



# Financial Services Tribunal

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## **DECISION No. 2018-RSA-002(c) and 003(c)**

In the matter of an appeal under section 54 of the *Real Estate Services Act*, SBC 2004, c 42

**BETWEEN:** Shahin Behroyan **APPELLANT**

**AND:** Real Estate Council of British Columbia and  
Superintendent of Real Estate **RESPONDENTS**

**BEFORE:** Michael Tourigny, Panel Chair

**DATE:** Conducted by way of written submissions  
concluding on September 30, 2019

**APPEARING:**

For the Appellant:	John Douglas Shields, Legal Counsel
For the Respondent Real Estate Council of BC:	Jean P. Whittow Q.C., Legal Counsel
For the Respondent Superintendent of Real Estate:	Joni Worton, Legal Counsel

## **Remedy flowing from Liability Appeal Decision**

### **Background**

[1] In September 2017, a Committee (the "Panel") of the Real Estate Council of British Columbia (the "Council") conducted a disciplinary hearing to determine whether Shahin Behroyan (the "Appellant"), a real estate agent licensed under the *Real Estate Services Act*, SBC 2004, c 42 (the "RESA"), committed professional misconduct contrary to section 35 of the RESA.

[2] By written decision dated October 30, 2017 (the "Liability Decision"), the Panel concluded that five of the seven allegations of misconduct that had been particularized against the Appellant in the Amended Notice of Discipline Hearing had been proven, leading to a finding of professional misconduct under section 35 of the RESA.

[3] After hearing oral submissions on penalty, the Panel issued a written decision on May 4, 2018 (the "Penalty Decision"). The Penalty Decision suspended the Appellant's RESA license for a period of 12 months effective June 1, 2018. The Penalty Decision also required that the Appellant pay a \$7500 fine and enforcement costs of \$58,708.85 within specified time limits, and that he take an ethics course prior to the completion of his suspension.

[4] In May 2018, the Appellant appealed both the Liability and Penalty Decisions to the Financial Services Tribunal (the "Tribunal") under section 54(1)(d) of the RESA. By operation of section 55(2) of the RESA, both decisions have been stayed pending final determination of the appeal.

[5] The Superintendent of Real Estate (the "Superintendent") filed a separate appeal under section 54(1)(d) of the RESA from the Penalty Decision.

[6] The parties agreed that these two appeals should be joined and heard together. The parties further agreed that the hearing of these appeals should be bifurcated to allow for the appeal from the Liability Decision to be decided prior to consideration of the Penalty Decision. These agreements of the parties were formalized by order of the Tribunal dated June 15, 2018, which order also provided that the appeals would be heard by a single member of the Tribunal.

[7] I heard and decided the Appellant's appeal from the Liability Decision in Tribunal Decision No. 2018-RSA-002(b) and 003(b), dated August 27, 2019 (the "Liability Appeal Decision"). In the Liability Appeal Decision I confirmed the Panel's findings of professional misconduct in relation to three of the five allegations found to have been proven by the Panel, and held that the Panel's findings of professional misconduct in relation to the remaining two allegations were made in error.

[8] I concluded the Liability Appeal Decision with instructions to the parties as follows (at paras 292-294):

[292] Given that the Appeal has been bifurcated and I have yet to address the penalty portion of the hearing, and given my decision that the Panel's findings in the Liability Decision in regard to allegations 1. d. and 1. f. were made in error, an issue arises as to the appropriate way to move this appeal forward.

[293] The parties have not provided submissions on remedy applicable to the circumstance of my finding that the Panel was in error in relation to two of the five specific allegations of professional misconduct found by it to have been proven in the Liability Decision. Accordingly, as a matter of procedural fairness, I invite the parties to provide submissions on appropriate remedy and on whether and how to proceed with the penalty portion of the appeal...

[294] Both the Appellant and the Respondents have sought costs of this appeal in their submissions. Success on this appeal from the Liability Decision was divided. If either the Appellant or the Respondents wish to pursue their claim for costs in

relation to this part of the appeal, notice of that intention should be provided in writing to the Tribunal and a schedule for the exchange of submissions will be set.

[9] The requested submissions from the Appellant and the Respondents have now been received by the Tribunal.

