Financial Services Tribunal
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DECISION NO. FST-RSA-21-A002(a)

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

BETWEEN:	Andrew Brian Laity	**APPELLANT**
AND:	Superintendent of Real Estate	**RESPONDENT**
BEFORE:	A Panel of the Financial Services Tribunal Jane A. G. Purdie, Q.C., Panel Chair	
DATE:	Conducted by way of written submissions concluding January 19, 2022	
APPEARING:	For the Appellant: Andrew Brian Laity For the Respondent: Kyle A. Ferguson, Counsel	

OVERVIEW

[1] On June 24 and 25, 2021, the Real Estate Council of British Columbia (the "Council") held a virtual hearing to determine whether Andrew Brian Laity (the "Appellant") was of good reputation and suitable to be licensed in accordance with the *Real Estate Services Act*, SBC 2004, c 42 (the "RESA")[1], and the Rules of the Council (the "Rules"). After pre-hearing orders, the Council issued an Amended Notice of Qualification Hearing stating that a hearing would be held to determine if the Appellant was of good reputation and suitable to be licensed as a Managing Broker in the category of trading services, or in the alternative, as an Associate Broker with the brokerage "The Firm Real Estate Services Ltd.".

[2] According to the Amended Notice of Qualification Hearing, the matters, amongst others giving rise to the hearing included:

[1] The version of the RESA in force at the times relevant to the underlying proceedings (prior to the dissolution of the RECBC on August 1, 2021), is the version of the RESA which is referenced in this decision.

i. Unprofessional and disrespectful communication with Council staff, including failure to limit communication to staff members having conduct of the matter.

ii. Ongoing bookkeeping and record keeping issues from 2013 through 2017 while Managing Broker of List Assist Mere Postings Ltd.

iii. Conduct giving rise to criminal charges, which charges were ultimately stayed.

[3] On July 28, 2021, a Hearing Committee of the Council (the "Committee") found that the Appellant had not established that he was of good reputation and suitable for licensing. The Committee also determined that no further application for licensing from the Appellant would be considered for a period of 3 years.

[4] The Appellant appeals to the Financial Services Tribunal (the "Tribunal" or the "FST") from this decision. The Council, now represented by the Superintendent of Real Estate (the "Superintendent")[2], opposes the appeal and seeks an Order dismissing the appeal and an opportunity to make submissions on costs.

[5] Section 242.2(11) of the *Financial Institutions Act,* RSBC 1996, c 141 (the "FIA") applies to this appeal, and provides that the FST may confirm, reverse, or vary a decision or send the matter back for reconsideration, with or without directions, to the person or body whose decision is under appeal.

BACKGROUND

[6] The RESA establishes a regulatory scheme for the licensing of persons providing real estate services in British Columbia by requiring such persons to meet specific requirements of the RESA and the Rules.

[7] The Appellant applied to the Council to have his licence renewed as a Managing Broker in the category of trading services, or in the alternative, as an Associated Broker with the brokerage firm, The Firm Real Estate Services Ltd. Sections 10, 13 and 15 of the RESA set out criteria, including that an applicant be of good reputation and suitable to be licensed and that the applicant meet any other qualification requirements established by the Rules.

[8] Prior to recent amendments to the RESA, the Council had the duty to maintain and advance the knowledge, skill and competency of its licensees, and uphold and protect the public interest in relation to the conduct and integrity of its licensees.

[9] Based on section 2-6 of the Rules which were in force at the time of the Hearing, if the Council considered there was an issue as to whether an applicant was qualified to be licensed, the Council was able to direct that the matter be dealt

[2] Through amendments to RESA after the Committee rendered its decision, the Council was dissolved and its functions were subsumed into the BC Financial Services Authority (BCFSA). As a result, and through transitional provisions in the associated legislation, the Council is now represented in this matter by the Superintendent.

with by way of a qualification hearing conducted by a hearing committee. This is what the Council directed.

[10] The material facts giving rise to the appeal are as follows.

[11] In February 2018, the Appellant applied to renew his Managing Broker licence with List Assist Mere Postings Ltd. ("List Assist"), the company of which he was the principal. In that application he disclosed that he had been charged with three criminal charges. The first charge had taken place five months prior to the disclosure, even though the Appellant was under an obligation to promptly notify the Council of any charges under Rule 2-21.

[12] The charges were in relation to uttering threats to family members, and two assaults while the Appellant was intoxicated.

[13] On May 2, 2018, Council advised the Appellant that it would not renew his Managing Broker license but would renew him as an Associate Broker. The Council further advised the Appellant that List Assist had until May 25, 2018 to find a managing broker, otherwise List Assist's license would become inoperative, as would that of the Appellant. As List Assist did not find an acceptable Managing Broker by the deadline, its license and the Appellant's Associate Broker license became inoperative. The Appellant requested a qualification hearing in respect of the refusal to renew his Managing Broker license.

[14] The RECBC requested further information from the Appellant about the criminal charges and reviewed the history of the Appellant's brokerage failing to file its accounting reports on time and with significant accounting errors and deficiencies noted. The Appellant was advised that he and the brokerage would need to deal with any disciplinary matters prior to any qualification hearing for him to be licensed as a managing broker. The disciplinary matters included failures to respond and provide documents with respect to the 2016 audit, and the 2017 Accountant's Report and late-filing, and his failure to disclose the criminal charges in a timely manner.

