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DECISION NO. FST-RSA-21-A001(c)

In the matter of an appeal under section 54 of the *Real Estate Services Act*, SBC 2004, c 42

BETWEEN:	Wei Qing (Wendy) Yang	**APPELLANT**
AND:	Superintendent of Real Estate	**RESPONDENT**
BEFORE:	James Carwana, Panel Chair	
DATE:	Heard by way of written submissions closing February 7, 2022	
APPEARING:	For the Appellant:	Jeffrey P. Scouten, Counsel
	For the Respondent:	David T. McKnight and Naomi J. Krueger, Counsel

APPEAL

[1] Wei Qing (Wendy) Yang (the "Appellant") appeals to the Financial Services Tribunal (the "FST") from a July 29, 2021 decision regarding the sanction imposed (the "Sanction Decision") by a Discipline Hearing Committee (the "Committee") of the Real Estate Council of British Columbia (the "Council"). There was a twelve-day hearing held by the Committee (the "Hearing") concerning the allegations against the Appellant. On April 9, 2021, the Committee issued its decision on liability (the "Liability Decision"). In the Liability Decision, the Committee found that the Appellant had "committed professional misconduct, and engaged in conduct unbecoming a licensee"[1]. After the Liability Decision, the parties made written submissions to the Committee which led to the Sanction Decision.

[2] In the Sanction Decision, the Committee ordered the following:

a. the Appellant's licence be suspended for one (1) year;
b. the Appellant be prohibited from acting as an unlicensed assistant during the licence suspension period;
c. the Appellant, at her own expense, register for and successfully complete the Council's Real Estate Trading Services Remedial Education

[1] Liability Decision at para 155.

Course, and the Real Estate Institute's Ethics in Business Practice course, within one (1) year from the date of its decision;

d. the Appellant pay enforcement expenses to Council in the amount of $150,000 within one (1) year from the date of its decision; and

e. if the Appellant fails to comply with any of the terms of the decision as set out above, the Council may suspend or cancel their licence without further notice pursuant to section 43(3) and 43(4) of the *Real Estate Services Act* ("*RESA*").

[3] With respect to the enforcement expenses portion of the Sanction Decision, the Committee noted that this amount was approximately 65 percent of the total enforcement expenses claimed by the Council.

[4] In her Notice of Appeal, the Appellant appealed various aspects of the Liability Decision and the Sanction Decision. However, in her written submissions to the FST, the Appellant elected "not to appeal from any of the Committee's specific findings of professional misconduct or conduct unbecoming made in the Liability Decision". Specifically, the Appellant appeals from the following orders in the Sanction Decision:

i) that her licence be suspended for one year; and

ii) that she pay enforcement expenses totaling $150,000.

[5] With respect to her licence suspension, the Appellant says that the Sanction Decision fails to conform to the reasonableness standard of review stated by the Supreme Court of Canada and the FST. In particular, the Appellant argues that "the Committee's reasons fail to lay out a clear 'line of analysis' or to adequately explain the progression of steps in the reasoning process that it followed in arriving at its decision to impose a one-year suspension".

[6] With respect to the enforcement expenses, the Appellant says the manner in which the Committee dealt with the enforcement expenses issue, and its decision on the matter, were both unfair and unreasonable. In particular, the Appellant says that the "Committee erred in proceeding to order the Appellant to pay enforcement expenses after being informed that there was a history of consent order negotiations potentially relevant to the determination of the Respondent's entitlement to enforcement expenses".

[7] As a result of legislative changes effective August 1, 2021, the Superintendent of Real Estate (the "Superintendent") is the Respondent on the present appeal (rather than the Council). The Superintendent opposes the appeal and has made submissions responding to the appeal.

Preliminary Matters

Previous Stay Orders

[8] Effective August 1, 2021, the British Columbia Financial Services Authority ("BCFSA") began handling the enforcement of this matter and on August 9, 2021, the BCFSA sent a letter to the Appellant enclosing the Sanction Decision and

advising the Appellant her licence would be suspended commencing on August 16, 2021.

[9] The Appellant filed her Notice of Appeal on August 11, 2021, and sought a delay in the commencement of her suspension. Among other things, counsel for the Appellant wrote to the Chair of the Committee on August 13, 2021 to request that the Committee "delay the commencement of her suspension for a brief period to allow time for her to apply to the FST for a stay".

[10] On August 15, 2021, the Committee, through a letter from independent legal counsel, distributed the substance of its decision and reasons to the parties relating to the Appellant's request to delay the commencement of her suspension. The Committee's decision was to amend its Sanction Decision to add that the Appellant's suspension "commences on the thirtieth (30th) day from August 9, 2021, the date on which the BCFSA delivered its letter enclosing the Sanction Decision". On August 19, 2021, the Committee issued its "Supplemental Reasons for Decision Regarding Sanction" signed by the members of the Committee, which was to the same effect as that communicated in the August 15, 2021 letter from legal counsel.

[11] The Appellant subsequently applied to the FST for a stay of the suspension imposed under the Sanction Decision pending the outcome of her appeal, as well as an interim stay of the suspension until the main stay application could be determined.

[12] On September 20, 2021, the Appellant was granted an interim stay of the suspension pending the determination by the FST of the main stay application[2]. On December 21, 2021, and after further submissions on the stay issue, I subsequently granted a stay of the suspension pending the determination by the FST of this appeal[3].

Outstanding Application to Admit New Evidence

[13] During the submission process relating this appeal, an issue arose concerning new evidence. The Appellant filed her submission with an affidavit attached to it and requested that the affidavit be filed as new evidence. The Respondent did not object and the Respondent filed an affidavit in response with its submission. The Appellant objected to the Respondent's affidavit being received as new evidence. I subsequently ordered that there be submissions regarding the Respondent's request to file new evidence.

[14] The Respondent says the Appellant is seeking to set aside the enforcement expenses order on the basis that it is unfair and unreasonable. The Respondent notes the Appellant has led fresh evidence on the issue of how the enforcement expenses issue was handled by the Committee and why she says the order was unfair and unreasonable.

[15] The Respondent says that "fresh evidence may be admitted in cases where it is necessary to assess the exercise of procedural fairness by a tribunal" and cites

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[2] See Decision No. FST-RSA-21-A001(a).
[3] See Decision No. FST-RSA-21-A001(b).

Nova Scotia (Attorney General) v Judges of the Provincial Court and Family Court of Nova Scotia, 2018 NSCA 83 in support. The Respondent argues that the new evidence it seeks to adduce provides the context for the Committee's decision on enforcement expenses in order to assess whether the decision was unreasonable or unfair in the circumstances.

[16] The Appellant argues that the Respondent's new evidence does not relate to the errors alleged by the Appellant and should not be admitted. The Appellant says Respondent's evidence was available at the time of the Committee's hearing and the Appellant asserts that the Respondent has failed to meet the statutory test under section 242.2(8) of the *Financial Institutions Act*, RSBC 1996, c 141 ("*FIA*") for the admission of new evidence, including the fact that the evidence was available at the time the original decision was made.

Decision on New Evidence Application

[17] I begin by observing that the decision whether to accept new evidence is a discretionary one. In determining whether to exercise my discretion, it is my view that the FST's power to make findings regarding procedural fairness necessarily includes the power to allow evidence relating to that matter. This was also the finding of the FST in *Grewal v Insurance Council of British Columbia*[4]. In other words, I find that section 242.2(8) of the *FIA* does not prohibit the Tribunal from receiving such evidence even where it may not meet the test set out in that section. Indeed, in the present case, the Appellant has put forward evidence relating to the consent order negotiations which took place prior to the Hearing and which evidence the Appellant was aware of and had available at the time of the original decision. If the only way new evidence could be admitted was if it complied with section 242.2(8)(b)(ii) of the *FIA*, the Appellant's new evidence would be inadmissible.

[18] In examining whether to exercise my discretion to admit the Respondent's new evidence, I note the FST has found that context is an important factor when examining the decision under appeal. This applies to a review of a decision on the grounds of procedural fairness as well as on the grounds of reasonableness. A review of the authorities indicates that the context and particular circumstances of the case under review are important considerations in evaluating whether the duty of fairness has been met.

[19] In my view, the new evidence which the Respondent seeks to tender relates to the context for the decision relating to enforcement expenses. The Respondent's proposed new evidence relates to matters it wishes to argue in response to the Appellant's new evidence and the procedural fairness issue. For example, the Respondent puts forward such new evidence to argue that the Appellant "knew enforcement expenses were at issue in the proceeding" prior to making submissions on sanction and ought to have raised the consent order negotiations matter earlier. Whether I accept the Respondent's arguments on such matters will be dealt with

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[4] *Grewal v Insurance Council of British Columbia and Financial Institutions Commission,* Decision No. 2018-FIA-001(a) (at para 89).

later in this decision; however, the Respondent should be permitted to put forward the evidence to make such arguments.

[20] In all the circumstances, I have decided to admit the Respondent's new evidence, exercising my discretion regarding the admission of such evidence and in particular my discretion relating to matters where procedural fairness is in issue. Before leaving this matter, I note that, although no issue was raised by the Respondent about the Appellant's new evidence, the FST retains jurisdiction about whether to admit such evidence. In other words, the evidence is not necessarily admissible because the parties consent. However, the Appellant's new evidence relates to the procedural fairness issue and would have been admissible on that basis if there had been an objection.

