

DECISION NO. 2010-RSA-001(a)

In the matter of an appeal under section 54 of the *Real Estate Services Act*, S.B.C. 2004, c. 42 to the Financial Services Tribunal pursuant to section 242.2 of the *Financial Institutions Act*, R.S.B.C. 1996, c. 141

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| BETWEEN: | Vikram Singh Atwal | APPELLANT |
| AND: | Real Estate Council of British Columbia | RESPONDENT |
| BEFORE: | Patrick F. Lewis, Member | |
| DATE: | Conducted by way of written submissions concluding on February 1, 2011 | |
| APPEARING: | For the Appellant: Robert Doran, Counsel For the Respondent: David P. Berger, Counsel | |

DECISION

[1] This is an appeal by Vikram Singh Atwal ("the Appellant" or "Mr. Atwal") from a June 17, 2010 decision ("Decision") of the Real Estate Council of British Columbia. It is brought pursuant to section 54(1) of the *Real Estate Services Act* [SBC 2004], c. 42 ("the *RESA*"), which allows for an appeal to this tribunal from a refusal to issue a licence for the provision of real estate services. The Decision represented such a refusal.

[2] The Real Estate Council of British Columbia is named as a party in this appeal, as is required by section 54(2) of the *RESA*. When I refer below to that party as a participant in this appeal, I will use the term "the Respondent", and when I refer to its more general function as a decision-making or licencing authority, I will use the term "Council". Finally, when I refer to the Committee forming part of Council that adjudicated this matter below, I will use the term "the Committee".

A. Background

[3] Mr. Atwal sought reinstatement of his expired real estate licence in an application dated April 6, 2010. By its Decision the Committee refused that application, concluding that Mr. Atwal was not suitable to be licenced, and ordering that no further application by him for reinstatement be considered for a period of three years from the date of the Decision.

[4] Mr. Atwal was first licensed as a real estate representative in October, 2003 and practiced in that occupation thereafter. An action was subsequently commenced in the Supreme Court of British Columbia against Mr. Atwal and numerous others by the Insurance Corporation of British Columbia ("I.C.B.C.") alleging, among other things, conspiracy and fraud in relation to a scheme involving the apparent theft of motor vehicles. As a result of that action a condition was placed on Mr. Atwal's real estate licence, to be displayed with the licence in the office of the brokerage in which he worked, indicating that on conclusion of the action his suitability for continued licencing would be considered. On March 19, 2010, two days after judgment ("Judgment") in the action was delivered, which found Mr. Atwal (and others) liable for various claims, Mr. Atwal's brokerage notified Council in writing that it was surrendering Mr. Atwal's licence. As Mr. Atwal ceased to then be engaged by the brokerage, pursuant to section 22(1) of the *RESA* his licence became inoperative.

[5] Very shortly thereafter, on April 6, 2010, Mr. Atwal commenced a process in pursuit of reinstatement. The initial step which he took on that date was to make a "pre-screening application" to Council, evidently a required application in such circumstances. In that application Mr. Atwal made certain disclosures, including the existence of the Judgment. That application led to what was effectively a qualification hearing before the Committee on May 14, 2010, giving rise to the Decision rendered the following month.

[6] The history of Mr. Atwal's licence as a submortgage broker also comes into play on this appeal. He first became registered as a submortgage broker in November, 2003. In a 2007 application for renewal of that licence Mr. Atwal answered negatively a question on the form as to whether there were any pending legal proceedings against him. In fact, there were five pending actions against him, all brought by I.C.B.C., including that which led to the Judgment. After a hearing the Registrar of Mortgage Brokers found that Mr. Atwal had made a false statement on the renewal application, while denying a second allegation in the hearing notice that he was unsuitable for registration, and ordered that Mr. Atwal be suspended for slightly more than two months between November, 2007 and January, 2008, following which an investigation of Mr. Atwal by the Financial Institutions Commission ("FICOM") was commenced. Subsequently, on March 23, 2010, being immediately after the Judgment was rendered, the Registrar of Mortgage Brokers ordered without a hearing that Mr. Atwal be suspended for a period of 150 days or until a determination had been made following an investigation as to whether his registration should be suspended or cancelled, whichever occurred first. The grounds given for that Order were:

I AM THEREFORE OF THE OPINION that Atwal is unsuitable and his registration objectionable because of the following:

- (a) He has refused to cooperate with Staff's request to meet to discuss concerns about his mortgage files and, when requested to do so, has been belligerent to Staff.
- (b) He has recently been found liable, civilly, for the tort of conversion and conspiracy. The findings made by the trial judge are very serious, particularly since they involved the perpetration of fraud on a financial institution, namely the Insurance Corporation of British Columbia.

[7] A Consent Order was then endorsed by Mr. Atwal and issued by the Registrar of Mortgage Brokers, to the effect:

That Atwal's registration as a submortgage broker is cancelled for life, and Atwal agrees never to reapply for registration, pursuant to section 8(1) of the Mortgage Brokers Act ...

[8] In his evidence before the Committee in these proceedings, Mr. Atwal essentially stated his practice as a submortgage broker had been minimal. He argues on this appeal that the reason for the cancellation of the submortgage broker's licence was simply that he voluntarily agreed to enter into the Consent Order.

[9] In the proceedings before the Registrar of Mortgage Brokers, a number of facts and admissions were accepted by the parties and form part of the Consent Order, mostly concerning Mr. Atwal's failure to provide all of the files requested of him in the FICOM investigation and his demeanour in answering the investigator's questions which, he admitted, was uncooperative and, at times, belligerent.

[10] That investigator was Karyn Jackson. Ms. Jackson was the only person apart from Mr. Atwal to testify before the Committee in this matter. Her evidence was generally in the vein of Mr. Atwal having failed to cooperate in her investigation and having at times used profane and abusive language toward her. The Committee accepted in evidence transcripts of two telephone conversations between Mr. Atwal and Ms. Jackson on March 3, 2010 which, Ms. Jackson testified, she had tape-recorded without Mr. Atwal's knowledge. A portion of the transcript of the first of those conversations is appended to this appeal decision.

