Financial Services Tribunal
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DECISION NO. FST-RSA-21-A001(b)

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

BETWEEN:	Wei Qing (Wendy) Yang	**APPELLANT**
AND:	Superintendent of Real Estate	**RESPONDENT**
BEFORE:	James P. Carwana, Panel Chair	
DATE:	Conducted by way of written submissions concluding on September 29, 2021	
APPEARING:	For the Appellant:	Jeffrey P. Scouten, Counsel
	For the Respondent:	David T. McKnight, Counsel

DECISION ON STAY APPLICATION

APPLICATION

[1] The Appellant has filed an appeal to the Financial Services Tribunal (the "FST") under section 54 of the *Real Estate Services Act,* SBC 2004 c 42 (the "*RESA*"), in respect of two decisions by a Discipline Hearing Committee (the "Committee") of the Real Estate Council of British Columbia (the "Council"). The Appellant seeks to stay the effect of the suspension set out in one of those decisions pending a determination on the merits of her appeal. In a previous decision, I granted an interim stay of the Committee's decision imposing a suspension on the Appellant until this main stay application was decided (see *Yang v. Superintendent of Real Estate*, Decision No. FST-RSA-21-A001(a)). The parties have made additional submissions in relation to the present main stay application.

BACKGROUND

[2] The Appellant is a real estate agent.

[3] The Respondent indicates that during the period from February 7, 2017 to July 12, 2017, the Council served six notices of hearing on the Appellant. These notices set out charges relating to various incidents which were alleged to have occurred in 2015 and 2016, including the alleged forgery of a signature on eleven listing amendment forms.

[4] The matters did not proceed to hearing in 2017 or 2018.

[5] On May 1, 2019, the Council served the Appellant with amended notices of hearing relating to the charges at issue.

[6] A hearing regarding the charges before the Committee was ultimately held in October and November 2020. Submissions on the issue of liability were subsequently made by legal counsel for the parties in January 2021, and the Committee reserved judgment.

[7] On April 9, 2021, the Committee issued its decision regarding liability in respect of the charges (the "Liability Decision"). The Committee made findings of professional misconduct and conduct unbecoming a licensee against the Appellant in relation to several of the charges.

[8] In the Liability Decision, the Committee stated that it would "hear evidence and submissions from the parties concerning orders under section 43(2) of the *RESA*, and expenses under section 44(1) of the *RESA*, and any other actions available to the Committee, at a date, time and place to be set."[1]

[9] In May 2021, the Committee received written submissions concerning sanctions and enforcement expenses to be ordered against the Appellant.

[10] On July 29, 2021, the Committee rendered its decision on penalty (the "Sanction Decision"), where it ordered:

a. the Appellant be suspended for one (1) year;

b. the Appellant be prohibited from acting as an unlicensed assistant during the license suspension period;

c. the Appellant, at her own expense, register for and successfully complete the Council's Real Estate Trading Services Remedial Education Course, and the Real Estate Institute's Ethics in Business Practice course, within one (1) year from the date of its decision;

d. the Appellant pay enforcement expenses to Council in the amount of $150,000 within one (1) year from the date of its decision; and

e. if the Appellant fails to comply with any of the terms of the decision as set out above, the Council may suspend or cancel their licence without further notice pursuant to section 43(3) and 43(4) of the *RESA*.

[11] On July 30, 2021, the Hearing Coordinator for the Council sent an email to counsel for the Appellant attaching the Sanction Decision.

[12] On August 1, 2021, amendments to the *RESA* came into effect pursuant to Bill 8 – *Finance Statutes Amendment Act, 2021 ("FSAA")*. Prior to those amendments, Section 55(2) of the *RESA* provided for an automatic stay of a Council decision upon an appeal to the FST. The amendments repealed section 55 and the automatic stay. The amendments further "dissolved and discontinued" the Council (*FSAA* at section 126), and established a new disciplinary process under a new Superintendent of Real Estate (the "Superintendent").

[13] The BC Financial Services Authority ("BCFSA") began handling enforcement of the matter effective August 1, 2021. On August 9, 2021, the BCFSA sent a letter to

[1] Liability Decision at para 156.

the Appellant enclosing the Sanction Decision and advising the Appellant her licence would be suspended from August 16, 2021 to August 16, 2022.

