Financial Services Tribunal

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DECISION NO. 2019-FIA-004(a)

In the matter of an appeal under section 242 of the *Financial Institutions Act,* RSBC 1996 c 141

BETWEEN:	Luan Charles Xing	**APPELLANT**
AND:	Insurance Council of British Columbia	**RESPONDENT**
AND:	Financial Institutions Commission	**RESPONDENT**
BEFORE:	Michael Tourigny, Panel Chair	
DATE:	Conducted by way of written submissions concluding on June 3, 2019	
APPEARING:	For the Appellant: Ravneet Arora, Legal Counsel For the Respondent Insurance Council of British Columbia: David T. McKnight, Legal Counsel For the Respondent Financial Institutions Commission: Sandra Wilkinson, Legal Counsel	

Decision on Application for Stay

The Application

[1] On May 7, 2019 Luan Charles Xing (the "Appellant") appealed to the Financial Services Tribunal (the "FST") under section 242 of the *Financial Institutions Act*, RSBC 1996 c 141 (the "*FIA*") from the April 23, 2019 decision (the "Order") of the Insurance Council of British Columbia (the "Council") insofar as the Order directed that his life and accident sickness insurance ("Life Agent") licence be suspended for a term of one year, with the necessary revisions to the remainder of the terms of the Order as are impacted by setting aside of his license suspension.

[2] In this application, also filed on May 7, 2019, the Appellant applies under section 242.2(10)(a)(i) of the *FIA* for a stay of the term of the Order suspending his

Life Agent license for one year (the "Suspension Order"). He also seeks a temporary stay of another term of the order which requires that he be supervised upon reinstatement of his Life Agent license. More specifically, the Appellant asks that if his application for a stay of the Suspension Order is granted, the supervision requirement be stayed for a reasonable period of time in order to provide him an opportunity to locate a supervisor and have that supervisor approved by the Council.

[3] The Council submits that the stay sought by the Appellant should not be granted. The Financial Institutions Commission agrees with and adopts the submissions of the Council.

[4] I observe that the Appellant's application also sought an interim stay pending determination by the FST of the within stay application. By decision dated May 17, 2019 I granted the requested application for an interim stay pending determination of this application.

BACKGROUND

[5] The Appellant has held his Life Agent licence since 2010.

[6] The Appellant had a contract to act on behalf of a life insurance company (the "Insurer"). In February 2016 Council received a report from the Insurer relating to client concerns about the Appellant's insurance services. This prompted the Council to conduct its own investigation in relation to those complaints. The resulting investigation report was considered by Council at its April 11, 2017 meeting.

[7] In reliance on the investigation report, Council determined that the Appellant's actions in relation to the client complaints contravened the *FIA*, Council's Rules and its Code of Conduct in that those actions brought into question his competency, trustworthiness, and his ability to carry on the business of insurance in good faith and in accordance with the usual practice of the business of insurance. Based on its competency finding, along with other stated factors, the Council provided the Appellant with notice of its intended decision to cancel his Life Agent licence.

[8] On receipt of the notice of the Council's intended decision the Appellant exercised his right under section 237 of the *FIA* to dispute Council's findings and intended decision and to require a hearing before the Council.

[9] Council issued the Appellant with a Notice of Hearing scheduling the hearing for September 28, 2018 (the "Hearing"). The Notice of Hearing set out that the purpose of the hearing was to determine whether the Appellant had contravened the *FIA*, Council's Rules and its Code of Conduct in that, among other things:

1. The Appellant failed to act in a trustworthy and competent manner, in good faith, and in accordance with the usual practice of the business of insurance:

    a. By misrepresenting and/or by making false and inaccurate declarations to an insurer that information contained in clients' insurance applications was accurate, including that his agency's address was the residential address of

the clients and that a third party, who paid the clients' insurance premiums, was a relative of clients;

b. By enlisting another individual to impersonate him for the purposes of professional development;

[10] The Hearing proceeded before a committee of the Council (the "Hearing Committee") on the evidentiary basis of an Agreed Statement of Facts (the "ASOF") which was entered as an exhibit. The Appellant admitted that his conduct outlined in the ASOF fell short in terms of his professional obligations of competence, trustworthiness and good faith. This left the issue of appropriate penalty to be determined.

