Financial Services Tribunal

Citation: *Murray Allan-a-Dale Savage v Registrar of Mortgage Brokers*, 2025 BCFST 2

Decision No.: FST-MBA-24-A003(a)

Decision Date: 2025-03-14

Method of Hearing: Conducted by way of written submissions concluding on May 2, 2024

Decision Type: Final Decision

Panel: Ryan N.A. Hira, Panel Chair

Appealed Under: Section 9 of the *Mortgage Brokers Act*, RSBC 1996, c 313

Between:

Murray Allan-a-Dale Savage

Appellant

And:

Registrar of Mortgage Brokers

Respondent

Appearing on Behalf of the Parties:

For the Appellant: Spencer Evans

For the Respondent: Simon Adams

FINAL DECISION

INTRODUCTION

[1] This is an appeal by Murray Allan-a-Dale Savage (the "Appellant") of findings made in *Re Savage*, 2023 BCRMB 7[1] (the "Liability Decision") and in *Re Savage*, 2024 BCRMB 2[2] (the "Penalty Decision"), which have resulted in the cancellation of his registration pursuant to the *Mortgage Brokers Act*, RSBC 1996, c 313 ("*MBA*") by the Registrar of Mortgage Brokers. Both the Liability Decision and the Penalty Decision (collectively the "Decision") were issued by the Chief Hearing Officer ("CHO") acting as a delegate of the Registrar of Mortgage Brokers, who is the Respondent in this appeal.

[2] The Registrar of Mortgage Brokers is a regulator housed within the BC Financial Services Authority (the "BCFSA"). I will refer to the Registrar of Mortgage Brokers as the Registrar or the Respondent. I will refer to the person who made the Decision as the CHO. Legal counsel for the BCFSA will be referred to as BCFSA Counsel.

[3] This matter was commenced via a Notice of Hearing issued by the Registrar on June 30, 2022, and an Amended Notice of Hearing that was subsequently issued on December 15, 2022. The Liability Decision was rendered on June 1, 2023, following a three-day hearing on January 9 – 11, 2023. The Penalty Decision was rendered on January 12, 2024, following a hearing on July 5, 2023.

[4] The Liability Decision found that, as a result of his criminal conviction of Possession of Child Pornography contrary to section 163.1(4) of the *Criminal Code*, RSC 1985, c 46 (the "*Criminal Code*"), the Appellant conducted himself in a manner that would make him unsuitable for continued registration pursuant to section 4 of the *MBA*. The Liability Decision also held that that the Appellant acted contrary to section 8(1)(h) of the *MBA* by omitting to inform the representative of the Registrar that he had pled guilty to the above noted *Criminal Code* offence.

[5] The Penalty Decision ordered that:

a) Pursuant to section 6(9) of the *MBA*, Murray Allan-a-Dale Savage must pay $14,329.91 to the BCFSA for investigative costs; and

b) Pursuant to section 8(1)(b) of the *MBA* that Murray Allan-a-Dale Savage's registration under the *MBA* is cancelled.

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[1] *Re Savage*, 2023 BCRMB 7, available online: https://www.bcfsa.ca/media/3364/download.

[2] The Penalty Decision, *Re Savage*, 2024 BCRMB 2, is not available online as of the release of this decision.

[6] This appeal to the Financial Services Tribunal (the "FST") is an appeal of 1) the findings made against the Appellant pursuant to section 8(1)(h) of the *MBA* in the Liability Decision; and 2) of the penalties levied on the Appellant in the Penalty Decision.

BACKGROUND

[7] The Appellant was registered as a submortgage broker on October 17, 2005. On June 23, 2008, the Appellant incorporated Second Street Mortgages Ltd. ("Second Street"). The Appellant was the sole officer and director of Second Street. On November 25, 2008, Second Street was registered as a mortgage broker under the *MBA*. The Appellant was the Designated Individual and registered as a submortgage broker with Second Street.

[8] On December 4, 2019, the Appellant was arrested for Possession of Child Pornography contrary to section 163.1(4) of the *Criminal Code*. Prior to this arrest, the Appellant had not had any professional disciplinary or misconduct issues.

[9] On May 3, 2021, the Appellant pled guilty to the offence in the BC Provincial Court. The Appellant was then sentenced on April 8, 2022 (*R v Savage* (8 April 2022), Victoria 178915-2 (BC Provincial Court)). The Honourable Judge Barrett sentenced the Appellant to a 10-month conditional sentence order (a jail sentence to be served in the community) followed by a 24-month probation order. Among the conditions attached to his sentence, the Appellant was ordered to provide a DNA sample and to be registered on the national sex offender registry for ten years (a mandatory order for child sex related offences pursuant to the *Criminal Code*).

[10] Judge Barrett's sentencing decision was the result of a contested sentencing hearing. Judge Barrett found that this was one of the exceptional cases wherein the court may impose a sentence without incarceration for an offence involving child pornography. In sentencing the Appellant to a conditional sentence (rather than incarceration in a prison), Judge Barrett noted that the Appellant "has made, in my view, exceptional efforts towards rehabilitation and turning his life around… [H]e has taken real, genuine and effective steps towards ensuring that he will not similarly offend in the future".

