FST06-020

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF THE *FINANCIAL INSTITUTIONS ACT*,
RSBC 1996, c. 141 as amended (the "Act")

BETWEEN:

THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

APPELLANT

AND:

INSURANCE COUNCIL OF BRITISH COLUMBIA
And
RICHARD JONES

RESPONDENTS

DECISION

BEFORE:	DALE R. DOAN, Presiding Member
APPREARANCES:	RICHARD FERNYHOUGH, for the Appellant DAVID T. McKNIGHT, for the Respondent, Insurance Council of British Columbia WILLIAM KNUTSON, for the Respondent, Richard Jones (Decision based upon written submissions)
DATE OF LAST SUBMISSION:	May 25, 2006
DATE OF DECISION:	June 29, 2006

INTRODUCTION

This appeal (the "Appeal") to the Financial Services Tribunal (the "FST") arose as a result of the Notice Of Appeal dated February 16, 2006 and filed with the FST by the solicitor for the Appellant, the Superintendent of Financial Institutions. The decision under appeal is that of the Respondent, Insurance Council of British Columbia (the "Council") dated January 17, 2006, which decision found that the Respondent, Richard Jones (the "Licensee") committed multiple breaches of sections 231(1)(a) and one breach of section 231(1)(e) of the *Act*. The Appellant appeals the decision of Council basically on the grounds that the penalty imposed by Council on Mr. Jones should be increased in terms of the period of suspension and that the educational requirement ordered by Council should be varied to require the completion of educational element prior to the Licensee reapplying for his registration as a Certified Financial Planner. The Appeal is submitted pursuant to section 242(3)(b) of the *Act*.

COUNCIL'S ORDER

Council issued its Order on January 17, 2006. In its Order, Council made reference to the fact that the Licensee accepted Council's intended decision dated April 22, 2005, as amended on December 22, 2005 (collectively, the "Intended Decision") and did not wish to exercise his right to a hearing. Thus, under the authority granted in sections 231, 236 and 241.1 of the *Act*, Council ordered as follows (please note that Council refers to Mr. Jones as the "Licensee" as will this Appeal decision):

1. the Licensee be suspended for nine months. If the Licensee, before he completes his first four months of the suspension, reimburses the clients Council deemed to have incurred unnecessary deferred sales charges totalling $25,155.21, the remaining five months of the suspension will be waived;
2. the Licensee be fined $10,000;
3. the Licensee, as a condition of his license, be required in each of the four years following the reinstatement of his license from the suspension, to successfully complete a different course comprising Advocis' Certified Financial Planner Program ('CFP") or a program with an equivalent curriculum;
4. the Licensee, as a condition of his license until successful completion the aforementioned financial planning courses, be supervised by a life insurance agent who meets Council's approval. The supervising life insurance agent must agree to have a condition placed on his/her insurance license making him/her accountable for the insurance business conduct of the Licensee;
5. the Licensee pay the costs of Council's investigation totalling $15,700; and
6. as a condition of any order, the Licensee will be required to pay the above mentioned costs and fines by making seven equal payments, with the first payment required at the beginning of the fifth month after the commencement of his suspension. If the Licensee does not pay the ordered costs and fines in accordance with this payment schedule, this licence will be suspended until such time as the outstanding fine and costs are paid.

It should be noted that the record for this Appeal (the "Record") includes the December 22, 2005 confirmation letter which sets out the results of an investigation by Council undertaken pursuant to section 232 of the *Act*, which investigation resulted in the Respondent Licensee confirming his agreement with all of the findings set out in Council's Intended Decision. Those findings, as confirmed, form part of the Record. The December 22, 2005 confirmation letter of Council then dealt with the two remaining matters of contention, being the amount of the fine imposed and the length of the suspension to be ordered.

The investigation conducted by Council pursuant to section 232 of the *Act* involved serious allegations described in Council's letter of April 22, 2005, addressed to the solicitor for the Licensee, as follows:

> "Contrary to section 231(1) of the *Act*, the Licensee no longer meets a licensing requirement under Council Rule 3(2) or did not meet that requirement at the time his licence was issued, or at a later time. In particular, the Licensee is not trustworthy and competent, and does not intend to carry on the business of insurance in good faith and in accordance with the usual practice."