BACKGROUND

[21] The Appellant is a real estate agent and was 53 years old at the time of the Hearing. She was first licensed with the Council on August 4, 2010 and worked as an independent agent elsewhere prior to joining New Coast Realty ("New Coast") in 2014.

[22] In February 2016, the Appellant left New Coast and joined Metro Edge Realty ("Metro Edge").

[23] In 2017, the Council served six notices of hearing on the Appellant. These notices set out charges relating to various incidents which were alleged to have occurred in 2015 and 2016, including the alleged forgery of a signature on eleven listing amendment forms.

[24] The matters did not proceed to hearing in 2017 or 2018, and on May 1, 2019, the Appellant was served with amended notices of hearing relating to the charges at issue.

[25] The Hearing regarding the charges was ultimately held and evidence was led before the Committee in October and November 2020. Submissions on the issue of liability were subsequently made by legal counsel for the parties in January 2021, and the Committee reserved judgment.

[26] The allegations which went to hearing related to seven separate properties known as the Brighouse Property, the Glendower Property, the 159B Street Property, the Larkin Property, the Williams Property, the Seafair Property, and the Grandy Property, and included allegations the Appellant had falsified documents in relation to some of those properties. In addition, there were allegations that the Appellant had forged documents in respect of a number of other properties.

[27] On April 9, 2021, the Committee issued the Liability Decision. In the Liability Decision, the Committee identified the allegations against the Appellant as involving many transactions where there were breaches of various specific requirements for licensees under provisions of the *RESA* and the Real Estate Rules (the "Rules")[5]. In

[5] Liability Decision at para 8.

addition, the Committee made particular reference to allegations that the Appellant had breached the duty to act honestly by falsifying documents[6].

[28] In the Liability Decision, the Committee made findings of professional misconduct and conduct unbecoming a licensee against the Appellant in relation to several of the charges. The Committee further indicated it would hear evidence and submissions from the parties on penalty under section 43(2) of the *RESA* and enforcement expenses under section 44(1) of the *RESA*[7].

[29] After further communications with counsel for the parties, the Committee subsequently ordered that the sanction matters would be dealt with by written submissions.

[30] The Committee summarized its findings on liability in the Sanction Decision as follows (at para 6):

a. Professional misconduct respecting the Brighouse Property:

    i. failing to advise the sellers that the property could not be listed for 60 days after cancellation;

    ii. failing to cancel the listing within a reasonable time;

    iii. failing to provide a copy of the cancellation form to the sellers.

    (Liability Decision para. 43.)

b. Professional misconduct respecting the Glendower Property:

    i. in the Contract of Purchase and Sale, improperly listing herself and Mr. S. as seller's agents, and Mr. L. as buyer's agent despite a dual agency agreement (Liability Decision para. 59);

    ii. failing to disclose the members of the Team on the Contract of Purchase and Sale (Liability Decision para. 60);

    iii. failing to disclose to the buyer the full amount of commission payable to New Coast (Liability Decision para. 63).

c. Professional misconduct respecting the 159B Street Property:

    i. allowing the Contract of Purchase and Sale to improperly list her as seller's agent and Mr. Z. as buyer's agent despite a dual agency agreement (Liability Decision para. 78);

    ii. failing to disclose the members of the Team on the Contract of Purchase and Sale (Liability Decision para. 79).

d. Professional misconduct respecting the Larkin Property:

    i. misusing an amendment form to change the expiry date for the listing contract (Liability Decision para. 100); and

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[6] Liability Decision at paras 12 – 14.
[7] Liability Decision at para 156.

ii. failing to provide real estate services only on behalf of New Coast Realty (Liability Decision para. 101).

e. Professional misconduct respecting the Grandy Property:

i. failing to provide services only on behalf of New Coast Realty; and

ii. failing to provide accurate brokerage listing information.

(Liability Decision para. 154.)

f. Professional misconduct and conduct unbecoming respecting the Williams Property by falsifying the Williams Amendment Form in order to amend the Williams Listing Contract, and failing to provide the form to New Coast Realty (Liability Decision para. 147 and 150).

g. Professional misconduct and conduct unbecoming respecting the Seafair Property by failing to provide transaction documents to New Coast Realty promptly (Liability Decision paras. 140, 144, and 148).

h. Professional misconduct and conduct unbecoming respecting various other properties (i.e., the Landsdowne, Seafield, Francis, Desmond, Tinmore, Greenlees, River, and Kwantlen Properties):

i. amending listing contracts to expire early without the consent of New Coast Realty;

ii. photocopying the signature of the managing broker for each listing; and

iii. failing to provide copies of the forms to New Coast Realty.

(See Liability Decision paras. 141, 142, and 144.)

[31] In the Sanction Decision, the Committee addressed the Appellant's misconduct in two groups (at para 35):

a. first, various breaches of the Rules, including failures to exercise reasonable care and skill (the "Contravening Conduct"); and

b. second, her attempts to take listings when she left New Coast Realty, which included her using photocopies of the managing broker's signature and failing to provide transaction documents to New Coast Realty (the "Dishonest Conduct")

[32] The Dishonest Conduct was viewed by the Committee as "clearly the most serious misconduct"[8].

[33] The Committee's penalty decision and the reasons for it then followed in four paragraphs (at paras 36-39):

> 36. Although Ms. Yang failed, with respect to the Contravening Conduct, to comply with a variety of requirements under the Rules, the Committee's concerns focused on Ms. Yang's dishonesty in misusing photocopies of the managing broker's signature, and concealing this misuse from New Coast Realty

[8] Sanction Decision at para 38.

through nondisclosure. The Committee recognized that the circumstances included the following aggravating and mitigating factors:

> a. The Respondent's five years of experience as a licensee before the conduct at issue was enough that the Committee could not conclude a lack of experience as a mitigating factor. To the contrary, she knew or ought to have known of her obligations.
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> b. The Respondent does not have any history of complaints or contraventions, and she has not been subject to any complaints or alleged contraventions for more-than-five-year period after the latest conduct at issue in early 2016.
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> c. With respect to the nature and gravity of the Contravening Conduct, while some of the Respondent's contraventions were less serious in nature, such as her failing to disclose the members of the Team – failures that New Coast Realty did not see fit to correct – Ms. Yang's contraventions constitute a pattern that make her collective practice contraventions somewhat more serious in nature.
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> d. With respect to the nature and gravity of the Dishonest Conduct, the Committee is satisfied that the nature and gravity of her contraventions was serious in nature. However, the Committee viewed the seriousness of her misconduct as less serious than what the licensee did in the *Behroyan* (2020). The Respondent was not attempting to profit at the expense of any sellers. The Respondent did, however, still act dishonestly when she knowingly misrepresented the consent of New Coast Realty in order to retain multiple listings (and by extension, potential commissions) that legally belonged to New Coast Realty. And while the Respondent's misuse of the managing broker's signature occurred during a limited window of time, the Committee cannot ignore that her conduct involved multiple misuses of that signature.

37. With respect to the Brighouse Property, the Committee agreed the Respondent did not have any reason to think that the sellers intended to relist their property. However, with respect to all the Contravening Conduct, including misconduct relating to the Brighouse Property, the Respondent failed to fulfil her responsibilities as a licensee. The Committee did not consider the busyness of her practice as a mitigating factor. Ms. Yang blamed others for matters that she was responsible for overseeing, and appeared to show a disregard for her responsibilities. One mitigating factor, however, was the lack of clear rules relating to how licensees must manage or supervise teams. The Committee also agreed with Respondent's counsel that the Respondent's conduct based on her mistaking when the Council would transfer her licence to Metro Edge did not deserve serious sanction.

38. With respect to the Dishonest Conduct, which was clearly the most serious misconduct, the Committee agrees that the Dishonest Conduct did not result in financial harm to sellers. The Committee also accepts that the Respondent only attempted to transfer listings that she or her team had sourced, and not listings resulting from leads provided by New Coast Realty. The Committee does not, however, agree with the Respondent's counsel that no person suffered any harm. To the contrary, the Respondent acted to secure financial benefit at the

expense of New Coast Realty, even though her attempts were ultimately unsuccessful.

39. After considering all the circumstances, including the cases provided by the parties, the Committee ultimately concluded that the following sanctions are warranted by the Respondent's misconduct taken as a whole:

a. a suspension of one (1) year;

b. that she be prohibited from acting as an unlicensed assistant during the licence suspension period; and

c. a requirement that the Respondent successfully complete the following courses during her period of suspension:

i. the Council's Real Estate Trading Services Remedial Education course;

ii. ii. the Real Estate Institute's Ethics in Business Practice course (REIC2600).

The Committee concluded that these sanctions will adequately fulfil the purposes set out in section 2.1.1 of the Guidelines, including denouncing the misconduct, deterring of future misconduct by the Respondent, deterring similar misconduct by other licensees, and maintaining public confidence in the real estate industry.

[34] The Committee next addressed enforcement expenses.