[11] In determining the sentence, Judge Barrett considered the facts underlying the offence and the personal circumstances of the Appellant. Some of these included:

a) The Appellant was in possession of 25 images and 14 videos;

b) The Appellant received all of the images and videos from those he was communicating with online, he did not search or seek the child pornographic material online;

c) The Appellant sent the child pornographic material he received to another account of his, where he would at times view the material;

d) The Appellant was the victim of emotional and physical abuse by his father during his youth;

e) The Appellant was sexually abused by his older brother on five or six occasions when he was just seven years of age;

f) The Appellant took full responsibility for the offence and feels a great deal of shame and remorse for his poor decision making.

[12] Prior to the April 8, 2022, sentencing decision, the Appellant was required to renew his registration as a submortgage broker with the Registrar. The Appellant submitted his application on August 24, 2021. On his application, the Appellant provided a declaration noting he had been charged with Possession of Child Pornography contrary to section 163.1(4) of the *Criminal Code*. The Appellant also attached a criminal record check to the application which noted that he did not have a criminal record. The Appellant and the Registrar's representative then exchanged a series of emails between August 26, 2021, and October 12, 2021. The Appellant's legal counsel and his treating psychologist also sent letters to the Registrar's representative between September 14 and November 11, 2021.

[13] In the above noted letters, the Appellant did not reveal that he had pled guilty on May 3, 2021, however, he was never asked to provide this information. The Appellant, through his written correspondence, opined on the possible outcomes, most of which focused on the sentence that he perceived he may receive from the court.

[14] On May 13, 2022, the Registrar suspended the Appellant from acting as a submortgage broker (*Re Savage*, 2022 BCRMB 1). The suspension order was made pursuant to section 8(2) of the *MBA*.

[15] A Notice of Hearing was issued on June 30, 2022, followed by an Amended Notice of Hearing on December 15, 2022. A contested hearing on liability was held between January 9 – 11, 2023, and the Liability Decision was rendered on June 1, 2023.

[16] In the Liability Decision, the CHO found:

a) Due to the Appellant's criminal conviction, he had conducted himself in a manner that would make him disentitled to registration if he was an applicant under section 4 of the *MBA* – this was consented to by the Appellant at the liability hearing; and

b) the Appellant acted contrary to section 8(1)(h) of the *MBA* by omitting to inform the representative of the Registrar that he had pled guilty to the above noted *Criminal Code* offence.

[17] With respect to the finding contrary to section 8(1)(h) of the *MBA* the CHO found that:

a) It was a forgone conclusion at the time of the Appellant's arrest that he would be found guilty;

b) It was far more likely than not that the Appellant would serve a custodial sentence as soon as he entered his guilty plea;

c) The Appellant was acutely aware that a criminal conviction and custodial sentence were the likely outcomes of his case;

d) It was unlikely that the Appellant's legal counsel would have advised him that he would receive a sentence other than a custodial sentence;

e) By omitting to disclose that he had pled guilty to the offence, the Appellant made his statements to the Registrar's representative regarding the possibility of a dismissal or a discharge misleading.

[18] A penalty hearing was held on July 5, 2023. The Penalty Decision was rendered on January 12, 2024.

[19] The CHO ordered that:

a) Pursuant to section 6(9) of the *MBA*, Murray Allan-a-Dale Savage must pay $14,329.91 to the BCFSA for investigative costs; and

b) Pursuant to section 8(1)(b) of the *MBA* that Murray Allan-a-Dale Savage's registration under the *MBA* be cancelled.

[20] In deciding to cancel the Appellant's registration under the *MBA*, the CHO found:

a) The Appellant's criminal conduct amounted to severe misconduct;

b) The Appellant's failure to advise the Registrar that he had pled guilty was an aggravating factor militating towards cancellation;

c) The Appellant posed a danger to the public; and

d) The Appellant had a moderate risk of reoffending.

[21] The Appellant filed a Notice of Appeal with the FST on February 9, 2024.

RELEVANT LEGISLATION

[22] The appeal is brought under section 9 of the *MBA* which provides:

> **Appeal to tribunal**
>
> **9 (1)** A person affected by a direction, decision or order of the registrar under this Act may appeal it to the tribunal, and, unless otherwise provided for in this Act, sections 242.2 and 242.3 of the *Financial Institutions Act* apply.
>
> **(2)** Despite section 242.2 (2) of the *Financial Institutions Act*, an appeal under subsection (1) of this section operates as a stay unless an order is made under section 242.2 (10) (a) of the *Financial Institutions Act*.
>
> **(3)** In respect of an appeal taken from a suspension of registration or an order made under section 8 (2), the following provisions do not apply:
>
> **(a)** subsection (2) of this section;

(b) section 242.2 (10) (a) of the *Financial Institutions Act*.

[23] The powers of the FST on such an appeal are set out in section 242.2(11) of the *Financial Institutions Act*, RSBC 1996, c 141 ("*FIA*"):

> 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.

STANDARD OF REVIEW

[24] As an administrative tribunal that is statutorily empowered to hear appeals on the record from another administrative tribunal, the FST occupies a somewhat unique position. Neither the *Administrative Tribunals Act*, SBC 2004, c 45 ("*ATA*"), nor the leading administrative law case of *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") prescribes the standards of review that this tribunal should apply when conducting its appeals (see *TruNorth Warranty Plans of North America, LLC v Superintendent of Financial Institutions*, 2020 BCFST 2 at paras 32-35, 55-70). As a result, the FST has developed its own appellate standard of review jurisprudence, which reflects its particular expertise and jurisdiction under section 58(1) of the *ATA*, its privative clause in section 242.3 of the *FIA*, and its obligation to align its jurisprudence on general legal principles with broader jurisprudence from British Columbia Superior Courts and the Supreme Court of Canada.

