**FST 05-009**

**FINANCIAL SERVICES TRIBUNAL**

IN THE MATTER OF
FINANCIAL INSTITUTIONS ACT R.S.B.C. 1996, CHAPTER 141, AS AMENDED

BETWEEN:

FINANCIAL INSTITUTIONS COMMISSION

APPELLANT

AND

INSURANCE COUNCIL OF BRITISH COLUMBIA
AND MARIA PAVICIC

RESPONDENTS

**APPEAL DECISION**

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

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

Appeal Decision Date: November 22, 2005

## INTRODUCTION

By virtue of a letter dated July 4, 2005, I was appointed the member of the Financial Services Tribunal ("Tribunal") to consider the appeal of the decision of the Insurance Council of British Columbia (the "Insurance Council") dated February 28, 2005 regarding Maria Pavicic ("Ms. Pavicic").

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

The Insurance Council ordered that Ms. Pavicic:

> "(1) receive a two week suspension;
> (2) be fined $1,000;
> (3) pay the costs of [Insurance] Council's investigation into this matter assessed at $1,237.50; and,
> (4) as a condition of this Order, the Licensee [Ms. Pavicic] is required to pay the above mentioned costs and fine by May 28, 2005. If the Licensee does not pay the ordered costs and fine by this date, the Licensee's license is suspended as of May 29, 2005, without further action from [Insurance] Council."

## APPLICATION FOR LATE FILING

I have been asked to first deal with an application for late filing submitted by legal counsel representing the Superintendent of Financial Institutions. This application is a result of an earlier ruling of the Tribunal dated June 23, 2005, which in essence determined that the original appeal involving Ms. Pavicic was of no legal effect. Legal counsel for the Superintendent of Financial Institutions submitted a "Notice of Appeal and Application for Leave to File Late", dated June 27, 2005. Notice of this application and the new appeal were provided to the Respondents, Ms. Pavicic and the Insurance Council. To expedite the appeal process, the Appellant's Submissions, together with the Book of Authorities of the Appellant were filed prior to a decision on the application for late filing. The Insurance Council and Ms. Pavicic were notified that they had until July 25, 2005 to reply to the Appeal Submissions. The Submissions and Book of Authorities of the Respondent Insurance Council were received on July 22, 2005. I have not received submissions on behalf of the Respondent Ms. Pavicic. The final Reply Submission of the Appellant was received on July 28, 2005. The Respondent Insurance Council takes no position with respect to the application for late filing.

In the documents filed in support of the Application for Leave to File Late, legal counsel for the Superintendent of Financial Institutions provided its reasons for the late filing application. I am satisfied that counsel error was the reason for the original improper filing of the initial appeal proceedings. I am also satisfied that there would be no

unreasonable prejudice to any of the parties to these proceedings if the application for late filing of the appeal is allowed. I am mindful that virtually identical circumstances were addressed by the Tribunal in *Financial Institutions Commission and Insurance Council of British Columbia and Branislav Novko* ("Novko Appeal") and that the Tribunal concluded the application for late filing of the Notice of Appeal be granted. Accordingly, the application on behalf of the Superintendent of Financial Institutions for leave for late filing of the Notice of Appeal is granted. Further, the filing of the Notice of Appeal, the Appellant's Submission and the Book of Authorities of the Appellant, the Submissions and Book of Authorities of the Respondent Insurance Council and the final Reply Submission of the Appellant are acknowledged and accepted.

**FACTS**

The facts and the findings of the Insurance Council are contained in the Insurance Council's letter to Ms. Pavicic dated February 2, 2005. The facts upon which the Insurance Council relied are not in dispute.

On December 9, 2004 an Investigative Review Committee (the "Committee") met with Ms. Pavicic to discuss allegations that she:

1. Procured insurance coverage for applicants under her name to conceal the fact that the coverage had been solicited and negotiated by an unlicensed person;
2. Signed as 'witness' to applicants' signatures on insurance transactional documentation without in fact witnessing their signatures; and
3. Paid compensation to an unlicensed person who carried on insurance activities which require an insurance license.