[35] The Committee reviewed various aspects relating to ordering enforcement expenses. The Committee referred to the quote from the decision in *Jacob Giesbrecht Siemens*[9]earlier in the Sanction Decision, and agreed with the analysis there and specifically stated (at para 45):

> Orders for enforcement expenses are a matter of discretion, and serve many purposes, including shifting the expense of disciplinary proceedings from all licensees to wrongdoing licensees, **encouraging consent agreements**, deterring frivolous defences, and discouraging steps that prolong investigations or hearings. As also addressed in Siemens, the Committee has discretion to order expenses at less than full indemnity.[emphasis added]

[36] The Committee subsequently identified the following factors from the case law about exercising discretion respecting costs (at para 53):

a. the nature of the misconduct,

b. **any settlement offer made in writing, and the date in terms of the offer**,

c. the member's failure to acknowledge any error or to act reasonably unprofessionally to avoid a hearing,

d. the relative success of the parties,

e. the costs of the investigation and hearing,

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[9] *Jacob Giesbrecht Siemens* (2020 CanLII 63581) ("*Siemens*").

f. the nature of the member's defence, and

g. the impact of the cost order on the member's ability to continue to practice.

[emphasis added]

[37] The Committee then commented to the effect that settlement offers and consent order negotiations were not to be considered when exercising its discretion regarding enforcement costs because neither the Regulation nor the Rules referenced such matters:

> These factors highlight the discretionary nature of enforcement expenses. With respect to item (b), however, neither the Regulation nor the Rules provide for consequences relating to the Council or a licensee failing to accept an offer of a consent order.

[38] Thereafter the Committee did not consider the effect of any settlement negotiations or offers when making its decision on enforcement expenses in this case.

POSITIONS OF THE PARTIES

The Appellant

[39] The Appellant relies on the decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*[10], to the effect that there is a presumption that 'reasonableness' is the appropriate standard of review to be applied in the review of an administrative decision. In particular, the Appellant says the standard of review regarding penalty decisions is one of reasonableness.

[40] The Appellant cites various authorities to the effect that the hallmarks of reasonableness are justification, transparency and intelligibility. In applying the reasonableness standard of review, the Appellant notes the proper application of the reasonableness standard is concerned with both "the decision making process and its outcomes"[11].

[41] In terms of the decision making process, the Appellant cites *Vavilov* and says the decision under review "must be based on reasoning that is both rational and logical" [12]. In that respect, the Appellant submits that there must be a line of analysis from which the reviewing body can "be satisfied that the decision maker's reasoning 'adds up'".

[42] The Appellant argues that the reasoning used relating to the suspension determination here does not meet the reasonableness standard. The Appellant says the "Sanction Decision does not lay out any clear 'train of reasoning' in arriving at that decision". The Appellant submits that, while the Committee identified some

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[10] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*").
[11] Citing: *TruNorth Warranty Plans of North America, LLC v Superintendent of Financial Institutions*, Decision No. 2019-FIA-003(a) (FST) ("*TruNorth*") at para 84.
[12] Citing: *Vavilov, supra* note 10, at para 102.

aggravating and mitigating factors, it did not explain how those factors amounted to a one-year suspension. The Appellant argues that it is basically a conclusion without a transparent and intelligible reasoning process to justify that particular determination. The Appellant argues "the Committee's Sanction Decision does little more than to say: 'Ms. Yang's misconduct was serious, so in our view she should be suspended for a year".

[43] The Appellant says the Committee may have had a sense it was doing justice by ordering a penalty between the Council's position (a licence cancellation and prohibition from reapplying for 5 years) and the Appellant's position (a two-to-three month suspension); however, such an approach does not satisfy a decision-maker's duty to provide justified, transparent, and intelligible reasons for the penalty it chooses.

[44] In her submissions, the Appellant notes the importance of the context when reviewing the decision. The Appellant relies on decisions of the FST in *Atwal v Insurance Council of British Columbia*[13], and *TruNorth*, as well as *Vavilov*, to the effect that "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review", and the "approach to assessing reasonableness on penalty appeals to the FST should more accurately be described as reasonableness taking its colour from the context"[14].

[45] The Appellant cites the decisions in *Atwal* and *Vavilov* to the effect that "where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes", and says "where the decision has consequences that threaten an individual's livelihood, the requirement for reasons explaining the result is at the higher end of the spectrum". The Appellant also cites many other decisions of the Real Estate Council regarding the context of past decisions of the administrative body and the importance of providing thorough and complete reasons given that contextual element.

[46] In the present case, the Appellant says that a lengthy suspension will have a severe impact on her as "a real estate agent in her mid-50's nearing the last leg of her career". The Appellant argues this "further amplifies the importance of the Committee providing reasons that are 'justified, transparent and intelligible' as a condition of their being found to be reasonable". The Appellant says the context for the Committee's decision, and its impact on her livelihood, supports her argument that the Committee's reasons do not meet the required standard.

[47] Thus, the Appellant argues that the suspension determination was unreasonable.

[48] Following from her contention that the suspension determination is unreasonable, the Appellant's position is that the suspension should be set aside and this Tribunal ought "to make a determination of an appropriate penalty in this case without having to send the matter back to the Committee for reconsideration". The Appellant says the facts and circumstances bearing on the determination of

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[13] *Atwal v Insurance Council of British Columbia*, Decision No.FST-FIA-20-A002(a) ("*Atwal*").
[14] *TruNorth, supra* note 11 at paras 86-87.

penalty are sufficiently clear to make such a determination, reconstituting the Committee would involve some practical challenges, and "it is in all parties' interests to bring this matter to a conclusion promptly and without further expense".

[49] In terms of setting the appropriate penalty for the Dishonest Conduct, the Appellant reviews various considerations. The Appellant begins with "a 'baseline' sanction of a 6-to-9 month suspension for dishonest conduct of this nature, committed in this context" as a reasonable penalty range. The Appellant says this is consistent with the 9-month suspension imposed by the discipline committee in *Inglis (Re)*[15], and upheld by the FST[16], "where the agent created a forged contract, lied to the Council about it and maintained his innocence through to the end of protracted proceedings".

[50] In terms of setting the appropriate penalty for the Contravening Conduct, the Appellant submits a 'baseline' sanction of a 2-to-3 week suspension would be a reasonable penalty range for this conduct, taken on its own, or a fine in the range of $10,000 (but not both).

[51] From those starting points, the Appellant says the factors relevant to penalty are predominantly 'mitigative' in nature. In particular, the Appellant argues leniency should be shown because she acted out of anger caused by the harsh treatment she received from the owner of New Coast. In this respect, the Appellant argues that the Sanction Decision did not "meaningfully grapple" with her submission that the Dishonest Conduct occurred in the heat of an emotional situation and anger caused by what she characterizes as the 'strong-arm' treatment of her by the owner of New Coast. She argues this is a significant mitigating factor.

[52] The result in all the circumstances, according to the Appellant, ought to be a suspension not exceeding two or three months coupled with a fine not exceeding $10,000.

[53] The Appellant challenges the enforcement expenses on a number of grounds. The Appellant begins by arguing that the Council alleged, and failed to establish, that the Appellant acted in a predatory manner in relation to various dealings with clients. As a result of the Council's failure in this respect, the Appellant argues that it is unfair that the Appellant be required to pay 65% of the enforcement expenses on a full indemnity basis. Rather, the Appellant submits that "a reduction in the range of 50% in the enforcement expenses that the Appellant should be required to pay is warranted on this basis alone".

[54] The next issue regarding enforcement expenses relates to the Appellant's submission before the Committee about a potentially relevant history of consent order negotiations. The Appellant's written submission before the Committee raised the issue of the potential effect of such negotiations as follows:

> …there is a history of discussions and a previous Consent Order proposal made by Ms. Yang, which, it is submitted could have a very significant bearing on the

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[15] *Inglis (Re)*, 2019 CanLII 53386.
[16] *Inglis v Real Estate Council of BC and the Superintendent of Real Estate*, Decision No. 2019-RSA-001(a)("*Inglis*").

> Council's entitlement to recover enforcement expenses, either at all or in the amount claimed. Because those discussions took place in the context of Consent Order negotiations, it would be inappropriate to be providing specific details of what those discussions were at this stage. Depending on the sanction the Committee ultimately sees fit to impose, however, the possibility exists that this entire costly hearing could have been avoided altogether, with a sanction no more severe than under the Consent Order proposal made by Ms. Yang, if that proposal had been accepted.

[55] Following from this, the Appellant submitted to the Committee that consideration of the issue of recovery of enforcement expenses should take place after the Committee's determination of sanction.

[56] The Appellant says that the Committee referred to case law "which listed 'any settlement offer made in writing, and the date and terms of the offer' as a factor to be considered when exercising discretion respecting costs". However, the Committee did not accede to the Appellant's request that consideration of the enforcement expenses be deferred so that she could be heard on the matter of the Consent Order settlement negotiations, with the Committee stating that neither the Regulation nor Rules specifically provide for consideration of the failure to accept an offer of a consent order[17].

[57] The Appellant argues that the relevant sections of the *RESA* or regulations do not limit the factors which "can properly be considered in determining whether or not to make an order relating to the payment of enforcement expenses". The Appellant states that to the extent the Committee determined it was precluded from considering consent order negotiations because there was no express authority to do so, "the Committee made an error in law". The Appellant also says that the Committee's decision not to consider settlement matters in relation to enforcement expenses was unreasonable and unfair. In that regard, the Appellant argues that it was unreasonable not to consider the relevant factor of the consent order negotiations and the "Committee effectively 'stopped its ears' to a consideration that may have affected its decision". Further, the Appellant says it was unfair for the Committee to decline to provide an opportunity to her to address the history of the consent order negotiations in this case after having been "expressly advised that a potentially relevant history of consent order negotiations did in fact exist".

