FST 04-001

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF
THE REAL ESTATE ACT
R.S.B.C., 1996, c. 397, as amended

BETWEEN:

RONALD PATRICK THOMSON

APPELLANT

AND:

THE SUPERINTENDENT OF REAL ESTATE

RESPONDENT

APPEAL BY WRITTEN SUBMISSIONS

BEFORE: JOHN B. HALL PRESIDING MEMBER

DATE OF LAST SUBMISSION: JANUARY 26, 2005

APPEARING: RONALD THOMSON FOR THE APPELLANT

SANDRA A. WILKINSON FOR THE RESPONDENT

THE DECISION AND REASONS OF THE TRIBUNAL ARE DELIVERED BY THE PRESIDING MEMBER.

INTRODUCTION

Ronald Thompson was licensed under the *Real Estate Act* as an agent nominee with Century 21 Icarus Realty Ltd. in Nanaimo. His license was suspended by the Superintendent of Real Estate in April 2004 after he was convicted of offences under the *Criminal Code of Canada* and the *Controlled Drugs and Substances Act*. Mr. Thomson has appealed the Superintendent's Order to this Tribunal, which replaced the Commercial Appeals Commission for purposes of appeals under Section 79 of the *Real Estate Act*.

ISSUES

The primary issue is whether the Superintendent erred when he suspended Mr. Thomson's license for an unspecified period of time. If that question is answered in the affirmative, it will be necessary to determine whether the Tribunal should reverse or vary the Order, or should refer the matter back to the Superintendent for reconsideration.

THE APPEAL PROCESS

Section 242.2(5) of the *Financial Institutions Act* provides that an appeal to the Tribunal is "… an appeal on the record, and must be based on written submissions". Subsection (8) allows the Tribunal to permit oral submissions on application by a party; neither party made such an application in this case, and the appeal proceeded by way of written submissions.

The result has not been an expedient process. Mr. Thomson's appeal was received by the Tribunal on June 15, 2004. He was then granted two consecutive 30-day extensions by the Chair. In the meantime, the Superintendent noted Mr. Thomson intended to rely on new evidence, and requested the time for filing submissions be adjourned so that Mr. Thomson could provide his new evidence with his written submission. This direction was made by the Tribunal, and Mr. Thomson filed his main appeal document on October 21, 2004. The Superintendent's submissions were filed on November 10, 2004 and Mr. Thomson's final submissions were

received on November 30, 2004.

Unfortunately, the submission process did not end at that point. Mr. Thomson's "final submissions" raised new, substantive arguments having potential merit. As a matter of fairness, the Superintendent was given an opportunity to address the new points. The Superintendent's surreply was received on January 7, 2005 and Mr. Thomson's last submission was received on January 26, 2005. Thus, submissions finally closed nine months after the Superintendent's Order was issued. I must also note it would have been helpful in this particular appeal to have the parties before me to answer questions concerning aspects of their submissions.

As recorded above, Mr. Thomson's appeal indicated he intended to rely on new evidence. Section 242.2(8)(b) allows the Tribunal to admit new evidence where the conditions described in that provision are satisfied. The Superintendent opposed Mr. Thomson's request; alternatively, the Superintendent requested that other new evidence be admitted in response to the appeal. I have decided during my deliberations to admit the new evidence from both parties, except for the results of a "Google" search by Mr Thomson on the internet. In any event, the results of the search go to a point made by Mr. Thomson through other admissible material. Aside from meeting the requirements of Section 242.2(8)(b), I am satisfied the new evidence was needed to ensure a full adjudication of the appeal -- especially as no hearing was held before the Superintendent's Order was issued.

BACKGROUND

Mr. Thomson was originally licensed as a real estate salesperson in January 1993. He became a licensed agent nominee in February 1998. In November of that year, he was arrested in what was later described as "the biggest hashish bust in B.C. history" (*The Province*, April 14, 2004 at p. A6). Mr. Thomson and eight co-accused were charged by the Royal Canadian Mounted Police on February 3, 1999 with six counts related to the importation, trafficking and possession of about 12 tons of cannabis resin.

