Financial Services Tribunal

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DECISION NO. 2018-RSA-001(a)

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

BETWEEN:	DOUGLAS WELDER	**APPELLANT**
AND:	REAL ESTATE COUNCIL OF BRITISH COLUMBIA	**RESPONDENT**
BEFORE:	JANE A. G. PURDIE, Q.C., PANEL CHAIR	
DATE:	WRITTEN SUBMISSIONS CONCLUDING JUNE 04, 2018	
APPEARING:	For the Appellant: Self-Represented For the Respondent: Jessica Gossen	

OVERVIEW

[1] On August 21 and 22, 2017, the Real Estate Council of British Columbia (the "Council") held a hearing to determine whether Douglas Welder (the "Appellant") was of good reputation and suitable to be licensed in accordance with the *Real Estate Services Act*, SBC 2004, c 42 (the "RESA"), and the Rules of the Council (the "Rules"). The Council issued a Notice of Qualification Hearing which set out that a hearing would be held concerning good reputation and suitability. The hearing was required in light of the Appellant having been disbarred from the practice of law as a result of a lengthy and serious discipline record and ultimate finding of ungovernability.

[2] On January 25, 2018, a Hearing Committee of the Council (the "Committee") found that the Appellant was not a person of good reputation, and was not suitable to be licensed at the level and category for which he was applying (the "Qualification Decision"). The Committee additionally held that no further application from the Appellant would be considered for a period of 3 years.

[3] The Appellant appeals to the Financial Services Tribunal (the "Tribunal" or the "FST") from this decision. The Council opposes the appeal and seeks a dismissal with costs payable by the Appellant.

[4] In his Notice of Appeal the Appellant asks that the Tribunal:

> a. reverse the decision of the Council with respect to the effect of section 87 of the *Legal Profession Act*, SBC 1998, c 9 (the "LPA");
>
> b. rule that there was no evidence that was admissible at the hearing that would disentitle the Appellant from being licensed; and
>
> c. direct that the Appellant be licensed under the RESA without conditions.

[5] Section 242.2(11) of the *Financial Institutions Act*, RSBC 1996, c 141 (the "FIA") applies to this appeal, and provides that the FST may confirm, reverse, or vary a decision or send the matter back for reconsideration, with or without directions, to the person or body whose decision is under appeal.

BACKGROUND

[6] The RESA establishes a regulatory scheme for the licensing of persons providing real estate services in British Columbia by requiring such persons to meet specific requirements of the RESA and the Rules of the Council.

[7] The Appellant applied to the Council to be registered as a trading services representative, and at the time of his application he had passed the required exams. The Appellant was making application to allow him the opportunity to earn a living as a realtor.

[8] The Council has the duty to administer RESA subject to the oversight and direction of the Superintendent of Real Estate. In particular, the objects of the Council are to maintain and advance the knowledge, skill and competency of its licensees, and to uphold and protect the public interest in relation to the conduct and integrity of its licensees.

[9] Among other requirements, section 10 of the RESA outlines that an applicant for a license must satisfy the Council that:

> (a) the applicant is of good reputation and suitable to be licensed at the level and in the category for which the applicant is applying;
>
> …
>
> (d) in all cases, the applicant has not
>
> > (i) been refused a licence under real estate, insurance, mortgage broker or securities legislation in British Columbia or another jurisdiction,
> >
> > (ii) held a licence that was suspended or cancelled under real estate, insurance, mortgage broker, or securities legislation in British Columbia or another jurisdiction,
> >
> > (iii) been disciplined by a professional body, or
> >
> > (iv) been convicted of an offence

> for a reason that reveals the applicant as unfit to be a licensee[.][emphasis added]

[10] The Appellant completed the application required by the Council. In doing so, he indicated that he had been disciplined by the Law Society of British Columbia ("Law Society") which, after a lengthy and serious discipline record, had ultimately disbarred him for professional misconduct on the basis of ungovernability.

[11] As a result of the Appellant's disclosed professional history, the Council held a qualification hearing under Rule 2-6 of the Rules in order to determine whether he was properly qualified for licensure. The Committee had to weigh the evidence presented and determine whether the Appellant satisfied them that he was "of good reputation and suitable to be licensed", and had not been disciplined by a professional body for a reason that revealed him to be unfit to be a licensee.

[12] During the course of the hearing, the Chair of the Hearing Committee raised an issue respecting section 87 of the LPA, which dealt with the privileged nature of certain documents coming within the definition of "report". Subsection 87(4) precludes the use of such reports in any "proceeding" without the written consent of the Executive Director of the Law Society. Proceeding is defined in section 87(1) to exclude certain internal Law Society proceedings mandated by the LPA.

[13] A binder of Law Society documents, tendered as Exhibit 4 in the hearing, contained some documents which potentially fell within the definition of "report". The entire exhibit was, by agreement of the parties, struck from the evidence.

[14] A binder of Law Society decisions and written reasons was tendered and admitted as Exhibit 2. Embedded in these materials were references to Law Society documents contained in Exhibit 4 which had been struck. The Committee asked the parties to provide written submissions on the admissibility of the contents of Exhibit 2; in particular, whether some of the contents would fall within the definition of "report", and would therefore be inadmissible without consent of the Executive Director of the Law Society.

[15] The Hearing Committee found Exhibit 2 admissible in its entirety on the basis that the Benchers' decisions and reasons for them did not require the consent of the Executive Director for use in other proceedings. The Committee further held that even if the sections of Exhibit 2 which might have amounted to "reports" were deleted, the remaining evidence was sufficient for the Hearing Committee to make its decision.

ISSUES ON APEAL

[16] The Appellant and the Respondent have framed the issues to be addressed in this appeal differently. In coming to the formulation of the issues set out below, I have considered the Appellant and Respondent's submissions, as well as the appeal record and underlying decisions.

Procedural fairness and natural justice

a) Did the Committee breach the Appellant's right to procedural fairness when it accepted written submissions regarding section 87 LPA after the evidence was heard?

Questions of law

b) Did the Committee correctly interpret section 87 of the LPA regarding the admissibility of Exhibit 2?

c) Did the Committee misinterpret the onus that applied at the qualification hearing?

Questions of fact, discretion and mixed fact and law

d) Did the Committee err in interpreting and weighing the evidence presented by the Appellant?

e) Did the Committee err in imposing a three-year limitation on the Appellant's ability to re-apply for a Real Estate License?

STANDARD OF REVIEW

[17] Unlike judicial decisions, tribunal decisions are not subject to precedent; the doctrine of *stare decisis* does not apply. Administrative tribunals are created to make decisions within their specialized areas, and are expected to provide their community and the public at large with some predictability and consistency while applying their expertise. The function of appeal bodies like the FST is not to second-guess underlying decision-makers, but to ensure that such decision-makers have acted appropriately within the framework of their legislation, policy and guidelines. In doing so, appeal bodies like the FST must decide upon the appropriate standard of review applicable to various issues which arise on appeal.

