FST 08-045

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF THE *FINANCIAL INSTITUTIONS ACT,*

R.S.B.C. 1996, c. 141 as amended (the "Act")

BETWEEN

JOCELYN FENELON

APPELLANT

AND

INSURANCE COUNCIL OF BRITISH COLUMBIA

RESPONDENT

APPEAL DECISION

BEFORE:	HELEN R. del VAL, Presiding Member
DATE OF LAST SUBMISSION:	February 1, 2009
APPEARANCES:	JOCELYN FENELON representing himself Gerald Matier, Executive Director for the Insurance Council of British Columbia
DATE OF DECISION:	April 12, 2009

INTRODUCTION

This is an appeal by Mr. Jocelyn Fenelon to the Financial Services Tribunal (the "Tribunal") under section 242(1)(a) of the Financial Institutions Act (the "Act"). The parties to this proceeding are Mr. Fenelon as appellant and the Insurance Council of British Columbia ("Council") as respondent[1].

Mr. Fenelon is appealing a decision that Council made on September 26, 2008. In that decision, Council found that Mr. Fenelon:

1. took and misused ICBC[2] insurance validation decals for personal use on his own vehicles to leave the appearance they were insured when they were not;
2. drove one or more of his vehicles without insurance over a period of at least seven months;
3. made a material misstatement in reply to an inquiry from Council; and
4. was complicit in the backdating of an ICBC Autoplan policy in order to circumvent a traffic violation ticket that had been issued to him by the police for driving without insurance.

Council issued the following order as of September 26, 2008:

1. Fenelon's life and accident and sickness insurance agent licence remain cancelled;
2. Fenelon is not suitable to hold any insurance licence under the Act for a period of three years, commencing from February 15, 2008;
3. Fenelon is fined $5,000;
4. Fenelon must pay the costs of Council's investigation into this matter, assessed at $10,187.50;
5. Fenelon must pay Council's hearing costs in this matter, assessed at $5,786.22; and,
6. As a condition of this decision, Fenelon must first pay the above mentioned fine and costs if he intends to make an application for an insurance licence after February 15, 2011

It is the September 26, 2008 order (the "Appealed Order") that Mr. Fenelon is appealing to the Tribunal.

CENTRAL ISSUE

The central issue to be determined on appeal is whether the Council's decision of September 26, 2008 is reasonable.

[1] The Superintendent of Financial Institutions had the right to participate as a respondent but declined
[2] Insurance Corporation of British Columbia

CONCLUSION

I find that:

- the cancellation of all licences and the prohibition against holding any insurance agent licence for a period of time are reasonable.
- a three year prohibition against holding a general insurance agent licence is reasonable. However, considering the undue hardship on Mr. Fenelon, the seven month period during which he had stopped working as a general insurance agent before a hearing was held should have been incorporated into the three year period.
- the prohibition period of three years against holding all types of insurance licences is unreasonable for being excessive. It fails to take into consideration the relevant factors of Mr. Fenelon's reform, his unblemished prior record and undue hardship of the penalty on him. Taking those factors into account, that period should have been reduced to two years.
- the $5000 fine is unreasonable because the imposition of that fine constitutes a variation to the original order Council made on February 15, 2008 (the "Original Order") and no reasons were given for varying the Original Order to increase the penalty.
- the award of hearing costs is reasonable because it is not a form of punishment but is a mechanism for the fair recovery and allocation of administrative costs.

As a result, the Appealed Order will be varied by:

1. changing the commencement date of the three year period during which Mr. Fenelon cannot hold a general insurance agent licence from February 15, 2008 to November 7, 2007;
2. allowing Mr. Fenelon to try and resume work in a field of insurance other than general insurance two years after February 15, 2008;
3. eliminating the fine of $5000; and
4. changing the deadline for paying the awarded costs to a date prior to Mr. Fenelon making an application for any insurance agent licence under the Act.

BACKGROUND

Mr. Fenelon was a licensed level 3 general insurance agent and nominee, and a life insurance agent. On January 13, 2006 Mr. Fenelon was issued a traffic violation ticket for driving without insurance (the "Violation Ticket"). Following that incident, Council's Investigative Review Committee launched an investigation which found that Mr. Fenelon had taken ICBC insurance validation decals for his personal use and processed a backdated Autoplan policy with his wife in order to circumvent the Violation Ticket. Investigators also found that he made one or more misstatements in the answers he gave during the investigation. As a result of the investigation,

Council decided to proceed under section 238 of the Act to take action without first holding a hearing[3]. Under Council's Policies and Guidelines (the "Council's Policies") 54.2:

> "Council recognizes that taking immediate action under section 238, without allowing the licensee to be heard at a hearing, is an infringement of normal due process afforded to a licensee. Therefore, Council exercises its power under section 238 in extreme circumstances only, where protection of the public requires immediate action."

On February 15, 2008, Council made the Original Order which:

1. immediately cancelled Mr. Fenelon's licence;
2. held him unsuitable to hold any insurance agent licence for 3 years;
3. held him liable to pay the costs of Council's investigation, which costs had been assessed at $10,187.50; and
4. required him to pay the investigation costs by June 14, 2008.

As allowed by section 238(2)(a) of the Act, Mr. Fenelon asked for a hearing after the Original Order was issued. Under section 238(3) Council "must hold the required hearing and following the hearing must confirm, revoke, or vary the order." Accordingly, Council appointed a hearing committee (the "Committee") which held the hearing on June 16, 2008 and subsequently issued a hearing report setting out its findings and recommendations. Council adopted that report as its decision of September 26, 2008 and issued the Appealed Order.

In its September 26, 2008 decision, Council did not expressly state whether it was confirming, revoking or varying the Original Order. A comparison of the Appealed Order to the Original Order shows that Council varied the Original Order by:

- adding a fine of $5000; and
- adding an award for the hearing costs and extending the related payment deadline.

GROUNDS OF APPEAL

At the hearing, Mr. Fenelon was represented by counsel, Mr. Fred Wynne. On appeal, he is acting on his own behalf. In his Notice of Appeal, Mr. Fenelon states:

> "I wish to appeal the decision made by the Insurance Council of British Columbia on September 26th, 2008. It is excessive in nature. It constitutes punishment not discipline. Furthermore false and misleading statements made on reports submitted to Council members prejudiced me and the integrity of the proceedings, undermining the fairness process. I will submit documentation to that effect."

[3] The full text of section 238 of the Act is set out in the appendix to this decision

Mr. Fenelon also believes that Council failed to take into consideration mitigating circumstances, in particular, stress caused by his work, personal and medical issues and other relevant factors including the undue hardship of the penalty on him and his long record of service in the industry without any prior infractions.

