FST-05-008

FINANCIAL SERVICES TRIBUNAL

In the matter of the *Financial Institutions Act* R.S.B.C. 1996, C. 141, amended

BETWEEN:

FINANCIAL INSTITUTIONS COMMISSION

APPELLANT

AND:

INSURANCE COUNCIL OF BRITISH COLUMBIA
AND BRANISLAV NOVKO

RESPONDENTS

APPEAL DECISION

Chair: Dale R. Doan LLB, member of the Financial Services Tribunal

Counsel for the Appellant, Sandra A. Wilkinson
Counsel for the Respondent, Insurance Council of British Columbia, David T. McKnight
No one participating on behalf of the Respondent, Branislav Novko

Appeal Decision Date: August 22, 2005

INTRODUCTION

By virtue of letter dated June 21, 2005, I was appointed the member of the Financial Services Tribunal ("FST") to consider the appeal of the decision of the Insurance Council of British Columbia (the "Insurance Council") dated February 28, 2005 regarding Branislav Novko ("Mr. Novko").

Pursuant to my ruling dated June 30, 2005, an application on behalf of the Superintendent of Financial Institutions for leave for late filing of the Notice of Appeal in this matter was granted. I further directed that submissions be filed by the Appellant and the Respondents by the dates prescribed in the June 30, 2005 ruling, and to date I have received submissions filed on behalf of the Appellant, Financial Institutions Commission, and on behalf of the Respondent, Insurance Council. I have not received submissions on behalf of the Respondent, Mr. Novko. The final submissions of the other parties were received by my office on July 25, 2005.

This appeal ("Appeal") arises pursuant to section 232 (3)(b) of the *Financial Institutions Act* (the "Act"). The February 28, 2005 decision of the Insurance Council determined that Mr. Novko had committed numerous breaches of the *Financial Institutions Act* and in particular breaches of sections 231(a) and 231(b) of the *Act.*

The Insurance Council ordered as follows:

(a) that Mr. Novko's license be suspended for two weeks,

(b) that Mr. Novko be fined the sum of one thousand dollars;

(c) that Mr. Novko pay the cost of the Insurance Council's investigation, assessed at nine hundred and twelve dollars and fifty cents; and

(d) that the said costs and fine be paid by May 28, 2005 failing which Mr. Novko's license be further suspended.

FACTS

The facts upon which the Insurance Council relied are not in dispute. The facts and the finding of the Insurance Council are found in the Insurance Council's letter dated February 2, 2005. They are summarized here.

In December 2004, an Investigative Review Committee met with Mr. Novko to discuss allegations of breaches under the *Act,* following which meeting the Investigative Review Committee prepared a report to the Insurance Council and presented the report at its January 18, 2005 meeting. Based upon this report, the Insurance Council made the following findings of fact:

1. Mr. Novko has been licensed in British Columbia since 1996;

2. Mr. Novko was approached by a former life insurance agent named SN ("S"), who was also known as SV, to place insurance coverage for individuals based on applications S had taken from them. Five applications were taken in total;

3. Mr. Novko, who did not previously know S, agreed to help her after being lead to believe she was experiencing difficult times, that she took the applications while licensed, and that she was in the process of becoming re-licensed with the Insurance Council;

4. Mr. Novko trusted S and did not question whether she had in fact taken the applications while licensed. Mr. Novko did not contact the Insurance Council to determine S's licensing status;

5. Mr. Novko signed the insurance applications as agent, signed as "witness" to applicant signatures on the transactional documentation without having witnessed the signatures, and then remitted the documentation to insurers for placement of coverage under his agent contract. This was carried out by Mr. Novko without having met or discussed the transactions with any of the applicants;

6. The transactional documentation provided to Mr. Novko by S was dated between July 28, 2003 and July 31, 2003. S's license with the Insurance Council expired on April 30, 2003;

7. Mr. Novko paid nine hundred dollars to S;

8. Upon delivery of policies to the applicants and thereafter, the licensee conducted a needs analysis of their situations to ensure the coverage was appropriate in the circumstances. He remains as the servicing agent for the policies;

9. Mr. Novko indicated that S was very manipulative. However, he acknowledged that he acted inappropriately and was remorseful for his actions.