Council then lists eight specific allegations which formed the subject matter of the investigation in the April 22, 2005 letter of Council to the lawyer representing the Licensee and outlined in detail the findings of the investigation, which findings comprise most of the fifteen page letter itself and which findings establish the legitimacy of the eight listed allegations. I will list the eight allegations accepted and confirmed by the Licensee:

1) The Licensee had clients named George Barrington and Brian Ahlsten sign incomplete (and/or blank) insurance related documents.
2) The Licensee fabricated George Barrington's signature on two insurance related documents.
3) The Licensee misled George Barrington to believe that a transfer of his segregated fund investments from one insurer to another had taken place when in fact if had not occurred.
4) The Licensee gave four clients (Janet Savage, Diane Medley, Margo Larson and Edna Laffey) inaccurate tax advice in relation to insurance matters.
5) Contrary to the interests of three clients (George Barrington, Diane Medley, and Margo Larson), the Licensee unnecessarily recommended and facilitated the transfer of their segregated fund investments to generate commissions.
6) In recommending and facilitating an insurance transaction for a client named Edna Laffey, the Licensee did not act in her best interests. In particular:
   - He failed to conduct sufficient fact-finding and needs analysis to properly assess her circumstances, goals and needs;
   - He did not make full and fair disclosure to all material facts about the proposed insurance to enable her to make an informed decision; and
   - His insurance recommendation was not reasonable in the circumstances and it was done for personal gain.
7) In recommending and facilitating several insurance transactions for Brian Ahlsten, the Licensee did not act in his best interest. In particular, the Licensee's insurance

recommendations were not reasonable in the circumstances and they were done for personal gain.

8) The Licensee willfully disregarded a requirement under the *Act* that he not rebate an insurance premium. In particular, he recommended and facilitated the transfer of a segregated fund held by Janet Savage in order to generate a commission, a portion of which he returned to her contrary to section 79 of the *Act*.

Council considered each of the eight findings in the context of the requirements defined in Council's Code of Conduct of competence, good faith and usual practice. These requirements are set out later in this Appeal decision, however, I mention them here due to the fact that the overriding duty of good faith to insurers and clients with whom licensees transact business is emphasized through the descriptions of the required level of competence, good faith and usual practice set out in the Code of Conduct. As Council described each of the allegations and the finding that resulted from the investigation under the *Act*, it was unequivocally clear that the Licensee did not meet the requirements of competence, good faith and usual practice to either the insurers with whom he transacted business or the clients whom he represented in the insurance policy placement process.

Further, the seriousness of the acts of the Licensee and the deliberate disregard for required procedures over a period of time are clearly set out in the findings of Council. The same can be said respecting those acts which were undertaken by the Licensee for personal gain and which were contrary to the interests of his clients. Forgery, misrepresentation, incompetence and inaccurate advice on tax matters and manipulation of clients' interests often for personal financial gain, all are serious matters that must be dealt with by Council in an effective and decisive manner if the interests of the public are to be met and if the integrity of the insurance industry in British Columbia is to be maintained. A close review of the April 22, 2005 letter containing the allegations and findings of Council must cause any reviewing body, and in particular the FST, to be on special alert in ensuring that the penalty imposed by Council properly addresses those legal and public policy principles that are inherent in the important task of determining the appropriate penalty in the circumstances created by the actions of the Licensee.

ISSUES ON APPEAL

The Appellant, Superintendent of Financial Institutions, describes the central issue on Appeal, to paraphrase, as follows:

> Council erred in exercising its discretion in unreasonably concluding that a period of suspension of only 9 months (reduced to 4 months if some restitution is made), and completing a financial planning course over a four year period after reinstatement, in addition to a $10,000 fine, was appropriate discipline of the licensee of engaging in the following conduct:
>
> a) forging a client's signature twice on insurance documents;

b) having a general practice of making clients sign blank insurance forms throughout his relationship with them, including authorizations to transfer funds, specifically with regard to the case of six clients who complained during the investigation;
c) misleading one of the clients to believe that a transfer of his segregated fund insurance contract had taken place when in fact it had not;
d) giving 4 of the same clients inaccurate tax advice in relation to insurance matters;
e) contrary to the interests of 3 of the clients, unnecessarily recommending and facilitating the transfer of segregated fund insurance contracts to generate commissions;
f) with respect to one of the clients, failing to conduct a sufficient fact-finding and needs analysis, failing to make full and fair disclosure of all material facts about the proposed insurance to enable her to make an informed decision, making an unreasonable recommendation which was done for personal gain;
g) not acting in the best interests of one of the clients by recommending and facilitating several insurance transactions, and in particular making recommendations that were not reasonable and done for personal gain; and
h) by willfully disregarding the statutory prohibition that he not rebate insurance premiums with respect to one of the clients for whom he recommended and facilitated a transfer of a segregated fund in order to generate a commission, $6,000 of which he returned to her.