[25] The applicable standard of review has been the subject of a number of decisions of the FST. The parties are in general agreement on the following applicable standards of review:

a) correctness for questions of law;

b) reasonableness for questions of mixed fact and law which includes findings on credibility, discretion, penalty, fairness, and procedural fairness; and

c) reasonableness for fact and discretionary decisions.

[26] For clarity, a reasonable decision is a decision that is based on a logical chain of reasoning that makes sense in light of the law and the facts. A reviewing tribunal must be able to trace the decision maker's reasoning without encountering any fatal flaws in the overarching logic or law. Reasons that reach peremptory conclusions while only summarizing statutory language and arguments will rarely be reasonable (*Vavilov* at para 102).

[27] Relying on *Financial Institutions Commission v Insurance Council of BC*, 2018 BCFST 5 ("*FICOM*"), the Appellant submits that with respect to penalty decisions a less deferential standard of review applies. The Appellant submits that a tribunal ought to accept that the Legislature intended it to intervene in any penalty decision where it finds that there has

been an error in principle, as opposed to an error in "line drawing" with respect to the imposition of a penalty (*FICOM* at para 76).

[28] Subsequent authorities have followed the analysis of *FICOM* and have concluded that less deferential reasonableness standard of review of "error in principle" applies to FST appeals of penalty decisions under the *MBA* (see *Arvind Shankar v Registrar of Mortgage Brokers*, 2019 BCFST 1 at paras 31–40 ("*Shankar*"); *Soheil Arman Kia (aka Soheil Armon Kia) v Registrar of Mortgage Brokers*, 2018 BCFST 7 at paras 21–30 ("*Kia*")). The rationale being that the Legislature intended that a specialized tribunal has the expertise to intervene on penalty findings made on an "error in principle" and ought to be less deferential to the decision maker below (*FICOM* at para 63; *Shankar* at paras 34 and 37).

[29] Although less clear in its submissions on the matter, it appears the Respondent agrees that a less deferential standard of reasonableness applies to penalty decisions made where there are errors in principle as opposed to errors in line drawing. I agree with the Appellant that (1) the modified reasonableness standard of "error in principle" is applicable in penalty appeals; and (2) this standard includes an overarching consideration of matters of principle guided by public interest.

SUMMARY OF THE PARTIES' POSITIONS ON APPEAL

The Appellant

[30] The Appellant has listed ten grounds on which it is submitted that the CHO's Decision is unreasonable. The grounds of appeal may be distilled to the following:

a) It was unreasonable to find that the Appellant had an intent to mislead the Registrar by not disclosing his guilty plea and making representations as to the sentence he may receive from the court;

b) The CHO misapprehended the evidence with respect to the continued risk the Appellant presented to the community at large; and

c) The penalty levied on the Appellant was excessive, arbitrary, punitive and disproportionate, and therefore unreasonable. In levying this penalty, the CHO unreasonably failed to consider the evidence and misapprehended some of the evidence before him.

[31] The Appellant seeks an order that the finding in the Liability Decision that he misled the Registrar was unreasonable. The Appellant also seeks an order setting aside the Penalty Decision, in part, and varying the penalty imposed on the following terms:

a) The cancellation of the Appellant's registration be substituted with a suspension; and

b) The order for investigative costs be set aside or varied.

The Respondent

[32] The Respondent contends that the CHO's Decision was reasonable and ought not to be altered. Specifically, the Respondent notes:

a) There was no misapprehension of evidence that renders the Decision unreasonable with respect to the Appellant misleading the Registrar by not disclosing his guilty plea;

b) The CHO's finding that the Appellant knew that a conditional discharge was "nothing more than a technical possibility" was reasonable and supported by the evidence;

c) The finding that the Appellant poses an ongoing risk to the public was reasonable;

d) The penalty of the cancellation of the Appellant's registration was reasonable and is within the range of acceptable penalties for a regulator to give a person whose conduct includes a criminal offence for child pornography.

[33] The Respondent's position is that the CHO's Decision should stand and should not be disturbed in any fashion as it is within the range of reasonable outcomes.

DISCUSSION AND ANALYSIS

The Section 8(1)(h) Liability Decision of the CHO

[34] Relying on the various email exchanges between the Appellant and the Registrar's representative from August through November of 2021, the CHO found that the Appellant misled the Registrar by not disclosing that he had pled guilty in court to the offence on May 3, 2021. In support of this finding, the Registrar further found that the Appellant provided false or misleading statements to the representatives of the Registrar as to the likely outcome of his criminal proceeding. The CHO found that as soon as the charge was laid that it was a foregone conclusion that the Appellant would be found guilty, and that more likely than not the Appellant was aware that a criminal conviction and custodial sentence was the likely outcome of his case. The CHO further found, in the absence of any evidence, that it was unlikely that the Appellant's criminal counsel, Mr. Hemphill, would have ever advised the Appellant that a discharge was a likely outcome of his case.