Mr. Thomson attended Vancouver Provincial Court on some 88 occasions between February 1999 and April 2004 in connection with the charges. The trial took about 170 days. Final reasons were delivered on April 13, 2004. Judge Elizabeth Arnold found Mr. Thomson guilty on four of the counts, and acquitted him on two others; she then entered a judicial stay of proceedings on one of the counts. The charges against Mr. Thomson were dealt with at paragraphs 307-323 of the judgment, and included these findings:

> [321] Based on all the evidence relating to Ronald Thomson, viewed in the context of all admissible evidence at trial, the only conclusion I can properly reach is that he was a party to the agreement to import and traffic the cannabis resin brought into Canada on the "Ansare II" at Fanny Bay. I find him to be an off-load conspirator in terms of his proven links with Fitznar, Guilbride and Kenneth Thomson. He had a clear role to assist with the actual importation at Fanny Bay, by performing a scouting and reconnaissance function in the early morning hours of November 4, 1998. He also was very involved in setting up the warehouse to receive, pack and ship the shipment of cannabis resin. The references to radios and batteries in Exhibit 50 indicate that he also performed a function in terms of the operability of communications equipment. While he played a less active role than either Fitznar or Guilbride, and a different role than Kenneth Thomson, he was clearly linked to the import side by virtue of his repeated contacts with Fitznar, who in turn was in touch with Goyer, who is proven to have been definitely linked to the "Blue Dawn" and its meeting with the "Ansare II". Therefore, I find Ronald Thomson to be a party to the conspiracy alleged in Counts 1 and 2, beyond a reasonable doubt, and I enter a conditional judicial stay in relation to Count 2 only.
>
> [322] I turn now to consider whether or not Ronald Thomson was a party to the importation of cannabis resin from the "Ansare II" (Count 3). Given that I have found the offence of importing to include the unloading of the "Ansare II" at the dock at Fanny Bay, there is no doubt on the evidence that Ronald Thomson was a party to that offence, by virtue of his presence in the gray van with Fitznar, in the vicinity of the dock, at a time when it was anticipated that the unloading would have been completed, and no communications from those on the dock had been received. His role, like that of Fitznar, was to act as a sophisticated form of scout or reconnaissance person to watch out for the police and coordinate the movement of 9.6 metric tones of cannabis resin. I find that Ronald Thomson, beyond any reasonable doubt, aided and abetted the importation by virtue of s. 21(1) of the *Code*. … For these reasons, I convict Ronald Thomson of Count 3.

> [323] Ronald Thomson is also charged as a party to the possession for the purpose of trafficking in relation to the same shipment of cannabis resin (Count 4). … I find it proven, beyond a reasonable doubt, while the cannabis resin was being unloaded by others at the dock, Ronald Thomson knew of the operation, consented to the possession by others, and by virtue of his role as scout and communications coordinator in the gray van, exercised a meaningful element of control over the drugs. His activities in the days leading up to November 4, 1998, and in the early morning hours of that day, lead irresistibly to only that conclusion. Therefore, I find that he was in "constructive possession" of the cannabis resin seized at Fanny Bay, by virtue of s. 4(3)(b) of the *Code*, which includes a meaningful element of control. I find him guilty of Count 4.

Mr. Thomson had continued to work as a nominee while the charges were pending. He advised the Real Estate Council of his situation, and says he corresponded with the Council throughout the criminal proceeding. Mr. Thomson also indicated he was "presently subject to a charge or indictment" when he submitted his license renewal applications to the Council. His license was renewed at least twice after the charges were laid.

The events leading to Mr. Thomson's suspension were set in motion by publicity surrounding the judgment. A "Briefing Document" dated April 27, 2004 was prepared for the Superintendent following an article in the *Vancouver Sun*. The document provided details of the charges and attached additional information. The author described the situation as "a very serious matter" and recommended Mr. Thomson's license be suspended immediately. The Superintendent acted on this recommendation, and issued an Order under Section 31(10) of the *Real Estate Act* on April 28, 2004. The operative paragraphs read as follows:

> NOW THEREFORE the Superintendent is of the opinion that the licensee is not a suitable person to be licensed, and the licence should be suspended.
>
> TAKE NOTICE THAT the Superintendent is also of the opinion that it is in the public interest to make an order under Section 31(10) of the Act suspending the licence of licensee and nominee Ronald Patrick Thomson. The license of Ronald Patrick Thomson is hereby suspended.
>
> AND ALSO TAKE NOTICE THAT the Superintendent considers that the length of time that would be required to hold a hearing would be prejudicial to the public

> interest, so Robert [sic] Patrick Thomson's license is suspended without giving him the opportunity to be heard pursuant to Section 31(12)(a) of the Act.