The Insurance Council found these facts constituted separate breaches of section 231 (1)(a) of 111e *Act* in that:

- Mr. Novko did not act in good faith and in accordance with the usual practice of the business of insurance, as required under Insurance Council Rule 3; and

- Mr. Novko compensated an unlicensed person for carrying on activities, which require an insurance license, despite being prohibited from doing so under the *Act.* In particular, and contrary to Insurance Council Rule 7, he did not comply with the Insurance Council's Code of Conduct, which makes it a requirement to adhere to the *Act.*

The Insurance Council considered the report before it and noted evidence that the Insurance Council felt mitigated Mr. Novko's misconduct. Specifically, on his own accord and prior to the Insurance Council's awareness of this matter, Mr. Novko conducted a comprehensive review and analysis of each applicant's circumstances to ensure that the issued policies were in their best interests.

The Insurance Council made its decision with respect to penalty and costs as outlined above. Mr. Novko was apprised of his right to dispute the Insurance Council's findings or its penalty and costs decision, however he declined to do so.

GROUNDS FOR APPEAL

The Appellant, Financial Institutions Commission, appeals the decision of the Insurance Council on the following grounds:

1. The Insurance Council did not adequately address the seriousness of the conduct in question as disclosed by the evidence contained in the Record, including the written reasons, and consequently,

2. The Insurance Council wrongfully concluded that a period of suspension of only two weeks was appropriate in the circumstances.

STANDARD OF REVIEW

The FST has considered the question of the standard of its review of a decision of an administrative tribunal by way of appeal to the FST. In particular, in the matter of *Danh Vanh Nguyen and Express Mortgages Ltd,* an appeal decision of the FST dealing with breaches of the *Mortgage Brokers Act,* I considered the standard of review determined appropriate by case law and scholarly works in this area and in particular the cases of *Dr. Q v. College of Physicians And Surgeons of British Columbia* [2003] 1 S.R.C. 226, 2003 S.C.C. 19 and *Re Galaxy Sports Inc.* (2004) BCCA 284, and concluded that the standard of review must be premised upon whether or not there were reasonable grounds for the administrative body to reach its decision based upon clear and cogent evidence presented before that body. The FST does not reconsider the entirety of the evidence in the form of a "re-hearing"; rather, deference is given to the findings of facts and the assessments of credibility made by the administrative body that actually experienced the hearing procedure, heard the witness(es), saw the documentary evidence and, combined with their experience as the administrative body created by the legislation in question, was in the best position to make the findings of fact found in its decision. However, the FST must determine whether or not the administrative body in question, after considering the evidence and the documentation, after making its assessments with respect to credibility, and after making its findings of fact, could reasonably have reached the decision that it has made, all based upon clear and cogent evidence presented to it.

The FST is the final appeal authority respecting decisions of the Insurance Council. The scope of the FST's appeal authority is found in the *Act* itself. Section 242.2(11) of the *Act* allows the member of the FST hearing the appeal to confirm, reverse or vary a decision under appeal, or to send the matter back for reconsideration, with or without directions, to the person or body whose decision is under appeal. This review authority goes beyond what would be expected in situations where either a privative clause exists or where the enabling legislation restricts the scope of review of the appeal tribunal in a material fashion. Further, the FST appeal process involves one administrative body handling the appeal of a decision of another, lower administrative body. I agree with submissions of the Appellant that the pragmatic and functional approach that may in many cases govern judicial reviews by our courts of decisions made by an administrative tribunal does not apply to a review by the FST of a decision of a lower tribunal. However, deference to those findings by the Insurance Council referred to earlier in this decision

is both logical and the correct procedure for the FST to follow in my view. In the end, it is necessary for the FST to make its determination using as its premise the standard of review above-stated.

In the submissions of the Respondent, Insurance Council, the Insurance Council correctly submits that the FST review should defer to the determinations of the lower tribunal on issues which fall within the scope of the statutory appeal and that curial deference should be given to the opinion of the lower tribunal on issues that fall squarely within its area of expertise. These submissions are in line with the *Dr.* Q decision of the Supreme Court of Canada referred to herein. However, it must be noted that the *Act* itself provides statutory authority for the FST to exercise its power to "confirm, reverse or vary a decision under appeal, or (to) send the matter back for reconsideration, with or without directions, to the person or body whose decision is under appeal." As I have stated earlier, a full re-hearing is inappropriate. However, a review based upon the standard of review set out in these decisions is appropriate.