## **ISSUES**

[10] The issues to be addressed in this decision are as follows:

- a. What is the appropriate remedy given the finding in the Liability Appeal Decision that the Panel was in error in relation to two of the five specific allegations of professional misconduct found by it to have been proven?
- b. Should costs of the Liability Appeal be awarded to either party?

## **ANALYSIS AND DECISION**

### **a. Remedy**

[11] By virtue of section 54(4) of the RESA, section 242.2(11) of the *Financial Institutions Act*, RSBC 1996, c 141, (the "FIA"), applies to this appeal, and provides that the Tribunal may confirm, reverse or vary a decision, or send the matter back for reconsideration, with or without directions. This provides the Tribunal member hearing an appeal with a broad discretion in crafting a remedy.

*Should the matter of penalty be addressed by the Tribunal or sent back to Council for reconsideration?*

[12] The Appellant submits that because the Panel made its Penalty Decision on the basis of five findings of professional misconduct, and given two of the five findings against him have now been set aside, as a matter of fairness the issue of the appropriate penalty should be remitted to a new panel of Council for a new, independent finding with "full appeal rights as afforded by statute". The Appellant argues no one can know what the principal factors were that led to the Panel's Penalty Decision. The Appellant submits that if the Tribunal were to proceed to decide the appeals from the Penalty Decision now, this would impair his statutory rights of appeal.

[13] The Superintendent likewise submits that the appropriate remedy is for the Tribunal to remit the matter of penalty back to the Council for reconsideration and takes no position as to whether the matter should be heard by the same or a new panel. The Superintendent observes that the parties do not have the benefit of a penalty decision of the Council that reflects the varied findings of the Tribunal made in the Liability Appeal Decision and argues that if penalty is not sent back to Council for reconsideration, the Superintendent is essentially placed in the position of making an argument de novo on penalty before the Tribunal and is no longer in the position of appellant. The Superintendent states further that, depending on the Council's new decision on penalty and reasons, the Superintendent may withdraw its appeal. However, if the matter is not remitted for reconsideration that possibility would be lost.

[14] Conversely, Council submits that the Tribunal should proceed with both appeals of the Penalty Decision in which each of the appellants have a full right of reply to the other appellant's submissions. In support of this submission, the Council points to the fact that in the Penalty Decision the Panel did not attribute portions of the penalty to different allegations and that the penalty was set globally. Council argues that the principal factor in setting the penalty in this case by the Panel was the seriousness of the Appellant's misconduct in causing his client to pay him a \$75,000 bonus by falsely stating that the bonus was demanded by the agent of prospective purchasers. The Council further submits that the two allegations reversed in the Liability Appeal Decision are "quite secondary".

[15] The Council advises that if the matter was remitted to Council for reconsideration it would have to go before a new panel for practical reasons associated with the difficulty or impossibility of reconstituting the original Panel due to the passage of time.<sup>1</sup>

[16] The Council submits that given the Tribunal's familiarity with the matter it is best positioned to consider the entirety of the record and determine whether the reversal of Panel's decisions as regards allegations 1.d. and 1.f. impacts the reasonableness of the Penalty Decision. The Council argues a referral to a new panel would be a duplication of effort, add complexity, and would prolong the case unnecessarily.

[17] Council is correct that the Tribunal has the discretion to proceed to address the appeals from the Penalty Decision to determine whether the reversal of Panel's decisions as regards allegations 1.d. and 1.f. impacts the reasonableness of the Penalty Decision. Council is also correct in observing that doing so would likely avoid some duplication of effort and expedite the ultimate determination of this case, both of which objectives could be seen to serve the interests of justice.

[18] The Council submits that a reconsideration by Council of penalty in the circumstances is not needed to meet the requirements of procedural fairness.

[19] Council observes that the Tribunal may and indeed has considered both liability and penalty appeals together and refers to the Tribunal's decision in *Parsons v Real Estate Council of British Columbia and Superintendent of Real Estate*, Decision No. 2015-RSA-002(d) ("*Parsons*") as an example of the Tribunal reversing a decision of Council in part, and in the same decision modifying the penalty.

