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DECISION NO. 2016-RSA-002(d)

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

BETWEEN:	Yu-Hsiang (Lester) Lin	**APPELLANT**
AND:	Real Estate Council of British Columbia and Superintendent of Real Estate	**RESPONDENTS**
BEFORE:	A Panel of the Financial Services Tribunal Patrick F. Lewis, Vice-Chair	
DATE:	Conducted by way of written submissions concluding on June 5, 2017	
APPEARING:	For the Appellant:	Wes McMillan, Counsel
	For the Respondent Real Estate Council:	Jessica S. Gossen, Counsel
	For the Respondent Superintendent:	Joni Worton, Counsel

APPEAL

A. Overview

[1] This is an appeal by Yu-Hsiang (Lester) Lin ("Mr. Lin" or "the Appellant") from a December 17, 2015 Order of the Real Estate Council of British Columbia cancelling his licence, first issued on September 7, 2008, to practice as a realtor in the province ("the Cancellation Order").

[2] I will refer below to the committee within the Real Estate Council that made the Cancellation Order as "the Committee", and to the Real Estate Council in its capacity as a party either to the proceeding below or this appeal as "Council".

[3] Extensive written submissions have been made on this appeal by Mr. Lin and by Council, both through counsel on their behalf. The Superintendent of Real Estate advised by letter of May 18, 2017 to this tribunal that it supports Council's submissions.

[4] The Cancellation Order expresses that the Committee (of which there were evidently three members) had read the Affidavits of Carmen deFoy and Bellia Tan, both Compliance Officers within Council, and further that a Consent Order Review Committee ("CORC") had made an Order against Mr. Lin on August 17, 2015, among other things suspending him for a period of one year ("the Consent Order"). The Cancellation Order, accordingly, was grounded in the Consent Order made four months earlier and the intervening evidence of Ms. deFoy and Ms. Tan.

[5] The Consent Order was made pursuant to section 41 of the *Real Estate Services Act*, SBC 2004, c. 42 ("*RESA*"), which provides in part that after a notice of discipline hearing has been issued to a licensee, he or she may propose a specified order under section 43, without a hearing, and which proposal may be accepted or rejected. The agreed discipline terms reflected certain of the actions enumerated at subsection 43(2) of *RESA*, thereby engaging subsections 43(3) and (4), which provide:

> (3) An order under subsection (2) may provide that,
>
> (a) if the licensee fails to comply with the order, or
>
> (b) if the licensee fails to comply with one or more specified restrictions or conditions of the licensee's licence,
>
> a discipline committee may suspend or cancel the licence under subsection (4).
>
> (4) If the licensee fails to comply as specified by a provision under subsection (3), a discipline committee may, by order, suspend or cancel the licensee's licence, as applicable, without the need for giving the licensee further notice or the opportunity to be heard.

[6] On the strength of the latter language in subsection 43(4), which was expressly incorporated in the Consent Order, Council later sought and obtained the Cancellation Order without notice to Mr. Lin and without his having the opportunity to be heard on the matter, in light of evidence appearing to show that Mr. Lin was practicing as a licensee while suspended.

[7] The one year suspension of the Appellant's licence called for by the Consent Order had commenced on September 23, 2015, and by its natural course would have ended on September 22, 2016. It was interrupted, however, by the concerns Council formed in the months following, leading to the Affidavits of the Compliance Officers and the Cancellation Order of December 17, 2015. In the result, the suspension was abridged and overtaken by a cancellation.

[8] Three interlocutory motions have been brought in this appeal proceeding, as follows:

(a) an unopposed motion by the Appellant seeking an extension of time to file a notice of appeal (in sympathetic circumstances, and after Mr. Lin had initially made efforts to return to the Committee to pursue his concerns), which I granted on November 3, 2016 ("the Extension Order");

(b) an unopposed motion by Mr. Lin to adduce new evidence on the appeal, in the form of transcripts of cross-examinations of Ms. deFoy and Ms. Tan, a documentary Affidavit and an audio recording, which I granted on December 9, 2016; and

(c) a contentious motion by Council to lift the stay of the Cancellation Order arising from subsection 55(2) of *RESA*, with the intended consequence that the Cancellation Order would

remain in effect pending this appeal, and which I granted on February 7, 2017 ("the Lift Order").

[9] Apart from during the roughly three months between the Extension Order and the Lift Order, the combined effect of the Consent Order, the Cancellation Order and the Lift Order is that the Appellant has been without a licence since his suspension began on September 23, 2015.

B. The Consent Order

[10] The Consent Order was preceded by an Agreed Statement of Facts ("ASF") and a Proposed Acceptance of Findings and Waiver signed by Mr. Lin and Council (with the caveat that Council indicated its endorsement only of the ASF, presumably on the view that the Proposed Acceptance of Findings and Waiver was by its nature provided solely by Mr. Lin to the CORC). The admitted misconduct was on any view very serious. While licenced in 2011 with Multiple Realty and in the course of acting for a prospective home buyer, Mr. Lin caused or allowed a purchase and sale agreement ("agreement") to indicate that the buyer had consented to a limited dual agency with Mr. Lin and another licensee with Multiple Realty, despite the client's never having heard of the other licensee. After a certain right-of-way on the property was discovered by the buyer, he refused to complete with the result that he was sued by the seller, and he then brought a third party claim against Mr. Lin in addition to a complaint to the Real Estate Council. The ensuing investigation revealed, and Mr. Lin later admitted in the ASF that:

(a) Mr. Lin had permitted the buyer to leave important parts of the agreement blank, and caused the second licensee to insert the price, deposit amount, her name as buying agent, the Working with a Realtor brochure and the Limited Dual Agency Agreement, and to purport to have been witness to the buyer's signature on the contract, when he knew that the other licensee had never met or had any contact with the buyer;

(b) he had acted in a deceptive manner in telling the buyer that other offers had been made on the property, which was not true and which caused the buyer to write a subject-free offer;

(c) he had acted in a deceptive manner and allowed a false or misleading statement to be made to the Real Estate Council (through his managing broker) that a builder he was representing had signed an offer on the property, which was not true;

(d) he had made two untrue statements to the Real Estate Council concerning an offer on the property by another party, a licensee; and

(e) he had caused the fabrication of evidence in the form of an offer to purchase the subject property by a certain party, and caused that party to provide a false statement to the Real Estate Errors

> & Omissions Insurance Corporation describing her role in the delivery of the apparent offer, which statement she later recanted in full.

[11] Following upon the acceptance of the ASF by the CORC, and to paraphrase, the Consent Order provided for:

(a) a one year suspension;

(b) a $10,000 discipline penalty payable within 90 days (being the maximum monetary penalty available under *RESA*);

(c) the completion at Mr. Lin's expense of certain remedial education and practice courses;

(d) upon reinstatement of his licence, direct supervision of Mr. Lin by his managing broker for a period of two years, a requirement that Mr. Lin advise his managing broker of any licenced or unlicenced assistants working for him, and a requirement that the managing broker review all transactions by Mr. Lin or any licenced assistant and report to Council anything of an adverse nature in connection with them; and

(e) payment by Mr. Lin of $1,250 in enforcement expenses within 60 days.

[12] As stated above, the Consent Order also expressed the concept set out in subsection 43(4) of *RESA*, to the effect that on a failure to comply with the order Council may suspend or cancel Mr. Lin's licence without further notice to him.

C. The Cancellation Order

[13] As I have indicated, the December 17, 2015 Cancellation Order was underpinned by the Consent Order and the evidence of Ms. deFoy and Ms. Tan. That evidence was generally to the effect that Mr. Lin had wrongly been performing real estate services while suspended.

[14] I will return to the evidence when I consider the substantive submissions on this appeal, but for immediate context I will describe it as follows.

[15] Ms. Tan stated that an investigation into Mr. Lin's activities while suspended was brought following concerns expressed by the Real Estate Board of Greater Vancouver ("the Real Estate Board"). She excerpts a portion of what she calls "Mr. Lin's blog" from a certain website containing background and promotional information respecting Mr. Lin as realtor, and Mr. Lin's Facebook profile referencing certain property listings in Burnaby (where Mr. Lin's practice was focused), both apparently current in December 2015 and both supplemented by Ms. Tan with translations of the Chinese text to English. Ms. Tan went on to describe her attendance on December 12, 2015, at an open house in Burnaby ("the Open House"), at which she posed as a potentially interested buyer and at which Mr. Lin and a licensee, Sisi Li of Lester Lin Realty, were present. She provides details of her observations there and of certain conversations occurring at the Open House, including with Mr. Lin, along with photographs and videos of the event. She opined

in her Affidavit that there was conduct upon which the Committee could conclude that Mr. Lin had breached the terms of the Consent Order, and expressed a belief that it was in the public interest that his licence be cancelled forthwith.

[16] Ms. deFoy gave written evidence that Lester Lin Realty was first licensed as a brokerage on September 18, 2015, and continued to be licensed at the time she swore her Affidavit. She stated that Mr. Lin transferred to Lester Lin Realty on September 22, 2015 (despite, apparently, the one year suspension about to commence). She attached the Consent Order and an August 18, 2015 letter sent by Council to Mr. Lin, setting out the dates of the imminent suspension and outlining the steps needed for compliance with the Consent Order, as well as a document enclosed with that letter headed "Procedure to be Followed in Case of Licence Suspension/Cancellation", which in part listed activities considered prohibited during the period of suspension ("the Prohibition List").

[17] Ms. deFoy stated further that on November 9, 2015, Council had received a complaint from the Real Estate Board which enclosed images captured from Mr. Lin's Facebook profile, including advertisements of properties for sale and what appeared to be a discussion between Mr. Lin and a member of the public regarding one of the properties. She proceeded to say that she created a fictitious persona that initiated an online dialogue with Mr. Lin, the particulars of which she provided. As did Ms. Tan, Ms. deFoy then opined that there was conduct upon which the Committee could conclude that Mr. Lin had breached the Consent Order, and she stated her belief that it was in the public interest that his licence be cancelled forthwith.

[18] The Cancellation Order reproduces the terms of the Consent Order and continues as follows:

> Whereas there has been conduct on the part of Yu-Hsiang (Lester) Lin during his period of suspension, namely that Yu-Hsiang (Lester) Lin is providing real estate services during the period of his suspension contrary to the terms of the Consent Order and contrary to section 20 of *RESA*;
>
> This Discipline Hearing Committee Orders that under sections (sic) 43(4) of the *Real Estate Services Act* Yu-Hsiang (Lester) Lin's licence is hereby canceled effective immediately.
>
> TAKE NOTICE that Yu-Hsiang (Lester) Lin may, pursuant to section 43(5) of the *Real Estate Services Act*, apply to vary or rescind this order by delivering written notice to the Real Estate Council.

[19] That final term tracks subsection 43(5) of *RESA*, which provides that:

> A discipline committee may, by order, on the application of or with the consent of the licensee subject to the order, vary or rescind an order made under this section.

[20] It was pursuant to that term of the Cancellation Order and that statutory provision that Mr. Lin, then represented by counsel, sought a return to Council for some time following the Cancellation Order. For reasons of no significance to this

appeal, he ultimately decided, with the acquiescence of Council so far as the timing was concerned, to pursue an appeal to this tribunal.

