FTS No. 06-022

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF THE REAL ESTATE SERVICES ACT

S.B.C. 2004, CHAPTER 42 and THE REAL ESTATE ACT R.S.B.C., 1996, c.397, as amended S.B.C 2004,
C. 42

BETWEEN:

THE SUPERINTENDENT OF REAL ESTATE

APPELLANT

AND:

THE REAL ESTATE COUNCIL OF BRITISH COLUMBIA

and

KENNETH SCOTT SPONG

RESPONDENTS

DECISION

Chair: Stanley W. Hamilton, Member of the Financial Services Tribunal

Counsel for the Appellant, Richard Fernyhough

Counsel for the Respondent, Real Estate Council of British Columbia, Frits Verhoeven

Counsel for the Respondent, Kenneth Scott Spong, James L. Straith

INTRODUCTION

The Superintendent of Real Estate (the "Superintendent') has appealed the decision by a Hearing Committee of the Real Estate Council (the "Hearing Committee" or the "Council") dated March 15, 2006 concerning the Respondent Mr. Kenneth Scott Spong. The decision of the Council was made pursuant to a decision of the Tribunal (*The Superintendent of Real Estate v. Real Estate Council of British Columbia and Kenneth Scott Spong,* December 19, 2005, FTS-05-007) remitting the matter back to the Council for a reconsideration with directions. The original decision of the Council was rendered on March 10, 2005 and was appealed by the Superintendent. The original hearing resulted from a complaint against Kenneth Spong by Elizabeth Thoma who was an unlicensed assistant employed by Mr. Spong.

In the original Decision, the Council made two findings adverse to Mr. Spong:

(i) he was found negligent within the meaning of the meaning of section 9.12 of Regulations 75/61 under the *Real Estate Act* in that he allowed Ms. Thoma to act or hold herself out as a salesperson without being the holder of a valid or subsisting salesperson's licence issued under the *Real Estate Act* or without being employed by the agent contrary to section 3(2) of the *Real Estate Act*; and

(ii) he misconducted himself within the meaning of section 31(1)(c) of the *Real Estate Act* in that he directed Ms. Thoma to act or hold herself out as a salesperson without being the holder of a valid or subsisting or salesperson's license under the *Real Estate Act*.

As a result of these findings, the Council suspended Mr. Spong's license for a period of seven (7) days. The Council also ordered Mr. Spong to successfully complete Chapter 2 of the Real Estate Services Licensing Course within six (6) months of its decision as a condition of continued licensing. Finally, the Council ordered Mr. Spong to pay costs in the amount of $5,585.20 within sixty (60) days of its decision as a condition of continued licensing.

The Superintendent appeals the decision of Council on the grounds that the Council erred in its discretion in concluding that a period of suspension of only seven (7) days in addition to completing Chapter 2 of the Real Estate Licensing Course was an appropriate penalty.

ISSUES

The submissions advanced by the parties give rise to the following issues:

1. What degree of deference should the Tribunal show to its own prior decision to remit the matter of penalty back to the Council for reconsideration in accordance with its directives?
2. What is the appropriate standard of review for reviewing the Council's decision?

3. Did the Respondent Council err in exercising its discretion in imposing a suspension of seven (7) days?
4. If so, what discretionary remedy should follow under section 242.2(11) of the *Financial Institutions Act*?

FACTS

There is minimal dispute over the facts.

1. Mr. Spong appeared before a Hearing Committee of Council on September 8, 2004, and on January 24 and 25, 2005 on the allegations that:
   (a) he allowed Ms. Thoma to act, or to hold herself out, as a salesperson without being the holder of a valid and subsisting salesperson's license or agent's license under the *Real Estate Act* and without being employed by an agent;
   (b) he agreed to pay a commission to Ms. Thoma for acting as an agent or salesperson when at the time she did not have a license as required under the *Real Estate Act*; and
   (c) he directed or alternatively allowed Ms. Thoma to act or hold her self out as a salesperson without being a holder of a valid and subsisting salesperson's license under the *Real Estate Act*.
2. The original hearing resulted for a complaint by Ms. Thoma dated January 3, 2003. She had been licensed as a salesperson in British Columbia from June 28, 1990 until September 1, 2001, but was unlicensed during the period that she worked for Mr. Spong.
3. Ms. Thoma was employed by Mr. Spong as an unlicensed assistant from September 2001 to March 2002.
4. Ms. Thoma indicated at the outset of her employment with Mr. Spong that she wanted to resume work as a licensed salesperson; however Mr. Spong had responded that she could only work as an unlicensed assistant.
5. Ms. Thoma's complaint arose out of a dispute about remuneration. In her complaint to Council, Ms. Thoma indicated that she believed she was owed a portion of the commission on two real estate transactions completed during her employment with Mr. Spong. Mr. Spong refused to pay the commission and Ms. Thoma threatened to report the matter to Council and eventually did so.
6. Ms. Thoma testified that as a former licensee, she knew that in order to work with buyers she had to be licensed.
7. There was no complaint from the public or from any other licensee, nor any suggestion that any member of the public or other licensee suffered any harm of any kind.
8. In her complaint to the Council, Ms. Thoma stated that she "worked directly with clients on two occasions as a Buyers Agent 'a licensed salesman relationship on behalf of Ken Spong' without being licensed."

9. The first transaction occurred March 2, 2002 and the showing of the property for the second transaction occurred on March 17, 2002.

10. On the first occasion, the Council found that "Mr. Spong permitted Ms. Thoma to be in a situation where she was instructed to take buyers around to several properties and spend hours with them while they viewed the properties alone. Mr. Spong's stated expectations that she would restrict her activities to opening doors for them was unrealistic in all the circumstances." Mr. Spong "did not take simple steps to ensure he maintained some degree of supervision over Ms. Thoma's activities." The Council also found that (Decision, p 10).

