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FST-08-041

FINANCIAL SERVICES TRIBUNAL

BETWEEN:

S.R.B.

APPELLANT

AND:

REAL ESTATE COUNCIL OF BRITISH COLUMBIA

RESPONDENT

APPEAL DECISION

BEFORE: DALE R. DOAN, Presiding Member

APPEARANCES: Jessica S. Gossen, for the Respondent
Andrew D. Gay, for the Appellant

**DATE OF LAST
SUBMISSION:**

DATE OF DECISION: July 28, 2008

INTRODUCTION

This is an appeal (the "Appeal") of the January 21, 2008 decision of the Qualification Hearing Committee of the Real Estate Council of British Columbia (the "Committee") that determined that the licensing application of the Appellant would not be considered prior to December 12, 2009 following its decision that the Appellant was not qualified to be licensed as a real estate representative in accordance with section 10 of the *Real Estate Services Act* (the "Act") and section 206 of the Council Rules (the "Rules"). The Appellant asks the Financial Services Tribunal (the "FST") to set aside or reverse the decision of the Committee and order that the Appellant be licensed with or without conditions.

PRELIMINARY APPLICATIONS

Two applications have been brought to the FST prior to the determination of the substance of the Appeal. The first relates to the admission of new evidence in the form of the transcript of proceedings before the Honourable Judge de Couto of the Provincial Court of British Columbia on December 12, 2007, as well as email correspondence between legal counsel for the Real Estate Council of British Columbia and the Appellant between December 13 and December 17, 2007. The second preliminary application is a request that the Appeal proceed on the basis of an oral hearing. It should be noted that the Appellant also requests costs of the two applications, which applications are found in a single Notice of Application dated February 22, 2008.

Both applications are opposed by the Respondent, Real Estate Council of British Columbia.

I have had an opportunity to review this preliminary application together with the Appellant's Affidavit sworn February 20, 2008 and in light of the decision I have reached in the Appeal, as set out below, it will be unnecessary to rule on the two preliminary applications before the FST. The decision in this Appeal below does not take into consideration either of the two pieces of new evidence.

FACTS

The Appellant was a high school teacher in Coquitlam, British Columbia, who committed an offence contrary to Section 153(1)(a) of the *Criminal Code*, namely touching the body of a young person (a grade 12 female student of the Appellant's) for a sexual purpose between November 1, 2005 and January 1, 2006. The Appellant pleaded guilty to the offence and received a sentence that included a mandatory DNA order, a conditional sentence of 10 months with a probationary order of 18 months, a victim's surcharge of \$100 payable January 9, 2008 and a series of 11 conditions attaching to the Conditional Sentence. For the purposes of this Appeal, the sentence has been fully completed by the Appellant subject to conditions which remain effective.

The Appellant applied for licensing as a real estate representative on July 23, 2007. In his

application, the Appellant answered "yes" to question one in Part E of the application form acknowledging that he had been convicted of a criminal offence under a Federal Enactment. The Real Estate Council of British Columbia (the "Council") advised the Appellant on September 11, 2007 that his application would not proceed and recommended that it be withdrawn. Council apprised the Appellant of section 10 of the Act described in the "Good Reputation" Guidelines followed by Council, and further that if the Appellant wished to proceed, a hearing before the Committee pursuant to Section 2-6 of the Rules would be required.

On September 21, 2007, C.T., the managing broker for the proposed employing brokerage, Royal LePage, wrote to Council requesting a hearing. The hearing commenced on December 17, 2007 and the Decision of the Committee was issued January 21, 2008.

This Appeal arose by virtue of notice of appeal dated February 20, 2008 filed with the FST by legal counsel on behalf of the Appellant.