[58] Similar to the Appellant's submission in respect of the suspension determination, the Appellant requests that the FST vary the enforcement expenses decision rather than send the matter back to the Committee on the matter of remedy.

The Respondent

[59] The Respondent says that for questions of penalty, such as the suspension determination here, the standard of review is one of reasonableness. The Respondent cites various FST decisions, including *Atwal* and *TruNorth*, regarding reasonableness being the standard of review and how the standard of review is to

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[17] Sanction Decision at para 53.

be applied. The Respondent quotes from *Atwal* that "the decision under review must be reasonable in respect of both: 1) the rationale for the decision which was made by the decision maker; and 2) the outcome to which it led"[18]. The Respondent further quotes from *Atwal* to the effect that "reasonableness is to be evaluated in light of the context"[19].

[60] Having said that, the Respondent quotes from *Vavilov* to the effect that "the written reasons given by an administrative body must not be assessed against a standard of perfection"[20]. The Respondent further notes that the review of an administrative body's decision cannot be divorced from the "institutional context in which the decision was made nor from the history of the proceedings"[21].

[61] With regard to the suspension determination here, the Respondent says the Committee noted that it had reviewed the submissions of the parties and identified key submissions. The Respondent argues that, "although not expressly stated", it may be inferred those key submissions factored into the Committee's decision-making process.

[62] The Respondent says the Committee considered whether its sanctions should take the form of a fine, but found that a suspension was more suitable than a fine to address the Appellant's serious misconduct. The Respondent further says that the Committee made certain specific findings as to why the Appellant's misconduct was serious, including findings that her contraventions set out in the Contravening Conduct constituted a pattern that made her collective practice contraventions somewhat more serious in nature. Regarding the Dishonest Conduct, the Respondent says the Committee found that the Appellant "had acted to secure a benefit for herself at the expense of NCR [New Coast], even if she was unsuccessful in doing so".

[63] The Respondent submits that the Appellant is attempting to reargue the merits of her case on penalty before the FST and her appeal of the suspension determination should be rejected.

[64] In the event the FST finds the suspension determination does not meet the reasonableness standard, the Respondent says the appropriate penalty would be a cancellation of the Appellant's licence for up to 5 years. The Respondent cites various discipline committee cases regarding penalty including those where there was a consent order, rather than an adjudication. In terms of cases considered by the FST, the Respondent cites *Financial Institutions Commission v Insurance Council of BC et al* ("*FICOM*")[22], where this Tribunal emphasized the importance of trustworthiness.

[65] *FICOM* dealt with the misconduct of insurance agents who had "renewed clients' auto insurance when the governing rules prohibited them from doing so

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[18] Citing *Atwal, supra* note 13, at para 65.
[19] Citing *Atwal, supra* note 13, at para 66.
[20] Citing *Vavilov*, *supra* note 10, at para 91.
[21] Citing *Vavilov*, *supra* note 10, at para 91
[22] *Financial Institutions Commission v Insurance Council of BC et al*, Decision No. 2017-FIA-002(a)-008(a) ("*FICOM*").

where bridge tolls had not been paid"[23]. During the relevant 18-month period of misconduct there, the number of times "that each licensee entered false information ranged from 32 to 116"[24]. The Respondent notes that in *FICOM*, the FST held 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"[25].

[66] The Respondent also cites *Inglis* as support for a "lengthy suspension", and notes that the committee there "found that a 9-month suspension was reasonable based on the conduct of the licensee (i.e. creating a forged contract, lying to Council about it, and maintaining his innocence through to the end of discipline proceedings"). That case was subsequently upheld by the FST.

[67] With respect to the enforcement expenses ordered here, the Respondent notes the Appellant's assertion that the enforcement expenses order was unfair as well as unreasonable. The Respondent says the standard of review for questions of procedural fairness is 'fairness', and cites *Kadioglu v Real Estate Council of British Columbia*[26] in that respect.

[68] Regarding the reasonableness of the enforcement expenses order, the Respondent says that such orders are discretionary orders "because they require disciplinary committees to weigh various factors after a disciplinary hearing". The Respondent notes that the Committee explained its rationale in arriving at its decision and specifically found a number of items to be reasonable in the circumstances, including the total time spent by legal counsel and the length of the hearing. The Respondent says the Committee explained its decision in reducing the amount of enforcement expenses "to reflect what it referred to as divided success on the remaining allegations" and its finding "that some of the misconduct was less serious in nature than argued by Council".

[69] In terms of the consent order negotiations, the Respondent argues that such matters are not to be taken into account under section 41 of the *RESA,* and says the Committee was correct not to consider such matters.

[70] The Respondent further relies on the context surrounding the Committee's decision regarding enforcement expenses in arguing that the Committee did not act in an unfair manner. The Respondent notes that each of the various Notices of Hearing provided to the Appellant indicated that enforcement expenses could be ordered, and the Liability Decision stated that enforcement expenses would be dealt with together with penalty. The Respondent then outlines the communications following the Liability Decision and says that the Appellant did not seek an extension to provide fulsome submissions on enforcement expenses and should have raised the separation of the enforcement expenses from penalty earlier. Conversely, the Respondent says that "if the Appellant considered the consent

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[23] *FICOM, supra* note 22 at para 5.
[24] *FICOM, supra* note 22 at para 5.
[25] *FICOM, supra* note 22 at para 123.
[26] *Kadioglu v Real Estate Council of British Columbia and Superintendent of Real Estate*, Decision No. 2015-RSA-003(b) ("*Kadioglu*").

order proposal negotiations relevant to matter at issue in the proceeding, including enforcement expenses, the time to raise the negotiations was in her submissions on penalty as she was advised to do by the Committee".

[71] In the alternative, the Respondent argues that any submissions made about the consent negotiations would not have impacted the amount of the enforcement expenses ordered by the Committee. The Respondent notes the Committee's finding that "no hearing time was wasted", and argues "there is no basis on which to vary the Enforcement Expenses Order" as requested by the Appellant. The Respondent further notes the suspension sought by the Appellant in the consent order negotiations was 120 days (i.e. 4 months), which was significantly less than the one-year suspension rendered by the Committee. As such, there would have needed to be a hearing in any event since the Council was not prepared to agree to such a suspension.

[72] The Respondent seeks an order dismissing the Appellant's appeal as well as order for costs of the appeal. The Respondent cites case law regarding the awarding of appeal costs and submits "that the costs of this appeal should be awarded against the Appellant because the grounds of appeal were manifestly unfounded in the circumstances".

Appellant's Reply

[73] The Appellant says that the Respondent fundamentally mischaracterizes what this appeal is about and that her appeal is not an attempt to reargue the merits of her case regarding penalty. Rather her appeal is based on the Committee's failure to adequately articulate the reasoning process it used in coming to its suspension determination.

[74] Regarding the Respondent's submission that the appeal is seeking a standard of perfection, the Appellant says that requiring the Committee to "articulate a cogent and traceable 'line of logic'" in arriving at its penalty determination "is not a demand of 'perfection' but a core requirement of 'reasonableness'".

[75] The Appellant notes the Respondent has asked the FST to "infer" what the Committee meant in its decision, and says this underscores that the Committee failed to adequately explain its reasoning process. In other words, the reasoning process should be plain on the face of the decision and not be "left to conjecture on an appeal".

[76] With respect to the Respondent's argument that the appropriate penalty should be a five-year licence cancellation, the Appellant notes that the Respondent did not cross appeal. Further, the Appellant says there could be no basis for the Respondent to argue that such a significantly different penalty from that awarded by the Committee is appropriate unless the Committee's suspension determination itself was an unreasonable outcome in first place.

[77] The Appellant says the consent orders cited by the Respondent regarding penalty have "no precedential value as 'decisions' justifying the suspensions ordered" since they resulted from agreements made to avoid potentially significant enforcement expenses and occurred "without an 'adjudication' of any sort as to the appropriateness of the suspensions agreed to".

[78] Turning to the enforcement expenses, the Appellant says the Respondent is incorrect that section 41 of the *RESA* prohibited the Committee from considering the history of consent order negotiations in this case. The Appellant says section 41 contains no such prohibition and only deals with situations where a licensee does not consent to their consideration. Here the Appellant consented to the use of the consent order negotiations and states that "she ought to have been given the opportunity to present evidence and make submissions regarding them, in determining whether she should be ordered to pay enforcement expenses, or in what amount".

[79] In the present case, the Appellant says that she "had good reason to consider it improper to disclose details of the history of 'without prejudice' Consent Order negotiations before the other issues of liability and penalty were decided". Contrary to the Respondent's argument, the Appellant says that the Committee's decision not to consider consent order negotiations amounted to an unfair refusal to hear evidence and submissions "which the Appellant sought to bring forward and make at the time when it was procedurally appropriate to do so".

RELEVANT LEGISLATION

[80] The appeal to the FST is brought under section 54 of the *RESA*.

[81] The powers of the FST on such an appeal are set out in section 242.2(11) of the *FIA* as follows:

> 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.