Further, the submissions of the Insurance Council include reference to *The Regulation of Professions in Canada,* by James T. Kasey, where the author proposes at page 15-8 that interference by courts (or in this case the FST) with a penalty imposed for professional misconduct should only be reluctantly undertaken unless the disciplinary tribunal has erred in principal or unless the penalty is manifestly excessive, totally disproportionate, or the disciplinary tribunal has misapprehended the evidence.

It is my view that deference must be shown by the FST to the Insurance Council's determinations of the facts, assessments as to credibility and considerations surrounding the penalty imposed unless the Insurance Council can be seen to have not met the standard of review set out above or has erred in the fashion described by James T. Kasey.

THE FST APPEAL DECISION

The Record in this Appeal includes the investigative reports submitted to the Insurance Council in this matter. The November 18, 2004 memorandum submitted to the Life Investigative Review Committee correctly identified the breaches by Mr. Novko of section 173 of the *Act,* which refers to breaches pursuant to subsections 173(l)(c)(iii) and (iv). These subsections refer to trustworthiness, competence and financial reliability as well as the carrying on of business as an insurance agent in good faith and in accordance with the usual practice of the business of insurance. Section 178(1) is also cited, which refers to the prohibition against paying any commission or compensation to a person who is not an insurance agent licensee or an insurance salesperson licensee for acting as an insurance agent or an insurance salesperson in British Columbia. Further, subsections 231 (1)(a) and (b) are cited, which provide that after due investigation, the Insurance Council may determine that a licensee no longer meets a licensing requirement or has breached or is in breach of a condition or restriction of the license of the licensee under the *Act,* and which section provides that the Insurance Council may by order direct certain penalties which include reprimand, suspension or cancellation· of the license, attaching conditions to a license, amending conditions attached to a license, requiring the licensee to cease specified activities related to the conduct of insurance business or to carry out a specified activity related to the conduct of insurance business, and the issuance of fines in a stated amount. Finally, section 14 (3) of the *Insurance Licensing Regulation* is referred to, which provides that it is a condition of every license issued to an insurance agent that each licensee must comply with the applicable requirements of the *Act* and regulations made under the *Act.*

The investigative report describes the circumstances under which Mr. Novko was drawn into the assistance of an unlicensed insurance salesperson, his improper witnessing of documentation, his improper submissions of documentation, his improper payment of compensation to an unlicensed insurance salesperson and his other activities which were the subject matter of the investigative report and later hearing. The Insurance Council had available for review a series of email communications forwarded by Mr. Novko to S which included Mr. Novko's September 26, 2003 message that exceeded three pages in length and appeared to be a thorough "venting" of his deep regret for having dealt with S. By way of compliance officer memo dated October 8, 2004, also contained in the Record, it is clear that Mr. Novko admitted to the wrongful witnessing of applicants' signatures without having met the applicants and to the wrongful payment of compensation to S who was an unlicensed agent, all contrary to the *Act,* its regulations and the published conduct rules that are imposed upon licensees pursuant to the *Act.*

The Insurance Council had evidence before it that Mr. Novko participated in these wrongful activities with respect to five insurance applications. He had not verified whether S was in fact applying for re-licensing, he did not perform any substantive due diligence on S or the applications which he submitted, and only after the fact did he investigate whether or not the insurance coverage was in the best interests of the clients in question. Mr. Novko replied to the detailed request letter of the Insurance Council dated February 2, 2004 by way of his letter dated February 15, 2004 where he substantially dealt with the matters of concern raised by the Insurance Council compliance officer. Mr. Novko's letter substantiates the strong feelings evident in his September 26, 2003 email message to S as well as his undertaking to provide the best service possible as a financial and insurance advisor. The Insurance Council also considered sections of the Code of Conduct for insurance agents, salespersons and adjustors. These Code of Conduct provisions clearly and unequivocally establish standards dealing with the levels of trustworthiness, good faith, competence, practice dealing with clients and practice dealing with insurers that are expected of licensees under the *Act.* A recommendation was made to the Insurance Council by the Investigative Review Committee and thereafter the Insurance Council's letter of February 2, 2005 was forwarded to Mr. Novko which set out the findings, the penalty, the assessment of cost, and which referred to the December 9, 2004 Investigative Review Committee meeting with Mr. Novko. It is noted that this committee meeting with Mr. Novko would in effect represent the "in person" meeting or hearing of the complaints. Mr. Novko did not appear before the Insurance Council; rather, only the documents and the committee report and recommendations were reviewed and considered by the Insurance Council. Mr. Novko has not provided any submissions in this Appeal.