[11] At the Hearing, legal counsel for the Appellant and the Council made a joint submission on the appropriate penalty to be imposed on the Appellant (the "Joint Submission"). The Joint Submission included terms providing for supervision of and restricting supervision by the Appellant for 1 year, requirements for the Appellant to complete specific professional/ethical education courses within a stated time frame, and payment by the Appellant of a set amount of investigation costs. The Joint Submission did not propose any suspension of the Appellant's Life Agent licence. It is common ground that the Joint Submission was not binding on the Hearing Committee.

[12] At the Hearing, members of the Hearing Committee inquired as to the appropriateness of the degree of the penalty being proposed in the Joint Submission, being the length of the supervision term and the amount of investigations costs proposed to be paid by the Appellant. Legal counsel for both the Appellant and the Council made submissions in response to these inquiries.

[13] On February 6, 2019, the Hearing Committee submitted a report to Council in relation to the Hearing, in which it recommended that the Appellant be fined $2,500, be supervised for 2 years rather than the 1 year suggested in the Joint Submission, and complete the courses and pay the investigation costs recommended in the Joint Submission.

[14] Council considered the penalty recommended by the Hearing Committee but did not adopt it, deciding instead that a more significant penalty was called for. In the Order, the Council suspended the Appellant's Life Agent licence for 1 year in addition to the penalty recommended by the Hearing Committee.

ISSUES

[15] Should the Suspension Order be stayed pending determination by the FST of this appeal?

DISCUSSION AND ANALYSIS

The test to be applied on an application for a stay

[16] Under section 242.2(10)(a)(i) of the *FIA,* the FST member hearing an appeal has the discretion to stay the decision under appeal for any length of time, with or without conditions.

[17] The *FIA* is silent as to how the discretion under section 242.2(10)(a)(i) of the *FIA* is to be exercised, or what test if any is to be applied where a stay is sought. This leaves the FST to exercise this discretion in a manner thought proper and just, taking into account the public protection objectives of the *FIA.*

[18] The FST is not bound by prior decisions of either the Courts or the FST, although as to the latter it is certainly desirable to strive for consistency in FST decisions wherever it can rightly be found. The FST should also consider and seek guidance from relevant decisions of the Courts where they touch on live issues, insofar as such decisions are reasonably applicable to the regulatory regime in question.

[19] Both the Appellant and the Council reference the decision of the Supreme Court of Canada ("SCC") in *RJR-MacDonald Inc. v Canada (Attorney General),* [1994] 1 SCR 311 ("*RJR-MacDonald")* as the leading authority establishing a three-part test for granting a stay pending an appeal.

[20] In *RJR-MacDonald* (which was a *Charter* case) the SCC held that the applicants before them would only succeed if they could satisfy the three-stage test laid down in *Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd.,* [1987] 1 SCR 110, ("*Metropolitan Stores*"), which test was described in *RJR-MacDonald* as follows (at para 48):

> First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

[21] Both the Appellant and the Council also reference the FST decision *Financial Institution Commission (FICOM) v Insurance Council of British Columbia and Babcock,* Decision No. 2017-FIA-005 ("*FICOM v Babcock*"), including where then Vice-Chair Lewis held (at para 7):

> [7] I should add that I do not find it necessary to conclude that the elements of the RJR-MacDonald test must be applied to a stay motion before the FST, being a point on which there has been no argument in this case. I discussed that leading authority on a motion to lift a statutory stay, in a legislative context distinct from the current appeal, in Lin v Real Estate Council of British Columbia and Superintendent of Real Estate, 2016-RSA-002(c), and where I indicated that a broader, interests of justice approach should govern the issue of that day (at para. 30). Despite the factual differences between that case and this, I would extend the following observations from that decision equally to the application before me now:
>
> > "[23] An application for a stay is a request that a decision of an authoritative legal body be temporarily constrained. Decisions of courts and tribunals take