[14] On August 11, 2021, the Appellant filed a Notice of Appeal to the FST. In it, the Appellant appealed both the Liability and Sanction Decisions.

[15] On August 12, 2021, counsel for the Appellant wrote to the BCFSA to request that implementation of the Appellant's suspension be delayed to allow her to make an application for a stay of the suspension to the FST. In this request, the Appellant referenced the fact that there was an automatic stay under section 55 of the *RESA* prior to August 1, 2021. On August 12, the BCFSA advised the Appellant that the implementation date for the suspension would not be delayed.

[16] On August 13, 2021, counsel for the Appellant wrote to the Chair of the Committee to request that the Committee "delay the commencement of her suspension for a brief period to allow time for her to apply to the FST for a stay". Counsel for the Appellant advised the Committee that the BCFSA had refused to delay the implementation and the practical effect of such a refusal was to render useless the Appellant's right to apply to the FST "for a stay of the Committee's Sanction Decision pending the outcome of her appeal".

[17] On August 15, 2021, the Committee, through a letter from independent legal counsel, distributed the substance of its decision and reasons to the parties relating to the Appellant's request to delay the commencement of her suspension. The Committee's decision was to amend its Sanction Decision to add that the Appellant's suspension "commences on the thirtieth (30th) day from August 9, 2021, the date on which the BCFSA delivered its letter enclosing the Sanction Decision". The letter from legal counsel stated that the decision and its reasons would be put in the form of an addendum to the Sanction Decision the following week.

[18] On August 19, 2021, the Committee issued its "Supplemental Reasons for Decision Regarding Sanction" signed by the members of the Committee. The Committee stated that it continued to have jurisdiction over the matter and that the supplemental decision was part of the Sanction Decision. The substance of the Committee's supplemental reasons and decision were as communicated in the August 15, 2021 letter from legal counsel referred to above.

[19] The Appellant subsequently applied to the FST for a stay of the suspension imposed under the Sanction Decision pending the outcome of her appeal. The Appellant also sought the Respondent's agreement to delay commencement of the suspension until a decision on the stay application. Failing such agreement, the Appellant sought an interim stay of the suspension until the main stay application could be determined. The Respondent did not agree to delay the commencement of the suspension as requested.

[20] The FST subsequently set a schedule for submissions on the main stay application and obtained submissions from the parties in relation to her application for an interim stay.

[21] On September 20, 2021, I granted an interim stay of the suspension pending the determination by the FST of the main stay application.

[22] As previously noted, the parties made additional submissions relating to this main stay application.

POSITIONS OF THE PARTIES

The Appellant

[23] The Appellant says there ought to be a stay on two grounds. First, the Appellant says that in the present circumstances the automatic stay under the former section 55 of the *RESA* endures for decisions of the Council, despite the repeal of that section on August 1, 2021. As such, the Appellant says that such a stay was effective upon her appeal. Second, the Appellant says there ought to be a stay based on the normal considerations for granting a stay, even if such a stay was not automatic here.

[24] On the first ground, the Appellant says the present circumstances are unique in terms of the timing of the Sanction Decision and the change in legislation effective August 1, 2021. The Appellant argues that because the decisions under appeal here are decisions of the Council, "there are grounds for questioning whether the repeal of s. 55, which came into effect on August 1st, negates the effect of s. 55 as it pertains to decisions made by the Real Estate Council before its repeal". Since she is appealing decisions of the Council (and not the Superintendent), the Appellant says the provisions relating to Council appeals remain in effect, including the automatic stay provision.

[25] On the second ground for seeking a stay, the Appellant argues there will be "serious and lasting damage stemming from the shuttering of her practice" if a stay is not granted. The Appellant says she is working with clients and has approximately eleven active listings. The Appellant states an interruption in her current ability to work and meet her clients' needs on pending transactions would cause her and her clients needless harm and inconvenience. The Appellant further notes that if her suspension takes effect now and it is later reduced to a period less than she serves, she will have been unfairly denied the ability to work for a longer period than the period of suspension ultimately imposed.

[26] The Appellant submits the immediate commencement of her suspension "is not required or warranted in the public interest" nor would it "create any risk of harm to the public". The Appellant argues that the timing of her suspension makes no practical difference in terms of the legitimate sentencing objectives that the suspension was meant to achieve.