[18] The Tribunal has developed its own appellate standard of review arising from section 58(1) of the *Administrative Tribunals Act,* SBC 2004, c 45, which sets out that relative to the courts, the FST must be considered an expert tribunal in relation to all matters over which it has exclusive jurisdiction.

[19] The decision in *Westergaard v British Columbia (Registrar of Mortgage Brokers),* 2011 BCCA 344, clarified that the test set out by the Supreme Court of Canada for judicial review[1] does not govern the standard of review that the specialist tribunal must apply.[2]

[20] In his submissions, the Appellant did not address the issue of the appropriate standard of review which should be applied by the FST in the present appeal.

[21] The Respondent submits that the standard of review that ought to be applied is summarized in the decision of this Tribunal in *Kadioglu v Real Estate Council of*

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[1] *Dunsmuir v. New Brunswick,* 2008 SCC 9.

[2] *Westergaard* at para 43.

BC and the Superintendent of Real Estate, Decision No. 2015-RSA-003(b) ("*Kadioglu*"), where Member Baker stated the following (at para 32):

> [32] In summary, I will apply the following standards of review:
>
> (a) correctness for questions of law, including the scope of s. 37(1) of the Act and the allegation of a breach of Charter rights;
>
> (b) reasonableness for questions of fact, discretion, and penalty,
>
> (c) fairness, for procedural fairness questions.

[22] In *Kadioglu*, Member Baker went on and reviewed the finding in *Seaspan Ferries Corp. v British Columbia Ferry Services Inc*., 2013 BCCA 55 ("*Seaspan*"), regarding the appropriate standard of review for issues of procedural fairness (*Seaspan* at para 52):

> I agree with the submissions of Seaspan … that the standard of review applicable to issues of procedural fairness is best described as simply a standard of "fairness". A tribunal is entitled to choose its own procedures, as long as those procedures are consistent with statutory requirements. On review, the courts will determine whether the procedures that the tribunal adopted conformed with the requirements of procedural fairness. In making that assessment, the courts do not owe deference to the tribunal's own assessment that its procedures were fair. On the other hand, where a court concludes that the procedures met the requirements of procedural fairness, it will not interfere with the tribunal's choice of procedures.

[23] I agree with the analysis applied in *Seaspan*, and adopt the finding that a standard of fairness will apply when reviewing issues of procedural fairness. I also agree with Member Baker's summary set out in *Kadioglu*.

[24] With respect to evidentiary findings, assessments of credibility and review of legal questions, this Tribunal, in *Hensel v Registrar of Mortgage Brokers,* 2016-MBA-001(a), held the following (at paras 17-18):

> [17] …[T]he case for deference to a first instance regulator is most compelling where the first instance regulator has made findings of fact. Since the Tribunal, unlike the Commercial Appeals Commission it replaced, is required to hear appeals on the record rather than conduct hearings *de novo*, the Tribunal's decisions properly accord deference where an appeal takes issue with evidentiary findings and related assessments. The rationale for this deference is the same rationale appellate courts use in granting deference to factual findings of trial judges. As noted by this Tribunal in *Nuguyen v. Registrar of Mortgage Brokers,* July 20, 2005, p. 9. "Deference must be given to the findings of fact and the assessments of credibility made by the Registrar who actually experienced the hearing procedure, heard the witnesses, saw the documentary evidence and, combined with his experience and knowledge given his position as Registrar of Mortgage Brokers, was in the best position to make the findings of fact found in his decision".
>
> [18] On the other hand, where the first instance regulator has made a finding of law, the Tribunal has generally held that deference is not required. Indeed, just as our court system proceeds based on the institutional premise that an appeal judge knows as much about the law as does a trial judge, the Tribunal is also entitled to proceed on the premise that the legislature intended that the specialized Tribunal would correct legal errors made by the first instance regulator. I note that the British

> Columbia Court of Appeal has considered this position to be a reasonable one in *Westergaard v. British Columbia (Registrar of Mortgage Brokers)*, 2011 BCCA 344.

[25] I agree with the discussion of deference in relation to findings of fact and assessments of credibility outlined in *Hensel* above. The legislation creating the FST contemplates a hearing "on the record", and not a new hearing of a matter. This Tribunal, not having the benefit of seeing and hearing the witnesses in person, should therefore afford underlying decision-makers, expert tribunals in their own right, a measure of deference when reviewing findings of fact and/or credibility. Similarly, an underlying decision-maker's exercise of discretion in relation to its area of expertise is deserving of deference.

[26] I also agree with the finding in *Hensel* that deference to underlying decision-makers is not warranted on questions of law. This Tribunal is an expert Tribunal and has been tasked by the legislature with reviewing the decisions of a number of other expert financial sector tribunals. Unlike in the situation where a first-instance decision-maker has specific information gleaned from the hearing process, when it comes to legal questions this Tribunal is in at least as good a position as an underling decision-maker with respect to its knowledge of the law.

[27] With respect to issues of mixed fact and law, this Tribunal held in *Schoen v Real Estate Council of BC and Superintendent of Real Estate*, Decision No 2017-RSA-002(b), that a reasonableness standard may apply, and clarified that (at para 34):

> Although the standard of review for issues of mixed fact and law may vary based on the particular context of each case, the more fact-intensive and the less law-focused the issues are, the more deference this Tribunal should give to the original decision-maker.

[28] I agree that for questions where assessment and weighing of evidence has occurred, deference is owed to the underlying decision-maker. I also agree that where questions of mixed fact and law involve a higher degree of legal analysis, less deference is owed. In the present case, the question of mixed fact and law which arises has to do with how the Committee interpreted and weighed the evidence presented by the Appellant. The Committee's analysis of whether the Appellant was of good reputation and suitable to be licensed involved assessing the Appellant's character and credibility, as well as applying the legal framework under which the Council is required to assess suitability and fitness for licensing. Although some legal analysis was required in the assessment of the Appellant's suitability for licensure, the analysis undertaken by the Committee was primarily fact-driven, and so a reasonableness standard is most appropriate for assessment of this question.

[29] Based on the above, I find that the appropriate standards of review applicable to the issues raised in the present appeal are as follows:

a. Fairness for issues of procedural fairness;
b. Correctness for questions of law, and
c. Reasonableness for issues of fact, discretion or mixed fact and law.

ANALYSIS

a) Did the Committee breach the Appellant's right to procedural fairness when it accepted written submissions regarding section 87 LPA after the evidence was heard?

[30] The Appellant argues that the Committee breached the rules of natural justice by requesting written submissions with respect to the applicability of section 87 LPA after the evidentiary portion of the hearing was completed. He says that in doing so, the Committee failed to set out their case against him in advance, and he was unaware of the case he had to meet.