[15] After the completion by the Appellant of an Alternative Measures Program, the criminal charges against him were stayed on June 4, 2018.

[16] On March 20, 2019, the Appellant made a new application to reinstate his licence as an Associate Broker with another brokerage. On June 3, 2020, the Council proposed enhanced supervision conditions in which the brokerage's managing broker would oversee the Appellant as associate broker. The Appellant requested a qualification hearing in relation to the June 3, 2020 decision which was set for October 5-6, 2020.

[17] From this time forward the Appellant flooded the RECBC with indiscriminate and oftentimes irrelevant email communication and ignored all entreaties to restrict his correspondence to the personnel tasked with dealing with his application.

[18] On September 22, 2021, the Appellant advised that he no longer wanted to proceed with the October 5-6 qualification hearing and that he would accept the enhanced supervision conditions. As a result, the Council provided the Appellant with six months to find a brokerage with which to be licensed as Associate Broker under the proposed conditions.

[19] In March 2021 the Appellant requested a qualification hearing regarding his application for Managing Broker licence, which hearing was set for and held virtually on June 24-25, 2021.

[20] Among other requirements, section 10 of the RESA outlines that an applicant must satisfy the Council that they are of good reputation and suitable to be licensed at the level and in the category for which they are applying, and that the applicant meets any other qualification requirements established by the Rules which are further detailed in the RECBC "Good Reputation, Suitability and Fitness Guidelines" ("the Guidelines").

[21] The Committee determined at that hearing that the Appellant had not established that he was of good reputation and suitable for licensing. The Committee also determined that no further application for licensing from the Appellant would be considered for a period of 3 years.

PRELIMINARY ISSUE REGARDING REOPENING THE APPEAL

[22] Prior to the closing of submissions for this appeal, the Appellant raised an issue with the completeness and integrity of the appeal record. This Tribunal granted the Appellant extensions, first to November 15, and then to December 10, 2021, to provide a list of materials that he said were missing from the appeal record. Additionally, in the first letter order the Tribunal provided the Appellant with an outline of how to apply to admit "new evidence". Despite these instructions and extensions, the Appellant failed to provide either, a list of documents, or actual documents, he alleged were missing from the appeal record.

[23] Subsequent to the closing of submissions on this appeal, the Appellant sent numerous unsolicited emails, attachments and couriered packages which he sought to introduce into the appeal. I reviewed all of these materials and determined that many of the documents he had sent already formed part of the appeal record, and, further, that the rest of the documents and/or correspondence were irrelevant to the appeal before the FST. I declined to allow the Appellant to re-open the appeal to submit these further materials.

ISSUES ON APPEAL

[24] In his Notice of Appeal, the Appellant raised various grounds for the appeal, essentially: disputing the evidence, disputing the absence of RECBC employees appearing as witnesses for him, disputing the reasonability of the waiting period for reapplication, and arguing breach of the Canadian Charter of Rights and Freedoms.

[25] He significantly expanded his grounds of appeal in his written submissions dated October 12, 2021, which, though entitled "Re: Concerns Regarding the Integrity of Completeness of the Record", were taken to be his appeal submissions. The Appellant's "Final Reply Dossier" and appendices dated January 19, 2022, were filed within the extended time parameters allowed by the Tribunal's order for final submissions. Accordingly all of these submissions are considered to constitute the Appellant's appeal submissions.

[26] From these documents, I have distilled the issues raised by the Appellant and questions to be determined as follows:

1. Did the Committee breach the Appellant's right to a fair hearing by:
    a. failing to allow previously submitted documents into evidence;
    b. not allowing media at the hearing;
    c. not upholding the Appellant's objection to the composition of the Panel; and
    d. failing to address breaches of procedure by the Council's lawyer regarding the Appellant whether through conflict of interest, bias or otherwise.
2. Did the Committee err in its assessment of the evidence of the Council's Senior Director, Accounting and Audit (the "Accounting Director")?
3. Did the Committee err in finding the Appellant had not met the onus of showing he was of good reputation and suitable for licensure?
4. Did the Committee err by imposing a three-year waiting period before a new application could be made?

[27] I have carefully considered the entirety of the Appellant's submissions and recognize that there may be certain discrete points within them beyond what I have outlined. The issues I have identified are the most prominent and I do not find any other points that merit consideration.

STANDARD OF REVIEW

[28] Section 58(1) of the *Administrative Tribunals Act*, SBC 2004 c 45 (the "ATA") states that in relation to the courts, the FST is considered an expert tribunal as pertains to all matters over which it has exclusive jurisdiction**.**

[29] Decisions of the FST are not subject to precedent but the Tribunal strives for consistency in its application of various standards of review, as was discussed in the decision this Panel made in *Siemens v Real Estate Council of BC and the Superintendent of Real Estate*, Decision No. FST-RSA-20-A005(a) *("Siemens")*), as follows (at para 15):

> A panel of the FST is not obliged to follow decisions by other members of the Tribunal as a matter of precedent but it is incumbent on panel members to strive for consistency. Using a similar standard of review will support such consistency.

