BRITISH COLUMBIA

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DECISION NO. FST-RSA-20-A003(a)

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

BETWEEN:	Shahin Behroyan	**APPELLANT**
AND:	Real Estate Council of British Columbia	**RESPONDENT**
AND:	Superintendent of Real Estate	**THIRD PARTY**
BEFORE:	Michael Tourigny, Panel Chair	
DATE:	Conducted by way of written submissions concluding on June 17, 2020	
APPEARING:	For the Appellant: J. Kenneth McEwan, Q.C. and Laésha J. Smith, Legal Counsel For the Respondent, Real Estate Council of British Columbia: Jean P. Whittow, Q.C. and Jessie I. Meikle-Kahs, Legal Counsel For the Third Party, Superintendent of Real Estate: Joni Worton, Legal Counsel	

Decision on Application to lift stay

THE APPLICATION

[1] On April 21, 2020 Shahin Behroyan (the "Appellant"), a real estate agent licensed under the *Real Estate Services Act,* SBC 2004, c 42 (the "*RESA*"), filed a notice of appeal to the Financial Services Tribunal (the "Tribunal") under section 54(1)(d) of the *RESA*. The appeal is from the March 24, 2020 decision of a discipline committee (the "New Panel") of the Respondent Real Estate Council of British Columbia (the "Council") wherein the New Panel imposed a discipline penalty against the Appellant for his professional misconduct.

[2] In its decision, the New Panel ordered the following penalty against the Appellant under section 43(2) of the *RESA* (the "Order"):

i. the cancellation of the Appellant's licence as a real estate agent issued to him under the *RESA;*

ii. a prohibition against the Appellant from applying for a licence under the *RESA* for a period of five (5) years, and until after the Appellant has paid enforcement expenses order by the Panel; and

iii. the Appellant must pay enforcement expenses to Council of $50,000 CAD, due sixty (60) days from the date of the Order.

[3] By operation of section 55(2) of the *RESA,* the Order was stayed upon the filing by the Appellant of his notice of appeal under section 54 of the *RESA*.

[4] Section 55(2) of the *RESA* further provides that such stay may be lifted on application to the Tribunal member hearing the appeal under section 242.2(10)(a)(ii) of the *Financial Institutions Act,* RSBC 1996, c 141 (the "*FIA*").

[5] On May 4, 2020 Council applied to the Tribunal under section 242.2(10)(a)(ii) of the *FIA* to lift the statutory stay of the cancellation and prohibition terms of the Order (together the "Cancellation Order"). Council's stay lift application expressly excludes the term of the Order requiring the Appellant to pay enforcement expenses.

[6] The Appellant opposes Council's application to lift the statutory stay of the Cancellation Order. The application and submissions of Council are supported and adopted by the Third Party, Superintendent of Real Estate (the "Superintendent"), with the Superintendent expanding upon several of the Council's submissions.

BACKGROUND

[7] In September 2017, a discipline committee (the "Original Panel") of Council conducted a disciplinary hearing to determine whether the Appellant committed professional misconduct contrary to section 35 of the *RESA*. The seven particularized allegations of misconduct focused primarily on the Appellant causing his client to pay him a bonus of $75,000 over and above the sales commission payable to him by his client on the sale of residential real estate, which sale completed in January 2015. The professional misconduct alleged against the Appellant occurred in late 2014.

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

[9] After hearing oral submissions on penalty, the Original Panel issued a written decision[1] regarding penalty (the "First Penalty Decision"). The First Penalty Decision

[1] Original decision dated May 4, 2018, with corrigendum dated May 29, 2018.

suspended the Appellant's *RESA* license for a period of 12 months effective June 1, 2018. The First Penalty Decision also required that the Appellant pay a $7500 fine and enforcement costs of $58,708.85 within specified time limits, and that he take an ethics course prior to the completion of his suspension.

[10] In May 2018, the Appellant appealed both the Liability Decision and the First Penalty Decision to the Tribunal under section 54(1)(d) of the *RESA* seeking to have both Decisions set aside. By operation of section 55(2) of the *RESA*, both Decisions were stayed pending the appeal. Council did not apply to set this automatic stay aside.

[11] Also in May 2018, the Superintendent filed a separate appeal under section 54(1)(d) of the *RESA* from the First Penalty Decision seeking to vary the 12 month suspension order to an order cancelling the Appellant's license and providing that he not be eligible to reapply for licensing for a period of 5 years.

[12] At the time, the parties agreed that the two appeals should be joined and heard together. The parties further agreed that the hearing of the appeals should be bifurcated to allow for the appeal from the Liability Decision to be decided prior to consideration of the First Penalty Decision. These agreements of the parties were formalized by order of the Tribunal dated June 15, 2018.

[13] On August 27, 2019 the Tribunal issued its written decision on the Appellant's appeal from the Liability Decision in Decision No. 2018-RSA-002(b) and 003(b) (the "Liability Appeal Decision"). In the Liability Appeal Decision the Tribunal confirmed the Original Panel's findings of professional misconduct under section 35 of the *RESA* in relation to three of the five allegations found to have been proven by the Original Panel, and held that the Original Panel's findings of professional misconduct in relation to the remaining two allegations were made in error. On the same date, the Tribunal issued a decision rejecting the Appellant's application to adduce new evidence (Decision No. 2018-RSA-002(a) and 003(a)).

[14] The net result of the Liability Appeal Decision was that the Appellant was found liable for professional misconduct under section 35 of the *RESA* as particularized in the Amended Notice of Discipline Hearing as follows:

> Allegation 1.a:
>
> 1.a. In or about November, 2014, Mr. Behroyan caused the seller of the Property and/or HG, her son and power of attorney, to purport to agree to pay a bonus of $75,000 over the remuneration called for in the Listing Agreement (the "Bonus") without HG's and/or the seller's informed consent, contrary to his duty to act in the best interests of his client and/or to avoid conflicts of interest pursuant to section 3-3 of the Council Rules;
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> Allegation 1.b:
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> 1.b. Mr. Behroyan represented to HG and/or the seller that the Bonus was required by the representative of persons interested in acquiring the Property, J.C. and A.C., and/or in order to secure an offer for the Property, when one or both of these representations was untrue, which constitutes deceptive dealing pursuant to section 35(1)(c) of the RESA and/or a breach of the duty to act honestly pursuant to section 3-4 of the Council Rules;

> Allegation 1.e:
>
> 1.e. Mr. Behroyan failed to disclose to the seller and/or HG at any material time that he had signed a Working with a Realtor form indicating that he was to provide agency services to Mr. and Mrs. C, contrary to his duty to disclose all material information to his client pursuant to section 3-3(f) of the Council Rules;

[15] In the Liability Appeal Decision, submissions were sought from the parties on the appropriate remedy and the best way to move the appeal forward.