I agree with the submissions of legal counsel representing the Appellant that Mr. Novko committed a significant breach of the *Act* when he purported to witness the execution of insurance policy applications when he did not in fact meet with the signing parties. The opportunity for fraudulent activity and the opportunity for the eventual submission of incorrect or improper documentation at the peril, cost and potential liability of third persons requires our courts and tribunals to protect the public against that sort of improper and unlawful activity. I also agree with the submissions of the Appellant that when an insurance agent and broker signs an insurance policy application as a witness, he or she represents to the insurer that:

(a) the applicant appeared before and acknowledged to the agent that he or she is the person named in the application as the applicant;

(b) the signature witnessed by the agent is the signature of the individual who makes the application;

(c) the applicant understands the nature of the application and the insurance applied for.

The importance and seriousness of improper witnessing of documentation of this sort is illustrated by the following facts:

(a) An insurance agent that witnesses a pre-screening declaration and a policy application for insurance effectively represents to an insurer that he or she has met with the proposed insured, confirmed the identification of the applicant, was physically present with the applicant at each point at which documents were signed, and so on;

(b) The applications in this Appeal are important contractual documents dealing with life, disability and critical illness insurance;

(c) The applications contain disclosures and declarations as to state of health, income, net worth and status in the country;

(d) The applications contain notes by the financial advisor/associate representative and notes to the underwriter, in this case the representative is noted as being Mr. Novko;

(e) The applications state that the applications are initiated by the broker. In this case the broker was Mr. Novko;

(f) Mr. Novko signed as the "Representative" on the pre-screening documents, as well as acting as the witness;

(g) The applications state that the applicants speak English or French. This is an important issue in this Appeal as the applicants in this matter were immigrants from Yugoslavia;

(h) Brokers reports are included in the applications, signed by Mr. Novko as the broker;

(i) The applications include a provision where the broker states that he knows the applicants "well" and that" I am familiar with the duty of care requirements for agents and brokers and have satisfied them";

(j) The duty of care requirement of insurance agents and salespersons is that they "have an obligation, before conducting a transaction, to conduct sufficient fact-finding and needs analysis to properly assess a client's circumstances, goals and needs";

(k) The applications contained certificates that the contents were true. In this case, Mr. Novko signed the applications certifying that the contents were true but knowing that his certifications were false;

(l) The Code of Conduct for insurance agents, salespersons and adjustors clearly

outlines the standards of conduct required of those persons and are known by and available to all insurance agents and brokers, including Mr. Novko. The breaches of the *Act* by Mr. Novko clearly breached the Code of Conduct provisions that deal directly with trustworthiness, intention to practice in good faith, competence and breaches of duties of care to the applicant and to the insurer; and

(m) The integrity of the insurance application process is clearly in jeopardy if licensed agents and salespersons disregard the Code of Conduct standards or the legal standards affecting the submission of false documentation.

As I have stated earlier, Mr. Novko acknowledges his breaches of the *Act;* he did not conduct due diligence regarding S's licensing status, he did not conduct an analysis as to the needs or interests of the applicants until after the fact and he made not one but many material errors of judgment that caused clear breaches of the *Act* as well as the Code of Conduct for this industry. His later rejection of S, his expressions of remorse for having dealt with her together with his cooperation with the investigations conducted by the Insurance Council, are indeed comforting, but they do not fully address the question of the appropriate penalty to be assessed in this sort of situation.