The Respondent

[27] Regarding the Appellant's first ground for a stay, the Respondent says the repeal of section 55 clearly applies to the Appellant. Under section 79 of the *FSAA*, section 55 of the *RESA* was specifically repealed, and the Respondent says when the *FSAA* came into force on August 1, 2021, section 55 ceased to have effect on any orders pronounced by the Council which were appealed after that date.

[28] The Respondent cites section 126 of the *FSAA* which deals with the transition and provides:

> 126 (1) The real estate council is dissolved and discontinued.
>
> (2) The appointment of each council member is rescinded.

> (3) All operations, activities and affairs of the real estate council are transferred to the Authority [the BCFSA] and are to be carried on and continued by the Authority.
>
> (4) Proceedings and other activities that are commenced or conducted by the real estate council, or to which the real estate council is a party, are
>
> > (a) in the case of proceedings and other activities that are related to a decision made by the real estate council under the Real Estate Services Act, deemed to be proceedings and other activities commenced or conducted by the new superintendent, or to which the new superintendent is a party, and are to be continued as such, and
> >
> > (b) in the case of any other proceedings and other activities, deemed to be proceedings and other activities commenced or conducted by the Authority, or to which the Authority is a party, and are to be continued as such.
>
> (5) A ruling, order or judgment in favour of or against the real estate council may be enforced by or against the Authority.

[29] Section 126 also came into effect on August 1, 2021. The Respondent says the Council was clearly gone as of that day and replaced with the BCFSA, which has been given the authority to carry on the activities of the Council. The Respondent relies on section 4 of the *Interpretation Act*, RSBC 1996, c 238 (the "*Interpretation Act*"), which provides that when an enactment is repealed and replaced it ceases to have effect when the new enactment commences – which, again, was August 1, 2021 in this case.

[30] The Respondent notes that, even under the previous system, orders of the Council were not stayed upon the making of such orders; rather they were only stayed once an appeal was filed. Thus the Council's order in this case was effective upon its making and by the time it was appealed by the Appellant, the automatic stay provision had been repealed. The Respondent argues the Appellant could have filed an appeal prior to August 1, 2021 but didn't, and the Respondent asserts there is no basis for suggesting the right to an automatic stay somehow continued to exist for appeals which were filed after the repeal. The Respondent refers to the debates of the Legislature where the Minister addressed the proposed repeal of section 55 stating that the existing model involving an automatic stay upon appeal was changing and that with the new legislation a stay would need to be granted by the FST.

[31] On the Appellant's second ground for a stay, the Respondent cites case law from the FST, including *Xing v The Insurance Council of British Columbia*, Decision No. 2019-FIA-004(b) ("*Xing*"), concerning the test for a stay. The Respondent argues the test involves:

> i) a preliminary assessment of the merits to determine if there is a serious question to be tried;
>
> ii)an examination of whether the applicant would suffer irreparable harm without a stay; and
>
> iii) an examination of whether the balance of convenience favours a granting of the stay.

[32] On the first part of the test, the Respondent acknowledges "the threshold for establishing that there is a serious issue to be tried is low" and involves examining whether the matter is vexatious or frivolous. However, the Respondent points to the Sanction Decision which made findings of serious misconduct, and submits a suspension is the inevitable outcome of the Appellant's appeal. The Respondent cites a decision where the FST dealt with an appeal relating to seven insurance agents (*Financial Institutions Commission v Insurance Council of BC et al*, Decision No. 2017-FIA-002(a)-008(a) ("*FICOM*"). The agents there had been involved in repeated misconduct over a period of 18 months involving the entry of false information into the ICBC computer system. The decision indicates that "the number of times during the relevant 18 month period that each licensee entered false information ranged from 32 to 116" (*FICOM* at para 5), and the FST held that "subject only to mitigating factors, a suspension of six months" ought to be "the minimum or baseline reasonable penalty that the licensee's conduct must attract" (at para 123). From this, the Respondent submits "the Appellant has not established there is a serious issue to be tried with respect to whether a suspension is an appropriate sanction in this case".