D. Grounds of Appeal

[21] Mr. Lin advances the following grounds of appeal:

(a) the Committee did not have the statutory jurisdiction to proceed under subsection 43(4) of *RESA*;

(b) Council in its investigation was procedurally unfair to Mr. Lin, on various scores but including by failing to interview Mr. Lin and by otherwise (allegedly) conducting the investigation incompetently and hurriedly, mischaracterizing and suppressing evidence, presenting false or misleading evidence to the Committee, and acting in a biased and closed-minded manner;

(c) the process before the Committee itself was procedurally unfair to Mr. Lin, because Mr. Lin was denied notice of the hearing and the opportunity to be heard, he was entitled to receive reasons for the Cancellation Order but none were given, the Committee lacked independence from Council, and Council failed to make full and frank disclosure to the Committee despite the *ex parte* nature of the process;

(d) the Committee's finding that Mr. Lin had engaged in misconduct was unreasonable; and

(e) the penalty of licence cancellation was unreasonable.

E. Standard of Review

[22] The parties are agreed on the applicable standard of review in relation to all of the foregoing grounds of appeal, except the first of them: the Appellant maintains that the correctness standard applies to its jurisdictional challenge and Council argues, on the premise that this is not a jurisdictional challenge at all, that the reasonableness standard applies. I will return to that question further below.

[23] As concerns the asserted lack of procedural fairness, both in relation to the investigation and the ultimate process before the Committee, the parties agree that according to the current posture of the case law these questions are to be judged, not on either a correctness or a reasonableness standard, but rather in view of whether Council and the Committee acted fairly. This proposition emerges from a growing view in the judicial review jurisprudence, perhaps best exemplified in this jurisdiction by *Seaspan Ferries Corporation v. British Columbia Ferry Services Inc.*, 2013 BCCA 55 (at 48-52), that the correctness and reasonableness measures do not fit well with attacks on procedural fairness, and that no criterion other than "fairness" itself is needed in such a circumstance. As can be seen by the Court's discussion of this question in *Seaspan*, the point was not previously entrenched and clarification was evidently required. That said, the fairness assessment was felt by the Court of Appeal to be consistent with (if not directly flowing from) certain earlier authorities, including the leading decision in *Dunsmuir*

v. New Brunswick, [2008] 1SCR 190, where the Supreme Court of Canada considered procedural fairness without attaching any standard of review to the question, apparently not considering it necessary to do so, and with subsections 58(2)(b) and 59(5) of the *Administrative Tribunals Act*, SBC 2004, c. 45. The effect of those provisions is that, whether or not the statute in issue contains a privative clause, on a judicial review of a tribunal decision a question around the application of common law rules of natural justice and procedural fairness is to be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

[24] The use of the fairness approach in *Seaspan* to an issue of procedural fairness was adopted by this tribunal in *Kadioglu v. Real Estate Council of British Columbia*, FST 2015-RSA-003(b). It was held there that the fairness test was appropriately applied by this tribunal in deciding whether the proceedings below were fair, though from the unique perspective of specialized knowledge of the industry factors falling within that tribunal's responsibility.

[25] I note as well that in *Hensel v. Registrar of Mortgage Brokers*, FST 2016-MBA-001(a) this tribunal also assessed a procedural fairness submission on the basis of whether the procedure below had been fair in all of the circumstances.

[26] I am not bound either by the Court decisions I have just referenced or even by the foregoing decisions of this tribunal, though as to the latter it is certainly desirable to strive for tribunal consistency wherever it can rightly be found.

[27] I have indeed decided to consider the procedural fairness submissions made by the Appellant on the basis of whether what took place in each of the investigative and adjudicative processes below was fair, in all of the circumstances. That will need to be assessed in light of both the evidence and the legal principles applying in those spheres. I settle on that approach because both parties, represented by counsel, propose it, two recent decisions of this tribunal have adopted it and, while an appellate tribunal must always consider whether judicial review principles are applicable to its context, I am influenced by the discussion of the point in the *Seaspan* decision. I would not want to conclude, however, that the approach by this tribunal to matters of procedural fairness is necessarily entirely settled, given that in none of *Kadioglu*, *Hensel* or this appeal have both sides of the question been argued, and it is apparent that the proposition emerging from *Seaspan* was at least partly based on considerations unique to judicial rather than tribunal review; at least as one example, subsections 58(2)(b) and 59(5) of the *Administrative Tribunals Act* relied on in that judgment are expressly applicable only to judicial reviews. In any case, whether there is anything left of the issue to be contended I leave for another day, content for the reasons I have given to proceed here as the parties have proposed.

[28] The parties are also in agreement that the challenges to the misconduct finding against Mr. Lin and to the cancellation of his licence are to be approached on the reasonableness standard. Both those determinations under attack involved the weighing of facts by a specialist tribunal mandated to regulate the profession of which the Appellant was a member, and I consider the positions of the parties on this score to be entirely appropriate and in line with established authority, including of this tribunal. I will approach those questions accordingly.

[29] I now return to the asserted lack of jurisdiction of the Committee to act as it did under subsection 43(4) of *RESA*. Some understanding of the Appellant's position here is needed in order to inform the appropriate review standard.

[30] Mr. Lin's position is that the *ex parte* stripping away of his professional standing trenched on a most fundamental legal right and that, despite the language of subsection 43(4) of *RESA* (reproduced in paragraph 5 above), the Committee had no jurisdiction to take that action without notice to him. He characterizes the question of the proper interpretation of subsection 43(4) and the jurisdiction it confers as being of pure law and beyond the special expertise of the Committee. Pointing out that *RESA* includes no privative clause, he likens this ground of appeal to a jurisdictional challenge made in *Hensel, supra*, where this tribunal applied a correctness standard to the issue, just as, he submits, should occur here.

[31] Beneath the broad position I have just tersely described, Mr. Lin submits that the *ex parte* Cancellation Order was an excess of jurisdiction for the particular reasons that:

(a) subsection 43(4) allows for such an order only in the event of non-compliance with the previous order, but the Cancellation Order is based on the finding that Mr. Lin had violated a provision of *RESA*, rather than of the Consent Order itself; and

(b) the opening words of subsection 43(4), "If the licensee fails to comply as specified …" cannot give rise to a without notice order if the fact of non-compliance is controversial and cannot be easily determined.

[32] Council responds by submitting that, particularly in view of *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] SCC 47, Mr. Lin has not here raised a true question of jurisdiction or a pure question of law and, even recognizing the absence of a privative clause within *RESA* and a statutory right of appeal, a question of this kind should be judged on a reasonableness measure, and indeed is so presumed as the question concerns the tribunal's interpretation of its home statute.

[33] To that submission, the Appellant replies that *Edmonton East* should be applied to judicial but not tribunal reviews, and the Committee in fact gave no interpretation one way or another to subsection 43(4) of *RESA*, relieving any need for deference to a tribunal's construction of its governing legislation.

[34] *Edmonton East* concerned a municipal assessment of property taxes initially appealed to a tribunal called the Assessment Review Board ("Board") before the case proceeded through the Court system. The Alberta courts had decided that the Board's assessment should be set aside and a new hearing conducted, but the Supreme Court of Canada allowed the appeal before it with the result that the decision of the Board was reinstated. The Supreme Court of Canada reasoned that the substantive issue in the case, being whether the Board had the power to increase the tax assessment, turned on the interpretation of a provision in the Board's home statute, and that as the issue did not fall within one of the categories identified in *Dunsmuir, supra*, calling for a correctness review, the standard of

review is presumed to be reasonableness. In the result, it held the decision of the Board to have been reasonable, thereby warranting the upholding of its decision in the form of an allowance of the appeal.

[35] There is some apparent merit in the Appellant's view of this issue. The argument he makes is plainly that the Committee utterly lacked jurisdiction to proceed without notice having been given to him. I am mindful of the admonition in leading case authorities, including *Edmonton East* and *Dunsmuir, supra*, against an over-broad characterization of a jurisdictional issue, but the Appellant puts his submission narrowly and precisely asserts that in the circumstances jurisdiction did not vest at all.

[36] I also recognize the presumption of a reasonableness standard of review of questions of tribunals' interpretations of their home statutes, even if the authority relied upon by Council here involved a judicial rather than tribunal review perspective (the significance of which distinction in this context I do not find it necessary to consider). Where a tribunal applies a provision in its governing statute to any degree it must be lending an interpretation to it, even if interpretive issues are not expressed in reasons or overtly considered. I believe that to have been the case here despite the difference between the extent to which the Board in *Edmonton East* actively construed its statutory ability to increase a taxation levy in the many millions of dollars, and the much smaller extent to which the Committee in this matter likely considered the scope of its power under subsection 43(4) of *RESA*.

[37] But what plainly to my mind tips the scales here is the need, as I explain below when considering the substantive merit of this ground of appeal, to determine factually whether non-compliance with a previous order has or has not occurred before it can be known whether the subsection 43(4) *ex parte* power is available. In light of that, the issue raised by the Appellant's submission is not merely of law, but rather entails consideration of facts and therefore in my view calls for deference to the first-instance adjudicator.

[38] Balancing all of the above considerations I conclude that a reasonableness standard applies to the Appellant's threshold submission, even though characterized by him as one purely challenging jurisdiction.

F. Arguments on Appeal

(i) Alleged Lack of Jurisdiction

[39] With logical sequencing in mind, I continue immediately, now substantively, with this question.

[40] In support of this submission the Appellant cites a series of broad legal principles:

(a) a tribunal must follow the rules of natural justice, including the provision of notice and an opportunity to defend where a person's professional standing is in jeopardy;

(b) within disciplinary proceedings a tribunal must comply with statutory requirements upon it, and particularly where a person's right of occupation is challenged such requirements will be construed strictly;

(c) words in a statute are to be read in their grammatical and ordinary sense, harmoniously with the scheme and object of the legislation and the intention of the legislators;

(d) fundamental rights, such as of a professional to procedural fairness in a discipline inquiry, will be seen as removed or curtailed by legislation only where the language is clearly to that effect; and

(e) following the recent Supreme Court of Canada decision in *Green v. The Law Society of Manitoba*, 2017 SCC 20, legislation apparently permitting a fundamental breach of the duty of fairness will not normally be considered exhaustive of procedural rights and the common law may be employed to supplement the statute and fill any resulting gap.

[41] As I stated above when discussing the applicable standard of review, the Appellant, while stopping short of any general attack upon subsection 43(4) of *RESA*, has submitted that the provision did not cloak the Committee with authority to proceed *ex parte* in this case, because it applies only where there has been a breach of a previous order, whereas the Cancellation Order was founded rather on a finding of a statutory breach, and where the asserted non-compliance was (to paraphrase) apparent and uncontroversial, in contrast, says the Appellant, to the situation here.

[42] Council takes issue with the Appellant's interpretation of both subsection 43(4) and the Cancellation Order itself. It underscores that the Cancellation Order expressly includes a finding that Mr. Lin's conduct was contrary to *both* the terms of the Consent Order and section 20 of *RESA*. That is undoubtedly the case and in view of this I cannot accept the Appellant's first specific submission within its jurisdictional challenge.

[43] More broadly, Council submits that the language of subsection 43(4) was precisely clear enough to empower the Committee to proceed without notice to Mr. Lin. It argues that the legislature saw the importance of strong and swift recourse by Council where evidence showed ongoing and deliberate conduct bringing the realty profession into disrepute, allowing it to enforce its own orders for the protection of unwary members of the public without notice to the licensee if so indicated by the public interest. Council characterizes *RESA* as consumer protection legislation and says it should be broadly construed, consistently with the need of the regulator to protect the public interest and maintain proper conduct of licensees.