11. On the second occasion the Council found that when Ms. Thoma presented Mr. Spong with a signed offer on a property she had shown to a potential buyer, he did not question the steps she had taken. The Council observed that "the only conclusion he could have drawn was that Ms. Thoma had taken the buyer through the property, discussed it and the offer should make." Mr. Spong relied on the work of Ms. Thoma and arranged to present the offer as drafted by Ms. Thoma to the listing agent.

12. The Council found that Mr. Spong "did not comply with office policy and insist that a contract be in place that clearly defined her responsibilities."

13. The Council found that while Mr. Spong may have been lacking in the details of what Ms. Thoma was doing, the evidence was that Mr. Spong permitted Ms. Thoma to cross the line into the prohibited area of licensed activities.

14. The Council found that Mr. Spong's actions resulted in a direction to Ms. Thoma to act as a salesperson without holding a valid and subsiding salesperson's license in two transactions. The Council concluded that if Mr. Spong did not directly instruct Ms. Thoma to act as she did, he ought to have known that she was carrying out licensed activities. Mr. Spong benefited from the two transactions.

15. The Council found that Mr. Spong was "negligent within the meaning of section 9.12 of regulation 75/61 under the *Real Estate Act* in that he allowed Ms. Thoma to act or hold herself out as a salesperson without being the holder of a valid and subsisting salesperson's license under the *Real Estate Act* or without being employed by the agent contrary to section 3(2) of the *Real Estate Act*."

16. The Council also found that Mr. Spong misconducted himself within the meaning of section 31(1)(c) of the *Real Estate Act* in that he directed Ms. Thoma to act or hold herself out as a salesperson without being the holder of a valid or subsisting salesperson's license.

17. The Council suspended Mr. Spong's license for a period of seven days and made additional orders as previously noted.

18. The Superintendent appealed the decision on the ground that the seven day penalty imposed on Mr. Spong should be increased (see *Spong*). The Superintendent also sought costs under section 47 of the *Administrative Tribunals Act.*

19. In *Spong*, rendered on January 13, 2006, the Tribunal concluded that the Council "breached its duty of fairness" by failing to provide any explanation on the face of

its decision for the seven day suspension. The Tribunal remitted the matter back to the Council for reconsideration with directions. The Tribunal stated the Council must be guided by three directions: It is not required to re-convene to receive further submissions; it must base its decision on factors relevant to the imposition of professional discipline including, but not limited to, those identified in *Wong*; and it must endeavour to issue its reconsideration decision with supporting reasons within 60 days of the FST decision (*Wong v. Real Estate Council of British Columbia* [2003] B.C.C.O. No.13, Commercial Appeals Commission Decision).

20. After reconsideration, the Council in its Decision of March 16, 2006 confirmed its initial decision to suspend Mr. Spong for seven days.

21. The Superintendent appeals the Reconsidered Decision of Council seeking an order to increase the period of suspension and an order for costs against the Council.

SUMMARY OF THE SUBMISSIONS

The Council submitted that the appropriate standard of review is the standard of patently unreasonable. In addition, the Council raised a new issue: what degree of deference should the Tribunal show to its own prior decision to remit the matter of penalty back to the Council for reconsideration in accordance with its directives?

The Council submitted that when the Tribunal remits a matter which is itself discretionary (penalty) to the Council for reconsideration, and given the Council does so showing respect for the directions given, the resulting decision ought to receive substantial deference. More deference should be given that in an ordinary case without such intervening proceedings.

The Council submitted that where a matter of penalty has been remitted back to the Council, unless it can be shown that the Council failed fundamentally to comply with the directions of the Tribunal, or otherwise failed to apply the correct legal principles and thereby rendered the decision patently unreasonable, the decision should not be interfered with. The Council submitted there is no point in the Tribunal exercising its power to remit for reconsideration if on further appeal from that reconsideration the standard of review remains no different than on an appeal in the first instance.

The Council submitted that where the Tribunal has itself remitted the matter back to the Council for reconsideration, and the Council has done so with clear respect for the directions of the Tribunal, it is submitted that the decision should not be interfered with unless it is patently unreasonable, which would include a significant failure to abide by any directions given to it by the Tribunal for reconsideration.

The Council further submitted that "The Council's decision is not patently unreasonable. No detailed review of these factors (as cited in *Wong*) or other decisions is required. It would be an error for the Tribunal to engage in such an analysis."

The Superintendent submitted that the appropriate standard of review for this appeal is the standard of reasonableness. In support of this position the Superintendent cited three recent decisions and submitted that the Tribunal has been clear in its previous decisions that the standard of review on an appeal of a penalty decision of a lower tribunal to the Tribunal is the standard of reasonableness. (*Financial Institutions Commission v. Insurance Council of British Columbia and Maria Pavicic*, FST No. 05-009 Appeal Decision dated November 22, 2005; *Financial Institutions Commission v. Insurance Council of British Columbia and Branislav Novko*, FST No. 05-008 Appeal Decision dated August 22, 2005; and *The Real Estate Council of British Columbia v. Sandra Jean Stinson and Keith Grant Nelson*, FST No. 05-013 Appeal Decision dated February 15, 2006.

The Superintendent further submitted that the Council is precluded from arguing once again in this appeal that the standard of review ought to be the standard of patent unreasonableness. The issue was argued and decided in several previous cases including the earlier appeal decision *Spong.*

The Superintendent submitted that there should be no difference in the standard of review on reconsideration and cites *Williams v. Newfoundland in and Labrador (Workplace Health, Safety and Compensation Commission*, [2004] N.J. No. 443.