[16] The Tribunal issued its written remedy decision on October 18, 2019 (Tribunal Decision No. 2018-RSA-002(c) and 003(c)) (the "Remedy Decision").

[17] In the Remedy Decision the Tribunal considered whether the matter of penalty should be addressed by it or sent back to Council for reconsideration and ordered that the question of penalty should be sent back to a new panel of Council for reconsideration with directions.

[18] On March 24, 2020 the New Panel issued its written reconsideration decision on penalty (the "Reconsideration Decision"). In its Reconsideration Decision the New Panel made the Order now under appeal.

ISSUE

[19] Should the stay of the Cancellation Order be lifted pending determination by the Tribunal of this penalty appeal?

DISCUSSION AND ANALYSIS

The test to be applied on an application to lift a stay

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

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

[22] The Tribunal is not bound by prior decisions of either the Courts or the Tribunal, although as to the latter it is certainly desirable to strive for consistency in Tribunal decisions wherever it can rightly be found. The Tribunal 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.

[23] Council submits that the test set out in *Lin v Real Estate Council of British Columbia and Superintendent of Real Estate,* Decision No. 2016-RSA-002(c) ("*Lin*") should be applied on this application. In *Lin*, which is the most recent consideration by the Tribunal of an application to lift a section 55(2) statutory stay, the presiding member held that the applicant seeking to lift a section 55(2) statutory stay carries

the onus to prove on a balance of probabilities that the interests of justice warrant lifting the stay (*Lin* at para 29). When exercising its discretion on such an application the Tribunal member is to take factors into account that he or she considers important including (*Lin* at para 30):

> (a) the apparent merits of the appeal and defence thereof based on a preliminary review; and
>
> (b) whether the balance of convenience favours the granting of the [stay lift] application, in the sense that the harm or prejudice to be suffered by the public interest if it is not granted outweighs the harm to be suffered by the [Appellant] if it is granted.

[24] In response, the Appellant submits that the approach taken by the presiding member in *Lin* should not be applied on this application.

[25] The Appellant submits that the Council's argument and the approach taken in *Lin* overlook that the scheme of the relevant provisions of the *FIA* and the *RESA* addressing a disciplined licensee's appeal rights (and the statutory stay in section 55(2) in particular), express the legislative intent that the public interest favours the stay pending the outcome of the appeal unless displaced on application under section 242.2(10)(a)(ii) of the *FIA.*

[26] The Appellant then goes on to submit that essentially, by virtue of section 55(2) of the *RESA* and the automatic stay it prescribes, the legislature has instructed the Tribunal to presume that the elements required to establish a stay are satisfied. Using the traditional three-part test for granting a stay pending an appeal set out by the Supreme Court of Canada ("SCC") in *RJR-MacDonald Inc. v Canada (Attorney General),* [1994] 1 SCR 311 ("*RJR-MacDonald"),* the Appellant submits that accordingly, it is statutorily presumed:

> a. That there is a serious question to be tried;
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> b. That the licensee would suffer irreparable harm if the injunction is not granted; and
>
> c. The balance of convenience, including the public interest, favours the granting of a stay.

[27] The Appellant submits that the test required to rebut this presumption ought not remove the requirement to prove irreparable harm, nor can it be determined on an equal weighting of the harms as against each party. To do so would be to ignore the legislature's granting of a statutory stay, and the inherent presumptions that the appellant would suffer irreparable harm without the stay and that the balance of convenience favours the appellant. Rather, to obtain a lift of the stay, the Council must establish on clear and cogent evidence that if the stay is not lifted, it will suffer irreparable harm, such that the balance of convenience favours the Council. The Appellant submits Council has not met this burden on this application.

[28] I note that in structuring his argument on this issue the Appellant has referred to and relied upon the recent decision of the SCC in *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 ("*Vavilov*"). In *Vavilov* the SCC explained that it was taking the opportunity to consider and clarify the law

applicable to the judicial review of administrative decisions as addressed in *Dunsmuir v New Brunswick,* 2008 SCC 9 ("*Dunsmuir*") and subsequent decisions. The first aspect of the *Dunsmuir* framework that the SCC sought to clarify in *Vavilov* was the analysis for determining the standard of review (reasonableness or correctness) applicable to judicial review by a court of a given administrative decision. The second aspect the SCC sought to clarify was how to properly apply the reasonableness standard, including an explanation as to what the standard means and how it should be applied in practice. The passages from *Vavilov* referred to by the Appellant do no more than confirm the well established law that one should look to the legislative intent when undertaking statutory interpretation.

[29] I find no basis in either the extracts from *Vavilov* or the Appellant's submissions generally, to support the reading of the suggested "statutory presumptions" or his proposed test into the legislative context of applications to lift a section 55(2) *RESA* stay under section 242.2(10)(a)(ii) of the *FIA.* The Appellant's submissions ignore the fact that the wording of section 242.2(10)(a)(ii) of the *FIA* specifically provides the member of the Tribunal hearing the appeal with discretion to lift the automatic stay – without any language dictating how that discretion is to be exercised. The wording of the legislation leaves any test to be applied by the Tribunal member hearing such an application as a matter of his or her discretion.

Lin analysis

[30] In formulating the test to be applied on such an application the presiding member in *Lin* considered the three-part test for granting a stay pending an appeal set out in *RJR-MacDonald* which had been applied by the Tribunal in two previous applications to lift a section 55(2) stay as follows: *Chrystale Ashworth et al v Real Estate Council of British Columbia* (2005, Decision No. FST 05-012 and 05-015) and *Donald Lawrence Tymchuk and New Way Realty Inc. v Real Estate Council of British Columbia* (2006, Decision No. FST 06-023). Both of these cases involved unrepresented appellants, and the presiding member in *Lin* found it apparent from a review of the decisions that the issues of the test to be applied were not fully argued in those cases.

[31] In *RJR-MacDonald,* (which was a *Charter* case wherein the applicant tobacco company sought a stay of the implementation of certain proposed tobacco packaging regulations pending their constitutional challenge of those regulations), the SCC held that the applicants would only succeed if they could satisfy the following three-stage test [at para 48]:

i. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried.

ii. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused.

iii. 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.