Regarding the agreed statement of facts which was entered into for the hearing, Mr. Fenelon states that he "had no part in it" and that when he protested his counsel, Mr. Wynne told him that it was in his best interest. Mr. Fenelon said he thought he "had to agree to these facts in order to get a hearing" and felt he had no choice but to reluctantly agree to it.

Council was represented by Mr. David T. McKnight at the hearing. On appeal, Council did not make any submissions except to say that "A review of the appellant's submission revealed no additional relevant information that was not already heard and considered by Council at Mr. Fenelon's hearing."

POINT OF CLARIFICATION

The June 18, 2008 hearing was a proceeding under section 238 of the Act. It was held pursuant to a Notice of Hearing[4] calling for a hearing under section 238 of the Act. The transcripts show that at the start of the hearing there was some misapprehension that the hearing was a proceeding under section 237[5] of the Act. Later during the hearing it was clarified that the proceeding was pursuant to section 238 of the Act to vary an earlier order[6].

That misapprehension could have led to the incorrect reference to section 237 in the Appealed Order. The Appealed Order is in fact an order under section 238(3) following a hearing held under that section of the Act.

The difference between proceeding under section 237 or 238 is vital. Under section 237, Council must hold a hearing before taking any action but under section 238, it can take action before holding a hearing. The powers that Council has after a hearing held under section 237 are distinct from those it has after a hearing held under section 238. Following a section 237 hearing, Council "may proceed in the exercise of the powers conferred under this Act in respect of the matter that was the subject of the notice" of intended action[7]. Following a hearing held pursuant to section 238, Council "must confirm, revoke or vary" the earlier order[8]. Therefore, the legislation requires that a new order Council makes after a section 238 hearing must be in relation to the earlier order.

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[4] The Notice of Hearing is at tab 2 of the Council's Book of Authorities
[5] The full text of section 237 of the Act is set out in the appendix to this decision
[6] p. 230 of transcripts of hearing
[7] Section 237(6) of the Act
[8] Section 238(3) of the Act

PRELIMINARY ISSUE

Mr. Fenelon submitted a substantial amount of material on appeal. More than half (well over 40) of the documents filed on appeal had not been introduced before. By a letter of February 16, 2009, I asked Mr. Fenelon to "kindly review each of the documents and identify those that had not been introduced at the hearing and which you now ask to be introduced as new evidence on appeal" and "For each document that you would like to introduce on appeal please address specifically how the requirements in section 242.2(8)(b)(i) and (ii) have been met." With the same letter, Mr. Fenelon was provided with a copy of section 242.2(8)[9] of the Act and the Tribunal's Directives and Practice Guidelines (the "Tribunal Guidelines") dealing with the introduction of new evidence on appeal. Mr. Fenelon was asked to provide the requested information within 14 days of receiving the letter. Having received no response, the Tribunal confirmed by letter of March 9, 2009 to Mr. Fenelon that he was making no submissions on this issue.

The Tribunal Guideline explains new evidence to be "evidence that was not introduced at the original hearing". Accordingly, I will treat all of the material filed by Mr. Fenelon on appeal that had not been introduced at the original hearing as new evidence. New evidence can be introduced on appeal only if it meets the following two requirements[10]:

1. it must be substantial and material to the decision to be made on appeal, and
2. it either (a) did not exist at the time the original decision was made, or, (b) did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered."

On the question of whether a piece of new evidence did or did not exist at the time the original decision was made, I will firstly establish that September 26, 2008 is "the time the original decision was made" since that is the date of the decision and order Mr. Fenelon is appealing. Secondly, without any submissions on when the new evidence actually came into existence I will rely primarily on the date of each document to determine whether it existed before or after September 26, 2008. That is, the date that a document bears will generally be deemed to be the date it came into existence.

Almost all of the materials comprising the new evidence bear dates earlier than September 26, 2008 (the "Pre-existing Material"). Based on their dates, I find that the Pre-existing Material did exist at the time the original decision was made. To consider allowing the Pre-existing Material to be introduced on appeal, there must be some explanation as to why such evidence was not discovered and could not have been through the exercise of reasonable diligence. On the face of

[9] The full text of section 242.2(8) is set out in the appendix to this decision

[10] section 242.2(8)(b); November 10, 2006 preliminary ruling of Mr. Hall in Superintendent of Financial Institutions v. Insurance Council of British Columbia, Special Risk Insurance Brokers Ltd. and Raymond Edward Willie (FST 06-026)[2007]BCWLD 501

the Pre-existing Material, no such explanation is apparent. Again, without any submissions from Mr. Fenelon on the point, I have no basis to find that the Pre-existing Material was not discovered and could not have been after reasonable diligence had been exercised. Therefore, I do not have sufficient grounds to admit the Pre-existing Material into evidence.

The only pieces of New Evidence that bear dates after September 26, 2008 are:

- Exhibit 32 filed on December 23, 2008 as part of Mr. Fenelon's appeal report which is a letter dated October 29, 2008 from Wholesaleautosource.ca regarding the sale of his boat (the "Wholesale Letter");
- Most of the articles on police misconduct included in Mr. Fenelon's final submission filed on February 4, 2009 (the "Police Articles").

Based on their dates, I will assume that they did not exist at the time of the original decision and go on to examine whether they are "substantial and material to the decision" I must make.

With respect to the Wholesale Letter, Mr. Fenelon refers to it in paragraph 41 of his December 23, 2008 appeal report as proof of his unsuccessful efforts to sell his boat. At the same time he was having problems with his cars. Mr. Fenelon repeats the position he had taken during the hearing that all these difficulties exacerbated the stress brought on by his mother's ailing health and eventual passing, his own medical, work and other personal issues. On appeal, Mr. Fenelon essentially restates his opinion that stress contributed to his neglecting to insure his cars and his resulting misconduct.

During the hearing, Mr. Fenelon had already specifically identified as sources of stress the trouble he had selling his boat and the problem of not having sufficient parking space at home for his vehicles, boat and the plane he was building in his garage[11]. Therefore, the Wholesale Letter does not present anything new, it is "'more of the same' evidence" already considered by the Council[12]. As such, it does not meet the criterion of being "substantial and material" to the decision to be made on appeal. Accordingly, there is insufficient ground to admit it.

With respect to the Police Articles, none of them pertain to incidents related to Mr. Fenelon's case. They are not relevant and therefore, not "substantial and material" to the decision to be made. Accordingly, they cannot be admitted.

In Appendix 1 of his December 23, 2008 appeal report, Mr. Fenelon included four articles written on the general symptoms, causes and effects of stress. None of them address specifically Mr. Fenelon's situation.

It is unknown when these articles actually came into existence although they appear to have been obtained from various websites on health issues and to have been printed in October, 2008.