The Respondent Council submits that the period of suspension must be viewed in conjunction with the imposition of the fine, costs of the investigation and the public reporting of the penalties and reprimand, all of which form part of the penalty imposed. Council also submits that the period of suspension itself was appropriate in the circumstances and that the decision is not ambiguous and is therefore enforceable in law.

The Respondent Council is of the view that the FST should not vary Council's decision as the standard of review governing the FST in the appeal process could hold that the FST is not in a position to vary Council's decision in the circumstances of the Appeal in this case. In addition, the Respondent submits that the penalty is substantial and appropriate in this case. It accomplishes, in the view of legal counsel for the Licensee, a balance between a significant penalty but not so punitive as to end the Licensee's career and thus his ability to earn a livelihood in a career he has pursued for almost 20 years. In addition numerous mitigating factors are reviewed by the Licensee that on their face lessen the severity of the acts of the Licensee.

The Respondent Licensee submits that Council had all of the requisite information before it when it made its decision, acted in accordance with the correct test, being reasonableness, and made the correct and reasonable determinations in the circumstances.

It must be kept in mind that the penalty imposed by Council arose in the context of its negotiations with the Licensee. A formal hearing was waived by the Licensee, the determinations of fact and the decisions of Council were confirmed by the Licensee and the penalty was imposed, all in the context of a negotiated settlement. To vary that penalty significantly at this time calls into question the context in which the settlement was reached as

well as the fairness of the process in question. In other words, if I determined that a material change in the penalty was mandated as a result of this Appeal, may I impose that penalty without also considering the fact that the Licensee waived his right to a hearing, confirmed facts and decisions and agreed to a penalty through a negotiated procedures and would now find that penalty changed unilaterally by an appeal authority? This, in my view, is a further issue on this Appeal that must be considered.

PRELIMINARY MATTERS

Counsel for the Appellant made an application pursuant to section 242.2(8)(b) of the *Act* for the introduction of new evidence by way of letter dated April 25, 2006 to the FST. This application related to segments of the submissions of each of the Respondents that Crown Counsel had reviewed the investigation materials of Council and had determined not to proceed against the Licensee with criminal charges. The submissions, in the view of the Appellant, were incomplete or improper in two respects. First, the segments of the submissions referred to evidence not in the Record. Second, the submissions failed to mention that Crown Counsel was prepared to proceed with criminal charges in one instance but decided not to proceed when the client of the Licensee died.

Counsel for the Respondent Council did not oppose the admission of new evidence by the Appellant, however, numerous submissions were made with respect to the admission of new evidence. By way of letter dated May 16, 2006, counsel for the Appellant withdrew the application for the submission of new evidence as a result of reflection upon the submissions of the Respondent Council.

Although it is not necessary for me to deal with this preliminary issue other than pointing out that the application for the admission of new evidence was withdrawn, I do believe that it is appropriate for me to comment that issues surrounding the laying of criminal charges are significantly different than issues surrounding penalties imposed by the Insurance Council of British Columbia in instances where Council's Code of Conduct have been breached. Each proceeding has its own investigative procedures, standard of proof, policy considerations and other critera that are applied. Neither is necessarily relevant to the other. For the purposes of this Appeal, matters concerning Crown Counsel determinations are not relevant.

BACKGROUND AND CHRONOLOGY

Earlier in this Appeal decision, a summary of the eight findings of Council as a result of its investigation are set out. In addition, the Record contains the full letter of Council dated April 22, 2005 addressed to counsel for the Licensee as well as the "Full Council Investigation Report Re: Richard Jones" dated March 30, 2005 and considered at the meeting of Council on April 12, 2005. As the findings of Council set out in the said letter and report are confirmed by the Licensee, it is not necessary to repeat them here. Rather, certain findings that are specifically relevant to this Appeal will be referred to below.

FACTS AND EVIDENCE

The Licensee has accepted and confirmed the findings of fact of Council summarized in the listing of the eight findings of Council set out above. The Licensee's confirmation extends to the March 30, 2005 Full Council Investigation Report Re: Richard Jones. A full reading of the said Report illustrates the gravity of the Licensee's breaches of the insurance industry's Code of Conduct. The resulting specific findings of Council adequately summarized these breaches for the purposes of this Appeal decision as well as for the purposes of addressing the issues on Appeal.

