



Financial Services Tribunal

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DECISION NO. FST-FIA-21-A001(a)

In the matter of an appeal under section 242(1) of the *Financial Institutions Act*, RSBC 1996, c 141

BETWEEN:	Maxxam Insurance Services (Burnaby) Ltd. and John Alexander Dewar	APPELLANTS
AND:	Insurance Council of British Columbia	RESPONDENT
AND:	British Columbia Financial Services Authority	THIRD PARTY
BEFORE:	J. Keith Bracken, Vice Chair	
DATE:	Heard by way of written submissions closing October 26, 2021.	
APPEARING:	For the Appellants: Martin Sheard and Tanvir Sanghera For the Respondent: David T. McKnight For the Third Party: Jessica Gossen	

APPEAL

[1] Maxxam Insurances Services (Burnaby) Ltd. (“Maxxam”) and John Alexander Dewar (collectively, the “Appellants”) appeal from the decision of a Hearing Committee (“the Committee”) of the Insurance Council of British Columbia (the “Respondent”) dated June 9, 2021, which found them each liable for several breaches of the Insurance Council of British Columbia Rules and Code of Conduct.

[2] Pursuant to section 242(3) of the *Financial Institutions Act*, RSBC 1996, c 141, the British Columbia Financial Services Authority (BCFSA) is a party to this appeal. By letter dated October 12, 2021, the BCFSA adopted the submissions of the Respondent.

BACKGROUND

Factual Context

[3] The Insurance Council decision initialized the names of all the people mentioned in the decision other than the insurance agency, its nominee Mr. Dewar, and the other agency West Canada Insurance Services Inc. (“West Can”) staff

members. It is not clear to me why it was necessary to do so, however I have continued that practice in this decision except for Mr. Bill Rai who I have named as he is the principal owner of Maxxam.

[4] However, as it is sometimes difficult to follow where only initials of people mentioned in the decision, it is perhaps useful to outline the participants and their respective roles in the matter. The Insurance Council witnesses were:

- (i) Mr. P.P. was the Insurance Council investigator who dealt with this matter;
- (ii) Ms. C.R. was a former Maxxam agent;
- (iii) Mr. D.C. was the owner of West Can at the time of these events;
- (iv) Mr. J.C. was Mr. D.C.'s son who was a former West Can employee who dealt with some of the technology issues at West Can; and
- (v) Mr. A.L. was an executive of Intact Insurance, the insurance carrier for the Motomaxx VRI policies.

[5] The Appellants called two witnesses:

- (i) Mr. Bill Rai, the principal owner of Maxxam, and
- (ii) Ms. J.C. who was the office manager at Maxxam at the time.

[6] Also mentioned in the decision of the Committee were:

- (i) Mr. J.S. and Mr. T.C. were the staff members of West Can who originally discussed the agreement for the Maxxam road agents to move to West Can with Ms. J.C. and Mr. Rai;
- (ii) Mr. M.O. was an executive of Intact insurance who corresponded with the investigator; and
- (iii) Mr. P.N. was the representative of Intact Insurance in British Columbia in December of 2016 and January 2017.

[7] Maxxam carried on business as an insurance agent engaged in selling automobile insurance as a part of its business activities. Prior to January 1, 2017, Maxxam had an Autoplan Service at Dealerships agreement ("ASD") with the Insurance Corporation of British Columbia ("ICBC"). That agreement allowed its sales agents, known as "road agents," to attend at dealerships to sell automobile insurance products to the customers of the dealerships.

[8] Maxxam had arrangements with approximately 40 dealerships in the lower mainland of British Columbia. When a motor vehicle was sold to a customer at the dealership, Maxxam was requested to send a road agent to deal with the insurance and registration of the vehicle. Maxxam also used those opportunities to sell vehicle replacement insurance ("VRI") policies to the buyers of new vehicles.

[9] However, in December 2016, Maxxam was advised by ICBC that it would not be offered an ASD agreement for the year 2017. The refusal to offer an ASD agreement resulted from a conflict with ICBC that was subsequently resolved in favour of Maxxam.

[10] The loss of the ASD agreement prevented Maxxam road agents from going to an automobile dealership to provide insurance products. That loss was a significant blow to Maxxam, as a large component of its revenue was derived from selling insurance products at the dealerships with which it had a relationship.

[11] The VRI policy sold by Maxxam was known as Motomaxx, and the underwriter of the policies was Intact Insurance. Mr. Bill Rai, one of the owners of Maxxam, was the sole owner of a numbered corporation that sold the Motomaxx policies, and that corporation benefitted financially from the sale of Motomaxx policies.

[12] Another consequence of the loss of the ASD agreement was that Maxxam employed approximately 30 road agents at the time who were no longer allowed to go to the dealerships they serviced to sell insurance. That posed a serious problem for Maxxam, as without an ASD agreement its sales agents were not allowed to sell ICBC insurance products at dealerships, and they could no longer go to the dealerships to sell VRI policies. Thus, Maxxam's road agents could not sell any insurance products at motor vehicle dealerships unless they were representing an insurance agency that was authorized to sell products under an ASD agreement.

[13] To preserve the employment of its road agents and to maintain its relationship with the dealerships it serviced, Maxxam sought a relationship with another insurance agency that would allow its road agents to become licensees of that agency so they could continue to service the dealerships. It is clear from the evidence of Mr. Rai before the Insurance Council, that he believed the loss of Maxxam's ASD was a temporary problem that he anticipated would be resolved in Maxxam's favour.

[14] An arrangement was subsequently made with West Can whereby Maxxam's road agents became agents of West Can which was party to an ASD agreement with ICBC. The agreement between Maxxam and West Can was made orally, during a phone conversation between Mr. Rai, and staff members of West Can. Ms. J.C. (the Maxxam office manager) and Mr. T.C. (a staff member of West Can) were also party to the conversation.

[15] There was disagreement on the evidence as to the precise details of the arrangement. Mr. Rai and Ms. J.C. said they believed the arrangement was that the Maxxam agents could sell not only ICBC products but also the Motomaxx VRI policies. They were aware West Can sold a competing VRI policy under the name of Optiom but said they believed Motomaxx could be sold at West Can as well as Optiom.