[31] This issue is one of procedural fairness. The standard of review for procedural matters is whether in all the circumstances of the case, the adjudicator acted fairly.

[32] The LPA, in section 87, provides for protection of privilege and confidentiality for "reports", which are defined as follows (section 87(1)):

> "report" includes any document, minute, note, correspondence or memorandum created or received by a person, committee, panel, review board or agent of the society in the course of an investigation, audit, inquiry or hearing, but does not include an original document that belongs to a complainant or respondent or to a person other than an employee or agent of the society.

[33] Under section 87(4), a "report" made under the authority of the LPA is not admissible in "any proceeding" without written consent of the Executive Director of the Law Society.

[34] Neither the Appellant nor the Respondent was alive to these sections of the LPA prior to them being raised by the Chair of the Committee. At the outset of the hearing, the Committee raised the issue of the applicability of section 87 of the LPA specifically with respect to parts of Exhibit 4. Exhibit 4 contained Law Society materials regarding the Appellant which related to investigative steps and proceedings, conduct review proceedings and the like, all of which, in the view of the Committee, possibly fell within the definition of "report".

[35] After a discussion of the applicability of section 87, by agreement of the parties the whole of Exhibit 4 was struck from the record.

[36] During the course of the hearing the parties also discussed whether Exhibit 2, which had been admitted without objection, was caught by the same section 87 LPA argument regarding admissibility. Both parties indicated they would be addressing this issue in the legal argument portion of their oral submissions, but when the Council lawyer suggested written argument, the Appellant agreed and indicated that submitting written argument would be preferable for him. As a result, the Committee requested written submissions on the issue.

[37] Procedural fairness concerns whether a person is entitled to and receives certain procedural rights when his or her case is before an administrative decision-maker. These rights encompass fundamental principles such as a person's right to know the case against him or her, the right to meaningfully respond to that case, and the right to have one's case considered impartially. In the present appeal, the Appellant argues his right to know the case against him has been breached by the

Committee's decision to accept written submissions on the admissibility of Exhibit 2 after the close of evidence.

[38] A tribunal is entitled to choose its own procedures as long as those procedures are consistent with statutory requirements and conform to the principles of procedural fairness. Context will determine the degree of procedural fairness required, and there is no obligation on the Committee to hear oral evidence in every instance.

[39] In this case, where the Appellant was applying to obtain a license to pursue a career as a real estate representative, he was entitled to a high degree of procedural fairness. The ability to practice in one's chosen profession is undoubtedly an important part of a person's autonomy and sense of identity. Before denying a person such an opportunity, a decision-maker must be sure to provide the person an opportunity to fully understand the case he or she has to meet, and a fulsome and meaningful opportunity to be heard.

[40] The Appellant submits that as a matter of procedural fairness, the case against him should have been set out in advance of his evidence in order to allow him to know, before he testified, what the case against him was.

[41] In my view, the Appellant was well aware of the evidence the Council intended to introduce; including Exhibit 2, to which the Appellant initially made no objection. It was the Committee who raised the issue of admissibility, and although the Appellant had not initially objected to the introduction of Exhibit 2, the Committee gave him a further opportunity to attempt to set it aside. Further, the Appellant agreed that it would be to his own benefit to provide written submissions rather than making oral legal argument at the end of his evidence. The Committee's decision to permit the parties to make submissions on the issue after the close of evidence did not breach the Appellant's right to procedural fairness. On the contrary, the Committee took steps to ensure the Appellant had an opportunity to understand the issue and respond to it. There can be no doubt that the Appellant was able to respond fully to the "case against him" by being able to provide submissions on the admissibility of Exhibit 2.

[42] I find that the Council acted fairly in all the circumstances in offering the Appellant the opportunity to provide written submissions regarding the issue of the admissibility of Exhibit 2.

b) Did the Committee Correctly Interpret Section 87 of the LPA regarding the admissibility of Exhibit 2

[43] The Appellant argues that the Council erred in its interpretation of section 87 of the LPA in accepting the hearing decisions of the Law Society into evidence without the written consent of either the Appellant or the Executive Director of the Law Society. The Respondent's formulation of the issue is whether the Hearing Committee erred in its view of the scope and applicability of section 87 when it decided it could take the Law Society decisions into account.

[44] The Appellant submits that if section 87 is interpreted as precluding admission of the Law Society decisions without consent, then all of Exhibit 2 should

have been excluded from evidence. According to the Appellant, without Exhibit 2, he would have had no case to meet as there would have been no evidence before the Committee which would disentitle him from licensure.

[45] The question of the Committee's interpretation of section 87 of the LPA is a question of law, and the standard of review for questions of law is correctness. I will therefore review this issue on a correctness standard.

[46] The Appellant submits that Exhibit 2 was inadmissible without the consent of the Executive Director of the Law Society because it fell within the definition of "report" in section 87 of the LPA. The Appellant argues that a "report" under section 87 includes not only conduct reviews and hearings and other preliminary documents, but also any discipline decisions that arise therefrom.

[47] Section 87 of the LPA provides:

> *Certain matters privileged*
>
> 87 (1) In this section:
>
> "**proceeding**" does not include a proceeding under Part 2, 3, 4 or 5;
>
> "**report**" includes any document, minute, note, correspondence or memorandum created or received by a person, committee, panel, review board or agent of the society in the course of an investigation, audit, inquiry or hearing, but does not include an original document that belongs to a complainant or respondent or to a person other than an employee or agent of the society.
>
> (2) If a person has made a complaint to the society respecting a lawyer or law firm, neither the society nor the complainant can be required to disclose or produce the complaint and the complaint is not admissible in any proceeding, except with the written consent of the complainant.
>
> (3) If a lawyer or law firm responds to the society in respect of a complaint or investigation, none of the lawyer, the law firm or the society can be required to disclose or produce the response or a copy or summary of it, and the response or a copy or summary of it is not admissible in any proceeding, except with the written consent of the lawyer or law firm, even though the executive director may have delivered a copy or summary of the response to the complainant.
>
> (4) A report made under the authority of this Act or a record concerning an investigation, an audit, an inquiry, a hearing or a review must not be required to be produced and is not admissible in any proceeding except with the written consent of the executive director.
>
> (5) Except with the written consent of the executive director, the society, an employee or agent or former employee or agent of the society, or a member or former member of a committee, panel or review board established under this Act
>
> (a) must not be compelled to disclose information that the person has acquired during the course of an investigation, an audit, an inquiry, a

> hearing or a review or in the exercise of other powers or the performance of other duties under this Act, and
>
> (b) is not competent to testify in a proceeding if testifying in that proceeding would result in the disclosure of information referred to in paragraph (a). [emphasis added]

[48] Under this section, certain consents are required to disclose or use "reports"; in some instances the consent of an involved lawyer, and in other instances, consent of the Executive Director of the Law Society.