[35] The Respondent submits that:

a) The CHO's finding is reasonable in that:

i. The evidence shows that the Appellant concealed the material fact that he had already pled guilty;

ii. The finding that Mr. Hemphill was unlikely to have advised the Appellant that he was unlikely to receive anything other than a custodial sentence was reasonable in light of Mr. Hemphill's testimony; and

iii. The evidence shows that the Appellant's statements of the likely outcome of his case to the representatives of the Registrar were misleading – specifically, there was no real likelihood of the matter being dismissed or the Appellant receiving a discharge; and

b) The Appellant, in his sentencing submissions, has admitted he should have informed the Registrar of the guilty plea, and cannot now withdraw such an admission.

[36] The Appellant submits that the CHO misapprehended the evidence before him, in that:

a) The Appellant did not make any misrepresentations as he was not asked about a guilty plea, nor did the Registrar express any interest in anything other than whether a conviction had been entered;

b) If there was a misrepresentation by omission, it was not material to the Registrar's consideration of the Appellant's registration. Only a conviction and not a guilty plea would result in the change of the Appellant's registration status. A misrepresentation only rises to become a material misrepresentation worthy of discipline when it is material to the Registrar's consideration of the registration renewal before it. Put simply, a misrepresentation of a conviction is material, but a misrepresentation of whether one pled guilty is not material – the only material issue is whether a conviction was registered (see *Howard Steven Levenson v Law Society of Upper Canada*, 2009 ONLSHP 98 at para 94 ("*Levenson*")); and

c) That evidence of the Appellant was not that it was likely that he would receive a discharge or that his matter would be dismissed, but rather that this was a possibility. The Appellant submits that this is supported by the evidence of Mr. Hemphill, who noted that a non-custodial sentence, including a discharge was a potential outcome of the Appellant's case.

[37] The outcome of an administrative decision may be rendered unreasonable if there is a misapprehension of evidence or where the evidence does not support the findings of the decision maker (*Cooper v British Columbia (Liquor Control and Licensing Branch)*, 2017 BCCA 451 at para 42 ("*Cooper*")).

[38] There is no dispute that the Appellant accurately completed the forms he was required to complete regarding the renewal of his registration and disclosed the outstanding criminal charge. There is further no dispute that at no time did the Registrar ever ask the Appellant whether he had pled guilty, nor did the Appellant volunteer this information. Finally, it is uncontroverted that the Appellant provided written communications surmising on the possible, not probable, outcomes of his case.

[39] On the record before me, it is clear that the Appellant never stated that a likely result was a discharge or a dismissal of his case, noting that these were possibilities. The Appellant is correct that the CHO has misapprehended the evidence on this finding. Even assuming that the Appellant did make those representations, I find the analysis undertaken by the CHO troubling. The Appellant is a layperson. It is not reasonable to expect a layperson to accurately opine on the likelihood of a criminal sanction. It is further not reasonable to make findings as to what that layperson was advised by their counsel in absence of any evidence. Finally, on this matter, a layperson is entitled to communicate their opinion on a legal process and the outcomes they believe may occur – it is an opinion after all, and one cannot be held to have committed misconduct for having a potentially inaccurate opinion on a matter outside their professional competence.

[40] As noted above, beyond speculation, there is no actual evidence as to what Mr. Hemphill advised the Appellant as to the likely outcomes of his criminal proceeding – his evidence was limited to noting that a conditional discharge was a potential disposition. Without such evidence, any finding as to what Mr. Hemphill advised the Appellant is unreasonable.[3] Put simply, the CHO misapprehended the evidence before him in making the unreasonable finding it was unlikely that Mr. Hemphill advised the Appellant that a discharge was a likely outcome.

[41] Finally, the CHO found that the Appellant misled the Registrar by failing to disclose his guilty plea when he knew the most likely outcome of a guilty plea was that he would receive a criminal conviction and a custodial sentence. I have already addressed the fact that laypeople cannot reasonably expected to comment on the likely outcome of criminal proceedings. The fact remains that the Appellant honestly and correctly completed the paperwork required for the renewal of his registration, and that the Registrar's representative never asked about whether he had pled guilty. The BCFSA is a sophisticated entity with solicitors within its employ. It could at any point have asked the Appellant about whether he had pled guilty, or conducted searches in publicly available databases provided by the British Columbia Provincial Court Registry to determine whether a guilty plea had been entered. I agree with the Appellant, the evidence shows that the only interest of the Registrar was whether a conviction had been entered.

[42] At no point did the Appellant mislead the Registrar as to whether he had been convicted. On the contrary, the evidence was that he properly completed his renewal registration forms without omission. There is also no evidence that the Registrar would refuse to renew the Appellant's license absent anything but a registered conviction. This is not a matter like *Levenson*, wherein a party is dishonest in the completion of a registration application, but rather a matter wherein the Appellant failed to disclose information that was not asked of him. This again amounts to a misapprehension of evidence rendering the CHO's finding unreasonable. It is unreasonable to find the Appellant deliberately attempted to mislead the Registrar when there is no evidence to suggest that the

[3] This is a matter subject to solicitor-client privilege, absent an explicit waiver of same.

Registrar was actually seeking the information that the Appellant did not disclose, nor is there any evidence to suggest it would have impacted the Registrar's registration renewal process.

[43] I note that the CHO relied on the Supreme Court of Canada authority of *C.M. Callow Inc. v Zollinger*, 2020 SCC 45 *("Callow")* in support of his finding that the Appellant had misled the Registrar. Respectfully, *Callow* is distinguishable as it relates to parties misleading about matters directly linked to the performance of contractual duties in a commercial contract, thus violating the duty of honest performance. This is not a case wherein a commercial party misleads another commercial party as to the performance of contractual duties. On the contrary, this is a case wherein a member of a regulated profession was required to submit paperwork for a renewal of his registration and he answered every question within his renewal application, and every subsequent question posed by the Registrar's representative.