[32] In considering whether to apply the three-part test set out in *RJR-MacDonald* the presiding member in *Lin* observed that in the context of whether or not the applicant needs to show irreparable harm in order to succeed, there is a principled distinction to be drawn between an application for a stay of an authoritative order on the one hand and an application to lift a statutory stay of an authoritative order on the other. The presiding member in *Lin* observed that while there have been very good reasons for the adoption of the irreparable harm principle in matters involving an application for either an injunction or a stay, the rationale for having to prove irreparable harm is not apparent in the lift application context. I agree.

[33] I recognize the conceptual and practical differences between applications by a regulator to lift a legislative stay (such as in the present case) and applications by a regulated licensee seeking a stay of a regulator's order. I also agree with and adopt for purposes of this appeal the following analysis from *Lin* (at paras 23-26):

> [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.*
>
> [24] The foregoing comments surely give short shrift to a large area of jurisprudence but I think them sufficient to support the observation that, historically, there have been very good reasons for the adoption of the irreparable harm principle in matters involving an application for either an injunction or a stay.
>
> [25] But is an application to lift a stay – that is, to reinstate the effect of the order below, and in that sense to allow the administrative justice system to flow unimpeded – also of such a serious ilk that a metric of irreparable harm should be used? That the legislature has presumptively favoured a stay in certain cases is no trifling matter, and surely means that the applicant has a burden to discharge before the stay will be removed, but equally the legislature has conferred jurisdiction to lift the stay. While including that power, the *FIA* gives no hint as to the test to be applied where a stay is sought to be set aside: there is no indication that irreparable harm, or any other particular notion, should be considered on such an application. Rather, the authority is simply and concisely

> stated, presumably leaving this tribunal to approach the matter in the way it thinks proper and just.
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> [26] To my mind, the rationale for having to prove irreparable harm is not apparent in the lift application context. As distinct from the injunction and stay situations at common law which I have just briefly discussed, I do not see reason on a motion under section 242.2(10)(a)(ii) of the *FIA* to put the concept of irreparable harm on any pedestal, particularly as the matter of harm will, in my view, on any proper approach to the question in any event become an important consideration.

[34] I find the forgoing extracts from *Lin* to be responsive to the argument advanced by the Appellant concerning his submitted "statutory presumptions", as well as to the alternative and far more strident test for the lift of a stay under section 242.2(10)(a)(ii) of the *FIA* advocated for by the Appellant.

[35] As was the approach adopted in *Lin,* I agree that the applicant, being Council in this case, has the onus of showing, on a balance of probabilities, that the *status quo* should be altered, and further that in discharging that onus it must show that the interests of justice support lifting the stay of the Cancellation Order.

[36] In exercising the discretion to grant or decline to grant the application, I will adopt the approach taken in *Lin* (at paras 29 and 30 referred to above) aided by a consideration of *RJR-MacDonald.*

STEP #1 - Apparent merits of appeal – is the appeal frivolous or vexatious?

Scope of merits assessment

[37] The Appellant submits that on the question of whether there is a serious question to be tried, the threshold is low. The Appellant relies on *RJR-MacDonald* where the SCC adopted language of Lord Diplock of the House of Lords in *American Cyanamid Co v Ethicon Ltd.,* [1975] AC 396, to the effect that the applicant seeking interlocutory relief 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".

[38] The Council's submissions do not directly address the meaning of "serious question to be tried". Its submissions were structured under the heading "The merits of the appeal and defence thereof" taken from *Lin.* The Council's submissions variously describe the grounds of appeal set out in the Notice of Appeal as being "without merit" or the appeal as having "little merit".

[39] For purposes of this application, and in an effort to avoid confusion due to the parties use of different terminology, I will proceed on the basis that "frivolous or vexatious" and "without merit" have basically the same meaning for purposes of my assessment of the merits on this application.

[40] The Appellant submits (again in reliance upon *RJR-MacDonald*) that whether this test has been satisfied should be determined by the Tribunal "on the basis of common sense and an extremely limited review of the case on its merits". A consideration of the question "does not involve an examination of the ultimate

merits of the appeal or its strength beyond being satisfied that the threshold has been met."

[41] The submissions of Council invite a more fulsome assessment of the weakness of the appeal on this application by taking the position that all of the issues raised by the Appellant are without merit. The Council has made extensive and carefully developed arguments on the merits of the issues raised by the Appellant on penalty on this appeal. In response the Appellant takes the position that this application is not the place to make full submissions on the merits.

[42] While *RJR-MacDonald* involved an application for a stay as opposed to an application to lift a stay, I find its analysis on this point equally applicable to this stay lift application. As a general rule, the SCC found (at page 337):

> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

[43] As a matter of fairness, I am not persuaded by Council that anything more than a preliminary assessment of the appeal to determine whether it is either frivolous or vexatious should be made on this application. I agree with the Appellant that the threshold is a low one. To conduct a more fulsome review on this application would risk prejudging the overall merits of the appeal without affording the Appellant his right to fully present and argue his appeal.

Issues raised on appeal

[44] In his Notice of Appeal, dated April 21, 2020, the Appellant asks that the Tribunal set aside the Reconsideration Decision as arbitrary and unreasonable. In the alternative, the Appellant asks that the Tribunal vary the Reconsideration Decision to a suspension of his license up to but not exceeding one year in duration.

[45] The grounds of appeal particularized in the Notice of Appeal in support of the remedies sought are as follows:

1. The penalty is unreasonable and arbitrary. The [New] Panel ordered cancellation of the Appellant's license with a five-year prohibition against application for re-licensing, a penalty far more severe than the one-year suspension ordered by the first Disciplinary Panel, despite there being fewer findings of liability against the Appellant. The [New] Panel does not address the increased severity of the sanctions, and the assessment of the penalty is arbitrary and disproportionately harsh, thereby rendering the decision unreasonable.
2. The [New] Panel erred in law and in principle by failing to properly consider and apply the sanction principles and guidelines, including but not limited to the principle of proportionality.

[46] After the initial written submissions on this application were exchanged, I granted leave[2] for the Appellant to make sur-reply submissions on an issue he characterized as being whether the New Panel had jurisdiction to order the cancellation of his licence in light of the Tribunal's direction in the Remedy Decision. It is the Appellant's position that the Tribunal ordered a limited reconsideration on the effect of the fewer proven allegations of misconduct on the First Penalty Decision, not a completely new sanction decision. This issue was not raised by the Appellant either before the New Panel or in his Notice of Appeal. By allowing submissions on this issue on this application, I do not intend to be seen as prejudging whether this constitutes a "new issue" or if so, whether it will be considered on the appeal on the merits.