Mr. Thomson was sentenced to four years' imprisonment on May 25, 2004. His Notice of Appeal was filed in the Court of Appeal two days later. He is under conditions of recognizance which, among other terms, require him to surrender his passport and remain within British Columbia. Mr. Thomson's release pending determination of his criminal appeal means his detention was not "necessary in the public interest": Section 679(3) of the *Criminal Code*. The Crown has filed an appeal seeking to have Mr. Thomson's sentence increased.

SUMMARY OF SUBMISSIONS

I have considered all of the materials on file, but will only address the more salient submissions. Some of the points raised by the parties are not supported by the record (e.g. the suggestion Mr. Thomson might engage in "money laundering"), while others (e.g. whether Mr. Thomson needed leave to appeal his conviction) stray from the central issue on appeal.

The thrust of Mr. Thomson's appeal to the Tribunal is found at pages 9-10 of his "final submissions". Mr. Thomson notes he remained licensed as an agent nominee for over five years after the charges were laid, and did not abscond with the trust account or behave in any fashion contrary to the public interest. Thus, at stake is the secondary public interest of the reputation and status of licensees in the real estate business generally: *Re Clough*, [1984] B.C.C.O. No. 3 (CAC). Mr. Thomson also argues his interest in pursuing his chosen profession is bolstered by the premise that revocation of a license constitutes interference with an existing right, and not a privilege: *Michael Yardly -and- Real Estate Council of B.C.*, CAC-9316 (February 25, 1994). He relies further on "the societal shift in views towards marijuana" as a factor when considering the reputation of licensees. Mr. Thomson seeks to have the Superintendent's Order overturned and the suspension lifted. Alternatively, he submits a time frame and/or conditions should be added to the suspension (for instance, that he be permitted to practice as a licensed salesperson).

The Superintendent argues there has been no change in circumstances. The Notice of Appeal does not change the fact Mr. Thomson has been found guilty of multiple criminal offences involving controlled substance importation, trafficking and possession. The Superintendent maintains the suspension is warranted in the public interest while awaiting a determination on appeal; put simply, any hardship on Mr. Thomson from having his license suspended is outweighed by the public interest. Further, it was reasonable to determine that someone convicted of these crimes is not of good reputation, would bring the profession into disrepute, and is unsuitable to be licensed under the *Real Estate Act*. For these and other reasons, the Superintendent seeks an order confirming the suspension with costs. Alternatively, if the terms of the suspension were "too vague", the Superintendent says the Order should be varied by making Mr. Thomson ineligible for a period of five years from the original Order or from the date his sentence is completed, whichever is later.

ANALYSIS

None of the authorities referred to in the parties' submissions reveals a direct parallel to the present circumstances. This observation applies to the nature of the charges; it applies as well to the fact the suspension was imposed several years after the charges were laid, but before the criminal proceedings had been completed. Nonetheless, considerable guidance can be taken from general statements of principle.

An appropriate starting point is the list of a nominee's responsibilities found in a document distributed by the Real Estate Council in early 2002 ("The Responsibilities of a Nominee Under the Real Estate Act"). The list provides ample support for the Superintendent's view that the activities of a nominee carry considerable responsibility to ensure the proper conduct of an agency with respect to licensees and the public. More generally, Section 4.01(c) of the Real Estate Regulations provides that every person who applies for a license under the *Real Estate Act* and "each nominee [of a partnership or corporation] shall … be of good reputation".