GROUND FOR APPEAL

The following grounds for appeal are proposed by the Appellant:

1. the Qualification Hearing Committee (the "Committee") erred in law by failing to properly apply section 10 of the *Real Estate Services Act*, S.B.C. 2004 c. 42 (the "Act"). In particular, the Committee erred in law by failing to consider whether the reason for the Appellant's conviction reveals that the Appellant is unfit to be a licensee;
2. the Council guidelines and rules for Applicants Applying for a Representative Associate Broker or Managing Broker License (the "Guidelines") purport to bar any consideration of applications from applicants with criminal records until such time as enumerated mandatory time periods have elapsed, and in so doing the Guidelines constitute a form of subordinate legislation which is not authorized by statute and which is fundamentally inconsistent with the discretion conferred on the Council under section 10 of the Act. By giving weight to the Guidelines and by relying on them, in part, to reach its decision, the Committee erred in law and fettered its discretion;
3. the Committee erred in law by drawing inferences about the Appellant in the absence of evidence necessary to support those inferences, including that the Appellant:
 - (a) is not a fit person;
 - (b) requires rehabilitation;
 - (c) has not demonstrated that he has rehabilitated himself;
 - (d) did not understand or accept the quality of his actions;
 - (e) was indifferent to the victim;

- (f) would not be able to identify issues such as conflicts of interest with their clients, and would be unable to understand that he cannot favour his own interests over his duties, and would be unable to understand appropriate conduct in transactions with unrepresented parties over whom he would have a clear advantage in knowledge;
 - (g) did not fully understand the standard of behaviour our society expects of those in a position of trust;
 - (h) failed to appreciate the significance of what he had done on the fact that the student was only a few months away from her 18th birthday and by stressing that the relationship was consensual; and
 - (i) did not understand the significance of the position of trust that he was in and why the law deemed there to be a situation of advantage;
4. the Committee erred by considering irrelevant matters or matters outside its jurisdiction, including whether the Appellant was "rehabilitated" or required "rehabilitation", and including whether the Appellant was remorseful toward the victim in the criminal matter;
 5. the Committee erred in law by failing to consider the expert report of Dr. E. and instead substituted its own opinion regarding the Appellant's need for rehabilitation and lack of fitness;
 6. in the alternative to ground (5), the Committee erred by failing to accord sufficient weight to the expert report of Dr. E., and by failing to give reasons for not accepting Dr. E.'s opinion;
 7. the Committee's decision was preceded by procedural unfairness. In particular, the Committee should have had before it a decision from the Provincial Court rendered in relation to the Appellant. Prior to the Committee hearing the Appellant, who was unrepresented, was in communication with the legal counsel for the Real Estate Council (the "Council"), including in relation to the anticipated receipt of a transcript of the reasons given by the Judge of the Provincial Court of British Columbia on December 12, 2007 terminating the Appellant's probation order. The Committee hearing occurred the morning of December 17, 2007. That afternoon, following the hearing, the Appellant received the transcript of the Judge's reasons and immediately advised the Council's legal counsel by email. Not appreciating the legal significance of the Judge's reasons, the Appellant asked the Council's counsel "are these still needed?". The Council's counsel did not respond, and then failed to advise the Committee of the existence of the Judge's reasons, notwithstanding her earlier statement to the Appellant that the Committee would be "interested in what the judge said". The Appellant assumed (wrongly) that since the hearing was over it was too late to put the decision before the Committee. Whether by way of consent, or by way of re-opening the hearing to enter the transcript as an exhibit, the transcript should

- (a) that the Appellant understood the ramifications of what he had done;
 - (b) that the Appellant is someone who has “learned his lesson”;
 - (c) that the Appellant is someone who has acknowledged his past and his wrong doing;
 - (d) that the Appellant has taken initiatives and steps to ensure that his wrongdoing would never happen again;
 - (e) that Dr. E. is a well-respected, very experienced, very senior psychiatrist; and
 - (f) that Dr. E.’s opinion in relation to the Appellant is due a good measure of respect;
8. the Committee erred by concluding that the kind of unprofessionalism associated with the commission of the criminal offence posed a risk of ongoing unprofessionalism in the real estate sector, in the absence of any evidence to support such a conclusion, and despite evidence which supported the contrary conclusion;
9. the Committee erred by misconstruing the Appellant's evidence in relation to the age of the complainant in the criminal case and his evidence in relation to the question of consent. This evidence, including that the complainant was almost 18, was relevant and does not show that the Appellant was indifferent to her or that he does not understand what society expects from those in a position of trust. The evidence is important because the younger the child the more serious the offence. This is because younger children are more easily taken advantage of and less able to protect themselves. The Committee was wrong in two respects when it said that a relationship between teacher and student "cannot be consensual" because the teacher is in a position of authority. First, the *Criminal Code* provides that this is only so if the young person is under 18. If they are 18 or older, the relationship can in law be consensual. Second, the *Criminal Code* expressly contemplates that there may be consent, but that such consent shall not be allowed as a defence. While the fact that the young person is *almost* 18 is irrelevant to the question of guilt under the *Criminal Code*, it is relevant to the question of seriousness of the offence and the degree to which it suggests unfitness. As for the Appellant's testimony that the relationship was consensual, he was clearly using the term in its lay sense, i.e. that there was no force, violence, coercion, use of intoxication, threats, bribery, blackmail, or any other coercive element which, in lay terms, would mean consent was absent. This again is highly relevant because the more coercive the relationship or the more