At the risk of some repetition, the allegations which form the subject matter of the investigation conducted by Council as set out in Council's letter to the solicitor for the Licensee dated April 22, 2005 are as follows:

> "Contrary to section 231(1) of the *Act*, the Licensee no longer meets a licensing requirement under Council Rule 3(2) or did not meet that requirement at the time his licence was issued, or at a later time. In particular, the Licensee is not trustworthy and competent, and does not intend to carry on the business of insurance in good faith and in accordance with the usual practice.
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> Specifically:

1) The Licensee had clients named George Barrington and Brian Ahlsten sign incomplete (and/or blank) insurance related documents.
2) The Licensee fabricated George Barrington's signature on two insurance related documents.
3) The Licensee misled George Barrington to believe that a transfer of his segregated fund investments from one insurer to another had taken place when in fact if had not occurred.
4) The Licensee gave four clients (Janet Savage, Diane Medley, Margo Larson and Edna Laffey) inaccurate tax advice in relation to insurance matters.
5) Contrary to the interests of three clients (George Barrington, Diane Medley, and Margo Larson), the Licensee unnecessarily recommended and facilitated the transfer of their segregated fund investments to generate commissions.
6) In recommending and facilitating an insurance transaction for a client named Edna Laffey, the Licensee did not act in her best interests. In particular:
    a. He failed to conduct sufficient fact-finding and needs analysis to properly assess her circumstances, goals and needs;
    b. He did not make full and fair disclosure to all material facts about the proposed insurance to enable her to make an informed decision; and
    c. His insurance recommendation was not reasonable in the circumstances and it was done for personal gain.
7) In recommending and facilitating several insurance transactions for Brian Ahlsten, the Licensee did not act in his best interest. In particular, the Licensee's insurance recommendations were not reasonable in the circumstances and they were done for personal gain.
8) The Licensee willfully disregarded a requirement under the *Act* that he not rebate an insurance premium. In particular, he recommended and facilitated the transfer of a

segregated fund held by Janet Savage in order to generate a commission, a portion of which he returned to her contrary to section 79 of the *Act*."

In the letter dated April 22, 2005, Council then reviewed in considerable detail the evidence. This resulted in the findings and reasons of Council, again set out in the said letter. The findings have been accepted and confirmed by the Licensee.

The findings clearly establish breaches of Council's Code of Conduct on all three requirements, being competence, good faith and usual practice. The Licensee intentionally:

(i) arranged for clients to sign incomplete or blank insurance documentation;
(ii) forged signatures on insurance documentation;
(iii) mislead a client respecting a transfer of investments from one insurer to another;
(iv) provided inaccurate tax advice on insurance matters to four clients;
(v) disregarded an express requirement under the *Act* that he not rebate an insurance premium generating a commission which was shared with the client contrary to the *Act*;
(vi) acted contrary to the interests of three clients by unnecessarily recommending and facilitating the transfer of investments to generate commissions;
(vii) specifically acted contrary to a client's best interests through improper assessments and analysis;
(viii) failed to make full and fair disclosure of material facts and make an insurance recommendation that was not reasonable in the circumstances and was done for personal gain; and
(ix) failed to act in a client's best interests which were again unreasonable in the circumstances and were done for personal gain.

ANALYSIS

These finding and the supporting evidence considered by Council indicate improper, fraudulent and incompetent conduct of the insurance business by the Licensee over a considerable period of time. These actions by the Licensee took place in an environment where the insurance business is highly regulated and is the subject matter of a clear Code of Conduct that prohibits acts of this sort. Faced with that environment, the Licensee chose to perform a series of unethical, improper, and in some cases fraudulent activities for his person gain and with blatant disregard for the best interests of the clients involved and the reputation of the insurance industry in general. The fact that in certain instances his clients made profits as a result of his actions does not lessen the improper nature of the motivation for his acts. The Licensee accepts that certain actions were also incompetent in terms of the standards of competence required of licensees.