The Committee prepared a report based on this meeting and it was presented to the Insurance Council at its January 18, 2005 meeting. Based on the information contained in the Committee's report and the investigation report dated November 23, 2004, the Insurance Council made the following findings of fact:

1. Ms. Pavicic has been licensed in British Columbia since 1991;
2. Ms. Pavicic was approached by a former life insurance agent named Slavica Nukmanovic ("Slavica"), who is also known as Slavica Vukmanovic, to place insurance coverage for individuals based on applications Slavica had taken from them. Five applications were taken in total;
3. Ms. Pavicic, who did not previously know Slavica, agreed to help her after being led to believe she was experiencing difficult times, that Slavica took the applications while licensed, and that she was in the process of becoming re-licensed with the Insurance Council;
4. Ms. Pavicic trusted Slavica and did not question whether she had in fact taken the applications while licensed. Ms. Pavicic did not contact the Insurance Council to determine Slavica's licensing status;

5. Ms. Pavicic signed the insurance applications and a basic disclosure statement as the agent, signed as "witness" to applicant signatures on the transactional documentation without having witnessed the signatures, and them remitted the documentation to insurers for placement of coverage under her agent contacts. This was carried out by Ms. Pavicic without having met or discussed the transactions with any of the applicants;
6. The transactional documentation provided to Ms. Pavicic by Slavica, which included insurance quotes and applicant premium cheques, were dated between May 27, 2003 and July 11, 2003. Slavica's license with the Insurance Council expired on April 30, 2003;
7. Ms. Pavicic paid Slavica compensation of $312.00 for her activities;
8. Only two applicants proceeded with the coverage. Ms. Pavicic subsequently met one of the applicants to review the appropriateness of the coverage. The other applicant appointed a new agent of record; and
9. Ms. Pavicic stated her office was busy at the time and she was also experiencing some family problems. She further indicated that Slavica was very manipulative. However, Ms. Pavicic acknowledged that ultimately there is no excuse for her conduct and she was remorseful for her actions.

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

- Ms. Pavicic did not act in good faith and in accordance with the usual practice of the business of insurance, as required under Insurance Council Rule 3; and,
- Ms. Pavicic compensated an unlicensed person for carrying on activities which require an insurance license, despite being prohibited from doing so under the Act. In particular, contrary to Insurance Council Rule 7, Ms. Pavicic did not comply with Insurance Council's Code of Conduct which makes it a requirement for her to adhere to the Act.

Prior to December 31, 2004, these facts would have constituted breaches under section 231(1) (a) and (b) of the Act.

The Insurance Council considered the Committee's report and made particular note of evidence it found mitigating, namely the Insurance Council learned of the misconduct from Ms. Pavicic "who reported the circumstances to [Insurance] Council staff and sought direction on what steps to take to help ensure that the applicants would not be prejudiced in this matter."

The Insurance Council made its decision with respect to penalty, fines and costs as outlined above. Ms. Pavicic was notified of her rights to dispute the Insurance Council's findings or intended decision, but she declined to do so.

## GROUNDS FOR APPEAL

The Appellant concurs with the Insurance Council finding of breach, and the imposition of a fine and costs, but appeals its decision with respect to the period of suspension on the following grounds:

a) It did not adequately address the seriousness of the conduct in question as disclosed by the evidence contained in the Record, including the Written Reasons and consequently;
b) It wrongly concluded that a period of suspension of only two (2) weeks was appropriate in the circumstances.

## ADMISSION OF NEW EVIDENCE

The Appellant seeks to introduce new evidence in the Appeal. The Appellant submits that the Order of the Superintendent of Financial Institutions issued February 7, 2005 ordering Slavica to cease from either directly or indirectly acting as an insurance agent in British Columbia ("Slavica Order") should be admitted as new evidence. The Appellant submits that the Slavica Order occurred after the Insurance Council made its original decision relating to Ms. Pavicic and is relevant for information purposes since it relates to one of the persons involved in the transactions in question. The Respondent Insurance Council does not oppose the Appellant's request to admit the Slavica Order as new evidence.

Section 242.2(8)(b) of the Act provides for the introduction of evidence. The Act states:

> "(8) On application by a party, the member considering the appeal may do the following:
>
> (a) permit oral submissions;
> (b) permit the introduction of evidence, oral or otherwise, if satisfied that new evidence has become available or been discovered that
>
> (i) is substantial and material to the decision, and
> (ii) did not exist at the time the original decision was made, or, did exist at the time but was not discovered and could not through the exercise of reasonable diligence have been discovered."

The immediate question before the Tribunal is whether the Slavica Order satisfies the requirements as set out in Section 242.2(8)(b). In my view, the Slavica Order meets the requirements of being new evidence that was not available at the time of the original decision, and also meets the requirements of being substantial and material to the decision as it provides insights into the activities of Slavica at approximately the time Ms. Pavicic became involved with Slavica. I direct that the Slavica Order be admitted as new evidence.