[11] p.70 of transcripts of hearing
[12] Paragraph 31 of Preliminary ruling in Special Risk et al (FST06-026)

Regardless of whether they existed at the time of the decision, I cannot admit these articles into evidence because they are not "substantial and material" to the decision to be made. They are not "substantial and material" to the decision on appeal because they are not probative. They offer no evidence on whether the type of stress that Mr. Fenelon was suffering would probably have caused him to commit the misconduct that he did.

In conclusion, none of the new evidence meet the criteria for admission prescribed by section 242.2(8) (b) of the Act. Accordingly, the new evidence cannot be introduced into evidence on appeal.

ISSUES ON APPEAL

To answer the key question of whether Council's September 26, 2008 decision is reasonable, the following specific issues must be examined:

1. Are the following findings of fact by Council reasonable?
   a. that Mr. Fenelon took and misused ICBC insurance validation decals for personal use on his own vehicles to leave the appearance they were insured when they were not,
   b. that Mr. Fenelon drove one or more of his vehicles without insurance over a period of at least seven months,
   c. that Mr. Fenelon made a material misstatement in reply to an inquiry from Council,
   d. that respecting the issue of whether Mr. Fenelon was complicit backdating an ICBC Autoplan policy in order to circumvent the Violation Ticket:
      i. he was not credible in his testimony and
      ii. he was complicit.

2. Are there misleading, inaccurate or false statements contained in the reports submitted to Council for the hearing?

3. To the extent that Council relied on the agreed statement of facts to make its findings, are those findings still reasonable?

4. Was Council reasonable in not accepting stress as a contributing factor to Mr. Fenelon's misconduct?

5. Is the penalty imposed by Council reasonable?

FACTS

Mr. Fenelon had worked in the insurance business since around 1985 and in British Columbia since around 1993. He was a licensed level 3 general insurance agent and nominee at Sussex Insurance Agency (Newton) Inc. (the "Agency") from May, 1999 until January 18, 2006 when his employment at the Agency was terminated as a result of the subject events. From September, 2006 to November, 2007, Mr. Fenelon was licensed as a level 2 general insurance agent at Gold Key Insurance Services Ltd ("Gold Key"). His work at Gold Key was terminated in November, 2007 as a result of the subject investigation. Until February 15, 2008, Mr. Fenelon also held a life insurance agent licence which was cancelled by the Original Order. Mr. Fenelon had a work history in the insurance industry without any prior infractions.

His position as a level 3 general insurance agent and nominee at the Agency gave him access to ICBC insurance validation decals. Mr. Fenelon also worked at Gold Key as their information technology technician and as such, had keys and passwords to Gold Key's computer system.

Mr. Fenelon had 3 cars including a 2001 Pontiac Montana (the "Montana"), which cars he did not always keep insured. On January 13, 2006, he was issued the Violation Ticket for driving the Montana without insurance by Constable Mondair who also seized the licence plate of the Montana (the "Seized Plate"). Mr. Fenelon told Constable Mondair that he had left his insurance documents at home. The officer agreed that if Mr. Fenelon produced the proof of insurance at the RCMP Surrey Detachment the following day, the Violation Ticket which carried a fine of $598 would be waived. Mr. Fenelon did not go to the RCMP Surrey Detachment to have his violation ticket waived.

ICBC's computer system shows that an Autoplan transaction to renew insurance on the Montana was data captured into the system on January 14, 2006 through a terminal at Gold Key. The interim owner's certificate of insurance manually renewing the Montana's insurance was prepared and signed by Mr. Fenelon's wife who had handwritten the date of January 12, 2006 on the certificate as the effective date of renewal. There was no reason to explain why the manual transaction was not captured into ICBC's system by telephone earlier than January 14, 2006.

On January 14, 2006, Mr. Fenelon went to Beveridge Insurance Brokers ("Beveridge") and declared the Seized Plate as "lost". Making such a declaration enabled him to obtain a replacement licence plate.

ICBC has a specific policy (the "Seizure Policy") that requires agents to mark "seized plate" on the application forms to replace plates seized by police. The application form completed by the agent at Beveridge who attended to Mr. Fenelon did not contain any indication that the plate had been seized by police. The Seizure Policy also requires that a letter from the law enforcement authorities allowing the replacement of a seized plate be produced. Mr. Fenelon did not have such a letter. At the time of attending at Beveridge, Mr. Fenelon was familiar with the Seizure

Policy and knew that he did not meet the requirements of having the Seized Plate replaced pursuant to that policy.

The Seized Plate displayed a 2006 decal (the "Decal") which Mr. Fenelon had illegally placed on it. On January 16, 2006 he attempted to return the Decal to ICBC as defective inventory. On the ICBC prescribed form for returning defective decals, Mr. Fenelon falsely indicated "procedure error" as the explanation for the Decal's defect.

Underneath the Decal was a 2005 decal. During a meeting in the investigation process, Mr. Fenelon denied that he was the one who had placed the 2005 decal on the Seized Plate and suggested that the RCMP could have done so or his former employer could be trying to discredit him. In a subsequent meeting more than a month later, he owned up to having illegally placed decals on his vehicles himself.

Mr. Fenelon admitted that he:

- took and misused ICBC insurance validation decals for personal use on his own vehicles to leave the appearance they were insured when they were not, and
- drove one or more of his vehicles without insurance over a period of at least seven months.

ANALYSIS

Standard of Review – When should the Tribunal interfere?

The standard of review that has been adopted by the Tribunal is reasonableness[13] , that is, the Tribunal will only interfere if Council's decision is unreasonable. In assessing the reasonableness of a decision, the Tribunal examines whether there is any "line of analysis within the Council's decision that could reasonably lead Council from the evidence to its conclusion."[14]

> "If any of the reasons used to support the conclusion are tenable in the sense that they can stand scrutiny, then the decision is not unreasonable . . ."[15]

Therefore, just because the Tribunal would have come to a different conclusion is not sufficient reason for it to interfere if "the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[16]

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[13] Scott Russell Bancroft v. Real Estate Council of British Columbia, unreported July 28, 2008 (FST 08-041), Superintendent of Financial Institutions v. Insurance Council of British Columbia and Richard Jones, unreported June 29, 2006 (FST 06-020), Jagjit Singh Cheema v. Insurance Council of British Columbia and Financial Institutions Commission, unreported June 15, 2006 (FST 05-019)

[14] April 23, 2007 unreported decision of Mr. Hall in Special Risk et al (FST 06-026), supra

[15] Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247 at para. 55

Issue 1 - Was Council reasonable in the following findings of fact?