A full hearing before Council did not take place as a result of the penalty negotiations and settlement having been reached between Council and the Licensee. Council imposed the following penalties as a result of that agreement:

1. the Licensee be suspended for nine months. If the Licensee, before he completes his first four months of the suspension, reimburses the clients Council deemed to have incurred

unnecessary deferred sales charges totalling $25,155.21, the remaining five months of the suspension will be waived;
2. the Licensee be fined $10,000;
3. the Licensee, as a condition of his license, be required in each of the four years following the reinstatement of his license from the suspension, to successfully complete a different course comprising Advocis' Certified Financial Planner Program ('CFP") or a program with an equivalent curriculum;
4. the Licensee, as a condition of his license until successful completion the aforementioned financial planning courses, be supervised by a life insurance agent who meets Council's approval. The supervising life insurance agent must agree to have a condition placed on his/her insurance license making him/her accountable for the insurance business conduct of the Licensee;
5. the Licensee pay the costs of Council's investigation totalling $15,700; and
6. as a condition of any order, the Licensee will be required to pay the above mentioned costs and fines by making seven equal payments, with the first payment required at the beginning of the fifth month after the commencement of his suspension. If the Licensee does not pay the ordered costs and fines in accordance with this payment schedule, this licence will be suspended until such time as the outstanding fine and costs are paid.

Council summarized the conduct of the Licensee as follows:

> "Overall, Council identified a pattern of behaviour whereby the Licensee consistently eschewed his duties and obligations as an insurance agent for personal benefit. This included showing no apprehension in having clients sign incomplete documents, in fabricating clients signatures and in rebating an insurance premium to a client, all of which he knew to be inappropriate conduct at the time. His actions also left Council to conclude he placed his interests before his clients in recommending and facilitating insurance transactions that were not in their best interests and from which he stood to derive personal gain through commissions. Further, he provided erroneous advice to clients on a subject matter which was beyond his level of expertise, resulting in decisions which prejudiced clients."

The Full Council Investigation Report re: Richard Jones comprises 25 pages of analysis coupled with 40 exhibits, all of which reviews in detail the allegations and the supporting facts as determined by the investigators. An overview of this investigative report establishes that the comments of the Appellant regarding the nature, severity and continuous nature of the impugned activities of the Licensee is accurate. However, it also illustrates that the mitigating circumstances described in the submissions of the Respondent Council are critically important to Council's decisions on penalty. Council submits that in virtually every instance of improper activity for personal gain, the Licensee provided background information and in some case excuses that reduced significantly either the seriousness of the activity itself or the consequences, financial or otherwise, to the client's of the Licensee in the end result. It would be improper in my view if the overall summary of the impugned activities were reviewed in this Appeal in isolation from the remainder of the investigative report which sets out certain mitigating features. Counsel for the Respondent Licensee is of the view that a balanced approach to the evidence is necessary given the investigative report's contents and I accept that position.

Examples of those mitigating features as described in the Respondent's submissions include the following:

a) The Licensee has confirmed that certain improper activities were "for personal gain". Council points out that the findings showed that certain of the activities "for personal gain" related to the Licensee's failure to discuss with his clients the choice between purchasing a product with upfront costs where the insurance agent gets less commission, and deferred sales charges where the insurance agent makes more income and the client is penalized if the investment is not held for a minimum number of years. Essentially, it was the lack of communication that caused the activity that was prejudicial, or potentially prejudicial, to the client of the Licensee;

b) The Investigative report shows that most of the Licensee's clients benefited from his actions and recommendations even in cases where penalties were experienced;

c) The improper activity of allowing insurance documentation to be signed in blank appear, in most if not all instances, to have resulted in the Licensee completing the documentation in the manner intended by both he and his clients based on information provided to him by his clients. Thus, although improper and not in accordance with usual practice for a licensed insurance agent, the information actually placed in the documentation was not inaccurate, incorrect or fraudulent;

d) Where the Licensee fabricated the signature on two insurance-related documents by cutting and pasting a client's signature on two documents, the Investigative Report indicates that the purposes behind the documents were a segregated fund redemption and the addition of co-annuitants, both on the client's instructions and in a situation where the Licensee did not gain in a financial manner;

e) The cutting and pasting incidents also appear in the Investigative Report to have been isolated activities with respect to this one client only. The Licensee acknowledged the impropriety of what he had done;

f) Although the redemption procedure with respect to the segregated fund was handled inappropriately by the Licensee, the client in that incident gained a significant advantage financially as a result of the redemption process itself causing Council to consider this as evidence that the Licensee was attempting in that situation to act in the client's interests;