[30] The self-represented Appellant did not provide any specific submissions as to the standard of review, but he does submit that the errors are those of mixed fact and law, showing some understanding of the various classifications of potential errors. He gives no input as to what rules or guidelines the Tribunal should use to assess the decision under appeal.

[31] The Superintendent submits that the standards of review for the various questions are those originally expressed in the decision of *Kadioglu v Real Estate Council of BC and the Superintendent of Real Estate*, Decision No. 2015-RSA-003(b) ("*Kadioglu*"), by Panel Chair Baker (as she then was) as follows:

- correctness for questions of law;
- reasonableness for questions of fact, discretion, and penalty; and
- fairness for procedural fairness questions.

[32] The Superintendent further submits that the FST has continued to rely on these standards subsequent to the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, ("*Vavilov"*) which set out to consider and clarify the law applicable to the judicial review of administrative decisions.

[33] The two aspects with which *Vavilov* dealt were: first, the analysis for determining the standard of review (reasonableness or correctness) applicable to judicial review by a court of a given administrative decision and, second, how to properly apply the reasonableness standard, including an explanation as to what the standard means and how it should be applied in practice.

[34] The Superintendent quotes *Vavilov* as to its test of reasonableness, but the *Vavilov* decision specifically did not deal with statutory appeals to administrative bodies. Panel Chair Tourigny in *TruNorth Warranty Plans of North America LLC v Superintendent of Financial Institutions*, Decision No. 2019-FIA-003(a) ("*TruNorth*"), made a thorough canvas and review of the *Vavilov* ruling as it may affect the standard of review to be applied by the FST. He found (*TruNorth* at para 69):

> The FST's jurisprudence is consistent insofar as appeals from questions of law are concerned in applying correctness as the standard of review. I find that this approach is reinforced by *Vavilov* insofar as it holds [at para 37] that judicial statutory appeals from administrative decisions will review for correctness on questions of law.

I agree with that finding and will apply the correctness standard of review for questions of law.

[35] Panel Chair Tourigny in *TruNorth* went on to consider the standard of review applicable to issues of mixed fact and law and concluded that the FST's finding in *Schoen v Real Estate Council of B.C. and Superintendent of Real Estate,* Decision No. 2017-RSA-002(b) ("*Schoen*"), was still applicable (*TruNorth* at para 76 quoting *Schoen* at para 34):

> With respect to the issues in this appeal which can best be characterized as issues of mixed fact and law, I have decided that the appropriate standard of review is reasonableness. Although the standard of review for issues of mixed fact and law may vary based on the particular context of each case, the more fact-intensive and the less law-focused the issues are, the more deference this Tribunal should give to the original decision-maker…

[36] In quoting the above paragraph, Panel Chair Tourigny added (at para 78) that "[t]he converse will apply where a particular issue is less fact-intensive and more law-focused. As contemplated in *Vavilov* such reasonableness review will take account of the context." I agree and will apply the standard of reasonableness to all questions of mixed fact and law.

[37] With respect to appeal issues based on questions of fact (e.g. evidentiary findings and related assessments), or involving the exercise of discretion, I will apply the standard of reasonableness as set out in *Kadioglu*.

[38] With respect to the standard of review for questions of procedural fairness, the test and standard is that of fairness within the statutory, administrative, and common law parameters.

ANALYSIS

1. Did the Committee breach the Appellant's right to a fair hearing?

a. Did the Committee breach procedural fairness by failing to allow previously submitted documents into evidence?

[39] The Appellant submits that the Committee erred in not admitting what he described as his "submitted evidence, submitted prior to May 28, 2021", the contents or evidentiary value of which are not indicated. The Superintendent submits that the Appellant was well aware of what documentary evidence the Superintendent was going to introduce at the hearing, that the Appellant had obtained an extension to provide him with more time to review the documents, and that the Appellant had taken no steps to introduce additional evidence.

[40] The Superintendent further submits that when questioned, the Appellant gave evidence that he would rather provide emails, whether the same or other documents, to other governmental administrative entities, rather than present them at the qualification hearing.

[41] There is no evidence in the Transcript that the Appellant attempted to introduce documents which he had allegedly submitted prior to May 28, 2021, nor what that evidence or documentation might have been. The onus on the Appellant at the qualification hearing was to provide whatever documentation and/or evidence he thought appropriate to support his application to prove he was of good reputation and suitable to be licensed.

[42] As discussed above, the standard of review for procedural matters is whether the Committee acted fairly in the circumstances.

[43] While the Appellant argued that certain materials were missing from the Book of Documents submitted by the Council at the hearing, it was not clear then nor has it become clear through the course of this appeal what documentation was missing. It was up to the Appellant to introduce whatever documentation he thought appropriate at the Hearing. He did not do this.

[44] The Committee took no action with respect to the Appellant's documentation which could possibly give rise to a finding of procedural unfairness.

b. Did the Committee breach procedural fairness by not allowing media at the Hearing?

[45] The Appellant submits that the Committee did not allow accredited media to attend the hearing. He further states that "Attendance parameters of hearings for the RECBC require internal approval" and submit that "This is very dangerous". While I agree with the Appellant's submission that "Accredited media are safeguards for democracy" I have to determine if what occurred in this instance was, as the Appellant submitted, a dangerous precedent and not fair.