> effect from pronouncement and are to be treated as correct unless and until an appellate body holds otherwise. To stay an authoritative order, otherwise in effect and to be accepted as current and binding, is a serious matter. It is, accordingly, unsurprising that a stay applicant's need to show irreparable harm has come to be accepted. This requirement also makes sense in the context of its origin in the principles around injunction applications, and from which the entire *RJR-MacDonald* test derived: common law courts have traditionally favoured interim maintenance of the status quo over the granting of injunctive relief and fixed on the idea that if damages would be an adequate remedy at trial there was no need for prior intercession in the form of an injunction; assuming success at trial, damages would make the claimant whole regardless of what had gone before and all would be as it should. If, however, irreparable harm could be established, damages would clearly fall short and, depending on other considerations, the court might then be persuaded to step in early and alter the state of affairs in some particular way. As the case law evolved, this sort of paradigm was extended in some situations to non-monetary public interest claims, such as in *RJR-MacDonald."*

[22] In concluding his submissions on the test to be applied by the FST on an application for a stay, the Appellant submits that addressing the elements of the *RJR-MacDonald* test will provide the context necessary to make a decision on the application on the broader, interest of justice based approach as outlined above in *FICOM v Babcock.*

[23] The Council submits that while *RJR-MacDonald* provides guidance to the FST in the circumstances, the overarching consideration for whether a stay should be granted in this case is whether the interests of justice support such an order, having regard to the Council's duty to regulate the insurance industry in accordance with the public interest.

[24] My consideration of how the FST is to exercise its discretion in a stay application under section 242.2(10)(a)(i) of the *FIA* has been assisted by consideration of both the *RJR-MacDonald* test and the above quoted extracts from the decision of Vice-Chair Lewis in *FICOM v Babcock*.

[25] I have also found substantive assistance from the overall analysis conducted by Vice-Chair Lewis in *Lin v Real Estate Council of British Columbia and Superintendent of Real Estate,* 2016-RSA-002(c) ("*Lin*") referred to in submissions.

[26] While *Lin* was considering an application by the Real Estate Council of British Columbia under section 242.2(10)(a)(ii) of the *FIA* to lift a stay of their decision that was triggered by section 55(2) of the *Real Estate Services Act,* SBC 2004, c 42, I find it to be useful in my consideration of the within stay application under section 242.2(10)(a)(i) of the *FIA*; though I recognize the conceptual and practical differences between applications by a regulator to lift a legislative stay, and applications (such as in the present case) by a regulated licensee seeking a stay of a regulator's order.

[27] As was the finding in *Lin*, I am of the view that there is no authority that compels selection of the test to be applied in this case. I consider the proper approach to be that the applicant, being the Appellant in this case, has the onus of showing that the interests of justice support granting the stay. In assessing the application from this perspective, I will take guidance from reasoning employed in

leading authorities, such as *RJR-MacDonald,* adapted as needed to the statutory context of the *FIA.*

[28] In exercising the discretion to grant or decline to grant the application, I will consider relevant circumstances including the following:

(a) The apparent merits of the appeal based on a preliminary assessment, to ensure that there is a serious question to be tried.

(b) Whether the applicant would suffer irreparable harm if the application were refused. and

(c) Whether the balance of convenience favours the granting of the stay application, in the sense that the harm to be suffered by the Appellant applicant if it is not granted outweighs the harm to be suffered by the public interest if it is granted.

Has the Appellant established that there a serious question to be tried?

[29] Both the Appellant and the Council submit, without being more specific, that the threshold under this branch of the *RJR-MacDonald* test is low.

[30] The SCC in *RJR-MacDonald* adopted language of Lord Diplock of the House of Lords in *American Cyanamid Co. v Ethicon Ltd.,* [1975] A.C. 396, to the effect that the applicant will satisfy the requisite standard that there is a "serious question to be tried" if he or she could satisfy the court that the claim is not "frivolous or vexatious". I will apply this standard in considering this issue. I find that this low standard is appropriate given the difficulties involved in deciding complex factual and legal issues based upon the limited submissions available in such interlocutory applications, along with the desire to avoid the risk of any appearance of prejudging the appeal.

[31] In his Notice of Appeal, the Appellant challenges the Suspension Order on two main bases: a denial of natural justice in respect of the procedures afforded to him; and unreasonableness in relation to the penalty imposed in the Suspension Order.