g) In a separate instance where the Licensee inappropriately allowed clients to sign insurance related documentation in blank to be later filled in, the clients were neighbours and very good friends of the Licensee, were always approached by the Licensee and advised with respect to the movement of money and the activities of the Licensee appear, according to the Investigative Report, to have been conducted in accordance with the desires and instructions of the clients. Council found that the transactions were made with the express consent of the clients even though the recommendations of the Licensee were motivated to general commissions for the Licensee;

h) The Licensee was found to have provided incorrect tax advice to four clients. The investigation determined that the Licensee misinterpreted a memorandum provided by an insurance company which discussed the tax deductibility of deferred sales charges within an RRSP. In effect, the tax advice provided by the Licensee to these

clients consisted exclusively of information set out in the life insurance company memorandum, albeit misinterpreted by the Licensee thus resulting in incorrect advice being provided to these clients. No harmful intent was found to exist on the part of the Licensee;

i) Other transactions are described in the Investigative Report where Council found that the transactions were motivated to generate commission income for the Licensee but in the end resulted in significant financial benefits to the clients compared to the financial situation they would have faced had they remained with the prior investments; and

j) In the incidents were the Licensee breached section 79 of the *Act* permitting a rebate on an insurance premium to be paid partly to a client, Council determined that this action constituted a willful disregard of the requirements under the *Act* but the Legislature has recently determined that the practice is now permissible. In addition, although the activity was improper, the Licensee had in effect created a means of satisfying the client's needs without expense to the client in that situation.

I wish it to be clear that although the mitigating circumstances described in the investigative report and in the submissions of Council on this Appeal are compelling, they do not minimize the essential fact that the Licensee knowingly and willfully undertook activities over a period of time that were contrary to usual practice and in some instances constituted activities that fit the technical descriptions at least of fraud and forgery. Nor do they lessen the emphasis that Council placed upon the fact that some of the recommendations were unreasonable, some advice given was not competently provided and some of the transactions were motivated so as to generate commission income for the Licensee. In addition, I accept for the most part the reply submissions of the Appellant that point out that the mitigating factors as submitted by the Respondents must be read in the context of the whole investigative report which point to some inconsistencies in the interpretation of the mitigating circumstances. However, the investigative report does establish that mitigating circumstances did exist which address some of the serious allegations and inappropriate activities of the Licensee, and that these mitigating circumstances were considered by Council when rendering its decision. Much of the submissions of both Respondents, Council and the Licensee, focus on these mitigating factors.

This brings us to the penalty provided and the ability of the FST to review the same.

Sections 242.2(5) and 242.2(11) of the *Act* established that the FST, when determining an appeal on the record, may confirm, reverse or vary a decision under appeal or it may send the matter back for reconsideration with or without directions to the person or body whose decision is under appeal. An appeal to the FST is not intended to be a rehearing nor is the FST expected to retry the matter. Legislation in British Columbia established tribunals such as the Insurance Council of British Columbia in order to create bodies with special expertise in certain professional or administrative areas. Those bodies are also expected to use their unique expertise as well as the guidance of the legislation that created them to conduct proper investigations, hearings where appropriate and to make decisions of an administrative and regulatory nature, all as provided for in the legislation and regulations establishing the said administrative bodies. Thus, deference is shown by the FST with respect to the findings of fact and determination of the tribunal whose decision is under appeal.

Case law and scholarly works in the area of administrative law, as well as the decisions of the FST establish that the test for review is one of reasonableness; namely, following its review of the clear and cogent evidence presented to it, could Council reasonably have made the determinations that it made including the imposition of the penalty that it imposed. This test is effected in the context of the reviewability set out in the *Act* that allows the FST to confirm, reverse or vary a decision under appeal or send the matter back for reconsideration, as stated above. As a result, in appeals to the FST, latitude exists for variations of decisions, and the case law and previous decisions of the FST endeavor to make it clear that variations or reversals may only be considered by the FST in cases where a manifestly unreasonable determination or decision has arisen. In this regard, I have relied upon a number of decisions including the following: *Financial Institutions Commission v. Insurance Council of British Columbia and Branislav Novko,* FST – 05-008; *Financial Institutions Commission v. Insurance Council of British Columbia and Maria Pavicic*, FST – 05-009; and *Jagjit Singh Cheena v. Insurance Council of British Columbia*, FST – 05-010.

As Mr. Hall points out in the Cheema decision, the Supreme Court of Canada in *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 show us that the pragmatic and functional approach to judicial review is inapplicable to appeals under section 242 of the *Act.* He also points out that the requirement for clear and cogent evidence in the first instance is separate from whatever standard is applied on review. I accept this analysis and application of the test of reasonableness to the review procedure involving professional bodies.