The Licensee Practice Manual prepared by the Real Estate Council, and given to all licensees, provides guidance on how the "good reputation" requirement applies to criminal convictions:

> **C. "Good Reputation" - Guidelines**
>
> Regulation 4.01 states that every applicant for a licence shall, among other things, be of "good reputation". General business and personal reputation in addition to criminal convictions and charges will be reviewed when considering an applicant's "good reputation". …
>
> Applications from individuals with criminal records will not be considered until the following periods have passed following convictions: …
>
> 2. Indictable offences
>
> (a) *Indictable offences unrelated to employment* – e.g., possession of narcotics for the purpose of trafficking.
>
> Applications from applicants will not be considered until at least one year following completion of sentence, parole and/or probation. These would include indictable offences for which the applicant received a sentence of imprisonment, a fine, a suspended sentence and probation, or a conditional discharge and probation.

Both parties agree the main issue raised by Mr. Thomson's appeal involves a balancing of interests. They additionally agree the interests at play were identified in *Clough, supra*. In that case, the Superintendent refused to renew the license of a nominee who had been convicted of fraud. The Commercial Appeals Commission was similarly required to consider the "status … of a criminal conviction while it is under appeal":

> In my view this is not a contest between the appellant and the respondent superintendent. It is a contest between the appellant on the one hand and the interest of the public generally on the other. The whole licensing scheme under the *Real Estate Act* is designed for the protection of the public. The legislature obviously feels that no one should be allowed to engage in real estate brokerage without being qualified for and obtaining a licence so that the public will be protected from unqualified, incompetent or dishonest brokers. A real estate broker is a person on whom a reasonable man is inclined to rely, expecting good advice and, certainly, integrity.

> Looked upon in that light, it seems clear that what we have to do is make a judgmental choice between inflicting hardship on the appellant and the protection of the public of the Province generally.
>
> A further consideration, although not of quite such importance, [is] support of the reputation and status of licensees in the real estate business generally. This last is also in the public interest. (QL p.4)

The conviction in *Clough* was "related to employment" as the charges stemmed from certain real estate transactions. However, the majority of the panel did not rely on this distinction when determining the public interest should prevail:

> To allow this appeal would be equivalent to ruling that a man who has been convicted of such fraud may continue to exercise the rights and privileges of a real-estate licence by filing a notice of appeal. Not all appeals are pressed to a hearing. Not all appeals that are pressed to a hearing are successful. I do not think that door should be open except, possibly, in most unusual cases. (QL pp. 4-5)

The dissenting member of the panel would have allowed the appeal based on "a preponderance of irreparable detriment to the appellant as opposed to the public in general" (QL p. 6).

Thus, based on *Clough*, the potential hardship to Mr. Thomson must be weighed against the interest of the public. A somewhat analogous approach was described in *Law Society of Upper Canada -and- Johnston*, [2001] L.S.D.D. No. 59 (LSUC), where a hearing panel facing an adjournment application explained the discipline process may be adjourned pending the outcome of criminal proceedings in certain situations:

> … The Law Society discipline process is often put on hold while proceedings involving the lawyer in the criminal courts are pursued to completion. The factors taken into account in deciding whether to put the discipline process on hold include a balancing of the competing interests. The accused lawyer is interested in obtaining fair treatment, in exhausting other remedies and in ensuring that there are no conflicting results in the two processes. There is also the public interest in the integrity of the administration of a self-governing

> regulatory scheme for lawyers. … (para. 8)

The hearing panel in *Johnston* refused the adjournment request. The lawyer had been cited with "conduct unbecoming" after he was criminally convicted on two counts of obtaining for consideration the sexual services of a person under the age of 18, and was later convicted on one count of assault. He had been an assistant crown attorney at the relevant times, and had prosecuted a rape trial in which one of the under-aged persons was the complainant. More than three years had elapsed since the Law Society began the discipline process. The lawyer had not prepared an application for leave to appeal the criminal convictions and, moreover, the time for filing the application "had long since expired" (para. 7). In the circumstances, the hearing panel quite understandably decided the discipline process should proceed.

What public interests are at stake in the present case? The suggestion that a suspension is needed "for the protection of the public" is refuted by the fact Mr. Thomson continued to practice as a nominee for more than five years after the criminal charges were laid. The Real Estate Council was aware of his situation, and there is no evidence to support a finding that he failed to act with integrity throughout this period; nor is there any indication the Council believed it prudent to monitor his practice. Mr. Thomson has provided admittedly limited confirmation of his reliability since the charges were laid. The evidence includes a letter from a client who will continue to recommend Mr. Thomson to other buyers and sellers based on him having been "trustworthy, reliable, diligent and professional throughout our [10 year] relationship".