[16] In her evidence, Ms. J.C. referred to the statement she provided to the investigator, Mr. P.P. She told Mr. P.P. that she asked Mr. D.C. to "take a look at" the Motomaxx VRI policy. Although she also said in her statement that West Can agreed to take all the Maxxam products, including Motomaxx VRI policies.

[17] Ms. J.C. testified that she spoke with Mr. T.C. and another employee of West Can respecting the proposed agreement to allow the Maxxam road agents to continue to service their dealerships under the West Can license. Mr. Rai was included in the call at the request of West Can. She said it was her understanding

that the Maxxam road agents would be able to sell the Motomaxx VRI policies under the West Can license.

[18] Ms. J.C. said that she also met with Mr. D.C. at his home in late December 2016 and he “agreed to take everything”, not just the Autoplan products. She said he left for vacation shortly after that meeting.

[19] In his statement to the Insurance Council, Mr. D.C. disagreed; he said while he was not involved in all the negotiations with Maxxam, he knew he could not sell Motomaxx VRI policies as he had no relationship with Motomaxx, and West Can sold a competitor’s VRI policy under the name of Optiom.

[20] It was clear from the evidence that the Maxxam road agents continued to sell Motomaxx VRI policies throughout January 2017, even though on January 13, 2017, Mr. D.C. convened a meeting of all the road agents operating under the West Can license and directed that there would be no further sales of Motomaxx VRI policies at West Can after that date.

[21] Mr. D.C. said that he made it very clear that the sale of Motomaxx policies had to stop. Mr. J.C., Mr. D.C.’s son, was also present at the meeting and agreed that the point was made very clear to all the agents that they were only to sell Optiom and not Motomaxx policies.

[22] Mr. Rai said that he believed the arrangement was that the Motomaxx policies would be sold under the West Can license. He said the sale documents should have been processed under the West Can name but the appropriate changes could not be made by Motomaxx to transfer the sales to West Can because the IT person who was able to input those changes to the computer was away from the office at that time.

[23] It is common ground that pursuant to the arrangement between Maxxam and West Can the Maxxam road agents became “dual agents” for the purposes of sales at the dealerships. They remained as licensed agents under the Maxxam license but without the ability to sell products under that license at automobile dealerships without an ASD agreement with ICBC. They were also agents under the license of West Can which enabled them to sell insurance products at the dealerships.

[24] The evidence established that 12 Level 1 and 13 Level 2 Maxxam road agents were allowed to continue to at least sell ICBC products at dealerships under West Can’s license.

Decisions at the Hearing

[25] The hearing was conducted over three days in January 2021 and a decision was released June 9, 2021.

[26] The findings of liability were that Maxxam and Mr. Dewar failed to act in accordance with the Council Rules and Code of Conduct by permitting and facilitating improper insurance transactions regarding VRI policies. The Committee found the Appellants liable for:

- i. Permitting and facilitating improper insurance transactions regarding VRI policies at motor vehicle dealerships while the Agency did not hold an Autoplan Service Dealership agreement with ICBC;

- ii. Breaching their duties to act in accordance with sections 3 (trustworthiness), 4 (good faith), 8.1 and 8.2 (disclosure to the public), of the Code of Conduct;
- iii. Allowing Level 1 general insurance salespeople to sell VRI policies contrary to Council Rule 6 and their license restrictions;
- iv. Breaching their duties to adequately supervise and train their road agents in accordance with Council Rule 7 (duty to customers), and Section 5 (competency), of the Code of Conduct;
- v. Failing to ensure appropriate disclosure was provided to customers in accordance with section 7 of the Code of Conduct;
- vi. Failing to ensure their road agents accurately represented themselves in accordance with section 10 of the Code of Conduct; and
- vii. Failing to demonstrate competence pursuant to sections 5 and 7 of the Code of Conduct as per Council Notice ICN 16-002 which provides that improper conduct of a Level 1 salesperson is deemed to reflect on the competence of the insurance agency and its nominee.

[27] As a result of its findings on liability, the Committee imposed a fine of \$20,000 on Maxxam and a \$5,000 fine on Mr. Dewar, the Agency's nominee. It also ordered the Maxxam to pay investigation costs of \$2,562.50. All amounts were to be paid within 90 days of the date of the order.

[28] The Committee also ordered the nominee's license to be downgraded from Level 3 to Level 2 General Insurance Agent with no right to re-apply for a Level 3 license for two years. Finally, the nominee, Mr. Dewar was directed to complete certain training courses, and the Appellants were ordered to pay the costs of the hearing on a joint and several basis within 90 days.

ISSUES

[29] The Appellants raise the following grounds of appeal:

- i. The Committee misapprehended the evidence by making findings of fact with no supporting evidence;
- ii. The Committee failed to consider material evidence before it;
- iii. The Committee made adverse credibility findings without sufficient explanation;
- iv. The Committee exhibited bias toward the Licensees.

RELEVANT LEGISLATION

- *The Financial Institutions Act*, RSBC 1996, c 141.

- *The Insurance Council of British Columbia Rules* (as amended), Rules 6, 7(8) and (14)
- *The Insurance Council of British Columbia Code of Conduct*, sections 3.2, 4.2, 5.3.3, 7.2, 8.1, 8.2 and 10.

DISCUSSION AND ANALYSIS

Standard of Review

[30] The appropriate standard of review on this appeal is set out in *Kadioglu v Real Estate Council of BC and Superintendent of Real Estate*, Decision No. 2015-RSA-003(b). In that case, the Financial Services Tribunal stated (at para 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.

[31] The main thrust of the Appellants' submission before the Insurance Council was that as all its road agents were operating under the West Can license and as a result, Maxxam and Mr. Dewar were not responsible for supervising them, and that pursuant to the agreement Maxxam had with West Can, the Maxxam road agents were authorized to sell Motomaxx VRI policies under the West Can license.