[11] As will be seen, on a number of grounds the Appellant challenges the evidence given by Ms. Jackson. In relation to her testimony new evidence has by consent of the parties been adduced on this appeal in the form of an August 10, 2010 memorandum on the masthead of FICOM, apparently signed by its Superintendent and CEO and directed to counsel for the Respondent. The memorandum, which I will refer to below as the "FICOM Memorandum", concerns a relationship between Ms. Jackson, who is a former prison guard, and a certain inmate which was the subject of cross-examination of Ms. Jackson by Mr. Atwal at the hearing. The FICOM Memorandum came into existence after the Decision had been rendered and, the Appellant submits, demonstrates that Ms. Jackson's evidence lacked credibility.

[12] Because Mr. Atwal's licence as a real estate representative had become inoperative under section 22(1) of the *RESA*, his application for reinstatement fell subject to the language of section 22(2), which provides:

- (2) On application of a person whose licence has become inoperative under subsection (1), the real estate council may, *if satisfied that the person continues to be otherwise qualified for the licence,*
- (a) reinstate the licence in its previous form if the person is re-engaged by the same brokerage, subject to any applicable amendments under section 16 ... or
 - (b) reinstate the licence with necessary amendment if the person is engaged by another brokerage.

(emphasis added)

[13] The words “otherwise qualified” in section 22(2) require consideration of any other criteria for qualification. Section 10 of the *RESA* provides in part:

Qualifications for obtaining licence

10 An applicant for a new licence or a licence renewal must satisfy the real estate council that they meet the following applicable requirements:

(a) the applicant is of good reputation and suitable to be licensed at the level and in the category for which the applicant is applying;

...

(d) in all cases, the applicant has not

(i) been refused a licence under real estate, insurance, mortgage broker or securities legislation in British Columbia or another jurisdiction,

(ii) held a licence that was suspended or cancelled under real estate, insurance, mortgage broker, or securities legislation in British Columbia or another jurisdiction,

(iii) been disciplined by a professional body, or

(iv) been convicted of an offence

for a reason that reveals the applicant as unfit to be a licensee;

(e) in all cases, the applicant meets any other qualification requirements established by the rules.

[14] In the action by I.C.B.C. against Mr. Atwal and others which led to the Judgment, it was found by the Court that several vehicles had been stolen or fraudulently acquired, were given a new vehicle identification number with false registration documents from Alberta naming fictitious Alberta residents as owners and were ultimately sold to third parties. While this particular action involved seven vehicles in relation to which an amount somewhat above \$300,000 was evidently paid out by I.C.B.C. in insurance claims, it was alleged that the total scheme involved many more vehicles and an insurance outlay of approximately \$2,000,000. I understand that there are four other actions featuring I.C.B.C. as Plaintiff and Mr. Atwal as a Defendant, and that the Judgment followed the first trial in these matters. Mr. Atwal’s ultimate liability as described in the Judgment pertained to six vehicles, yielding a total award against him of approximately \$218,644, including \$60,000 for punitive damages. Mr. Atwal was one of the parties the Court described as the “conspiracy defendants”, about whom the following was said by the trial judge:

[307] In the present case, the conspiracy defendants whom I have found liable, were involved to some degree or another in a well organized and executed criminal enterprise to defraud the plaintiff of a significant amount of money. The cost to the plaintiff is, of course, the cost to the motoring public. In determining whether punitive damages are appropriate, and if so in what amount, it is important to consider the factors set out in para. 306 above in relation to each of the defendants and to consider whether the global amount of special damages ordered is insufficient to address the issues set out above.

[15] As to punitive damages against Mr. Atwal in particular, the Court reasoned as follows:

[311] It is of some significance that in his cross-examination of various of the plaintiff's witnesses, the defendant Vikram Atwal asserted that they had in effect framed him and falsely accused him of things he did not do. But when given the opportunity, he never testified in his own defence to deny any of the allegations made against him. In my view, in all the circumstances, it is appropriate to award the plaintiff punitive damages in the amount of \$60,000 against the defendant Vikram Atwal. He clearly was a significant participant in six of seven of the schemes alleged in this action and his conduct is of a sort, untempered by any sign of remorse, that requires damages which will address its reprehensible nature and provide a measure of both specific and general deterrents (sic) and denunciation. The scheme he was involved in was manifestly unlawful and harmful to the plaintiff and the motoring public it serves.

[16] The Court expressly found Mr. Atwal liable to the Plaintiff in fraud and conspiracy.

[17] In deciding that Mr. Atwal's application under section 22(2) of the *RESA* for reinstatement of his licence should be refused, the Committee wrote:

After the conclusion of the hearing, the Qualification Hearing Committee deliberated. First and foremost, the Committee considered section 10(a) of *RESA* and whether or not Mr. Atwal was of good reputation and suitable to be licensed. Overall the Committee noted there was an absence of evidence attesting to Mr. Atwal's good character, good reputation, whether it be personal reputation or business reputation. To the contrary, the evidence provided about Mr. Atwal's reputation demonstrated that his personal reputation was not particularly favourable, given the recent civil judgment arising from his role in the ICBC fraud conspiracy. Mr. Atwal did not counter this evidence with testimony that he had been involved in volunteer work, community services work or involvement with his church or temple, or that he had rehabilitated his reputation otherwise. While he offered some character reference letters as evidence, Mr. Atwal had no letters of support from his family and had no other witnesses testify about his character, good reputation or suitability for licencing. The Committee noted particularly that Mr. Atwal displayed little remorse for his involvement in the ICBC fraud conspiracy, and appeared to be unable to accept responsibility for his role in that case. Mr. Atwal's after the fact admission of his involvement in the ICBC conspiracy held little weight with the Committee, as they noted that as set out in the Reasons for Judgment that while Mr. Atwal acted in his own defence at the trial, he attempted to characterize that he had been "framed" for his involvement in the conspiracy.