[20] While it is common for the Tribunal to consider both liability and penalty in a single appeal and for the Tribunal to modify the penalty, as occurred in *Parsons*, I find the circumstances of this appeal to be distinguishable from *Parsons* and relatively unique. In this case we are dealing with two separate appeals (one by the Appellant from both liability and penalty, and a separate appeal by the Superintendent from penalty), which have been joined to be heard together with that hearing bifurcated to allow for the appeal from the Liability Decision to be decided prior to the consideration of penalty. I point out that due to the bifurcation

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<sup>1</sup> For this reason, the Council, in alternative submissions, consents to a direction that the matter be referred to a new panel if reconsideration by Council is ordered by the Tribunal.

of the appeals I have not yet been provided with submissions from the parties or otherwise commenced consideration of the substance of the appeals from the Penalty Decision.

[21] As submitted by Council, the Superintendent requested bifurcation on the basis that, depending on the outcome of the appeal from the Liability Decision, the Superintendent's appeal could vary or not be required at all.

[22] As noted above, the Superintendent submits that depending on the Council's new decision on penalty and reasons, the Superintendent may withdraw its appeal. However, if the matter is not remitted for reconsideration the Superintendent submits that such possibility would be lost. More particularly, the Superintendent submits that if the matter of penalty is not referred back for reconsideration by a disciplinary committee of Council for decision in light of the varied findings of the Tribunal in the Liability Appeal Decision, the Superintendent will be deprived of the benefit of an informed decision of a disciplinary committee in relation to which it could fairly consider whether to exercise its appeal rights under 54(1)(d) of the RESA.

[23] In exercising my discretion as to how best to proceed with the matter of penalty I have weighed the advantages of proceeding as suggested by Council against the concerns raised primarily by the Superintendent if I was to do so.

[24] In the rather unique circumstance of dealing with a bifurcated appeal, I am persuaded by the submissions of the Superintendent to the effect that the question of penalty should be sent back to a new panel of Council for reconsideration as a matter of procedural fairness. I so order. The rationale for the bifurcation of the penalty appeals from the liability appeal would otherwise be frustrated. Likewise, if the Tribunal were to proceed to hear both appeals from the Penalty Decision, as suggested by Council, the ability of the Superintendent to make fulsome submissions as an appellant would be complicated and potentially compromised by being forced to engage in speculation when addressing the reasonableness of the Penalty Decision.

[25] As submitted by the Superintendent in the appeal of the Liability Decision, Council is a licensing and regulatory body with a mandate to protect the public interest in relation to the conduct and integrity of its licensees by enforcing the licensing and licensee conduct requirements of the RESA. The Council's core business areas are education, licensing, and disciplinary and hearing processes. While the Tribunal clearly has the expertise and is in a position to decide penalty in this matter, I am comforted by the fact that the subject matter of the appropriate penalty in light of the Liability Appeal Decision also falls squarely within Council's expertise. I have taken this expertise into account in deciding to send the question of penalty back to Council for reconsideration.

[26] The question remains as to the directions I shall provide to Council in regard to its reconsideration of penalty.

*What directions should be given by the Tribunal to Council governing its reconsideration of penalty?*

[27] I repeat that under section 242.2(11) of the FIA the Tribunal has broad discretion as to whether and what directions to give to a new panel of Council reconsidering penalty.

[28] The Appellant argues that the hearing before a new panel should allow for full oral submissions given the seriousness and the extent of what the Council seeks as a penalty, to ensure that the new panel is properly informed and the Appellant is given full rights of advocacy and response. The Appellant suggests that in addition to his legal counsel's oral submissions he may want to speak to the new panel personally, as part of his submissions. The Appellant submits that oral submissions on penalty are usually heard by Council before a decision is rendered.

[29] The Superintendent submits that the Tribunal should direct that reconsideration of penalty by the new panel be based on the record of proceedings after receiving written submissions of the parties. The Superintendent argues that a full oral hearing on evidentiary matters has already been completed, and a decision on penalty based on the varied findings can be reached by a review of the record and with written submissions from the parties. There is no need for a more extensive hearing. Once a new penalty decision is released, the Superintendent can determine whether to proceed with his appeal on penalty or to withdraw the penalty appeal.

[30] The Superintendent references and commends the approach taken in the prior decision of the Tribunal in *The Superintendent of Real Estate v Real Estate Council of British Columbia and Kenneth Scott Spong*, FST 05-007 ("*Spong*"), in which the Tribunal directed that the matter of penalty be sent back to the Hearing Committee for reconsideration based on the record.