[44] In sum:

a) the CHO has misapprehended the evidence before him, and on some occasions has made unreasonable findings without any evidentiary foundation;

b) There was no evidence beyond speculation to support any finding as to what Mr. Hemphill advised the Appellant. The evidence was that the Appellant stated to the Registrar's representative that a discharge or dismissal were possible outcomes, not likely outcomes – and in any event, it is not reasonable to expect laypeople to comment on the likely outcomes of criminal proceedings.

c) There was no evidence that the Registrar would not have renewed the Appellant's registration had he disclosed the guilty plea. The evidence shows the primary concern of the Registrar was whether the Appellant had been convicted, which he had not been at the time of his correspondence with the Registrar's representative. The evidence was that the Appellant correctly and honestly completed his registration renewal paperwork. It is an unreasonable finding that the Appellant misled the Registrar in failing to disclose something that was never asked of him.

[45] Finally, I will address the Respondent's submission that the Appellant cannot now resile from its position in the sentencing hearing before the CHO that he should have disclosed his guilty plea to the Registrar's representative. In support of this position, the Respondent relies on *Re Welder*, 2007 LSBC 29 *("Welder")*, a decision from the Law Society of British Columbia. In *Welder*, the applicant was attempting to withdraw his admission of guilt of professional misconduct. The same is not applicable in this matter, as there was no guilty plea, but rather a contested hearing on whether the Appellant committed misconduct. The law for the withdrawal of a guilty plea is different and much more stringent than the law pertaining to what is submitted in a sentencing hearing. Accordingly, I do not find *Welder* of any assistance to my analysis on this matter, nor do I accept that the Appellant is withdrawing an admission.

The Finding of an Ongoing Risk by the CHO in the Penalty Decision

[46] The CHO levied the most severe penalty possible against the Appellant by cancelling his registration under the *MBA*. Part of the rationale for this decision was the finding that the Appellant still posed a moderate risk for re-offending. Pursuant to the CHO's reasoning, this moderate risk of reoffending supported the finding that the Appellant poses an ongoing risk to the public such that to ensure that the public was protected his registration as a mortgage broker could not be renewed. This finding is not reasonable nor supported by the evidence.

[47] Dr. Monkhouse was the only expert who provided evidence at the hearing before the CHO. His opinion was that, as of July 2023, the Appellant no longer posed a serious risk to the community. Dr. Monkhouse did not waiver from this position.

[48] Dr. Monkhouse also provided two reports. In his first report dated December 7, 2020 (the "First Report"), Dr. Monkhouse conducted three sets of analysis using three different tools, the Child Pornography Offender Risk Tool ("CPORT"), the STABLE 2007, and the Psychopathy Checklist-Revisited ("PCL-R"). Dr. Monkhouse found the Appellant to be a low risk for sexual recidivism on the CPORT, low moderate risk for sexual re-offending on STABLE 2007, and a low risk for violent reoffending on the PCL-R. In this first report, Dr. Monkhouse also concluded that the Appellant would benefit from gainful employment and that he could be managed safely in the community.

[49] Dr. Monkhouse's First Report was before Judge Barrett and was referenced in her April 8, 2022, sentencing reasons. In reaching her decision that the Appellant's custodial sentence in the community would not endanger the community, Judge Barrett relied on Dr. Monkhouse's conclusion that the Appellant was a low moderate risk to re-offend and a low risk for violence.

[50] In addition to the First Report, the CHO had before him the reasons of Judge Barrett and the second report of Dr. Monkhouse dated December 19, 2022 (the "Second Report"). In the Second Report, Dr. Monkhouse noted that the Appellant had been attending therapy on a weekly basis for approximately ten months and over sixty sessions, all of which the Appellant personally paid for. In reconducting his assessment Dr. Monkhouse found that the Appellant was now at a low risk for sexual recidivism on the CPORT, low risk for sexual re-offending on the STABLE 2007, and a low risk for violent reoffending on the PCL-R.

[51] In the Penalty Decision, the CHO did not address the findings of Judge Barrett or Dr. Monkhouse's ultimate conclusions in the Second Report. Instead, the CHO focused on the STABLE-2007 scale in the Second Report, and found that the score of four assigned to the Appellant by Dr. Monkhouse correlated with a moderate risk to reoffend. This specific discrepancy was never put to Dr. Monkhouse to explain, although in the context of explaining his First Report, Dr. Monkhouse has previously noted that there is some clinical judgment involved in determining one's STABLE-2007 assessment beyond merely the objective score. Put simply, pursuant to Dr. Monkhouse's Second Report, the

uncontroverted evidence was that the Appellant was a low risk to reoffend and a low risk for violence.

[52] Although the CHO is not bound by the findings of Judge Barrett in her sentencing decision, it is noteworthy that Judge Barrett found that a custodial sentence served in the community would not endanger the community at large, whereas the CHO found that the continuation of the Appellant's practice of a mortgage broker, wherein his clientele are adults, poses an ongoing risk to the public.