Similarly, the Committee also considered the business reputation of Mr. Atwal. In particular the Committee noted Mr. Atwal's dealings with Ms. Jackson in her role as an investigator with FICOM. The Committee noted that there was no evidence to suggest that Ms. Jackson's character should be questioned, but Mr. Atwal was undeterred in his assessment and was adamant that Ms. Jackson was a biased and corrupt investigator. Mr. Atwal also provided an insufficient answer about the reason why he did not make a complaint against Ms. Jackson when he first suspected her bias. Perhaps most importantly, the Committee noted the conflicts in the evidence,

assessing overall, based on the evidence heard, that Mr. Atwal did not have information of Ms. Jackson's alleged corruption until after his first phone call with her and likely did not receive the information until after his second phone call with Ms. Jackson. Further, the source of Mr. Atwal's information about Ms. Jackson's alleged corruption was from a source with suspect credibility - a convicted criminal - and as a result of multiple hearsay. Despite the weak evidence, Mr. Atwal still behaved as he did toward Ms. Jackson.

With respect to section 10(a) of RESA, the Committee concluded that Mr. Atwal had not demonstrated that he was of good reputation and therefore was not "otherwise qualified" to have his license reinstated pursuant to section 22(2) of RESA. However, the Committee also further considered and deliberated the requirements of section 10(d) of RESA with respect to Mr. Atwal notwithstanding that the Committee had already found him unsuitable for licencing pursuant to section 10(a) of RESA. Specifically, the Committee found Mr. Atwal did not meet the requirements of section 10(d)(iii) of RESA as he held a sub-mortgage broker's licence that was cancelled in British Columbia by the Registrar of Mortgage Brokers. The cancellation resulted from Mr. Atwal's refusal to cooperate with an investigation by FICOM into the issues of incomplete credit checks and file numbering irregularities. Accordingly, the Committee found Mr. Atwal unfit for licencing under RESA.

Further, the Committee was concerned by Mr. Atwal's evidence that he continues to associate, at least peripherally, with other individuals named and found liable in the ICBC fraud case, particularly in light of Mr. Atwal's evidence that all of the individuals involved were currently incarcerated except for him. This, compounded with the evidence provided indicating that Mr. Atwal's role in the conspiracy did not appear to be minor, was of great concern for the Committee. Overall, the evidence presented did not include evidence indicating Mr. Atwal had the support of his family or involvement in his life other than Mr. Atwal's father who was also named as a defendant in the ICBC fraud case and who was also found liable. On balance, the Committee's greatest concern was not with respect to Mr. Atwal's failure to make restitution to resolve his past wrongdoing with respect to the ICBC fraud, but with Mr. Atwal's attitude that he intended to simply put those matters behind him and move on without having made sufficient restitution or gained an appreciation of the gravity of his actions.

The Committee found that Mr. Atwal's adamant allegations that Ms. Jackson was a biased and corrupt investigator because of her involvement with individuals incarcerated was of little relevance, because it was not related to Mr. Atwal's reputation or suitability to be licensed save and except for his display of unprofessionalism in his dealings with Ms. Jackson. The Committee found that Mr. Atwal's insistence on continuing to malign Ms. Jackson and her character in the face of the Committee's indication that they wanted her evidence, surprising. Mr. Atwal was adamant that Ms. Jackson was corrupt but this was based on triple hearsay from convicted criminals which evidence held no weight with the Committee.

[18] While the third paragraph in the above passage refers to section 10(d)(iii) of the *RESA* in relation to the cancellation of Mr. Atwal's submortgage broker's licence, I agree with counsel for the Respondent that the intended reference must have been to section 10(d)(ii), which deals with such a cancellation. I do not attach any significance to that minor (and possibly clerical) error.

B. Grounds for Appeal

[19] Though Mr. Atwal was unrepresented in the proceeding below, counsel on his behalf filed a Notice of Appeal and subsequently a written appeal submission. From those two documents I extract the following as the essence of the positions put forward in support of the appeal:

- (a) The Committee erred in its application of section 10(d) of the *RESA*, in part because it should not have been considered separately from the question of suitability to be licenced, and in part because the circumstances giving rise to the cancellation of the Appellant's submortgage broker licence were not considered and, if they had been considered, would not have supported a conclusion that he was unfit to be licensed;
- (b) The evidence of Karyn Jackson was inadmissible and should have been refused, thereby leading to a different outcome;
- (c) Ms. Jackson's evidence was untruthful and should have been rejected, thereby leading to a different outcome;
- (d) The Committee gave undue weight to the facts giving rise to the Judgment, failing to consider that those facts occurred in 2002 and 2003, before Mr. Atwal was licensed as a real estate representative in October, 2003;
- (e) The Committee erred in failing to conclude that Mr. Atwal had established his good character and good reputation; and
- (f) Alternatively, the Order that Mr. Atwal could not again apply for reinstatement for three years was excessive.

[20] I have carefully considered the entirety of the Appellant's Notice of Appeal and submission and recognize that certain discrete points are made within them beyond the grounds I have just described. I have distilled the above grounds of appeal in part because they are the most prominent in the Appellant's materials and in part because I do not find any other points raised to merit consideration.

C. Standard of Review

[21] The Appellant has not addressed the standard of review to be applied on this appeal. The Respondent submits that the standard of reasonableness is applicable. There is no reply submission from the Appellant on this point. As a result, it appears uncontroversial that the reasonableness standard, which entails a measure of deference to the original decision-maker, is engaged here.

[22] The leading decision on standard of review is *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, in which the Supreme Court of Canada reconsidered the existing standards of judicial review, which had been patent unreasonableness, correctness and, theoretically lying somewhere in between, reasonableness *simpliciter*. The majority of the Court held that the distinction between patent unreasonableness and reasonableness *simpliciter* was effectively meaningless in

practice and that, henceforth, the only standards to be considered would be reasonableness, representing appropriate deference to the decision-maker below, and correctness. The Court provided extensive guidance as to the selection of the applicable standard as between those two alternatives. Generally, deference is to be paid a tribunal where it is interpreting its own statute, there exists a special administrative regime in which the decision-maker has expertise, the related legislation contains a privative clause, or where the question is one of fact, discretion, policy or involving legal and factual issues that are intertwined and cannot be readily separated. In contrast, a question of law that is of central importance to the legal system and outside the area of the tribunal's expertise will normally suggest a correctness standard.