[44] It is convenient to again set out subsections 43(3) to 43(5):

(3) An order under subsection (2) may provide that,

> (a) if the licensee fails to comply with the order, or
>
> (b) if the licensee fails to comply with one or more specified restrictions or conditions of the licensee's licence,
>
> a discipline committee may suspend or cancel the licence under subsection (4).
>
> (4) If the licensee fails to comply as specified by a provision under subsection (3), a discipline committee may, by order, suspend or cancel the licensee's licence, as applicable, without the need for giving the licensee further notice or the opportunity to be heard.
>
> (5) A discipline committee may, by order, on the application of or with the consent of the licensee subject to the order, vary or rescind an order made under this section.

[45] The Appellant essentially submits that this statutory *ex parte* power is engaged only in the case of a clear breach of a previous Order. Council responds that the jurisdiction to make the Cancellation Order in this case is found squarely within subsection 43(4), though while also maintaining that Mr. Lin's breach of the Consent Order was indeed clear. Council does not address directly the question of the extent of the clarity needed to invoke the jurisdiction. In considering the Appellant's submission, I find that I must do so.

[46] Subsection 43(3) contemplates that a discipline order may or may not provide that, in certain events including non-compliance with the order, a discipline committee may suspend or cancel the licence under subsection (4). Subsection 43(4) then confers a power (rather than a duty, as the language is permissive) upon a discipline committee to suspend or cancel a licence without giving the licensee notice or the opportunity to be heard, if there has been a failure to comply as specified by a provision under subsection (3). If the order does not include the term permitted by subsection (3), then a subsection (4) scenario cannot arise. Subsection 43(5) then provides that, where a suspension or cancellation of licence has occurred under subsection (4), a discipline committee may on application or with the licensee's consent vary or rescind an order made "under this section", which I take to extend to any order made under section 43 of *RESA*, whether an initial order under subsection 43(2), an order under subsection (3) or an *ex parte* order under subsection (4). Accordingly, such an *ex parte* order can subsequently be challenged by the licensee before the discipline committee itself (which, I note, was the course initially pursued by Mr. Lin).

[47] The Consent Order in this case did indeed include a subsection 43(3) term, the text of which was as follows:

> If Yu-Hsiang (Lester) Lin fails to comply with any term of this Order, the Council may suspend or cancel his licence without further notice to him, pursuant to sections 43(3) and 43(4) of the *Real Estate Services Act*.

[48] The non-compliance referred to in the later Cancellation Order was with the one year suspension imposed by the Consent Order, as it was found that Mr. Lin had provided real estate services during his suspension, contrary to the Consent

Order and section 20 of *RESA* (which prohibits a licensee from providing real estate services when his licence is inoperative or suspended).

[49] Accordingly, applying with some paraphrase subsections 43(3) and (4) to the matter at hand, the original order stipulated that in the event of its non-compliance Council may suspend or cancel Mr. Lin's licence without further notice to him, and the ultimate order imposed cancellation because of a perceived failure to abide the suspension in the original order.

[50] The opening words of subsection 43(4) are simply, "If the licensee fails to comply …". If there is no failure to comply, the provision will not be in play. But how is it to be determined whether there has been a failure to comply, and to what standard must non-compliance be shown? Further, if suspension or cancellation is ordered under subsection (4) but it is later shown by the licensee, either on a subsection 43(5) application to the discipline committee or on appeal to this tribunal, that in fact there had *not* been a failure to comply, does this mean that there had been no jurisdiction for the *ex parte* order or merely that it should be set aside?

[51] The Appellant's position is that jurisdiction only exists if the failure to comply is "easily determined" and not "controversial". While distancing itself from the Appellant's interpretation of the statute, Council appears to primarily say in response that it may act without notice to the licensee where called for by the public interest, while also submitting that in drafting *RESA* the legislature gave Council "… strong and swift recourse in circumstances such as these where there is clear evidence of ongoing, deliberate conduct which both brings the profession into the public disrepute …". I might be construing this statement unfairly if I took Council to mean that it is *only* in cases of clear and ongoing misconduct that the *ex parte* power exists, rather than as simply submitting that surely it must apply in such a case.

[52] As I have noted, an *ex parte* order under subsection 43(4) is not immune from attack, the two methods for doing so being an application under subsection 43(5) and a statutory appeal.

[53] Neither party has cited any authority dealing with the question of whether a tribunal is without jurisdiction if it exercises a statutory power dependent on a factual finding later shown to have been wrong, or whether it will nonetheless have been procedurally entitled to act though in the ultimate event the substance of its decision must be set aside. Again, the opening words of subsection 43(4) are, "If the licensee fails to comply …". They are not, for example:

> "If the Discipline Committee determines that the licensee has failed to comply …",
>
> "If it appears the licensee has failed to comply … and if it considers it in the public interest to do so … may …". or
>
> "If it appears obvious that the licensee has failed to comply …".

[54] I agree with Council that subsection 43(4) contains clear language sufficient to override any otherwise common law right to notice and opportunity to be heard

even before an order for cancellation of one's professional standing is made – there is no other reasonable interpretation of the language – but on condition, however, that the licensee has indeed failed to comply. The *ex parte* power to cancel a licence is plain enough so far as it goes, but the more difficult question is the nature of the factual circumstance that triggers it.

[55] I cannot accept the benchmarks proposed by the Appellant such as non-compliance being easily determined or not controversial, partly as they are too vague to consistently apply. More importantly, they would limit the use of the subsection 43(4) power to circumstances in which it seemed clear that there had been a failure to comply, rendering it inapplicable in situations where there had in fact been a failure to comply though not initially apparent – and that construction is not consistent with the language used. I have arrived at the view, however, that the power to make an *ex parte* order under subsection 43(4) exists simply where there has *in fact been* a failure to comply by the licensee within the meaning of the provision. I consider that to be the fairest view of the language used (both on its own and in its context) and one that avoids amplification of statutory meaning where a fundamental right, such as to receive notice of an intention to arrest one's livelihood, has been cut down.[1]

[56] The result is that a discipline committee within Council will want to ensure it is on safe ground before purporting to exercise its subsection 43(4) power, and I consider that an entirely fair state of affairs.

[57] I pause to say that, while the Appellant puts this argument on the basis of jurisdiction, it might be more accurately characterized as an issue of statutory power. Apart from Council's submission that care need be taken not to misdescribe an issue as one of jurisdiction when in fact true jurisdictional questions are narrow, all of which I accept, no submission has been made on whether this threshold argument by the Appellant is in fact one of jurisdiction, or perhaps one respecting a power. I am generally aware that, while jurisdiction and power are related concepts they are not identical, but I will say no more on the topic as it has not been addressed by the parties and I do not think the point is necessary to my decision. When I use the terms "jurisdiction" and "power" in these reasons, it is out of convenience in the context rather than an attempt to distinguish the one from the other.

[58] The remaining question under this head is whether Council acted reasonably in concluding that Mr. Lin had failed to comply with the suspension order upon him, thereby clothing the Committee with the power to proceed as it did.

[59] The underlying question arising is whether Mr. Lin performed "real estate services" while suspended. Section 1 of *RESA* includes the following definitions:

> "**real estate services**" means

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[1] In saying this I appreciate that Mr. Lin accepted a term in the Consent Order specifically contemplating such an eventuality. Leaving aside that he was unrepresented at that time, for which no one is to be faulted, that term in the Consent Order references and simply brings one back to the language of subsection 43(4), and the need to determine in what situation *ex parte* action can be taken. That it could occur only where there had been a failure by Mr. Lin to comply afforded him a level of protection, despite his acceptance of the Consent Order terms.

(a) rental property management services,

(b) strata management services, or

(c) trading services;

"**trading services**" means any of the following services provided to or on behalf of a party to a trade in real estate:

(i) advising on the appropriate price for the real estate;

(ii) making representations about the real estate;

(iii) finding the real estate for a party to acquire;

(iv) finding a party to acquire the real estate;

(v) showing the real estate;

(vi) negotiating the price of the real estate or the terms of the trade in real estate;

(vii) presenting offers to dispose of or acquire the real estate;

(viii) receiving deposit money paid in respect of the real estate

but does not include an activity excluded by regulation;

[60] With the latter language in mind, I now set out subsection 2.10(2)(b) of the *Real Estate Services Regulation*, BC Reg. 506/2004 ("the *Regulation*"), as follows:

Exemption for persons providing information only

2.10 (1) A person who is providing trading services only by providing information is exempt from the requirement to be licensed under Part 2 of the *Act*.

(2) Without limiting subsection (1), that subsection applies to

…

(b) the publication of information contained in an advertisement of specific real estate.

[61] As pointed out by Mr. Lin in his submissions, the Professional Standards Manual ("the Manual") published by the Real Estate Council includes the following language in relation to the foregoing exemption:

Mr. Good has written a book entitled "How to Sell Your Own Home". He also operates a website which provides general tips for people who wish to sell real estate they own without the assistance of a licensee. The website includes a section where

> property owners can advertise their home for sale and provide their contact information for follow-up enquiries.
>
> Section 2.10 of the Real Estate Services Regulation provides an exemption for those who provide trading services by providing general information only. This includes providing material and information to assist owners to dispose of their own real estate by themselves, and the publication of information contained in an advertisement of specific real estate. The services that Mr. Good provides, including the advertising section of his website fall within the parameters of this exemption.

[62] The Manual also provides in respect of Trading Services that licensees may employ assistants who are entitled to schedule appointments for the licensee, though not for the purpose of soliciting business.

[63] The Appellant submits that he did not perform real estate services while suspended, and particularly that:

(a) the Facebook conversation to which he was party did not go beyond arranging appointments for Sisi Li, the licensee he says he was assisting;

(b) the advertisements he posted from Ms. Li's listings on Facebook fall within the subsection 2.10(2)(b) exemption set out above;

(c) he did not "host" the Open House attended by the Compliance Officer, Bellia Tan, but rather attended the Open House strictly as an assistant to the host, Ms. Li; and

(d) what was characterized in evidence before the Committee as his "blog" was in fact merely a directory providing links to various websites around the world, without any evidence that Mr. Lin had any control over removal of its content.

[64] Turning to the submissions of Council, reliance is put on the Prohibition List (as defined in paragraph 16 above) which includes language that the licensee must not:

- host open houses or solicit sellers, buyers, landlords or tenants in any manner;

...

- communicate with consumers about any real estate transaction or service agreement.

[65] The Prohibition List also states that a suspended licensee must cease and remove all advertising during the term of the suspension, including by disabling all websites, web pages or other online representations, promotions or solicitations.

[66] Council refers further to what it describes as the "very broad" definition of "trading services" in *RESA*, and among those activities emphasizes "making representations about the real estate" and "showing the real estate".

[67] Council reviews various particulars of the evidence given below by Ms. Tan and Ms. deFoy, though without correlating the activities described there to any

particular type of trading service as defined in *RESA*. Council refers more generally to what it characterizes as clear evidence that Mr. Lin was performing real estate services while suspended and, as I have said, lays some stress upon the making of representations about real estate and the showing of real estate, among the statutory illustrations of trading services.

[68] Council does not refer to the Appellant's submissions around the exemption for the provision of information only and the elaboration of that exemption in the Manual. Council does not submit that Mr. Lin while suspended would have been less entitled to the benefit of this exemption than any other unlicensed member of the public, and nor, it seems to me, could such a distinction be fairly drawn.

[69] The rules around activities while suspended in the factual context of this appeal are as set out in the definition of "trading services" within *RESA* and as qualified by the *Regulation*. The Prohibition List, though no doubt created as a conduct monitor and an intended useful guide to the suspended licensee, does not have the force of law and would have to yield if not reflected in *RESA* or the *Regulation*.