[53] In Dr. Monkhouse's more recent Second Report he found that across all assessment tools, the Appellant was a low risk to reoffend. This evidence, from the only expert witness in the entire proceedings, was uncontradicted and seemingly undermines the CHO's finding that the Appellant was a "moderate risk to reoffend" (Penalty Decision at para 106) – which in itself is a misstatement of Dr. Monkhouse's findings. Instead, the CHO noted that on the STABLE-2007 scale, the score of a 4 placed the Appellant "in the "moderate" risk to reoffend category" (Penalty Decision at para 105). The fact remains, that the only evidence from a qualified expert on the likelihood of the Appellant to reoffend was from Dr. Monkhouse, who unequivocally found that the Appellant was a low risk to reoffend, not a moderate risk. The CHO did not make any findings to suggest he disbelieved Dr. Monkhouse's evidence, instead, he chose to construe Dr. Monkhouse's evidence as supporting that the Appellant was a moderate risk to reoffend, when Dr. Monkhouse's actual finding was that the Appellant was a low risk to reoffend. This is a misapprehension of the evidence. Rather than accepting the assessment of risk to the community carried out by Judge Barrett, and the evidence of Dr. Monkhouse, the CHO stepped outside his expertise, and, at paragraph 109 of the Penalty Decision, went so far as requiring the Appellant to satisfy him that he posed a level of risk that was akin to no risk whatsoever – an impermissible standard of perfection (*Cooper* at para 48).

[54] The CHO has misapprehended the evidence with respect to Dr. Monkhouse's findings and the Appellant's ongoing risk to the community. As noted above, where a decision maker misapprehends the evidence or makes findings that the evidence does not support, those findings may be found to be unreasonable (*Cooper* at para 42).

[55] The CHO's findings that the Appellant poses a moderate risk to reoffend and is an ongoing risk to the public are not supported by the evidence and are therefore unreasonable. The CHO cannot substitute his reading of an expert's report with the expert's actual opinion unless there is evidence to support this substitution. As noted above, there was no evidence to support the CHO's substitution of Dr. Monkhouse's opinion on the Appellant's risk to reoffend. Likewise, there was no analysis as to the danger the Appellant posed to the public given that his clientele were adults and not minors.

Reasonableness of the Cancellation of the Appellant's Registration

[56] As noted above, the standard of review in consideration of the penalty is a less stringent reasonableness standard. If there is an error in principle in the imposition of the penalty, then the penalty may be found to be unreasonable. The *MBA* regulatory scheme is intended to ensure the efficient operation of the mortgage marketplace while instilling public confidence in the system by determining who is suitable to be registered as a mortgage broker *(Cooper v Hobart*, 2001 SCC 79 at para 49 ("*Hobart*")). The overarching purpose of administrative penalties under the *MBA* is the protection of the public in the mortgage marketplace. (*Kia* at para 226; *Shankar* at para 150). In crafting an appropriate penalty, the public must be protected while also considering proportionality between the penalty imposed and the wrongdoing vis-à-vis the mortgage broker marketplace. Proportionality of sentence is of utmost significance when a person's livelihood is at stake. A decision maker must consider the range of all possible penalties in achieving the objection of protection of the public, and whether something less than cancellation of registration may meet the statutory objectives (*Cooper* at para 42).

[57] The CHO ultimately ordered the cancellation of the Appellant's registration as the appropriate penalty. In arriving at this decision, the CHO weighed various aggravating and mitigating factors. The aggravating factors included:[4]

a) That the Appellant committed a serious criminal offence that the courts have repeatedly found poses a specific danger and harm to the public;

b) That the Appellant misled the Registrar by failing to disclose his guilty plea;

c) That the Appellant made misleading statements to the Registrar about the potential outcomes of his criminal proceedings;

d) That the Appellant has attempted to minimize the nature of his criminal actions by incorrectly stating that he did not later view the pornographic images after receiving them; and

e) That the Appellant posed a continued risk to the public.

[58] The CHO considered various mitigating factors as well, including:

a) That the Appellant pled guilty at first instance in the BC Provincial Court;

b) Although not expressly considered as a mitigating factor, but rather the absence of an aggravating factor, that the Appellant had no history of professional misconduct or discipline;

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[4] It appears the CHO had the Report to Crown Counsel before him on this matter. Pursuant to the implied undertaking, materials used for criminal defense cannot be used for any other matter. It is unclear to me as to how this formed part of the record, absent an order consistent with *Wong v. Antunes*, 2009 BCCA 278. I am not aware if such an order was made on the record before me.

c) That the Appellant had engaged in treatment and according to Dr. Monkhouse was a moderate low risk to reoffend (addressed above regarding the error in this interpretation); and

d) The Appellant was a victim of child sexual abuse that caused psychological harm that he is now aware of and has taken steps to address with counseling.