[49] The Committee raised the issue of interpretation of the consent provisions of section 87 with respect to the contents of certain parts of Exhibit 2, which included decisions of various Law Society Bencher panels, and which, in some cases, included findings and recited past disciplinary proceedings and investigations concerning the Appellant.

[50] As discussed above, after raising the issue the Committee invited and received written submissions from the parties as to their respective positions regarding the admissibility of the Law Society discipline decisions. The Committee ultimately concluded that section 87 did not prevent the consideration of decisions relating to the Appellant, holding that the privilege or confidentiality protection under section 87(4) did not extend to written reasons. The Committee decided that it could consider both published and unpublished determinations and written reasons.

[51] The Committee further held that even if it were incorrect, and portions of the written reasons were inadmissible, the Committee could still consider determinations on liability and penalty, including the findings of ungovernability and professional misconduct.

Parties' Positions

[52] The Respondent refers to the decision in *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, where the Court relied on Elmer Driedger's "definitive formulation" of statutory interpretation as follows (at para 26):

> Today there is only one principle or approach; namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[53] The Appellant refers to the approach to statutory interpretation outlined in *Sullivan on the Construction of Statutes ("Sullivan")*[3], and in particular, to the "ordinary meaning rule" and the rule regarding "presumed knowledge". He asserts that section 87 must be given its ordinary meaning, and the ordinary meaning of "report" must include Law Society decisions. He also asserts that the "legislature is presumed to know all that is necessary to produce section 87"[4], though he does not

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[3] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th edition (LexisNexis, 2008).

[4] Appellant written submissions at para 46.

elaborate on what that presumed knowledge entails or why it is relevant in the present case.

Statutory Interpretation

Purpose, Scheme and Context

[54] In coming to the conclusion that the Law Society decisions were admissible in the Council's proceedings, the Committee engaged in a detailed review of statutory interpretation. In particular, the Committee focused on the purpose of section 87, the context of that provision within the LPA, and the overall purpose and scheme of the LPA.

[55] The Committee looked closely at the purpose of the disclosure protection in section 87(4) and was of the view that "the Legislature did not intend this provision as a means of protecting lawyers from public scrutiny or being held accountable in court or other tribunals".[5] I agree. I also agree that while it is arguable that a lawyer's privacy interests might be implicated in this provision, such interests are subordinate to the privacy and confidentiality interests of others, such as a lawyer's clients.

[56] In terms of the context of the provision within the LPA more broadly, the Committee pointed out that section 87 is "the servant of the overall purpose of the legislation which is to protect the public interest, and to ensure professional standards are met, complaints and concerns investigated, and remedial or disciplinary action applied, where appropriate."[6]

[57] Section 3 of the LPA sets out the "Object and duty" of the Law Society as follows:

> **3** It is the object and duty of the society to uphold and protect the public interest in the administration of justice by
>
> (a) preserving and protecting the rights and freedoms of all persons,
>
> (b) ensuring the independence, integrity, honour and competence of lawyers,
>
> (c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,
>
> (d) regulating the practice of law, and
>
> (e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

[58] While the sub-sections of the "Object and duty" section include, *inter alia,* references to protecting the rights and freedoms of all persons and ensuring the independence, integrity, honour and competence of lawyers, the overriding purpose

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[5] Qualification Decision at para 37.
[6] Qualification Decision at para 38.

of the LPA is to uphold and protect the public interest in the administration of justice.

[59] As such, the disclosure protection in section 87 must be read in the context of that overriding purpose. The Rules of the Law Society support this reading in that Rule 3-3(1) essentially does not allow for disclosure about complaints "except for the purpose of complying with the objectives of the Act or with these rules."

[60] It is clearly within the objectives of the Act and in accordance with the rules to provide the public with discipline decisions and the bases upon which they are made.

Ordinary Meaning

[61] With respect to the Appellant's argument that the ordinary meaning of section 87 includes Law Society decisions in the definition of "report", I disagree.

[62] The ordinary definition of "report" in the Oxford English Dictionary[7] includes the following description:

> I. Information provided or conveyed, and related senses.
>
> a. An account of a situation, event, etc., brought by one person to another, esp. as the result of an investigation; a piece of information or intelligence provided by an emissary, official investigator, etc.; a notification of something observed.
>
> b. [use in legislative assembly]
>
> c. An evaluative account or summary of the results of an investigation, or of any matter on which information is required (typically in the form of an official or formal document), given or prepared by a person or body appointed or required to do so.

[63] There is a clear analogy in the excerpt from *Sullivan* provided by the Appellant which references the Supreme Court of Canada case of *Thomson v Canada (Minister of Agriculture)*, [1992] 1 SCR 385 ("*Thomson*"), involving consideration of the meaning of the word "recommendations" in the *Canadian Security Intelligence Service Act.*[8] The Court in *Thomson* discussed the ordinary meaning rule as follows (at p 399-400):

> The simple term "recommendations" should be given its ordinary meaning. "Recommendations" ordinarily means the offering of advice and should not be taken to mean a binding decision. I agree with the conclusion of Dube, J. of the Trial Division who noted, at p.92, that:
>
> > The grammatical, natural and ordinary meaning of the word "recommendation" is not synonymous with "decision". The verb "to recommend" is defined in the *Oxford English Dictionary* as "to communicate or report, to inform". In *Webster's Third New International Dictionary* it is defined as "to mention or introduce as being worthy of acceptance, use or

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[7] *Oxford English Dictionary Online: retrieved February 19, 2019*.

[8] *Canadian Security Intelligence Service Act*, SC 1984, c 21, (now RSC, 1985, c C-23).

> trial; to make a recommendatory statement; to present with approval; to advise, counsel". [emphasis added]

[64] Although the above excerpt was considering the word, “recommendation”, not “report”, the analysis of the term in *Thomson* is useful in interpreting the specific meaning of the words at issue in this case. In *Thomson*, the ordinary meaning of the verb “to recommend” was held to be synonymous with “to communicate or report, to inform”, implying reporting to some authority or supervisory body which would then make a determination or decision and issue reasons, whether written or otherwise.

[65] The same distinction can be drawn in this analysis, where report is generally used in the *LPA* as being a report to some body or institution, normally as in the first definition being from “one person to another, esp. as the result of an investigation”.

[66] Whether in its ordinary meaning or as more narrowly defined in the LPA, I do not find that determinations, decisions and/or written reasons fall within the definition of “report”. Even if I were inclined to that view, once the purpose, scheme and context of the LPA are reviewed, it becomes apparent that there is a clear differentiation between reports and decisions.