## STANDARD OF REVIEW

The Tribunal has considered the question of the standard of its review of a decision of an administrative tribunal by way of two appeals to the Tribunal. In *Danh Vanh Nguyen and Express Mortgages Ltd.* ("Nguyen Appeal"), an appeal decision dealing with breaches of the *Mortgage Brokers Act*, the Tribunal concluded that the standard of review in the Nguyen Appeal must be premised upon whether or not there were reasonable grounds for the administrative body to reach its decision based upon clear and cogent evidence presented before the body. The Tribunal also concluded that the it should not reconsider the evidence in the form of a "re-hearing", rather, deference must be given to the findings of fact and the assessment of credibility made by the administrative body that actually experienced the hearing procedure, heard the witnesses, saw the documentary evidence and, combined with their experience and knowledge, was in the best position to make the findings of fact found in the decision. The Tribunal notes that, in its view, this is the standard contemplated in the Act and in case law, in particular Dr. Q v. College of Physicians and Surgeons of British Columbia [2003] 1 S.C.R. 226, 2003 SCC19 and Re Galaxy Sports Inc. (2004) BCCA 284.

The standard of review was again addressed by the Tribunal in *Financial Institutions Commission and Insurance Council of British Columbia and Branislav Novko* ("Novko Appeal"), an appeal decision of the Tribunal dealing with breaches under the *Financial Institutions Act*. The Novko Appeal shared much in common with this Appeal in that the breaches occurred under the same provisions of the Act and involved one party (Slavica) participating in a similar role in both cases. In the Novko Appeal, the Tribunal applied the basic standard of review set out in the Nguyen Appeal, concluding that the standard of review must be premised upon whether or not there were reasonable grounds for the administrative body to reach its decisions based upon clear and cogent evidence presented before that body. The Tribunal concluded it does not reconsider the entirety of the evidence in the form of a re-hearing. The Tribunal agreed with submissions of the Appellant that the pragmatic and functional approach does not apply to a review by the Tribunal of a decision of a lower tribunal. The Tribunal agreed with the submissions of the Respondent that the "review should defer to the determinations of the lower tribunal on issues which fall within the scope of the statutory appeal and that curial deference should be given to the opinion of the lower tribunal on issues that fall squarely within its area of expertise." The Tribunal cited Casey (*The Regulation of Professions in Canada*, James T. Casey (2003)) where the author proposes that interference by courts with a penalty imposed for professional misconduct should only be reluctantly undertaken unless the disciplinary tribunal has erred in principle or unless the penalty is manifestly excessive, totally disproportionate, or the disciplinary tribunal has misapprehended the evidence. In the Novko Appeal the Tribunal concluded that deference must be shown by the Tribunal to the Insurance Council's determinations of the facts, assessments as to credibility and considerations surrounding the penalty imposed unless the Insurance Council can be seen to have not met the standard of review set out above or has erred in the fashion described by Casey.

The Novko Appeal appears to refine the conclusions from the Nguyen Appeal in two ways. In the Nguyen Appeal, deference was given to "finding of facts and the assessment of credibility" while in the Novko Appeal, deference refers to "the determinations of the lower tribunal on issues which fall within the scope of the statutory appeal and that curial deference should be given to the opinion of the lower tribunal on issues that fall squarely within its area of expertise." Second, the Novko Appeal adds and accepts the position from Casey noted above as it relates to interference with penalties imposed for professional misconduct.

In the Appeal, the Respondent submits that the Tribunal "should not retry the case." This is one of the conclusions reached in the Nguyen Appeal and I agree that the Tribunal should not retry the case in the Appeal. The Appellant submits that the pragmatic and functional approach is not well suited for determining the standard of review of administrative tribunals sitting in review of another administrative tribunal. The Appellant cites Falzon ("Appeals to Administrative Tribunals", *Canadian Journal of Administrative Law and Practice,* 18(1)) and Plimmer v. Calgary (City) Police Service [2004] A.J. No. 16 (ABCA)(QL) dissenting decision in support of this submission. This is also the decision in the Novko Appeal. I agree that Tribunal should not apply the pragmatic and functional approach in the Appeal, but recognize that the contextual factors inherent in the pragmatic and functional approach remain useful in administrative appeals.

The Respondent submits that in general terms, the scope of review and the extent of deference shown by an appellate body from the lower tribunal depend on a number of factors, such as the expertise of the lower tribunal, and the extent to which the issue on appeal is within that expertise. The Appellant submits that the standard of review may differ depending upon the particular issues being considered by the Tribunal or on the particular tribunal being appealed from. I agree with these submissions and quote Norman Gilchrist Ltd. (1880) 33 B.C.L.R. 153 as cited Reed v. British Columbia (Superintendent Of Insurance) [1985] B.C.C.O. No. 17 (CAC)(QL) that "Common sense must prevail. The matters that come before us vary greatly. We must take each case as a separate problem, give it proper and individual consideration…."