Submissions of the parties on issues raised on appeal

The penalty was unreasonable and arbitrary.

[47] The Appellant submits that his appeal is neither frivolous nor vexatious; raising a serious question as to whether, in applying the relevant law and principles in respect of sanctions to identical findings of fact before the Original Panel, the New Panel's decision gave rise to such a different and more severe penalty despite there being fewer findings of liability against him, that the decision and analysis was arbitrary and unreasonable. The very fact that in these circumstances two panels came to such different conclusions is itself dispositive. The Appellant refers to *Vavilov* and submits that the failure of the New Panel to substantively address or justify the more severe penalty based on fewer findings of liability the decision is not "justified, intelligible, or transparent…to the individual subject to it", nor is it "justified in relation to the relevant factual and legal constraints that bear on the decision."

[48] Council submits that given the New Panel was tasked with reconsideration of penalty, it was under no obligation to address the increased severity of the penalty that it imposed in relation to the penalty imposed by the Original Panel. The New Panel was under no obligation to defer to the Original Panel decision on penalty. Moreover, the New Panel was entitled to reach a different conclusion than the Original Panel and it did not have to explain why it had done so.

[49] The Council submits that it is clear that the New Panel did not make its decision arbitrarily from a review of the Reconsideration Decision.

[50] Consequently, Council submits that the majority of the Appellant's first ground of appeal is without merit as it clearly rests on an inaccurate understanding of the nature of reconsideration. To the extent that this ground of appeal does not relate to the Original Panel's decision, it is likewise without merit as the Reconsideration Decision, when read as a whole is reasonable.

The New Panel failed to properly consider and apply the Sanction Guidelines, including but not limited to the principle of proportionality.

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[2] On condition that the other parties were granted a right of further reply in response.

[51] The Appellant submits that in considering proportionality of sanctions, the New Panel simply concludes "the Committee will make its reconsideration decision without deciding if the sanctions ordered by the First Committee was proportionate, too lenient, or too harsh." The analysis with respect to proportionality (at paras. 69-73) and the decision on sanctions (at paras. 86-89) do not in any way address the change in the foundation of the liability order and the impact of these changes on the imposition of sanctions.

[52] The Appellant submits that the principle of consistency in decision making is reflected in the Sanction Guidelines for the purpose of enhancing the transparency, consistency of approach, and fairness in the disciplinary process. The Appellant submits that the Reconsideration Decision fails to demonstrate a consistency of approach by the Council in considering sanctions.

[53] The Appellant contrasts the decisions of the Original Panel and the New Panel on identical findings of fact and asserts that the imposition by the New Panel of a substantially more severe and punitive penalty cannot be said to be consistent in approach or transparent. The Appellant then asserts that neither the outcome nor the reasoning in the Reconsideration Decision demonstrate that the New Panel turned its mind to the issue of consistency and transparency in the imposition of sanctions where the very foundation for liability has been reduced following an appeal to the Tribunal.

[54] In concluding his submissions that there is a serious question to be tried the Appellant submits the New Panel made further errors including:

a. A failure to properly apply the principle of proportionality, including failing to consider the degree of proportionality between wrongdoing and the penalty imposed, especially where the licensee's livelihood is at stake;

b. A failure to consider the purpose of sanctions, without considering whether something less than cancellation could meet the appropriate sentencing objectives, as the Original Panel (which had the benefit of hearing the Appellant's *viva voce* evidence) did;

c. A failure to consider or accept findings of fact made by the Original Panel which were favourable to the Appellant, or to find any mitigating factors in favour of the Appellant, instead interpreting each factor as being either an aggravating or neutral factor; and

d. A failure to consider any of the authorities referred to by the Appellant in relation to the appropriate penalty for each individual charge.

[55] Council submits that the New Panel properly considered and applied the sanction principles and guidelines in considering mitigation and aggravating factors and determined in the Reconsideration Decision that:

a. The Appellants age and experience were not mitigating factors (para 51);

b. The absence of previous discipline indicated this was not a case where the New Panel could infer that prior sanctions have been inadequate or that specific deterrence justified an increased sanction (para 54);

c. The nature and gravity of the Appellant's misconduct was "a serious form of professional misconduct that violates express statutory provisions". The New Panel agreed with the Original Panel that the Appellant's misconduct met the elements of civil fraud. The New Panel was not persuaded that the Appellant understood the severity of his actions or that he was remorseful. (paras 58-61);

d. The conduct involved issues of public safety and interest and abused the trust between a client and licensee. The conduct, without sanction, could undermine public confidence in the entire real estate industry (para 62);

e. The fact that the Appellant gave up his claim to the $75,000 is not a factor on sanction because he could not undo his fraud by renouncing his claim to the bonus more than three years after events. Moreover, even if he had given up his ill-gotten gains, he had not suffered any formal sanction or penalty for his misconduct (paras 63 and 68);

f. The Appellant's conduct involved an attempt to conceal that he would be benefitting from the bonus payment (para 64); and

g. While negative public reaction to a licensee defrauding a client may result in a degree of specific deterrence, the New Panel must ensure that the sanctions imposed achieve the purposes served by the sanction regime (para 67).

[56] The Council submits that in his submissions to the New Panel, the Appellant referred to several Council and Tribunal decisions involving fraud for the proposition that the one-year suspension imposed by the Original Panel was unduly harsh. The New Panel (at para 82) distinguished each of these cases on the basis that unlike the Appellant's proven misconduct these other decisions did not involve:

a. Defrauding a member of the public;

b. Fraud by a licensee against his own client;

c. Acting without approval, or apparent client approval and/or

d. The licensee actively fabricating events for his client.

[57] Council submits that there are several precedents referred to in the Reconsideration Decision supporting licence cancellation for fraudulent behaviour similar to the Appellant's, thus the penalty is neither arbitrary nor disproportionately harsh.

The Tribunal ordered a limited reconsideration in its Remedy Decision.