Appeal based on alleged denial of natural justice

[32] In relation to the alleged denial of natural justice, the Notice of Appeal alleges:

> The process below was contrary to the principles of natural justice in the following respects:
>
> a. The Appellant was *de facto* not given a hearing wherein the Appellant made submissions regarding the appropriateness of a term of suspension as a penalty in this matter;
>
> b. The decision regarding the penalty to be imposed against the Appellant was made by decision makers within Council, who were different from the persons comprising the Hearing Committee and whose identity is unknown to the Appellant; and

c. The reasons provided by Council in reaching its decision are inadequate, especially because there was a Proposed Joint Penalty which the Hearing Committee considered and analysed at length in making its recommendation regarding the penalty to Council.

Legislative framework

[33] The Appellant's right to a hearing under section 237 of the *FIA* is subject to section 223 of the *FIA* which authorizes the Council to delegate its duty to hold a hearing to a committee of Council. Subsection 223(4) of the *FIA* states:

> (4) If the council delegates the duty to hold a hearing to a committee under subsection (1), the committee must hold the hearing and make a written report of the hearing to the council, and after receiving and considering the report the council may decide on the matter that was the subject of the hearing.

[34] Sub-subsection 225.1(2)(h) of the *FIA* authorizes the Council to make rules:

> (h) establishing the criteria to be applied and the procedures to be followed by the council or a committee of the council respecting hearings and suspension, cancellation or restriction of licences and the imposition of fines;

[35] The nature and extent of the Appellant's entitlement to natural justice or procedural fairness must be considered in the statutory context of the *FIA* including the above referenced provisions.

Appellant's submissions

[36] The Appellant's grounds of appeal assert that he has the right to a fair hearing and that he was deprived of that right because he wasn't able to address the issue of the appropriateness of a suspension as a penalty.

[37] The Appellant's submissions refer to the significance of the Joint Submission, and authority to the effect that where a joint submission on penalty is rejected the tribunal should give counsel the opportunity to make representations addressing the issue of the more serious penalty being considered.

[38] The Appellant's submissions refer to authority which he submits supports the proposition that the Council, in rejecting the recommendation of the Hearing Committee on penalty and imposing the Suspension Order, should have given him a meaningful opportunity to dispute the imposition of the more serious penalty under his rights to natural justice.

[39] The Appellant submits that the imposition of the ultimate penalty against him by way of a closed door decision making process by decision-makers unknown to him, without an opportunity to make submissions regarding the more severe and different kind of penalty being considered, amounts to a fundamental breach of the principles of natural justice.

[40] The Appellant refers to authority in support of his procedural fairness right to receive a reasoned decision from the Council. He asserts that the Council unfairly failed to provide adequate reasons in the Order for its decision to conclude that the penalty recommended to it by the Hearing Committee was inadequate.

The Council's submissions

[41] The Council submits that the Appellant's argument that he was denied natural justice is bound to fail, and there is no serious issue to be tried.

[42] While the Council's submissions do not dispute that the Appellant is entitled to a fair hearing, it takes issue with the extent of those rights in the context of the legislative framework of the *FIA*. The Council submits that the Appellant was afforded his right to procedural fairness in the circumstances.

[43] The Council submits that the Appellant was given ample notice that the jeopardy he faced included a suspension of his Life Agent licence, and that his opportunity to address the possible suspension was before the Hearing Committee. The Council submits that the responsibility for the Appellant's decision not to raise the matter of the possible license suspension with the Hearing Committee lies with him.

[44] The Council submits that the authorities relied upon by the Appellant are distinguishable on the facts, and refers to other authority that it says fully answers the substance of the Appellant's natural justice appeal.

Conclusion - serious question to be tried

[45] Having considered the extensive submissions of the parties and the numerous authorities referred to by them based on natural justice, all in the context of the Appellant's burden to establish that his appeal in neither frivolous nor vexatious, I find that the Appellant has met that low threshold. I do not agree with the Council's submission that the appeal on this ground is bound to fail. The Appellant has raised substantive questions of procedural fairness that are foundational to disciplinary hearings under the *FIA.*

[46] I make the finding that there is a serious question to be tried without comment on the ultimate likelihood of success of the appeal on the grounds of a denial of natural justice.

Appeal based on alleged unreasonableness of Suspension Order

[47] While I have already held that the Appellant has met his burden to establish a serious question to be tried on his natural justice ground of appeal, and therefore a ruling on this unreasonable penalty ground is, strictly speaking, unnecessary, I find, based on the submissions of the parties, that the Appellant has again met the low standard of establishing that his appeal on this ground is neither frivolous nor vexatious.