On appeal Mr. Fenelon repeats many of the points and arguments he advanced at the hearing. An appeal to the Tribunal is not a rehearing and the Tribunal is not expected to retry the matter[17]. Since Council had the benefit of seeing and hearing Mr. Fenelon testify, it is in a better position than I to assess the evidence and the critical issue of credibility. Accordingly, I will show a greater degree of deference to Council's finding of facts.

a. Misuse of decals

Council's finding that Mr. Fenelon took and misused ICBC insurance validation decals for personal use on his own vehicles to leave the appearance they were insured when they were not is reasonable because it is based on the admissions he made under oath during the hearing. Additionally, this is an admission he made in the agreed statement of facts.

b. Driving without insurance

Council's finding that Mr. Fenelon drove one or more of his vehicles without insurance over a period of at least seven months is reasonable because it is again based on his testimony at the hearing. His testimony added to the admission he made in the agreed statement of facts where he admitted only to driving without insurance but not to the period of time over which he had done so.

c. Making a misstatement

On the issue of whether Mr. Fenelon made a material misstatement in reply to an inquiry from Council, it is not entirely clear from his testimony whether he was admitting to having done so. However, I find that there is a fair and reasonable preponderance of cogent evidence to support Council's conclusion that he did make a misstatement.

Firstly, there is the written evidence which he himself tendered for the hearing. I refer to the fifth page of Mr. Fenelon's January 11, 2008 letter to the Council which was entered as Exhibit 3 in the hearing. There he states: "November 20, 2007 I requested a meeting with Mr. Barron. I wanted to come clean about the decals and to apologize in person (Council's Exhibit 26) regarding my actions, and consequently my not being forthwith with him in our first meeting."

Secondly, this evidence is corroborated by the January 8, 2008 general investigative review committee report from investigator Mr. Stephen Barron[18]. Mr. Barron reported that the third meeting he had with Mr. Fenelon took place on November 20, 2007, and during that meeting Mr. Fenelon admitted that he had placed a 2005 decal on the Montana in December, 2004.

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[16] Dunsmuir v. New Brunswick 2008 SCC 9, [2008] 1 S.C.R. 190 at 47
[17] Richard Jones (FST 06-020), supra
[18] At tab 25 of exhibit 2 in the hearing

Furthermore, Council's conclusion in this regard is also consistent with:

- the opening statement of Mr. Wynne who indicated that, with the exception of the issue of backdating the Autoplan, Mr. Fenelon was admitting to all of the allegations including that of having made a material misstatement in reply to an inquiry from Council, and
- paragraphs 33 and 34 of the agreed statement of facts.

According, Council's finding that Mr. Fenelon made a material misstatement in response to an inquiry from Council is reasonable.

d. Backdating an Autoplan policy

Mr. Fenelon adamantly denied the allegation of complicity in backdating the insurance policy. Again, I find that there is a fair and reasonable preponderance of cogent evidence to support Council's conclusion that Mr. Fenelon was complicit in backdating his Autoplan insurance policy in order try to circumvent the Violation Ticket. Furthermore, Council was reasonable in deciding not to accept his evidence respecting this allegation because such evidence fell short of being credible.

(i) Question of credibility

I will first address why I find Council to have been reasonable in questioning the credibility of Mr. Fenelon's evidence in this regard and in ultimately deciding not to accept his evidence.

Failure to produce proof of insurance

Mr. Fenelon maintained under oath that insurance was in fact in place for the Montana on January 13, 2006 when Constable Mondair issued him the Violation Ticket. He was cross examined extensively on why he did not present his insurance documents at the RCMP Surrey Detachment on January 14, 2006 in order to have the ticket waived. He testified that his reasons for not doing so are[19]:

- He was offended because Constable Mondair accused him of driving erratically and speeding and he did not believe that he was driving in such a manner,
- He did not think that Constable Mondair was "genuine" in offering him an opportunity to have the ticket and fine waived if he provided proof of insurance because (a) the constable had accused him of driving erratically and speeding when he was pulled over; and (b) while he was not home on January 14, 2006, the police (not Constable Mondair) went to his house to issue notices to remove his other vehicles, and
- He was offended because he felt that the police who attended at his house on January 14, 2006 insulted and frightened his wife

[19] pp. 133 to 149 of transcripts of hearing

I find the reasons Mr. Fenelon gave for not producing proof of insurance on January 14 to be incoherent.

Firstly, whether he was genuine or not, Constable Mondair made available to Mr. Fenelon an easy way out, which was to present proof of insurance the following day. If Mr. Fenelon did have insurance in place, it is illogical that he would not have taken Constable Mondair up on his offer to waive the significant fine even if he believed the offer to have been disingenuous.

Secondly, Mr. Fenelon's account that he was offended by the police and therefore did not go to the police station to produce proof of insurance is neither coherent nor credible. Producing proof of insurance would have given him an opportunity to vindicate his claim that he did in fact have insurance.

Lastly, it should be noted that Mr. Fenelon took the time and trouble on January 14 to go to Beveridge to falsely declare his Seized Plate as "lost" in order to obtain a replacement licence plate for the Montana. If insurance were in fact in place, a more normal reaction would have been to simply present the insurance documentation to the police.

Declaring Seized Plate as "lost" at Beveridge

Like his testimony regarding why he did not present proof of insurance at the police station, his testimony regarding the declaration of lost plate he made at Beveridge on January 14, 2006 is damaging to his credibility. His evidence respecting what transpired at Beveridge is internally inconsistent.

Mr. Fenelon was cross examined extensively on whether he told the agent at Beveridge that the Seized Plate had actually been seized by the police. The questions and answers on this issue take up 6 pages of the transcripts[20]. His answers included the following: (1) he was too embarrassed to tell the agent that his licence plate had been seized, (2) the agent would most likely have asked him how he lost his plate, (3) he believed that he did in fact tell the agent, (4) he probably did not use the word "seize" but may have told the agent that the police did not believe that he had insurance, (5) he told Council investigators that he may have told the agent that the plate had been seized but the investigators did not include that in their reports, and (6) while dealing with his declaration, the agent at Beveridge was "juggling" him and another gentleman.

The final answer Mr. Fenelon gave under oath was that he could not recall whether he told the agent at Beveridge that the Seized Plate had in fact been seized by the police. That answer is inconsistent with the facts that: (1) he would have appreciated the importance of that piece of information given his familiarity with the Seizure Policy; (2) his licence plate had just been seized less than 24 hours ago, and (3) his goal in attending Beveridge was to have the Seized Plate replaced.