[32] There is no dispute that the Maxxam road agents sold Motomaxx VRI policies through the early part of January 2017. However, when Mr. D.C. returned from vacation, he immediately called a meeting of all the road agents on January 13, 2017, and made it clear that Maxxam road agents who were operating under the West Can license were not authorized to sell Motomaxx VRI policies. He advised the agents that West Can could not sell Motomaxx VRI policies as it had no relationship with Motomaxx or its underwriter Intact Insurance. It is clear the Committee found as a fact that after January 13, 2017, agents under the West Can license were not to sell Motomaxx VRI policies.

[33] Mr. D.C. then provided all the Maxxam road agents training in Optiom, the VRI policy that West Can was authorized to sell. He said that he directed all the agents that only the Optiom policies were to be sold by the agents. Notwithstanding that advice to the agents, the Maxxam agents continued to sell Motomaxx policies at the dealerships.

[34] When Mr. D.C. realized that the Maxxam agents were continuing to sell the Motomaxx VRI policies contrary to his instruction he advised the Insurance Council of what had happened, and an investigation was initiated by the Insurance Council. That investigation led to the allegations that form the basis of this appeal.

Submissions of the Appellants

[35] The Appellants argue that the terms of the agreement between Maxxam and West Can are critical findings in this matter. The Appellants submit that the agreement made in the telephone conversation between Mr. Rai, Mr. T.C., Mr. J.S. and Ms. C.R. was that West Can would take all the business that the Maxxam road agents normally conducted by Maxxam, including the sale of Motomaxx VRI policies.

[36] The Appellants submit that there is no evidence that either Maxxam, Mr. Rai or Mr. Dewar were advised of the direction given at the January 13, 2017, meeting, and therefore they should not be held responsible for the supervision of the road agents. Further, the Appellants submit that West Can was the agency responsible for the supervision of the road agents while they were selling any insurance products at automobile dealerships.

Submission of the Respondent Insurance Council

[37] The Respondent submits that the undisputed facts established at the hearing before the Committee are:

- (i) Motomaxx VRI policies were sold by Maxxam agents who were not licensed to make those sales at motor vehicle dealerships;
- (ii) Maxxam was paid for selling those policies;
- (iii) Maxxam was the broker of record for those sales; and
- (iv) The customers who purchased those policies were unaware that Maxxam was the broker of record.

[38] The Respondent submits that the Committee properly assessed the evidence of the witnesses and provided reasons for accepting the evidence of some witnesses over the evidence of others. The Respondent says there is no evidence of procedural unfairness or bias on the part of the Committee.

The Committee's Decision

[39] The Committee concluded at para 64 of its decision that Mr. Rai was surprised when he heard about the January 13, 2017, meeting because he believed West Can did not need an agreement with Intact to sell the Motomaxx VRI policies. Mr. Rai also said Mr. D.C. had agreed that the Motomaxx products could be sold under the West Can license.

[40] He agreed that he had heard "through the grapevine" about Mr. D.C.'s direction to stop the sale of Motomaxx products but he did not take any steps to stop the Maxxam road agents from selling Motomaxx policies.

[41] He said he believed the agreement with Mr. D.C. was that the Maxxam agents could sell Motomaxx, and he did not believe West Can needed any agreement with Intact, the underwriter of the Motomaxx policies.

[42] The Appellants submit that conclusion is not supported by the evidence and that it has been "inconsistently recharacterized" by the Committee throughout the decision to support its conclusion that Maxxam, Mr. Rai and Mr. Dewar were either aware of the direction that its agent stop any sales of Motomaxx VRI policies, or, that they were willfully blind to the decision.

[43] Under cross-examination, Mr. Rai acknowledged that he was aware of the direction at the January 13, 2017, meeting when Mr. D.C. directed the road agents to stop selling Motomaxx products. The following exchange appears to have been the source of the Committee's conclusion that Mr. Rai, at least was aware of the direction to stop selling Motomaxx products:

Q. And you're aware of a meeting on January 13, 2017, where former Maxxam Burnaby agents were told by Mr. Charlton that they could no longer sell the Motomaxx VIR (sic) product; correct?

A. I'm not aware of that. I heard - - I heard it through the grapevine, obviously, because that came as a surprise to me because he had actually agreed we could sell the product there.

Q. Okay. Well, whether he agreed or not, but as you testified, you heard sometime on January 13, 2017, or shortly thereafter or sometime after that Mr. [D.C.] was prohibiting those agents from selling the Motomaxx product; correct?

A. I couldn't tell you that. I wasn't at that meeting.

Q. No. But you heard through the grapevine. You said that?

A. Yeah

Q. All right.

A. I heard through the grapevine.

[44] Mr. Rai went on to testify that he was aware that the Maxxam road agents continued to sell the Motomaxx VRI policies after January 13, 2017, contrary to the direction of Mr. D.C.

[45] It is also clear from the evidence that Ms. J.C., the former office manager at Maxxam, was aware of the January 13, 2017, direction from Mr. D.C. She also testified that she received a cheque for commissions she earned selling Motomaxx policies from Maxxam. Mr. Rai testified that he paid the commissions only because West Can was not paying the agents and he did not want them to be without the income they earned.

[46] Mr. Rai also testified that when he found out about the direction from West Can to stop selling Motomaxx, he took no action. He said he believed the responsibility to supervise the road agents rested with West Can, not Maxxam. However, he also acknowledged that he was aware that sales were continuing and that commissions on those sales were being paid to Motomaxx and the commissions for Maxxam and the road agents were received by Maxxam. In

addition, Motomaxx was sold only through a business that Mr. Rai owned and controlled.

[47] The Respondent argues the evidence clearly supports the factual findings made by the Committee and, in any event, the Committee is owed deference respecting its findings of fact and those findings should not lightly be disturbed. The principle is summarized in *British Columbia (Financial Institutions Commission) v Insurance Council of British Columbia and Novko*, 2005 CarswellBC 3211, August 22, 2005 (at para. 11):

The FST does not reconsider the entirety of the evidence in the form of a “re-hearing”; rather, deference is given to the findings of facts and the assessments of credibility made by the administrative body that actually experienced the hearing procedure, heard the witness(es), saw the documentary evidence and, combined with their experience as the administrative body created by the legislation in question, was in the best position to make the findings of fact found in its decision. However, the FST must determine whether or not the administrative body in question, after considering the evidence and the documentation, after making its assessments with respect to credibility and after making its findings of fact, could reasonably have reached the decision that it has made, all based upon the clear and cogent evidence presented to it.