[33] With respect to the second part of the test, the Respondent cites *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 (SCC) ("*RJR-MacDonald"),* to the effect that irreparable harm involves "harm which either cannot be quantified in monetary terms or which cannot be cured" (at para 64). The Respondent says the Appellant will not suffer irreparable harm. The Respondent argues that any appellant facing a suspension could allege that not being able to work constitutes irreparable harm and allowing such an allegation to suffice would turn the system into one where there would effectively be an automatic stay after a filing a notice of appeal. The Respondent asserts this would be contrary to the repeal of section 55 of the *RESA* and says the status quo should be maintained as reflected in the repeal of section 55 of the *RESA*. The Respondent says that "decisions of courts and tribunals take effect from pronouncement and are to be treated as correct unless and until an appellate body holds otherwise", and submits that the Appellant has not established the status quo should be altered.

[34] Regarding the third part of the test regarding a stay, the Respondent says the balance of convenience involves weighing the harm suffered by the Appellant against the harm suffered to the public if the stay is granted. The Respondent argues there is a risk to the public if the Sanction Decision does not take effect immediately. The Respondent relies on the findings of the Committee and says there will be actual harm to the public interest caused by an erosion of "trust and confidence in the real estate regulatory regime" if the suspension does not take effect immediately. The Respondent relies on the FST decision in *Behroyan v Real Estate Council of BC and Superintendent of Real Estate*, Decision No. FST-RSA-20-A003(a) ("*Behroyan*"), where the FST lifted an automatic stay, and argues that licensees must be held accountable for their misconduct.

[35] The Respondent cites an excerpt from Hansard and argues the automatic stay provision was repealed because it posed a significant risk to the public and quotes from the Minister's comments including: "[w]hen licensees do appeal a discipline decision to the Financial Services Tribunal, the decision of the superintendent will remain in place until the tribunal grants a stay of the decision." The Respondent says there will be irreparable harm to the public interest if a stay is granted. In support of this argument the Respondent cites the decisions in *Carvalho*

v BC (Medical Services Commission), 2016 BCSC 1603 ("*Carvalho*") and *Balderston v British Columbia (Superintendent of Motor Vehicles)*, 2006 BCCA 138 ("*Balderston*"), regarding the importance of the public interest in determining the balance of convenience.

Appellant's Reply

[36] The Appellant says the decision being appealed from is a decision of the Council, not the Superintendent. As such, the Appellant argues that the statutory authority for bringing the appeal in this case drives from section 54(1)(d) as it existed prior to August 1, 2021. The Appellant argues that both section 54(1)(d) and section 55 continued to have life after August 1, 2021 in relation to appeals from a decision made by a discipline committee of the Council. Regarding section 126 of the *FSAA*, the Appellant says that section does not specifically provide that "decisions" of the Council are deemed to be decisions of the Superintendent, and this supports the position that decisions made by the Council are distinct from those made by the Superintendent.

[37] Turning to the test cited by the Respondent for a stay, the Appellant agrees with the Respondent that the threshold is low for establishing that there is a serious question to be tried. The Appellant says she has challenged the reasonableness of the suspension on a number of bases. She submits that "the proper application of the principles of law and published guidelines of the Real Estate Council" make the suspension in the present case unreasonable in light of the circumstances. In the Appellant's Notice of Appeal, she appeals both the Liability Decision and the Sanction Decision. The Appellant's Notice of Appeal mentions, among other things, that the grounds stated in the Sanction Decision for the period of suspension imposed do not rationally or logically support the conclusion reached; the period of suspension is not reasonable in light of previous penalty decisions and the principles set out in the Real Estate Council's Sanction Guidelines; and the Committee failed to consider submissions made on behalf of the Appellant regarding the absence of evidence or a sufficient legal basis to support a suspension of the length imposed. The Appellant submits that she has met the low threshold for establishing a serious question to be tried.

[38] In terms of irreparable harm, the Appellant says she will suffer irreparable harm with her appeal becoming moot "to the extent that the time she is unable to work because of the delays inherent in the appeal process exceeds the period of the suspension ultimately ordered". The Appellant cites the decision in *Sherwood v Cinnabar Brown Holding Ltd.*, 2018 BCCA 347 ("*Sherwood*"), as authority for the proposition that potential mootness of this type constitutes irreparable harm "for the purpose of satisfying this element of the applicable test on an application for a stay".