The question become, therefore, whether or not there is a reasonable analysis within the accepted evidence and determinations by Council that would enable it to have made the decisions that it made regarding the Licensee's conduct and in imposing the penalties that were determined appropriate by Council through the negotiation process with the Licensee.

I would like to comment that on my reading of the Record, the variety, severity and ongoing nature of the impugned activities of the Licensee would have caused me to conclude that a significant period of suspension of the Licensee's license would be appropriate, even a period that greatly exceeds that determined appropriate by Council and the Respondent Licensee through negotiation in this case. I have carefully reviewed the submissions of Council, the Licensee and the Appellant regarding the length of the suspension as well as the numerous cases cited in their books of authorities. I feel that the cases imposing lengthier suspensions as well as those imposing outright license terminations have certain application to the facts in this Appeal. Having said, however, I recognize that Council had before it a detailed investigative report which clearly described the improper activities of the Licensee as well as detailed explanations as to mitigating factors. Council made its penalty determinations. However, a complicating factor exists in that a negotiated settlement on the penalty took place in this case as well.

In the Supreme Court of Canada decision *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, at paragraph 47, our highest Court stated:

> "The standard of reasonableness basically involves asking "After a somewhat probing examination, can the reasons given, when taken as a whole, support the

> decision?".....Deference is built into the question since it requires that the reviewing court assess whether a decision is basically supported by the reasoning of the tribunal or decision-maker, rather than inviting the court to engage *de novo* in its own reasoning on the matter."

The Supreme Court of Canada stated that when a court reviews a decision under the reasonableness standard, it must stay close to the reasons given by the tribunal and "look to see" whether any of those reasons adequately support the decision.

In this Appeal, I am satisfied that when it comes to the question of every element of the penalty, excepting the length of suspension and its abbreviation if clients were paid back early, Council had reasons that adequately supported its decisions. I also have two collateral concerns respecting the educational requirement imposed upon the Licensee as well as the payment method to be used by the Licensee in paying the victim clients as well as the fine and costs award which will be discussed below. However, with respect to the question of the penalty imposed and its possible abbreviation, I am unequivocally of the view that Council acted unreasonably in the circumstances. In the face of fraudulent activities over time, and in particular the eight confirmed allegations, a suspension of nine months which could be reduced to four months if restitution is made amounts to nothing more than a "slap on the wrist". Further, it amounts to a message to those parties dealing with British Columbia's insurance agents that activities of the sort undertaken by the Licensee will be met with disapproval by Council but will not be punished in a manner that adequately takes into consideration the interests of insurance companies with whom insurance agents deal or the best interests of the public.

The Licensee was responsible over a period of time for fraudulent activities, forging of documents and churning client investments for personal gain. The mitigating circumstances set out in the investigative report are compelling, however, so are the submissions of the Appellant which point out: (i) that even in the face of these mitigating circumstances, the Licensee acted for personal gain in a pattern of regularly recommending investments to clients in a matter establishing that "the Licensee's motivation in recommending and facilitating the fund transfers was to generate commissions," (ii) that Council concluded that the Licensee "placed his interest before his clients in recommending and facilitating insurance transactions that were not in their best interests and from which he stood to derive personal gain through commissions," (iii) that Council itself found that fund performance should not be indicative of whether an agent has acted in the client's best interests, thus, the fact that certain that the Licensee's clients had not lost funds as a result of the activities of the Licensee was not relevant to the determination of whether the Licensee had performed those activities nor as a mitigating factor on the penalty to be imposed, (iv) that Council made findings that were contrary to the proposed mitigating factors where for example, it stated "Council found in some cases, the transactional fact pattern contradicted the Licensee's rationale for the fund transfers... This demonstrated to Council that the Licensee's fund transfer recommendations were arbitrary in nature rather than for the reasons he submits," (v) that even in the case of the Barrington investments, which grew as a result of the transfers and which the Respondent argues is evidence that the Licensee was attempting to act in his client's interests, Council found this view to be flawed as fund performance should not be indicative of whether an agent has acted in a client's best interests.

Numerous of the mitigating factors were not adequately supported by independent evidence of third parties. In some cases, the Licensee had not provide direct evidence, either of his own or third party evidence, supporting the mitigating factors. A mitigating factor cannot be solely supported by the Licensee's own submissionsin a situation where Council has found the Licensee to be an incredible witness.