Confidentiality and Privilege

[67] Throughout the LPA there are provisions protecting solicitor and client privilege and confidentiality, but the privilege and confidentiality is generally that of the client, not the lawyer. These rules preserve what the Respondent correctly submits is the “private versus public tension that is clear within provisions relating to public hearings and the provisions that relate to conduct reviews and solicitor client confidentiality”.

[68] The LPA contemplates the Law Society having freedom internally to share information and reports by excluding from the consent provisions essentially all Law Society proceedings.[9] At the same time, it prohibits external proceedings from using reports, as defined, without consent. Further, other sections of the LPA refer to “determination”[10] and “written reasons for its determination”[11] in the context of describing decisions. These sections do not refer to Law Society decisions as “reports”.

[69] Once final decisions, orders, determinations and/or written reasons are made by the Benchers, the contents of the reports which may have formed the basis for the result may be referred to within them, subject to client confidentiality and solicitor/client privilege.

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[9] LPA at section 87(1).
[10] LPA at section 38(3)(a).
[11] LPA at section 38(3)(b).

Disclosure

[70] Another inconsistency in the Appellant's proposed interpretation of "report" to include Law Society decisions is that under Law Society Rule 5-10(2), subject to solicitor and client privilege and confidentiality, the Executive Director of the Law Society must disclose a panel's written reasons for its decision on request. Clearly this section of the LPA contemplates the disclosure and use of Law Society decisions more broadly than in the narrow parameters outlined in section 87(4).

[71] With respect to the actual wording of section 87, the Committee pointed out that while the legislative drafting of section 87 could have been improved, the wording was clear enough to differentiate between "reports" and "written reasons".

[72] I agree with the Committee`s finding that "report" does not include Law Society discipline decisions as they are not "created …by a person, committee, panel, review board or agent of the society in the course of an investigation, audit, inquiry or hearing" as report is defined, but rather represent its end product, and it would be "ludicrous to find that information published by the LSBC and 'available to the world on the Internet' concerning the Applicant was somehow barred from being put in evidence".[12]

Public Interest Concerns

[73] The Committee discussed the incompatibility of the requirement under section 10 of RESA for disclosure by an applicant for a real estate license of a history of discipline by a professional body, and the Appellant's argument that the disciplinary reasons from another professional body are privileged.

[74] The Committee found that under RESA the Real Estate Council is mandated to uphold and protect the public interest in relation to the conduct and integrity of its licensees, and that the public interest in that context favours disclosure of disciplinary decisions between regulatory bodies.

[75] The LPA has similar language stating that the object and duty of the Law Society is to uphold and protect the public interest in the administration of justice. I am of the view that the public interest objects of the two statutes are served by cooperation between the regulatory bodies and disclosure of relevant disciplinary information.

[76] I agree with the Committee on its finding that the contents of Exhibit 2 are admissible in their entirety, including the written decisions of the Benchers. A written decision produced as a result of a hearing, is very different from a "report" which is created or received in the course of a hearing. It is an insupportable reading of section 87(4) to preclude the use of publicly available decisions, which decisions in most cases the Executive Director of the law society is mandated to publish, at least in summary form, and now oftentimes are posted on the LSBC website in full.

[77] For all the reasons set out above, I find that the Committee correctly decided that section 87(4) of the LPA does not apply to decisions, determinations or written

[12] Qualification Decision at para 43.

reasons of the Benchers of the Law Society, and that Exhibit 2 properly formed part of the evidentiary basis upon which the Council considered the Appellant's application.

c) Did the Committee misinterpret the onus that applied at the qualification hearing?

[78] The Appellant submits that the Council misinterpreted the onus that applied for the purposes of the qualification hearing. He argues that there must be a *prima facie* case made out by Council prior to him having to rebut the evidence against him.

[79] Further, citing this Tribunal's decision in *Yang v Real Estate Council of British Columbia* (Decision No. 2017-RSA-001(a)) ("*Yang*"), the Appellant argues that the assumption should have been that he was "governable" unless there was something inappropriate he had done in the specific context of the RESA regulatory framework.

[80] In *Yang*, the Real Estate Council was urged to find the applicant for licensing "ungovernable", because he had made repeated unsuccessful complaints and claims, including complaints about the professional conduct of others in the industry. The Hearing Committee in that case declined to make that finding.

[81] In the Appellant's situation, the LSBC did made a finding of ungovernability in its disciplinary hearing. This finding resulted in the Appellant's disbarment, which he was required to disclose to the Council. That disclosure gave rise to the qualification hearing, at which time the Committee was tasked with considering the evidence presented and deciding how much weight to give it in each instance. Unlike in the *Yang* case, in the Appellant's case the Committee was not making any new finding of ungovernability, but had to assess whether the Appellant's previous disbarment on the basis of ungovernability precluded him from licensure under the RESA. The *Yang* case has no application in the present appeal.

[82] Previous decisions aside, the Appellant misapprehends the onus in Real Estate Council qualification hearings. The opening words of section 10 of the RESA state "[a]n applicant for a new license…must satisfy the real estate council that they meet the following applicable requirements". Pursuant to section 10 of the RESA, the onus was always on the Appellant to satisfy the Council that he (a) was of good reputation and suitable to be licensed in the level and category for which he was applying, and (b) had not been disciplined by a professional body for a reason that revealed him to be unfit to be licensed.

[83] I reject the argument by the Appellant that there must be a *prima facie* case made out by Council prior to him having to rebut the evidence against him.

d) Did the Committee err in interpreting and weighing the evidence presented by the Appellant?

[84] The Committee's analysis of whether the Appellant was of good reputation and suitable to be licensed involved assessment and weighing of evidence, and application of a legal framework for analysis. As I have found above, this raises a

question of mixed fact and law to which a reasonableness standard of review applies.

[85] The Appellant submits that the Committee was wrong in interpreting the evidence he presented. He further submits that it is the role of this Tribunal to "consider all of the evidence that has been presented at the hearing and to determine whether or not I am of 'good reputation' and am otherwise 'suitable' for licensing as a Trading Services Representative".

[86] The Appellant's formulation of the role of the FST in this regard is incorrect. How the Committee evaluated and weighed the evidence relating to good reputation and suitability in this case is a question of mixed fact and law attracting a reasonableness standard of review. It is my role, therefore, to evaluate whether the Committee's analysis and ultimate decision was reasonable, and I find that it was.

The Committee's Analysis of the Good Reputation Guidelines

[87] The Committee dedicated a large portion of its decision to an exhaustive review of the evidence presented by the Appellant; including his explanation for his disbarment, and his provision of character evidence through supportive witnesses and letters of reference.

[88] In analyzing the evidence and considering the issue of good reputation raised by section 10(a) of the RESA, and fitness for licensure raised by section 10(d) of the RESA, the Committee referred to the Council's "Education and Licensing Policies" and, in particular, the "Good Reputation Guidelines" (the "Guidelines") set out in section 2-3 of Part II of the "Licensing Guidelines for Individuals".