[48] The Respondent says that the standard of proof in administrative decisions is proof on the balance of probabilities. It relies on *F.H. McDougall*, 2008 SCC 53, at para 40 where the principle is clearly stated.

[49] The Respondent also submits that the agreed statement of facts, on its own, supports the findings of fact made by the Committee. It notes in its written submissions that the Maxxam road agents continued to sell VRI products throughout January 2017 and that no disclosure was made to customers that they were not dealing with West Can for the purchase of VRI policies.

[50] The Respondent says that it is an admitted fact that between January 2, 2017, and January 31, 2017, the Maxxam road agents sold 101 Motomaxx VRI policies at the dealerships while licensed as Level 1 sales agents. The policies all showed Maxxam BBY as the broker for all the sales.

[51] The Respondent argues that it is not material to the decision whether Maxxam or its nominee Mr. Dewar were aware of Mr. D.C.’s direction to the road agents to stop selling Motomaxx VRI policies.

[52] The Respondent also submits that the findings of fact made by the Committee meet the standard of reasonableness for findings of fact.

[53] The Appellants submit that the Committee “made adverse credibility findings” without sufficient explanation. The focus of their submission is the conclusion of the Committee at para 100 of its decision where it stated:

In any event, even if there was an agreement between the Agency and West Can with respect to the Motomaxx product between January 1 and 12, 2017, the Hearing Committee concludes that there was no such agreement as of January 13, 2017. The Hearing Committee finds that on this date Mr. D.C., the owner of West Can, instructed the Road Agents to cease selling the Motomaxx product by way of a staff meeting at the West Can offices. If there was a meeting of the

minds with respect to the sale of the product prior to that time, it ceased as of that date.

[54] That paragraph refers to the discussions between Maxxam and West Can respecting the arrangement for West Can to take on the Maxxam road agents and in particular, the alleged agreement that West Can agreed to allow the Maxxam road agents to sell Motomaxx VRI policies.

[55] The Committee concluded at para. 98 of its decision that things were left "somewhat up in the air and without the legal certainty to form a contract" respecting that aspect of the agreement. Mr. Rai said that that he believed it was "quite okay" for the agents to sell the policies Mr. D.C. said he never agreed to allow the sale of Motomaxx policies under the West Canada license.

[56] The Respondent argues that even if the initial agreement between Maxxam and West Can did authorize the Maxxam road agents to sell Motomaxx VRI policies, it was clear after January 13, 2017, that the road agents were no longer authorized by West Can to sell Motomaxx VRI policies under the West Can license. The Appellants argue that conclusion was not supported by the evidence.

[57] The Appellant's submission on this point is that there is no evidence the direction given by Mr. D.C. at the January 13th meeting was ever communicated to Maxxam or its Nominee Mr. Dewar. The Appellants also argue that there is no evidence that Maxxam had the responsibility to supervise the road agents when they were servicing the automobile dealerships under West Can's license. The Appellants say that responsibility rested with West Can.

[58] However, it is noted that Ms. C.R., the office manager at Maxxam, attended the meeting and was obviously aware of Mr. D.C.'s strong admonishment that the agents were no longer to sell Motomaxx policies.

[59] Mr. Rai's evidence was that he heard about Mr. D.C.'s direction at the January 13, 2017 meeting "through the grapevine". It is not clear when he heard about the direction. He also testified that he was aware the Maxxam road agents were not happy at West Can and that Mr. D.C. had made some negative comments about him to the agents.

[60] The Committee concluded that Mr. Rai knew about Mr. D.C.'s direction soon after the day of the meeting and that conclusion was, on the totality of the evidence, a reasonable one. There is no evidence that Mr. Rai took any steps to inquire with Mr. D.C. or that he discussed the issue with Ms. C.R.

[61] Mr. Rai's evidence is that the Maxxam agents were under the control of West Can while they were working there. He argues that Maxxam had no responsibility for their conduct or actions while they were operating under the "dual license" system. In Mr. Rai's evidence in chief, which was very brief, he said that Maxxam was not in a position to authorize the sale of Motomaxx VRI policies by Maxxam agents at West Can. He said that was up to West Can. He also said Maxxam did not make any money on the impugned transactions. The suggestion from his evidence is that any violations of the Code of Conduct or Rules are the responsibility of West Can and not Maxxam or Mr. Dewar.

[62] However, under cross-examination and in answer to questions from the Committee, he described the flow of payments from the point of sale of a

Motomaxx VRI policy. The following exchange resulting from a question from the Chair of the Committee illustrates the point:

Q. So just to be - - sorry. I was making notes. So the premium - - regardless of the payment method, the premium, then, ends up in Motomaxx's - -

A. That's correct.

Q.- - bank account?

A. That's right.

[63] The exchange between Mr. Rai and the Chair went on to describe how the agency, in this case Maxxam, and the insurance carrier Intact, were paid. The result of the series of questions and answers established that the money generated at the point of sale flowed to Motomaxx and was then distributed to the selling agency and the carrier. Mr. Rai acknowledged that the revenue from the impugned sales of Motomaxx policies generated by Maxxam agents at West Can is still held in the Motomaxx bank account.

[64] Mr. Rai said he notified West Can the money was being held and that he wanted to move the agency share to West Can, but he received no response. He acknowledged that he paid sales commissions for the sale of Motomaxx policies to one agent but said it was paid by Maxxam not Motomaxx. The documentary evidence respecting all the impugned sales showed Maxxam as the selling broker.

[65] Throughout Mr. Rai's evidence, he maintained that Maxxam had no responsibility or ability to supervise and control the Maxxam agents while they were working at West Can. He said that so far as he was concerned the Maxxam road agents were effectively West Can agents and not within his control or responsibility. The Committee clearly rejected his position.