[23] The Appellant has submitted that the transcripts of the telephone conversations between Mr. Atwal and Ms. Jackson should not have been admitted into evidence because, among other things, Ms. Jackson's recording of them without Mr. Atwal's knowledge constituted a breach of his privacy. Leaving aside whether that submission has merit, I consider it to be a true question of law that has at least general (whether or not central) importance in the legal system and is not within the particular expertise of the tribunal below. I arrive at that view even though, as will be apparent presently, a privative clause exists in this case, and despite the absence of a submission from the Appellant on the point.

[24] The balance of the grounds of appeal concern fact or mixed fact and law and are matters on which appropriate deference should be paid the Committee. This is particularly so given that Council is statutorily charged with responsibility for inquiring into and adjudicating on the conduct of its members and enforcing the provisions of the *RESA*, which is precisely what occurred in this case. I recognize and accept that Council has a special duty and expertise in such matters, consistent with the privative clause in section 242.3(2) of the *Financial Institutions Act*, R.S.B.C. 1996, c. 141 (made applicable in this matter by section 54(4) of the *RESA*), which provides:

A decision of the tribunal on a matter in respect of which the tribunal has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

[25] That Council is the exclusive licencing authority in relation to the provision of real estate services, and held exclusive jurisdiction here to entertain Mr. Atwal's application for reinstatement of his licence, is apparent from the provisions of the *RESA*, including sections 3(1), 9(1), 10 and 22(2). The privative clause is therefore engaged.

[26] In summary, I hold that the correctness standard applies to the submission that the telephone transcripts should have been refused in evidence on the ground of breach of privacy, and that the standard of reasonableness applies to the remaining submissions of the Appellant.

[27] I will now consider the different arguments on appeal.

D. Section 10 of the *RESA* Not Properly Applied

[28] For convenience I again set out the relevant portions of this provision:

Qualifications for obtaining licence

10 An applicant for a new licence or a licence renewal must satisfy the real estate council that they meet the following applicable requirements:

- (a) the applicant is of good reputation and suitable to be licensed at the level and in the category for which the applicant is applying;
- ...
- (d) in all cases, the applicant has not
 - (i) been refused a licence under real estate, insurance, mortgage broker or securities legislation in British Columbia or another jurisdiction,
 - (ii) held a licence that was suspended or cancelled under real estate, insurance, mortgage broker, or securities legislation in British Columbia or another jurisdiction,
 - (iii) been disciplined by a professional body, or
 - (iv) been convicted of an offencefor a reason that reveals the applicant as unfit to be a licensee;
- (e) in all cases, the applicant meets any other qualification requirements established by the rules."

[29] On the plain language of section 10(d)(ii), an applicant for a licence renewal must satisfy Council that he or she has not held a licence that was suspended or cancelled under real estate, insurance, mortgage broker, or securities legislation for a reason that reveals the applicant as unfit to be a licensee.

[30] Under section 22 of the *RESA*, an applicant for reinstatement of an inoperative licence must satisfy Council, apart from that he or she is engaged in a brokerage, that he or she is "otherwise qualified" for the licence. The qualifications for obtaining the licence are those set out in section 10. It follows that the Appellant's section 22(2) application here requires for success, among other things the satisfaction of Council that his mortgage broker licence was not suspended or cancelled for a reason that reveals he was unfit to be a licensee.

[31] In respect to section 10 of the *RESA*, the first submission the Appellant makes is that the cancellation of the mortgage broker licence, while relevant to the general question of suitability, does not constitute a separate, stand-alone ground for consideration on the application. It is readily apparent, however, from the language and intersection of sections 10 and 22 that satisfaction of section 10(d)(ii) was indeed required and was a proper consideration for the Committee to make. I see no merit in the Appellant's submission on this point.

[32] The Appellant next argues that, if section 10(d)(iii) (which I assume tracks the error in the Decision, and should be 10(d)(ii)) does apply, Council is required to consider a number of factors and make an investigation to determine whether or not the Appellant is fit to be a licensee, and failed to do so. It is not clear what is meant by an investigation, but it is certainly the case that section 10 requires consideration, not only of whether one of its criteria has been unsatisfied, but also whether it was for a reason revealing unfitness. I do not accept, however, that the

Committee failed to make that consideration. At pages 4 and 5 of the Decision, the Committee reviewed the history of Mr. Atwal's submortgage broker registration, including the initial suspension for approximately two months and the reasons therefor, the later suspension for as long as 150 days and the ensuing Consent Order and terms thereof. When later in its reasons the Committee referred to the cancellation of the submortgage broker's licence, it expressly added the following language:

The cancellation resulted from Mr. Atwal's refusal to cooperate with an investigation by FICOM into the issues of incomplete credit checks and file numbering irregularities. Accordingly, the Committee found Mr. Atwal unfit for licencing under RESA. (Decision, p. 11)

[33] Although that particular reasoning is not expansive, in looking at the Decision as a whole I do not find the manner in which the Committee expressed itself on the issue to be lacking or unreasonable. More to the point, I find the Committee plainly considered that which the Appellant submits it did not.

[34] It may well be that the reasons on this issue were ultimately briefly expressed because the Committee made it clear that, even without considering section 10(d), it felt the application must fail on application of section 10(a), concerning good reputation and suitability for licencing. That this was the primary reason the Committee refused the application is evident from the following language:

With respect to section 10(a) of RESA, the Committee concluded that Mr. Atwal had not demonstrated that he was of good reputation and therefore was not "otherwise qualified" to have his licence reinstated pursuant to section 22(2) of the RESA. However, the Committee also further considered and deliberated the requirements of section 10(d) of RESA with respect to Mr. Atwal notwithstanding that the Committee had already found him unsuitable for licencing pursuant to section 10(a) of RESA ... (Decision, p. 11).