[89] The Guidelines provide that the inquiry regarding good reputation under section 10(a) of the RESA will include an assessment of "[g]eneral business and personal reputation, in addition to criminal convictions and charges… or whether an applicant has been disciplined by a professional body" [emphasis added]. In this way, the Guidelines articulate that the issue of an applicant's good reputation under section 10(a) of the RESA is at least partially informed by other issues such as professional discipline by another regulating body under section 10(d) of the RESA.

[90] With respect to an applicant's fitness for licensure under section 10(d) of the RESA, the Guidelines provide that:

> Factors that the council will take into consideration to determine whether the applicant is unfit to be a licensee include:
>
> 1) Whether the conduct for which the applicant was disciplined or refused a license…involved dishonesty, fraud, misappropriation or wrongful taking of funds, deceptive dealing, or any other conduct resulting in harm to the public. [emphasis added]

[91] After considering the evidence presented by the Appellant, the Committee found that the acts committed by the Appellant which had led to his disbarment

involved "serious misconduct" [13]. The Committee held that because the Appellant was in a fiduciary relationship with clients he was representing and who suffered losses as a result of his misconduct, he had committed what amounted to "equitable fraud"[14].

[92] Although the Committee provided case law in support of its finding on this point, I question the appropriateness of this characterization of the Appellant's misconduct. I need not decide this point however, because the Committee went on to hold that even if the Appellant's conduct fell short of amounting to equitable fraud, the conduct amounted to "other conduct resulting in harm to the public".[15]

[93] After finding that the conduct which resulted in the Appellant's disbarment amounted to serious misconduct which resulted in harm to the public, the Committee went on to consider the Appellant's evidence regarding whether he was rehabilitated. As a framework for their analysis the Committee used both the "Rehabilitation Factors", set out under section 5 of the Guidelines, and factors listed under section 4 of the Guidelines under the heading "Older and Lengthy Criminal Records".

[94] The Committee pointed out that although the Rehabilitation Factors are primarily focused on past criminal behaviour, they are relevant and applicable to the issue of past professional discipline as well.[16]

[95] In my view, although some of the Rehabilitation Factors reference past criminal behaviour, the formatting of the Guidelines would lead one to believe that the Rehabilitation Factors actually have more to do with past disciplinary proceedings, as they are listed under section 5 of the Guidelines which is headed "*Disciplinary Proceedings Under Legislation Regulating Real Estate, Insurance, Mortgage Broker or Security Activities or by a Professional, Occupational or Self-regulatory Body*". This inconsistency, among others I noted in my review, points to the fact that the Guidelines are not clearly organized.

[96] The Committee did not specifically comment on the applicability of the section 4 "Older and Lengthy Criminal Records" factors, which, similarly, seem to be set out in relation to the commission of criminal offences and not to the issue of professional discipline.

[97] The Appellant argues that it was a mistake for the Committee to analyse and rely on the factors set out in section 4 of the Guidelines because he was never convicted of any crime in relation to the conduct which resulted in his disbarment. I disagree that the Committee erred in this regard.

[98] The Guidelines, as the Committee stated at paragraph 32 of its decision, are not binding, but provide notice as to how a hearing committee will generally approach issues. Unfortunately, the Guidelines are confusing, lack internal organization and are poorly drafted and formatted. However, the factors listed

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[13] Qualification Decision at para 148.
[14] Qualification Decision at para 148.
[15] Qualification Decision at paras 150 and 152.
[16] Qualification Decision at para 31.

under section 4 of the Guidelines, while specifically indicated to deal with applicants with criminal records, include and mirror both section 10(1) RESA requirements for an applicant who has been disciplined by a professional body, and the Rehabilitation Factors listed below the section 5 Disciplinary Proceedings section.

[99] The section 4 factors are not at odds with the relevant factors contained in the Guidelines and the RESA, and the fact that the Committee used these factors as part of their framework for analysis of the Appellant's evidence did not amount to an error.

[100] Reviewing the section 4 Factors and comparing them with the section 5 Rehabilitation Factors and the requirements of section 10 of the RESA, I find that the following factors are closely related, and all are relevant factors for consideration of suitability for licensure:

- Guideline 4(a), "[h]ow much time has elapsed since the last conviction", is similar and addresses the same issue as Guideline 5(h) which queries whether there has been a change in attitude from that which existed at the time of the conduct in question.
- Guideline 4(b), which questions whether the conviction is for crimes involving dishonesty such as property crimes, sexual offences, theft fraud, or forgery, closely mirrors the opening of the Guidelines which lists the following as factors which the Council will consider in their determination of fitness for licensure: "[w]hether the conduct the applicant was disciplined for…involved dishonesty, fraud, misappropriation or wrongful taking of funds, deceptive dealing, or any other conduct resulting in harm to the public".
- Guideline 4(c), "[w]hether the applicant is eligible to apply for a pardon", is similar to Guideline 5(b) which has to do with successful completion or early discharge from probation or parole.
- Guideline 4(d), which has to do with whether the applicant is "honest, trustworthy and competent to transact the business of a real estate licensee in a manner which will safeguard the interest of the public" is equivalent to section 10(a) of the RESA which requires the applicant to currently be of good reputation and suitable to be licensed. This factor also mirrors many of the Guideline 5 factors, including Guideline 5(f) which has to do with the correction of business practices which resulted in injury to others.
- Guideline 4(e), "[h]as the applicant rehabilitated himself or herself" is a simple restatement of the Guideline 5 Rehabilitation Factors (a)-(h), which may be considered to determine whether an applicant has fully rehabilitated him or herself and is currently of good reputation and suitable to be licensed.

[101] While the Committee should have been clearer in its decision about how and why it was analyzing the evidence in terms of different categories of factors set out in the Guidelines, in fact, all the factors the Committee considered are aimed at determining the applicant's qualification as being "of good reputation", and this is the overriding context of the Guidelines.

[102] In summary, I find that the Committee's analysis of all of the Guidelines factors in the context of the Appellant's evidence was reasonable. The Committee's consideration of these factors was in consideration of the overarching issue of the Appellant's suitability for licensure. Factors such as the length of time since the misconduct, whether the misconduct evidenced dishonesty, whether the Appellant is honest and trustworthy, and whether the Appellant has rehabilitated himself were all germane to the Committee's analysis of the Appellant's fitness for licensure at the time of the application.

The Committee's Analysis of the Evidence

[103] After having found that the Appellant had engaged in "serious misconduct" which resulted in "harm to the public", the Committee held that it had to be satisfied that the Appellant was rehabilitated prior to being able to meet suitability criteria and convincing the Committee that he would comply with professional standards in the future.