[66] Mr. Rai's evidence clearly showed that when Maxxam lost its ASD agreement, it was Mr. Rai and Ms. J.C. who sought out another agency where the Maxxam road agents could continue to work. It was Mr. Rai and Ms. J.C. who made the agreement with West Can and the Maxxam agents moved to West Can. When that arrangement broke down, the Maxxam agents moved as a group to another agency where they were apparently allowed to sell Motomaxx products. Again, the road agents appeared to move as a group.

[67] At several points in his evidence, Mr. Rai testified to the effect that Maxxam "was moving" its road agent business to another agency. He said he felt that the arbitration with ICBC that resulted in the loss of Maxxam's ASD would be successful for Maxxam and he expected Maxxam would get its ASD agreement back. He also said it was important to Maxxam to maintain the relationship between Maxxam and its dealerships as they were familiar with the Motomaxx product.

[68] The Committee decided that Maxxam had control of its road agents pursuant to its license even though they were also licensed by West Can. The Committee concluded that Maxxam had the responsibility to supervise the agents and ensure that the agents operated within the Council Rules and Code of Conduct. That conclusion is supported by the evidence, and, in my view, it is a reasonable conclusion.

[69] The Appellants also argue that Ms. C.R.'s evidence supports the conclusion that no one at Maxxam authorized her to sell the Motomaxx policies after January 1, 2017. However, the Respondent argued that her evidence leads to the opposite conclusion. The Committee agreed with the Respondents. In her evidence in chief, Ms. C.R. and counsel had this exchange:

Q. Ms. [C.R.], no person from Maxxam Insurance Services Burnaby Limited authorized you to sell Motomaxx subsequent to January 1st, 2017; is that correct?

A. No one - - pardon? Say that again.

Q. No person on behalf of Maxxam Insurance Services Burnaby Limited authorized you to sell Motomaxx products on behalf of Maxxam on or after January 1st, 2017? Do you agree with that statement?

A. After - - no.

[70] The sequence of questions and answers is somewhat confusing. The Committee took it to mean that Ms. C.R. was in fact authorized by Maxxam to sell Motomaxx products after January 1, 2017. The Appellants argue that it means just the opposite, that is, that Maxxam was not the entity that authorized the sale of Motomaxx products and that the agents must have been authorized by West Canada.

[71] However, given the totality of Ms. C.R.'s evidence, Maxxam must have been aware she was selling Motomaxx products at West Can and, in my view, it was open to the Committee to reach the conclusion it did.

[72] On the evidence before it, the Committee concluded that even if Maxxam believed West Can had agreed to allow the road agents from Maxxam to sell Motomaxx products when they began servicing their automobile dealerships under West Can's license, Maxxam knew on or soon after January 13, 2017, that authorization was withdrawn by West Can. The Committee also concluded that the former Maxxam agents continued to sell Motomaxx products after that date.

[73] The Committee also concluded that the road agents were still Maxxam's "licensees" in that they continued to sell Motomaxx products under the Maxxam license, and they were allowed to service their dealerships and sell ICBC Autoplan products under the West Can license. On that evidence, the Committee concluded that Maxxam was responsible for the proper supervision of the road agents.

[74] Finally, the Committee concluded that so far as the buyers of the Motomaxx policies were aware, the agency selling the products was West Can and there was no disclosure of Maxxam's involvement in the transaction to the customers. Likewise, the Committee concluded there was no disclosure to Intact, the underwriter of the policies, that the Motomaxx policies were being sold under West Can's license and not Maxxam's license.

[75] On the facts found by the Committee it concluded that it did not need to decide whether there was a formal agreement ever concluded for Maxxam to sell Motomaxx products under the West Can license. The Committee found that the issue was discussed but never formally agreed to by West Can. On that point, the Committee said (at para 98):

The Hearing Committee does not need to make a legal determination about the specific terms of the agreement between the Agency and West Can, particularly with respect to the sale of the Motomaxx product. It seems clear that there were at least some discussions about this possibility, and an intention to put it in place, at least eventually – perhaps what one might call an “agreement to agree”. With other more pressing matters, the reduced time frame to get the Road Agents up and running, the Christmas holidays and Mr. D.C. being out of the country, it appears fair to conclude that things were left somewhat up in the air and without the legal certainty to form a contract.

[76] On the evidence, it was open to the Committee to it to reach that conclusion. Mr. D.C. denied he agreed to the Maxxam agents selling Motomaxx. Ms. J.C. was part of the discussion when the initial arrangements were made to move the Maxxam road agents to West Can. She said that she initially met with two staff members of West Can and they discussed the possibility of moving the Maxxam road agents to West Can. She said that the West Can staff wanted Mr. Rai to be part of the discussion so she attended at the West Can office with Mr. T.C. and Mr. J.S. of West Can and Mr. Rai attended the meeting by telephone.

[77] Ms. J.C. described what happened at the meeting and said that the issue of selling Motomaxx VRI policies was specifically raised with West Can. Mr. A.L. of Intact Insurance testified that there was no record of any advice to Intact that Maxxam was selling its VRI policies through West Can. At page 132 of the Transcript of evidence of Day 2 of the Hearing Ms. J.C. testified in her examination in chief as follows:

Q. Okay. Please tell me everything you can recall about the discussion pertaining to Motomaxx at that meeting.

A. Bill [Rai] had mentioned to [J.S.] and to [T.C.] that Motomaxx is a replacement cost product and if they wouldn't mind taking a look at it so they could, you know, make a - - I guess what - - what I'm going to say here is they currently had Optiom, so they wanted to look at it as an option, and they were – of my opinion of that time that they were very interested in selling Motomaxx as well as an option, as an alternative to Optiom. [J.C.] did mention to Bill Rai that - -

(Objection by Counsel – and a brief discussion occurred)

Ms. J.C.'s evidence continued:

A. I'll - - I'm going to rephrase. They - - there was an agreement of all parties at this meeting that they were going to take over the road service. And - - and Bill had mentioned Motomaxx, and they had mentioned, let's - - okay. Let's talk further in more detail. And I know - - I know I'm talking a little bit, you know, hearsay, but if you - - you go to my statement, my statement's pretty clear as to what took place at that meeting. And it was that they would continue or it was agreed upon all parties that West Can would continue to sell Motomaxx replacement insurance as an option to an alternative. And this statement as April 10th, 2018.