[70] Looking together at *RESA* and the *Regulation*, I find that Mr. Lin was prohibited while suspended from making representations about or showing any real estate to a party to a prospective trade in that real estate, though he was not restrained from providing information only.

[71] As to particular activities of Mr. Lin while suspended, Ms. Tan in her Affidavit refers to a website hhlink.com that she describes as Mr. Lin's blog, to Mr. Lin's Facebook profile and to her attendance at the Open House.

[72] While defending the presentation of the so-called blog evidence as forming part of its investigation, and denying the allegation of bias in connection with that evidence, Council on this appeal does not submit that the above website amounted to the performance of real estate services by Mr. Lin during his suspension. Its focus rather is on the Facebook exchanges and the Open House.

[73] Ms. Tan gave evidence that on December 10, 2015, roughly 2 ½ months into the one year suspension, she viewed Mr. Lin's Facebook profile (in a Chinese language) which she exhibits to her Affidavit together with her translation from Chinese to English. It included a photograph of Mr. Lin, his contact information, a reference to his having been a "Recipient of top 1% Golden President Club Award" (sic), and advertisements for two Burnaby properties said to be listed by Lester Lin Realty and including apparently factual information, along with terse marketing language (in one case, "rare opportunity", and in the other, "luxury mansion").

[74] In her evidence, Ms. deFoy also exhibited an excerpt from Mr. Lin's Facebook profile as at November 9, 2015, which included an advertisement for one of the two properties referred to in Ms. Tan's Affidavit and a brief conversation wherein Mr. Lin appears to have answered a query as to lot size. She goes on to describe, as I said earlier in these reasons, that she then created a fictitious persona for the purpose of pursuing a Facebook conversation with Mr. Lin. Within that ensuing conversation, in which Ms. deFoy was putting certain basic questions to Mr. Lin and which he proceeded to answer, there appears to have sent or caused to be sent an email to the inquiring party, attaching an information sheet for the

property clearly indicated to have been presented by Sisi Li of Lester Lin Realty. When Ms. deFoy inquired about a viewing of the property, Mr. Lin asked that she contact "my wife Sisi" to set up an appointment, and offered a telephone number. Ms. deFoy then pursued a text exchange, apparently with Sisi, in which she started by suggesting that Mr. Lin had indicated Sisi could arrange an appointment for Mr. Lin to show her the property. The upshot of that dialogue was Sisi's statement that, "Lester don't do showings" (sic) but that she, Sisi, would be available to show the property.

[75] Once again, the Open House was on December 9, 2015. It was advertised by Sisi Li, as a licensee with Lester Lin Realty, and both Mr. Lin and Ms. Li were present in the home during Ms. Tan's attendance. Mr. Lin greeted Ms. Tan near the main entrance to the home and told her that, "We just ran out of feature sheets". Ms. Tan walked toward the upper floor of the property, followed by Mr. Lin and then spoke with Ms. Li, who told Ms. Tan that she could not give her a feature sheet as she only had one left. Ms. Tan asked Ms. Li about the assessment on the property (that is, the assessed value, for tax purposes, I assume) and Ms. Li said she needed to check and asked Mr. Lin if he remembered the assessment, though Mr. Lin simply shook his head. Ms. Tan then proceeded to view the three upstairs bedrooms and Mr. Lin followed. They had a conversation about the existing rental income for the bedrooms, with Mr. Lin saying that he was not sure and the details needed to be confirmed with the landlord, but he thought it was $500 or $600 per room. On being asked by Ms. Tan, he ventured that he thought the tenants will likely want to stay, and when she requested that he contact the landlord (apparently to confirm these details), he responded, "Good, good". Ms. Tan then rejoined Ms. Li and asked her about the rental income, being told that the rents were approximately $1,600 to $1,700, that the parents of the owner lived downstairs and the assessment was approximately $1,000,000. Returning to the downstairs, Ms. Tan says that she had another conversation with Mr. Lin in which she related what Ms. Li had said about the rental income, and further that Mr. Lin said that the first bedroom rented for $550, the second for $550 and the third for $700 so the total should be $1,800. She also states that Mr. Lin told her that two people sitting in the recreation room were the parents of the owner. As to the recreation room, she says that Mr. Lin also told her that she could convert the room to a two bedroom rental income suite.

[76] Ms. Tan continued by stating that a licensee walked into the home and asked Mr. Lin if he was an agent but that he did not answer. She added that another person asked him if he was a realtor but that, without speaking, he pointed his finger toward the upstairs, which is where Ms. Li had positioned herself. She said that she asked Mr. Lin about the size of the recreation room, to which he answered "600 square feet". She then related that three prospective buyers walked into the recreation room and asked Mr. Lin about the occupants of the property, to which he answered that the parents of the owner lived downstairs and three students were renting upstairs. She asked Mr. Lin if she could take photos of the home, to which he answered affirmatively, and she then moved around the home doing so. She also said that she heard Mr. Lin speaking to three prospective buyers in Chinese (which Ms. Tan understands) about what she understood to be

the rental potential of the property. She stated that she also saw Mr. Lin moving through parts of the home with the prospective buyers.

[77] Having reviewed the evidence, I will now set out my conclusions around Mr. Lin's compliance with the Consent Order or otherwise.

[78] First, I am not prepared to conclude that there is anything in the two Facebook conversations to which Mr. Lin was privy that amounted to the performance by him of trading services, being the only area of real estate services relevant on these facts. His contributions to those conversations were minimal and, to the extent anything substantive was said by him within them, it amounted to no more than the provision of very basic information. I agree with the Appellant that this is the sort of information that an unlicensed party could offer with impunity.

[79] Second, I am not prepared to conclude that the maintenance while suspended of two real estate listings on Mr. Lin's Facebook page was an activity from which he was restrained. I appreciate that the Prohibition List expressly directed Mr. Lin to disable all such forms of advertising, but the Consent Order, referring only to a one year suspension, does not set this out. More to the point, and while I can imagine that such publication would otherwise constitute "finding a party to acquire the real estate", as that phrase appears at subsection (d) under the definition of "trading services" – which I will refrain from stating definitively, as there has been no argument on the point – it would seem to be exempted from any licensing requirement under section 2.10(2)(b) of the *Regulation*, which refers to "the publication of information contained in an advertisement of specific real estate". As I said earlier, there are a couple of words in each of those two advertisements on Mr. Lin's Facebook profile that perhaps go beyond the pure provision of information, but in the absence of any argument about those words I consider them insignificant and trifling. All of that being so, I am not persuaded that the property listings on Mr. Lin's social medium were offside the Consent Order terms.

[80] Third, however, I am of the view that Mr. Lin's conduct at the Open House constituted the performance of real estate services, and in particular the showing of the real estate to a party to a prospective trade. This statutory language has not been analyzed in the submissions made before me but, in light of what I consider its ordinary meaning, to my mind Mr. Lin was that day "showing" real estate to parties to prospective trades, which I take to mean prospective or potential buyers of it. Underneath that conclusion I observe as follows:

(a) there is nothing within that statutory language to indicate that only one party can be showing real estate at the same time;

(b) it is not in my view determinative of the point to simply note that the Open House was being officially presented by Ms. Li. Such a fact is not irrelevant but the key consideration is substantive personal conduct; and

(c) Mr. Lin, who appears to have been present for the entire twenty five minutes or so when Ms. Tan visited the home, greeted her at the door, accompanied her through parts of the house,

> possessed and imparted knowledge regarding the property and the tenants, made a suggestion to her concerning the conversion of a certain room into a suite, and accompanied other prospective buyers through parts of the house while discussing the property with them.

[81] On any reasonable view of the word, I believe that Mr. Lin was "showing" the property on that occasion and therefore performing real estate services when suspended from doing so, and indeed after having been ordered by his consent not to do so.

[82] I will make two final comments before moving to the next ground of appeal.

[83] First, in my view it does not help Mr. Lin that he did not expressly hold himself out as a realtor during the Open House, or that he appeared to vaguely indicate that the licensee was upstairs. In other respects, and as I have just summarized, he implicitly did so represent himself, and beyond this, it is clearly the case that he did nothing to avoid a perception that he was acting as a licensee. It would have been more prudent and certainly safer if he had not attended the Open House at all, but even so there would have been a way of attending without transgressing. He did not achieve it.

[84] Second, and all of that said, the Prohibition List stipulated that the suspended licensee not "host" an open house, and this may have created some doubt as to what was permissible. Arguably it should not have used that word as *RESA* does not: rather, it is the "showing" of real estate that falls under the definition of trading services. I have no idea whether Mr. Lin or for that matter Sisi Li fixed on the word "host" and genuinely felt that the only host of an open house is the realtor sponsoring it, meaning that Mr. Lin was permitted to attend and participate in the Open House. There are, however, several answers to this: prudence would have kept Mr. Lin away from the Open House in any event; he should have asked Council whether any such (theoretical) interpretation was correct; while the point has not been argued and I say this qualifiedly, there can probably be more than one host of such an event (a co-host, for example, depending on contributions and conduct); there is broader language in the Prohibition List, such as not being involved in "… selling activity …", that should have caused Mr. Lin to be more circumspect; and, finally, it must in the end be the statutory rules that govern, and Mr. Lin was, as I have concluded, showing real estate to prospective buyers at the Open House when he had been suspended from such activity.

[85] In summary, I am of the view that the Appellant breached the Consent Order by his conduct at the Open House, but not otherwise.

(ii) Fairness of the Investigation

[86] The Appellant's challenges in this area are extensive, and include the following contentions:

(a) Council wrongly failed to ensure Mr. Lin was interviewed in relation to the concerns that he was in breach of the Consent Order;

(b) the investigation was slipshod and incompetently carried out;

(c) the investigation was rushed;

(d) evidence was mischaracterized and suppressed;

(e) the investigators were biased and closed-minded; and

(f) false or misleading evidence was placed before the Committee.

[87] The Appellant submits that Council had a duty to conduct the investigation fairly, citing *Swanson v. Institute of Chartered Accountants of Saskatchewan*, 2007 SKQB 480 and *Tanaka v. Certified General Accountants Assn of the Northwest Territories* (1996), 38 Admin. L.R. (2d) 99 (NWTSC), and to thoroughly carry it out, relying upon *Sketchley v. Canada (Attorney General)*, 2005 FCA 404 and *Public Service Alliance of Canada v. Canada (Treasury Board)*, 2005 FC 1297.

[88] Council roundly rejects the various allegations of investigative unfairness and, so far as the law is concerned, takes the position that the duty of fairness is minimal at the investigative stage of a professional misconduct inquiry, relying upon *Kyle v. Stewart*, 2017 BCSC 522, *George v. Canada (Attorney General)*, 2207 FC 564 and *Puar v. Association of Professional Engineers and Geoscientists*, 2009 BCCA 487.

[89] I will deal first with the scope of the duty of fairness during Council's investigation and thereby frame the ensuing factual review of the matter.

[90] *Swanson* was an application for judicial review of a tribunal committee's decision to hold a hearing in respect of a complaint against an accounting professional. The allegations on the motion were that the regulator had breached a duty of fairness to the member by showing bias during that phase of the matter, relying upon irrelevant evidence, failing to follow its own procedures, inquiring into matters outside of the complaint made and failing to provide full particulars of the complaint. The Saskatchewan Court of Queen's Bench accepted that, as the decision to proceed to hearing could have an adverse effect upon the member, and further as a duty of fairness arose during even that preliminary investigation, there must therefore be a right to seek judicial review of the decision. The Court held further that the duty of fairness at that preliminary stage was limited, to be distinguished from a full duty of fairness during or in connection with the ultimate hearing; an example given is that, whereas full particulars would be necessary for the hearing, at the investigative stage the member must simply be notified of the complaint to enable a response to it, following *Tanaka, supra* (also relied upon by the Appellant in the present case). Having determined that a limited fairness duty existed at the investigative stage, the Court went on to examine the particular concerns expressed and to conclude that there had been no breach of that duty.