I disagree with the submissions of the Appellant, the Financial Institutions Commission, that the FST should not hesitate to disagree with the penalty imposed by the Insurance Council if after a careful review of all of the circumstances the FST opines that the sentence imposed was not a fitting one. This submission arises from the *Reed v. British Columbia (Financial Institutions Commission of Insurance)* [1985] B.C.C.O. no.17 (CAC) (QL) case. Rather, it is my view that the standard of review is that set out earlier in this decision, being a modification of a standard of review referred to in the Supreme Court of Canada decision in *Dr. Q.* v. *College of Physicians and Surgeons of British Columbia, supra,* and the British Columbia Court of Appeal decision in *Re Galaxy Sports Inc., supra,* namely, the FST must determine whether the Insurance Council could reasonably have reached the decision as to penalty that it has made after considering all of the evidence, the documentation, the assessments regarding credibility, and its findings of facts, all based upon clear and cogent evidence presented to it. Should the FST determine that the Insurance Council could not reasonably have reached its decision on penalty after applying that standard, then it is open to the FST in this Appeal to reverse or vary the decision or to send this matter back to the Insurance Council for reconsideration with or without directions. If the FST determines that the Insurance Council could reasonably have reached its decision applying the tests set out above, then it is necessary for the FST to confirm the decision of the Insurance Council. In my view, the powers given to the FST to vary a decision should be used in cases where the tribunal decision under review contains an error or misapplies a principle under its enabling legislation.

One of the primary duties of the Insurance Council is to regulate the insurance profession. This by necessity involves the careful administration of the Code of Conduct imposed upon all insurance licensees as well as the careful consideration and application of the *Act* and its regulations. The integrity of the insurance profession and the protection of the public requires this careful administration by the Insurance Council.

In instances of misconduct, the Insurance Council must be mindful of the goals which are achieved through the penalty process. In *The Regulation of Professions in Canada,* by James T. Kasey (2003) at page 14-5, the author reviews the factors that are to be taken into account in determining how the public is best protected from acts of professional misconduct. These factors

include specific deterrence of the licensee from engaging in further misconduct, general deterrence of licensees, rehabilitation of the licensee, punishment of the licensee, the denunciation by society of the conduct, the need to maintain the public's confidence of the integrity of a profession's ability to properly supervise the conduct of its members, and the avoidance of imposing penalties which are disparate with penalties imposed in other cases.

It is my view that the Insurance Council must consider all of these factors in determining the appropriate penalty to impose in cases where its legislation or conduct rules have been breached by a licensee. A review of the cases presented in this Appeal indicate that one and two week suspensions have been granted by administrative bodies to their regulated licensees in instances where isolated or relatively minor procedural or regulatory breaches took place, Usually a single event involving an error of judgment existed. Other cases were cited where the license of a licensee was suspended for three months for forging a signature of a client on a single application form and falsely indicating that the licensee witnessed the signature. A license was revoked altogether where the licensee signed signatures of clients on fourteen applications, advised a client to sign her spouse's signature on an application and submitted false oral swabs in twelve of the said applications. Clearly, Mr. Novko's breaches of the *Act* and Code of Conduct evidence a situation that falls near the center of the relative extremes of penalties referred to above.

In particular, I have reviewed the following cases dealing with the assessment of penalties:

1. Michelle Therese Twanow, Nanaimo, *BC,* May 2002 Council Decisions -The licensee's insurance license was suspended for one week and the licensee was assessed the Council's investigative costs as a result of permitting one spouse of an elderly couple to forge the signature of the second spouse who was ill. The Insurance Council noted that it is never acceptable to forge someone else's signature, to improperly witness a forged signature, or to accept and process a document on which you are aware a signature has been forged;

2. Haroon Akbar Khan, Surrey, BC and Saraj Khan, Surrey, *BC,* May 2002 Council Decisions - A reprimand and a suspension of two weeks was assessed together with a fine, as well as an assessment of the costs of Council's investigations, where the agency controlled by the licensees failed to remit required cash to ICBC in accordance with the ICBC Auto Plan Agreement. The funds were fully paid in due course and the ICBC Agency Agreement was terminated;

3. Sydne Baxter-Dennis, Scarborough, Ontario, October 29, 2003 - Financial Services Commission of Ontario Bulletin No. G-03/04 - Licensee's insurance license was revoked for three months where the licensee forged the signature of the client on an insurance application form and falsely indicated that he had witnessed the client's signature. The Ontario Insurance Board recommended a three month suspension noting mitigating circumstances which included no prior history of misconduct and co-operation with the investigation. The Superintendent of Insurance suspended the licensee's license for three months;

4. Michael Benezra, Richmond Hill, Ontario, November 12-13, 2003, Financial Services Commission of Ontario Bulletin No. G-03-04 - The licensee signed the signatures of clients on fourteen life insurance applications which involved seven separate incidences of two policies each, advised another client to sign her spouse's signature

> on an application and he submitted false oral swabs in twelve of the applications. The licensee admitted all allegations but mislead investigators numerous times about the number of signatures that he signed. The licensee's license was fully revoked.