[58] In the Remedy Decision the Tribunal considered whether the matter of penalty should be addressed by it or sent back to Council for reconsideration. The Tribunal held (at paras 24 and 25):

> [24] In the rather unique circumstance of dealing with a bifurcated appeal, I am persuaded by the submissions of the Superintendent to the effect that the question of penalty should be sent back to a new panel of Council for reconsideration as a matter of procedural fairness. I so order. The rationale for the bifurcation of the penalty appeals from the liability appeal would otherwise be frustrated. Likewise, if the Tribunal were to proceed to hear both appeals from the Penalty Decision, as suggested by Council, the ability of the Superintendent to make fulsome submissions as an appellant would be complicated and potentially compromised by being forced to engage in speculation when addressing the reasonableness of the Penalty Decision.
>
> [25] As submitted by the Superintendent in the appeal of the Liability Decision, Council is a licensing and regulatory body with a mandate to protect the public interest in relation to the conduct and integrity of its licensees by enforcing the licensing and licensee conduct requirements of the RESA. The Council's core business areas are education, licensing, and disciplinary and hearing processes. While the Tribunal clearly has the expertise and is in a position to decide penalty in this matter, I am comforted by the fact that the subject matter of the appropriate penalty in light of the Liability Appeal Decision also falls squarely within Council's expertise. I have taken this expertise into account in deciding to send the question of penalty back to Council for reconsideration.

[59] In the Remedy Decision the Tribunal then went on to consider what directions to give to Council under section 242.2(11) of the *FIA* in relation to its reconsideration of penalty and (at para 37) gave directions as to how submissions were to be made, what materials the New Panel should base its decision on, and the adjournment of the outstanding appeals on penalty.

[60] The Appellant submits in his sur-reply submissions, (relying primarily on his interpretation of language used in the Remedy Decision at paras 16 and 17), that it was never contemplated or ordered in the Remedy Decision that the reconsideration would allow the New Panel to order a change in sanction unrelated to the diminution of liability (let alone the dramatically increased penalty at issue). The Appellant submits that the New Panel exceeded its jurisdiction on reconsideration by re-evaluating the entirety of the Appellant's sanction.

[61] For practical purposes, the Appellant's submission is to the effect that the New Panel on the reconsideration was only to consider whether the one-year suspension imposed by the Original Panel should be varied downwards because the Tribunal had only upheld three of five finding of misconduct in the Liability Decision.

[62] Council summarized its response to the Appellant's sur-reply submissions as follows:

a. The Tribunal did not order a limited reconsideration of the impact of the varied findings on the first Penalty Decision;

b. There is no limitation at law for the reconsideration of a penalty;

c. The issue of lack of jurisdiction to impose a more severe penalty was not raised by the Appellant before the New Panel, was not part of his Notice of Appeal, and is inconsistent with his position on the remedy in the Liability Appeal; and

d. Even if the New Panel did not have authority to cancel the Appellant's licence, it would have had authority to impose a lengthy suspension. Thus the "jurisdiction" issue does not change the irreparable harm and balance of convenience analysis.

[63] Council submits that the Appellant's interpretation of the relied upon extracts from the Remedy Decision is wrong. It was the broad question of penalty that was sent back to the New Panel for reconsideration.

[64] Council submits the Tribunal did not in fact, and could not, direct the result of a reconsideration as the Appellant submits it did. This would fetter the discretion of the New Panel. Reliance was placed on *Testa v WCB (BC),* 1989 CanLII 2727 at para. 53 (BCCA) ("*Testa*").

[65] The New Panel had authority to order the cancellation of the Appellant's licence under section 43(2) of the *RESA* on the reconsideration as it did.

[66] The Superintendent filed a separate response to the Appellant's sur-reply submissions. In addition to supporting the submissions of Council the Superintendent submitted that it was open to the New Panel to consider all possible penalty options given the serious findings of misconduct. The Tribunal did not restrict the range of penalties as a condition of reconsideration in the Remedy Decision; nor did the Appellant argue before the New Panel that it was restricted in its ability to apply any of the penalties, or a range of penalties, available to it under section 43(2) of the *RESA.*

[67] The Superintendent also pointed to the fact that the Appellant's interpretation that the Tribunal limited the reconsideration to consider a diminished liability is not supported by the clear wording of the Remedy Decision (at para 24): "In the rather unique circumstance of dealing with a bifurcated appeal, I am persuaded by the submissions of the Superintendent to the effect that the question of penalty should be sent back to a new panel of Council for reconsideration as a matter of procedural fairness. I so order."

Conclusion on question of whether the appeal is frivolous or vexatious

[68] On a preliminary assessment of the submissions of the parties on the forgoing issues raised by the Appellant on this appeal, I find that Council has not met its burden to establish that these issues are frivolous or vexatious. The Appellant has made arguments which are clearly based on the particular facts of the case supported by relevant legal principles. As I have noted above, the threshold to meet the standard of not being frivolous or vexatious is a low one.

[69] I make the finding that the issues raised on appeal are not frivolous or vexatious without comment on the ultimate likelihood of success or failure of any of these issues on appeal.

STEP #2 - Balance of Convenience

[70] As previously held in this decision, the Council, as applicant, carries the onus of showing, on a balance of probabilities, that the *status quo* should be altered, and

further that in discharging that onus it must show that the interests of justice support lifting the stay of the Cancellation Order.

[71] The question at this stage is whether the balance of convenience favours the granting of the stay lift application, in the sense that the harm or prejudice to be suffered by the public interest if it is not granted outweighs the harm to be suffered by the Appellant if it is granted.

Harm or prejudice to the public interest if the stay is not lifted

Council's submissions

[72] Council submits that public trust and confidence in the real estate regulatory regime will be eroded if the stay is not lifted in the circumstances of this case. This would be harmful to the public interest.

[73] Council begins its submissions by reference to *RJR-MacDonald* where the SCC held that the onus of demonstrating irreparable harm to the public interest upon a public authority is less than a private applicant and the threshold is low (at p 346):

> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

[74] Council refers to *Lin* to argue that the *RJR-MacDonald* presumption has been applied in the regulatory context in *Starflick.com v British Columbia Securities Commission,* (2014) BCSECCOM 25 ("*Starflick*") and *Pierce v British Columbia Securities Commission,* (2016) BCSECCOM 44 ("*Pierce*").

[75] Section 73(2) of the *RESA* sets out that the objects of Council are to:

a. administer, subject to the oversight and direction of the Superintendent under section 89.1, this Act and the regulations, rules and bylaws,

b. maintain and advance the knowledge, skill and competency of its licensees, and

c. uphold and protect the public interest in relation to the conduct and integrity of its licensees.