[91] The decision of the Northwest Territories Supreme Court in *Tanaka* arose in a similar way, though with the opposite result as the direction for an inquiry into the conduct of the member professional was in that case quashed on findings that

the rules of natural justice applied during the investigation, including "at least a limited duty" to hear the member's side of the story before any decision was made, and further that the regulator fell down in that duty by failing to notify the member of the complaint and solicit her response. The Court appears to have accepted the reconciliation set out in Casey, *The Regulation of Professions in Canada* (1994), at 7-7 to 7-9, between past cases holding that there was or alternatively was not a duty of fairness during the investigation stage, based on whether it featured an element of decision-making. In the case before it, the Court held that the investigators had the power to decide and not merely recommend whether further action including an inquiry should be pursued, giving rise to a duty of "elemental fairness" at the investigative stage (at page 14).

[92] The Federal Court of Appeal's decision in *Sketchley, supra*, arose from an appeal from a trial division decision on judicial review, setting aside a decision of the Canadian Human Rights Commission and referring the matter back to the Commission to be reviewed by a new investigator. The case concerned an alleged discriminatory policy and decision said to force the retirement of a disabled worker. The discrimination issues aside, the Federal Court at both the trial and appellate levels determined that the Commission's investigation had been procedurally unfair, as there had been a failure to investigate the question of accommodation of the worker's disability and to explore whether in accordance with the policy leave should have been extended, and further that there was a failure to investigate the alleged discrimination by interviewing other public servants on medical leave who claimed to have been differently treated. Following the leading decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the Federal Court of Appeal observed that the content of procedural fairness is variable and must be determined in the specific context of each case. In upholding the Federal Court's decision that the Commission's investigation lacked thoroughness, the appellate court held that there were serious investigative omissions, "compounded by a fundamental misapprehension" of the worker's request of her employer, with the result that the investigative report "could not form a fair foundation" for the Commission decision which followed (at para. 123).

[93] *Public Service Alliance of Canada v. Canada (Treasury Board), supra,* was another judicial review of a decision of the Canadian Human Rights Commission whereby an allegation of discrimination on the ground of sex had been dismissed (though other relief was granted to the petitioning workers). The Commission's decision was made in part on the basis of an investigator's report in which it was recommended that no further action be taken regarding the complaint. In the result, there was no reference to a tribunal and, before judicial review proceedings were taken, the matter had come to an end. The Federal Court noted that in such a matter the Commission does not decide the complaint on its merits, but rather performs an assessment of whether there is sufficient evidence to justify proceeding to the next stage. It was held that the Commission must comply with the duty of procedural fairness when deciding whether such an investigation report is adopted or dismissed in accordance with the applicable legislation, and further that if the decision was based on an inadequate investigation, it could not be considered reasonable as the evidentiary foundation would be defective (at paras. 34 and 35). Ultimately, the Court held that the investigator's report was so utterly

deficient in addressing the discrimination issue that even the submissions made on behalf of the workers were not capable of salvaging it. As a result, the Commission's decision was considered unreasonable as having sprung from an inadequate investigation.

[94] Turning to the authorities cited by Council, *Kyle v. Stewart, supra*, a March 30, 2017 decision of the British Columbia Supreme Court, arose from two petitions for judicial review from an investigation by the Police Complaint Commissioner into the conduct of an officer. The particular relief sought was an order setting aside decisions compelling two officers, including the subject of the complaint, to attend at investigation interviews. The member complained about had already submitted to one interview but balked at attending a second, and took the position that, were he to do so, information and evidence which had been assembled should be provided to him in advance. The parties agreed that a duty of procedural fairness applied to adjudication by an administrative tribunal, but disagreed as to the extent of such a duty during the investigative stage, the member taking the position that "interrogation by ambush" did not meet the "minimal standard" of fairness in place. The Court was guided by a significant number of authorities, such as *Baker, supra*, and the other decisions now relied upon by Council in this appeal, including *Puar, supra*. In *Puar*, the member engineer had argued that the Association's publication of a notice of inquiry against him, listing the allegations made, should not have occurred before he had received disclosure of the allegations and had the opportunity to rebut them. The British Columbia Court of Appeal ultimately held against the argument, reasoning in part as follows:

> … before a decision is ultimately taken to discipline a member of the Association, the member is entitled to know the allegations against him and be given the opportunity to respond. Netupsky does not assist Mr. Puar. It does not establish that, where the investigative function in a disciplinary process is distinct from the adjudicative function, as is the case here, procedural fairness requires the duty to disclose an allegation and afford the opportunity to be heard to be discharged at the investigative stage. While early disclosure may be useful, it is not normally required until the adjudicative stage where the member can expect to be afforded a hearing (at *Kyle*, para. 75).

[95] The Court in *Kyle v. Stewart* also relied on *George v. Canada, supra,* wherein a police officer had argued that she had been denied procedural fairness when not offered an opportunity to be heard prior to an interlocutory decision to suspend:

> … the decisions to investigate allegations and to suspend an officer with pay pending that investigation are not final disciplinary decisions; rather they are essentially preliminary non-judicial decisions. Generally speaking, decisions of a preliminary nature will not trigger a fairness duty: *Knight v. Indian Head School* … even in cases where preliminary decisions do trigger a duty to act fairly, such as informal inquiries where personal reputations are at stake, the individuals implicated will not be entitled to full trial-like procedural protections during this pre-trial fact finding stage … procedural fairness requirements in the

> context of a suspension with pay pending an administrative investigation are necessarily lower than those triggered by disciplinary proceedings which would follow an adverse investigation … the lower procedural fairness requirement at the preliminary stage is not a licence to treat people unfairly; rather it is necessary to allow investigators the chance to do their job and it is corollary to the higher standard to be applied to any subsequent proceedings … (at *Kyle*, para. 88).

[96] The case law was summarized in *Kyle v. Stewart* as establishing that the duty of fairness is minimal at the investigative stage of a professional misconduct complaint, given that the investigation is preliminary and non-judicial in nature. On the facts of the case, it held that this minimal duty had not been breached, as the officer had been given the complaint and an opportunity to respond to it.

[97] There is a broad distinction between the facts in *Kyle*, *Puar* and *George*, on the one hand, and the present appeal on the other. In the former cases the investigation under scrutiny was the lead-in to what was clearly a preliminary or interim decision, being (respectively) whether an interview must be attended and if so on what terms, whether a publication of a notice of inquiry could be made and whether an interim suspension with pay should be imposed. In the present case, the investigation Mr. Lin challenges was the immediate precursor to a decision on the merits of his conduct and, as it happened, the removal of his right to practice his profession. In light of this, and given that Council must be taken to have known that the investigation could result in an application under subsection 43(4) of *RESA*, particularly as this was adumbrated by a term in the Consent Order, I do not view the investigation as occurring at a preliminary stage of the matter. Rather, in my view it occurred during the adjudicative stage, or at least at a stage which supported and immediately preceded an adjudication greatly affecting Mr. Lin's substantive rights.

[98] All of that being so, I am inclined to follow the jurisprudential trend revealed in the cases cited by the Appellant, and I conclude that during the investigative stage that ensued Council owed Mr. Lin a duty to act fairly, without attenuation. Mr. Lin also submits that there was a duty to conduct the investigation thoroughly, but I am not persuaded to import this as a separate measure: fairness is the key and, while its application will vary from one case to another – plotting the line between what is fair and unfair will depend on the relevant circumstances, including any dictates of legislation – it is a broad and flexible concept, and nothing more is needed.

[99] I will turn now to the factual side of the question. I have carefully considered all of the submissions the Appellant has made, and have reviewed all of the evidence he relies upon in connection with them, including the transcripts of the cross-examinations of the two Compliance Officers. I have, of course, also read and considered the submissions made by Council. For the purpose of these reasons, I will classify the Appellant's submissions as follows:

(a) Mr. Lin should have been interviewed and given the opportunity to be heard;

(b) the investigation was incompetently conducted; and

(c) the evidence was not fairly presented.

(a) Denial of Opportunity to be Heard

[100] The Appellant emphasises Council's failure to interview him, or Sisi Li or anyone else at Lester Lin Realty, and refers to this as the "… most obvious failing of the investigation …".

[101] Once again, the Consent Order included a term that in the event of its breach Council could act under subsections 43(3) and (4) of *RESA* to suspend or cancel the Appellant's licence without further notice to him. That would plainly suggest that in such a circumstance Mr. Lin may not be interviewed or advised at all of the alleged breach, and indeed that his associate and/or spouse (the evidence is not clear), Sisi Li, may not be so advised or interviewed, either. Further, those provisions of *RESA* itself clearly contemplate that Council may indeed so proceed without notice to the licensee. I have already held that Council had the jurisdiction to make the *ex parte* Cancellation Order, given the existence of a breach of the Consent Order in the form of Mr. Lin's conduct at the Open House. That is not to say that even in the event of a breach of the Consent Order Council was obliged to proceed without notice to Mr. Lin, as it clearly was not: subsection 43(4) includes the language, "… a discipline committee may … suspend or cancel … without the need for giving the licensee further notice or the opportunity to be heard". The language, as the Appellant has submitted, is permissive rather than imperative.

[102] Nonetheless, I find that Council's power to move *ex parte* is directly relevant to the present attack on its fairness in having done so.

[103] In his extensive submissions on appeal, and while accurately citing the terms of the Consent Order, Mr. Lin makes no mention of the facts that underlay it. That includes his submissions in reply, even though Council in its argument described and relied upon the backdrop to the Consent Order, saying among other things that the penalties set out in the Consent Order "… were just short of a licence cancellation". I can infer a view on the Appellant's part that the Consent Order with its stringent terms speaks for itself and that drilling beneath it is not necessary. It is apparent, however, that Council does not share that view, and nor do I. I believe that in proceeding as it did during both the investigation and the ultimate adjudication Council was entitled, and indeed in light of its mandate to protect the public was required, to remain mindful of the nature of the admitted misconduct that spawned the disciplinary proceedings against Mr. Lin. I summarized that misconduct in paragraph 10 above, and it amounted to shocking behaviour striking at the core of Mr. Lin's integrity and suitability to be licensed. I agree with Council's submission that the *ex parte* power set out in subsection 43(4), immediately followed by a provision conferring the right upon a licensee to seek a variation or rescission, must have been intended in whole or in part for situations where urgent action was deemed necessary with the public interest in mind. The latter consideration should not be made by Council without a fair and a broad view of the matter. Subsection 43(4) by definition involves a perceived breach of a prior order and Council must be astute in acting under it to the reasons

that prior order was made. It would otherwise not be safeguarding the public interest as required.

[104] The Consent Order arose from egregious misconduct in relation to Mr. Lin's representation of a buyer through a real estate transaction. The Open House occurred less than four months after the Consent Order was made and showed Mr. Lin to be dealing with prospective buyers of property (or, in the case of Ms. Tan, an apparent prospective buyer), as though he were a licensee when in fact he was suspended. This occurred even though Mr. Lin had consented to a term in the Consent Order, and accordingly was clearly aware, that in the event of a breach of the suspension order he could suffer further suspension or a cancellation without notice. Against all of those circumstances, and in light of the statutory power to proceed *ex parte*, I am of the view that Council was entitled to proceed without notice to or discussion with either Mr. Lin or Ms. Li. Council could not have known where Mr. Lin's misconduct might lead, and protection of the public interest in view of the whole of the circumstances overrode any need to provide notice to Mr. Lin.