[35] In proceeding at that point of its reasons to consider section 10(d) the Committee referred only to the ultimate cancellation of the submortgage broker's licence, and not again to the prior suspensions discussed earlier in the Decision. The longer suspension, in particular, could have again been referred to had the Committee elaborated on the considerations arising under section 10(d), particularly as section 10(d)(ii) refers to suspensions or cancellations. As it was, the Committee ultimately appeared content to make brief reference to the facts and admissions forming part of the Consent Order for cancellation, concluding that a lack of fitness was thereby revealed.

[36] It is important and entirely realistic to keep in mind the context of that Consent Order. Apart from the facts and admissions within it, the very Order made, being a cancellation for life on the basis that Mr. Atwal could *never* reapply for registration, was at or near the far end of the disciplinary spectrum. That surely will not have been lost on the Committee. Moreover, the Consent Order makes clear reference to the second Order of suspension, being the longer suspension which was essentially a precursor to it. The terms of that second suspension Order were extremely strong, referring in part to Mr. Atwal's conduct giving rise to the Judgment, which was released just before that suspension was imposed. The

second suspension Order expressly pronounced Mr. Atwal's unsuitability for registration. As that Order was made without a hearing this pronouncement would not carry weight if Mr. Atwal had been subsequently vindicated, but given his acquiescence in the permanent cancellation of his licence almost immediately thereafter, it certainly retained significance.

[37] While, then, in its ultimate reasons around section 10(d) the Committee referred only to the cancellation of Mr. Atwal's licence, and briefly to his refusal to cooperate in the FICOM investigation and to problems with files, the following must be recognized. Firstly, the cancellation of Mr. Atwal's mortgage broker's licence on the basis that he would never again apply for registration, whether by consent or not, was a very significant event relative to his later application for reinstatement of his real estate licence. Secondly, in referring to that cancellation the Committee would certainly have been mindful of the Consent Order and of the strong terms of the second suspension Order to which it makes reference, both of which were in evidence before it and were described earlier in its reasons.

[38] I therefore find that the Committee gave sufficient consideration to whether Mr. Atwal was fit to be a licensee within the meaning of section 10. I also find its conclusion that Mr. Atwal was not so fit to have been amply supported by the evidence. Accordingly, I reject the submission that the Committee erred, unreasonably or otherwise, in its application of section 10(d) of the *RESA*.

E. Evidence of Karyn Jackson Should Have Been Refused or Rejected

[39] There are different issues that arise in relation to Ms. Jackson's evidence.

[40] The first contention of the Appellant is that, as the telephone conversations were admittedly recorded by Ms. Jackson without the Appellant's knowledge, a violation of the *Privacy Act*, R.S.B.C. 1996, c. 373 occurred with the result that the transcripts and associated testimony of Ms. Jackson should not have been admitted into evidence. It is also submitted that Mr. Atwal should not, therefore, have been in the position of having to give evidence in relation to those transcripts and testimony.

[41] Mr. Atwal, who was not represented before the Committee, did not object to the admissibility of the transcripts or related testimony into evidence. No submission is made on this appeal as to the considerations that may arise from that failure to object.

[42] The Appellant submits that there was a breach of sections 1(1) and (4) of the *Privacy Act*, which provide that:

1(1) It is a tort actionable without proof of damage, for a person, willfully and without a claim of right, to violate the privacy of another.

...

(4) Without limiting subsections (1) to (3), privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass.

The Appellant does not explain on what basis Ms. Jackson's recording of conversations in which she was a party amounts to either a violation of his privacy or, possibly and more specifically, to eavesdropping or surveillance, and provides no authority beyond the provisions of the statute to support his position.

[43] The Respondent submits that there was no breach of sections 1(1) and (4) of the *Privacy Act* as Ms. Jackson's acts did not amount to eavesdropping or the conducting of surveillance. While the Appellant made no reference in his submission to the *Criminal Code*, the Respondent goes on to submit that the recording of the conversations did not amount to an unlawful interception of a private communication within the meaning of sections 183 and 184 of the *Criminal Code*, again as Ms. Jackson was herself a party to the conversations.

[44] In his Reply, Mr. Atwal does not challenge the Respondent's position that the *Criminal Code* has not been contravened. He does argue that none of the exceptions in section 2 of the *Privacy Act* apply in these circumstances, but does not expand in any way on his bare threshold point that the transcribing of the calls constituted a violation of privacy. He does not, for example, address whether:

- (a) his privacy can be seen as having been compromised when he willingly spoke with Ms. Jackson who he clearly knew to be a FICOM investigator;
- (b) the right to privacy that he asserts is absolute or is confined to reasonable limits and, if the latter, as I suspect would be the case, the particular circumstances here are within or without those limits; and
- (c) even if the recordings constituted torts on application of the *Privacy Act*, and therefore the basis for a cause of action, they should therefore not have been admitted into evidence before the Committee, which is, perhaps, an entirely different question.

[45] In Reply (though, I observe, probably not in proper reply), Mr. Atwal also submits that Ms. Jackson committed a further violation of his privacy by disclosing the transcripts to third parties without his consent, knowledge or authority (and when such was not authorized or requested under a law enforced in British Columbia, or by a Court, or by any process of a Court). Mr. Atwal does not specify the disclosure being referred to, whether being the giving of evidence before the Committee or some other communication, and on that basis alone it is difficult to accept the submission. In any event, the Appellant has not developed his submission on the point at all, and accordingly makes no convincing case that the tort of violation of privacy occurred here or, even if it did, that this necessarily means the transcripts are inadmissible in these administrative proceedings.

[46] For the above reasons, I do not find the Appellant's argument persuasive. In my view, if these same submissions of the parties on admissibility had been made before the Committee the appropriate course would have been to accept the transcripts and related testimony into evidence. In other words, even leaving aside any possible issue arising from the absence of an objection on the point at the time, I believe the Committee was correct in admitting the evidence.