> Further, the fact that the matter is being heard by way of reconsideration rather that at first instance in the Review Division should not, it seems to me, make any difference with respect to the standard of judicial deference. It would be somewhat anomalous if, on judicial review, a decision of a review commissioner was accorded significant deference but if the same decision had gone through the Chief Review Commissioner, the Chief Review Commissioner's decision should be accorded some lesser degree of deference." (p.5)

The Superintendent submitted that the issue on appeal is the decision of Council, not the decision of the Tribunal.

The Superintendent further submitted that the Council provided no authority for the position that an appeal of a reconsideration decision ought to be accorded more deference by the Tribunal than an appeal of an original decision. The Superintendent submitted that "With respect this proposition is not only unsupported by any authorities, it is also counterintuitive. That approach would tend to benefit the Council for making a reviewable error in the first instance, as the second time around it would be shown more deference and as a result an equally unreasonable decision would not be overturned. "

The Superintendent submitted that the Tribunal must intervene where the particular penalty falls outside an acceptable range and where there are no extenuating circumstances. The Superintendent further submits that the "threshold" penalty for a finding of "misconduct" is 30 days and that the Council has recognized that and accepted that the range of suspension for a finding of misconduct starts at 30 days in *Wong* (p. 6).

The Superintendent submitted that the appropriate suspension where a licensed salesperson allows and directs an unlicensed person to perform acts that require a license is in the range of one to three months and submitted that the appropriate suspension in the particular circumstances of this Appeal should be between six and eight weeks.

The Council submitted that the Superintendent relies heavily upon an argument that where misconduct is found, the threshold for penalty must be a 30 day suspension, although it conceded that there may be cases where the threshold may be departed from. The Council submitted there is no such legal principle and that questions of penalty are uniquely unsuited to inflexible rules of that kind.

The Council submitted that each case is different, and the duty of the Council is to be cognizant of that, and to impose an appropriate penalty in its discretion, exercised in accordance with the correct legal principles. The Council further submitted that when a decision is discretionary, there is no one correct answer, therefore be considerable latitude and deference must be allowed.

The Superintendent submitted that *Spong* articulated the deference the Tribunal will accord a sentencing body on a penalty appeal.

> "The tribunal should be reluctant to intervene where the sentencing body has turned its mind to the relevant considerations unless the penalty falls outside an acceptable range and there is no extenuating circumstance.' (Spong, p.9)

The Superintendent submitted that there is undoubtedly a legal principle that sentencing bodies should avoid imposing penalties which are disparate with penalties imposed in other cases. "A comparison of penalties imposed in other cases for certain conduct provides the sentencing body with a range of penalties which are appropriate for that conduct."

The Superintendent acknowledged that Council is afforded some latitude in deciding on an appropriate sentence because there is a range available for certain conducts. Where in the range the sentence falls is generally determined by the specific circumstances of the misconduct and any mitigating circumstances. The Superintendent acknowledged that the appropriate penalty may fall outside the acceptable range, but in such circumstances, an explanation must be provided.

The Council used the factors identified in *Wong* and the list identified in James T. Casey, *The Regulation of Professions in Canada* (Carswell, 2001) as a guide to the factors to be considered when determining an appropriate disposition on reconsideration. The Council determined that its principle mandate is to protect the public and accepted the definition of "misconduct" to be "action knowingly performed which is patently contrary to the interests of the public." (*Licensing Practice Manual*, 5th edition at p.164.

The Council discussed the role of Ms. Thoma and concluded there was no complaint about how she did the work and no evidence of any actual harm. The Council viewed Ms. Thoma's evidence to be tainted, exaggerated and sometimes unbelievable in an attempt to put Mr. Spong's conduct in the worst possible light. But even with the

expressed concerns with the evidence from Ms. Thoma, the Council determined that Mr. Spong must have known that Ms. Thoma's conduct would cross the line. However, the Council concluded on the basis of all the evidence that there was little or nor risk to the public. Council stated the unlicensed activity related to two files approximately two weeks apart and when Mr. Spong became aware of the approach Ms. Thoma was taking on the issue of remuneration for her work, he terminated the employment. The Council concluded that the circumstances of the case were at the lowest end of the range of conduct that would be characterized as misconduct.

The Superintendent submitted that Council erred in considering the conduct of Ms. Thoma as somehow relevant to the determination as to whether the penalty imposed adequately addressed the protection of the public. The Superintendent further submitted that Ms. Thoma's conduct may well have been relevant to a determination of her credibility, it ceased to be an issue after the Council found Mr. Spong guilty of negligence and misconduct.

The Council concluded that on the basis of Mr. Spong's demeanour at the hearing and his evidence that he regretted his failure to be diligently ensure Ms. Thoma was not crossing the boundary into activities that required a license. The Council also concluded that the message broadcast to other licensees, coupled with all of the mitigating circumstances and the seven day penalty, would be of sufficient deterrence to other licensees.

The Superintendent submitted that the Council did not articulate its reasons for believing that the sentence imposed would have the desired effect on Spong. In terms of the general deterrence, the Superintendent submitted the Council did not identify any mitigating circumstances nor did it provide reasons for its conclusions.

The Council addressed the issue of punishment of the offender and concluded that while Mr. Spong's actions could not properly be characterized as simple omissions or carelessness, the wrongdoings he committed were at the lowest end of that which could be characterized as misconduct. The Superintendent submitted the Council offered no reasons to support this conclusion.