ISSUES

[82] As previously noted, the Appellant seeks to set aside the suspension determination and the enforcement expenses order.

[83] I will consider the issues raised on this appeal as follows:

a. What is the standard of review to be applied to each of the matters raised on this appeal?

b. Does the suspension determination meet the applicable standard of review?

c. In the event the suspension determination does not meet the applicable standard, what remedy should follow?

d. Does the enforcement expenses order meet the applicable standard of review?

e. In the event the enforcement expenses order does not meet the applicable standard, should the enforcement expenses be varied as submitted by the Appellant?

ANALYSIS

a. The Standard of Review to be Applied

[84] Both the Appellant and the Respondent have referenced the decision of the FST in *Atwal*. In that case, I reviewed the law regarding the standard of review for penalty decisions. I stated (at paras 65-70):

> [65] In *TruNorth*, the panel held that the standard of review on questions of penalty was reasonableness. In applying the reasonableness standard, the panel in *TruNorth* referred to *Vavilov* and held "the proper application of the reasonableness standard is concerned with the decision-making process and its outcomes" (at para 84). Stated another way, the decision under review must be reasonable in respect of both: 1) the rationale for the decision which was made by the decision maker; and 2) the outcome to which it led. The Supreme Court of Canada in *Vavilov* stated it this way (at paras 86-87):
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> > …In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.
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> > …that a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome was recently reaffirmed in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6, at para. 12. In that case, although the outcome of the decision at issue may not have been unreasonable in the circumstances, the decision was set aside because the outcome had been arrived at on the basis of an unreasonable chain of analysis. (emphasis in original)
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> [66] When conducting a penalty review, the panel in *TruNorth* referenced the guidance from *Vavilov* about the importance of context. The panel quoted from *Vavilov* to the effect that reasonableness is to be evaluated in light of the context and "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*TruNorth*, para.86). The panel stated that the "approach to assessing reasonableness on penalty appeals to the FST should more accurately be described as reasonableness taking its colour from the context" (*TruNorth*, para 87)
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> …
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> [68] In applying a contextual analysis, the Supreme Court of Canada in *Vavilov* referred to its previous decision in *Baker* and identified a number of factors to be considered. Such factors include the past practices and past decisions of the administrative body, as well as the impact of the decision on the individual.
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> [69] With respect to whether the decision is consistent with the past decisions and practices of the administrative body, the Court stated that where a decision maker departs "from longstanding practices or established internal authority, it

> bears the justificatory burden of explaining that departure in its reasons" (*Vavilov*, at para. 131). In that regard, the legitimate expectations of the parties, based on such past decisions and practices, "help to determine both whether reasons are required and what those reasons must explain" (*Vavilov*, at para. 131, and see also *Baker* at para. 26).
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> [70] Regarding the impact of the decision under review, the Court in *Vavilov* stated that a review based on reasonableness requires that "where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes" (*Vavilov*, at para 133). In particular, where a decision has consequences that threaten an individual's livelihood, the requirement for reasons explaining the result is at the higher end of the spectrum. In *Baker*, the Court quoted an earlier decision holding that "a high standard of justice is required when the right to continue in one's profession or employment is at stake" (at para. 25), and in *Vavilov* the Court held such a principle was applicable both for procedural fairness and on a reasonableness review (at para. 133).

[85] To summarize the above, I found:

- the standard of review in respect of penalty matters to be reasonableness;
- that the "reasonableness review applies to both: 1) the rationale for the decision which was made by the decision maker; and 2) the outcome to which it led"; and
- the application of the reasonableness review involves a contextual analysis including consideration of factors such as the past practices and past decisions of the administrative body, as well as the impact of the decision on the individual.

[86] The case law further establishes that in reviewing an administrative body's reasoning, the question is whether the reasoning is transparent, intelligible and justifiable such that it 'adds up', and a decision may be set aside on the basis of an unreasonable chain of analysis even though the outcome may be reasonable.

[87] I will apply the reasonableness standard of review as summarized in the paragraphs above when analyzing the suspension determination in the present case.

[88] Turning to the standard of review regarding the enforcement expenses order, the Appellant challenges the Committee's handling of the consent order negotiations matter and raises a number of concerns.

[89] First, the Appellant says that to the extent the Committee considered it was precluded from considering the history of consent order negotiations by the *RESA*, the Regulation or the Rules, the Committee made an error of law. As a "specialized administrative appeal tribunal with statutorily acknowledged expertise"[27], the standard of review that the FST generally applies to questions of law is

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[27] *Trunorth, supra* note 11 at para 60.

correctness[28]. I see no reason to depart from that approach in assessing this question of law in the present appeal.

[90] Second, the Appellant says the Committee's reasoning relating to the consent order negotiations was unreasonable. To the extent the Committee made the decision about such negotiations based on considerations other than the legal question mentioned above, I will apply a reasonableness standard in examining that matter. This is in accordance with the case law relating to such a review of an administrative decision maker's decision.

[91] Third, the Appellant says that the "Committee was expressly advised that a potentially relevant history of Consent Order negotiations" existed and the Committee failed to allow such evidence to be considered. This raises a question of procedural fairness, and the standard of review I will apply in that regard is fairness[29].

[92] As previously noted, the Appellant has also made arguments that the amount awarded for enforcement expenses is too high and has submitted that in the circumstances, the enforcement expenses should be reduced. I will consider these arguments in greater detail later in this decision.

b. Application of the Reasonableness Standard to the Suspension Determination

[93] As previously noted, the question which arises in respect of the Committee's reasoning on penalty is whether the Committee's decision to impose a one-year suspension was arrived at in justified, transparent and intelligible manner in the circumstances.

[94] Having reviewed the matter, I have concluded that the Committee's reasoning does not "add up" in terms of adequately explaining why the Appellant was suspended for one year as opposed to some other time period. While I appreciate that the Committee found the Appellant's misconduct to be serious and warranting a suspension rather than a fine, there is not a justifiable, transparent and intelligible explanation for the choice of a one-year suspension. I have come to this conclusion for a number of reasons.

[95] First, although the Committee identifies a number of aggravating and mitigating factors, it does not explain how those factors figure into a one-year suspension. I find there is a gap in the Committee's rationale, and it lacks reasoning tying the factors identified by the Committee to the ultimate determination. There is no discussion of a penalty range from which to apply the aggravating and mitigating factors in setting the suspension at one year, or how that number was determined. As the Appellant argues, the Sanction Decision does not lay out any clear "train of reasoning" in arriving at the ultimate suspension length of one year. The result is that the Sanction Decision fails to explain why a

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[28] *TruNorth, supra* note 11 at paras 66-70.
[29] See: *Atwal, supra* note 13 at para 72 and *Kadioglu, supra* note 26 at para 32.

one-year suspension was chosen by the Committee as opposed to 6 months or 18 months or some other time frame.

[96] Second, the reasoning fails to meet the reasonableness standard given the context. As previously noted, a factor in conducting a contextual analysis is the impact of the decision on the individual and, where a decision has consequences that threaten an individual's livelihood, the requirement for reasons explaining the result is at the higher end of the spectrum. A one year suspension from being able to practice in one's chosen profession is a serious and significant penalty. Before the Committee, the Appellant had argued there ought to be a 2-to-3-month suspension and I find she had a legitimate expectation of receiving an explanation from the Committee for why it chose a one-year suspension. I further find the Committee's reasoning and lack of explanation for setting the length of suspension at one year does not meet the required standard given the stakes involved.

[97] Third, in conducting a contextual analysis another consideration is the past decisions of the administrative body. A factor in setting a penalty is ensuring it is not disparate with penalties imposed in similar cases[30]. Here no comparison is made by the Committee to other similar cases to justify the choice of a one-year suspension. The only reference to another case is a mention of "*Behroyan (2020)*"[31] in relation to only one of the factors considered (the nature and gravity of the Dishonest Conduct). The result in that case was very different and it does not follow that because the conduct here was less serious than that which warranted a 5-year licence cancellation in *Behroyan*, the suspension here should therefore be one year. As previously noted, there is a gap in the Committee's reasoning in explaining how a one-year suspension was arrived at, and in explaining how that outcome fits with past decisions of the administrative body.

[98] For the above reasons, I find that the Committee's rationale for the one year suspension is unreasonable. I will discuss what remedy flows from this finding below.

c. Remedy relating to the Suspension Determination

[99] As a result of my finding that the Committee's rationale does not meet the applicable reasonableness standard, I set aside the Committee's determination of a one-year suspension. Based on the law as set out in *Vavilov* and *TruNorth*, the failure of the suspension determination to meet the reasonableness test in terms of its rationale means that portion of the Sanction Decision may be set aside without the necessity of reviewing whether the outcome meets the reasonableness standard. In *Vavilov*, the Supreme Court of Canada made particular note of a case where the decision was set aside because the outcome had not been arrived at on the basis of a reasonable chain of analysis, even though that outcome itself may not have been unreasonable in the circumstances.