[76] The Council submits that the need to maintain the integrity and public confidence in the regulatory system is paramount. The Council is charged with upholding and protecting the public interest in relation to the conduct and integrity of its licensees pursuant to section 73(2)(c) and that the Cancellation Order was made pursuant to this purpose.

[77] Council relies on *Re Goodwin,* 2018 CanLII 11327 (Penalty) (BC REC) in support of the proposition that the public must be confident that the Council holds its licensees accountable; particularly where a breach of ethics is involved (at paras 15-16).

[78] Council also relies on *Ontario (College of Pharmacists) v Nguyen,* 2015 ONCPDC 11 ("*Nguyen*") which involved an issue of whether to adjourn or stay the member's disciplinary proceedings pending resolution of charges under the Ontario *Provincial Offences Act*. The pharmacist had been accused of significant over-billing of the provincial drug benefit program. The panel in *Nguyen* held that the allegations of false and misleading billings impugned the member's honesty and integrity and held (at para 82-83) that the need to maintain the integrity and public confidence in the health regulatory system was paramount and weighed against the granting of the stay sought by the member. Council points out that *Nguyen* involved unproven allegations of dishonesty while here, the Original Panel found the Appellant was dishonest and that he engaged in fraud and deceptive dealing. Those findings were upheld on appeal in the Liability Appeal Decision. Thus, there is an even more compelling case here that the public interest will be harmed if the stay of the Cancellation Order is not lifted.

[79] Council submits that to have the Appellant, who has been found to have committed deceptive and fraudulent behaviour, continue to be licensed despite those serious findings of misconduct will erode public trust and confidence in the real estate regulatory regime.

[80] Council submits that cases such as this one involving serious fraud where the New Panel has concluded that only the most serious penalty of license cancellation is appropriate must over-ride the section 55(2) *RESA* statutory stay. To conclude otherwise would be to render section 242.2(10)(a)(ii) meaningless.

[81] Council further submits that the public protection purposes of the *RESA* are engaged in this application. Here, the mandate of the Council is to protect the public interest by enforcing licensing and licensee conduct under the *RESA*. Referring to the Council Discipline Hearing Committee decision in *Re Roberts*, 2013 CanLII 14176 (BC REC), Council submits it is responsible for ensuring that the interests of consumers who use the services of real estate licensees are adequately protected against wrongful conduct by licensees.

[82] Council submits that if the stay of the Cancellation Order is not lifted, then the Appellant will continue to be licensed with no restrictions or oversight on his license and the public will continue to be at risk of harm. This is clearly contrary to the public protection mandate of the *RESA.*

Appellant's submissions in response

[83] The Appellant submits that the Council has not established harm as it has led no evidence of harm on this application. The Appellant asserts that Council, as applicant, must establish on a "sound evidentiary foundation" that harm will result, and it cannot be "mere speculation" relying on *Adolph v St'at'imc First Nation,* 2011 BCSC 1940 ("*Adolph*") at para 44, and *Vancouver Aquarium Marine Science Centre v Charbonneau*, 2017 BCCA 395 ("*Vancouver Aquarium*") at para 60.

[84] Rather, Council relies on the presumption of irreparable harm set out in *RJR-MacDonald*, and the Appellant submits that the factual and legislative context of *RJR-MacDonald* is distinguishable from this case. The Appellant submits that the basis upon which the court held that harm to the public interest could be presumed in *RJR-MacDonald* does not arise in this case. The Appellant distinguishes *Nguyen, Pierce* and *Starflick* on a similar basis.

[85] The Appellant references *Lin* (at para 25 in part):

> [25] …That the legislature has presumptively favoured a stay in certain cases is no trifling matter, and surely means that the applicant has a burden to discharge before the stay will be removed, but equally the legislature has conferred jurisdiction to lift the stay. …

and submits that Council now seeks to alter the status quo and to question the effectiveness of the legislative regime. To apply the *RJR-MacDonald* presumption of irreparable harm to the public interest in this stay lift application context would be tantamount to a conclusion that any decision of the Council must be in the public interest. This would render the statutory stay meaningless as any application by the Council to lift a stay would satisfy this threshold without evidence.

[86] In response to the Council's public protection submissions the Appellant submits (and has affirmed in an affidavit filed in opposition to this application) that in the nearly six years since the misconduct in 2014, while he has continued to act for many clients on hundreds of transactions, he has done so without any further disciplinary issues.

[87] In reply submissions, Council confirms that while there have been no further discipline hearings conducted under section 42 of the RESA against the Appellant, it would be incorrect to say that there have been no investigations or complaints. Council refers to two complaints as defined in section 36 of the *RESA* made to Council with respect to the Appellant during the last five and one-half years, of which the Appellant received notice relating to conduct that occurred earlier than the misconduct at issue here. These complaints have been closed without further action. A third complaint file concerns a Council-initiated investigation regarding the Appellant, pursuant to section 37 of the *RESA*. This investigation, which relates to conduct that occurred after this misconduct, remains open and the Appellant has been informed of such.

[88] The Appellant submits that Council's submission that if the stay is not lifted the Appellant will continue to be licensed with no restrictions or oversight ignores the practical reality of the *status quo*. As a licensee, the Appellant remains subject to the oversight of Council under its mandate. Further, it cannot be said that allowing the Appellant to retain his license pending the determination of the appeal, in accordance with the *RESA*, is contrary to the purpose of that legislation.

[89] Finally, the Appellant observes that Council did not find it necessary to seek to set aside the stay on the first appeal, arising from these very facts. Accordingly, it cannot be heard to now take a contrary position.

[90] In reply submissions Council points out that the first appeal was with respect to both liability and penalty. The situation is quite different now as this appeal is

with respect to penalty only. There are now definitive findings on liability. In particular, the Tribunal confirmed the Original Panel's findings of professional misconduct with respect to the three most serious allegations. Consequently, at the conclusion of this appeal, the Appellant will be subject to some form of penalty. The Council submits that given the seriousness of the proven misconduct, even if the Appellant is successful on this appeal, he is still likely to receive a period of suspension. Conversely, had the Appellant been entirely successful on his appeal on liability, he would not have been subject to a penalty.

Finding on harm or prejudice to the public interest if the stay is not lifted

[91] I will start by repeating my finding that the rationale for having to prove irreparable harm is not required in the lift application context. The applicant Council is not obliged to prove irreparable harm to the public interest.