The Council considered the issue of rehabilitation of the offender and noted that Mr. Spong took the necessary steps to ensure Ms. Thoma's conduct ceased and concluded that Mr. Spong was cognizant of his responsibilities and had taken steps to ensure that both his office procedures and his own general business practice had changed so the conduct would not reoccur. The Superintendent submitted that the Council overlooked the fact that Mr. Spong terminated Ms. Thoma over a financial dispute and not because she was conducting unlicensed activities.

The Council addressed the issues of isolation of the offender and denunciation by society of the conduct, as illustrated by public nature of the hearing and subsequent publication of the findings. The Superintendent submitted the isolation of the offender is more applicable to the criminal sentencing and acknowledged that denunciation by society of the conduct has diminished importance in regulatory proceedings.

The Council concluded that the decision on penalty of seven days will maintain and not erode the public's confidence in and the Council's ability to properly supervise licensees. The Superintendent submitted that the Council gave no reasons why the sentence imposed adequately addressed this principle.

The Council determined that the penalty imposed on Mr. Spong was not disparate with penalties imposed in other cases and that it is not patently unreasonable. The Council concluded that no detailed review of these factors or of the other decisions is required and that it would be an error for the Tribunal to engage in such an analysis.

The Council identified several mitigating factors considered in their deliberations. These included the fact there was little or no risk to the public; Mr. Spong's demeanour at the hearing, including his regret for failing to diligently ensure that Ms. Thoma did not cross the line into unpermitted activities; the prompt termination of Ms. Thoma's employment; the short timeframe of the activities in question; Mr. Spong's testimony that he now only uses licensed assistants; and Mr. Spong's evidence that he was cognizant of his responsibilities and had taken steps so the conduct would not reoccur.

Mr. Spong submitted that this is the first blemish on his professional record and he has not engaged in any acts of dishonesty. Mr. Spong submitted he should not be punished because he did not admit his guilt. The Superintendent submitted that the Appeal had nothing to do with Mr. Spong not entering a guilty plea on the allegations he faced.

Mr. Spong submitted that there is absolutely no indication that the decision of the Council was exercised arbitrarily, in bad faith, for an improper purpose, based on predominately irrelevant facts or failed to take statutory requirements into account. The Superintendent submitted that the Appeal is based on the reasonableness of the Council decision, and not based on any of the factors cited by Mr. Spong.

Mr. Spong submitted that there is no evidence that he actually directed Ms. Thoma to engage in unlicensed activities, rather he put her in a position where he ought to have known she would take advantage of the situation. The Superintendent submitted that an attack on the evidentiary foundation of the Council's finding is not within the scope of this Appeal.

The Council submitted that having reconsidered the question of penalty in accordance with the direction of the Tribunal, and having done so in conformity with the correct legal principles, should have its decision respected.

The Superintendent submitted that the suspension of seven days imposed on Mr. Spong was not sufficient to address the sentencing goals of specific and general deterrence and the need to maintain the public's confidence in the integrity of the Council's ability to properly supervise the conduct of its members.

The Superintendent submitted that the FST must intervene where a particular penalty falls outside an acceptable range and where there are no extenuating circumstances.

The Superintendent submitted that Mr. Spong committed a fundamental breach of the *Real Estate Act* and that there are no extenuating circumstances such that the Council could reasonably depart from the acceptable range of suspension for misconduct.

The Superintendent submitted that the Council erred in considering the conduct of Ms. Thoma as somehow relevant to the determination of the penalty imposed on Mr. Spong.

The Superintendent submitted that while the Council properly identified the factors relevant to the imposition of a penalty, it offered no line of analysis within the given reasons that could reasonably lead the Tribunal from the evidence to the conclusion before it. The Superintendent further submitted the penalty falls outside the acceptable range and there are no extenuating circumstances identified.

ANALYSIS

I will address the issues in the order set out earlier in this decision.

Appropriate standard of review on further appeal?

This Appeal raises a new issue: When the Tribunal has remitted a matter back to the Council for reconsideration with directions from the Tribunal, in this case reconsideration of the penalty, what is the appropriate standard of review on further appeal?

The Council submitted that substantially more deference should be given than in an ordinary case without such intervening proceedings providing the reconsideration shows obvious respect for the directions given but did not provide any authorities for this position. The standard advanced by Council is that the decision should not be interfered with unless it is shown that the Council failed fundamentally to comply with the directions of the Tribunal, or otherwise failed to apply the correct legal principles and thereby rendered the decision patently unreasonable.

I am inclined not to accept the position of Council, especially in the context of this Appeal. In *Spong,* the Tribunal concluded that there was an absence of any reasons to support the Council's decision to suspend Mr. Spong for seven days. In remitting the matter back to the Council for consideration, the Tribunal stated: "Thus, completely aside from the questions relating to the appropriate standard of review, I would allow the appeal on the basis the Hearing Committee breached its duty of fairness by failing to provide any explanation on the face of its decision for Mr. Spong's seven day suspension." Council in its original decision failed to provide reasons for the penalty.

It would seem that the "fairness" referred to would extend to all parties that have a right to appeal the original decision. As a consequence of not having provided reasons for penalty in the original, the Superintendent was precluded from addressing these particular points in the first instance. Once the Council reconsidered its original decision following the directions as set out by the Tribunal, the Superintendent ought to then have the right to appeal the reconsidered decision and the reasons given for penalty. It seems to me to

be fundamentally wrong to first present a decision found to be unfair in that it did not include reasons for penalty, then argue the Superintendent either cannot appeal or is limited to a different standard of appeal once the reconsideration is complete. Had these reasons been included in the original decision, the Superintendent would have been afforded an opportunity to make submissions based in part on the reasons for penalty at that time.