The Respondent, citing Casey, further submits that "it is settled law that courts will rarely interfere with the disciplinary decisions of a self-regulated profession."

> "Courts are reluctant to interfere with a penalty imposed for professional misconduct unless the disciplinary tribunal has erred in principle or unless the penalty is manifestly excessive, totally disproportionate, or the disciplinary tribunal has misapprehended the evidence." (Casey, p 15-9).

The Submissions of the Respondent include reference to section 59 of the *Administrative Tribunals Act* [S.B.C. 2004] Chapter 45 permitting a court to interfere with the decision of an administrative body only where the decision is patently unreasonable (emphasis added) or offensive to the rules of natural justice and procedural fairness. The Respondent argues that this is the appropriate test. In my view this is an inappropriate

standard of review for the Tribunal. The Tribunal has the power 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 members of the Tribunal are appointed after a merit based process. The Tribunal operates in a domain where the protection of the public is an important consideration. In my view, restricting the Tribunal to decisions that are "patently unreasonable' places too great a limitation on the Tribunal's ability to ensure decisions adequately address the intent of the legislation, in particular the protection of the public.

Citing Plimmer, the Appellant submits that administrative review of an administrative decision is meant to ensure that the ultimate decision emerging from the administrative decision-making process is correct, and thus the appropriate standard of review that the final administrative tribunal should apply is the correctness standard unless its powers of appeal clearly indicate otherwise. The Appellant further submits that the Tribunal should decide the issue on the basis of correctness, meaning it should "undertake its own reasoning process to arrive at the result it judges correct." Ryan offers insights into the three standards (Correctness, Reasonable Simpliciter and Patently Unreasonable) a court should apply. "Correctness" is associated with one single best decision or one single decision that is demonstrably superior to others (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 (QL)). In my view this would be an inappropriate standard of review for the Tribunal, at least in circumstances where the decisions involve a combination of law and fact and where some elements of discretion are involved. As cited in Galaxy, there is a long standing principle which requires the application of the "correctness" standard when compliance with mandatory provisions (which equate to questions of law and statutory compliance) is involved and the application of a "reasonableness standard where the determination of a factual matter or an exercise of true discretion is called for (Re Galaxy Sports Inc. (2004) BCCA 284, para 39). It is also my view that if a decision failed to meet the strict correctness standard on something as fundamental as a point in law or compliance, it would also fail to meet the standard of reasonableness. Therefore, it is my view that the standard of correctness should not be used in this case.

Having rejected both the standard of "patently unreasonable" and "correct", I am of the view that a standard of reasonableness as established in the Novko Appeal is the appropriate standard for the Tribunal. In the Novko Appeal, the Tribunal concludes that deference must be shown by the Tribunal to the Insurance Council's determination of the facts, and also to assessments as to credibility and considerations surrounding the penalty imposed unless the Insurance Council can be seen to have not met the standard of reasonableness set out, or has erred in the fashion described by Casey. The circumstances cited by Casey, including "erred in principle", a penalty that is "manifestly excessive" or "totally disproportionate" and "misapprehended the evidence" are certainly circumstances where the decision would be unreasonable. But these four circumstances do not, in my view, articulate the full domain of unreasonable decisions. The standard of review is one of reasonableness, and reasonable implies neither more nor less than expected under the circumstances. If the Tribunal determines the decision is unreasonable, it should not hesitate to interfere with the decision.

## THE TRIBUNAL APPEAL DECISION

The Record in this Appeal includes the investigative report, dated November 23, 2004, submitted to the Committee. The investigative report notes that on October 5, 2004 a compliance officer conducted a recorded interview with Ms. Pavicic. Submissions made by Ms. Pavicic during the interview are included in the investigative report. The investigative report describes how, some time in mid-2003, Ms. Pavicic was approached by Slavica about placing insurance coverage based on five insurance applications Slavica had purportedly taken while licensed. Ms. Pavicic indicated she had been asked by a tax client, who was also one of the applicants, to assist Slavica. Ms. Pavicic indicated it was her understanding that Slavica was experiencing difficult times caring for her sick mother and was in the process of becoming re-licensed with the Insurance Council within a few days. Slavica provided Ms. Pavicic with the five completed and signed insurance applications she had taken. The documentation included applications, a basic disclosure statement in one case, insurance quotes, and checks from applicants for premium payments. The dates on the documents were between May 27, 2003 and July 11, 2003.