Thus, the relevant public interest here is "the support of the reputation and status of licensees in the real estate business generally": *Clough, supra*. On that account, I reject Mr. Thomson's arguments based on societal views as expressed in the *Report of the Senate Special Committee on Illegal Drugs* (September 2002); *R.v. Malmo-Levine*, [2003] 3 S.C.R. 571; and Madame Justice Southin's dissent in *R.v. Schedel*, 2003 BCCA 364. Regardless of where one stands in the debate over decriminalizing the personal use of marijuana, trafficking is an entirely different subject. To that end, the Senate Committee specifically recommended criminal penalties for

illegal trafficking (p. 46), and proposed that "[r]esources available to police and customs to fight to smuggling … and cross-border trafficking should be increased" (p. 57).

Mr. Thomson appears to have recognized the gravity of his conviction in a letter he wrote before the Superintendent's Order was issued. He referred to changing public opinion, but allowed "… the fact remains that Parliament still views this as a very serious offence" (letter of April 22, 2004 at p. 2). Mr. Thomson also appreciates the consequences should the Court of Appeal rule against him. If the appeal is unsuccessful and results in a period of incarceration, he states "I would of course surrender my license at that time". The nature and scale of Mr. Thomson's offence should also be considered. His involvement was summarized in the passages from Judge Bennett's reasons quoted earlier. Statistics provided by the Superintendent establish the amount of hashish he and his co-accused attempted to import was about 75% of all hashish seized by authorities during that year for all of Canada. Without belabouring the point, I find the Superintendent reasonably concluded the reputation and status of licensees generally would be undermined by Mr. Thomson's conviction.

What of Mr. Thomson's interests? The Superintendent argues he is qualified to pursue other means of income. However, I find the opportunities are limited, and he is certainly precluded from pursuing what he describes as his "chosen profession". Further, he has been precluded from doing so over the last 11 months and, given the terms of the Order, remains suspended indefinitely.

This last observation leads to my primary concern with the Order; namely, its indefinite duration. My concern is reinforced by the fact that its one year anniversary will soon occur. That period co-incides with the one year "waiting period" the Council has as a guideline for considering applications from persons who have been convicted of indictable offences unrelated to employment. Moreover, the specific offence listed in the guidelines is "possession of narcotics for the purpose of trafficking": *Licensee Practice Manual*, at p. 168. Mr. Thomson is in a stronger position than an applicant: he held a license, such that the suspension was an

interference with his right to make a living: *Yardly*, *supra*, quoting *Re Coates et. al. -and- Registrar of Motor Vehicle Dealers and Salesmen* (1989), 65 O.R. (2d) 526.

I have not been directed to any authority where an indefinite suspension has been approved as a final sanction in a professional or regulatory setting. Some statutes allow professional bodies to suspend a member as an interim measure, but this is done pending an investigation or hearing. In other situations, suspensions without a fixed term have been imposed, but the suspensions have been tied to a future event such as satisfactory completion of remedial training. Mr. Thomson's suspension is open-ended. It effectively amounts to a cancellation without any qualification such as a hearing into his suitability to be licensed (in fact, his license expired in January of this year). In response to Mr. Thomson's alternative argument that the Order should have contained a specific time frame and/or conditions, the Superintendent's surreply acknowledges "… the suspension order should have defined the period of suspension in order to provide [Mr. Thomson] with an indication of the onus which must be discharged for relicensing" (para. A.3). See *Khosla -and- Real Estate Council of British Columbia*, [2000] B.C.C.O. No. 11 (CAC), at para. 30.

Thus, the issue becomes the appropriate length of Mr. Thomson's suspension. Should it be lifted because the period since the Order is adequate under the circumstances, as he argues? Or should the sentence be converted to a period of five years, as the Superintendent submits? Those questions raise many competing considerations. But there is another question which necessarily precedes the inquiry: Who should make the decision in the first instance?