[39] On the balance of convenience, the Appellant says the Respondent has not identified any evidence that permitting the Appellant to continue practicing "over the several month period before this appeal is decided would in any way pose any risk to the public". The Appellant points out that the most serious incidents found by the Committee occurred "over a few-day period over 5 years ago, in the context of a bitter commercial dispute" and did not involve a situation of ongoing misconduct over a lengthy time period. The Appellant notes that there are conditions on her licence which include the supervision of her practice by her managing broker and that she

"has had no discipline history since the events of 2015 and 2016". The Appellant says there is strong evidence against the claim that there is a risk to the public in allowing her to continue practicing while her appeal is being decided and submits that "the balance of convenience overwhelmingly weighs in favour of granting a stay".

Respondent's Sur-reply

[40] The Respondent notes that, with the repeal of section 54(1)(d), the appeal in this case has been processed under section 54(1)(e) of the *RESA*, which relates to appeals from the order of the Superintendent. The Respondent submits that this is in line with section 126 of the *FSAA* deeming decisions of the Council to be decisions of the Superintendent as of August 1, 2021, and with section 54(1)(d) and section 55 of the *RESA* being of no effect as of August 1, 2021.

[41] With respect to the Appellant's reference to the decision in *Sherwood*, the Respondent says that case is distinguishable and again relies upon the *Balderston* decision in terms of the public interest aspect of the current matter.

ISSUES

[42] The issues in respect of the present application are as follows:

1. Was there an automatic stay of the Sanction Decision, and in particular the suspension portion of that Decision, with the Appellant's filing of an appeal on August 11, 2021?
2. If there was not an automatic stay, should a stay of the suspension nevertheless be granted in the particular circumstances of this case?

ANALYSIS

1. Was there an automatic stay of the Sanction Decision?

[43] I begin with sections 78 and 79 of the *FSAA*. Section 79 of the *FSAA* clearly states "Section 55 [of the *RESA*] is repealed". Section 55 contained the automatic stay provision, and its repeal was effective August 1, 2021. That means section 55 was gone as of August 1, 2021.

[44] Section 78 of the *FSAA* amends certain provisions of section 54 of the *RESA.* In particular, amendments are made to section 54(4) which provides that section 242.2 of the *Financial Institutions Act* ("*FIA*") applies in relation to an appeal under section 54 of the *RESA*. Section 242.2 deals with the practice and procedure regarding appeals to the FST. Under section 242.2(2) of the *FIA*, "**a decision is not stayed by the filing of an appeal"** (emphasis added), and under section 242.2(10) provision is made for a member of the FST to decide whether a stay should be granted as opposed to such a stay being automatic. By the time the Appellant filed her appeal, not only was the automatic stay gone, but the appeal was governed by legislation specifically stating that there was not a stay by the filing of an appeal.

[45] I find that there was not an automatic stay of the Sanction Decision with the filing of the Appellant's appeal. I find it was the Legislature's intent to end the automatic stay effective August 1,2021 as indicated in the legislation noted above.

In this respect, I do not accept the Appellant's argument that the Legislature intended the automatic stay to continue for Council decisions rendered before August 1, 2021. I say this for two reasons. First, in my view such an exception from the clear statutory language relating to the removal of the automatic stay, would need to have been explicitly stated in the transition provisions and it is not. I find the Legislature would not have intended such a result by implication, in such an undefined manner, particularly with section 55 gone for anyone looking at the legislation. Second, it is administratively difficult and confusing to have two different appeal mechanisms in effect at the same time and, again, if such a situation was intended by the Legislature, it would need to have been specifically stated.

[46] In addition to the foregoing, I further find the *Interpretation Act* applies to the circumstances here. There was a repeal of the automatic stay provision and it was replaced with legislation specifically providing decisions were not stayed upon the filing of an appeal. Pursuant to section 4 of the *Interpretation Act*, the automatic stay would ceased to have had effect on August 1, 2021.

[47] With respect to section 126 of the *FSAA*, I find that section does not support the Appellant's position that there was an automatic stay. Under section 126(4)(a) of the *FSAA*, proceedings to which the Council is a party that are related to a decision by the Council under the *RESA* are deemed to be proceedings to which the new Superintendent is a party. In my view, this applies to appeals from Council decisions, as in the present case, and further demonstrates that the intention of the Legislature was to have such appeals dealt with under the amended legislation and not under the previous repealed legislation.