it involves force, the more serious the offence, and the more likely the offence will suggest unfitness; and

10. the Committee erred by failing to give proper consideration to the option of conditional licensing of the Appellant and in this regard failed to give due weight to the fact that the Appellant had arranged employment under the supervision of a senior and respected licensee who had agreed to oversee the Appellant's work.

ISSUES ON APPEAL

The Appellant's submissions indicate a number of issues to be dealt with on this Appeal. In fact, all 10 of the grounds for Appeal summarize issues that are relevant for consideration. I will deal with what I believe to be the two key issues in this Appeal:

1. Did the Committee err in law by failing to properly apply section 10 of the Act by not considering whether the reason for the Appellant's criminal conviction reveals that the Appellant is unfit to be a real estate licensee; and
2. Whether the Committee properly applied the guidelines and Rules set out by Council for applicants applying for a representative associate broker or managing broker license (the "Guidelines") with respect to the reputation test found in section 10 of the Act.

These two central issues form the first two grounds for appeal outlined by the Appellant. Other grounds for appeal will be discussed in this decision. Further, the first two grounds for appeal create the foundation for what I believe to be the successful argument that the Decision of the Committee should be overturned.

DECISION

The public interest in British Columbia is served in part by the supervisory and regulatory roles undertaken by the Real Estate Council of British Columbia. Council, as part of its duties, ensures that individuals who are not fit to become real estate licensees or who act in a manner that renders an individual unfit to be a real estate licensee are prevented from causing harm through restrictions and sanctions that Council administers.

At the initial licensing stage, Council has as its main tool section 10 of the Act. That section provided that an applicant for a new license must satisfy Council that he or she is of good reputation and suitable to be licensed. The onus is placed upon the applicant to establish good reputation and suitability.

Council is made up of experienced individuals in the real estate industry. The Committee is a specialized tribunal with particular capability to determine questions such as good reputation

and suitability for licensing. Its findings should not be lightly overturned. Deference is in order in all but exceptional circumstances.

When faced with an applicant who has been convicted of an indictable offence, the public rightly expects Council, through the Committee when a hearing has been requested, to ensure that the public interest is protected and that only appropriate applicants are granted licensing. Because the onus is on the applicant to establish good reputation and suitability for licensing, it would be reasonable to expect individuals who have been convicted of indictable offences to face an uphill battle. The Committee takes its duty of responsibility seriously. An indictable offence is a serious matter that goes to the heart of at least the key element of suitability in a regulated field such as real estate brokerage and real estate sales. However, the onus may be met in exceptional circumstances, even in cases where the applicant has been convicted of a serious crime. I believe that in the case of the Appellant, these exceptional circumstances exist, the onus has been met and the decision of the Committee should be overturned.

I have reached these conclusions for two reasons. First, I am of the view that the first two grounds for appeal of the decision of the Committee are valid. Second, having reviewed the entirety of the Record in this Appeal, the nature of the conviction, the time that has elapsed since the conviction and the restrictions that are proposed by the Appellant as reasonable conditions on his licensing should it be granted, the applicant in this case has met the onus of establishing good reputation and suitability for licensing subject to the conditions to be outlined below.

