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DECISION NO. 2015-RSA-001(b)

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

BETWEEN:	Superintendent of Real Estate	**APPELLANT**
AND:	Real Estate Council of British Columbia	**RESPONDENT**
AND:	Richard Thomas Valouche	**RESPONDENT**

BEFORE: Patrick Lewis, Panel Chair

DATE: Conducted by way of written submissions concluding on May 22, 2015

SECOND PRELIMINARY DECISION CONCERNING APPLICATION TO AMEND NOTICE OF APPEAL

[1] The Appellant, Superintendent of Real Estate ("Superintendent"), applies to amend the Notice of Appeal it filed on March 6, 2015. The application is opposed by the Respondent, Real Estate Council of British Columbia ("Council"). I understand that the Respondent, Richard Thomas Valouche ("Mr. Valouche"), has not provided any response to the application, though served with it.

[2] In a Preliminary Decision of April 22, 2015 I set a timetable for the filing and exchange of written submissions in connection with this application, which steps have since been completed.

[3] The earlier background is as follows.

[4] Mr. Valouche was the subject of discipline proceedings below and ultimately consented to an Order by Council that he had committed professional misconduct as defined in the *Real Estate Services Act*, SBC 2004, c. 42 ("*RESA*"), and that he be reprimanded, pay a discipline penalty of $10,000 within ninety days, pay for and complete certain remedial training, and pay enforcement expenses of $1,250 within sixty days. Despite the consent to these such terms by Mr. Valouche and Council, the Superintendent has pursued this appeal pursuant to its right to do so as set out in section 54(1)(d) of *RESA*. The single ground asserted in the Notice of

Appeal as filed is that Council erred in law in failing to provide adequate reasons in support of its decision on penalty, such that the decision is unreasonable.

[5] The Financial Services Tribunal ("FST") wrote to the parties on March 18, 2015, enclosing a copy of the record of proceedings ("Record") which, it indicated, it had received the previous day. Pursuant to the timelines set out in its *Practice Directives and Guidelines* ("*Guidelines*"), the FST advised in that letter that the Appellant's written submission was due April 13, 2015. By letter to the FST of March 25, 2015, copied to the other parties, the Superintendent questioned the composition of the Record, particularly the inclusion of an earlier proposed consent resolution that had not been accepted and minutes of Council's apparent deliberations in that regard, and asked Council to provide confirmation on the point. In the event those documents were indeed part of the Record, the Superintendent advised, it sought leave to amend its Notice of Appeal by adding the following ground:

> The Council erred in law by relying on an improper records and information in reaching its February 5, 2015 decision. In particular, the Council erred by reviewing and taking into consideration a proposal that had previously been rejected, the minutes of the Council's own deliberations regarding that prior proposal, and the fact that it had been rejected, when deciding on whether to accept a subsequent proposal, contrary to s. 41 of RESA and since those documents and the related information are protected by settlement privilege from being considered or otherwise reflect statutory decision maker deliberations which do not properly form part of the Record.

[6] By a letter from its lawyer of April 9, 2015 to the FST and copied to the Superintendent, Council confirmed its position that the two queried documents were indeed a necessary and proper part of the Record. Accordingly, the Superintendent seeks the foregoing amendment.

[7] Council argues that the amendment is factually and legally unsupportable. It contrasts its own broad self-regulatory authority and direct responsibility for the education and conduct of licensees with the much more limited role it says is played by the Superintendent to merely appeal orders for disciplinary penalties it thinks insufficient. That role does not extend, it is submitted, to attacking the structure and content of Council's procedures. As to the contention that Council relied on improper material or trenched on settlement privilege, it asserts a close linkage between (a) the earlier proposal for a consent resolution (b) Council's determination that it was acceptable only if the discipline penalty was increased by $2,500 and (c) on the heels of that determination, the consent resolution incorporating that single change. Council's primary position, accordingly, is that the challenged documents were part of a single, unified process giving rise to the

ultimate Order. Alternatively, Council says that the licensee, Mr. Valouche, consented to Council's use of these documents through a cooperative process, thereby creating an exception to the otherwise prohibition against the use of such documents under section 41(5) of *RESA*.

[8] As to the law, Council submits that the Superintendent's right to appeal an Order of a discipline committee, found in section 54(1)(d) of *RESA*, must be seen as simply a right to appeal the outcome – that is, the adequacy of the penalty imposed – and does not include challenges to the process leading to the Order, which process is controlled by Council.