[46] In response, The Superintendent details the series of emails where RECBC staff provided the Appellant with the information for registering hearing attendees and any media, to ensure that there was appropriate room. The Superintendent further pointed out the Procedural Order made May 11, 2021, after a Pre-Hearing Conference which specifically dealt with the media issue as follows:

> #13. No person except for a court reporter is permitted to use cameras, recording devices or any other forms of electronic recording during the hearing.

[47] The Committee at a further pre-hearing conference upheld that clause of the Order. The Committee found that despite assertions by the Appellant that Council would shut down any requests from media to attend the hearing, the Appellant did not provide any reasons for the Committee to amend or remove Clause 13. The clause did not relate to possible attendees at the hearing, but only prohibited the use of recording devices except by a court reporter.

[48] The Appellant, throughout the hearing, and in his appeal submissions argued that media were not allowed to attend the hearing. There is no evidence that any media indicated that they wished to attend or that any had been refused admittance to the virtual hearing which the RECBC had indicated was open to the public. The Appellant submits that if any media outlets had submitted a request to attend that they would not have been approved.

[49] The standard of review for procedural matters is whether the Committee acted fairly in the circumstances.

[50] While it is open to me to consider the fairness of any process or procedure instituted by the RECBC in determining which or how many or what prerequisites are required for any potential attendee, whether a member of the public or the media to attend hearings, it is not appropriate or useful for the FST to delve into hypotheticals.

[51] There is no evidence that any media personnel sought to attend the hearing and beyond the Appellant's bald assertion, there is no evidence, whether through witnesses or documentation, to support the Appellant's submission that the Committee disallowed media to attend the hearing. The Committee committed no breach of procedural fairness on this ground.

c. Did the Committee breach procedural fairness by not upholding the Appellant's objections to the composition of the Committee?

Reasonable Apprehension of Bias

[52] At the commencement of the hearing when asked if he objected to the composition or jurisdiction of the hearing Committee, the Appellant raised objections to the composition of the Committee based on the issues of what he termed, "diversity and competition". The Appellant argued that he was discriminated against as it took almost 2 years for the hearing to be held; accordingly he would have liked to have had a member of an ethnic minority as one of the Committee members. He further submitted that as one of the Committee members was an active realtor, that they were in competition with him and thus biased. The Chairperson of the Committee duly noted the objections but held that there were not sufficient grounds to prevent the Committee from proceeding.

[53] In his appeal the Appellant submitted that he should have been informed in advance of the composition of the hearing Committee, that there should have been more diversity on the Committee and/or a lawyer or member of a consumer group. The Appellant further submitted that one of the reasons the hearing was not fair was that the RECBC did not inform the Appellant which RECBC members would be on the Committee and further alleged that there were some "undisclosed connections" between two committee members alleging that one member had accepted political donations from the brokerage which employed the other member and then went on to assert: "Absolutely, I object someone working in the real estate industry being a committee member in my hearing". The Appellant further made disparaging remarks and unproven allegations about the qualifications of the Committee members.

[54] The Superintendent submits that the Appellant did not put forward any evidence to support an allegation of a reasonable apprehension of bias.

[55] The RESA in force at the time provided that the Lieutenant Governor in Council could appoint 16 members of the Council[3], and that a three-member hearing committee would consist of a majority of council members but could also include individuals who were not Council members[4].

[56] The test for procedural fairness is just that, fairness. The concept of impartiality is helpfully summarized by Sara Blake in her text *Administrative Law in Canada*[5] as follows (at para 3.16):

> Impartiality is personal to an individual decision maker and specific to the circumstances of the case to be decided. It refers to personal interests and opinions which reflect the state of mind that the tribunal member brings to bear on the decision. Bias is an attitude of mind unique to an individual. All of these concepts tend to be discussed under the general heading of bias.

[57] The Superintendent relies on the BC Court of Appeal decision in *Taylor Ventures Ltd. (Trustee of) v Taylor, 2005 BCCA 350*, where the Court identified the principle governing the reasonable apprehension of bias concept as that discussed in *Wewaykum Indian Band v Canada* [2003] 2 SCR 259 and quoted from Counsel's factum:

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[3] RESA at section 74.
[4] RESA at sections 83 and 84.
[5] *Administrative Law in Canada* (6th Ed.) 2017 Blake, pub. By Lexis-Nexis at para 3.16.

(i) A judge's impartiality is presumed;

(ii) A party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified;

(iii) The criterion of disqualification is the reasonable apprehension of bias;

(iv) The question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through conclude;

(v) The test for disqualification is not satisfied unless it is proved that the informed, reasonable and right-minded person would think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly;

(vi) The test requires demonstration of serious grounds on which to base the apprehension;

(vii) Each case must be examined contextually and the inquiry is fact-specific. [emphasis removed]

[58] The Superintendent submits that the Appellant has not put forward any evidence to support an allegation of a reasonable apprehension of bias nor explained how his allegations give rise to serious grounds on which an informed, reasonable and right-minded person would perceive an apprehension of bias.