[92] However, as stated by the presiding member in *Lin,* on a stay lift application the applicant has a burden to discharge before the presumptive statutory stay will be removed (at para 25). I find this burden includes the onus to show that the public interest will suffer at least some harm if the stay is not granted to be weighed against whatever harm that the Appellant shows he or she will suffer if the stay is lifted.

[93] The Appellant submits that the Council has not established harm as it has led no evidence of harm on this application, and instead relies upon an inapplicable presumption from *RJR-MacDonald* and "mere speculation".

[94] In support of his submission that Council, as applicant, must establish on a "sound evidentiary foundation" that harm will result, and it cannot be "mere speculation", the Appellant relied upon findings in *Adolph* and *Vancouver Aquarium.* Both cases involved applications for interlocutory injunctive relief pending trial in civil proceedings applying the *RJR-MacDonald* three-part test. As distinct from those cases, we are operating within a regulatory framework wherein Council is statutorily mandated to protect the public interest (section 73(2)(c) *RESA*). Accordingly, I find the legal and factual basis for the findings in *Adolph* and *Vancouver Aquarium* to be distinguishable from this case.

[95] I agree with Council's submission that it is charged with upholding and protecting the public interest in relation to the conduct and integrity of its licensees pursuant to section 73(2)(c) and that the Cancellation Order was made pursuant to this purpose.

[96] I find the submissions of Council that public trust and confidence in the real estate regulatory regime will be eroded if the stay is not lifted in the circumstances of this case to be more than "mere speculation" as suggested by the Appellant. I agree with Council that harm to the public interest will flow from allowing the statutory stay to remain intact in this case given that the Appellant has been found liable for serious misconduct involving findings of fraud. I find that harm will be caused to the public interest if the stay is not lifted.

[97] I also find that *Re Goodwin* and *Nguyen* as referred to in Council's submissions support the proposition that the public must be confident that the Council holds its licensees accountable; particularly where a breach of ethics is

involved. In particular, the fact that the Original Panel found the Appellant was dishonest and that he engaged in fraud and deceptive dealing, which findings were upheld on appeal in the Liability Appeal Decision, gives substance to the submission that the public interest will be harmed if the stay of the Cancellation Order is not lifted.

[98] On the question of risk of further misconduct and resulting harm to the public due to the Appellant continuing to be licensed pending the appeal, while the Council in reply submissions points out it would be incorrect to say that there have been no investigations or complaints involving the Appellant in the period since his proven dishonest conduct in late 2014, the Appellant has affirmed that while he has continued to act for many clients on hundreds of transactions in the interim period, he has done so without any further disciplinary issues. Based on the information before me, I find that Council has only shown a minimal risk of further misconduct pending the appeal that would harm the public interest. While I agree with the Appellant that any such conduct could be addressed by Council through its oversight powers under the *RESA* if such were to occur, such disciplinary process would involve some delay and the alleged harm would have already occurred. I also agree with Council that its public protection mandate is concerned with minimizing the risk of any potential harm to the public.

[99] I do not accept the Appellant's submission that since the Council did not apply to lift the stay on the first appeal, that it cannot be heard to now take a contrary position. The Council quite correctly submits that the question of liability was a live issue on the first appeal while that is no longer the case on this appeal. Consequently, at the conclusion of this appeal, the Appellant will be subject to some form of penalty, whereas had the Appellant been entirely successful on his appeal on liability, he would not have been subject to any penalty.

[100] A fundamental starting point in assessing the reasonableness of penalty when the merits of this appeal are dealt with will be the consideration of the seriousness of the proven misconduct. The Original Panel concluded that the Appellant had committed professional misconduct that included deceptive dealing, breach of his duty to act honestly and failure to act in his client's best interest and/or avoid conflicts of interest. As found by the New Panel (at para 88) "The Licensee's conduct in this case involved a fraud of significant magnitude on his own client, at the client's expense. The fraud was predatory conduct of a serious nature. As the Council submitted, 'It is difficult to imagine a more fundamental breach of the fiduciary duties owed by an agent to a client' ".

[101] Nothing in the issues raised by the Appellant on this appeal challenge or diminish the serious nature of his proven misconduct. While the appeal raises issues as to the appropriate penalty for this misconduct, there is no question as to liability. In these circumstances I find that the harm to the public's perception of the real estate regulatory regime including disciplinary proceedings under the *RESA* if the stay is not lifted is amplified.

[102] The Appellant has submitted that the finding in *RJR-MacDonald* relied upon by Council to the effect that the onus of demonstrating irreparable harm to the public interest upon a public authority is less that a private applicant and the threshold is low, should not apply in the context of this stay lift application. Even

though all of *RJR-MacDonald, Pierce* and *Starflick* relied upon by Council were stay applications as opposed to stay lift applications, I do not agree with the Appellant that as such, this aspect of the *RJR-MacDonald* analysis should not apply to a stay lift application. In particular, insofar as Council is mandated to protect the public interest and the Cancellation Order was imposed pursuant to that duty, I see no principled reason to reject the premise that on a stay lift application the onus on Council of demonstrating harm to the public interest if the stay is not lifted is less than that of a private applicant seeking a stay of an authoritative order made by such a public authority, and that the threshold is low.

[103] I find that the Council has met its burden to show that the public interest will suffer harm if the stay is not lifted. In addition to establishing Council's public protection mandate and the fact that the Cancellation Order was imposed pursuant thereto, Council had also provided information establishing at least some harm to the public interest in the particular circumstances of this case if the stay is not lifted. The strength of this harm will be weighed against any harm that the Appellant has shown he will suffer if the stay is lifted.

Harm to the Appellant if the stay is lifted

[104] The Appellant's submissions on the harm he will suffer are supported by his affidavit.

[105] According to the Appellant's affidavit:

- he is currently licensed as a representative for trading services with the brokerage of Behroyan & Associates Real Estate Services Ltd. actively working with over 100 clients, including on long-term development projects. His real estate business remains his livelihood and source of significant income.
- If the stay order is lifted and his licence is cancelled pending the determination of his appeal, he will not be able to provide services to existing clients in what is already a very difficult real estate market. This will be prejudicial for his clients as they will need to find new brokers to take the listings. Further, he will have to tell all of his current clients that his licence has been cancelled. He expects that this will result in the permanent loss of many of these relationships, even if his appeal is ultimately successful and his licence is not cancelled.
- If the stay order is lifted, he will not be able to earn a living as a real estate agent and will suffer a serious loss of income. Further he will suffer irreparable harm to his reputation and his relationships with current and ongoing clients.