[104] The Committee reviewed in detail the testimony of the Appellant, his witnesses and his character references. The onus was on the Appellant to prove that the features of his character that led him to the acts of misconduct for which the Law Society found him ungovernable were no longer present. The Committee found, in its thorough review of the evidence presented, that the Appellant had failed to meet this onus; he failed, more generally, to demonstrate that the suitability requirement for licensing under RESA had been met.

[105] The Committee specifically contrasted the Law Society's characterization of a conflict of interest issue as "a mistake" made by the Appellant, with the Appellant's own evidence given at the Committee hearing with respect to that issue. The Committee found that (at para 109):

> He focused more on his own self-interest than he did on how his actions would look and affect the position of the former, client, who had in several matters reposed trust and confidence in him. Being "mad" at someone is not a good excuse for violating a professional standard. Opting not to consider what the client would think about it, is not a fit response when asked to justify acting against a former client.

[106] With regard to how he would act in the future, the Committee highlighted the Appellant's position that in order to avoid future conflicts he felt that "the only way I can protect myself and clients is just don't go there"[17]. In response to this point the Committee held that (at para 114):

> Staying away from something does not really represent a full appreciation for what is right and what is wrong. When acting for a client one must constantly keep in mind the bounds of professional conduct. One cannot simply tell a client that you are staying away from advising on a matter because it may be problematic.

[107] The Committee considered the Appellant's submissions that he has "always been of the view that character includes appreciating the differences between what

[17] Qualification Decision at para 113.

is right and what is wrong"[18]. He added that "character is revealed by your actions and that character includes being able to do the right thing no matter what doing the right thing may do to you personally or to a business or organization you may be involved with".[19]

[108] The Committee found that while these were strong statements of principle, the Appellant did not relate these attributes to his lengthy record of his failing to live up to those standards or to show his rehabilitation, but instead referred to two events involving his service with soccer groups where he detected and pursued wrongdoing in others. The Committee found that (at para 120):

> Being able to see wrongdoing in others and pursuing them is not the same thing as the principles governing personal conduct that the Applicant sets out in his para 119. Being able to see where temptation lies and to avoid misconduct in one's personal conduct is demonstrated by consistently observing the rules.

[109] The Committee considered the letters of reference and reviewed the evidence given by the Appellant's character witnesses. The committee found that while all of that evidence was supportive, the persons who provided the evidence did not appear to have detailed or complete knowledge of the disciplinary proceedings of the LSBC leading to the Appellant's disbarment.

[110] Ultimately, the Committee was not convinced that with less pressure and stress the Appellant would be a changed person and therefore unlikely to repeat any misconduct. On this point the Committee found (at para 137):

> The evidence presented by and for the Applicant suggested that if he kept his workload light and his stress level moderate, he would not make the bad choices and do the wrongful things that had gotten him in trouble before. But his plan is to engage in a high stress, active role as a licensee and business person. In essence, his own case undercuts his argument that he is someone to be trusted not to repeat past 'mistakes'.

[111] The Committee also referred to *Kholsa v Real Estate Council of British Columbia,* [2000] BCCO No 11 (September 13, 2000), ("*Khosla*"), which set out the following concerning "the suitability requirement" under the RESA to which decision the Appellant has also referred (at para 27):

> …The qualities that make a person suitable for licensing include such things as honesty, reliability, integrity and professionalism. Where an applicant's conduct has shown an absence of one or more of these qualities, the applicant is not suitable and should not be licensed. These qualities are questions of character which are often enduring.

[112] The Committee's findings led them to the conclusion that the Appellant did not have a clear understanding of the issues arising from his prior disciplinary matters, and neither the insight nor ability to ensure that they would not be repeated.

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[18] Qualification Decision at para 119 citing Appeal Record - Exhibit 9, "*Douglas Welder Evidence*" – at para 119.
[19] Qualification Decision at para 119 citing Appeal Record - Exhibit 9, "*Douglas Welder Evidence*" – at para 119.

[113] In coming to the conclusion that the Appellant was unsuitable for licensure the Committee considered the general business and personal reputation of the appellant as set out in the Guidelines, and considered relevant factors, legislation, case law and Rules. The Committee considered all of the evidence put forward by the Appellant and provided a detailed analysis of that evidence. Contrary to the submissions of the Appellant, I find the Committee did not misinterpret any of the evidence led by the Appellant, but came to different conclusions than the Appellant about what the evidence showed.

[114] I find the Committee's interpretation and consideration of the Appellant's evidence was reasonable.

e) Did the Committee err in imposing a three-year limitation on the Appellant's ability to re-apply for a Real Estate License?

[115] The Appellant's final argument is that the Council was wrong in law and fact in imposing a time limit during which he would not be eligible to re-apply to the Council for licensing. The Committee decided that no further application from Mr. Welder would be considered for 3 years after the decision; being on or after January 25, 2021.

[116] The assessment of a waiting period falls implicitly within the Council's jurisdiction over licensing. On this point, in *Khosla*, referred to above, the Commercial Appeals Commission held (at para 26):

> The power to rule, in effect, that a person will continue to be unsuitable for a minimum period of time must be inferred from the power to so decide in the first place as a matter of reasonable inference, administrative expediency and fairness to the applicant.

[117] The decision of Council to impose a three-year waiting period on the Appellant was a discretionary decision which, as discussed above, attracts a reasonableness standard of review.

[118] The Panel in *Khosla* pointed out that when a finding of unsuitability has been made against an individual on the basis of past misconduct, the qualities of character which led to the misconduct are often "enduring". The Commission held that it is implicit from a finding of current unsuitability for licensure that future suitability for licensure can only be shown if an individual shows rehabilitation that occurs over time.[20]

[119] The Panel further held that because an applicant for a license has a right to be heard, once a finding of unsuitability has been made, it becomes a matter of administrative expediency to impose a minimum period of time before another application can be considered.[21]

[120] The assessment of a waiting period allows the Council to be able to effectively control the licensing process by precluding repeat applications for

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[20] *Khosla* at paras 26-29.
[21] *Khosla* at para 30.

registration by the same applicant; especially where the Council has made findings that an applicant is not of good reputation and suitable to be licensed.

[121] In *Anoliefoh v Real Estate Council of BC,* Decision No. 2012-RSA-001(a) (*"Anoliefoh*"), this Tribunal indicated that a waiting period may be necessary for administrative expediency as follows (at para 107):

> The waiting period is not a penalty but a "minimum period of ineligibility that the respondent prescribes in a given case [that] is a reflection of the degree of unsuitability displayed and is commensurate with the time required to establish that a person who has not been suitable may be suitable" (*Khosla*, p. 7)

[122] The authorities submitted by both the Appellant and Respondent include decisions where waiting periods for re-application have been imposed. The longest waiting period, five years, was assessed in the *Khosla* decision referred to above.