[59] The Appellant submits that the RECBC should not have selected these committee members under his heading *Procedural Fairness-Composition of the Hearing Committee*. However, apart from generalized derogatory remarks about the Committee members, the Appellant did not at the hearing, and has not in his appeal submissions, provided any evidence that would give rise to a finding of a reasonable apprehension of bias "by an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through".

Charter of Rights and Freedoms

[60] In addition to his argument alleging bias, the Appellant argues that if his objection to the composition of the Committee had been upheld and a different Committee had been constituted then "they would not have supported a *Charter of Rights* abuse". The Appellant has not stated which *Charter* right he felt was breached in this instance and I cannot easily infer from the rights guaranteed by the *Charter* which section the Appellant might have in mind. It is clear from the statutory scheme governing the operation of the FST that this Tribunal does not have the jurisdiction to consider constitutional questions.

[61] The FST's jurisdiction over constitutional questions was discussed in the *Siemens* decision as follows (at paras 43-46):

> [43] The FST is established under section 242.1 of the FIA and section 242.1(7)(e) of the FIA sets out that section 44 of the *Administrative Tribunals Act* SBC 2004, c 45 (the "ATA") applies to appeals conducted by this Tribunal. Section 44 of the ATA states that the FST does not have jurisdiction over constitutional questions.

> [44] The term "constitutional questions" is defined in section 1 of the ATA to mean "any question that requires notice to be given under section 8 of the *Constitutional Question Act*"[...]. Section 8(2) of the *Constitutional Question Act*, RSBC 1996, c 68 (the "CQA"), states the following:
>
> > (2) If in a cause, matter or other proceeding
> >
> > > (a) the constitutional validity or constitutional applicability of any law is challenged, or
> > >
> > > (b) an application is made for a constitutional remedy,
> >
> > the law must not be held to be invalid or inapplicable and the remedy must not be granted until after notice of the challenge or application has been served on the Attorney General of Canada and the Attorney General of British Columbia in accordance with this section.
>
> [45] The term "constitutional remedy" is further defined in section 8(1) of the CQA as meaning "a remedy under section 24(1) of the *Canadian Charter of Rights and Freedoms* other than a remedy consisting of the exclusion of evidence or consequential on such exclusion". ….
>
> [46] The definitions above clearly preclude the FST from considering any question where a constitutional remedy is being requested. ….

[62] As noted above, the Appellant has not identified what *Charter* Right(s) he says were breached, how they were breached, or what remedy he is seeking as a result. I cannot evaluate the merits of this unparticularized argument, and even if I could, in accordance with the analysis set out in the above excerpt from *Siemens*, the FST does not have the jurisdiction to consider questions where a constitutional remedy is being sought.

d) Did the Council's lawyer breach any procedural rules in his actions with regard to the Appellant whether through conflict of interest, bias or otherwise?

[63] Initially, the Appellant submits that the hearing was not procedurally fair, citing the fact that the lawyer for RECBC did not call additional RECBC witnesses with whom the Appellant had dealt and that the lawyer met and prepared the witnesses he did call.

[64] The Superintendent points out that the Appellant bore the burden of establishing that he was of good reputation and suitable to be licensed. The Superintendent further submits that the RECBC did not have an obligation to call any witnesses but chose to do so to introduce evidence about the Appellant's books and records while he was managing broker, and the investigations conducted into the Appellant's suitability for licensing. The Superintendent points out that these witnesses, being employees of the RECBC, were prepared for the hearing by the RECBC lawyer, so as to expedite the hearing and such preparation would not be behaviour outside the norm for a lawyer calling their own witnesses, who were both available for cross-examination by the Appellant.

[65] The Appellant submits in his notice of appeal that it was improper for the Accounting Director to meet with the lawyer for RECBC the day before the hearing.

Then in his first submissions the Appellant again argues against the lawyer meeting with and preparing witnesses.

[66] The Superintendent submits that it is not only acceptable but a professional obligation for a lawyer to meet with a witness prior to their testimony. The Superintendent further submits that there was no indication that calling further employees of RECBC as additional witnesses would have assisted the Appellant in establishing his good reputation or suitability. The Superintendent states that as there was no duty on the RECBC to tender evidence from additional witnesses, no breach of a duty of fairness to the Appellant could arise on that basis.

[67] In his final appeal submissions, the Appellant submits that the lawyer for the RECBC was negligent and that he owed a duty of care to the Appellant to confirm that certain RECBC employees would appear as witnesses for the Appellant. Both the original RECBC lawyer and the lawyer who ultimately appeared as RECBC counsel at the hearing sent many emails in which they clearly stated they acted solely for RECBC and urged the Appellant to retain his own lawyer. The Appellant continued to mistakenly believe that the RECBC lawyer would assist him in pursuing his qualification hearing. On more than one occasion the Appellant advised the RECBC lawyer that he had retained a lawyer, but at no time did he provide the name of any lawyer representing him.

[68] The standard of review with all procedural matters is that of fairness.

[69] While I have no evidence as to whether the Appellant sought or obtained legal advice, negligence is a civil tort, that is a legal action against someone who commits a careless act that creates harm to another person in certain circumstances. This Tribunal does not deal in civil actions and, clearly, there was no duty owed by the lawyer for the RECBC to assist in the preparation or presentation of the Appellant's application for licensing.