[100] Having set aside the suspension determination, the next question is whether to remit the matter of penalty to the Committee. The Appellant has argued that in

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[30] See *Financial Services Commission v Insurance Council of British Columbia and Maria Pavicic*, November 22, 2005 ("*Pavicic*") at p 12.
[31] *Behroyan (Re)*, 2020 CanLII 36926 (BC REC) ("*Behroyan*").

the event the suspension determination is found to be unreasonable, I should determine the appropriate penalty without sending the matter back for reconsideration. The Respondent did not argue the matter should be remitted in such circumstances, but instead made submissions on the appropriate penalty. The Respondent asserted the appropriate penalty is for the Appellant's licence to be "cancelled for up to 5 years for the reasons set out in its submissions to the Committee".

[101] In the present circumstances, I find that it would be appropriate for me to determine the appropriate penalty, exercising my power to vary the decision under appeal pursuant to section 242.2(11) of the *FIA*. As the Appellant has noted, the "legal principles, facts and circumstances bearing on the determination of penalty are sufficiently clear" to enable me to make a determination of appropriate penalty in this case. In that respect, the parties have made submissions to this panel specifically on what the appropriate penalty ought to be. The time and expense of dealing with this matter have already been significant and the parties should not be put to the time and expense of more proceedings to determine the matter. Further, the additional delay in referring the matter back ought to be avoided. The notices of hearing against the Appellant were initially issued in 2017 – approximately five years ago – and the incidents of misconduct relate to 2015 and 2016. If the matter was to be referred back for reconsideration, there would be further delay with the potential for even more delay and cost in the event of another appeal.

[102] My decision to determine the matter of the Appellant's penalty on this appeal is also consistent with the application of various factors identified in *Vavilov* regarding whether to remit a matter[32]. In addition to the factors of concern for delay and avoiding costs to the parties noted in *Vavilov* and previously mentioned, the nature of the regulatory regime here is one where the FST is recognized as a specialized tribunal with the ability to make its own specialized judgments regarding penalty matters[33].

[103] I turn now to determining the matter of penalty. I begin by noting that both parties have submitted the Appellant should be prohibited from practicing for some period of time – although those time periods are very different. The factors to be considered from the case law in determining this matter include: the penalty imposed in similar cases; specific deterrence of the licensee from further acts of misconduct; general deterrence of other members of the profession who might consider engaging in such misconduct; and maintaining public confidence in the integrity of the profession[34].

[104] The first factor I will examine is the penalty imposed in cases involving similar misconduct. As previously noted, the FST has recognized as a principle of sentencing that there should be "an avoidance of imposing penalties which are disparate with penalties imposed in other cases."[35]. While each case will depend on its own particular facts, the principle that similar cases should be treated in a like

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[32] See *Vavilov, supra* note 10, at para 142.
[33] See *FICOM, supra* note 22 at para 77.
[34] See *Pavicic, supra* note 30 at p 12, and *Inglis, supra* note 16 at para 52.
[35] See *FICOM supra* note 22 at para 97.

fashion has been described in the case law as the "principle of parity" and applied by the FST[36].

[105] In terms of the case law, both parties have referenced the *Inglis* decision, as having some applicability to the present case. The Appellant submitted that it would be consistent with the 9-month suspension imposed by the Council in *Inglis*, and upheld by the FST, to begin with "a baseline sanction of a 6-to-9 month suspension" for dishonest conduct of the nature here, although the Appellant argued the ultimate penalty for all of the Appellant's misconduct should be less. The Respondent cited *Inglis* as support for a "lengthy suspension", but argued for a licence cancellation period longer than in *Inglis*. I have reviewed the *Inglis* case and find that while not identical to the present case, it is sufficiently similar that it can be used for comparison purposes regarding penalty.

[106] In comparing *Inglis* to the present case, I note first that in *Inglis* there was fraudulent conduct involving a forged offer on one property. Here the Appellant's misconduct involved multiple uses of the forged signature involving a number of properties. Further, in her attempt to take listings when she left New Coast, the Appellant prepared other related documents and submitted them to the Real Estate Board of Greater Vancouver ("REBGV") in the days that followed. For example, the Appellant fraudulently amended listing contracts for the Landsdowne Property, the Seafield Property and the Francis Property on January 27, 2016, subsequently submitted them to the REBGV, and on or about February 3, 2016 re-listed those properties with Metro Edge[37]. With respect to the purpose behind the forgeries, the Committee noted that the Appellant's actions relating to the forged documents were "to secure financial benefit at the expense of New Coast Realty, even though her attempts were ultimately unsuccessful"[38].

[107] In addition to the misconduct involving forgeries, both the Appellant and Mr. Inglis were found to have committed other misconduct. The Committee found the Appellant to have engaged in multiple instances of Contravening Conduct. While the Committee described some of her contraventions as less serious in nature, the Committee found that her contraventions constituted "a pattern" which made "her collective practice contraventions somewhat more serious in nature"[39]. Mr. Inglis was found to have made a false statement to the Council during the investigation, and to have threatened retaliation against his co-listing agent for making a complaint against him to the Council. The Committee in *Inglis* stated that such matters were "very serious", and I agree with that finding.

[108] The Appellant has specifically submitted that a significant mitigating factor in her case is that "her Dishonest Conduct occurred in the heat of emotional upset and anger" caused by the "'strong-arm' treatment of her" by the Owner of New Coast. Regarding that submission, I make the following findings.

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[36] See *Kia v Registrar of Mortgage Brokers*, Decision No. 2017-MBA-002(b),at paras 246 and 259 ("*Kia*").
[37] Liability Decision at paras 117,118, 122 and 135.
[38] Sanction Decision at para 38.
[39] Sanction Decision at para 36.

[109] First, while the evidence at the hearing indicates that the Appellant felt emotional upset and wanted "to fight" in response to the Owner of New Coast's treatment of her[40], I find that such emotional upset does not adequately explain her actions or mitigate her misconduct. The forging of documents occurred over a three day time period, from January 27-29, 2016, and thereafter she continued to act in accordance with the forged documents for a number of days by submitting related documentation to the REBGV. I find the Appellant had more than adequate time to have "cooled down", had second thoughts, and changed her course of conduct; however, she did not do so.

[110] Second, with respect to the Owner of New Coast's treatment of her, the evidence at the hearing indicated that such conduct had occurred over a sufficient period of time for her to have sought legal advice about her rights rather than engaging in conduct which she knew or ought to have known was wrong. In early January 2016, she received a document from the Owner of New Coast with terms she found onerous. On January 14 she met with the Owner of New Coast to discuss the matter and believed they had come to an agreement, only to learn on January 16 that he had reneged on certain terms of that agreement, and he became "really mad" with her. At that point, the Appellant could have obtained legal advice on her situation, particularly since there had been discussions about having her lawyer review the agreement discussed at the January 14 meeting. On January 26, she met with another shareholder of New Coast who communicated that the Owner of New Coast's position about the document given to her was that she could take it or leave it. Again, she could have obtained legal advice as to her rights in the days that followed. Instead, over the next three days she forged documents to take listings from New Coast, and over the course of the following five days she provided documents to the REBGV in order to have the listings go to her new brokerage. I find the Appellant had sufficient time to have obtained appropriate legal advice, and made appropriate choices in response to how she felt about the Owner of New Coast's treatment of her.

[111] In the circumstances I find the Appellant's upset and feelings about the Owner of New Coast's treatment of her are not a mitigating factor as asserted by the Appellant, and the Appellant's Dishonest Conduct, including her filings with the REBGV to take listings when she left New Coast, cannot be attributed to having occurred in the heat of the moment.

[112] In comparing the misconduct of the Appellant to Mr. Inglis, I find the level of the overall misconduct to be similar. The Appellant's involvement with forged documents and their use was to a greater extent than that of Mr. Inglis. However, Mr. Inglis' additional misconduct, including threatening retaliation against his co-listing agent for making a complaint against him to the Council, was more serious than the Appellant's Contravening Conduct and, while precise comparisons are difficult, may make Mr. Inglis' total misconduct somewhat more deserving of rebuke.

[113] On balance I do not find the totality of the Appellant's misconduct was more serious than Mr. Inglis' misconduct. Further I do not find the Appellant's suspension

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[40] Hearing Transcript, Vol 7, pages 1099 and 1103.

should be longer than Mr. Inglis' suspension based on the misconduct involved in the two cases. While I recognize that there was also a $7,500 fine in *Inglis*, I find that an additional three-month increase added to a nine-month suspension for the Appellant would be a significant increase, a much more severe penalty than the fine in *Inglis*, and an unwarranted increase given my previous statement regarding Mr. Inglis' total misconduct being somewhat more deserving of rebuke.

[114] Regarding whether there was an acknowledgement of wrongdoing, the Appellant confirmed at the Hearing that she had falsified the amendment forms. Mr. Inglis admitted that he had altered one offer on a property to some extent and admitted to making statements to another realtor threatening retaliation, although he did not admit to the allegation of making a false statement to the Council. On balance, I find there is nothing in this factor warranting an additional three months of suspension for the Appellant than for Mr. Inglis.

[115] Regarding their background, both the Appellant and Mr. Inglis had been real estate agents long enough to know what they were doing was wrong. In terms of the impact of a suspension on the affected individual, the Appellant cites her age as being in her mid-50s nearing the last leg of her career and says a lengthy suspension could possibly be career ending. Although I did not see Mr. Inglis' age listed in the decision, he was indicated as having over 30 years of real estate trading services experience and the liability decision in his case indicates that he became a licensee in 1986. I find that the impact of a suspension on the Appellant would be similar to the impact on Mr. Inglis given where they stand in their careers.