[47] The Appellant next contends that the investigation by Ms. Jackson was confidential to the process initiated under the *Mortgage Brokers Act* and should not, therefore, have been admitted into or considered in the proceedings before the Committee. The Appellant has provided no authority, whether being the provisions of the *Mortgage Brokers Act* or case law, to in any way support that position. The Respondent submits that the Committee was in fact duty-bound to inquire into the suspension and cancellation of Mr. Atwal's submortgage broker's licence, and the circumstances around that, given the clear reference in section 10(d)(ii) of the *RESA* to the suspension or cancellation of such a licence. That submission is perfectly logical and I accept it. I consider the Committee's treatment of this issue as well to have been both reasonable and correct.

[48] The Appellant submits further that Ms. Jackson lacked credibility and that her entire evidence should have been rejected. The basis for this is the FICOM Memorandum.

[49] The general thrust of Ms. Jackson's evidence was that Mr. Atwal was not cooperating in FICOM's efforts to examine his mortgage broker files, such examination apparently being a standard practice after a suspension. Ms. Jackson's expressed concern was that, while five files were left by Mr. Atwal to be picked up by the predecessor investigator, documents within them appeared to be missing and it seemed that there should have been approximately fifty-nine files made available. She also referred to the two recorded telephone conversations between her and Mr. Atwal, both occurring on March 3, 2010, and which show Mr. Atwal using highly inappropriate language.

[50] On being questioned on the following points by Mr. Atwal in cross-examination at the hearing, Ms. Jackson testified that she:

- (a) had been a prison guard from 2004 to 2005;
- (b) knew an inmate named Warren Michaels;
- (c) did not have an affair with Mr. Michaels' when she was a prison guard;
- (d) last visited him approximately two months before giving her evidence at the hearing;
- (e) did not tell Mr. Michaels about Mr. Atwal's case;
- (f) was not told by Mr. Michaels to suspend Mr. Atwal's licence; and
- (g) did have "private family visits" with Mr. Michaels as a "support person from the community".

[51] As indicated above the FICOM Memorandum is dated August 10, 2010, therefore post-dating the Decision, and appears to be signed by the Superintendent of Real Estate. It makes a number of statements concerning Ms. Jackson and Warren Michaels, including that Ms. Jackson admitted to her manager (at FICOM, presumably) that there was more to her relationship with Mr. Michaels than she had previously disclosed. The occasion of that previous disclosure is not indicated, however, so there is no basis for concluding it was a reference to Ms. Jackson's evidence before the Committee (rather than, for instance, what she may have said in a discussion with her manager). There is also reference in the FICOM

Memorandum to records of the correctional institution apparently showing seventy-nine visits by Ms. Jackson to Mr. Michaels between April, 2006 and April, 2010, including a number of social events and three private family visits, each of the latter visits evidently spanning a seventy-two hour period. During that time period, the records apparently show, Ms. Jackson listed herself as Mr. Michaels' fiancée.

[52] Counsel for the Respondent readily accepted that the FICOM Memorandum should be admitted as new evidence on this appeal, stating that it is substantial and material and was not available at the time the Decision was made. The Respondent in its submission concedes the Appellant's point that Ms. Jackson was untruthful under cross-examination about her relationship with an inmate, but submits that there was no evidence that the telephone conversations she had with the Appellant or that her investigation of the Appellant were improper. It also points out, importantly, that the Appellant took no issue with the accuracy of the transcripts of the conversations, and indeed that he admitted their contents.

[53] To conclude that Ms. Jackson was untruthful in her evidence is of course a serious matter. On the materials submitted on this appeal, I am not prepared to do so, for the following reasons:

- (a) while I am prepared to consider the FICOM Memorandum as evidence, which both parties request that I do, I must still recognize that it is entirely hearsay, and on that basis alone an unsatisfactory ground for trumping the *viva voce* evidence of Ms. Jackson;
- (b) beyond being hearsay, the documentation that underlies the FICOM Memorandum, being the relevant records of the correctional institution, are not attached to it or otherwise produced;
- (c) I have not had the opportunity to assess the demeanour and credibility of any of the persons from whom information found in the FICOM Memorandum has come;
- (d) I have not had the opportunity to assess the demeanour and credibility of Ms. Jackson, as did the Committee;
- (e) there is no suggestion in the FICOM Memorandum that Ms. Jackson's evidence that she had not spoken to Mr. Michaels about Mr. Atwal's case, and had not been told by Mr. Michaels what to do concerning Mr. Atwal, was in any way untrue; and
- (f) most fundamentally, I do not discern, and neither counsel has pointed out, any particular conflict between Ms. Jackson's evidence before the Committee and the content of the FICOM Memorandum. In her evidence, Ms. Jackson only denied having an affair with Mr. Michaels when she was a prison guard, which she said was from 2004 to 2005, and the records of visits referred to in the FICOM Memorandum, including of private family visits, concern only the period of 2006 to 2010. She was not asked in evidence whether she had an affair with Mr. Michaels after leaving her employment as a prison guard. Even on the point of the private family visits subsequent to that employment, it appears on close review of the transcript of her cross-examination that

she may have been admitting, or at least preparing to admit, having had conjugal visits with Mr. Michaels:

Q Okay. All right. That will be provable. And you say you never had no conjugal visits with him?

A I did have private family visits with him, yes, but it was –

Q You did?

A *Yeah, it was* as a support person from the community.

(emphasis added)

Ms. Jackson's complete answer to the first of these questions was not given, apparently because of an interruption by Mr. Atwal, but it does appear that she was affirming having had conjugal visits with Mr. Michaels, and going on to say that this was as a support person from the community (perhaps, though one cannot be certain on this material, in contrast to having done so as an employee of the institution). She did not offer the information that she was Mr. Michaels' fiancée (if indeed she was), but nor was she asked specifically about the status of the relationship.