In the case of Mr. Novko, the facts establish that he falsely witnessed signatures on live application forms, he executed two brokers' reports without knowledge of the facts or the applicants involved, he signed as the representative agent without having met the applicants, he paid compensation to an unlicensed insurance salesperson, he failed to conduct sufficient, or in some cases any, due diligence respecting the unlicensed insurance sales person and with respect to the insurance needs of the applicants and his multiple errors of judgment as well as his wrongful act were not so proximate in time that they may be considered isolated.

Given all of the foregoing and considering Mr. Novko's remorse and the corrective measures that he took after the fact, I am of the view that the Insurance Council could not reasonably have reached the decision that it made respecting penalty after considering all of the evidence, the standards of conduct and procedures expected of licensed insurance agents and the goals and scope of the protective procedures expected of the Insurance Council in cases of material breaches of the *Act,* Regulations and Code of Conduct governing insurance agents and brokers. It is also my view that the Insurance Council erred in principal by assessing a penalty that does not adequately address what may be referred to as the principle of protection of the public, deterrence and the appropriate punishment, given the seriousness of the breaches in this instance, This is a case, in my view, where the FST may properly exercise its power to vary a decision under appeal pursuant to section 242.2 (11) of the *Act.* The seriousness of the breaches of the *Act,* its Regulations and the Code of Conduct governing insurance licensees in this case necessitates a greater penalty. These breaches go to the heart of integrity of the insurance application process. Not only must the penalty imposed against Mr. Novko reflect the seriousness of these breaches, but also the penalty must act as a deterrent against further breaches of the *Act* by Mr. Novko as well as similar potential breaches of the *Act* by other insurance licensees. The failure by the Insurance Council to address these principals in assessing the penalty against Mr. Novko could have the effect of reducing the deterrence factor against similar breaches or reducing the public's confidence in the administration of the insurance processes in effect in this Province. A "no tolerance" standard would be excessive and would ignore isolated incidences caused by unusual or extreme circumstances as well as minor or technical breaches that do not have a material effect upon the insurance application process. However, a very low tolerance is appropriate in my view in cases where material breaches of the *Act,* its Regulations or the Code of Conduct occur, especially in cases where the best interests of the applicants may be jeopardized, financial losses to insurance companies who receive improper or fraudulent documentation are possible, or where reckless or unscrupulous practices result in the incompetent administration of insurance applications. The penalties imposed by the Insurance Council require consideration of the standard of procedures required of insurance licensees as well as the necessity of protecting the best interests of the public from improper or unscrupulous activities of insurance licensees.

Accordingly, on behalf of the FST, I order that the penalty imposed upon Mr. Novko be varied so that the period of suspension be increased to sixty days, but that the fine and costs award against Mr. Novko and the time set for payment of the same remain unchanged. It is my view that an order for costs against the Respondent, Insurance Council of British Columbia, is not appropriate in the circumstances as the record indicates that the Insurance Council performed its duties and acted in what appears to be good faith throughout in the matter.

PENALTY

The FST assesses the following penalty on Appeal:

1. The suspension of the license of Mr. Novko imposed by the Insurance Council shall be varied to increase the period of suspension to a period of sixty days;

2. The fine of $1,000.00 and the order for costs of $912.50 together with the time for payment of the same imposed by the Insurance Council shall remain unchanged, except insofar as sums remaining owing as at the date of this decision, Mr. Novko shall have a period of 15 days to satisfy the same; and

3. No costs shall be assessed in relation to this Appeal.

Respectfully submitted this 22nd day of August, 2005.

“Dale Doan”

Dale R. Doan LLB
Member, Financial Services Tribunal