[70] When opening the Hearing, the Committee heard the Appellant's objection to the Council not calling further RECBC employees as witnesses, as requested by the Appellant, and again advised the Appellant that as the onus was on him to prove his good reputation and suitability to be licensed that he should have called whatever witnesses he wanted and that the RECBC was not obligated to call witnesses for him.

[71] The Committee reiterated in its decision that the onus was on the Appellant to demonstrate that he was, on a balance of probabilities, currently of good reputation and suitable to be licensed. After reciting the fact that the Appellant had not provided any evidence in his testimony or letters of support/character references via oral testimony or written submissions at the hearing, the Committee concluded that the Appellant had incorrectly placed the blame on the lawyer for the Committee.

[72] It is clear that the onus was on the Appellant to establish his good reputation and suitability to be licensed. The lawyer for the RECBC neither owed a duty of care to the Appellant nor did the lawyer breach the requirement for procedural fairness in preparing his own witnesses for the hearing. The Appellant was provided with the information necessary for him to prepare his own case and, once he had advised the lawyer for the RECBC that he had retained his own lawyer, there was even less

duty and more ethical boundaries for a lawyer when dealing with an individual represented by his own lawyer.

[73] The Appellant throughout his cross-examination, and in this Appeal, appears to have misunderstood the role of the various parties. Despite many letters encouraging him to seek independent legal advice and confirming that the lawyer for RECBC was not acting for him, the Appellant did not appear to understand that the employees of the RECBC and the lawyer for the RECBC were in opposition to his application.

[74] The actions of the lawyer for the RECBC do not give rise to any breach of procedural fairness and the Committee did not breach any procedural fairness by rejecting the Appellant's request that the RECBC produce other members of the RECBC staff as witnesses.

2. Did the Committee err in its assessment of the evidence of the Accounting Director?

[75] The Appellant in his Notice of Appeal submitted that "Without doubt, [the Accounting Director] lied under oath and that her oral testimony directly contradicted other RECBC evidence submitted. In his first submissions the Appellant alleges that the Accounting Director presented evidence that was false. In his final submissions, the Appellant alleges that the Committee's findings of fact regarding an exit interview held with the Appellant and several other RECBC staff members were defamatory and false.

[76] The Superintendent characterizes this issue as whether the Committee erred in its assessment of the evidence of the Accounting Director.

[77] This issue raises specific questions of fact which are reviewable on the standard of reasonableness.

[78] The Appellant did not dispute the facts as outlined by the Committee, but he took issue with the oral and supporting documentation provided at the qualification hearing.

[79] At the hearing and in his appeal to this Tribunal, the Appellant, rather than providing evidence to support his good reputation and suitability to be licensed, consistently took issue with the original findings of the Council which set out the rationale for not renewing his licence. Throughout the hearing, the Appellant failed to grasp that he was applying to be re-licensed on the basis that he was of good reputation and suitable to be licensed and that disputing or re-arguing the original findings of the licensing body was never a potential path for him to accomplish this.

[80] The Applicant chose to dispute specifically the evidence of the Accounting Director; though her appearance was mainly to introduce the documentary evidence presented by the RECBC.

[81] The Appellant takes issue with the testimony of the Accounting Director regarding an exit interview that occurred on July 28, 2016 which was summarized by the Committee as follows (at para 47):

> [The Accounting Director] recalled that in the boardroom there was a printed phone list that showed the names of RECBC staff and their office phone

> numbers. [The Appellant] explained that he had taken notes on the staff phone list, and [the Accounting Director] recalled that at some point during the meeting, [the Appellant] sought to leave the boardroom with the staff phone list. When [the Appellant] was confronted and told to return the phone list, he became further agitated and he called the police.

[82] The Appellant, in his final submissions, disputes that he "ever left the RECBC boardroom with any staff phone list", and states that he has no contact information for the RECBC whatsoever. However, later in those same submissions he admits that he innocently took the phone directory sheet "… and used the clear backside of the staff phone list to take notes and that he still had a copy of the notes and that the back page of the phone list is full of notes, if you can see the piece of paper, you know I had the paper for a long time".

[83] The Appellant also disputes the circumstances surrounding his phoning the police at this meeting. In his final submissions the Appellant indicates that he dialed the 911 emergency line after the Accounting Director refused three requests from the Appellant to view the contents of her briefcase. The Appellant further queries why the Accounting Director's paperwork was so confidential that even with a call to 911, she would still not share her paperwork. The Appellant further complained that "[the Accounting Director] testified and commented on my behaviour not my communications."

[84] The Appellant further disputes the evidence of the meeting as the date was mis-stated in some evidence as July 27, 2016, instead of July 28.

[85] The Committee were the ones who heard the RECBC witnesses, and while there might well be inconsistencies in the evidence as to the July 28, 2016 meeting, there was no doubt that the meeting occurred, there was a dispute over the staff phone list, and the Appellant phoned 911. I cannot find anything unreasonable about the Committee's assessment of the evidence in relation to these matters.