The two grounds for appeal referred to above require analysis.

The first proposes that the Committee erred in law by failing to properly apply section 10 of the Act and in particular the Committee failed to consider whether the reason for the Appellant's conviction reveals that the Appellant is unfit to be a licensee.

I accept the submissions of the Appellant that the Committee based its decision to disallow the Appellant's application for licensing on the Appellant's views regarding the nature and seriousness of his offence, his lack of evidence of rehabilitation and the seriousness of the offence, being an indictable offence. I also accept the Appellant's submission that the proper basis of the Committee's analysis should have been whether the fact that the Appellant, being a teacher' at the time, had sexual relations with a grade 12 student, makes him unfit to hold a real estate license. This latter analysis is required by section 10 of the Act. Instead, the Committee relied upon the Appellant's analysis of his offence, his views towards the same, drew inferences without any apparent facts supporting the same, made findings that were contrary to the only evidence before the Committee on the question itself, and either discounted or ignored the expert evidence available to the Committee on the key questions of suitability.

This is not to say that the offence was not a serious offence or one deserving careful review by the Committee. However, the statutory requirement placed upon the Committee is to then analyze whether the commission of that offence creates a situation where the applicant is unfit

to be licensed. The applicant's own feelings or conclusions regarding the offence are only relevant if they provide insight to the Committee on the applicant's reputation in the community or suitability to practice in the area of real estate sales. The evidence of the applicant's psychiatrist, Dr. E., and possibly the evidence of an unrelated industry participant such as the head of the real estate brokerage firm proposing to hire the applicant, should be of primary importance to the analysis by the Committee on the questions of reputation and suitability. In this case, the record clearly indicates that the Committee relied upon the former, being the analysis that the applicant itself, over the latter, being the reliable and relevant evidence on these' central questions.

The submissions of the Appellant analyze the two elements to be considered by the Committee in section 10(a) of the Act. The Appellant submits that the element of good reputation stands alone while the element of suitability is qualified to mean the suitability of the applicant to be licensed at the level and in the category for which the applicant is applying. This distinction respecting the two elements in question is accurate. However, the Appellant's conclusion that there is no suitability issue in this case as that term is used in the Act is not completely accurate. It is my view that the Act requires the Committee to consider the reputation of the applicant and may in fact deny an application on that criteria alone if the facts warrant it. On the question of suitability, the Committee is required to consider suitability for licensing with specific regard to the level and the category for which the applicant is applying for licensing. Again, the facts of each and every case will vary and what constitutes a fit verses an unfit applicant for licensing must be determined by the facts of each case. In the case of the Appellant, considering both elements, good reputation and suitability, is required just as it is required in every other case brought before the Committee. It is how the Committee applied the analysis mandated by section 10 of the Act that is the question in this Appeal.

A review of the record indicates that Council did not provide any evidence as to the Appellant's reputation, at least in the form of reports, professional analysis or other empirical data. The Committee reviewed the offence itself as evidence that is relevant to the analysis of reputation and considered the Appellant's own analysis of the offence. It is my view that consideration of the offence itself should be given in the context of an applicant's fitness for licensing and not with respect to the applicant's reputation. This is for two reasons. First, until such time as a convict obtains a pardon, the offence will be on that individual's record. If, for example, an individual does not apply for a pardon, the registration of the conviction will exist 10, 12, 15 years or longer. A simple consideration of the offence itself would indicate that that individual would never be able to be licensed under the Act if that consideration is given in the context of the element of reputation. Second, subsection 10(d)(iv) provides clear evidence that the Act intends the conviction of an offence to be considered in relation to the element of fitness.