I also note that the finding in *Williams* v. *Newfoundland and Labrador (Workplace, Health, Safety and Compensation Commission*) [2004] N.J. No. 443 2004 NLTD 249 where the Court found that there should be no difference in the standard of review on reconsideration is helpful and is the only authority offered the Tribunal on this issue.

Given that the penalty is one of the major issues in both the previous appeal and in this Appeal, coupled with the fact that the reasons for penalty were not included in the original decision, I am of the opinion that the same standard of review should apply in this Appeal as one would apply to an appeal to the Tribunal in the first instance.

Standard of Review

The matter of the standard of review has been addressed in a number of recent decisions of the Tribunal. Four of these, including *Spong,* are previously cited in this Decision. While I am not obliged to follow these earlier decisions, I am inclined to accept the general direction taken concerning the standard of review. The prior cases have generally rejected the standard of patently unreasonable and I will to do so here. For purposes of this Appeal I am accepting the standard of reasonableness is the appropriate standard of review as I see nothing in the circumstances of this Appeal to convince me not to accept the general direction of the Tribunal decisions.

Reasonableness of the Council's Decision as to Penalty

Before addressing the specific issue of the reasonableness of the decision, it is helpful to review the directions given to the Council in *Spong*. The Council was directed to be guided by three considerations. First the Council was not required to re-convene to receive further submissions, although it elected to do so. Second, the Council was to based its decision on factors relevant to the imposition of professional discipline including, but not necessarily limited to, those identified in *Wong*. The third consideration related to the timing of the reconsideration by the Council and this deadline was achieved.

There were three reasons given in *Spong* for referring the matter back to the Council. First, the original decision of the Council failed to provide reasons for penalty. The second concerned the enumeration of the factors relevant to assessing penalties. The third was to ensure that the penalty imposed is not disparate with the penalties imposed in other cases.

The Superintendent submitted that Council did turn its mind to the relevant considerations, but the reasons suggest that the relevant considerations were dealt with in an unreasonable manner. I do believe the Reconsideration Decision does provide some reasons for penalty; it contributes to an enumeration of the factors relevant to assessing penalties; and it does contribute to the issue of ensuring the penalty is not disparate with penalties in other cases. I further believe that the Council and Mr. Spong have responded in a reasonable manner, although I do accept that reasons were not carefully crafted on all aspects. Nevertheless, I believe the responses from Mr. Spong and the Council provide a foundation from which to move forward. I am also mindful of the fact that many previous cases appear to be deficient in terms of reasons for penalty.

Consistent Penalties

Let me first address the matter of ensuring the penalty is not disparate with penalties in other case. In *Spong,* the third reason for referring the matter back to the Council was ensure that the penalty imposed is not disparate with the penalties imposed in other cases. The decision made specific mention of the fact that the Council decided to impose the seven day suspension without providing any rationale for departing from "the threshold" identified by the Council in *Wong.* The Superintendent submitted that the Tribunal must intervene where a penalty falls outside the acceptable range and where no extenuating circumstances exist.

The Superintendent further submitted that the "threshold penalty" for misconduct is 30 days and that Council has recognized and accepted that the range of suspension for a finding of misconduct starts at 30 days. However, the particular citation that appears to be the foundation for the position of the Superintendent is somewhat more qualified. The reference to p. 6 of *Wong* states: "Counsel (for Council) submits the threshold penalty for a finding of 'misconduct' is usually 30 days, and relies on the established duty to disclose latent defects at the outset." (emphasis added). I see no reference to the Council recognizing or accepting that the range of penalty for misconduct starts at 30 days.

I would further note that the panel in *Wong* looked to the case law to identify a range of penalties and made no specific reference to reliance on the "threshold" submitted by Council. I am inclined to place greater weight to the notion that there is a range of penalties than to the notion of a 30 day threshold. However, in the particulars of this Appeal, the range appears to also address the issue of a 30 day threshold.

The Council observed that the Superintendent relied heavily upon the an argument that when misconduct is found, the threshold penalty must be a 30 day suspension, although it conceded that there are many cases where the threshold may be departed from. The Council argued there is no such legal principle. Each case is different, and the Council has the responsibility to be cognizant of the differences and to impose an appropriate penalty, in its discretion, exercised in accordance with correct legal principles. The Superintendent submitted there is such a legal principle that a comparison of penalties imposed in other cases for certain types of conduct provided a range of penalties which are appropriate for that conduct. And if a penalty falls outside this range, there must be

some extenuating circumstances. This, of course, leaves open the question of what constitutes an acceptable range.

I am prepared to accept that the Tribunal must intervene where a penalty falls outside an acceptable range and where there are no extenuating circumstances. I adopt this position because if a penalty fell outside an acceptable range without any extenuating circumstances, I would accept this as evidence that the penalty is unreasonable. I am also inclined to accept that the general model adopted in *Wong* where the acceptable range was identified by reference to the penalties in existing cases is appropriate for purposes of this Appeal.

The Superintendent further submitted that where a licensed salesperson allows and directs an unlicensed salesperson to perform licensed acts is in a range of one to three months. The Superintendent provided no specific justification for this particular range but did cite cases that are helpful in this regard. Before addressing this point, it would be helpful to consider the cases submitted and I will start with the cases that meet the criteria submitted by the Superintendent. There are five cases cited that involve circumstances where a licensed salesperson allows and directs an unlicensed salesperson to perform licensed acts.