[20] pp. 154 to 159 of transcripts of hearing

Returning the Decal as "defective"

Mr. Fenelon's attempt to return the Decal as "defective inventory" on January 16, 2006 is yet another incident that is detrimental to his credibility. He vehemently disagreed with Mr. McKnight's description of that act as a misrepresentation. Instead, he characterized it as a mistake or an error and explained that it was due to the pressure he was under, that he had just been fired that day and that "everybody is lying to me."[21]

Therefore, based on:

- The reasons he gave for not producing proof of insurance,
- His testimony on what transpired at Beveridge and his declaration of the Seized Plate as lost, and
- His attempt to return the Decal as defective,

Council had ample ground to doubt the credibility of Mr. Fenelon's evidence respecting the question of whether he was complicit in backdating the Autoplan insurance policy and was reasonable in not accepting his evidence.

(ii) Finding of complicity

The facts that:

1. the interim certificate of insurance evidencing a manual renewal transaction for the Montana was signed by Mr. Fenelon's wife. The effective date of January 12, 2006 is handwritten on it;
2. no insurance renewal transaction for the Montana was entered into the ICBC's computer system until January 14, 2006 when Mr. Fenelon or his wife could have entered the manual transaction by telephone earlier;
3. the transaction was entered through a computer at Gold Key where Mr. Fenelon worked and had access to its computer passwords and keys; and
4. Mr. Fenelon's evidence in this area is very problematic and therefore not credible

justify Council's finding that he was complicit in the backdating of the Autoplan insurance policy in order to circumvent the Violation Ticket.

In concluding the analysis of Council's above findings of fact, I would add that the transcripts show that direct and clear answers were sometimes difficult to extract from Mr. Fenelon. Parts of his testimony on some key issues appear overly complicated and evasive. Under these

[21] p. 173 of transcripts of hearing

circumstances, I am extremely reluctant to interfere with Council's findings of fact in the absence of clearly "palpable and overriding error"[22]. There being no evidence of such error, I find all of Council's above findings of fact to be reasonable.

Issue 2 - Was Council reasonable in not accepting that stress was a contributing factor to Mr. Fenelon's conduct?

Under both direct and cross examination, Mr. Fenelon gave extensive testimony about the stress that he had been under. The various sources of stress included work, health and personal issues. Mr. Fenelon's counsel, Mr. Wynne dedicated a significant portion of his examination in chief solely to questions relating to Mr. Fenelon's sources of stress[23]. Under cross examination, Mr. McKnight again posed questions specifically about Mr. Fenelon's sources of stress. Throughout his testimony, Mr. Fenelon raised the issue of stress brought on by work, personal and medical conditions to explain his actions. That issue had been extensively explored at the hearing.

While it may be Mr. Fenelon's opinion that stress caused his misbehaviour, there was no evidence presented at the hearing to link Mr. Fenelon's sources of stress to his misconduct. That is, there was no evidence that stress or any of the conditions he mentioned would have caused him to commit the misconduct that he committed. In the absence of such evidence, Council was reasonable in not accepting that stress contributed to his misconduct.

Issue 3 - Are there misleading, inaccurate or false statements contained in the reports submitted to Council for the hearing?

Referring to the reports submitted to Council for the hearing, Mr. Fenelon believes that they "tainted" his "character in trying to suggest things by using false evidence and misleading statements." [24] I find that there is no evidence to show that statements contained in the reports are false, inaccurate or misleading.

Issue 4 - To the extent that Council relied on the agreed statement of facts to make its findings, are those findings reasonable?

As for the agreed statement of facts, Mr. Fenelon seems to suggest that he was compelled to enter into it and did not fully appreciate why he was entering into it. He said that he thought he had to "agree to these facts in order to get a hearing" and that his counsel told him that it was in his best interest to do so.

I have carefully reviewed the transcripts. Mr. Fenelon's testimony portrays him as an intelligent man with an excellent command of language and a very strong will. Under intense and sometimes aggressive cross examination, he mounted a tenacious defence against accusations he

[22] Superintendent of Real Estate v. Real Estate Council of British Columbia and Kenneth Spong, unreported December 19, 2005 (FST 05-007)
[23] pp. 55 to 73 of transcripts of hearing
[24] p.10 Mr. Fenelon's appeal report filed on December 23, 2008

believed to be unproved. Where admissions were made, he almost always offered lengthy explanations as to why he did what he did. Given Mr. Fenelon's personal characteristics, it is unlikely that Mr. Fenelon did not understand the consequences of agreeing to the statement of facts or that he was forced to admit to doing what he in fact did not do. As for his counsel's advice that it is in Mr. Fenelon's best interest to enter into the agreed statement of facts, counselling party litigants to agree to as much as possible prior to a hearing is generally sound legal advice as that will usually lower the costs of a hearing.

In light of all of the above, I find the agreed statement of facts continues to be reliable. Therefore, Council's conclusions on the findings of fact were not compromised to the extent that Council relied on the agreed statement of facts to form part of the factual basis of its findings.

Issue 5 – Is the penalty imposed by Council reasonable?

"The Tribunal should be reluctant to intervene where the sentencing body has turned its mind to the relevant considerations, unless a particular penalty falls outside an acceptable range and there are no extenuating circumstances."[25]

The cancellation of all insurance agent licences and the prohibition against holding any insurance agent licence for a period of time is reasonable. However, a three year prohibition against being licensed in any field of insurance is overly severe as Council did not take into consideration the relevant factors of the licensee's reform, his unblemished prior record and undue hardship of the penalty on him. Council may have given disproportionately more weight to less comparable precedents where heavier penalties were imposed, and not enough consideration to more comparable ones where lighter penalties were imposed.

The Precedents

In the following section, I will discuss:

- the four precedents to which Council gave particular consideration: Clark[26], Cheema[27], Henneberry[28] and Apex[29]; and
- three other precedents whose facts I find to be more comparable to Mr. Fenelon's but which Council did not specifically mention: Takhar[30], Tsui[31] and Newton[32].

[25] Kenneth Spong (FST 05-007) supra
[26] Larry James Clark and Clark Thomas Insurance Services
[27] Cheema, FST 05-019 supra
[28] Derek David Henneberry, Council Bulletin October 2007
[29] Apex Insurance Services Ltd et al, Council Bulletin October 2007 (at tab 11 of Council's Book of Authorities submitted at hearing)
[30] Baljinder Singh Takhar, October 2, 2007 (at tab 12 of Council's Book of Authorities submitted at hearing)
[31] Lai Wa (Michelle) Tsui, Council Bulletin April 2007
[32] Morgan Gregory Newton, Council Bulletin April 2006

A review of the precedents show that the range of prohibitions previously imposed by Council is significantly wider than that represented by the Clark, Cheema, Henneberry and Apex cases Council particularly considered. They also show that a total ban against holding all insurance agent licences is a punishment not often imposed. Only in three of the previous cases, namely, Clark, Henneberry and Takhar, was a total ban issued. In the other cases, the licence in the field where the agent committed the misconduct was cancelled but no general prohibition was issued barring the agent from working in every field of insurance.