Concluding on this point, namely the question of reputation, there are certainly convictions that would reasonably be expected to cause the Committee to take particular note. For example, an indictable conviction involving fraud could logically be expected to cause the Committee to be concerned about the protection of the community respecting dealings in real estate, large investments, deposits and the like. Similarly, repeated or numerous convictions involving violence towards others may reasonably cause the Committee to be concerned about the

protection of the public who may face such an individual in a real estate transaction. But even in these examples, the conviction itself cannot be the criteria for determining reputation. It goes to the question of fitness or suitability. A full analysis of the facts respecting the applicant's reputation is indeed required. In the case of the Appellant, the offence was serious and was treated as an indictable offence. There is conflicting evidence in the Record as to whether or not the conviction is broadly known in the community of the Appellant. The Appellant met the onus placed upon him by providing evidence and letters of reference unequivocally showing the Appellant as a person with a fine reputation and good character that would be a benefit to the real estate industry in this community. It cannot be denied that a conviction will be known by some persons and that the general knowledge of a conviction in a community will diminish over time. Council has the ability to restrict the timing for applications for up to a number of years where it determines it appropriate. Following a conviction on a serious offence, especially an offence that touches upon the nature of the real estate business itself (fraud, breaches of trust, repeated acts of violence, and so on) may require the imposition of a waiting period to properly protect the public, but only if the analysis of the offence affects the applicant's suitability as a licensee. In the case of the Appellant, it is my view that the harm that the conviction has brought to the Appellant's reputation and the nature of the conviction in relation to the proposed profession of the Appellant both lessen the potential harm to the public. But most importantly, the Appellant has met the onus placed upon him with respect to the element of reputation. The evidence of good reputation in this case is virtually uncontroverted.

With respect to the element of suitability for licensing, the Appellant's conviction is directly relevant to the analysis of his fitness to act as a real estate licensee. The preponderance of the evidence before the Committee in the form of the psychiatrist's expert report, the oral evidence of witnesses including the Appellant and the very favorable letters of reference, establish the Appellant's suitability to hold a real estate license. Council provided virtually no evidence respecting unsuitability. The only question, therefore, that remains is the conviction itself and its effect upon the suitability analysis.

In this latter regard, I accept the submissions of the Appellant. The Appellant was convicted of a specific offence, namely, having a sexual relationship with a person under the age of 18. The Act therefore requires the Committee to determine whether that particular act of the Appellant renders him unfit to hold a real estate license. All the other evidence points towards his suitability, and even his exceptional suitability, to hold such a license.

The Committee found the conviction to be evidence that the Appellant is guilty of unprofessionalism, lack of integrity and that the crime evidences one of favoring his own interests over his duties. To hold that the Appellant is generally unprofessional, without integrity or selfish because of the conviction is unreasonable. Rather, the Committee must review the facts surrounding the events and all material and relevant evidence respecting the Appellant prior to the offence, at the time of the offence and subsequent to the offence in order to reach a reasonable conclusion on questions of professionalism, integrity and those other factors that are important qualities of a suitable real estate licensee.

In this case, the future context of the Appellant's professional work will be that of adults investing in real estate. It will not be teaching minors. In terms of the Appellant's fitness or suitability to perform the tasks of a real estate licensee in a professional, honest and proper manner, the only evidence before the Committee indicates that he will do so and will represent the profession admirably. The facts involved in the offence for which he was convicted do not diminish the existing evidence regarding suitability. In the context of the category for which the Appellant is applying, his suitability has been established and the Appellant has met the onus of proving his suitability.

While Council did not lead contrary evidence and while the Committee did not have before it evidence of real or potential issues in relation to ethical or professional responsibility and activities, the Appellant's evidence has established his qualities as an ethical and responsible individual capable of assuming the responsibilities of a real estate licensee. Nor did the Committee consider that the Appellant's commission of the offence in question would not necessarily result in unprofessional acts in the unrelated areas of stealing deposits, deceiving sellers or purchasers of real estate or the like. A review of the Record in its entirety leads to the conclusion that the offence committed by the Appellant does not render him unsuitable for licensing.

Prior to concluding, it is necessary to comment on the Guidelines relied upon by Council and the Committee. The Appellant submits that the Guidelines are inconsistent with the Act in the areas of initial application and renewal application procedures, particularly as they relate to reputation and suitability. I have carefully reviewed the provisions of the Guidelines and note that there are examples where the Guidelines go beyond a general statement of principles, standards or criteria to be used as directions by the tribunal in question. In fact, the Guidelines used by Council appear to be "directive". One example used by the Appellant relates to the consideration of criminal convictions when considering suitability of an applicant. The Guideline provision reads:

“Applications from applicants with criminal records will not be considered until the following periods have passed following convictions.”