In *Horizon Financial Services Ltd. v. British Columbia (Registrar of Mortgage Brokers),* [1990], B.C.C.O. No. 4 (CAC)(QL), Horizon appealed a three month suspension imposed by the Registrar of the *Mortgage Brokers Act* for employing unregistered submortgage brokers. After being refused an exemption from licensing by the Registrar of Mortgage Brokers, Horizon created a plan whereby it circumvented the requirements under the *Mortgage Brokers Act* for licensing of certain individuals. The Commission found that Horizon had "committed a fundamental breach' of the (*Mortgage Brokers) Act.* The Commission concluded that "the evidence was overwhelming that the Appellant employed unregistered persons and further that the Appellant had not treated the matter seriously in that it made no effort to get these people registered and deliberately ignored the requirements of registration." The Commission affirmed the three month suspension.

The Council submitted this case was fundamentally different from the Mr. Spong's circumstances because of the sheer size of the scheme, the duration of the activity and the audacity of the company in the way they treated the matter. The Superintendent submitted the actions of Spong were arguably less serious than the circumstances in *Horizon.* I agree with the submission of the Council on this point.

In *Legge (c.o.b. Mortgageline) v. British Columbia (Registrar of Mortgage Brokers),* [1995] B.C.C.O. No. 13 (CAC) (QL), Mr. Legge appealed a decision of the Registrar of Mortgage Brokers. The Registrar found that Mr. Legge had employed an unregistered submortgage broker and also that Mr.Legge breached Condition 7 of the Conditions of Registration by failing to file audited statements within four months of the end of the year. Mr. Legge was suspended for one month for his conduct in employing an unlicensed mortgage broker. Mr. Legge had also paid a commission to the unregistered submortgage broker of approximately $45,000 during 1993. The Commission concluded that Mr. Legge "knowingly breached Section 22(1) (d) of the Act by continuing to employ [the unregistered submortgage broker] between November 1992 and December

1993 and essentially condoned his unlicensed activity." The Commission concluded that a one month suspension "was consistent with similar cases and is not extreme or harsh in the circumstances."

The Council submitted the activities by Mr. Legge were significantly more serious than those of Mr. Spong, but identified no specific reasons in support of this submission therefore it is necessary to refer to the particulars of *Legge*. In the case summary presented above, I note that the Commission concluded that Mr. Legge "knowingly breached" the *Mortgage Broker Act* by continuing to employ an unregistered submortgage broker for approximately 13 months and "essentially condoned his unlicensed activity." I also note that Mr. Legge paid a significant commission to the unregistered submortgage broker. Given these factors, I accept the submission of the Council that *Legge* is more worthy of a longer penalty because the activity was "knowingly breached" over a much longer time period than did Mr. Spong, involved the payment of a commission and the breach was condoned by Mr. Legge.

The direction to reconsider the penalty contained in *Spong* made specific reference to *Wong*. While I do not believe the reference was intended to require the Council to compare the seven day suspension of Mr. Spong with the penalty of Mr. Wong, the Council elected to do so in its reconsideration. Mr. Wong had appealed a decision of Council where Mr. Wong was found to have had misconducted himself within the meaning of section 31 of the *Real Estate Act* because he had failed to disclose material facts about a property. The Commission found that Mr. Wong deliberately withheld information he knew, or should have known, he had a professional responsibility to disclose. The Commission concluded that the range for penalties in cases involving failure to disclose material information to potential purchasers range from 30 days to four months and the range seemed to apply regardless of whether the offense was misconduct or negligence. Given mitigating circumstances, Mr. Wong was suspended for 45 days.

In *Shaw v. British Columbia (Real Estate Council),* [1987] B.C.C.O. No. 12 (CAC) (QL) Mr. Shaw, a nominee, appealed an earlier decision of the Council. The Council found Mr. Shaw and the brokerage firm were negligent within the meaning of section 9.12 of the Regulations under the *Real Estate Act* in that they did not exercise appropriate supervision and control as evidenced that an unlicensed individual continued to be employed as a real estate licensee and that they did not ensure that a system was in place to ensure that transactions were continuously monitored. The evidence indicated the unlicensed salesperson had been instructed by her employer to cease activities that required a license. Mr. Shaw was suspended for 30 days and the firm was reprimanded. The Commission upheld the suspension.

The Superintendent submitted the circumstances in *Spong* are more serious than in *Shaw* as Mr. Shaw cautioned his unlicensed employee not to engage in licensed activities and he did not profit from doing so and that Mr. Spong, on the other hand, directed Ms. Thoma to engage in licensed activities and profited from these activities on two occasions. Council submitted that "the disposition with respect to the managing broker and brokerage might be difficult to reconcile with more current cases" but gave no explanation why this may be the case.

The Council cited two cases in the first instance. In *Bird and West Coast Realty Ltd. dba Sutton Group-West Coast Realty*, (October 16, 2003), Council found that Mr. Bird breached the *Real Estate Act* in that he agreed to pay a commission or other compensation to an unlicensed assistant for acting, or attempting or assuming to act as an agent or salesperson and that Mr. Bird was incompetent within the meaning of section 9.12 of Regulation 75/61 that he allowed the assistant to hold herself out as a licensee without having a license. Mr. Bird was suspended for ten days.

The second case referenced in the first instance was *Harrap, Smithies and Martello Property Services Inc. dba CB Richard Ellis Property Management Services* (May 23, 2000). The Council found that Ms. Harrap was incompetent within the meaning of section 9.12 of Regulation 75/61 of the *Real Estate Act* in that she permitted an unlicensed person to manage rental units. Ms. Harrap was reprimanded.

Both Bird and Harrap involved findings of incompetence rather that misconduct and negligence and the Superintendent submitted it would be an error to consider these two cases. The Superintendent also submitted that these two cases contained no reasons for the penalty. I accept the position of the Superintendent to the extent that less weight should be placed on these two cases but I do not believe it need follow that no weight be assigned. I also accept the caution that these two cases offered no reasons for the penalty. Unfortunately, the same can be said for a number of the other cases cited.