The investigative report indicates that Ms. Pavicic advised that she did not question whether or not Slavica had in fact taken the applications while licensed nor did she contact the Insurance Council to determine the status of Slavica's license. Ms. Pavicic trusted Slavica's representations and subsequently signed the applications and basic disclosure statement as an agent of record, signed as a "witness" to applicants' signatures, and then remitted the applications along with the accompanying documents to insurers for processing. All of this was done by Ms. Pavicic without having met or discussed the applications with any of the applicants. Ms. Pavicic noted she was familiar with one of the applicants and therefore recognized the applicant's signature on the application for insurance which had been taken by Slavica. The compliance officer also noted that these matters were brought to the Insurance Council's attention by Ms. Pavicic.

Ms. Pavicic indicated she attempted to contact each of the applicants to discuss their applications, but only one client returned her telephone calls. She met with this one client to review the appropriateness of the insurance coverage. One other client proceeded with insurance coverage, but subsequently appointed a different agent of record. In explaining her actions, Ms. Pavicic stated her office was very busy and she mistakenly did not analyze the situation or pay close attention to what was transpiring, and she was remorseful.

The compliance officer also had available copies of documents indicating Ms. Pavicic earned commissions of $1,405.15 and subsequently paid Slavica $312.00. Two e-mails were also available to the compliance officer, the first from Ms. Pavicic to Slavica dated August 26, 2003 "advising that she will be reporting the circumstances to Council", and one from Slavica to the Insurance Council, dated September 3, 2003, outlining her recollections of the events with Ms. Pavicic. I note that the August 26, 2003 e-mail from Ms. Pavicic to Slavica actually states that "I <u>have spoken</u> (emphasis added) to insurance council today and reported the whole incident…."

The investigative report identifies the breaches by Ms. Pavicic pursuant to section 173(1)(c)(iii) and (iv) of the Act. These subsections refer to trustworthiness, competence and financial reliability and the intention to carry on business in good faith and in accordance with the usual practice of the business of insurance. Section 178(1) is also cited, which refers to the prohibition of offering, promising or paying any commission or compensation to a person who is not licensed for acting as an insurance agent or insurance salesperson in British Columbia. Sections 231(1) (a) and (b) are also cited. These sections provide that after due investigation, the Insurance Council may determine that the licensee no longer meets a licensing requirement or has breached or is in breach of a condition or restriction of the license of the licensee, and provide that the Insurance Council by order may direct penalties including reprimand, suspension or cancellation of the license, attach conditions to the license, amend the conditions to a license, require the license to cease specified activities or to carry out a specified activity related to the conduct of insurance business, fine the license or former license. Section 14(3) of the Insurance Licensing Regulation is also referred to, which provides that it is a condition of every license to an insurance agent that each licensee must comply with the applicable requirements and regulations made under the Act.

The Investigative Review Committee received the investigative report prepared by staff at the Insurance Council. The investigative report was also sent to Ms. Pavicic. The Committee met with Ms. Pavicic on December 9, 2004 to discuss the results of the investigation and to allow Ms. Pavicic an opportunity to provide additional information or make further submissions. The Committee and Ms. Pavicic agreed that the facts constituted breaches of sections 231 of the Act in that Ms. Pavicic did not act in good faith and in accordance with the usual practice of the business of insurance, and that she acted contrary to a condition of her license by compensating an unlicensed person for carry on activities which require an insurance license. Ms. Pavicic was advised that the Committee was prepared to recommend the following to the Insurance Council:

1. That Ms. Pavicic receive a one month suspension;
2. That Ms. Pavicic receive a fine of $1,000; and
3. That Ms. Pavicic pay the costs of the Insurance Council's investigation into this matter, assessed at $1,237.50.

Ms. Pavicic agreed to this recommendation and the recommendation was made to the Insurance Council.

The Insurance Council had the report of the Committee before it. The Insurance Council found the facts constituted separate breaches of section 231(1) (a) of the Act in that Ms. Pavicic did not act in good faith and in accordance with the usual practice of the business of insurance, as required under Council Rule 3; and she compensated an unlicensed person for carrying on activities which require an insurance license, despite being prohibited from doing so under the Act. In particular, contrary to Council Rule 7, Ms. Pavicic did not comply with the Council's Code of Conduct which makes it a requirement for her to comply with the Act. In making its decision, the Insurance

Council considered the Committee's report and "made particular note of evidence which they found mitigating. Specifically, [Insurance] Council learned of the misconduct from the licensee who reported the circumstances to [Insurance] Council staff and sought direction on what steps to take to help ensure that the applicants would not be prejudiced in this matter." The Insurance Council did not indicate what evidence prompted a two week suspension when the Committee had recommended a one month suspension. In a letter dated February 2, 2005, the Insurance Council advised Ms. Pavicic of the intended decision and outlined her rights to a hearing to dispute the findings or its intended decision. Ms. Pavicic was to notify the Insurance Council by February 28, 2005. Ms. Pavicic made no submissions.

