FST 06-026

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF THE *FINANCIAL INSTITUTIONS ACT*, R.S.B.C. 1996, c. 141 (the "Act")

BETWEEN:

SUPERINTENDENT OF FINANCIAL INSTITUTIONS
(the "Superintendent")

APPELLANT

AND:

INSURANCE COUNCIL OF BRITISH COLUMBIA (the "Council"),
SPECIAL RISK INSURANCE BROKERS LTD. (the "Agency"),
and
RAYMOND EDWARD WILLIE (the "Licensee")

RESPONDENTS

PRELIMINARY RULING

BEFORE: JOHN B. HALL, Presiding Member

APPEARANCES: SANDRA WILKINSON, for the Superintendent
DAVID T. McKNIGHT, for the Council
LAURI ANN FENLON, for the Agency and Licensee

DATE OF FINAL SUBMISSION: October 16, 2006

DATE OF DECISION: November 10, 2006

PRELIMINARY RULING

INTRODUCTION

The Council issued an Order on June 24, 2006 which, among other things, downgraded the Licensee's license and placed conditions on the Agency's license. The Order followed an intended decision made by the Council on May 16, 2006. Neither the Licensee nor the Agency (who will be referred to jointly as the "Respondents") requested a hearing within the time provided to them by the Council, and they did not oppose the intended decision.

The Superintendent has appealed the Order, and seeks to have the Tribunal increase the penalties imposed on the Respondents. The two grounds set out in the Notice of Appeal are as follows:

> 1. The penalty decision of the Respondent Council is not supported by adequate reasons in that it failed to consider factors to be taken into consideration when imposing penalties for the protection of the public including specific deterrence of the licensee and agency from engaging in further misconduct, general deterrence of licensees and agencies, rehabilitation of the licensee, punishment of the licensee and agency, the denunciation by society of the conduct, the need to maintain the public's confidence in the integrity of the Council's ability to properly supervise the conduct of its registrants, and the avoidance of imposing penalties which are disparate with penalties imposed in other cases; [and]
>
> 2. The penalties imposed are unreasonable in the circumstances; ...

This preliminary ruling addresses what the Superintendent describes as "Applications for New and Pre-Existing Evidence" which were filed at the same time as its appeal submissions. The applications were made respectively under Sections 242.2(8)(b) and 242.2(10)(b)(ii) of the *Financial Institutions Act* (the "Act"). The appeal process was put in abeyance while the parties were given an opportunity to address the two applications (more will be said about the procedure later in this ruling).

THE APPLICATIONS

The first application seeks to introduce "new evidence" pursuant to Section 242.2(8)(b) of the Act. The specifics need not be described for the time-being. The Superintendent says all of the evidence in this category "did not exist at the time final submissions were filed with the Council (May 15, 2006)", and argues the evidence is substantial and material to the decision to be made in this appeal.

The second application under Section 242.2(10)(b)(ii) of the Act seeks to introduce "pre-existing evidence". The Superintendent submits this evidence "does not qualify under the requirements of Section 242.2(8)(b) as 'new evidence' but ... is admissible and relevant to the issue[s] in the appeal". The Superintendent argues the test for the introduction of evidence under Section 242.2(10)(b)(ii) is a lower standard (i.e. "admissible and relevant") than the test for new evidence (i.e. "substantial and material"), and additionally argues the formal rules of evidence do not apply to the Tribunal.

The Respondents and the Council (which is also a respondent to the appeal) oppose both applications for reasons which will be incorporated into the balance of this ruling. Taken together, the parties' arguments raise several interpretative questions of first impression before the Tribunal.

THE RELEVANT STATUTORY PROVISIONS

Section 242.2 of the Act provides in its relevant parts as follows:

> **Practice and procedure**
>
> **242.2**
>
> (5) Subject to subsection (8), an appeal is an appeal on the record, and must be based on written submissions.
>
> * * *

(8) On application by a party, the member considering the appeal may do the following: ...

(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 a 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.