Other seeming contradictions or at least anomalies appear in the investigative report, all of which lead me to the view that Council clearly and correctly reached its determinations regarding the improper and illegal activities of the Licensee but, in the face of those determinations, could not reasonably have determined that a nine month suspension, reduced to four months if certain restitution was made, would be an adequate penalty. It simply does not reflect the seriousness and continuing nature of the offences. It does not reflect an adequate consideration of deterrence, an importance factor mentioned in those cases dealing with penalties and suspensions. And, it does not reflect the necessity of a regulated industry such as the insurance industry in British Columbia to protect contracting parties who deal with insurance agents as well as the insurance public who rely on insurance agents to live up to the insurance Code of Conduct.

CONCLUSION

Reaching a negotiated settlement on penalties in situations where a hearing has been waived by a licensee causes grave concerns when the decision of the regulatory body is later subject to an appeal. The FST may not retry the matter. However, even after applying the tests of curial deference, the decision of Council must in this case be overturned or varied. It is my view that it is improper for the FST to simply impose a new penalty when the Licensee confirmed the facts in the investigative report, confirmed the findings of Council, agreed to the penalties imposed by Council and waived his right to hearing based upon the same, all in a negotiations context. In these circumstances, I see no alternative but for the FST to return the matter to Council. In addition, in cases where negotiated settlements of this sort are reached without the benefit of a hearing having successfully completed, I believe that we may expect many Council decisions and penalty determinations to be sent back to Council for a formal hearing, further consideration or variation.

In this Appeal, I have determined that:

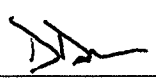
1. The requirement of the Licensee to reimburse clients that Council deemed to have incurred unnecessary deferred sales charges totalling $25,155.21 is confirmed;
2. The fine of $10,000 is confirmed;
3. The condition that the Licensee be required in each of the four years following the reinstatement, if any, of his license from the suspension or termination imposed by Council after its hearing to successfully complete a different course comprising Advocis' Certified Financial Planner Program or a program with an equivalent curriculum, shall be varied to include, in addition, the requirement that the Licensee, as a condition of his license, be required to complete a course or courses approved by Council that include insurance business and ethical components prior to any reinstatement of his license from suspension or termination as the case may be;

4. The condition that the Licensee, as a condition of his license until successful completion of the last of the aforementioned financial planning courses, be supervised by a life insurance agent who meets Council's approval, which supervising life insurance agent must agree to have a condition placed on his/her insurance license making him/her accountable for the insurance business conduct of the Licensee is confirmed;
5. The determination that the Licensee pay the costs of Council's investigation totalling $15,700 is confirmed;
6. The condition dealing with the payment of the costs and fines is varied as follows: as a condition of his license, the Licensee shall be required to pay the above mentioned payments to the clients, fine and costs of Council's investigation by way of seven equal monthly payments, the first of which monthly payments shall be made on the 1st day of the fifth month following the completion of the hearing before Council described below. If the Licensee does not make the payments described herein, or misses any payment, his license will be suspended until such time as the entire outstanding balance of the payments for clients, fine and investigation costs has been paid in full;
7. The matter of the length of suspension or the termination of the Licensee's license shall be remitted to Council for reconsideration with the following directions: a) a hearing shall be held by Council as soon as reasonably possible and at any rate within 60 days of the date of this Appeal decision, with the Licensee invited to attend to make submissions with legal counsel should the Licensee so choose and with Council hearing any submissions that the Appellant may wish to submit on behalf of the Superintendent of Financial Institutions, b) the Appeal orders described in numbers 1 through 6 inclusive above not be varied by Council and that Council deal with the matters of suspension or termination of the Licensee's license as its primary considerations, c) Council shall be entitled to rely upon the Record in this Appeal as part of its materials to be considered at the hearing together with those other documents, materials, reports and submissions as it deems appropriate, and (d) Council shall be entitled to make rulings and orders in addition to those dealing with suspension or termination of the Licensee's license should it see fit.

Council shall pay the Appellant's costs of this Appeal set in the amount of $1,000. No costs shall be awarded against or in favour of the Respondent Licensee in relation to this Appeal decision.

Dated at White Rock, British Columbia this 29th day of June, 2006.

FOR THE FINANCIAL SERVICES TRIBUNAL



DALE R. DOAN
Presiding Member