Legal counsel representing the Appellant submits that when an insurance agent and broker sign an insurance policy application as a witness, he or she represents to the insurer that:

(a) The applicant appeared before and acknowledged to the agent that he or she is the person named in the application as the applicant;
(b) The signature witnessed by the agent is the signature of the individual who makes the application; and
(c) The applicant understands the nature of the application and the insurance applied for.

I agree with this submission.

The Appellant illustrates the importance and seriousness of improper witnessing of documents of the nature involved in this case. The Appellant identifies the important central role that the applications and disclosures play in the insurance industry, the fact these documents include important data used in the insurance decisions, the fact the documents make representations to the potential policyholders, the increased potential for fraud if the appropriate standards are not maintained and the fact that the integrity of the entire insurance application process may be placed in jeopardy. I agree with the submissions that the documents in question form a central element in the insurance application process and, when improperly addressed, could serve to undermine the process.

Ms. Pavicic acknowledges she did not witness the signatures and did not meet the applicants prior to signing the documents relating to the five application files Ms. Pavicic signed from Slavica, Ms. Pavicic also signed Advisor's Reports in which she represented to the insurer that she declares "that the statements and answers given in this application are complete and correctly recorded to the best of my ... knowledge and belief, and that I ... am not aware of additional information material to the proposed life insurance...." Since Ms. Pavicic admits that she was not present when the Advisor's Reports were completed, making such a declaration was misleading and false. I agree with the Appellant's submissions that insurance agents have a duty to conduct sufficient fact finding and needs analysis to properly assess a client's circumstances, goals and needs. Ms. Pavicic acknowledges that she did needs analysis after signing the applicants and after the Insurance Council became involved.

The Code of Conduct for insurance agents, salespersons and adjustors clearly outlines the standards of conduct required and are generally available to all insurance agents and brokers. This Code is an important element in helping to ensure the integrity of the application system. In the Code of Conduct reference is made to "trust" as a foundation for all dealings, and "rigorous standards of personal integrity and professional competence".

One of the primary purposes of legislation regulating professions is protection of the public and the Insurance Council has a duty to regulate the insurance industry to help ensure the public is protected. One of the tools available to the Insurance Council to help protect the public is the application of penalties for professional misconduct. Casey reviews the factors that are to be taken into account in determining how the public might best be protected, including specific deterrence of the member from engaging in further misconduct, general deterrence of other members of the profession, rehabilitation of the offender, punishment of the offender, the denunciation by society of the conduct, the need to maintain public confidence in the integrity of a profession's ability to properly supervise the conduct of its members, and ensuring that the penalty imposed is not disparate with penalties imposed in other cases (Casey, op cit, p 14.2). Casey also provides a summary of factors relating to the offender to consider in determining the proper penalty for an offense. He also cites *Jaswal v. Medical Board (Newfoundland)* (1996), 42, Admin. L.R. (2d) 233 (Nfld. T.D.) at page 249-250 where the Court described some of the factors to be considered, including "the need to promote specific and general deterrence, and, thereby protect the public", "the need to maintain the public's confidence in the integrity of the ...profession;" and "the range of sentence in other similar cases."

The Appellant submits that the Tribunal should not hesitate to disagree with the penalty imposed by the Insurance Council if, after a careful review of all of the circumstances, it opines that the sentence imposed was not a fitting one. This submission arises from the *Reed v. British Columbia (Financial Institutions Commission of Insurance)* [1985]B.C.C.O. no.17 (CAC) (q1) case. As previously noted, I am of the view that the appropriate standard of review is one of "reasonableness". Hence in my view, the Tribunal may disagree with the penalty, but it should only interfere where the penalty is found to be unreasonable.

I believe there are several mitigating circumstances that require consideration. First, the Insurance Council noted that they learned of the misconduct from Ms. Pavicic who reported the circumstances to Council staff and sought direction on what steps to take to help ensure that the applicants would not be prejudiced in this matter. In an e-mail dated August 26, 2003 from Ms. Pavicic to Slavica, Ms. Pavicic states "I <u>have spoken</u> (emphasis added) to insurance council today and reported the whole incident ...." While there is no direct confirmation that Ms. Pavicic did indeed contact the Insurance Council on that date, there is a second e-mail from Slavica to the Insurance Council dated September 3, 2003 in which she brought the matter to the attention of the Insurance Council. Hence if the Insurance Council learned of the matter from Ms. Pavicic, it must have been between August 26, 2003 and September 3, 2003. I agree with the Appellant's

submission that there is no evidence in the record or finding of fact as to the circumstances or reasons surrounding Ms. Pavicic's disclosure to the Insurance Council. There is an additional element of evidence that I believe requires consideration. In the e-mail dated September 3, 2003 from Slavica, she states that "We ran into a snag almost at the start because she (Ms. Pavicic) had asked James to verify everything and contact her about everything." In this context James is identified as being associated with Cartier Partners. The e-mail indicates that Ms. Pavicic did make some effort, "almost at the start" of her association with Slavica to verify information. Ms. Pavicic has expressed remorse for her actions and accepted responsibility. She also made an effort to contact the applicants, after she signed the documents, to undertake the needs assessments.