[9] The Superintendent in reply points out that *RESA* confers powers upon it beyond its right of appeal, such as to conduct independent investigations and hearings relative to licensees where Council has declined to act. As to the section 54(1)(d) right of appeal, the Superintendent observes that the language therein extends equally to the Superintendent and "the person subject to the order", and does not express a limit on the scope of appeal available to either of those parties, which it maintains is consistent with the "fair, large and liberal construction" the legislation should receive in order to best attain its objects. If the Superintendent's scope of appeal was intended to be limited, it argues, the legislature could easily have provided for that, and if there were any distinction intended to exist between the right to appeal an order following a hearing and the right to appeal a consent order, this also could have been made clear. The Superintendent accordingly relies on a natural and, if needed, a liberal construction of the language which creates its right of appeal.

[10] As to the facts, the Superintendent notes that Council relies in its submission on certain facts not in the evidentiary record, but helpfully indicates it is prepared to assume they are accurate (subject to any concerns of Mr. Valouche, which have not been expressed). It nonetheless challenges the inclusion in the Record of a rejected proposal for a consent resolution and the minutes of an apparently private deliberation of Council – really, of the Consent Order Review Committee, established by Council – in relation to that proposal. It says that evidence of back and forth negotiations are not to be considered by the ultimate decision-maker, and further that due process requires a tribunal's decision to be based only on material properly before it. Finally, the Superintendent refers to the constituents of an appeal record as set out in section 242.2(6) of the *Financial Institutions Act*, RSBC 1996, c. 141 ("*FIA*"), as support for its contention that the deliberative minutes of Council's meeting in this case were not "evidence before the decision maker" and therefore should not have been in the Record before it.

[11] The threshold legal context of this application is section 22(2)(c) of the *Administrative Tribunals Act*, SBC 2004, c. 45, which requires that a Notice of Appeal to a tribunal "state why the decision should be changed". That provision is made applicable to appeals to the FST by section 242.1(7) of the *FIA*. The Superintendent has apparently (and understandably) concluded that, if it wishes to pursue its second proposed argument in an appeal submission, it should seek to

state this in the Notice of Appeal as another reason why the decision should be changed, lest it may be thought the argument cannot be entertained.

[12] There does not appear to be any provision either in the governing legislation or in the *Guidelines* concerning an amendment to a Notice of Appeal, but both counsel appear in their submissions to accept (clearly or tacitly) that such amendments can occur, and I believe they are probably right to do so; I expect the FST has the ability to control the process before it, and that this would extend to entertaining such amendment requests. It would possibly be of some significance that the *Guidelines*, while not discussing amendments to a Notice of Appeal, do contemplate certain other procedural orders (for instance, an extension of time to file a Notice of Appeal), but in the absence of any controversy on the issue here, I will proceed on the basis that the FST does indeed have authority to permit amendments to a Notice of Appeal where thought appropriate.

[13] Moving forward, it is not immediately clear what test should be applied on an application to amend a Notice of Appeal, and neither party has made mention of the point. I am aware that:

(a) generally, amendments to pleadings are allowed by our Courts so long as they disclose a cause of action (or a defence, as the case may be), and otherwise comply with rules governing pleadings, subject however to the weighing of any actual prejudice arising therefrom (see *British Columbia (Civil Forfeiture) v. Vu*, 2012 BCSC 1476, varied 2013 BCCA 279; and *Peterson v. 469690 B.C. Ltd*., 2014 BCSC 1531);

(b) the British Columbia Court of Appeal (whose Rules permit the amendment of a Notice of Appeal: see Court of Appeal Rules, Rule 12) has applied an "interests of justice" test to whether an amendment of a Notice of Appeal should be permitted (see *Shannon v. Gidden*, 1999 BCCA 461); and

(c) demonstrating a difference in at least one other jurisdiction, the Nova Scotia Court of Appeal (whose Rules also permit applications for an amendment to a Notice of Appeal) applies a twofold analysis on such motions of whether the amendment is reasonably necessary and, if so, the extent of any resulting prejudice (see *Nyiti v. University College of Cape Breton*, 2009 NSCA 54).

[14] In the absence of argument on the issue, I am inclined to apply an "interests of justice" measure to this application. The low threshold applied to proposed amendments to general court pleadings is too permissive in the context of this appeal process, all of the stages of which are governed by prescribed timelines. By the same token, I see no reason for the FST to be fettered by a requirement of reasonable necessity before allowing such an amendment. Rather, leave to amend a Notice of Appeal should be given if in all of the circumstances it is just to do so. Such an approach affords this tribunal appropriate flexibility in the exercise of its discretion, and no other considerations are necessary.