[105] To my mind, therefore, Council did not act unfairly in refraining from involving Mr. Lin or Ms. Li in the investigation or advising Mr. Lin of it before the Cancellation Order was made.

(b) Competence of the Investigation

[106] The Appellant makes several allegations falling loosely under this head, which I will describe and answer as follows.

[107] First, it is said that the investigators did not make notes of the investigation, or certainly not fully or contemporaneously with the steps taken, despite their having conceded in cross-examination that the usual practice would be to keep notes in an electronic record. Related to this, it is also said that a memorandum of her observations at the Open House was prepared by Ms. Tan only three days after the event and after she had been "chatting" with Ms. deFoy and with counsel.

[108] Second, the Appellant submits that Council relied upon "gossip" from another licensee in the form of a December 3, 2015 email to Council, setting out information apparently received by her colleagues without any indication that it proceeded to interview those colleagues.

[109] Third, the Appellant says that Council failed to disclose various materials or information, including the particulars of the initial complaint apparently made by the Real Estate Board of Greater Vancouver, an internal email communication or communications Mr. Lin infers was sent by counsel in connection with the scheduling of the hearing before the Committee, and records of the interviews of any witnesses.

[110] Fourth, the Appellant submits that the investigation was rushed as (he says) is apparent from scheduling emails between December 15 and 17, 2015, and the late decision to use a second-choice translator found online and certified to translate from English to Chinese but not from Chinese to English, which is what the job entailed. I note that Ms. Tan gave evidence that she was able to translate between those languages, and further that she proceeded to include her

translations within her Affidavit, but explained that, in the single case of the conversation between Mr. Lin and the three prospective buyers at the Open House, Council decided out of caution to also obtain a translation from a party formally qualified to give it.

[111] I have considered all of those points (as elaborated upon in the Appellant's submission), and am not persuaded that they amount to procedural unfairness.

[112] It appears that investigator note-taking was minimal but the key notes were in the form of the detailed summary of what occurred at the Open House, and I am troubled neither by their being compiled three days later nor by intervening discussions, the nature and effect of which I have been told nothing, between Ms. Tan and other members of Council.

[113] As to the matter of disclosure, Mr. Lin at some point subsequent to the Cancellation Order received an evidence package from Council consisting of 1,488 pages (all in the appeal record, though minimally referred to in submissions), and I do not understand him to argue that any of the types of material or information I have referred to in paragraph 107 above are within that package; in other words, I do not understand in relation to those items there to be any allegation of earlier wrongful concealment from the Committee. Rather, the point seems to be that such materials should have been created – such as, for instance, notes of interviews, which were either conducted or, the Appellant would say, should have been conducted – and then provided presumably to Mr. Lin and to the Committee. Because of the *ex parte* nature of the process which I have concluded to be proper, there would not have been disclosure to Mr. Lin in any case (I will address further below the question of presentation of evidence to the Committee).

[114] Carrying forward, I cannot conclude that Council had a duty to interview other parties, including the three persons whose names were passed along by another licensee by way of what the Appellant calls gossip. The general subject was a client's having allegedly signed a listing agreement with Mr. Lin when he was suspended, and Mr. Lin's apparent visit to and provision of information at an open house (other than the one attended by Ms. Tan). While an entirely thorough investigation would have included the interviewing of these persons, this information was plainly second-hand and must have appeared as such to any reasonable reader of the Tan Affidavit. There is nothing in the record to indicate it was dressed up by Council as anything more than hearsay, and evidence of other activities by Mr. Lin, certainly in relation to the Open House, is much more prominent than this topic in the Affidavit material.

[115] Finally, I see no merit in the argument that the investigation was inappropriately rushed or that its timing created an unfairness: there is nothing of significance in the evidence cited in this regard, and in any case it is not surprising that Council would wish to move quickly in bringing an *ex parte* application under subsection 43(4).

(c) Fairness of Evidence Presented to the Committee

[116] The Appellant forcefully advances his submissions in this area. As I have stated, he contends that Council mischaracterized and suppressed evidence and

further that false or misleading evidence was given to the Committee. A related argument is that Council, including Ms. Tan and Ms. deFoy, were biased against Mr. Lin and close-minded in their views respecting his conduct, as illustrated by the presentation to the Committee of only apparently inculpatory information. The following particulars are given:

(i) a four page memorandum prepared by Ms. Tan for Council's Manager of Compliance on December 7, 2015, contained exculpatory information which was not presented to the Committee either in the form of the memorandum or otherwise;

(ii) Ms. Tan admitted in cross-examination that in making her recommendation she did not consider any mitigating factors or penalties less than cancellation;

(iii) Ms. Tan in her evidence wrongly characterized the hhlink.ca website directory as Mr. Lin's own blog, though effectively later admitting in cross-examination that she did not understand what a blog was;

(iv) Ms. deFoy's evidence did not disclose that she had been told by Ms. Li that Mr. Lin did not do showings, and misleadingly stated that there was no indication or disclosure that she was dealing with any licensee other than Mr. Lin;

(v) in her Affidavit Ms. deFoy referred to and exhibited the December 3, 2015 email, without disclosing that this information was hearsay or gossip and that Council had not interviewed anyone with first-hand knowledge of the matters set out;

(vi) Ms. deFoy refers in her Affidavit to Mr. Lin's Facebook profile picture but without disclosing that it was uploaded on September 21, 2015, before Mr. Lin was suspended;

(vii) Ms. Tan deposed that the investigation into Mr. Lin was commenced on November 9, 2015, when Council's internal records show that the file was not opened until November 23, 2015;

(viii) Ms. Tan refers in her evidence to the Open House without stating that she only created the written summary three days later after "chatting" about the evidence with Ms. deFoy and counsel;

(ix) Ms. Tan deposed that she heard Mr. Lin at the Open House talking to a group of three potential buyers about the rental potential of the property but admitted on cross-examination that she did not "exactly" hear the term "rental" but "expected" that is what they were talking about, while admitting that her inference was maybe wrong;

(x) Ms. Tan did not disclose in her Affidavit that the Chinese to English translation came from a party unfamiliar to Council and who was not certified for such translation;

(xi) Ms. Tan admitted on cross-examination that she chose not to translate interactions between Mr. Lin and people at the Open House that did not tend to substantiate the allegations against him, but did not disclose this in her Affidavit; and

(xii) in her Affidavit, Ms. Tan stated that at no time during the Open House was she aware that Mr. Lin was not licensed – I take this to mean that as a member of the public she would not have been so aware – whereas when Mr. Lin was asked during the Open House whether he was a realtor he in fact had pointed towards Ms. Li.

[117] Ms. Tan's memorandum that was not placed into evidence verifies that Mr. Lin advertised himself as a "Licensed Builder" with Ratemax Homes Ltd. in a publication known as the New Home Guide as at early December 2015, and that according to a certain public registry Ratemax was indeed a licensed builder. I do not see that this information needed to be imparted to the Committee. Council was not taking the position that Mr. Lin was continuously acting as a licensee or that he did not engage in other livelihoods, related or otherwise. Rather, the case against Mr. Lin was situational, essentially consisting of social media publications and discourse and the occurrences at the Open House. I do not see how it would have assisted Mr. Lin for the Committee to know that he was also advertising himself as a licensed builder, or indeed that he was a licensed builder. The Appellant also points out that the Tan memorandum fairly references that in the Facebook dialogue Mr. Lin asked that the inquirer call Ms. Li to set up an appointment, and that in the ensuing exchange with Ms. Li she stated that Mr. Lin did not do showings, but the entirety of this exchange was reproduced and attached to the Affidavit of Ms. deFoy that was before the Committee. There is no way of my knowing whether this information was additionally mentioned in a submission before or was read by the Committee, but I see no difficulty with the Affidavit so far as this point is concerned.

[118] Nor do I see unfairness in the reference in and attachment to Ms. deFoy's Affidavit of the December 3, 2015 email. As I have essentially said above, on looking at that email it is unmistakable that it purports to relay information from other persons, such that the Committee members must have known it was merely hearsay. It would have been preferable for Council to have interviewed the sources of the information in the email, but I do not regard the presentation of the email to the Committee as being in any way misleading or improper. It is given brief treatment in the body of Ms. deFoy's Affidavit and appears more in the vein of information received early on that spurred concerns – that is, as part of the narrative as to why Council then actively pursued an investigation – than having been offered up as evidence in itself of misconduct. The emphasized evidence lay in other areas.

[119] I do not know when Mr. Lin's Facebook profile picture was uploaded, though I have seen a date upon it of September 21, 2015. I do not however have the

facts allowing me to conclude whether Mr. Lin was able to subsequently remove or alter that profile, though he does not suggest on appeal that he lacked that ability. I would have thought such ability existed, though I will not draw a conclusion about that either way.

[120] I see no significance in the point that Council's records show the opening of a file on November 23, 2015, when Ms. Tan states that the investigation commenced on November 9, 2015; there may or may not be reasons why the file opening would occur at a later time, but in any case there is nothing concrete I can derive from this. If it is being suggested that it casts doubt on Ms. Tan's credibility, that is a bigger leap than I can make.

[121] I have already expressed my views regarding the preparation by Ms. Tan of her summary of the Open House three days post and after having spoken to colleagues, and I see nothing problematic in any of this.

[122] Cross-examination of Ms. Tan on her evidence about overhearing Mr. Lin's discussion with the three potential buyers at the Open House does cast some doubt on the accuracy of her conclusion that they were discussing rental potential, but she did not recant the evidence, and in any case she gave direct evidence that Mr. Lin was discussing rental potential with her, so I would not think the point leads anywhere that is useful for Mr. Lin. If this is simply a comment about Ms. Tan's credibility, I do not perceive value in it on appeal.

[123] Nor am I with the Appellant in relation to the Chinese to English translation. I see no reason for the Committee's needing to be told that Council had not used this translator before, or that their "usual" translator (if there was one) was not available in the short timespan reflected here, or that there was any question around the credentials of the translator, whose Declaration appended to Ms. Tan's Affidavit states in part that:

> … Proficient in the Chinese to English combination … hereby declare that I did transcribe and translate into English the video clip … and that, to the best of my knowledge, the transcript and translation accurately reflects (sic) the contents and meaning of the Chinese original.

The membership card in the Society of Translators and Interpreters of British Columbia is shown below the Declaration, and refers to his being an associate Member in respect of "English to Chinese". While that seems narrower than the text of the Declaration, I would need stronger evidence to conclude that there truly was a problem with qualifications here and further that Council should have known of it and so advised the Committee.

[124] The reference in Ms. Tan's Affidavit to the so-called blog has given me more hesitation. Part of the evidence introduced by Mr. Lin on appeal is an Affidavit of the legal assistant to counsel that, among other things, attaches a printed excerpt from the hhlink.com website that appears to indicate that it is a business directory, and further that, at least at the time the affiant made the attempt (bearing in mind the Affidavit was sworn September 15, 2016), navigating the page to try to obtain more information about Mr. Lin led to a website, apparently lesterlin.ca, that was no longer in operation. That certainly appears to contrast with the evidence given

by Ms. Tan that on December 3, 2015, she "reviewed Mr. Lin's blog" at that website, before exhibiting an excerpt from it that appears to have originated at lesterlin.ca. The Committee may thereby have been left with the impression that during the period of suspension Mr. Lin was publishing background and promotional information about himself on one or the other of those websites. I have no reason to characterize Ms. Tan's evidence in this respect as deliberately misleading, but I accept the Appellant's submission that in this respect it was slipshod.