[54] I would not consider it either fair to Ms. Jackson or warranted by the material presented on appeal to conclude that she was untruthful in her evidence. But even if I were to draw such a conclusion, I would go on to agree with the Respondent's submission that ultimately the point is not determinative, particularly given Mr. Atwal's agreement at the hearing that the transcripts of the telephone conversations were accurate. Further, and as the Committee noted in the Decision, Mr. Atwal conceded at the hearing that the way in which he addressed Ms. Jackson was "probably" not the best and that his conduct in that regard was not becoming of a real estate salesperson.

[55] If the assertions of fact in the FICOM Memorandum had been in evidence before the Committee – which I say even though they are not properly in evidence on this appeal, being based on hearsay and without the relevant supporting documents – I expect the Committee may have better understood Mr. Atwal's direction in cross-examination of Ms. Jackson. Whether, assuming their existence, such facts could have mitigated the view of Mr. Atwal's behaviour toward Ms. Jackson during the investigation, however, is doubtful. In the Decision, the Committee noted,

... that Mr. Atwal did not have information of Ms. Jackson's alleged corruption until after his first phone call with her and likely did not receive the information until after his second call with Ms. Jackson ... (Decision, p. 11)

Those findings are not challenged on this appeal, and obviate any thought that the questions raised around Ms. Jackson's credibility could explain Mr. Atwal's inappropriate behaviour toward her during the transcribed telephone calls.

[56] For the above reasons I do not consider the new evidence in the form of the FICOM Memorandum to assist Mr. Atwal on this appeal, and in particular do not regard it as a basis for determining that the Committee's findings arising from Ms. Jackson's evidence were in any way unreasonable.

F. Age of Events Giving Rise to the Judgment Not Considered

[57] The Judgment against Mr. Atwal played an important role in the Committee's conclusion that he had not demonstrated good reputation and suitability to be licenced, as required by section 10(a) of *RESA*. On this appeal, Mr. Atwal submits that the Committee erred in failing to take into account that the events underlying the Judgment in which Mr. Atwal was involved occurred between 2002 or 2003, before he even became a real estate representative in October, 2003.

[58] I do not accept the submission that the Committee was obligated to consider that Mr. Atwal's conduct leading to the Judgment occurred before he was licensed, or that this fact should have proved material if it had been considered. While the timing of misconduct can in certain circumstances be important to consider, the following factors here militate against the Appellant's position:

- (a) the misconduct was severe, the Court having concluded that Mr. Atwal (and others) were involved in a well organized and executed criminal enterprise to defraud the Plaintiff;
- (b) the misconduct was not isolated, but rather in Mr. Atwal's case occurred in relation to six different vehicles;
- (c) in the course of the trial in 2009, being about seven years after the time period referenced by Mr. Atwal in this submission, he was found by the Court to have asserted in cross-examination of various Plaintiff's witnesses that he had been framed and falsely accused, though did not go on to testify on his own behalf. As a result, his misconduct was found to have been "untempered by any sign of remorse" and \$60,000 in punitive damages were awarded against him - not because of his conduct in 2002 or 2003, but rather because of his conduct during the trial in 2009;
- (d) the Committee found that Mr. Atwal in evidence before it essentially accepted the findings in the Judgment against him, but again failed to show any remorse for his behaviour; and
- (e) while the Judgment was clearly integral to the Decision, in addition to the facts in the Judgment the Committee made adverse findings against Mr. Atwal in relation to a number of instances of misconduct in subsequent years, including the false statement in his application for renewal of his submortgage broker licence, his failure to cooperate in the FICOM investigation and his extremely inappropriate behaviour toward Ms. Jackson.

[59] I conclude that the Committee was entitled to fully and fairly apply to the matter before it the findings set out in the Judgment, in relation to both the unlawful acts committed and Mr. Atwal's comportment during the later trial. The Committee was also entitled to consider the other conduct to which I have just referred, which would heighten concerns as to Mr. Atwal's suitability for licencing. For these reasons, I cannot accept the submission of the Appellant regarding the length of time that has passed since the conduct underlying the Judgment occurred.

G. Good Reputation and Suitability For Licencing Established

[60] The Appellant submits, in essence, that Mr. Atwal did provide sufficient evidence of good character and suitability to be licensed, which the Committee erred in failing to consider or accept.

[61] In particular, the Appellant points to (a) his evidence of his experience as a realtor, free of any difficulties since 2003 (b) his evidence as to his marriage and parentage of a young child and (c) the ten letters of reference that he submitted at the hearing from friends, clients and associates.

[62] The Committee found that there was an absence of evidence to support Mr. Atwal's good character and good reputation, whether personal or business. In light of the Judgment in fraud and conspiracy, the Committee found that the evidence around Mr. Atwal's reputation was in fact to the contrary, and that he did not overcome this by showing involvement in volunteer work, community services, association with his Church or Temple or other rehabilitation. As to the letters of reference, the Committee stated that there were no letters from Mr. Atwal's family and that none of the authors of the letters testified. The Committee went on to find that Mr. Atwal displayed little remorse for his involvement in the motor vehicle conspiracy, maintaining at trial that he had been framed. It found that he tried to excuse his conduct during the telephone conversations with Ms. Jackson on the ground of her allegedly corrupt behaviour, but that it appeared in fact that he did not learn of that alleged behaviour until after those conversations occurred. The Committee also noted Mr. Atwal's continuing peripheral association with other individuals named in the motor vehicle conspiracy case. It commented on the role played by Mr. Atwal in the conspiracy and fraud which, it said, did not appear to be minor. The Committee expressed concern that Mr. Atwal had failed to make restitution to resolve his wrongdoing in relation to the I.C.B.C. fraud. In the context of character and reputation, the Committee also referred to the cancellation of Mr. Atwal's submortgage broker licence.

[63] It is apparent from its Decision that the Committee took a very serious view of Mr. Atwal's behaviour toward Ms. Jackson, which occurred quite recently, in March, 2010. A review of the partial reproduction of the first telephone transcript appended to this decision shows that the Committee could not reasonably have done otherwise. The evidence of his dealings with Ms. Jackson added appreciably to an already-heavy burden upon Mr. Atwal, given the other facts in play, to demonstrate his good reputation and suitability for licencing.