[86] The Appellant disputes some of the findings regarding the accounting reports that were filed late and contained errors and deficiencies. At no time in the hearing did the Appellant take responsibility for his accounting issues, even though he had, at the time of the various accounting years, affirmed that he would do better and improve his accounting and record-keeping. At the hearing the Appellant generally argued that accounting issues usually garnered small fines but did not result in licence suspensions. In fact, the Appellant's license was not suspended, jut not renewed.

[87] The Appellant submitted that the RECBC evidence of his accounting records was up to 8 years old and should not have been considered. Despite the historic nature of some of the accounting evidence, the same issues and themes recurred throughout and showed a clear course of conduct – late filings, errors and deficiencies, and promises to improve his behaviour – that was consistent for several years. There is no evidence that the Appellant ever changed his behaviour with respect to the accounting issues.

[88] The Committee made no specific finding as to credibility of the RECBC witnesses but did accept the documentary evidence. The Committee did, however,

make findings that the Appellant lacked credibility, that his testimony contradicted itself at times and was inherently unbelievable.

[89] The Appellant submitted that the Accounting Director testified and commented on his behaviour not his unprofessional communications, the latter of which was one of the issues giving rise to his licence not automatically being renewed. On this point, the Committee reviewed the decision in *Re: Alexander* (September 30, 2010) where a different committee of Council concluded that an applicant for licensure was not suitable based on the applicant's conduct at the hearing which was described as "unprofessional, rude and at times …he appeared to have a belief that there was a conspiracy against him or that the Council, the Committee and all of Council staff were biased or racist towards him."

[90] The Committee did not need to rely on the testimony of the Accounting Director as the Committee found that the Appellant's demeanor, manner and conduct throughout the proceeding was unprofessional, rude, and showed a complete disregard for the participants or process.

[91] Unlike the Committee, I did not have the opportunity to assess the demeanour or credibility of either the Appellant or the Accounting Director. However, based on the transcript and the paucity of any evidence provided by the Appellant, I find that the Committee was not unreasonable in their assessment of the evidence of the Accounting Director and the documentary evidence provided. I do not find that the Committee's findings arising from the Accounting Director's evidence were in any way unreasonable.

3. Did the Committee err in finding the Appellant did not meet his onus to show he was of good reputation and suitable for licensure?

[92] This issue involves both a question of law - which party had the onus - and a question of mixed fact and law – did the appropriate party meet that onus? As discussed earlier in this decision, questions of law are reviewable on a correctness standard, and questions of mixed fact and law are reviewable on a reasonableness standard.

[93] The Committee found that the Appellant had the onus of showing he was of good reputation and suitable for licensure, and the Committee ultimately held that he did not meet that onus.

Onus

[94] In his final reply submissions, the Appellant alleges that his *Charter* rights were violated by the Council because "I am entitled to the presumption of innocence until proven guilty". The Appellant makes this statement in the context of arguing that the Council's original decision not to renew his Managing Broker's license was flawed.

[95] As I have already set out, the FST does not generally have the jurisdiction to consider constitutional questions. Here, the Appellant has framed this presumption of innocence argument as a *Charter* issue, but I think it is more accurately an issue

about either bias (which I have dealt with above in this decision), or a question of onus.

[96] As I have previously stated, it is clear from the legislative framework governing licensee qualification that the onus was on the Appellant to show the Council that he was of good reputation and suitable for licensure. There was no presumption that he was suitable and/or "innocent" as he has framed it in this context. Section 10 of the RESA which was in force at the time of the hearing states:

> 10 An applicant for a new licence or a licence renewal must satisfy the real estate council that they meet the following applicable requirements:
>
> (a) the applicant is of good reputation and suitable to be licensed at the level and in the category for which the applicant is applying; …

[97] The RESA clearly sets out that it is the "applicant" for a license who has to "satisfy" the Council that they meet certain qualifications including that they are of "good character" and "suitable" to be licensed. The Council was correct in placing the onus on the Appellant.

Whether Appellant Met the Onus

[98] Despite the onus being on the Appellant to prove that he was of good reputation and suitable to be licensed, the Committee noted that the Appellant provided no evidence in his testimony or letters of support/character references via oral testimony or written submissions for the Hearing Committee's consideration. The Committee found that the Appellant placed the blame on the lawyer for RECBC for not providing such information through RECBC witnesses.

[99] In his final submissions the Appellant asserts that he could provide a minimum of 50 past customers who would be willing to write recommendation letters. With respect to the criminal charges arising from a family dispute, the Appellant further asserts that his family members would all recant and offer support letters. However, neither support letters nor oral testimony by any witnesses for the Appellant were presented at the Committee Hearing. No such evidence was tendered in the original hearing.

[100] In his testimony, the Appellant was aware that there were four bases for his not being re-licensed and he provided limited and unhelpful responses to them.

[101] With respect to the issue about the criminal charges against him, the Appellant denied that he was guilty of any criminal charges, and while he had been charged, ultimately, the charges were stayed.

[102] With respect to the allegations that his communications with Council staff were unprofessional, disrespectful, and demonstrated issues concerning his governability, and with respect to his failure to respect requests from the Council staff to limit his communications a typical response from the Appellant was:

> [RECBC lawyer], I emailed you examples of rape, examples of fraud. Okay? That's your alley, that's your mandate, and you've done nothing, Okay? That's, that's scary, I'm scared. I am very scared. Okay?