[15] I will now turn to the present application.

[16] So far as applications to amend go, this one is unusual. As I have stated, following the filing of the Notice of Appeal and prior to the deadline for filing a written submission, the Superintendent asked Council to confirm whether the two documents in issue were indeed part of the Record when the Order below was made, while proceeding to say that, in the event Council confirmed that composition of the Record, it wished to amend its Notice of Appeal. Council then confirmed its position that those documents were indeed part of the Record. Apparently the Superintendent did not know when it filed its Notice of Appeal what the Record below comprised, and accordingly its first opportunity to form a view upon it came following that filing. Presumably, if the procedures were different and the Superintendent could have been certain of the Record content earlier on, its original Notice of Appeal would have included the ground it now proposes to add.

[17] That history tends to favour the allowance of this application, bearing fairness or justice principles in mind, though I recognize that, even if matters had proceeded that way, it would have been open to Council to apply for a summary dismissal of the ground of appeal concerning the Record, on the basis, for example, that there was no reasonable prospect for its success, in accordance with paragraph 3.6 of the *Guidelines*. Of course, the overall merits of the present application must be considered, beyond recognizing how it came about.

[18] I have decided it is in the interests of justice to permit the application to amend as sought, and I so order. Whether the appeal argument will ultimately succeed is a different question, and I will say little about its underlying merit pending full appeal submissions, though I will express my reasons for allowing the application, as follows:

(a) it is at least arguable that the Superintendent has a right under section 54(1)(d) of *RESA* to appeal on matters other than merely the sufficiency of penalty. I see potential merit in the position that a broader right flows from the absence of any limiting language and from the reference to arguably coextensive rights of appeal enjoyed by the Superintendent and the person subject to the appeal, who presumably would have wide appeal rights extending to matters of due process. I also recognize that the Superintendent appears to have a right to appeal from a consent order of Council, as per section 41(5)(a)(ii) of *RESA*;

(b) while I appreciate Council's position that the two documents in issue here were really part of a single, unified process yielding the consent Order ultimately made, I nonetheless regard it as at least arguable that those materials should not have been included within the Record, bearing in mind authority such as the following references from the British Columbia Administrative Law Practice Manual, published by CLE B.C. (2012), and relied on here by the Superintendent:

> … In practical terms, the record before the tribunal generally consists of:
>
> (1) originating and other documents equivalent to pleadings in civil court;
>
> (2) documents introduced into evidence, including expert reports;
>
> (3) any agreed statement of fact;
>
> (4) real evidence introduced into evidence, such as video and audio recordings and tangible things marked as exhibits; and
>
> (5) oral evidence heard by the tribunal
>
> (at p. 8-2)
>
> …
>
> Similarly, draft decisions and similar documents emanating from the adjudicator or from internal tribunal consultations do not form part of the record before the tribunal and are not accessible to the parties or the court on judicial review. Such materials are covered by the principle of deliberate secrecy (Ellis-Don Ltd. v. Ontario (Labour Relations Board), 2001 SCC 4 at paras. 52 to 55).
>
> (at p. 8-12)

(c) while it is not clear to me whether, even assuming for the moment that the Record wrongly included certain material, this would be a reviewable error with an actual consequence in this appeal, I am persuaded that the point may, possibly, touch on important principle, and that the Superintendent deserves an opportunity to attempt to develop it in a full submission;

(d) Council does not assert any prejudice to it arising from the amendment, and, I would think, appropriately not, as it would be hard to conceive of any; and

(e) on receiving the Record, the Superintendent moved expeditiously to raise its further argument based on the content of that Record, and at its first practical opportunity to do so. The result is that the amendment comes early in the process, and conveniently before any submissions have been composed.

[19] Upon receipt of the Appellant's application for leave to amend its Notice of Appeal, by letter dated March 30, 2015, the FST suspended the usual written submissions schedule as set out in section 3.11 of the Guidelines, pending my decision on the preliminary application. I will now set a new deadline for the filing of the Appellant's submission of June 29, 2015, being twenty one days from delivery of this decision. Following the filing of the Appellant's submission, other submissions will be due in accordance with the time periods set out in the *Guidelines*.

"Patrick Lewis"

Patrick F. Lewis, Panel Chair
Financial Services Tribunal

June 8, 2015