[64] It may indeed have been more effective in Mr. Atwal's case if one or more of his character references had given evidence before the Committee, but I do have sympathy for Mr. Atwal in this regard. Firstly, the Committee accepted the character letters in evidence. Secondly, Mr. Atwal was unrepresented before the Committee and there is no indication that he was asked to produce the authors of those letters for cross-examination (even if that would have occasioned an adjournment), and certainly not as a condition of the letters being marked in evidence. That said, written support has less potential to convince than does *viva voce* evidence, and if that was the Committee's point on the matter, it was a fair one.

[65] The primary difficulty for Mr. Atwal was that the evidence against good reputation and suitability for licencing, which I have described above, appeared very strong, almost overwhelmingly so. Alongside that evidence, the character references and Mr. Atwal's testimony about his experience as a realtor and his family status were not nearly sufficient to satisfy his burden under section 10(a) of the *RESA*. Certainly, that was the view of the Committee, which view I believe was supported by the evidence as a whole.

[66] Accordingly, I am of the view that the Committee reasonably, and indeed correctly, concluded that Mr. Atwal had not demonstrated good reputation and suitability to be licenced, as he was required to do in order to succeed in his application.

H. Three Year Waiting Period Excessive

[67] The final paragraph of the Decision reads:

The Committee concluded that Mr. Atwal was not suitable to be licenced at this time and ordered that no application for Mr. Atwal be considered for a period of three years after the date of this decision. If after three years Mr. Atwal wishes to become relicenced, the onus will be on Mr. Atwal to prove his suitability and good reputation before a Qualification Hearing Committee in order to become relicenced.

[68] Earlier in its reasons, the Committee summarized certain authorities that had been relied on by counsel for the Respondent in argument, including as concerns the appropriate length of time following a reinstatement refusal before another application for reinstatement would be considered ("the Waiting Period").

[69] On appeal, Mr. Atwal argues that the Waiting Period here should be no greater than one year from the date of the Decision.

[70] Central to the Appellant's submission is the notion that professional misconduct warrants a longer Waiting Period than misconduct not occurring within the practice of the licence, such as that at issue in this case. The Appellant also cites four decisions of Council, all arising from Consent Orders, two of which involve suspensions of existing licensees, and two of which feature the fixing of Waiting Periods where a reinstatement request was refused. The Waiting Periods in those cases were for six months and eighteen months, and the suspensions were for shorter periods.

[71] The Respondent cites four other reinstatement cases, all involving Waiting Periods of three years or longer. Three of those concerned malfeasance in the course of professional duties and the fourth, involving a real estate salesperson, arose from a twenty year ban on account of serious *Securities Act* violations: *Specogna and Real Estate Council of British Columbia, Commercial Appeals Commission*, May 17, 2003. The Waiting Period ordered by Council in that case was five years.

[72] The regulatory role played by Council is primarily intended for protection of the public interest. One of the duties of Council is to ensure the fitness of real estate licensees. Generally speaking, lack of fitness to hold a real estate licence will

be most apparent when the behaviour which has caused concern occurred in the course of the practice of that licence, and there is a resultant discernible connection between the behaviour and risk to the public posed by continued possession of the licence. Many other circumstances can be imagined, however, or for that matter plucked out of the case authorities, where the problem behaviour has arisen outside of strict occupational boundaries and yet betrays unfitness for licencing, perhaps because it demonstrates a lack of honesty or integrity or involves the commission of a serious offence of one kind or another. In the case under appeal, arising in part from a finding by a superior court that the applicant engaged in a conspiracy and repetitive frauds, a serious concern over professional licencing is unavoidable, even though the conduct in issue was not committed *qua* real estate salesperson.

[73] While I can appreciate that in some circumstances it may be material that the misconduct did not arise in the practice of the profession in issue, perhaps moderating concern that continued practice would be hazardous to the public, in my view that type of consideration is overridden in this case by the severity and scope of the misconduct, which included that:

- (a) as found in the Judgment, Mr. Atwal:
 - (i) was involved in a well organized and executed criminal enterprise to defraud I.C.B.C. of a significant amount of money;
 - (ii) was part of a civil conspiracy against I.C.B.C.;
 - (iii) was a significant participant in six of the seven schemes alleged in the action; and
 - (iv) showed no remorse, as demonstrated by his conduct during the 2009 trial;
- (b) as found by the Registrar of Mortgage Brokers in late 2007, Mr. Atwal made a false statement when applying for a renewal of his mortgage broker licence, in the form of a denial that there were any pending legal proceedings against him, and was suspended for just over two months as a result;
- (c) in March, 2010, following pronouncement of the Judgment and Mr. Atwal's refusal to cooperate in a FICOM investigation, the Registrar of Mortgage Brokers suspended him for a period possibly as long as 150 days while declaring him unsuitable for registration;
- (d) in May, 2010 a Consent Order of the Registrar of Mortgage Brokers was made by which Mr. Atwal agreed to a cancellation of his mortgage broker licence and to never apply for its reinstatement;
- (e) he lacked remorse, in the view of the Committee; and
- (f) as found by the Committee, Mr. Atwal behaved profanely and abusively toward Karyn Jackson during the FICOM investigation despite at that time not being aware of the alleged facts later said to impugn her professionalism.

[74] The question here is whether the Committee was unreasonable in setting the Waiting Period at three years. In view of the misconduct that I have just

summarized, I am unable to say that it was. In the circumstances, I would think the one year proposed as a maximum by the Appellant to be unreasonably low. While these are not scientific exercises, having considered the evidence in this matter and all of the authorities submitted by both the Appellant and the Respondent, I conclude that the ordered three year Waiting Period falls within the spectrum of what is reasonable.

I. Disposition

[75] For all of the above reasons, the appeal is dismissed.

[76] As the Respondent has not sought costs, none are awarded.

“Patrick Lewis”

Patrick F. Lewis, Member
Financial Services Tribunal

February 17, 2011