For the discussion, it may be useful to refer to the following chart which summarizes the range of licence prohibitions imposed by the precedents (please note that the chart does not show other penalties such as fines which may or may not have been levied):

	Licence held	Breach	Banned from	Ban period	comments
Clark	life	Untrustworthy, Lack good faith, Not usual practice	All	5 yrs	
Cheema	Level 2 general	Untrustworthy, Lack good faith, Not usual practice	Only general	2 yrs	
Henneberry	Level 1 general	Untrustworthy, Lack good faith, Not usual practice	All	2 yrs	
Apex	Level 3, nominee	Untrustworthy, Lack good faith, Not usual practice, Incompetent	Only level 3 general	2yrs	But can work as level 2 general agent after 9 months – effectively 9 month suspension plus downgrade
Takhar	Level 1 general	Untrustworthy, Lack good faith, Not usual practice	All	1 yr	
Tsui	Level 2 general	Untrustworthy, Lack good faith, Not usual practice	Only level 2	3 mon	Can work as level 1 with temporary restrictions after 3 months
Newton	Level 1 general	Lack good faith, Not usual practice	Nil	0	Not found untrustworthy

<u>The Cases Particularly Considered</u> - *Clark, Cheema, Henneberry and Apex*

Council stated in its decision that it gave particular consideration to the cases of Clark, Cheema, Henneberry and Apex. With the exception of Apex, those cases are not comparable to Mr. Fenelon's.

The Clark case is one on which Council has relied in other recent cases (namely, Xia (Jenny) Liang[33] and Kalano Y.L. Jang et al[34]) where it proceeded under section 238 of the Act to cancel a licence before holding a hearing. In each case, Council imposed a 5 year ban against holding any insurance licence. The Clark case involved a life insurance agent who was also selling securities. Mr. Clark lied to his clients so that they would invest in his company. He allowed a client to surrender 2 life insurance policies to invest the proceeds in his company without regard for that client's needs. Mr. Clark was also the subject of an investigation under B.C. Securities legislation.

In its decision, Council explained that the Clark case "has some similarities to the Fenelon matter in that Fenelon was acting to serve his own interests in disregard to the law". That being the only similarity worth noting, Clark is not very useful: Numerous cases share the general characteristic of involving an offender acting out of self interest and disregarding the law.

As for the Cheema and Henneberry cases, Mr. Cheema accessed ICBC's computer system to obtain personal and confidential information of an ICBC client intending to share that information with someone known to be involved in criminal activities. Mr. Henneberry also obtained personal and confidential information in the same way, he then shared the information with a third party who used that information to threaten the ICBC client in a road rage incident. Mr. Cheema was prohibited against holding a general insurance agent licence for two years and Mr. Henneberry against all insurance agent licences for two years. In its decision, Council distinguished the Cheema and Henneberry cases from Mr. Fenelon's on the ground that the agents there were licensed at levels lower than Mr. Fenelon, thus Mr. Fenelon's more senior position made his actions "particularly more egregious." However, Council did not state what similarities it found between the respective misconduct of the agents in Cheema and Henneberry and that of Mr. Fenelon's.

Apex involved a level 3 general insurance agent and nominee like Mr. Fenelon. The agent there, Ms. Lau, allowed an excessive number of ICBC transactions to be processed for the sole purpose of generating commissions. Ms. Lau's level 3 general insurance licence was cancelled for 2 years. However, she was allowed to resume work as a level 2 agent after 9 months. Therefore, the effective penalty is a 9 month suspension and a downgrade. There was no blanket prohibition against Ms. Lau holding all insurance agent licences.

The Cases Not Mentioned – *Tsui, Newton and Takhar*

The recent cases of Tsui, Newton and Takhar were presented to Council for consideration but were not specifically mentioned in its decision. The facts in these cases are more similar to Mr.

[33] Insurance Council of British Columbia v. Xia (Jenny) Liang, March 18, 2008

[34] Insurance Council of British Columbia v. Kalano Y.L. Jang, Trillion Financial Corp., and Billion Financial Corp., March 18, 2008

Fenelon's: In each case, the general insurance agent misused his/her expert knowledge of the ICBC insurance system to improperly process Autoplan transactions for personal gain.

The facts of Tsui are strikingly similar to those of Apex. Ms. Tsui was a level 2 general insurance agent who improperly processed ICBC transactions to generate extra commissions. She was penalized with a 3 month suspension and was allowed to work as a level 1 general agent with temporary restrictions after the suspension. Again, Ms. Tsui was not generally prohibited from holding all insurance licences.

In the Newton case, the agent was a level 1general insurance agent. Mr. Newton tried to renew his own Autoplan insurance that was due to expire by the end of that day. However, he owed an outstanding amount to ICBC which, if unpaid, would have prevented the renewal. In processing his renewal transaction, Mr. Newton manipulated the ICBC computer system to misrepresent that the outstanding debt had been paid. When asked for payment later, he presented a cheque he knew would be returned for non sufficient funds. Mr. Newton also made a material misstatement on an insurance licence application albeit in an unrelated matter. Despite those facts, Council found that Mr. Newton's conduct did not warrant a ruling that he was untrustworthy. Mr. Newton was reprimanded. The Newton case is best described as an anomaly.

In Mr. Takhar's case, in addition to processing ICBC transactions to generate commission, he also improperly processed some transactions on vehicles he and/or his wife owned in order to save on insurance premiums. Mr. Takhar was also found to have made a misstatement to ICBC regarding an insurance claim and to have falsely executed insurance documents by signing his wife's name without her consent. Mr. Takhar was prohibited from holding any insurance agent licence for one year.

The Takhar case is particularly helpful because Council clearly set out what factors were considered and how they affected its determination of the appropriate penalty to impose. With respect to the severe penalty of a general prohibition against holding all insurance licences, Council explained that it is warranted where the agent poses an ongoing risk to the public. It then went on to explain that Mr. Takhar posed a continuing risk because he still wanted to deflect blame on others even though he had admitted some of his wrongful actions.

Council specifically addressed whether the fact that Mr. Takhar had no prior disciplinary history should be considered a mitigating factor. Council found that an unblemished prior record is not a mitigating factor in Mr. Takhar's case because he had worked only part time in the insurance business for seven years selling insurance only to clients known or referred to him. Mr. Takhar worked primarily as a real estate agent. In this respect, Takhar stands for the proposition that a prior record of relatively limited commitment to working in the insurance industry will not be considered a mitigating factor even if such record is unblemished.

Council also showed that it turned its mind specifically to Mr. Takhar's reform by stating that the one year "period away from the industry will serve not only to protect the public, but also as a

rehabilitation mechanism for the licensee such that in the future, in his capacity as an insurance salesman, a real estate agent, or otherwise, he will conduct business in an honest and trustworthy manner."