Before making a final judgment, it is worth considering the other four cases cited that relate to findings of misconduct. The circumstances of the cases do not involve a licensed salesperson allowing and directing an unlicensed salesperson to perform licensed acts.

In *British Columbia (Superintendent of Real Estate) v. Hui*, [1998] B.C.C.O. No. 5 (CAC) (QL), Ms. Hui appealed a decision of Council. The Council found Ms. Hui had been negligent on three matters and she had misconducted herself on three matters and suspended Ms. Hui for 120 days. Council concluded Ms. Hui, amongst other actions, had provided a buyer with false information and misleading information, assisted the buyer to provide false and misleading information to a mortgage lender and drew an addendum to a Contract of Purchase and Sale which the representative knew was untrue. The Commission recognizes that "the broad purpose of the *Real Estate Act* is the protection of the public and maintaining standards of practice which will ensure that the public is not put at risk." The Commission further noted that misconduct that involves providing false or misleading information has been viewed by the Commission and the courts as being serious and deserving of a substantial penalty. The Commission added a further six months, for a total of ten months suspension for Ms. Hui.

The Council submitted the considerations in *Hui* were very different from Mr. Spong's Appeal. I accept this position.

In British Columbia (*Superintendent of Real Estate) v. Real Estate Council of British Columbia*, [2004] B.C.C.O. No. 2 (C AC) (QL), The Superintendent of Real Estate appealed a Consent Order between Mr. Chung and the Council in which Mr. Chung's registration under the *Real Estate Act* was suspended for 14 days on the basis he

misconducted himself within the meaning of section 31(1) of the *Real Estate Act* by showing a property to a former client while his license was suspended. Mr. Chung submitted he was mistaken about the period of the suspension and though the suspension was over before he showed the property to his former client. Mr. Chung was previously suspended for 90 days for having forged a signature on a multiple listing contract. The Commission found that Mr. Chung "was willfully blind and reckless with regard to the suspension period" and "willfully failed to confirm the duration of the suspension, despite ample opportunity to do so with a minimum of effort." The Commission further noted "that given the breach occurred while the respondent was subject to disciplinary action, it imports a gravity that it would otherwise not have." The Commission assessed a 30 day suspension for the misconduct noting it was within the normal range for such a finding, and a further 30 days because the misconduct occurred while suspended.

The Council submitted *Chung* was not particularly helpful because of Mr. Chung's previous record, the seriousness of the original offence and the question of Mr. Chung's credibility. The Superintendent submitted that the actions in *Chung* were less serious because Mr. Chung only participated in one transaction. I am inclined to the view that the circumstances in *Chung* are more serious than those committed by Mr. Spong.

In *McNeal v. Real; Estate Council of British Columbia*, [2002] B.C.C.O. No. 3 (CAC) Mr. McNeal appealed a Decision of the Council wherein the Council found the agent contravened the *Real Estate Act* when it paid funds that it was holding in trust out to a purchaser and that Mr. McNeal, as nominee for the agent, committed misconduct because he permitted the agent to pay the deposit to the purchaser without expressed written consent of the seller. The Council suspended the license of Mr. McNeal for seven days. The Commission noted that: "Regarding penalty, similar cases should be treated similarly. Based on the cases with similar fact and findings a seven day suspension for misconduct is appropriate in the circumstances." The Commission further noted: "Compared to some cases where trust funds were wrongfully paid out, the penalty is low." However, the following considerations were taken into account: Mr. McNeal admitted he paid out the funds; he did not benefit from the trust monies; and the funds were placed back into the trust account.

In *Saric, Wong and Multiple Realty Ltd, (July 10, 1989) (Real Estate Council of British Columbia)*, Mr. Saric was found negligent within the meaning of section 9.12 of the Regulations under the *Real Estate Act* in failing to complete a disclosure form to disclose that he was a purchaser of a property and found incompetent in witnessing a signature on the disclosure form contrary to the explicit instructions provided on the form. Mr. Saric was reprimanded. Catherine Wong and Multiple Realty Ltd. misconducted themselves within the meaning of section 20(1)(c) of the *Real Estate Act* in that they provided a blank disclosure form signed by the nominee, without having any knowledge as to the particulars which might be inserted later, contrary to explicit instructions on the form. Ms Catherine Wong was reprimanded and ordered to complete the lesson on Mandatory Requirements Under the *Real Estate Act*.

In referring the matter back to the Council, specific reference was made to "ensuring that the penalty imposed is not disparate with the penalties imposed in other cases.

"Reference was also made to providing a rationale for departing from the "threshold" identified by the Council in *Wong*. The Council also made submissions on *Wong*. The Council submitted that the actions of Mr. Wong are much more serious that those of Mr. Spong. The Council submitted that "Mr. Wong was essentially dishonest, he misled the selling agent and he acted in a conflict of interest as he was one of the owners (of the property) and clearly had a vested interest which he allowed to supercede his professional responsibilities." I accept this submission and place no weight on the specifics of the case.

In *Tse v. British Columbia (Real Estate Council),* [1991] B.C.C.O. No. 8 (CAC) (QL) Ms. Tse appealed a decision of Council. The Council had found that Ms. Tse, while a licensee under the Real Estate Act, acted as an agent without a valid license contrary to section 3(1) of the *Real Estate Act;* breached section 15(2) of the *Real Estate Act* by failing to deliver to her agent a deposit; and demonstrated incompetence within the meaning of section 9.12 of the Regulations under the *Real Estate Act*. The Council suspended Ms.Tse for 45 days. The Commission upheld the 45 day suspension and noted that "this Commission would expect that [agents] and nominees would not facilitate, condone or acquiesce in any such improper property management activities by their licensees. It appears that the Real Estate Council should at least consider assessing more stringent penalties in this area." Neither party appeared to place great weight on this case.