[123] In *Khosla*, the Real Estate Council had issued an order preventing Mr. Khosla from reapplying for licensure for a period of five years on the basis that his misconduct was very serious and equated to "white collar" fraudulent crime. The Commercial Appeals Commission held that it was wrong of the Council to assess the five year period on the basis of equating the conduct to a criminal offence, but upheld the overall finding that five years was appropriate because of the serious nature of Mr. Khosla's misconduct, and because the guideline ineligibility period for criminal offenses was, in effect, much longer than five years (at paras 34, 35 and 37):

> [34] We find that it was incorrect for the respondent to equate the appellant's [respondent's – sic] past conduct to fraudulent white collar crime and impose a prescribed ineligibility period on that basis. The stigma and consequent damage to reputation that flows from a criminal conviction is more severe than that which results from wrongful acts for which there are neither criminal charges nor convictions.
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> [35] However, that is not to say there is no stigma and consequent damage to reputation as a result of the appellant's past conduct. The guidelines allow for consideration of "general business and personal reputation" when considering good reputation. Although it does not carry with it the same stigma and consequent damage to reputation as a criminal conviction, the appellant's past conduct is nevertheless extremely damaging to his general and personal reputation.
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> …
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> [37] On that basis, the Commission finds that the five year period of ineligibility is appropriate notwithstanding that there has been no criminal conviction. We note that the Guideline five-year ineligibility period for fraudulent white collar crime is a minimum and follows completion of sentence such that, in effect, the ineligibility period had the appellant been convicted of such a crime would likely be much longer than five years.

[124] In *Atwal v Real Estate Council of British Columbia*, Decision No. 2010-RSA-001(a) ("*Atwal*"), a waiting period of three years was assessed. In that decision, the waiting period was imposed on the basis of Mr. Atwal's dishonest behaviour

outside his profession, including that he had been found liable for fraud against ICBC in a civil action.

[125] The low end of waiting periods was set out in *Anoliefoh*, referred to above, where the FST reduced a 3-year waiting period to a one-year waiting period. The FST overturned certain findings that Mr. Anoliefoh was responsible for causing "public harm", holding "the evidence does not establish any actual public harm caused by the Appellant".[22] However, the FST pointed out that the shortcomings in the Appellant's management of the brokerage "put the public interest at risk of potential harm",[23] and determined that he needed a minimum time to acquire "the level of knowledge and skills appropriate to competently carry out the responsibilities of a managing broker".[24] The FST ultimately held that one year would allow the Appellant the time to become suitable prior to reapplication.

[126] A number of other cases were presented by the Appellant in which applicants were granted licenses and no waiting periods were assessed. In a qualification hearing involving disbarred lawyer Peter Hammond[25] for example, the Real Estate Council granted a license to Mr. Hammond, who had been disbarred by the Law Society 10 years earlier. In determining that Mr. Hammond was suitable to be licensed (with conditions attached to his license), a major factor for the Council appeared to be the long period of time which had elapsed since his disbarment, and his gainful employment and honest and trustworthy behaviour over the course of that time.

[127] In the present case, the Committee justified its assessment of a three year waiting period on the basis of three points. First, the Committee pointed out that the Law society's finding of ungovernability and disbarment of the Appellant was relatively recent, and the Appellant had only admitted wrongdoing subsequent to his disbarment. The Committee reviewed the evidence and held that in the period of time since the final Law Society decision the Appellant had not demonstrated current "governability". In the Committee's view, there had not been a sufficient passage of time to assure the Committee that past misconduct would not be repeated.

[128] Second, the Committee rejected the Appellant's explanation that in order to avoid making the same mistakes as he had in the past he would avoid the stressful situations that gave rise to them. The Committee reasonably pointed out that acting as a real estate licensee involves regularly engaging in stressful situations. The Committee held that it was not convinced that the Appellant's temperament would allow him to meet professional standards in such stressful situations.

[129] Finally, the Committee pointed out that the Appellant's history of "blending business with professional matters and his own interests with those of his clients" raised concerns regarding his apparent lack of understanding of the problems with behaving in such a manner in the context of being a real estate licensee.

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[22] *Anoliefoh* at para 109.
[23] *Anoliefoh* at para 109.
[24] *Anoliefoh* at para 111.
[25] *In the Matter of the Qualification of Peter Wallace Hammond* (May 03, 2012) ("*Hammond*").

[130] In my view, the Appellant's prior misconduct conduct is factually closer to the conduct in the *Khosla* and *Atwal* cases than it is to the conduct in the *Anoliefoh* or *Hammond* cases.

[131] Although the Appellant was not charged with criminal fraud nor found civilly liable for fraud, he was disbarred for professional misconduct and deemed ungovernable; among the most extreme findings of professional misconduct in Law Society proceedings.

[132] While I may have some doubts regarding the Committee's finding that the Appellant's actions equate to "equitable fraud", as discussed above, this finding was not necessary for the Committee to conclude that the Appellant had engaged in serious misconduct which had resulted in harm to the public.

[133] Further, in some of the cases cited by the parties, while the applicant was granted a license without a waiting period or where the waiting period was at the lower end, the length of time between the applicant's original conviction or disciplinary action and the application for licensing was much longer than in the present case. The Committee here, exercising its discretion, decided that there had not been a sufficient period of time between the actions complained of and the application, nor enough evidence of good behaviour since.

[134] Discretionary decisions deserve a level of deference. There are a range of waiting periods that the Committee could have imposed, and after reviewing the decisions presented by the Appellant and the Respondent in this matter, I am of the view that this decision is clearly within the range of reasonable outcomes. I find the waiting period was reasonable in the circumstances.

DECISION

[135] I find that the Committee satisfied the requirements for procedural fairness in the timing of the evidence and requests for written submissions regarding the issue of the admissibility of Exhibit 2 based on the interpretation of section 87 of the LPA.

[136] I find that the Committee correctly interpreted section 87 of the LPA, and that Exhibit 2 and its contents were properly included in evidence before the Committee.

[137] I find that the Committee applied the correct onus at the qualification hearing.

[138] I find that the decision that the Appellant was not suitable to be licensed as a trading services representative under section 10 of the RESA and sections 2-6 of the Council Rules was reasonably decided by the Committee based on the evidence.

[139] I find that the Committee's assessment of a three-year waiting period for reapplication was reasonable.

[140] Mr. Welder's appeal is dismissed in its entirety, and the Council's decision of January 25, 2018 is confirmed.

COSTS

[141] Neither party has provided full submissions on costs. As it is the Council which seeks costs, I invite the Council to provide submissions on costs by **March 14, 2019** , following which the Appellant may provide his response submissions by **April 04, 2019** with a right of reply to the Council by no later than **April 11, 2019**.

"Jane Purdie"

Jane A. G. Purdie, Q.C.

Panel Member, Financial Services Tribunal

February 21, 2019