[103] With respect to the multiple years of accounting deficiencies, the Appellant's evidence was that the deficiencies were minor and the shutting down of his company was a result of corruption. He testified that:

> [i]f you want to spend this much time trying to qualify me because of deficiencies, I mean it's really ridiculous at this point in time. With the problems that you have. Okay? Let's, let's look at you. Let's look at the Real Estate Council. This Council has been ripe with, with corruption, ripe with fraud and there's a reason for that. …I'm finished. This is just a complete waste of time and resources. Complete waste of time…

[104] The Committee had extensive documentation in front of it. The Committee heard the testimony of the Appellant and the two witnesses from the RECBC. The onus of proof was on the Appellant to prove, on the balance of probability that he was of good reputation and suitable to be licensed as a Managing Broker or Associate Broker with or without conditions or restrictions on his licence.

[105] The Committee had the opportunity to hear the witnesses, assess the evidence and make determinations of credibility. I find that the Committee reasonably concluded that the Appellant had not demonstrated himself to be of good reputation and suitable to be licensed, as required for him to succeed in his application.

4. Did the Committee err by imposing a three-year waiting period before a new application could be made?

[106] The Committee determined that a period of three years was a reasonable minimum period for the Appellant to "re-establish his suitability and good character, gain insight into why his recent conduct has been concerning, and show that he can engage in a professional setting in a civil and respectful manner before re-application for licensure."

[107] The Superintendent did not make submissions specifically in relation to the length of the waiting period, submitting that the Appellant did not dispute this waiting period. However, in my review of the materials I note that the Appellant's Notice of Appeal indicates that he is appealing the decision not to issue a licence and the 3-year time limit to re-apply. Having said that, the Appellant does not provide any further submissions on this specific issue.

[108] The imposition of a three-year waiting period is an exercise of discretion by the Council, and discretionary decisions are reviewable on a reasonableness standard.

[109] The Committee did not expressly discuss its assessment of the length of the waiting period in its reasons. Instead, it appears to have approached its assessment of suitability for licensure and length of time for reapplication together, as it went through the evidence at the hearing, the applicable legal principles, and the decisions of professional regulatory bodies in both real estate and law.

[110] Relying on guidance from the Council's Good Reputation, Suitability and Fitness Guidelines, the Committee considered whether the Appellant had changed his behaviour or attitude, and also went through several decisions where suitability for licensure was at issue.

[111] At the Hearing, the Appellant did not provide any input as to a possible waiting period for re-application should he be unsuccessful in his application to be licensed. In fact, the Appellant's testimony seemed to indicate that he was indifferent to whether he was licensed in British Columbia or not.

[112] Numerous times through the course of the Hearing the Appellant advised the Committee that he was not planning on seeking licensure with the Council in the future. He made statements indicating that he did not care if he were licensed or not; that maybe if he could get his license again, he could transfer to another province; and that his true intention was to transfer out of the province, to Alberta or another prairie province.

[113] The only decision referred to by the Committee (at para 74) specifically with respect to the waiting period was that provided by the Council, being the decision *Re: Alexander* (September 30, 2010), where a five-year waiting period was imposed on the applicant. There were many similarities between that decision and the matter under appeal here.

[114] The Committee in *Alexander* was concerned that the applicant was unwilling to properly respond to questions asked of him in cross examination and when he did answer, he often retracted or resiled from his answer and then subsequently refused to answer. In this matter, the Committee found that the Appellant was evasive to an extreme by his refusal to answer basic questions for which he easily had the ability to answer and that his testimony lacked credibility, contradicted itself at times and was inherently unbelievable.

[115] In the *Alexander* decision, the Committee found that Mr. Alexander made repeated and constant references to possible Human Rights Tribunal proceedings which were not relevant. In this matter, the Committee found that the Appellant kept interrupting the other participants in the hearing to attempt to discredit individuals and to express his believed views regarding a conspiracy amongst the participants and to express repeatedly his view that there was fraud, corruption and rape within the industry and that the Council, and its employee were participants.

[116] In the *Alexander* decision, the Committee found that Mr. Alexander did not appear to appreciate that the onus was on him to prove the veracity of the information he had provided. In this matter the Committee found that the Appellant showed a complete disregard for the participants or process and did not appreciate that he had the responsibility to prove his suitability.

[117] While the similarities between the *Alexander* decision and this matter are striking and in *Alexander* the Committee imposed a five-year waiting period before the applicant could re-apply, I find that the Committee's imposition of a three-year waiting period here was not outside a range of reasonable outcomes, and as an exercise of discretion is entitled to some deference.

DECISION

[118] For the above reasons, the appeal is dismissed.

COSTS

[119] The Superintendent seeks an order for costs but has not provided full submissions for consideration. I invite the Superintendent to provide submissions on costs by May 20, 2022, following which the Appellant may provide response submissions by June 3, 2022. Any final reply submissions of the Respondent must be provided by June 10, 2022.

"Jane A. G. Purdie"

_____

Jane A. G. Purdie, Q.C.
Financial Services Tribunal

May 6, 2022