[48] In relation to the alleged unreasonableness of the penalty imposed the Notice of Appeal alleges:

> The decision below is unreasonable for the following reasons:
>
> a. The Council placed undue emphasis on select factors to be considered in arriving at the appropriate penalty and ignored an important factor, being that the penalty not be disparate as compared to other cases. In addition, the Council did not engage in an analysis of penalties imposed in other cases that guided its decision in imposing the penalty in this case, including those past decisions that were relied upon by counsels for the Council and the Appellant

and discussed by the Hearing Committee in its Report. The Council's decision on the penalty in the circumstances is arbitrary and therefore, unreasonable;

b. The Council made its decision regarding penalty without benefit of proper submissions, which would have been significantly different than made at the hearing had the possibility of suspension been contemplated at the hearing because a potential suspension engages different considerations than a term of supervision. Because the Council's decision was made without benefit of proper submissions, it is arbitrary and therefore, unreasonable; and

c. Lastly, Council's decision regarding penalty in this matter represents a significant departure from Council's past decisions in similar circumstances such that Council's decision is unproportionate to the impugned conduct of the Appellant and therefore, unreasonable.

[49] On this aspect of the appeal, the Appellant submits that in considering the appropriate penalty in the circumstances the Council, with the objective of protecting the public, was obliged to consider a number of factors including:

i. Specific and general deterrence;

ii. The need to maintain the public's confidence in the integrity of the profession's ability to properly supervise the conduct of its' members; and

iii. Ensuring that the penalty is imposed is not disparate with penalties imposed in other cases.

[50] The Appellant submits that Council's decision on penalty was unreasonable in that it placed undue emphasis on factors i and ii above, and ignored factor iii, being that the penalty must not be disparate as compared to other cases. He submits that the penalty imposed was unreasonable as being a significant departure from past decisions in similar circumstances.

[51] The Appellant's further submissions on this issue overlap with his natural justice arguments; in particular, his argument addressing the denial of an opportunity to make submissions on the appropriate penalty.

[52] Council submits that in order to succeed on this ground of appeal, the Appellant must show two things: first, that his own interpretation of the matters at issue is reasonable, and second, that the decision-maker's interpretation was unreasonable. The Appellant does not dispute this requirement for his success on appeal, but points out that the Joint Submission was supported as being reasonable by Council's counsel before the Hearing Committee.

[53] The Council refers to the standard of review on appeals of penalty decisions before the FST, and specifically references *Financial Institutions Commission v Insurance Council of BC et al,* Decision No. 2017-FIA-002(a)-008(a), wherein the FST concluded that a less deferential standard of review should be applied to appeals of penalty decisions.

[54] The Council then submits the Appellant has failed to demonstrate that there is a serious question to be tried on this issue, without substantively addressing the specific "unreasonableness" alleged by the Appellant.

[55] I disagree with Council that the Appellant has not raised a serious issue to be tried with regard to this part of his appeal. The Appellant has made arguments which are clearly based on the particular facts of the case, and has cited relevant case law in support of his arguments. I find his arguments on this point are neither frivolous nor vexatious. Accordingly, I find a serious question to be tried on this issue as well.

[56] As with my finding on the natural justice arguments above, I make the finding that there is a serious question to be tried without comment on the ultimate likelihood of success of the appeal on the grounds of the reasonableness of the Suspension Order.

Has the Appellant established that he will suffer irreparable harm if the stay application is refused?

[57] The Appellant submits that the Council is shielded from any action for damages resulting from its decisions by virtue of section 243 of the *FIA*, and, accordingly, any harm suffered by the Appellant due to the suspension will remain uncompensated in the event the Suspension Order is overturned. This proposition is not disputed by the Council.

[58] In considering whether such a potential uncompensated loss would amount to irreparable harm I, again, am guided by the decisions in both *RJR-MacDonald* and *Lin.*

[59] As set out by the SCC in *RJR-MacDonald* (at para 64):

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.