The Council has submitted that *Hui and Chung*, two other cases involving misconduct, deserve longer penalties than Mr. Spong. The Superintendent makes no specific submission on the penalty in *Hui*. The parties disagree on the relative positioning of *Chung* with the Superintendent arguing it is less serious than *Spong* because there was only one property involved. Given the other circumstances of *Chung* as noted above, I do not find this submission convincing and more inclined to accept the position of the Council on the significance of the Chung case.

The Superintendent further submitted that the appropriate penalty where a licensed person allows and directs an unlicensed person to perform licensed acts is in the range of one to three months. The three cases that meet these criteria support the position of the Superintendent's submission that the range of penalties is one to three months. It would then fall on the Council to find reasonable grounds for using a seven day penalty for Mr. Spong that falls outside this range. The Council submitted that the circumstances in *Horizon* are fundamentally different from Mr. Spong's circumstances. The Council further submitted that the circumstances in *Legge* are significantly more serious than those of Mr. Spong. Mr. Legge "knowingly breached" the *Mortgage Brokers Act* by continuing to employ an unregistered submortgage broker for over one year; paid a commission to this submortgage broker; and essentially condoned the unlicensed activity. In contrast, Mr. Spong's activities with Ms. Thoma lasted but a few months and involved no payment of commission. I am prepared to accept that the penalty for Mr. Spong should be significantly less than the penalty in *Horizon* and less than the 30 days in *Legge*. On the other hand, I see no compelling reason why the circumstances in *Shaw* should be considered less serious than those of Mr. Spong.

Based the six cases that meet the standard submitted by the Superintendent (that where a licensed salesperson allows and directs an unlicensed salesperson to perform licensed acts) I am prepared to accept the submissions that the activities of Mr. Spong deserve a lesser penalty that in either *Horizon* or *Legge*. I find that *Bird* and *Harrap* contribute little in that they relate to cases of incompetence rather than the more serious findings of misconduct or negligence. Indeed the Council submitted that "generally where there was a finding of misconduct, those cases will attract a more serious penalty. This is clearly true because to make a finding of misconduct there must be a degree of deliberateness or at very least a willful blindness in the face of improper conduct on the part of others."

While the facts in McNeal are quite different, I do find McNeal helpful to the extent a finding of misconduct attracted a penalty of seven days. The Commission acknowledged that seven days is low, but cited mitigating circumstances to justify the low penalty.

The Council has submitted some mitigating circumstances that should be given some weight. No member of the public complained or made submissions; this was Mr. Spong's first blemish as a licensee; Mr. Spong's demeanour at the hearings, including his regret for failing to diligently ensure Ms. Thoma was not crossing the line between permitted and unpermitted activities; and the short interval over which these activities occurred.

CONCLUSION

Having adopted the standard of reasonableness, it is appropriate to ask if there is a line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion reached. I believe the answer is yes, but the line is incomplete. The Council submitted that the facts in *Horizon* and *Legge* would justify a greater penalty that Mr. Spong. I accept this submission and am comfortable concluding a penalty of less that 30 days is appropriate. Therefore I am left to understand how one would reasonably move from a penalty less that *Legge* to one of seven days and at this point the line becomes incomplete. The Council elected to rely on Bird, a case with similar facts, but a lesser finding of incompetence where the penalty was 10 days. The Council justified adopting a lesser penalty of seven days solely on the basis of the finding in Bird relating to the fact that Mr. Bird agreed to pay a commission whereas Mr. Spong refused to pay a commission. But the Council offered no reasons for not making allowances for the finding of negligence and misconduct rather than incompetence and by their own submission, this is an important consideration.

I am mindful of the fact that the Council had three days of hearings and an opportunity to reconsider the penalty. This is not to be dismissed lightly. And I accept the position that the Tribunal should be reluctant to interfere unless the penalty is unreasonable. However, I believe in this case the penalty of seven days is unreasonable.

Appropriate Penalty

Section 242.2(11) of the Financial Institutions Act allows a member hearing an appeal to "confirm, reverse or vary a decision [or] send it back for reconsideration, with or without directions." This matter has been sent back on one occasion already and I see little purpose in sending it back again.

For reasons presented earlier, I reject the submission of the Superintendent that the penalty should be between six and eight weeks. I believe a penalty of less that 30 days is justified in this case and determine that a penalty of 14 days is appropriate. I believe a penalty of 14 days is sufficient to preserve public confidence in the system since other cases of misconduct arising from somewhat different facts have been granted lesser penalties. I am also mindful that the Council commented favorably on Mr. Spong's demeanour during the hearings and I am satisfied the 14 days will serve to discourage him from offending again.

Accordingly I order that:

1. The suspension of the license of Mr. Spong imposed by the Council shall be varied to increase the suspension to a period of fourteen (14) days;

2. The Council order concerning completion of Chapter 2 of the Real Estate Licensing Course was not under appeal and therefore remains in effect; and

3. The Council order in respect of costs was not under appeal and therefore remains in effect.

The parties to this Appeal have sought costs. Given that the Tribunal is still at the early stages of establishing a reasonable set of decisions and given that the parties were responsible in presenting their positions, I have decided that costs should not be awarded.

DATED AT VANCOUVER, BRITISH COLUMBIA, this 6th day of February, 2007.

FOR THE FINANCIAL SERVICES TRIBUNAL

Stanley W. Hamilton
Presiding Member