[31] In alternative submissions, the Council submits that if the matter of penalty is to be sent back to Council for reconsideration, the Tribunal should exercise its discretion to provide directions. Council submits that the following directions would preserve the full opportunity to make submissions in light of the Tribunal's Liability Appeal Decision, but also offer a way to expedite the process:

- a. That submissions are to be made to the new panel in writing, in accordance with a schedule to be set by the panel, and without an in-person attendance before the panel.
- b. The panel's decision is to be made based upon the record before the Tribunal, that is, the transcripts, exhibits, and decisions of the Panel, plus the Liability Appeal Decision and decision of the Tribunal on the application to adduce new evidence.
- c. The balance of appeal No. 2018-RSA-G01 shall be adjourned generally, to avoid complications arising from multiple proceedings.

[32] This aspect of the dispute between the parties boils down to a consideration as to whether, as a matter of fairness, I should direct that oral or written submissions should be made by the parties to the new panel reconsidering penalty, and whether the reconsideration should be based on the record.

[33] The nature and extent of the Appellant's entitlement to procedural fairness must be considered in the statutory context of the RESA. Under section 40, following an investigation under section 37 the Council may issue a notice to the affected licensee of a hearing by a discipline committee under section 42 of the RESA, such as that afforded to the Appellant in this case.

[34] Under its statutory powers Council has established and published "Complaint and Discipline Procedures" which include procedures applicable to disciplinary hearings conducted under section 42 of the RESA. These procedures contemplate separate hearings before the discipline committee for liability and penalty and provide that when a separate hearing with respect to penalty is held, the discipline committee "may invite written or oral submissions" on penalty. I reference these provisions in determining that the Appellant has no statutory right to advance his submissions on reconsideration by the new panel of penalty in an oral hearing as opposed to making submissions in writing.

[35] The Superintendent is correct in stating that a full oral hearing on evidentiary matters has already been completed. Additionally, Following the Panel's Liability Decision, in which the Appellant was found to have committed professional misconduct contrary to section 35 of the RESA in respect of five specific allegations, the Appellant was afforded a day long oral hearing on penalty. A transcript of those fulsome submissions form part of the record on this appeal.

[36] I agree with the submissions of the Superintendent and Council to the effect that a decision on penalty based on the varied findings can fairly be reached by a review of the record and with the benefit of written submissions from the parties. I find that there is no need for a further oral hearing or for the introduction of any further evidence as sought by the Appellant.

[37] I find that a new panel of the Council will be properly informed and best positioned to apply its expertise in reconsidering penalty with the benefit of the following directions, which I have slightly modified from the directions suggested by Council:

- a. Submissions are to be made by the Appellant and Council to the new panel in writing, in accordance with a schedule to be set by the new panel, and without in-person attendance or further oral submissions before the panel.
- b. The new panel's reconsideration is to be based upon the record before the Tribunal on this appeal; that is, the transcripts of testimony and submissions before the Panel, exhibits, and decisions of the Panel, plus the Liability Appeal Decision [Decision No.2018-RSA-002(b) and 3(b)] and the decision of the Tribunal on the application to adduce new evidence [Decision No.2018-RSA-002(a) and 3(a)].
- c. The outstanding appeals from the Penalty Decision by the Appellant and Superintendent shall be adjourned generally, to avoid complications arising from multiple proceedings.

**b. Costs**

[38] In the Liability Appeal Decision, based on the fact that the parties had sought costs of the appeal from each other in their submissions, I sought notice of their current intentions to pursue a claim for costs given the divided success in the appeal of the Liability Decision.

[39] Both the Appellant and Superintendent have submitted, given the divided success on the appeal of the Liability Decision, that the parties should bear their own costs.

[40] Council submits, based on the Tribunal's Practice Directives and Guidelines, (which include criteria that the Tribunal may consider in determining whether a party is liable to pay the costs of another party), that "at this time" no costs in respect of the appeal are payable by or to any party. Council submits that costs would need to be revisited following the penalty appeal.

[41] In these circumstances, and without prejudice to the rights of any party to ultimately pursue a claim for costs of the appeal of the Liability Decision pursuant to subsection 242.1(7)(g) of the FIA and section 47 of the *Administrative Tribunals Act*, SBC 2004, c 45, I have decided to not address the question of costs of the appeal at this time.

"Michael Tourigny"

Michael Tourigny  
Member, Financial Services Tribunal

October 18, 2019