[125] It is certainly the case that the *ex parte* process before the Committee required what in the circumstances was a fair and balanced presentation of evidence. That is not the same, however, as requiring that the evidence be perfect or even entirely free of flaws or mistakes. It is not unusual that *ex parte* orders – which are often sought on an urgent basis – are subsequently challenged in one way or another, nor is it unusual that, when challenged, some level of deficiency in the evidence or the presentation of it is exposed. The question generally arising in such matters is whether there has been material non-disclosure and the result that should prevail when contrary or supplementary evidence is later given by the party subject to the Order. I have no way of knowing whether and to what extent the Committee relied on Ms. Tan's evidence about the "blog", but I observe with the materiality question in mind that there was other evidence before it in the form of Mr. Lin's Facebook profile that included promotional information, and I would think it very unlikely that if the "blog" evidence were removed from the equation the analysis would have been appreciably different than what it was. Further, I regard the significant, core evidence to be the goings-on at the Open House, which were unrelated to the hhlink.com website.

[126] I am not of the view that either the investigation or the evidence below demonstrates bias or close-mindedness against the interests of Mr. Lin. It is natural that Council, having formed a view that Mr. Lin had been practicing while suspended, and to which view it was entitled, would present evidence expressing that concern and underpinning that conclusion. There is nothing untoward in any of that. The problem would arise if in the course of so doing Council cherry-picked what to tell the Committee and omitted exculpatory facts or context. The leaving out of neutral information is immaterial, and in that sense the evidence put forward need not be comprehensive. To my mind, the Appellant has not pointed to any exculpatory fact that Council withheld from the Committee. The most that can fairly be said is that Ms. Tan gave evidence about a promotional website that should not have been offered, but on balance I do not think this sufficient for me to accept this ground of appeal.

[127] After careful consideration I am not inclined to accept the submission of procedural unfairness in the presentation of evidence to the Committee. In arriving at that view I indeed take account of all of the circumstances, and my reasoning set out above in respect of them, the absence of evidence of intention to mislead the Committee, the existence aside from the mischaracterized blog of promotional information by Mr. Lin while suspended (being on his Facebook page which, again, refers to his having been the recipient of the "Top 1% Golden President Club Award", and without any evidence that he tried to remove or alter the page while suspended but was unable to do so), and the need to avoid the

setting of an unrealistically high standard for the adduction of evidence, even in an *ex parte* context, lest the process be deemed unfair; by the latter words, I mean again that general fairness through an investigation does not necessarily require the flawless presentation of evidence. The investigator must strive for and deliver fairness, to be judged in context and not excessively narrowly. That is especially the case where a regulator charged with protection of the public perceives that it must move quickly through a process to provide that protection, as appears to have been the case here and as was reasonable particularly given the nature of Mr. Lin's original misconduct, followed by activity that appeared to flout a suspension order.

(iii) Fairness of the Committee's Adjudication

[128] I now move past the actions of Council to consider the submission that the Committee itself failed to accord procedural fairness to Mr. Lin.

[129] The Appellant alleges four instances of unfairness in the adjudication. The first is Council's asserted failure to make full and frank disclosure to the Committee of material facts. I have already set out my findings on the subject of evidentiary disclosure to the Committee, and I am not of the view that there was such a failure. The second is the decision to proceed in the absence of notice to Mr. Lin, which I also dealt with earlier in these reasons, and as to which I am of the view that both Council and the Committee were within their rights in so proceeding.

[130] I will now address the remaining two submissions under this head, being that Mr. Lin was entitled to receive reasons for the cancellation of his licence and that the Committee lacked institutional independence from Council.

(a) Entitlement to Reasons

[131] The parties agree that Mr. Lin was entitled to reasons but disagree on whether what was provided by the Committee was adequate in that regard. The Appellant submits that no reasons were given at all, while Council maintains that the Cancellation Order itself, together with the Affidavits of Ms. Tan and Ms. deFoy which it expressly references, amount to sufficient reasons for the decision made.

[132] A second point of difference between the parties on this score is as to what order should flow in the event I hold that reasons were required but were not given or adequately given: the Appellant submits that the Cancellation Order must be quashed, while Council states that the appropriate course would be to remit the matter to the Committee for the provision of adequate reasons.

[133] I have no hesitation in endorsing the parties' agreement that reasons were required of the Committee in this case. The matter for Mr. Lin could scarcely have been more important, as his professional standing was taken from him. Additionally, he had statutory rights to seek a variation or rescission of the decision before the discipline committee and to appeal the decision to this tribunal, and it is not in the interests of the parties or conducive to a fair and effective subsequent adjudication to deliver a decision without reasons. The leading decision on whether an administrative tribunal has a duty to provide reasons for a decision remains *Baker v. Canada, supra*, which concerned an appeal from a deportation

order on humanitarian and compassionate grounds, and in which this was said following an extensive review of the case authorities:

> In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has *important significance for the individual*, when there is a *statutory right of appeal*, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary … (*supra*, para. 43). (emphasis added)

[134] The real issues here are whether adequate reasons were provided and, if not, the remedy that should follow.

[135] There is a clear difference between a need to provide, as *Baker* says, "some form of reasons" and the matter of the adequacy of what is given. In *Baker*, for example, the provision of an immigration officer's notes was taken to be a sufficient revelation of the reasons for the decision made.

[136] Both parties to this appeal (the Appellant in reply) place reliance upon *Clifford v. Ontario (AG)* [2009] ONCA 670, which held in part as follows:

> … In the context of administrative law, reasons must be sufficient to fulfill the purposes required of them, particularly to let the individual whose rights, privileges or interests are affected know why the decision was made and to permit effective judicial review … this is accomplished if the reasons, read in context, show why the tribunal decided as it did. The basis of the decision must be explained and this explanation must be logically linked to the decision made. This does not require that the tribunal refer to every piece of evidence or set out every finding or conclusion in the process of arriving at the decision. … the "path" taken by the tribunal to reach its decision must be clear from the reasons read in the context of the proceeding, but it is not necessary that the tribunal describe every landmark along the way (at para. 29).

[137] Council relies further on this tribunal's decision in *Superintendent of Real Estate v. Valouche*, FST 2015-RSA-001(c), in which the Superintendent exercised its statutory right of appeal from a Consent Order to which it had not been privy, and I held in that context that sufficient reasons could be found from the cobbling of the Consent Order, the Agreed Statement of Facts referred to in that Order, and certain minutes of a meeting that explained the basis upon which the consent disposition was made and which had formed part of the decision-making process in the unique circumstances of that case. As is apparent from the decision, the minutes were key to the finding that sufficient reasons had been given, and in a setting where extensive reasons were not required in light of the efficiency intended by the consent order process and the infrequency of appeals therefrom.

[138] The Cancellation Order in the present case, as I have said earlier in these reasons, and as would be expected in a form of such order, simply cites the

evidence relied upon, the earlier Consent Order and the terms being imposed. There is nothing within the Cancellation Order itself that could be taken as reasons for the decision, as that concept, for instance, is described in *Clifford, supra*. Council does not submit otherwise and I infer a concession that incorporation of the Affidavits is vital to a conclusion that sufficient reasons were given.

[139] An adjudicator of course has the ability to accept or reject on proper grounds any portion of the evidence presented. In this case, there is no way for an outsider viewing the record below to know (a) the portions of evidence that were accepted by the Committee or found to be persuasive (b) why the Committee found misconduct to have occurred (c) why the Committee determined that cancellation of Mr. Lin's licence was the appropriate resulting penalty and (d) the extent to which, if at all, the Committee had regard to the facts that gave rise to the earlier Consent Order. As a result, even if the Affidavits are in the mix, one can only guess the facts within them that were relied on by the Committee and its particular application of those facts.

[140] I pause to say that I concluded earlier in these reasons that Mr. Lin had acted in breach of the Consent Order by his conduct at the Open House, and therefore that the Committee's power under subsection 43(4) of *RESA* was engaged. I found it necessary, as I explained, to determine whether such a breach had occurred in order to answer the Appellant's threshold, jurisdictional submission, and I was able to make that determination based upon the written evidence that was before the Committee and the extensive submissions of fact and law made on appeal. That I was able to arrive at such a finding without the expression of reasons by the Committee does not, of course, touch the question of whether the Committee had a duty to provide such reasons, being one that clearly existed, or whether that duty was met.

[141] Extensive reasons for the Cancellation Order were not required but an explanation approximating the standard described in *Clifford* was needed here, particularly given the high importance of the matter. I believe it would stretch beyond any authority referred to me to conclude that the mere reference in the Cancellation Order to Affidavits qualifies the evidence therein as part of the reasons for the order, despite the growing willingness of appellate bodies that I recognized in *Valouche* to identify reasons with somewhat of a broad compass. In my view, the Affidavit content in this case does not constitute reasons for the order made, and in light of this I conclude that no reasons were given for the Cancellation Order at all. Further, as I have explained, even if I had treated the Affidavits as amounting to reasons, I do not believe the *Clifford* standard would have been met, as the vagueness I have described above would still have prevailed.[2]

[142] I therefore conclude that the Committee's process was procedurally unfair to Mr. Lin. The resulting question is the remedy that should follow.

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[2] If I had concluded that reasons had been given by the Committee but were inadequate, I would have considered whether the issue remained one of procedural fairness, and if the "fairness" criterion on appeal was the appropriate assessment, as distinct from a reasonableness review of the adequacy of reasons as appears to be mandated by *Newfoundland v. Newfoundland and Labrador (Treasury Board)* [2011] 3 SCR 208, at paras. 21 and 22.

[143] In *Abetew v. Taxicab Board* [2013] M.J. No. 72 the Manitoba Court of Appeal allowed an appeal and quashed a decision of the Taxicab Board cancelling the appellant's cab licence on the sole basis of a perceived serious breach of procedural fairness in the form of a failure to deliver any reasons for the cancellation. The appellant's licence was ordered to be reinstated with a term that if the Board wished to proceed with the complaint it would need to pursue a new proceeding. Apart from the serious breach the Court of Appeal took into account that the Appellant had been unable to earn his livelihood for several months after the Board had agreed but failed to provide reasons. That same Court's decision in *Brar v. Manitoba (Taxicab Board)* [2013] M.J. No. 388 released several months later concerned a very similar fact pattern and with precisely the same result.

[144] In submitting that a finding of a breach of duty in this context should see the matter remitted to the discipline committee for the provision of reasons, Council relies on the British Columbia Court of Appeal decision in *Wong v. Real Estate Council of British Columbia* (2002) BCCA 609 and the decision of this tribunal in *The Superintendent of Real Estate v. Real Estate Council (British Columbia) and Kenneth Scott Spong*, [2005] FST05-007. In *Wong*, which was an appeal from a decision of the Commercial Appeals Commission, being the forerunner of this tribunal, reasons had been given following a *de novo* hearing before the Commission for a finding that the licensee had committed misconduct but none were given for the imposition of a sixty day suspension. In a concise judgment the Court of Appeal held that some reasons for the penalty were required and that the failure to provide them was an error in law, the remedy for which was a setting aside of the penalty and a remission to the Commission to hold a new hearing on sanction and then deliver adequate reasons for its reconsidered decision.