[106] Council acknowledges that if the stay is lifted, and the Cancellation Order takes effect, then the Appellant will be unable to earn commissions from real estate sales. However, Council submits that even if he were to be successful on appeal, the Appellant is likely to be suspended for a lengthy period of time, given the serious findings of misconduct made by the Council and affirmed by the Tribunal. Thus, the Appellant will suffer economic harm whether the stay is lifted or not.

[107] Council submits further that while the Appellant may suffer harm to his reputation by informing his clients that his licence has been cancelled, that harm cannot be said to flow from the imposition of penalty or the lifting of the stay. Rather, any harm to the Appellant's reputation ultimately is a result of his serious misconduct. In other words, the Appellant is the author of his own misfortune.

[108] It is not in dispute that if the Appellant's licence is subject to suspension or cancellation that he will suffer economic and reputational harm and that his current clients will have to find another licensed real estate agent.

[109] The question here is whether this harm would be caused by the lifting of the stay.

[110] The Appellant points to his suffering economic and reputational harm in his affidavit.

[111] The Council concedes that economic and reputational harm will flow from the cancellation or suspension of the Appellant's real estate licence but submits this harm flows from the Appellant's serious misconduct and not the lifting of the stay.

[112] The only way that the Appellant will suffer any such harm directly attributable to the lifting of the stay, (as opposed to being solely attributable to his proven serious misconduct), will be if he is successful on the merits of the appeal to the extent that he convinces this Tribunal that a penalty less than a suspension is warranted. This is because if something less than a suspension is warranted, then his having to give up income and suffer reputational harm based on his licence being cancelled while the appeal is ongoing will have been for nothing.

[113] Although I have found, for the purposes of this application, that the appeal is neither frivolous or vexatious, it appears to me, based on the three findings of serious fraudulent misconduct which were upheld in the Liability Appeal Decision, that the Appellant will be hard pressed to show that a penalty of something less than a suspension is warranted in the circumstances. This is not to say that I have made any findings in this regard; indeed each of the Appellant's grounds of appeal will have to be fully assessed and decided upon following fulsome submissions from the parties on the appeal on the merits. I make this observation for the purposes of this application, on the basis of the materials that are currently before me, only to point out that any harm which may flow to the Appellant as a result of the stay being lifted, appears at this stage to be remote.

[114] I find that the Appellant has established a remote risk that he will suffer potential economic or reputational harm directly attributable to the lifting of the stay of the Cancellation Order.

Weighing the harm

[115] Council submits that the risk of economic harm and harm to the Appellant's reputation should not be given significant weight in the balance of convenience analysis. There is very limited risk that the Appellant will suffer some harm if the stay is lifted, however, the harm to the public interest if the stay is not lifted is greater. This harm is two-fold, as it engages both the protection of the public from

further misconduct by the Appellant and protection of the public confidence in the integrity of the real estate licensing regime.

[116] Council relies on *Carvalho v BC (Medical Services Commission)*, 2016 BCSC 1603 ("*Carvalho*") at para 73 in support of the proposition that in the professional discipline context, the public interest has been referred to as an "essential factor" at the balance of convenience stage of the analysis. In *Carvalho,* the Court determined that even though the applicant physician would suffer irreparable harm if his stay application was not granted, the balance of convenience favoured protection of the public interest, and the stay application was dismissed (at para 98). As in *Carvalho*, the Council submits that the balance of convenience favours the protection of the public interest and the integrity of the real estate licensing regime over the interests of the Appellant. Thus, the balance of convenience favours granting the stay lift application.

[117] Council submits that the test to lift the stay has been met and the public interest in lifting the stay far outweighs any potential harm to the Appellant. The application to lift the stay of the Cancellation Order should be granted.

[118] The Appellant submits that if the stay is lifted, he will suffer not only economic harm, including the loss of his livelihood and primary source of income, he will also suffer irreparable reputational harm. I have held above that the actual risk of potential harm that the Appellant can link to the granting of the stay lift application is remote.

[119] The Appellant again challenges the alleged harm to the public as being speculative and unsupported by evidence. The Appellant questions "why now rather than after the appeal on the merits?" and suggests the Council is seeking to send a message to the public that may be premature and cause him irreparable damage with no cogent reason. I have found above that the Council has met its burden on the question of harm to the public interest.

[120] The Appellant submits the balance of convenience favours the protection of his economic and reputational interests, which will be significantly harmed if the status quo is altered. The legislative scheme is intended to provide him with temporary protection pending the appeal. By contrast, Council has not established any real proof of harm. Accordingly, the balance of convenience favours the dismissal of the stay lift application.

[121] The Appellant further submits that the purpose of the section 55(2) *RESA* stay, (as acknowledged by Council in its submissions in *Lin*), is to provide a "temporary pause" to spare the licensee the harm occasioned by the order below pending determination of the merits on appeal. He claims the benefit of such a "temporary pause" and that it be taken into account is weighing the harm.

[122] I agree with the finding in *Carvalho* relied upon by Council to the effect that in the professional discipline context, the public interest is an "essential factor" at the balance of convenience stage of the analysis. I have found that Council has shown that actual harm will be suffered by the public interest if the stay is not lifted, while the Appellant has only shown potential harm, and based on the information before me, such potential harm appears remote. Contrary to the

submission of the Appellant, I find that the public interest trumps his personal economic and reputational interests in this case.

[123] On balance, I find there is a remote risk that the Appellant will potentially suffer some economic or reputational harm attributable to the lifting of the stay, however, the actual harm to the public interest if the stay is not lifted is greater. This harm to the public interest is two-fold, as it engages both the erosion of the public trust and confidence in the integrity of the real estate regulatory regime if the stay is not lifted in the circumstances of this case as well as protection of the public from further misconduct by the Appellant, (the risk of which I have found to be minimal).

[124] I find that Council has met its burden to establish that the balance of convenience favours the granting of the stay lift application, in the sense that the harm or prejudice to be suffered by the public interest if it is not granted outweighs the harm to be suffered by the Appellant if it is granted.

DECISION

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

[126] I have concluded that Council has met its onus of showing, on a balance of probabilities, that the *status quo* should be altered, and further that the interests of justice support lifting the stay of the Cancellation Order.

[127] Accordingly, I grant Council's application under section 242.2(10)(a)(ii) of the *FIA* and order that the section 55(2) *RESA* stay of the Cancellation Order be lifted.

"Michael Tourigny"

Panel Chair

September 11, 2020