[60] As set out by the FST in *Lin* previously quoted above (at para 23):

> …It is, accordingly, unsurprising that a stay applicant's need to show irreparable harm has come to be accepted. This requirement also makes sense in the context of its origin in the principles around injunction applications, and from which the entire *RJR-MacDonald* test derived: common law courts have traditionally favoured interim maintenance of the status quo over the granting of injunctive relief and fixed on the idea that if damages would be an adequate remedy at trial there was no need for prior intercession in the form of an injunction; assuming success at trial, damages would make the claimant whole regardless of what had gone before and all would be as it should. If, however, irreparable harm could be established, damages would clearly fall short and, depending on other considerations, the court might then be persuaded to step in early and alter the state of affairs in some particular way.

[61] Given that any harm suffered by the Appellant due to the suspension will remain uncompensated in the event the Suspension Order is overturned, I find that the requisite irreparable harm will exist if it is established by the Appellant that material economic loss will be suffered by him due directly to his suspension.

[62] While the Council does not put in issue what constitutes irreparable harm, it does challenge whether the Appellant has met his burden of proof on this issue.

[63] In support of his application the Appellant has filed a brief affidavit in which he affirmed the following facts to be true:

> 3. I am married and have [REDACTED] also reside with my family at our family home and are dependent on us for their sustenance.
>
> 4. My insurance business, which is dependent on my insurance licence, is our family's primary source of income. I carry on my insurance business through my company [REDACTED].
>
> 5. My family does not have another source of business or employment income.
>
> 6. If my insurance licence suspension is upheld, my family will be deprived of its primary source of income, on which we rely to pay for our day to day expenses. This will lead to significant financial hardship for my family.
>
> 7. [REDACTED] will also have to lay-off all of its employees because all of its revenue results from my insurance business activities.
>
> 8. It is likely that I will suffer permanent longer-term harm as well due to the suspension. Other than losing renewal commission revenue, I will be unable to partake in business development activities. In addition, I may lose a portion of my existing clientele, if they have additional insurance related needs, as I will be unable to meet those needs and will have to refer them to another licensee.

[64] The Council submits that the Appellant has not established he will suffer irreparable harm if the stay is not granted. Rather, the Council submits that the Appellant's "bald assertions" about those who depend on his income are advanced without providing a proper evidentiary basis to support the harm he alleges. The Council submits that the failure to include financial information relating to household income, expenses, savings or the nature of his financial obligations is fatal to the claim of irreparable harm.

[65] In support the Council refers to the decision of *Kadioglu v Real Estate Council of British Columbia et al,* (unreported, January 3, 2018) (BCCA)("*Kadioglu").*

[66] The applicant in *Kadioglu* was a real estate agent who had his agent's licence suspended for 30 days and was ordered to pay $14,000 of enforcement costs by a disciplinary panel under the *Real Estate Services Act,* SBC 2004, c 42. His appeal to the FST was dismissed, as was his application to the BC Supreme Court for judicial review of the FST decision. The BC Court of Appeal (in Chambers) was asked to stay the enforcement of the penalties and costs imposed on the applicant pending his appeal of the judicial review. The materials filed in support of the application asserted that he would suffer irreparable harm and loss.

[67] The Chambers Appeal Judge dismissed the application for a stay in *Kadioglu* based on the failure of the applicant to demonstrate that he would suffer irreparable harm if his licence was suspended for 30 days and if he were required to pay the enforcement expenses holding (at para 8):

> … There is no evidence with respect to his household income and expenses other than the notice of assessment. In addition, there is no evidence with respect to the assets owned by the appellant or his ability to borrow funds. Nor is there any evidence with respect to the effect of a 30 day suspension on his realty business.

[68] I find that *Kadioglu* is distinguishable on the facts from the present application before me.

[69] In *Kadioglu,* the applicant claimed that payment of $14,000 in enforcement costs would constitute irreparable harm to him without any evidence as to his ability to pay or any submission that he could not recover the funds if his appeal was successful. The Appellant in the present case is not seeking to stay the Order against him relating to the fine or costs imposed. Further, in *Kadioglu* the suspension was for just 30 days, not 1 year.

[70] Most importantly, the Appellant in the present case has filed an affidavit in support of his claim of irreparable harm while the applicant in *Kadioglu* did not. The affidavit of the Appellant does provide evidence as to the effect of the 1 year suspension on his insurance business, as well as that economic harm will be suffered by the Appellant's family and employees. The applicant in *Kadioglu* provided no evidence on the impact of the 30 day suspension on his realty business.