[116] Having reviewed the matter I have concluded that a nine-month suspension would be an appropriate penalty for the Appellant's misconduct, which includes both the Dishonest Conduct and the Contravening Conduct found by the Committee. As in *Inglis*, I find nine months is a significant period of suspension, with the Appellant being deprived from earning her livelihood in her chosen profession for a significant period of time. Further, as part of the Committee's order, she will be prohibited from acting as an unlicensed assistant during the licence suspension period. I find such a suspension and prohibition constitute a significant monetary and professional sanction relating to her serious misconduct.

[117] In terms of a nine-month suspension as specific deterrent, I find such a suspension will be a significant deterrent regarding any future misconduct by the Appellant. She will know that she will likely face even more severe penalties regarding any future misconduct due to having this on her record.

[118] Regarding the effect of a nine-month suspension as a general deterrent, I find a suspension of a significant length is required to be a general deterrent to those in the industry who may be faced with similar circumstances in disputes with their brokerage or in changing brokerages. Similar to *Inglis*, I find a suspension of nine months, being a significant suspension, will serve "as a general deterrent to other members of the profession who might consider engaging in such misconduct"[41].

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[41] *Inglis*, supra note 16 at para 52.

[119] With respect to the maintenance of public confidence, the Committee noted that sellers did not suffer financial harm as a result of the Appellant's dishonest conduct. However, the Committee further noted that the Appellant acted to secure a financial benefit for herself at the expense of New Coast and she forged documents in furtherance of that end. The Appellant's misconduct was serious and in my view the public must be satisfied that the forging of documents and the seeking of financial benefit in that regard will be treated seriously, even though members of the public may not have suffered in this particular incident. Similar to *Inglis*, I find a suspension of nine months here is of sufficient length "to maintain public confidence in the disciplinary process"[42] and to provide the appropriate denunciation of the serious misconduct here.

[120] Before leaving this matter, I note two other items. First, the Committee further ordered that the Appellant is to take a remedial education course and a course in ethics. This order is not challenged by the Appellant on this appeal, is appropriate in terms of contributing to the rehabilitation of the Appellant, and will remain in place. Second, while a considerable part of my analysis on the appropriate penalty has dealt with the Appellant's misconduct and its relation to the penalty in similar cases, that has largely been as a result of the parties' submissions and the Committee making no comparison to such cases - it does not mean that other matters won't warrant more of the analysis in future cases under the revised legislation since each of these cases is context dependent.

d. The enforcement expenses order

[121] In the Sanction Decision, the Committee quoted from *Siemens* with respect to enforcement expenses. In discussing the purpose of enforcement expenses, the Committee specifically agreed with *Siemens* in stating that one of the purposes behind orders for enforcement expenses is "encouraging consent agreements"[43]. Similarly, the Committee referred to *Behroyan* which identified "any settlement offer made in writing, and the date in terms of the offer" as a factor regarding enforcement expenses being awarded.[44]

[122] The Committee subsequently held that "neither the Regulation nor the Rules provide for consequences relating to the Council or a licensee failing to accept an offer of a consent order"[45]. Although the Committee did not specifically say it could not therefore consider the consent order negotiations as requested by the Appellant, it appears – and I say appears because it is not clear – that was the Committee's conclusion and that is what happened.

[123] On this appeal, the Respondent has raised a number of matters in support of the Committee's decision not to consider the consent order negotiations. First, the Respondent has argued on this appeal that section 41 of the *RESA* prohibits the use of consent order proposals in subsequent proceedings. In my view, section 41

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[42] *Inglis*, supra note 16 at para 52.
[43] Sanction Decision at para 45.
[44] Sanction Decision at para 53.
[45] Sanction Decision at para 53.

contains no such prohibition when, as the Appellant says, the licensee consents to their use – which is what the Appellant did in the present case.

[124] Second, the Respondent notes that, in the Liability Decision, the Committee had stated that it would "hear evidence and submissions from the parties concerning orders under section 43(2) of the *RESA*, and expenses under section 44(1) of the *RESA*"[46], and says that the Appellant ought to have raised the issue relating to consent order negotiations earlier. While it may have been preferable for the matter to have been raised earlier, given the Committee's statement about hearing submissions about enforcement expenses, I do not find it was unreasonable for the Appellant to have raised the matter of the consent order negotiations and their potential impact on enforcement costs in her submissions.

[125] Third, the Respondent says that "if the Appellant considered the consent order negotiations relevant to matters at issue in the proceeding, including the enforcement expenses, the time to raise the negotiations was in her submissions on penalty as she was advised to do by the Committee". In other words, the Respondent says the Appellant should not have sought to have the matter dealt with after the penalty determination. I note, however, that in the Respondent's reply submission to the Committee on Sanction, it argued that the consent order process was conducted on a without prejudice basis and it was inappropriate for the Appellant to advance submissions about such matters "as part of the Committee's decision-making process on penalty". In that regard, I agree with the Appellant that since consent order negotiations take place in a 'without prejudice' context, "the Appellant proceeded in a proper fashion by informing the Committee that such negotiations had taken place but not disclosing the details of those negotiations, and instead requesting that consideration of the issue of enforcement expenses be deferred until after the Committee had rendered its decision on other aspects of sanction in the case".

[126] As previously noted, it appears the Committee found the Regulation and the Rules precluded consideration of the consent order negotiations. I find, however, that while the words of the Regulation and Rules do not expressly provide for consequences relating to the failure to accept the offer of a consent order, that by itself does not legally preclude consideration of consent order negotiations. In fact, it is clear from the case law cited by the Committee that such matters are a relevant factor relating to the determination of enforcement expenses and I agree with the Appellant that, to the extent the Committee considered it was precluded by the Regulation and Rules from considering consent order negotiations, the Committee was incorrect and erred in law.

[127] In the event that the Committee did not decide that it was precluded from considering consent order negotiations, but simply chose not to do so, the question arises as to whether the Committee's decision not to consider such matters was reasonable. In that respect, I find the Committee's decision was unreasonable both regarding the rationale and the outcome.

[128] The rationale was not intelligible or transparent in two ways. First, while the Committee made an observation about what the Regulation and Rules did not say,

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[46] Liability Decision at para 156.

the Committee did not make a finding as to what that observation meant. In that respect, the Committee did not actually say it would not consider the consent order negotiations because of the Regulation and Rules – but again, that appears to be what happened. Second, although the Committee did not consider the consent order negotiations, it did not say, as previously noted, whether it was precluded from doing so or simply decided not to do so.

[129] The rationale was not justifiable since saying the Regulation and Rules do not provide for consequences relating to the failure to accept the offer of a consent order does not explain why a relevant factor should not be considered where it is permissible to do so. The case law cited by the Committee indicated such matters were a relevant consideration and the Committee did not seek to distinguish such case law. Except for the Committee's comment about the Regulation and Rules (which I have commented on above), there was no reasoning provided by the Committee for not applying the case law. Further, the Committee's decision about consent order negotiations is to be contrasted with the Committee's decision to reduce the enforcement expenses based on its concern about the Appellant's ability to carry on practice; the aspect of some allegations being dropped at the time of the Hearing and divided success; some of the Appellant's misconduct being less serious; and her not having engaged in any behaviour deserving of rebuke during the investigation or in the hearing process[47]. In making these determinations, the Committee did not cite portions of the Regulation or Rules which provided for consequences relating to such matters.

[130] Regarding the outcome of the Committee's decision, I find it was unreasonable because matters relating to consent order negotiations are a relevant factor in deciding enforcement expenses. For example, if a licensee had made an offer to accept a one-year suspension during consent order negotiations which was not accepted, and a committee later ordered a 10-month suspension after a hearing, that would be a factor in deciding the degree to which enforcement expenses should be ordered since the hearing could potentially have been avoided had the consent offer been accepted. By deciding, however, that it would not even consider consent order negotiations where it was permissible to do so, the Committee effectively made a relevant factor into a non-factor. Whether the consent order negotiations in the present case would ultimately have impacted the Committee's decision on enforcement expenses is not the question at this point of the analysis and will be examined later. At this point, the question is whether it was reasonable for the Committee to have not even considered the matter – and I have found it was unreasonable.

[131] Turning to the question of fairness, in the Sanction Decision the Committee stated that the Appellant had sought to have enforcement expenses addressed separately from sanctions. The Committee did not, however, mention a significant reason for the Appellant's request for penalty to be decided first – which was that such matters could not be decided together because the consent order negotiations around penalty had been conducted on a without prejudice basis. The Committee subsequently went on to place some significance on the Appellant not having requested an adjournment of the enforcement expenses matter, although the

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[47] Sanction Decision at para 56.

Appellant had clearly sought to have the matter of enforcement expenses dealt with at a later date. In the circumstances, I find it was unfair for the Committee to have relied upon the Appellant not requesting an adjournment of the enforcement expenses matter and to have decided the matter without further addressing her request for delay based on the without prejudice consent order negotiations. This is particularly the case since the Committee cited law to the effect that consent order negotiations were a relevant factor in ordering enforcement expenses, and had been advised by the Appellant that a potentially relevant history of consent order negotiations existed.