Subsection 10(d)(iv) provides as follows:

“An applicant for a new license or a license renewal must satisfy the real estate council that they meet the following applicable requirements: ...in all cases, the applicant has not...been convicted of an offence....for a reason that reveals the applicant is unfit to be a licensee.”

In other words, the Guideline provides a mandatory directive that an applicant with a criminal record will not be considered for a licensing until certain time periods have passed, whereas the legislation itself mandates a tribunal to consider the reasons that reveal that the applicant will be unfit for licensing when a conviction of a criminal offence is involved. The effect of the Guidelines in this case is to provide an even more difficult onus upon the Appellant when the Act itself does not provide that level of onus. With the hopes that Council and the Committee use the Guidelines as general statements of principle and guidance only, I merely state that this

appears to be an anomaly and one that could given the right circumstances, create a situation that is unfairly prejudicial upon applicants for licensing or licensing renewals. For the purposes of this Appeal, I have reviewed and relied upon the provisions of section 10 of the Act.

The standard of review for the FST of decisions of tribunals is reasonableness; see FST 06-022 Superintendent of Real Estate v. Kenneth Scott Spong. Given my findings that the Committee erred in its analysis, I find that its determination in this case was unreasonable.

CONCLUSION

Section 242.2(11) of the *Financial Institutions Act* provides that the FST may confirm, reverse or vary a decision under appeal, or may send the matter back for reconsideration to the person or body whose decision is under appeal.

In this instance, the Appellant has proposed a series of conditions that it feels is reasonable for the benefit of the protection of the public in the event of his licensing. I have reviewed the list of conditions and I agree that the conditions proposed provide a high degree of comfort in terms of both public protection and the perception that a fair and appropriate licensing regime has been imposed upon the Appellant. In the same vein, given this Appeal decision, I do not view it as necessary in this case to send the matter back to the Committee with directions. Rather, this Appeal is the proper forum to finally determine these matters. The discretion afforded the FST enables me to reverse the Committee Decision and I do so in the context of accepting the Appellant's conditions.

The Decision shall be overturned and the Appellant, S.R.B., shall be licensed pursuant to section 10 of the *Real Estate Services Act* as a first time applicant for the licensing level of "representative" in the category of "trading services" which license and any renewal thereof shall be subject to the following conditions:

1. that he be restricted to work at the Royal LePage Brokerage under the supervision of Ms. T. for a period of 24 months;
2. that his real estate work be performed solely for the real estate clients of his mother, J.B., for a period of 12 months under the additional supervision of Ms. B. in relation to those client relationships for that period;
3. that a copy of this Appeal decision be provided to Ms. T. and Ms. J.B. with a letter from the Real Estate Council of British Columbia requesting each of them to immediately report any unethical, unprofessional or criminal activity of S.R.B. to Council during the time periods outlined above;
4. that Ms. T. be requested to submit a report every six months during the 24 month period outlined above to Council commenting upon the number of clients assisted by Mr. B. during the preceding six month period, reports provided to Ms. T. or to Ms. B.

and later learned by Ms. T. respecting the nature and quality of the services provided by Mr. B. to those clients, any issues that may reasonable be considered as impacting on professionalism or ethical qualities exhibited by Mr. B. during the prior six month period as well as the resolution of the same, and any other matter which Ms. T. believes should be brought to the attention of Council related to Mr. B.'s activities as licensee, which reports shall be dated and signed by Ms. T. and Mr. B. following review of the same with Ms. T.; and

5. That he not be charged or convicted of any criminal offence during the 24 month period outlined above.

In the event that any of the conditions above are not met, Council shall have the right to terminate the licensing of Mr. B. until such time as the appropriate hearing or procedure has been followed to determine the matter.

Costs in relation to this matter shall be awarded in favour of the Appellant and shall be set in the amount of the appeal fee paid to the FST at the instigation of this Appeal.

Respectfully submitted this 29th day of July, 2008

“Dale Doan”

Dale R. Doan LLB
Member Financial Services Tribunal