[71] I agree with the submission of the Appellant that his economic loss arising directly from his licence suspension is readily apparent from the affidavit and that the affidavit appropriately addresses the nature of the harm to be suffered.

[72] I find that the Appellant has established that he will suffer material economic loss and irreparable harm if the stay application is refused.

Has the Appellant established that the balance of convenience favours the granting of the stay application?

[73] I have held above that the Appellant has established that his appeal raises serious questions to be tried and that he will suffer irreparable harm if the stay application is refused.

[74] The material economic harm to be suffered by the Appellant and his dependents if his application for a stay is not granted has already been canvassed when determining the question of irreparable harm. Those findings are relevant to the balance of convenience analysis as well.

[75] It is when considering this balance of convenience question that the public protection purpose of the *FIA* must be taken into account and weighed against the harm to the Appellant if the stay is not granted.

[76] The Council submits that its mandate is to regulate the insurance industry in accordance with the public interest. This proposition is not disputed by the Appellant and is not in issue.

[77] The Council submits that the Suspension Order reflects its serious concerns about the Appellant's competency and trustworthiness as a licensee, in addition to its concern relating to public harm and the need to maintain public confidence in the insurance industry as a whole.

[78] The Council also refers to the quotation in *Rak v British Columbia (Superintendent of Brokers),* [1990] BCJ No. 2383 (BCCA) ("*Rak*"), taken from *Re Securities Act and Morton,* [1946] 3 DLR 724, in addressing the special regulatory

character of securities commissions and their paramount obligations to protect the public (*Rak* at para 23):

> A registered broker or salesman has no vested interest that is to be weighed in the balance against the public interest. I have no doubt the Commission will, on proper occasions, give consideration to the possible serious consequences of taking away a man's livelihood, and of making the business of a broker or salesman a precarious occupation. Such considerations may have their proper place in determining what is in the public interest. It is, however, the public interest that is to be served by the Commission, and no private interests or the interests of any profession or business, in the exercise of the Commission's powers of suspension or cancellation of the registration of any broker or salesman.

[79] The Counsel further submits that the following statement from *Lin* provides guidance in considering the balance of convenience (at para 23):

> An application for a stay is a request that a decision of an authoritative legal body be temporarily constrained. Decisions of courts and tribunals take effect from pronouncement and are to be treated as correct unless and until an appellate body holds otherwise. To stay an authoritative order, otherwise in effect and to be accepted as current and binding, is a serious matter.

[80] I agree with the above statement in *Lin* that to stay an authoritative order, otherwise in effect and to be accepted as current and binding, is a serious matter. I have already held that to succeed the applicant, being the Appellant in this case, has the onus of showing that the *status quo* should be altered, and further that in discharging that onus must show that the interests of justice support the stay sought.

[81] In addressing the public protection purpose of the *FIA* in the context of the facts of this appeal the Appellant submits the following:

i. Under section 238(1) of the *FIA* the Council had the authority to suspend his licence pending determination of the hearing he requested under section 237 of the *FIA.* If Council had considered his conduct to be egregious enough so as to invoke that procedure in order to protect the public it could have suspended his licence at that time. The Council did not do so.

ii. The Appellant has been licensed and carrying on his business since the issuance of notice of Council's intended decision in May 2017, in compliance with the rules and requirements of the Council without any further allegations of misconduct; and

iii. The Appellant does not take issue with the other terms of the Order, being the supervision and completion of remedial educational courses, such that Council's mandate regarding the protection of the public can be adequately carried out in the event that the stay of the Suspension Order is granted.

[82] The Council's submissions do not take issue with the Appellant's submissions summarized above.

[83] While the Council points to the Suspension Order as reflecting its general concern relating to public harm and the need to maintain public confidence in the insurance industry as a whole, no submission is made by the Council suggesting any actual or specific risk of harm to the public pending the appeal if the stay is granted.

[84] The Council does not allege any risk of a potential for recurrence of the admitted improper past behaviour pending the appeal if the stay is granted.