Is the cancellation of all licences reasonable?

Intentionally making a misstatement in reply to Council inquiry is a very serious misconduct because it interferes with the due administration of the Act. It is the type of activity contemplated by the Act and Council's Policies as calling into question a licensee's suitability to continue to hold an insurance agent licence. [35]

Like Mr. Takhar, Mr. Fenelon also has a tendency to blame others for his predicament even though he accepts some responsibility for his misconduct. Mr. Fenelon doubted the motive of the police and pointed to mistakes others could have made. In his December 23, 2008 appeal report, he describes himself as having been surrounded by "substandard" agents and as having been subjected to a negative environment. His continued deflection of blame on others poses an ongoing risk to the public that calls into question his suitability to hold an insurance agent licence.

Therefore, the cancellation of all of Mr. Fenelon's licences is reasonable.

Is the three year prohibition against holding any insurance licence reasonable – were relevant factors considered?

Council's decision is silent on the issues of the licensee's reform, his long unblemished record and undue hardship of the penalty on him. Therefore, there is no indication that these relevant factors were considered in imposing penalty on Mr. Fenelon. There is no line of analysis within the decision that could reasonably have led Council from the evidence to a conclusion that these factors were not relevant in determining the appropriate penalty to impose on Mr. Fenelon.

Prior Record

Unlike Mr. Takhar, Mr. Fenelon had a long and substantial work record in the insurance field. That record was unblemished until the subject incident. In Takhar, Council held that it will not consider an unblemished prior record as a mitigating factor in assessing penalty if the offending agent's commitment to his work the insurance industry is relatively limited. By logical extension, an unblemished prior record will be considered a mitigating factor if the offending agent has a long history that demonstrates substantial commitment to working in the insurance sector. Therefore, Mr. Fenelon's clean prior record should have been taken into consideration.

Reform

[35] see section 231(1)(c) of the Act and Council Policies 54.1

That Mr. Fenelon had never previously offended in his long career in insurance increases the likelihood of successful reform. Therefore, the penalty imposed on Mr. Fenelon should have been adjusted to encourage and provide an opportunity for rehabilitation.

Undue hardship

The fair imposition of professional discipline must involve an assessment of whether the hardship on the licensee resulting from the penalty is undue under the circumstances. There is no indication within the decision that Council undertook such an evaluation.

I find that the cumulative effect of:

1. the seven months that he had stopped working as a general agent before he had an opportunity to be heard,
2. the long period of uncertainty resulting from the protracted investigation, and
3. having been punished before being heard

subjected Mr. Fenelon to hardship that is undue.

Stopped work prior to hearing

By the time of the hearing in June, 2008, Mr. Fenelon had not worked as a level 3 general insurance agent and nominee for over 2 years (since January 18, 2006) and as a lower level general agent for 7 months (since November 7, 2007). Whether it be the result of an edict by Council or termination by employer, he had effectively been stopped from working as a general agent for a significant period before he had the opportunity to be heard.

Long Investigation

Mr. Fenelon was subjected to an unduly long period of uncertainty because the investigation was protracted and no decision was taken until February 15, 2008, which is 2 years after the incident. Mr. Fenelon's misstatement would have contributed to the delay but is unlikely to have been the sole cause. I note from the report of ICBC's provincial investigation team[36] that ICBC started investigating in April, 2006 and concluded in August, 2006. That ICBC report is stamped as received by Council one year later in August 2007. None of the documents on record disclose any further investigation activity until the fall of 2007 when interviews were carried out by Council investigators. I am unable to find any explanation on the record for the apparent lapse of more than one year between the conclusion of ICBC's investigation and commencement of Council's.

[36] At tab 31 of exhibit 2 in the hearing and exhibit 6 of Mr. Fenelon's December, 2008 appeal report

Punished before hearing

Despite how long the investigation took, Council considered that "the length of time that would be required to hold a hearing would be detrimental to the due administration of this Act"[37] and proceeded under section 238 of the Act against Mr. Fenelon. Punishing before hearing is an extreme measure that, in and of itself, increases the severity of the penalty.

In sum, the period and scope of the ban are excessive because Council did not consider the relevant factors of reform for Mr. Fenelon, his unblemished record and undue hardship of the penalty on him. There is no tenable reason for excluding these factors from consideration and the penalty of a three year prohibition against holding a licence in every field of insurance should be reduced to reflect these factors.

What would be a reasonable ban?

Compared to the Tsui, Apex and Takhar cases, Mr. Fenelon's conduct is worse because he exposed the public to potential grave risk by misrepresenting that his cars were insured when they were not and by driving without insurance for a significant period of time. In addition, he hampered the inquiry process by making a misstatement in reply to Council inquiry.

Furthermore, in all cases except for Apex, the agents were licensed at a level lower than Mr. Fenelon. As a level 3 general insurance agent and nominee, Mr. Fenelon had achieved the highest level of licensing in the field of general insurance and ought to have known and behaved better.

Therefore, a penalty more severe than those imposed in the Tsui, Apex and Takhar cases is to be expected.

A prohibition for a period of three years from the field of general insurance is reasonable particularly in light of Mr. Fenelon's continued assignment of blame on others. Such attitude increases the continuing risk he poses should he be allowed back too soon into the field where he would encounter the same temptations. That three year period should, however, be deemed to have commenced as of November 7, 2007 in order to take into account the undue hardship to which Mr. Fenelon had been subjected.

As for the prohibition against holding licences in the insurance fields of life and accident and sickness, I find that a reasonable period of prohibition to be 2 years commencing February 15, 2008. The period is reduced from that which Council imposed by one year to take into account Mr. Fenelon's unblemished prior record. Those fields are also a logical place for Mr. Fenelon to start his reform and rebuild his reputation in the insurance industry.

[37] Section 238(1)(b) of the Act

Is imposition of $5000 fine reasonable

Varying the penalty imposed by the Original Order by adding a $5000 fine is unreasonable because no reasons were given for such variation.

Under s. 238(3) of the Act, Council "must confirm, revoke or vary" the original order following the hearing. The legislative requirement is that any new order that Council makes must be in relation to the original order. This means that if Council chooses to make a new order that is different from the original one, then a comparison of the two orders must be undertaken and the reasons for the variation must be clear.

Therefore, following a section 238 hearing, if Council wishes to vary the penalty imposed by an earlier order, (1) it must expressly give reasons for varying the earlier penalty, and (2) the new penalty must be reasonable.

Why Council increased the original penalty by adding a $5000 fine is unknown. The fact that Council could have imposed a fine at the time of the Original Order but chose not to do so only begs the question: What made Council change its mind between the time of the Original Order and the hearing? In its decision, Council did not point to any change in the facts or the law that occurred since the Original Order was made that would justify a variation. No reasons were given for the variation. Without reasons, the variation is arbitrary and the additional penalty of a fine is unreasonable.