[132] To summarize the above, I find as follows:

a. to the extent the Committee considered it was precluded by the Regulation and Rules from considering consent order negotiations as part of its assessment of enforcement expenses, the Committee erred in law;

b. the Committee's decision not to consider the consent order negotiations in coming to its decision on the assessment of enforcement expenses was unreasonable; and

c. in the circumstances, it was procedurally unfair for the Committee to have decided the enforcement expenses matter without further addressing the Appellant's request for delay based on the without prejudice consent order negotiations.

e. Should the enforcement expenses be varied as submitted by the Appellant

[133] As a result of my findings above, the question arises as to whether I should remit the enforcement expenses matter to the Committee or decide myself whether the order should be varied. The Appellant's position is that I ought to determine the effect of the consent order negotiations and vary the enforcement expenses order in the event I find (as I have) that the Committee acted in an unreasonable and unfair manner. The Respondent's position is that any submissions to the Committee about the consent order negotiations would not have affected the enforcement expenses order and has made arguments that the enforcement expenses should not be varied. In effect, both parties would have me make a determination about the effect of the consent order negotiations and the enforcement expenses. For the reasons given regarding the avoidance of delay and cost for my decision not to remit the penalty determination to the Committee and to consider that matter myself pursuant to section 242.2(11) of the *FIA*, I similarly find that I ought to determine whether to vary the enforcement expenses order myself. In that respect, the Appellant has made submissions that a reduction in enforcement expenses is warranted and I will consider those submissions, and in particular the effect of the consent order negotiations, in determining whether I will vary the enforcement expenses order.

[134] A review of material presented on this appeal indicates that there were negotiations between legal counsel for both the Appellant and the Council relating to a consent order before the Hearing. During those negotiations, counsel for the Council noted any proposal by the Appellant would need to be submitted to a

Consent Order Review Committee, which had the option of accepting or rejecting the proposal.

[135] The Appellant submitted a proposal for a 120-day suspension, a discipline penalty of $10,000, enforcement expenses of $10,500 and other items, along the lines of previous negotiations between counsel. The Consent Order Review Committee did not accept the penalty proposed and advised that it would accept an 18 month suspension and 24 month period of enhanced supervision, together with the other terms proposed by the Appellant.

[136] The Appellant was not prepared to accept the penalty proposed by the Consent Order Review Committee and says she was left with a hard choice to make. She could either agree to the longer period of the suspension put forward by the committee and avoid all of the costs relating to a hearing – including the potential liability for higher enforcement expenses – or she could exercise her right to a hearing. The Appellant says that faced with the suspension proposed, which exceeded that ultimately ordered by the Committee, "the Appellant really had no alternative but to prepare for and defend herself at the hearing".

[137] In my view, the Appellant did have alternatives. First, she could have responded with another settlement offer between the parties' positions and indicated that she reserved the right to refer to her offer on the issue of enforcement expenses in the event that a hearing proceeded. Second, the Appellant had a choice about whether to accept the offer presented to her by the committee, and it was up to her and her legal counsel to determine her best course of action in the circumstances. The fact that a party involved with litigation faces difficult choices about settlement is often part of the litigation process, and it is not a reason to reduce hearing costs for a party because they had a difficult decision to make about whether to proceed to a hearing. Thus I find that the circumstances put forward by the Appellant regarding the consent order negotiations do not warrant a reduction in the enforcement expenses order.

[138] With regard to the Appellant's offer itself, this is not a case where the settlement offer was at or better than the ultimate penalty determination such that it can be said a hearing could have been avoided. While I find a tribunal nevertheless has the discretion to consider consent order negotiations even where the offer may not meet or exceed the ultimate result, the Appellant's offer here was not sufficiently close to the suspension awarded to warrant a reduction in the enforcement expenses above that already determined by the Committee.

[139] The Appellant has also submitted that the enforcement expenses should be reduced since there were a number of allegations and arguments made by the Respondent which were not accepted by the Committee. The Appellant says that she argued before the Committee that the Respondent had not made out various claims and this ought to be accounted for in reducing the enforcement expenses. A review of the Appellant's submission to the Committee indicates she argued that a number of specific charges had been withdrawn just before or during the Hearing, and the Respondent had failed to show she had been engaged in a pattern of dishonest practices at her clients' expense. In her submission on this appeal, the Appellant lists a number of the Respondent's arguments which she says were not borne out, including the Respondent's argument that her primary concern was earning commission.

[140] In dealing with the Appellant's submissions on this point, there are a few things to note. First, the Committee did reduce the enforcement expenses on the basis of divided success, which would account for some of the matters raised by the Appellant. In that respect, I find the reduction of about 35% in the enforcement expenses by the Committee to be a significant amount.

[141] Second, I find that the matters raised by the Appellant in arguing for further reduced enforcement expenses relate more to submissions made by the Respondent on the evidence, than to the time spent on the evidence itself. In that regard, I find the Appellant has not shown that the Hearing time and related expense would have been less than the reduction already accounted for by the Committee. This is particularly the case given the Committee's finding that "no hearing time was wasted"[48].

[142] Third, I find it is not unfair to maintain the Committee's apportionment of enforcement expenses even though all of the Respondent's submissions may not have been accepted. In civil litigation full costs may be awarded to a successful party even though all of its submissions may not have been accepted at trial, particularly if it is found that no trial time was wasted. Here, neither all the Appellant's submissions nor all the Respondent's submissions were accepted in whole. Further, the Committee did make findings along the lines of some of the submissions of the Respondent regarding the Appellant's impugned conduct. For example, while the Committee may not have stated that the Appellant's primary concern was earning commission, the Committee did find the Appellant "knowingly misrepresented the consent of New Coast Realty in order to retain multiple listings (and by extension, potential commissions) that legally belonged to New Coast Realty"[49].

[143] Fourth, I agree with the Committee's statement that "a Discipline Committee must generally recognize that the Council and its lawyers have latitude to decide how to investigate and prosecute a case, and will conclude only in exceptional cases that an investigation was excessive, or that any part of a hearing and its related expenses was unnecessary"[50]. Given this latitude, the reduction already made by the Committee, and the finding already mentioned that "no hearing time was wasted", I find there should be no further reduction in the enforcement expenses to account for the matters raised in the Appellant's submissions.

[144] In all the circumstances, I am not persuaded that the amount of enforcement expenses awarded by the Committee should be varied, and find that the amount of enforcement expenses should remain as ordered by the Committee.

DECISION

[145] For the reasons set out, I have found the Committee's determination that the Appellant be suspended for one year was not reasonable. I have set aside that portion of the Sanction Decision and decided that I should exercise my power to

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[48] Sanction Decision at para 55.
[49] Sanction Decision at para 36(d).
[50] Sanction Decision at para 55.

vary the penalty rather than remit the matter back to the Committee. In that respect, I have substituted a nine-month suspension for the one-year suspension.

[146] Having found a nine-month suspension to be appropriate for the Appellant, the next question is when that period should begin. I find it should be 30 days from the date of my decision. This is similar to the order made by the Committee in its Supplementary Reasons and allows for the Appellant to make the necessary arrangements regarding outstanding matters for her clients and others (e.g. other agents) prior to her suspension taking effect. Alternatively, if the parties agree some other date would be appropriate for the suspension to commence, then such other date will be substituted as the commencement date for the suspension.

[147] With respect to the enforcement expenses, I have found that: i) to the extent the Committee considered it was precluded by the Regulation and Rules from considering consent order negotiations, the Committee was incorrect and erred in law; ii) the Committee was unreasonable in its decision not to consider the matter of consent order negotiations raised by the Appellant; and iii) the Committee proceeded in a procedurally unfair manner in dealing with the issue of the consent order negotiations raised by the Appellant. I have considered the Appellant's submissions requesting the enforcement expenses be further reduced beyond the approximately 35% reduction made by the Committee. I have not accepted those submissions and instead have decided that the enforcement expenses should not be reduced further and should remain at $150,000 as set by the Committee.

[148] Following from all of the above, the Appellant's appeal relating to her suspension is allowed on the basis previously set out. I uphold the terms of the Committee's Order apart from varying the first item in the Committee's Order relating to the period of suspension. In the result, I vary the first item of the Committee's Order as follows:

> (a) Ms. Wei Qing (Wendy) Yang be suspended for nine months commencing either 30 days following the date of the FST's decision on the appeal of this matter, or such other commencement date as agreed upon by the parties.

COSTS OF THIS APPEAL

[149] The Respondent has sought an order for costs of this appeal. The Respondent submits that "the costs of this appeal should be awarded against the Appellant because the grounds of appeal were manifestly unfounded in the circumstances".

[150] The Appellant did not address the issue of the costs of this appeal in her submission on appeal or in her reply submission.

[151] At this point, and without the benefit of full submissions on costs, I would characterize the outcome of this appeal as both parties having some degree of success. I have varied the suspension determination of the Committee to some extent, but not the enforcement expenses order, though I did find errors in the Committee's decision not to consider the consent order negotiations.

[152] In the circumstances, if either party wishes to make a submission regarding the costs of this appeal, they may do so **within 14 days** of the date of this

decision. Failing any party wishing to pursue the issue of the costs of this appeal, no costs of this appeal will be awarded.

"James Carwana"

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James Carwana,
Member, Financial Services Tribunal

April 22, 2022