inflexible regulator than to compromise their integrity. The Insurance Council's penalties must reinforce this message in clear and certain terms. .

[117] Third, I will agree that untrustworthy behavior that confers a direct economic benefit on the licensee, or on family and friends, is an *aggravating* factor. However, it is unreasonable and an error in principle to suggest that the absence of those factors in a case where a licensee's trustworthiness has been called into question removes the presumptive need for action on the license.

[118] Given the reasons I have just articulated, it will be no surprise that I have considerable difficulty accepting the Insurance Council's submission as follows:

> 18. In each of the decisions under appeal, Council recognized that Respondent licensees faced significant pressure from their customers to complete insurance transactions in a timely manner, and that the Respondent licensees were attempting to facilitate those transactions for their customers, albeit improperly.
>
> 19. There is no suggestion in the undisputed factual findings of the decisions under appeal that the Respondent licensees pose an ongoing risk to the public or to ICBC in the circumstances.
>
> ...

> 22. There are many decisions in which Council has recognized a breach of ICBC procedure for "customer convenience" and determined a fine was appropriate in all the circumstances.

[119] In my view, it is a reviewable error for a regulator whose trust in a licensee has been shaken to at the same time assert that "there is no suggestion" of any ongoing risk to the public or ICBC. This submission fails to adequately grasp the significance of the finding that a person's trustworthiness has been called into question, particularly where, as in all these cases, that behaviour has become habitual. It reinforces my view that the Council's penalty determination was unreasonable.

[120] Where, as here, the regulator has failed to fashion a penalty at the more serious end of the remedial scale when it has found conduct that calls into question a licensee's trustworthiness – the ability to act in a way that is honest and straightforward even where it is inconvenient and even in the face of client complaints and even if it involves a subject matter (such as bridge tolls) which are a matter of public debate – that regulator has failed to reasonably protect the public interest.

X. REMEDY

[121] This brings me to the issue of remedy. As noted above, the Tribunal's remedial authority on appeal is set out in s. 242.2(11) of the *Act*:

> (11) The member hearing the appeal may confirm, reverse or vary a decision under appeal, or may send the matter back for reconsideration, with or without directions, to the person or body whose decision is under appeal.

[122] FICOM's position is that if the administrative fines in these cases are set aside, I should "vary" the penalties by cancelling the fines and ordering that the licenses be suspended.

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

that the licensee's conduct must attract. Whether the ultimate penalty is higher or lower depends on a consideration of mitigating or aggravating factors in a given case.

[124] While FICOM argues "that there appear to be no mitigating factors which would favour a short period of suspension or a fine alone", it is apparent to me that the Insurance Council did not meaningfully consider this issue given that it issued a common penalty in each case. It is also apparent to me, based on the arguments and the fresh evidence applications, that the problem of multiple infractions does not excuse the Insurance Council from its responsibility to make specific intended remedial judgments on a case-by-case basis based on its factual findings which are now not open to challenge or relitigation. In my view, it is appropriate for the Insurance Council to make these judgments in the first instance.

[125] To this end, I issue these directions:

(a) The Insurance Council is to issue a new intended decision limited to the issue of intended penalty in each of these cases in accordance with these reasons. To be clear, the new intended decisions may not alter the factual findings and characterizations of the conduct set out in each decision.

(b) Each licensee will have up to 14 days to request a hearing on the issue of penalty only. If no hearing is requested, the Council's decision will be final, subject only to an appeal by FICOM. If a hearing is requested, the outcome will be subject to appeal in the usual fashion by the licensee or FICOM.

(c) Any hearing requested by the licensee as described in paragraph (b) in response to the new intended decision, is not to be an opportunity for the licensee or the Council to arrive at new or conflicting findings of fact regarding conduct, as those findings were not challenged before the Council or the Tribunal and are now final and binding.

[126] In view of the remedy I have granted, I do not find it necessary to consider the fresh evidence application of Mr. Johal in reliance on s. 242.2(8)(b) of the *Act*. However, I will note that FICOM has made a compelling argument that the evidence he seeks to adduce does not pass the statutory test of not being in existence or reasonably discoverable at the time the original decision was made. The same is true of the factual statements made throughout the submission of Mr. George.

[127] The Insurance Council and FICOM have withdrawn any application for costs in this proceeding. I find no reason for ordering costs to or against any other party.

"Theodore F. Strocel, Q.C."

Theodore F. Strocel, Q.C.
Chair, Financial Services Tribunal

July 31, 2018