The last question is answered implicitly by one of the Superintendent's authorities: *Re Royal College of Dental Surgeons of Ontario and Shankman* (1980), 119 D.L.R. (3d) 289 (Ont Div Ct). The issue before the court was whether the penalty imposed by a disciplinary committee was appropriate. The majority decided to impose a more severe penalty; the dissenting judge would not have disturbed the original suspension. However, both opinions stressed the constraints which should apply where an appeal is taken from a committee composed largely of members of

a profession, and who have seen and heard witnesses: see the majority at QL pages 21-22. The dissenting judge expressed his concerns in this manner:

> Although this matter is before the Court as an appeal, s. 13(2) gives the Court much broader powers than are usually vested in an appellate tribunal. In spite of this authority, it is my opinion that our discretion is not totally unfettered.
>
> The [Discipline] Committee had the advantage of seeing, hearing and observing witnesses. *The majority of the members of the Committee belong to the profession of dentistry. They, for the most part, are in a better position than this Court to determine the appropriate penalty*, and we should be reluctant to interfere with their determination except in the clearest of cases. (QL p. 25; emphasis added)

Two points flow from the court's analysis in *Shankman*: first, the duration of the suspension should preferably be determined by the real estate profession, as Mr. Thomson proposes in his last submission; and second, the decision should be made following a hearing where witnesses can be heard and observed. My view that the matter should be heard by a person or body appointed under the *Real Estate Act* is reinforced by recognizing the outcome will ultimately turn on Mr. Thomson's suitability to hold a license: see *Khosla, supra;* and *British Columbia (Superintendent of Real Estate) -and- Real Estate Council of British Columbia*, [2002] B.C.C.O. No. 2 (CAC). See also *Administrative Law in Canada*, Sara Blake (Third Edition), at p. 59.

Section 31(12)(a) of the *Real Estate Act* allows the Superintendent to suspend a license "without giving the licensee ... an opportunity to be heard" where the Superintendent "considers that the length of the time that would be required to hold a hearing would be prejudicial to the public interest". It is not possible to assess whether the Superintendent's decision to not give Mr. Thomson an opportunity to be heard was a proper exercise of this discretion at the time, as no reasons were given for that aspect of the Order. But I have little hesitation concluding any prejudice to the public interest caused by holding a hearing is now outweighed by Mr. Thomson's interests -- particularly when one recalls the fast approaching anniversary of the suspension. An additional reason for giving Mr. Thomson an opportunity to be heard is the apparent lack of redress should his appeal of the criminal conviction be allowed.

CONCLUSION

Section 242.2(11) of the *Financial Institutions Act* allows a member of the Tribunal to "confirm, reverse or vary a decision under appeal, or … send the matter back for reconsideration, with or without directions, to the person or body whose decision is under appeal". I have decided the Order suspending Mr. Thomson cannot be allowed to operate indefinitely. However, I have also decided the duration of the suspension should be determined following an oral hearing before a person or body appointed under the *Real Estate Act*. Thus, the appropriate remedy is to remit the matter to the Superintendent with directions pending a hearing.

The above outcome was not anticipated by either party in their written submissions, and they should be allowed to address the form of the directions for reconsideration. Further, the new *Real Estate Services Act* has been proclaimed, and it may have a bearing on my final decision. The Tribunal will contact the parties to canvass the most expeditious process for concluding this appeal, and I reserve jurisdiction for that purpose.

This is not an appeal where costs should be ordered under Section 47(1) of the *Administrative Tribunals Act* as both sides have had partial success in advancing their respective positions.

DATED AT VANCOUVER, BRITISH COLUMBIA, this 4th day of APRIL, 2005.

FOR THE FINANCIAL SERVICES TRIBUNAL

JOHN B. HALL
PRESIDING MEMBER

CORRECTION:

The FST has amended this decision to correct a typographical error. On page 14, the second paragraph of original decision read:

CONCLUSION

Section 242.2(1) of the *Financial Institutions Act* allows a member of the Tribunal to "confirm, reverse or vary a decision under appeal, or … send the matter back for reconsideration, with or without directions, to the person or body whose decision is under appeal".

The decision now reads:

CONCLUSION

Section 242.2(11) of the *Financial Institutions Act* allows a member of the Tribunal to "confirm, reverse or vary a decision under appeal, or … send the matter back for reconsideration, with or without directions, to the person or body whose decision is under appeal".

FST Deputy Registrar
April 22, 2005