[78] The evidence established that Ms. J.C. was looking at her statement to the investigator when she gave the latter part of her evidence. Initially, her evidence suggested that the issue of selling Motomaxx at West Can was something to be

discussed in more detail. Neither party called the others who were at the meeting, and Mr. Rai, who was a party to the meeting, was not asked about the exact nature of the conversation by either party. He simply said at several points in his evidence and in answer to questions from members of the Committee that it was understood that the Maxxam road agents could sell Motomaxx policies at West Can.

[79] The Committee went on to say that even if there was an agreement to sell Motomaxx products in the first part of January 2017, that agreement ended on or soon after January 13, 2017, when Mr. D.C. made it clear there was no authorization to sell Motomaxx under the West Can license. Soon after, it appears the former Maxxam agents left West Can and moved to another agency. Ms. C.R. testified that after the move to the new agency the road agents sold Motomaxx "as usual", which she confirmed was to put the policies through Maxxam Burnaby.

[80] The Appellants also point to what they say are inconsistencies in the evidence. First, they note that there are discrepancies in the evidence respecting the sale of Motomaxx through other brokers.

[81] There was also some inconsistency in the evidence of Mr. P.P., the investigator for the Council, and Mr. M.O. and Mr. A.L. of Intact insurance. Mr. Rai testified that he did tell Mr. P.N., the British Columbia Intact representative at the time, that Maxxam had lost its ASD and was moving the road agency business to another agency, although it appears no record of that advice was ever made by Intact. Mr. A.L. of Intact Insurance testified that there was no record of any advice to Intact that Maxxam was selling its VRI policies through West Can.

[82] Mr. Rai's evidence is that Motomaxx has an agreement with Intact to sell insurance products that are underwritten by Intact. Motomaxx also has an agreement with Maxxam to sell the product through its agents. Mr. Rai said that Intact was always aware Maxxam agents were selling the Motomaxx policies.

[83] Even though there are some inconsistencies in the evidence, they were not of significance to the overall issues before the Committee, as those issues dealt with the terms of the agreement between Maxxam and West Can and whether West Can required an agreement with Intact before Motomaxx policies could be sold under the West Can license.

[84] The Committee concluded it did not have to resolve either of those issues. It found Maxxam liable for the violations of the Code of Conduct and Rules based on its responsibility to supervise its agents properly even though they were selling insurance policies to customers of automobile dealerships under the West Can ASD agreement.

[85] The Committee concluded that as the Maxxam agents were dual licensees of both Maxxam and West Can, Maxxam and its nominee could not simply pass all responsibility under its license to the other licensee. It was still responsible to manage and supervise its agents under the terms of its own license and the Code of Conduct and Rules of the Insurance Council.

[86] On the totality of the evidence, it seems clear that even on the evidence of Mr. Rai, the road agents sold Motomaxx products under the Maxxam license throughout January 2017. The Committee found that Maxxam and its nominee were still responsible to ensure they complied with the Council Rules and Code of

Conduct based on the fact they were still operating partially as Maxxam road agents.

[87] The Committee found that Maxxam and its Nominee, Mr. Dewar, were responsible for the agents at least with respect to the sale of Motomaxx VRI policies. The Insurance Council Rules and Code of Conduct operate to make a licensee responsible for its agents, and the Committee concluded the Appellants had a continuing responsibility to supervise and manage the road agents when they were selling Motomaxx products.

[88] The evidence is clear that the sale of Motomaxx VRI policies formed about thirty per cent of Maxxam's business and that it was therefore very important to Maxxam to find a way for the road agents to continue to work. It was for that reason the arrangement was made with West Can.

[89] Also, given the importance of that portion of the Maxxam's business, it is not unreasonable to expect a high standard of care in settling the arrangements for them to work and to ensure all sales were being managed in accordance with the Council Rules and Code of Conduct. The Committee found Maxxam and Mr. Dewar failed in that duty, and that finding of the Committee was reasonable.

[90] The Appellants also submit that they were subjected to procedural unfairness and a lack of impartiality in the hearing and in the investigation; though I note at the outset that the appeal is taken from the decisions of the Committee and not the conduct of the investigation.

[91] The Appellants argue that the Committee said in its reasons that it would not make a factual finding whether West Can required a specific contract with Intact to sell the Motomaxx VRI products. The Appellants argue the Committee then went on to make that factual finding and then used that conclusion to base all its findings of liability against Maxxam and Mr. Dewar.

[92] The Appellants make much of the relationship between West Can and Intact. They argue that the Committee erred in its assessment of credibility of Mr. P.P., the Council investigator, Mr. A.L., an Intact representative, Mr. M.O., Mr. A.L.'s supervisor, and Mr. P.N. the former Intact representative on Vancouver Island. The evidence of Mr. A.L. was that all the transactions respecting sales of Motomaxx products were recorded through Maxxam Burnaby. He acknowledged that those records might include some products from another Maxxam agency in Langford, although clearly all sales at the dealerships in question were generated by the Maxxam Burnaby agents.

[93] Mr. A.L. said that there had to be a relationship of some kind between an Agency and Intact. Mr. A.L. also said that he could find no indication that anyone had ever informed Intact that the Motomaxx product was being sold at West Can or anything to suggest Intact was aware Maxxam had not been granted an ASD agreement for 2017.

[94] Mr. A.L., testified that he had reviewed the records of Intact and could find no indication that Maxxam had advised Intact that the Motomaxx policies were being sold by West Can. Mr. A.L. was the branch director of the BC Region for Intact from September 2017 to December 2018. He was not in that position during the months of December 2016 and January 2017.