2. Should a stay of the suspension nevertheless be granted?

[48] I begin by noting that while I agree that orders such as the Sanction Decision speak from their pronouncement and should be treated as correct unless an appellant body holds otherwise, when a stay of such a decision is sought, the circumstances of the particular case must be examined to determine if a stay is appropriate. Moreover, it goes without saying that each case involving a stay application will turn on its own particular facts and circumstances.

[49] The determination about whether to grant a stay is a discretionary one (*Xing* at para 16). In exercising that discretion, I find that the appropriate test to be applied is that set out in the above submissions and jurisprudence and involves the three elements of:

i) whether the appeal raises a serious question to be tried;

ii) whether the appellant would suffer irreparable harm without a stay; and

iii) an examination and weighing of the balance of convenience.

[50] I will apply this test in examining whether a stay should be granted in the particular circumstances of this case.

i) Serious Question to be Tried

[51] In examining this question, it has been held that the threshold to be met at this stage of the inquiry is a low one and "[i]f the application for a stay is not

vexatious or frivolous then the inquiry should proceed to the second and third tests" (*Carvalho* at para 49). In this respect, the courts have further held that "a prolonged examination of the merits is 'generally neither necessary or desirable'" (*Carvalho* at para 49 quoting *RJR-Macdonald).* I will apply this approach in examining this aspect of the test.

[52] In her Notice of Appeal, among other issues, the Appellant has questioned the reasoning used in the Liability Decision and the Sanction Decision. In particular, the Appellant has questioned the reasoning used to arrive at the suspension in the Sanction Decision. Whether the reasoning used by the Committee to arrive at a penalty meets the standard for review is a valid basis to seek to set aside a decision. In that respect, the panel in *Xing* noted that in *FICOM* "the FST concluded that a less deferential standard of review should be applied to appeals of penalty decisions" (at para 53). In *Atwal v Insurance Council of BC and BC Financial Services Authority*, Decision No. FST-FIA-20-A002(a) ("*Atwal*"), the FST held that standard of review to be applied to penalty decisions was one of reasonableness and that a contextual analysis was to be used when applying the reasonableness standard. This contextual analysis includes the examination of factors such as the "past practices and past decisions of the administrative body" (*Atwal* at para 68). In the present case, the Appellant has raised the question of whether the reasoning of the Committee meets the required standard in light of such factors, referring to the suspension being unreasonable in light of "previous penalty decisions and the principles set out in the Real Estate Council's Sanction Guidelines"[2]. Having reviewed the matter, I find this is not a frivolous or vexatious ground of appeal and that the appeal raises a serious question to be tried regarding the Appellant's suspension. Thus, on the first element of the test, I find the appeal meets the low threshold required.

[53] As the panel did in *Xing*, I make the finding that the appeal here raises a serious question to be tried without comment on the ultimate likelihood of success of the appeal on the grounds of the reasonableness of the suspension[3]. Further, I find it is not necessary for me to review each ground of appeal in dealing with this aspect of the test in keeping with the Supreme Court of Canada's statement around the undesirability of a prolonged examination of the merits.

ii) Irreparable Harm

[54] Irreparable harm involves harm which cannot be remedied. In *RJR-MacDonald*, the Court stated (at para 64):

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

[55] On the issue of irreparable harm, the Appellant raises the aspect of mootness in the event the ultimate determination of her appeal results in a suspension shorter than she serves without a stay. Such an aspect of mootness has been recognized as constituting irreparable harm (see *Sherwood* at paras 24 and 26). In *Balderston*, the

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[2] Notice of Appeal at p 2.
[3] *Xing* at para 56.

Court noted that irreparable harm exists where an appeal would be rendered nugatory (at para 15).

[56] In the present case, I find irreparable harm has been established. The Appellant will suffer economic loss that is not recoverable without a stay by being prevented from working due to the suspension taking immediate effect (*Carvalho* at para 63). In the event her suspension is overturned or reduced to a period less than she serves without a stay, she will not be able to recover her loss from the Respondent. This is similar to the finding in *Xing* that the requisite irreparable harm was established "given that any harm suffered by the Appellant due to the suspension will remain uncompensated in the event the Suspension Order is overturned" (see *Xing* at para 61). Further, there will be disruption to the Appellant's business and to her clients which would be difficult to quantify. In addition to the loss being unrecoverable, the difficulty in quantifying the related loss further supports the stay here as does the disruption to the Appellant's clients (see *Carvalho* at para 74).

iii) The Balance of Convenience

[57] The irreparable harm to the Appellant is to be weighed against the harm to the public interest in determining the balance of convenience. In conducting that weighing exercise, I have concluded that in the particular circumstances of this case, that balance weighs in favour of the Appellant. I have come to this conclusion for a number of reasons.