[85] While there is no statutorily mandated time within which the FST must deliver its decision on an appeal under the *FIA*, the FST Practice Directives and Guidelines state that the FST will endeavour to provide a copy of the final decision, including the written reasons, within 90 days from receiving the last submissions of the parties. My point here is that the likely timeline until a decision is released on the appeal is relatively short in the context of length of time that has passed since the admitted improper past behaviour occurred, or the length of time since the issuance of notice of Council's intended decision in May 2017, without any further allegations of misconduct arising.

[86] As submitted by the Appellant, he has been licensed and carrying on his insurance business over the past 2 years, apparently without issue.

[87] I am also persuaded by the Appellant's submission to the effect that the Council's mandate regarding the protection of the public could be adequately respected and the public adequately protected pending the appeal through his supervision together with his compliance with the remedial educational requirements of the Order (neither of which are challenged on his appeal).

[88] I cannot see how the public confidence in the administration of justice or the proper administration of the disciplinary mandate of the Council under the *FIA* would be eroded if the temporary stay of the Suspension Order, subject to conditions that I will address below, is granted pending final determination of the appeal.

[89] Therefore, subject to the conditions addressed below, I find that the Appellant has met the onus of showing that the balance of convenience favours the granting of the stay in this case; in other words, he has demonstrated that the harm he would suffer if the stay is not granted outweighs the harm that would be suffered by the public interest if the stay is granted.

Conditions of the Stay

[90] Paragraph 2 of the Order provides that the 2 year supervision period was to commence on April 23, 2020, being immediately upon expiry of the 1 year suspension set out in the Suspension Order. The Appellant does not appeal the 2 year period of supervision, but in his application asks that if the Suspension Order is stayed, paragraph 2 of the Order be stayed for a reasonable period of time in order to provide him an opportunity to locate a supervisor and have that supervisor approved by the Council.

[91] Instead of staying paragraph 2 of the Order, I hold that in addition to the 2 year period of supervision provided for in paragraph 2 of the Order, the Appellant

must be supervised by a supervisor approved by Council for the duration of the stay of the Suspension Order.

[92] Consistent with the Appellant's request that he be granted a reasonable period of time to locate a supervisor and have that supervisor approved by the Council, I will grant 30 days from the date of this decision in order to provide the Appellant and the Council an opportunity to do so. I do not have the benefit of any submissions as to what the parties consider to be a reasonable time. Accordingly, if 30 days is insufficient or impractical for some reason, I grant the parties leave to make further submissions to me in that regard.

[93] Paragraphs 3 through 8 of the Order have not been challenged on this appeal. Paragraphs 4 and 5 require the Appellant to pay a fine of $2,500 and investigation costs of $1,487.50, while paragraphs 6 and 7 require the Appellant to successfully complete specified courses. Paragraph 8 requires the Appellant to fully pay the amounts and complete the specified courses by no later than July 23, 2019.

[94] The Appellant has submitted that his completion of the remedial educational courses will assist in meeting Council's mandate regarding the protection of the public. Accordingly, as a further condition of the Stay of the Suspension Order I find that the Appellant must comply with the requirements of paragraphs 4 through 8 of the Order before the stay of the Suspension Order takes effect.

[95] I am of the view that granting a stay of the Suspension Order subject to the foregoing conditions will meet the interests of justice and respect the public protection mandate of the *FIA*.

DECISION

[96] In making this decision, I have carefully considered all of the evidence before me and the submissions and arguments made by each of the parties, whether or not they have been referred to in these reasons.

[97] The interim stay granted on May 17, 2019 expires on the date of this decision.

[98] The Appellant's application under section 242.2(10)(a)(i) of the *FIA* for a stay of the Suspension Order pending final determination of this appeal is granted subject to the following conditions:

i. the Appellant must be supervised by a supervisor approved by Council during the currency of the stay of the Suspension Order. The Appellant is granted 30 days from the date of this decision in order to provide the Appellant a reasonable opportunity to locate a supervisor and have that supervisor approved by the Council; and

ii. the Appellant must comply with the requirements of paragraphs 4 through 8 of the Order before the stay of the Suspension Order takes effect.

[99] I remain seized of this matter for purposes of the implementation of this decision in light of the conditions imposed.

"Michael Tourigny"

Michael Tourigny
Panel Chair

August 02, 2019