The Respondent submits that a key mitigating fact is that there were no clients or consumers harmed or insurers damaged as a result of Ms. Pavicic's actions. But as the Appellant notes, there is no finding of fact or evidence in the record that supports the statement that "there were no clients or consumers harmed or insurers damaged...."

Both the Appellant and the Respondent provided cases to illustrate the range of penalties applied in cases of misconduct and fraud. It is clear that the penalties cover a broad range, as do the circumstances of the cases. The penalties range from reprimand in single cases of misconduct to fully revoking a license in the case of multiple false applications. Individuals have been reprimanded for isolated minor breaches where the licensee had an existing relationship with a client, but committed procedural or regulatory breaches. One to two week suspensions have been imposed by administrative bodies in instances where isolated, generally a single event, procedural or regulatory breaches occurred. Other cases were cited where, in one case, a three month suspension was applied for forging signatures of clients and in a second case, the license was revoked for multiple signings of the clients' signatures and the submission of false oral swabs in twelve applications.

I believe the following four cases best outline the scope of penalties in the cases cited that involve false witnessing of signatures.

1. Terence Colton, Coquitlam, B.C., June 12, 2000, Council Decisions. The licensee was reprimanded and assessed investigative costs after the Insurance Council determined the licensee failed to present and review Basic Disclosure Statements with two policyholders before taking applications for replacement insurance, failed to forward these to the existing insurers on time and improperly signed as witness on two supplementary applications. The insured lived in a remote area and the licensee had met with the insured to discuss the replacement insurance, but did not have the necessary forms at the time of the meeting.
2. Michelle Therese Twanow, Nanaimo, B.C., May, 2002, Council Decisions. A licensee was suspended for one week and assessed investigation costs for knowingly signing and processing a motor vehicle transfer form and registration knowing a signature had been forged. The vehicle was jointly owned by an elderly couple, one of whom was ill. To avoid inconveniencing the client, the licensee permitted the other owner to forge his wife's signature.

The Insurance Council noted that "Proper execution of insurance documents is fundamental notwithstanding the reason. It is never acceptable...to improperly witness a forged signature...."

3. Lynne Yvonne Swerhun, Vancouver, B.C., March, 2005 Council Decision. A licensee was suspended for two weeks and assessed investigation costs for signing a friend's name on a form and processing the document in her capacity as an insurance agent. The signing was done with consent of the friend. The Insurance Council found the licensee was not attempting to deprive anyone of ownership of the vehicle and that this was an isolated incident which arose out of a difficult personal situation and generally unrelated to the licensee's practice.
4. Sydney Baxter-Dennis, Scarbourgh, Ontario, September, 2003 Financial Services of Ontario Bulletin. The licensee forged the signature of a client on an insurance application form and falsely indicated that he had witnessed the signature. The licensee was suspended for three months, noting mitigating circumstances which included no prior history of misconduct and co-operation with the investigation.

It is my view that the breaches committed by Ms. Pavicic fall somewhere between the two extremes, Ms. Pavicic did not forge signatures, but she did falsely witness signatures on five applications, executed one broker's report without knowledge of the facts or having met the applicants, signed as a representative agent without having met the applicants, failed to conduct due diligence on the status of Slavica prior to signing, and paid a commission to a knowingly unlicensed insurance sales person. At the same time, Ms. Pavicic, after the signings occurred, appears to have undertaken steps to ensure the information in the documentation was correct. Ms. Pavicic first notified the Insurance Council concerning the matter and cooperated in the process. She did try to contact the applicants, but after the fact, and she did express remorse. Neither the Appellant nor the Respondent Insurance Council cited any evidence to indicate Ms. Pavicic had prior incidents of misconduct.