[145] The situation in *Spong* was conceptually similar, this tribunal finding that the hearing committee within the Real Estate Council had rendered a decision for a seven day suspension without any line of analysis explaining how this conclusion was reached upon the evidence. The matter was remitted to the hearing committee for reconsideration along with directions, particularly in view of the Real Estate Council's expanded jurisdiction as a self-regulatory body and as the hearing committee had already heard directly from the licensee on factors relevant to penalty.

[146] As was noted in *Spong*, the authority conferred upon this tribunal in respect of appeal hearings is broad. The *Financial Institutions Act*, RSBC 1996, c. 141, section 242.2(11) provides:

> 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.

[147] Simply quashing the Cancellation Order in this case without further recourse available to Council would not be a just outcome. Certainly in view of the facts touching on both the Consent Order and the Cancellation Order, this is a serious matter, both to Mr. Lin and on consideration of the public interest, and it is one that should ultimately rest on its merits; I note that even in the Manitoba cases cited by the Appellant where a quashing order was made rather than a remission

for the giving of reasons, the tribunal was expressly recognized to have the right to bring further proceedings in relation to the subject matter. The real question, to which I have given anxious consideration, is whether I should send the matter back to the discipline committee for reconsideration or proceed to decide the matter, including the Appellant's submission that the cancellation of licence was unreasonable. One of the themes in Mr. Lin's arguments on appeal is that he has surely on any view of the matter already been sufficiently punished, bearing in mind that he has been without his licence for most of the period dating from September 23, 2015. In part, that length of time arose from an ultimately unsatisfying period of several months where he was seeking a return to the Committee under subsection 43(5) of *RESA*, while then opting to appeal out of frustration with that process. In addition to that, this appeal process has already been substantial, involving three applications, numerous appeal grounds advanced, more than fifteen hundred pages of evidence, about one hundred pages of written submissions and several volumes of case authorities. I am for those different reasons tempted to deliver a final decision (subject to appeal) in order to conclude these proceedings with some semblance of efficiency.

[148] I have, however, reluctantly decided that the proper course is nonetheless to remit this matter to the discipline committee for reconsideration on penalty and the giving of proper reasons. I am not prepared to remit the matter merely for the giving of reasons for the decision the Committee has already made, as Council proposes, but rather will do so for a reconsideration entirely of the issue of penalty, as occurred in *Wong* and *Spong, supra*, and as I think is consistent with the very word "reconsideration" as used in subsection 242.2(11) set out above. The ultimate Order may or may not be for cancellation of Mr. Lin's licence but regardless it is to be preceded by a genuine reconsideration, on directions that I will set out later in these reasons.

[149] My decision to remit rather than finally decide the matter is based largely on Council's duty to regulate its licensees and, in appropriate cases, to levy penalties for purposes that certainly include protection of the public. I agree with the comments in *Spong, supra*, concerning the breadth of that statutory jurisdiction and I recognize that maintenance of the necessary professional standards rests most logically with the Real Estate Council itself. I am influenced by those factors despite a secondary thought that the Real Esate Council might be said to have forfeited its right (which I do not intend literally) to decide this matter by its failure to deliver reasons. Nonetheless, I have decided to order reconsideration on directions and terms that I will express later in these reasons, and that I intend will strike a fair balance between the interests both of Mr. Lin and of Council as the protector of the public interest.

(b) Institutional Independence of Council

[150] Given my finding that the Committee breached its duty of procedural fairness to Mr. Lin by the failure to provide reasons for its decision, it may not be strictly necessary for me to address this final submission on the subject of fairness, but as I can see the possibility of its being useful, either within these ongoing proceedings (e.g., lest the same point would otherwise be taken, theoretically

speaking, on appeal of the reconsideration decision) or more generally, I will do so briefly.

[151] The Appellant's position is that Council has conflated the roles of prosecutor before and independent counsel to its hearing committees, including the Committee in this case. There is only a single fact occurring within this proceeding which he references to support that position, being that prosecuting counsel wrote an email referring by first name to the panel members of the Committee as it was being formed. Beyond that, the Appellant simply refers generally to the duties of legal counsel set out in Council's official job descriptions, which include the drafting of hearing decisions on the instructions of the hearing committee and the training of prospective panel members. Mr. Lin therefore argues that the same lawyers who prosecute matters before bodies like the Committee also provide active support to their members, and this despite materials published by Council referencing case authority and admonishing panel members not to "hear from prosecution counsel who trained you." The position is taken that, in view of the foregoing facts, there is an institutional bias within Council arising from a lack of independence as between its prosecuting lawyers and its adjudicators.

[152] The Appellant relies upon *Bell Canada v. Canadian Telephone Employees Assn.*, 2003 SCC as to the importance of the right to be heard by an independent and impartial tribunal, and the related test of whether the problem identified would give a fully informed person a reasonable apprehension of bias in a substantial number of cases (at paragraph 25). Mr. Lin also relies indirectly, in referencing Council's own summary of the legal principle in an internal paper, on *Bailey v. Saskatchewan Registered Nurses' Association* (1998) 167 Sask. R. 232, where the Court found that a discipline panel had lacked independence from prosecuting counsel as that counsel had been involved in the training of the members of the panel over a protracted period. As a result, the reasonable apprehension of bias standard was met and the disciplinary order was set aside.

[153] Council responds in part by saying that the provisions of *RESA* reflect a legislative intention that discipline committees shall be mostly made up of members of the Real Estate Council, that there is no evidence to support the asserted connection between counsel and panel members in this particular case, other than within the actual hearing below, and that it is the Appellant's onus to demonstrate a real likelihood of probability of bias, beyond mere suspicion, following *R.D.S. v. Her Majesty the Queen* [1997] 3 SCR, at pages 530-31. I believe it is more accurate to construe *R.D.S.* as recognizing that the grounds for finding real or perceived bias must be substantial, and that the threshold for such a finding is high, but I otherwise agree with all of these submissions by Council.

[154] A fully informed person would know that there is no evidence in this case of any historic interaction between counsel and the members of the Committee beyond the presentation of this case, unlike the situation in *Bailey*. This factor in itself is enough to conclude that the Appellant has not discharged his onus of showing substantial grounds for a finding of bias. I am also of the view that it would be unrealistic to expect from the discipline committee, which by its governing legislation is created out of the Real Estate Council, a level of independence that would be required of a court, bearing in mind that the Real

Estate Council must surely be within its rights to appoint counsel to act in disciplinary matters from within its own ranks, without being compelled to retain lawyers externally. This certainly does not mean that principles of independence and impartiality go out the window, but if a hearing committee is to be fairly characterized as lacking in those areas, there must be something concrete and substantial to go on such as facts showing a relationship inconsistent with those principles, to the extent of meeting the legal test the leading authorities have enunciated. I do not find that to be the case here.

[155] I therefore reject the submission that the Committee lacked independence and impartiality.

(iv) Reasonableness of the Finding of Misconduct

[156] For the sake of completeness, I will record here, within the sequence of my consideration of the various grounds of appeal, that I find that the Committee acted reasonably in determining that Mr. Lin acted in breach of the Consent Order, solely and specifically because of his conduct at the Open House.

[157] I set out my reasons for that view at paragraphs 59 to 81 above, having explained that I felt it necessary to resolve the point in order to assess the merit of Mr. Lin's jurisdictional challenge.

[158] But for that jurisdictional challenge and the analysis it compelled me to make, leading to my conclusion that Mr. Lin had indeed breached the Consent Order, I would likely have remitted that liability issue for reconsideration in addition to the matter of sanction, given the absence of any reasons from the Committee on the point.[3] However, as I have found it necessary to undertake that analysis and determine that question, it would be illogical and unworkable to include liability within the reconsideration. My findings on the misconduct issue will therefore govern, both in respect to what did and did not constitute performance by Mr. Lin of impermissible activity.

[159] As is apparent, I do not accept the Appellant's submission that the misconduct finding below was unreasonable.

(v) Reasonableness of the Licence Cancellation

[160] For the reasons I have given above, I decline to decide this question, preferring after close consideration to remit the matter to the discipline committee of the Real Estate Council ("Discipline Committee") for reconsideration.

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[3] Even though I have decided to remit the matter of penalty for reconsideration given an absence of reasons for the Cancellation Order, I would have considered it unfair to the Appellant not to fully consider and answer his submission on jurisdiction which, if successful, may well have brought the entire proceedings to an end, without any remission for reconsideration. This was, therefore, a necessary analysis in my view, and, for the reasons I have explained, one that led to my conclusion that there had been, in the form of Mr. Lin's activities at the Open House, misconduct on his part.

G. Disposition

[161] In the absence of any reasons from the Committee for its decision, I am exercising my discretion to remit the matter to the Discipline Committee below both for reconsideration of the issue of penalty in this case and, once that reconsideration has occurred, for the delivery of adequate reasons.

[162] I hereby provide the following directions in relation to the reconsideration:

(a) the Discipline Committee shall empanel a hearing committee in accordance with *RESA* that may or may not include the persons who were on the Committee below;

(b) the reconsideration shall be limited to the question of sanction, and is not to be influenced in any way by the original order for licence cancellation;

(c) the only evidence to be considered shall be that which was originally placed before the Committee, provided however that even within that evidence there shall be no consideration of any activities that I have found not to have amounted to the performance by Mr. Lin of real estate services while suspended. For greater clarity, the only activity of Mr. Lin's within that evidence to be considered (apart from the conduct that gave rise to the Consent Order) shall be that which occurred at the Open House of December 12, 2015;

(d) the hearing committee shall also consider this appeal decision; and

(e) Council and Mr. Lin shall be entitled to attend and make a submission before the hearing committee.

[163] It goes without saying that a remission for reconsideration, particularly where accompanied by directions, will not result in a process that is a snapshot of that which originally occurred; rather, it will be altered to the extent of the directions and the fresh or different considerations to be made. The idea is not, therefore, to repeat history. In directing that Mr. Lin may make submissions before the hearing committee, I am further distancing the process to come from the *ex parte* application made before the Committee, and I do so while appreciating that under subsection 43(4) of *RESA*, which I have discussed at some length above, the discipline committee possesses a discretion to proceed without notice to the licensee. Any exigency of that first application before the Committee has however been relieved with time and Mr. Lin's later involvement in this adversarial process, and in any case it would be decidedly unjust if following this appeal he were denied a voice at the next stage.

[164] In directing that the hearing committee may or may not include the persons who were on the Committee below, I have in mind that no bias on the part of the Committee has been satisfactorily demonstrated and I have no reason to believe

that any potential panel members would be unable to discharge this next function in a fair and reasonable way.

[165] A question arising is Mr. Lin's status in the interim period. It cannot be known what sanction would have been imposed if the Committee had expressly found, as I have determined it should have, that Mr. Lin's only breach of the Consent Order was his conduct at the Open House, nor can it be known, if the resulting order would have been a further suspension, whether that suspension would by now have expired. With those considerations in mind, and also as I think it appropriate given the absence of any reasons for the Cancellation Order, pending the reconsideration and delivery of reasons the cancellation of Mr. Lin's licence is hereby set aside. As a result, the Cancellation Order is no bar to Mr. Lin's ability to practice as a licensee.

[166] The parties are welcome if they wish to make submissions on costs during the next sixty days, with an additional right to reply to any such submission by the opposing party within fourteen days of receipt of it.

"Patrick F. Lewis"

Patrick F. Lewis, Vice-Chair
Financial Services Tribunal

July 27, 2017