[59] The CHO weighed the factors and ultimately concluded, at paragraph 110 of the Penalty Decision:

> … without a better indication that Mr. Savage is not seeking to minimize his moral culpability, and without a better indication that his therapy will and has ensured that the risk to reoffend is in fact not moderate, I cannot be satisfied that the mere suspension of his licence would preserve the reputation of the mortgage broker profession. In my view, the cancellation of Mr. Savage's registration is required to do so.
>
> [emphasis added]

[60] In sum, the CHO found that the reputation of the profession could only be preserved by the cancellation of the Appellant's licence. In reaching this conclusion, the CHO reviewed and analyzed the authorities before him. The CHO found that this matter was most similar to *Law Society of Ontario v Rooney*, 2023 ONLSTH 14 ("*Rooney*"). *Rooney* is a decision of the Ontario Law Society Tribunal. Mr. Rooney had pled guilty in the courts and was convicted of making, distributing, possessing, and accessing child pornography, as well as counselling to commit an indictable offence. Mr. Rooney served a 15-month sentence of incarceration in a correctional facility for his crimes. The specifics of his criminal actions included making fictional child pornography (not with real children) and distributing it, as well as contacting various individuals on phone applications and counselling them to commit indictable offences including sexual interference with a minor. These actions, including the counselling of offences, occurred over a two-year period. After his arrest, the respondent engaged in therapy and was ultimately deemed a low risk to reoffend by a medical professional who provided a report for Mr. Rooney's criminal sentencing. Unlike in the matter of Mr. Savage, no medical professional provided evidence at the Law Society Tribunal hearing to comment on the respondent's state of rehabilitation or his ability to handle the return to the practice of law (*Rooney* at para 62).

[61] On its face the similarities between *Rooney* and the matter before me are minimal. In *Rooney* the respondent was engaged in behaviour of greater criminality that involved contacting individuals for the purposes of counselling indicatable offences. The differing levels of criminality is evinced by the different criminal sentences Mr. Rooney and Mr. Savage received. Most importantly, there was no medical evidence at the Law Society Tribunal hearing that was capable of satisfying the tribunal of (1) the current state of the respondent's rehabilitation; (2) what practice restrictions would be necessary; and (3) if the respondent could even return to the practice of law. The opposite is true in this matter –

Dr. Monkhouse has provided uncontroverted evidence of the Appellant's low risk to re-offend and his ability to return to the profession.

[62] It is unclear why the CHO determined *Rooney* was the authority most applicable to the Appellant's matter. Counselling parties to commit indictable offences, in addition to child pornography offences, renders the conduct of Mr. Rooney much more serious than that of the Appellant in this matter. Several authorities were before the CHO wherein a professional was reinstated under strict practice conditions after being found guilty of criminal offences, including child pornography. This included cases that were more factually similar such as:

a) *Re Rea*, 2012 LSBC 22 ("*Rea*"), wherein the respondent accessed child pornography, saving 94 images on his computer. The respondent was sentenced to 14 days of incarceration and a two-year probation after a guilty plea. Medical evidence reported that the respondent had reduced his risk such that he was a low risk to re-offend and that the respondent's difficulties would not interfere with his capacity to practice law.

b) *Law Society of Ontario v Splinter*, 2021 ONLSTH 58, wherein the respondent pled guilty to and was convicted of possessing and accessing child pornography and sentenced to a three-year custodial sentence in prison. The respondent had accumulated child pornography for a period of six to seven years, that was the subject matter of his charge and ultimate conviction. The respondent experienced poor self-esteem, and sought the assistance of a psychologist to address his use of child pornography. The respondent spent about 20 sessions with the psychologist and addressed a plan to mitigate his risk moving forward. The psychologist deemed the respondent a low risk to reoffend. A joint submission was made on sentencing. A 26-month suspension was imposed which amounted a four-year period of non-practising, as the respondent stopped practising at the outset of his charges.

c) *Law Society of Upper Canada v. Tan*, 2015 ONLSTH 60, wherein the respondent was convicted of possession of child pornography and incarcerated for 90-days served intermittently after a guilty plea. The respondent found child pornography on the internet and then saved it on his computer. The respondent had an otherwise unblemished record, and a joint submission on sentence was made. The respondent was suspended for a period of 6-months.

[63] The CHO's reliance on *Rooney* above other similar authorities does not in itself render the decision unreasonable. The CHO was not bound to follow these decisions in his reaching his conclusion. However, it is indicative of two broader errors in principle: the failure of the CHO to consider lesser penalties, and, the focus on the reputation of the profession as opposed to the protection of the public when crafting a penalty.

[64] The British Columbia Court of Appeal has held that there must be some proportionality between a penalty imposed and the wrongdoing committed (*Cooper* at

para 42). Likewise, penalties must be levied in concert with the central purpose of the act under which a tribunal operates. The tribunal is not to engage in a commission into the moral character of its registrants but rather is to craft a decision on penalty based on the purposes of it home statute (*Cooper* at para 45).

[65] The purpose of the *MBA* is the protection of the public in the mortgage marketplace (*Kia* at para 226). Sanctions imposed under the *MBA* are designed to protect the public from noncompliant mortgage brokering activity and that may result in a loss of public confidence in the mortgage industry (*Shankar* at para 150). Further to the Court of Appeal's analysis in *Cooper*, penalties levied under the *MBA* must focus on the regulation of the mortgage brokers profession and the risk to the public from mortgage broker related activities. Penalties under the *MBA* are, for the most part, not to encompass general statements on one's moral character or designed to protect the public from some nebulous risk of criminal recidivism – rather, that is the role of the criminal justice system.

[66] Put simply, the primary purpose of penalties under the *MBA* is to protect the public from noncompliant mortgage brokering activity. That is not to say that a penalty may never consider issues such as public safety, so long as the offending conduct has a nexus to issues concerning mortgage broker activity. For example, if a mortgage broker used his position as a mortgage broker to distribute or access child pornography, then more weight may be provided to issues of public safety in a penalty analysis because there is a connection between the individual's profession and the misconduct. There is no such connection in this particular case.