The Insurance Council submits that the decision imposed was "just and reasonable" and that the fact Ms. Pavicic's name and the particulars of the investigation, as well as the Insurance Council's Order, were published in the disciplinary bulletin must also be considered. Given all of the facts, and considering the mitigating circumstances, I am of the view that the Insurance Council could not have reasonably reached the decision that it made respecting the penalty. I do not believe that the Insurance Council could reasonably conclude that a suspension of two weeks, in the circumstances of the Appeal, and based on the evidence at hand, would serve to adequately protect the public. The evidence suggests Ms. Pavicic is remorseful, and it is necessary to ask if the two weeks suspension plus publicity may reasonably be expected to have the desired effect on her future behavior. But it is also necessary to ask if a two week penalty will also serve as a message to deter others in the industry and to adequately address the broader principle of protection of the public. The Novko Decision and the Slavica Order suggest that misconduct of the type that Ms. Pavicic committed is not an isolated incident in the insurance industry.

The Respondent Insurance Council submits that it is necessary to make a choice between inflicting hardship on the individual and the protection of the public. The Insurance Council cites Re: Clough, [1984] B.C.C.O. No. 3 (CAC), p.5 (Q.L.). The support of the reputation and status of other professionals in the industry is also cited in Clough as a consideration, albeit not quite as important as protecting the public. The Appellant submits that any balancing of interests must fall in favor of protecting the public interest. I agreed with the submission of the Appellant in this regard.

I am of the view that the suspension of two weeks fails to meet a test of reasonableness in deterring others in the industry from committing similar acts, and fails to reasonably support the broader principle of protecting the public. The Code of Conduct for Insurance Agents, Salespersons & Adjusters clearly indicates that "...you must meet rigorous standards of personal integrity and professional competence. ... Failure to adhere to these standards reflects not only on you, but also on the profession. Trustworthiness is a fundamental element (emphasis added) of each rule..." "...the exercise of good faith by licensees ... is essential (emphasis added) to public confidence in the industry." Failure to reasonably address these issues in the assessment of penalty could reduce the deterrence within the industry and reduce public confidence in the administration and governance of the insurance processes. I would also observe that the Insurance Council did not provide extensive reasons for its decision nor did it explain why the one month suspension recommended by the Committee was reduced to two weeks. That in itself does not imply the Insurance Council ignored the issues mentioned above nor does it necessarily make their decision unreasonable. However, a somewhat more complete reasoning may have assisted the Tribunal in its own review.

The Novko Appeal presented insights as to the reasonableness of a penalty in similar, but not identical, circumstances. In my view there are at least three factors that appear to distinguish the Appeal from the Novko Appeal and that require consideration. In particular, the fact Ms. Pavicic appears to have first informed the Insurance Council of the matter; that according to Slavica, Ms. Pavicic "almost at the start" asked representatives from Cartier to "verify everything"; and the fact that Ms. Pavicic was licensed since 1991 and there is no evidence of earlier acts of misconduct. In my view these factors call for a lesser penalty than imposed in the Novko Appeal.

It is my view that this is an appeal where the Tribunal may exercise its power to vary a decision pursuant to section 242.2(11) of the Act. This case involves multiple breaches and these relate to issues that are "fundamental" and "essential" to the insurance application process. I am mindful of the expertise and knowledge that the Insurance Council brings to these matters and do not lightly vary their decision, but it is my view their decision does not meet the test of reasonableness when consideration is given to deterrence of the individual, deterrence of others in the industry, and protection of the public. Accordingly, on behalf of the Tribunal, I order that the penalty imposed on Ms. Pavicic be varied and the period of suspension be increased to thirty (30) days, but the fine and costs award and the time for payment of the same remain unchanged.

The Appellant seeks an order for costs against the Respondent Insurance Council for $850.00 which represents the filing fee in this matter. The Respondent Insurance Council seeks an order for costs against the Appellant. In my view an order of costs is not appropriate in this Appeal. The Insurance Council appears to have acted in good faith, and while the Insurance Council potentially incurred some additional costs associated with the original appeal and the Application for Late filing, the Tribunal has concluded the decision that the Insurance Council could not have reasonably reached the decision they made given the evidence presented. I am of the view no costs should be awarded to either party.

**CONCLUSIONS**

Accordingly, I order that:

1. The Appellant's submission for leave for late filing of the Notice Of appeal be approved;
2. The Appellant's submission for the introduction of new evidence (Slavica Order) be approved;
3. The suspension of the license of Ms. Pavicic imposed by the Insurance Council shall be varied to increase the period of suspension to a period of thirty (30) days;
4. The fine of $1,000.00 and the order of costs of $1,237.50 together with the time for payment of the same imposed by the Insurance Council shall remain unchanged, except insofar as any sums remaining unpaid as at the date of this decision shall be payable within 15 days of this decision; and
5. No costs will be assessed in relation to this Appeal.

Submitted this 22nd day of November, 2005

S. W. Hamilton

Stanley W. Hamilton
Member of the Financial Services Tribunal