[95] He was called as a witness by the Insurance Council. In his evidence in chief, he testified as follows:

Q. So you mentioned Mode and Maxxam Burnaby selling the Motomaxx product. Could any brokerage - - as far as Intact was concerned, could any brokerage sell that product at any time or would there have to be a specific agreement with Intact before an insurance agency could sell that Intact Motomaxx product?

A. There would need to be - - there would need to be a specific agreement in order for someone new to distribute the product, yes.

[96] Mr. A.L. went on to say that no one ever contacted Intact to say that the broker of record for any sales of the Motomaxx VRI policies in December 2016, or January 2017 had changed to West Can. He said that he had reviewed the records of Intact from November 2016 through to January 2017 and found that all transactions had been reported through Maxxam Burnaby.

[97] Mr. Rai said that he spoke to Mr. P.N., who was at the time, the Intact agent in Victoria, and told him that Maxxam had lost its ASD agreement and was moving the road agent business to West Can. There is no record of that conversation at Intact.

[98] Mr. A.L. also described how the premiums for the sale of Motomaxx policies were processed. He said that Maxxam advised Intact of the sales for each monthly period. He said that Intact was entitled to payment of its premiums after the sales commissions were taken. Once the commissions were paid out, Intact withdrew its premiums from an account owned by Maxxam. Because of the nature of its relationship with Intact, Maxxam had authorized Intact to withdraw the payments due to it from Maxxam's bank account.

[99] Mr. Rai put it somewhat differently. He said that when the policies are issued and any money is owing to the dealership that money is sent to Motomaxx's account and Motomaxx pays what is due to Maxxam and Maxxam then pays what is due to the agent.

[100] While there is some conflict in the evidence between Mr. A.L. who said that Intact does need to establish a relationship with any agency that sells Motomaxx, and Mr. Rai who said an agreement is not necessary, the Committee concluded it did not need to resolve the conflict.

[101] The Committee stated at para 102 of its reasons:

Just as the Hearing Committee does not need to decide whether there was an agreement that West Can could sell the Motomaxx product, the Hearing Committee also does not need to find whether or not Intact required a contract for West Can to sell the Motomaxx product. Intact's evidence from Mr. A.L. and through Mr. P.P. by virtue of his conversations with Mr. M.O., was that Intact needed to be made aware of who was selling the Motomaxx product and that there needed to be agreement from Intact to do so, either with Motomaxx on Mr. M.O.'s interpretation, or with the brokerage (Maxxam or West Can as the case may be) on Mr. A.L.'s evidence. For the purposes of this hearing, it does not matter which it is. The requirement of Intact's approval in one way or another makes sense to the Hearing Committee although, again, it makes no specific findings in this regard.

[102] The Appellants argue that the Committee made a finding of fact that West Can required a specific contract with Intact and relied on that finding to base its findings of liability. I do not read the reasons of the Committee that way. The Committee based its findings of liability on the acknowledged fact that the Maxxam road agents were still operating under a license from Maxxam for other related business but were operating under the West Can license for the sale of ICBC products at its usual dealerships. As such, the Committee concluded that Maxxam still had an obligation to properly supervise its agents and that it and its nominee Mr. Dewar failed in that responsibility.

[103] The Committee also rejected Mr. Rai's evidence that the Maxxam road agents were totally under the control of West Can and that Maxxam had no authority to tell them what to do. The Committee concluded that so long as the road agents were licensed as "dual agents", Maxxam and its nominee had not only the right but also the obligation to supervise them, and they failed to fulfil that responsibility. In the result, the Committee found Maxxam and Mr. Dewar liable for the alleged breaches of the Council Code of Conduct and the Council Rules.

[104] The Appellants also argued that the hearing was procedurally unfair in that Mr. P.N., the former Intact agent in Victoria, did not give evidence. The Appellants say his evidence would have corroborated Mr. Rai's evidence that Intact was advised the Maxxam road agents would be selling Motomaxx products at West Can.

[105] As already noted, Mr. A.L. gave evidence on the issue. Both Mr. P.P. and Mr. A.L. were witnesses for the Insurance Council and gave evidence prior to Mr. Rai. If it was thought to be a significant issue, the Appellants could have called Mr. P.N. as a witness or, if he was unavailable for the hearing they could have asked for an adjournment. They did neither.

[106] The Appellants also argue the Committee acted improperly by preferring the evidence of some of the Insurance Council witnesses over the evidence of Mr. Rai and Ms. J.C. The Appellants referred to *Bradshaw v Stenner*, 2010 BCSC 1398, at paras 186 – 187; *aff'd* 2012 BCCA 296. In that case, the Court discussed the proper approach to assessing credibility of a witness. The principles set out in *Bradshaw* have been applied in numerous cases and the analysis is well established and accepted.

[107] The Appellants say the Committee failed to properly apply the principles in *Bradshaw* in assessing the evidence of Ms. C.R. and Mr. Rai. At para 46 of its reasons for example, the Committee stated:

The Hearing Committee found Ms. C.R. to present as an honest, credible and forthright witness who did not have a vested outcome in these proceedings. Where the evidence of Ms. C.R. and another witness differed and the Hearing Committee was required to make a finding of fact on that point of evidence, the Hearing Committee preferred the evidence of Ms. C.R.

[108] I agree with the submission of the Appellants that it is not proper for a finder of fact to simply state that the evidence of one witness is preferred over another. The finder of fact in any proceeding where there is conflicting evidence must set out a "pathway" of reasoning to show why certain evidence is accepted and other

evidence is not. The factors set out in *Bradshaw* constitute a useful template for factfinders to explain findings of credibility.

[109] One of the tools used by counsel to assist factfinders in assessing credibility is cross-examination. Where a challenge is made to the evidence of a witness, questions by way of cross-examination can test the evidence of the witness and expose inconsistencies, lapses of memory, personal interest in the outcome and other weaknesses that might demonstrate that some, or all a witness's testimony is unreliable.

[110] In this case, counsel for the Appellants asked Ms. C.R. only five questions. None of the questions asked focused on issues of credibility or challenged her evidence in chief. The Committee noted she gave her evidence in a forthright manner, had no motive to lie. The Committee was entitled to accept her evidence.