[58] First, in the Sanction Decision, the Committee noted that the Appellant did "not have a history of complaints or contraventions, and she has not been subject to any complaints or alleged contraventions for more-than-five-year period after the latest conduct at issue in early 2016" (at para 36). This demonstrates there is little likelihood of recurrence for the period of a stay and the risk to the public is low.

[59] Second, the Sanction Decision was rendered in July 2021, and the Respondent has not raised any further allegations since that time. This supports the previous finding of low risk to the public during the time period of a stay.

[60] Third, in its Supplemental Reasons, the Committee did not identify any particular risk to the public interest if the suspension did not occur immediately, and delayed the effect of the suspension for 30 days from the date of delivery of the Sanction Decision to the Appellant by the BCFSA. This further supports a finding that the risk to the public is low with delaying the imposition of any suspension due to a stay and there is not an immediate need for the suspension to take place.

[61] Fourth, from February 7, 2017 to July 12, 2017, the Council served the original notices of hearing on the Appellant, which included allegations related to the alleged forgery of signatures on eleven listing amendment forms. However, it was more than three years later, in October and November 2020, that the Council proceeded to a hearing on the allegations. The lengthy delay by the Council in bringing this matter to hearing raises questions about the degree to which the Council felt there was an ongoing danger to the public interest, or that there should be immediate or prompt action relating to the Appellant, or that there would be a recurrence of such behaviour by the Appellant in the immediate future.

[62] Fifth, there are a number of conditions which are currently in place on the Appellant's licence which also alleviate concerns about the public interest. These

conditions include the Appellant being under the direct supervision of the managing broker where she works, requirements that she keep her managing broker and the Council informed of various matters, and restrictions on her ability to sign documents connected with her real estate practice.

[63] The reasons set out above demonstrate that the risk of any harm to the public interest if a stay is granted is low. In the particular circumstances of this case, I have found the irreparable harm to the Appellant outweighs the harm to the public interest and the balance of convenience weighs in favour of ordering a stay.

[64] With respect to the Respondent's reliance on *Behroyan*, in my view there are three things which distinguish the present case from *Behroyan*. First, in the Sanction Decision the Committee stated that it viewed the seriousness of the Appellant's misconduct "as less serious than what the licensee did in *Behroyan*" (at para 36). Second, there had been complaints about the appellant in *Behroyan* after the misconduct at issue, including an investigation which remained open when the stay was being considered. Third, in *Behroyan* the evaluation of the risk to the public was different than here, particularly in light of the specific factual context of the case.

[65] Regarding the decisions in *Balderston* and *Carvalho*, I find those cases to be distinguishable as well. In *Balderston*, the applicant was able to keep working despite his driving suspension and had demonstrated an ability to cope without his driver's licence (at para 17). Further, the Court of Appeal noted that there was a particular emphasis on the public safety factor as a basis for refusing applications to stay driving suspensions (at para 18). In *Carvalho*, the applicant had a history of difficulties with the regulators and had been suspended in the past. The circumstances in *Carvalho* also involved a situation where conditions imposed on the applicant had not been successful in the past, with the applicant having 15 incidents of improper billing over a period of approximately five months after those conditions had been imposed, which factored in the Court weighing the balance in favour of the public interest (at para 82). The particular circumstances weighing in the balance of convenience here, as noted previously, are different than in both of those cases and favour a stay.

DECISION

[66] For the reasons given, I grant a stay of the suspension of the Appellant under the Sanction Decision pending the determination by the FST of the appeal.

[67] I remain seized of this matter, and in making this stay order I grant the Respondent liberty to apply any time under section 242.2(10)(a)(ii) of the *FIA* to lift this stay order, in the event the Respondent believes it has become in the public interest to do so.

"James P. Carwana"

James P. Carwana, Panel Chair
Financial Services Tribunal

December 21, 2021