Furthermore, increasing a penalty without giving reasons after the licensee exercises his right to be heard creates the undesirable impression that the licensee is being penalized for insisting on his right to due process. Such an effect is detrimental to the administrative justice system. Accordingly, the fine of $5000 will be eliminated.

Is adding hearing costs and extending payment schedule reasonable?

Varying the Original Order by adding an award for hearing costs and extending the time for payment is reasonable because:

1. costs and its related payment schedule are administrative matters that are not part of punishment. Section 241.1 of the Act and Council's Policies 56.1 provide for administrative cost recovery;
2. the reason for the variation is obvious: Hearing costs had not been incurred at the time of the Original Order and were not incurred until after the hearing; and
3. the assessment of hearing costs was carried out strictly in accordance with the Act and Council's Policies and the reasons for the assessment were fully set out in the decision.

In summary, a variation to the Original Order to deal with strictly administrative matters such as recovery of costs and the related payment schedule is reasonable as long as the reason for the variation is discernible and the subsequent cost order is reasonable.

CONCLUSION

In conclusion, Mr. Fenelon's appeal is allowed in part. Pursuant to section 242(11) of the Act, I would vary Council's September 26, 2008 decision by:

1. changing the commencement date of the three year period during which Mr. Fenelon is deemed unsuitable to hold a general insurance agent licence to November 7, 2007;
2. changing the period during which Mr. Fenelon is deemed unsuitable to hold an insurance agent licence other than a general insurance agent licence to two years commencing February 15, 2008;
3. eliminating the fine of $5000;
4. changing the deadline for paying the awarded costs to a date prior to Mr. Fenelon making an application for any insurance agent licence under the Act.

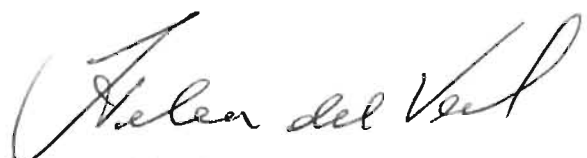
Accordingly, I order that:

1. Mr. Fenelon's life and accident and sickness insurance agent licence remain cancelled;
2. Mr. Fenelon is not suitable to hold:
    a. a general insurance agent licence under the Act for a period of three years, commencing from November 7, 2007;
    b. an insurance agent licence under the Act other than a general insurance agent licence for a period of 2 years, commencing February 15, 2008;
3. Mr. Fenelon must pay the costs of Council's investigation into this matter, assessed at $10,187.50;
4. Mr. Fenelon must pay Council's hearing costs in this matter, assessed at $5,786.22;
5. As a condition of this decision, Mr. Fenelon must first pay the above mentioned costs prior to making an application for any insurance agent licence under the Act.

No order for costs will be made as neither party sought such an order and success on appeal is divided.

Dated at North Vancouver, British Columbia, this 12th day of April, 2009.

FOR THE FINANCIAL SERVICES TRIBUNAL



Helen R. del Val
Presiding member

APPENDIX

Hearing requirements

237 (1) This section applies to hearings by the commission, superintendent or council under this Act.

(2) The commission, superintendent or council, depending on which of them has the power to take the action, must give written notice in accordance with the regulations of the intended action to any person who will be directly affected by it, before taking any of the following actions:

(a) making an order under section 38 (1) or (2), 48 (2), 67 (2), 93 (1) or (2), 99 (2), 109 (2), 125 (1), 137, 143, 144 (3), 193, 197, 231 (1), 244 (2), 245 (1), 247 (2) or (4), 249, 253.1, 275 or 277 (d) to (g);

(b) refusing an order under section 245 (5);

(c) giving a consent referred to in section 235 (2) subject to conditions;

(d) imposing or varying conditions on a previously made order referred to in section 235 (1);

(e) imposing or varying conditions on a previously given consent referred to in section 235 (2);

(f) refusing to give a consent referred to in section 235 (2);

(g) issuing

(i) a business authorization,

(ii) a permit under section 187 (1), or

(iii) a licence under Division 2 of Part 6,

subject to conditions;

(h) imposing or varying conditions in respect of a previously issued

(i) business authorization,

(ii) permit under section 187 (1), or

(iii) licence under Division 2 of Part 6;

(i) refusing to issue a

(i) business authorization,

(ii) permit under section 187 (1), or

(iii) licence under Division 2 of Part 6.

(3) Not later than 14 days after receiving notice under subsection (2) of an intended action, a person directly affected,

(a) by delivering notice in writing to the commission may require a hearing before the commission in any case in which it is the minister or the commission that intends to take the action, or

(b) by delivering notice in writing to the superintendent or the council, as appropriate, may require a hearing

(i) before the superintendent in any case in which it is the superintendent who intends to take the action, and

(ii) before the council in any case in which it is the council that intends to take the action.

(4) A hearing required under subsection (3) must be held within a reasonable time after delivery of the written notice under subsection (2).

(5) [Repealed 2004-48-102.]

(6) After

(a) the expiry of the 14 day period referred to in subsection (3) if no hearing has been required within that period, or

(b) after the hearing, if one has been required within that period,

the commission, the superintendent or the council, as the case may be, may proceed in the exercise of the powers conferred under this Act in respect of the matter that was the subject of the notice delivered under subsection (2).

Summary procedure — superintendent or council

238 (1) If the superintendent acting in accordance with a delegation by the commission, or the council, depending on which of them has the power to make the order,

(a) intends to make an order under section 48 (2), 93 (1) or (2), 99 (2), 144 (3), 231 (1) (g), (h), (i) or (j), 244 (2), 245 (1), 275 or 277 (d) to (f), and

(b) considers that the length of time that would be required to hold a hearing would be detrimental to the due administration of this Act,

then, despite section 237, the superintendent or council, as applicable, may make the intended order without giving a person directly affected by it an opportunity to be heard, but the superintendent or council, as soon as practicable after making the order, must deliver to that person

(c) a copy of the order and written reasons for it, and

(d) written notice of the person's rights under subsection (2).

(2) A person directly affected by an order made under subsection (1) may, within 14 days of receiving a copy of the order,

(a) require a hearing before the superintendent or council, as applicable, by delivering written notice to the superintendent or council, or

(b) appeal the order to the tribunal.

(3) Within a reasonable time after receiving written notice referred to in subsection (2) (a), the superintendent or council, as applicable, must hold the required hearing and following the hearing must confirm, revoke or vary the order.

Practice and procedure

242.2 (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 that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.

This is Part 1 of a two part document.

To view Part 2, select the document labelled:

Jocelyn Fenelon (LIF) 15Feb2008 Part 2 of 2