[111] The Appellants also argue that there were inconsistencies in the evidence that were not addressed by the Committee. The inconsistencies referred to were largely related to the contractual relationship between Motomaxx and Intact. As noted, the Committee did not find it necessary to decide whether West Can needed a contractual relationship with Intact although it noted that it made sense that some sort of arrangement would normally be in place. Those inconsistencies were unrelated to the Committee's conclusion that as "dual licensees" Maxxam could not simply wash its hands of responsibility and claim that West Can was responsible for the Maxxam road agents.

[112] The Committee noted that Maxxam's motivation was to find another agency where it could move its road agents so it did not lose continuity with the dealerships that it normally served. In addition, Maxxam wanted to maintain the sales of Motomaxx products that were important to both Maxxam and Mr. Rai's numbered corporation.

[113] As the Respondent submits, findings of credibility attract deference on appeal. The Committee provided detailed reasons in this matter, including reasons explaining findings of credibility. I find no error in the assessment of credibility of the witnesses by the Committee and I find that its conclusions on credibility of the witnesses who testified before it are reasonable.

[114] The Appellants submit that the Committee was biased or impartial in how it dealt with this matter. As the Respondent notes in its submissions, to establish bias the Appellant must demonstrate that the Committee had made up its mind so that any representations at the hearing were unlikely to be effective¹.

[115] An allegation of bias must meet a high standard. Such allegations are serious and should only be made after careful consideration of the evidence².

[116] In this case, I can find nothing in the evidence to support the allegation of bias made by the Appellants. The Committee appeared to have understood the evidence presented, and at times posed questions to a witness at the end of their

¹ See: *Construction and Specialized Workers' Union, Local 1611 v SELI Canada Inc.*, 2010 BCCA 335.

² *Quigley v Columbus Charities*, 2016 BCSC 1557, at para 12.

testimony. The questions posed by the Committee showed they had listened to the evidence and the questions were clearly attempts to gain a greater understanding of the evidence, not to try and shape the evidence in any way.

[117] Upon my review of the findings of the Committee and the evidence in support of those findings, I am not persuaded the Committee made any errors of fact, law, or mixed fact and law. The appeal respecting liability of Maxxam and Mr. Dewar is dismissed.

[118] The Appellants also challenge the penalty that was imposed on the Appellants. The Committee imposed a penalty of \$20,000 on Maxxam and \$5,000 on Mr. Dewar. The Respondent submits the penalties, although substantial, were appropriate in the circumstances.

[119] The Appellants suggest the violations found by the Committee were inadvertent and not malicious or fraudulent. The Appellants also allege that the Committee made "numerous errors of fact, mixed fact and law and procedural unfairness pertaining to the decision."

[120] The Appellants say West Can had "primary responsibility" of the road agents but was not sanctioned, a fact that I do not consider relevant, and, in any event, there was no evidence on the issue presented at the hearing. However, the Committee clearly found that Maxxam had responsibility to supervise the road agents even while they were working under West Can's license, and they failed to do so. The Committee concluded that as dual licensees operating partly under the Maxxam Agency license, Maxxam still had a responsibility to supervise its road agents.

[121] The evidence establishes that Maxxam still had control of its road agents in that it made the arrangements to move the road agents first to West Can and then to another agency. The agents moved as a group and when they were unhappy at West Can they complained to Mr. Rai not Mr. D.C., the owner of West Can.

[122] Mr. Rai acknowledged that he did not have very much day-to-day involvement with the operation of Maxxam, and Mr. Dewar, the nominee of Maxxam chose not to give evidence at all.

[123] The Committee concluded that Maxxam arranged for its road agents to work through West Can so that it could continue to maintain its relationships with the dealerships it serviced and continue to sell ICBC products and Motomaxx VRI policies. The Committee clearly found Maxxam and Mr. Dewar continued to have a supervisory role over the road agents that they failed to properly exercise.

[124] The purpose of the arrangement with West Can was to avoid the consequences of the loss of the ASD agreement with ICBC and to carry on much as it had when it had its own ASD agreement. When the arrangement with West Can collapsed, the road agents moved as a group to another agency where they could operate under that agency's ASD agreement with ICBC.

[125] Maxxam also has a prior history of violations, including failing to have adequate training or supervisory procedures in place.

[126] In *Financial Services Commission v The Insurance Council of British Columbia and Maria Pavicic*, November 22, 2005, the Financial Services Tribunal set out some of the factors to be considered in imposing a penalty. Those factors include:

- (i) The need to promote specific and general deterrence, and thereby protect the public;
- (ii) The need to maintain the public's confidence in the integrity of the profession; and
- (iii) The range of sentencing in other cases.

[127] In this case the Committee provided detailed reasons why the penalties it imposed were appropriate. The standard of review respecting penalties is reasonableness. I agree with the Respondent that the penalty decision in this case meets the standard of reasonableness. The conduct of the Appellants in this case had, as its purpose, the avoidance of the loss of an ASD agreement with ICBC. Given the facts and the history of Maxxam, I find the penalties imposed by the Committee were reasonable and I am not prepared to interfere with the Committee's decision.

[128] There was no evidence from Mr. Dewar to support any mitigation of the penalty and I find the penalty imposed on Mr. Dewar is also reasonable. The appeal of the penalties imposed is dismissed.

DECISION

[129] In all the circumstances of this case, the findings of fact of the Committee were reasonable and the application of the facts as found to the issues of contract interpretation were correct. I find the penalties imposed against Maxxam and Mr. Dewar to be reasonable. The appeal is therefore dismissed.

[130] The Appellant and Respondent have both sought costs of this appeal, but neither party has provided full submissions on the issue. Apart from adopting the submissions of the Respondent, the BCFSFA has not specifically sought costs in this matter. If any party wishes to pursue a claim for costs of this appeal, they shall be free to bring an application by no later than August 04, 2022 and the Registry will set a submission schedule.

"J. K. Bracken"

James Keith Bracken
Vice Chair, Financial Services Tribunal

July 21, 2022