[67] The CHO erroneously chose to focus on the reputation of the profession, rather than the proper considerations of future compliance with regulations, general deterrence, specific deterrence, and protection of the public (*Thow v BC (Securities Commission)*, 2009 BCCA 46 at para 38 ("*Thow*")). In so doing, he crafted a remedy that was unduly punitive in punishing past transgressions and improperly supported by general statements about the Appellant's moral character, without an analysis on any lesser sanctions that may result in deterrence and future compliance with the regulations (*Thow* at para 38; *Cooper* at para 42).

[68] In fact, the CHO did not engage in any analysis regarding lesser sanctions, despite the Appellant being prepared to accept any conditions on his practice that the Registrar deemed appropriate.

[69] The CHO's failure to engage in an analysis of the appropriateness of lesser sanctions, and the imposition of the most serious sanction on a misapprehension of evidence is akin to what occurred in *Cooper*. There, a business owner was convicted (after a guilty plea) of touching the body of a child under 16 years for a sexual purpose. The child was 15-years old and his employee. The Liquor Control and Licensing Branch cancelled his liquor licence which had the result of closing a longstanding family business. Like in this matter, the cancellation of the licence was based on (a) a misapprehension of the evidence that there was a risk of re-offending when the evidence was that the risk of recidivism was "very low risk"; and (b) a misunderstanding of the regulatory scheme of the Branch. The

scheme was not designed to judge the moral character of licence holders, but to regulate the sale of liquor in the public interest (*Cooper* at para 45).

[70] The Appellant has already been punished for his moral and criminal transgressions within the criminal justice system. The overarching purpose of administrative penalties under the *MBA* is ensuring the protection of the public in the mortgage marketplace. Although deterrence is a basis for a penalty, deterrence may have been accomplished by lesser sanctions. Simply put, lesser sanctions such as a lengthy suspension as well as ongoing professional restrictions, may have been sufficient to cultivate deterrence. A failure to consider lesser possible sanctions that meet the objectives of the regulatory scheme is an error in principle that renders the penalty finding unreasonable (*Cooper* at paras 42 and 47). This is especially so as the actions of the Appellant were wholly separate from his professional work as a mortgage broker, where he primarily serves a clientele that is 55-years-old or older.

Conclusion

[71] The CHO's Penalty Decision was based on flawed reasoning that was not reasonably supportable by the evidence before the CHO. Flawed reasoning renders the CHO's decision unreasonable The flawed reasoning includes:

a) A reliance on an unreasonable finding in the Liability Decision that the Appellant misled the Registrar by not informing the Registrar's representative that he had pled guilty and opining on possible outcomes of his criminal proceeding;

b) Making a finding on the likelihood of recidivism by the Appellant that was contrary to the evidence of the only expert evidence in this proceeding and strayed beyond the CHO's expertise;

c) Crafting a penalty that was focused primarily on preserving the reputation of the mortgage brokers profession rather than addressing the required criteria of future compliance with the regulations, protection of the public with respect to the mortgage marketplace, and specific and general deterrence;

d) Relying on authorities that share little factual similarity to the matter before him in support of rendering the harshest possible penalty; and

e) Failing to consider possible lesser sanctions available to him that would have satisfied the regulatory scheme including protection of the public.

[72] In coming to this conclusion, I have carefully considered all of the evidence before me and the submissions and arguments made by each of the parties, whether or not they have been referred to in these reasons.

DECISION

[73] The Appellant has appealed:

a) The CHO's finding in the Liability Decision that the Appellant misled the Registrar contrary to section 8(1)(h) of the *MBA*; and

b) The entirety of the CHO's Penalty Decision.

Importantly, the Appellant is not appealing the finding that, as a result of his criminal conviction, he conducted himself in a manner that would make him disentitled to registration if he was an applicant under section 4 of the *MBA* – this was consented to by the Appellant at the Liability hearing. Accordingly, a penalty must follow this contravention.

[74] As noted above, the CHO has made errors rendering the Liability Decision unreasonable vis-à-vis the finding of wrongdoing contrary to section 8(1)(h) of the *MBA*. Pursuant to section 242.2(11) of the *FIA*, the Liability Decision is varied such that the finding regarding the Appellant making false or misleading statements contrary to section 8(1)(h) of the MBA is set aside.

[75] Despite these errors, the Appellant has none-the-less admitted that his conviction for possession of child pornography makes him disentitled to registration under section 4 of the *MBA*, and he has not sought to overturn that aspect of the Liability Decision.

[76] The Appellant's conduct is serious and abhorrent in nature and a penalty must follow. I am guided by *Rea* in determining that a three-year suspension ought to follow in cases wherein the misconduct relates to the serious criminal offence of child pornography. The Appellant has been suspended since May 13, 2022. Accordingly, he will not be entitled to obtain registration until May 13, 2025.

[77] I am further guided by *Cooper* in imposing the following professional restrictions on the Appellant:

a) The Appellant is not to allow any person under the age of 18 within his place of work;

b) The Appellant is not to intentionally interact with any person under the age of 18 while conducting his duties as a mortgage broker; and

c) The Appellant is only able to provide services to those over the age of 18.

[78] As the Appellant was successful in this appeal, and has achieved the result he was seeking at first instance, the CHO's order for the payment of $14,329.91 for investigative costs is varied such that the Appellant is not ordered to pay any costs of the investigation and hearing.

“Ryan Hira”

Ryan N.A. Hira, Panel Chair
Financial Services Tribunal