* * *

(10) In respect of an appeal, ...

(b) at any time before or during a hearing, but before its decision, the member hearing the appeal may make an order requiring a person ...

(ii) to produce for the member hearing the appeal or a party a document or other thing in the person's possession or control, as specified by the member hearing the appeal, that is admissible and relevant to an issue in an appeal, ...

(c) the member hearing the appeal may permit a person who is not a party to the appeal to provide submissions in respect of the appeal if, in the opinion of the member, the submissions would substantially assist in the determination of the appeal,

These statutory provisions are reflected in the Tribunal's Directives and Practice Guidelines issued under Section 12 of the *Administrative Tribunals Act*. Section 40(1) of the same statute applies to the Tribunal, and allows it to "receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law".

Section 242.2(8)(b) of the Act

In my view, and as partially identified by the Council and the Respondents, the Superintendent's applications are premised on a misapprehension of Section 242.2(8)(b) and (10)(b)(ii). As a technical matter, the reference point in Section 242.2(8)(b) is "the time the original decision was

made" and not "the time final submissions were filed" (as set out in the first application). That being said, one could possibly debate whether the decision under appeal was made on May 16, 2006 (the date of the intended decision) or June 24, 2006 (the date of the Order).

More substantively, while Section 242.2(8)(b) does refer to "new evidence", it seems readily apparent that the category is not limited to evidence which has come into existence since the original decision. This interpretation flows from the language of Section 242.2(8)(b)(ii) which explicitly contemplates the introduction of evidence that "*did exist* at [the time of the original decision] but was not discovered ... through the exercise of reasonable diligence..." (emphasis added). "New evidence", as contemplated by Section 242.2(8)(b), is evidence that is not part of the record which otherwise forms the basis for an appeal. As similarly stated in Practice Guideline 3.13, new evidence is "evidence that was not introduced at the original hearing".

The Respondents argue that the Superintendent does not have the statutory right to apply to introduce new evidence under Section 242.2(8)(b), although they acknowledge the Superintendent's right to appeal a Council decision to the Tribunal under Section 242(3)(b) of the Act. This argument is premised on the "diligence" requirement; more specifically, the Respondents submit a party such as the Superintendent who does not participate in an original process is not in a position to meet the test for introducing new evidence by demonstrating reasonable diligence. Alternatively, if the reference to "party" in Section 242.2(8)(b) can be read as including the Superintendent, the Respondents submit the test for admitting evidence must be determined by referring to the due diligence of the Council in the original decision process.

I am not persuaded by these aspects of the Respondents' submissions, and am not prepared to find the Superintendent has diminished status as a "party" where a decision is appealed under Section 242(3)(b) of the Act. The Respondents' position would effectively exclude crucial evidence which was not part of the record if other parties chose not to apply to have it introduced.

Nonetheless, applying the "reasonable diligence" requirement to the Superintendent is somewhat problematic. As the Council accurately observes, the Superintendent has not clearly set out why

the new evidence in the first application could not through the exercise of reasonable diligence have been discovered as part of the original decision process. But there is an obvious impediment: the Superintendent was not privy to the original decision process. Nor is the alternative solution proposed by the Respondents satisfactory. Subject to what might be said in a particular decision, it will be difficult -- if not impossible -- for the Superintendent to demonstrate the Council used reasonable diligence.

I am thankfully relieved from having to resolve this apparent conundrum because the Superintendent's first application can be determined on other grounds. But it can be observed there is a legitimate rationale for holding the reasonable diligence requirement may not apply to the Superintendent with the same vigour it does to parties to the original decision. One of the reasons for the equivalent rule at common law is that it prevents a party from shoring up its case on appeal by adducing evidence that was available and known to the party prior to the hearing in first instance: *Cresbury Screen Entertainment Ltd. v. Canadian Imperial Bank of Commerce* (2006), B.C.L.R. (4th) 40 (C.A.). The Superintendent cannot be accused of attempting to "shore up" its case on appeal to the Tribunal because it was not a party to the initial decision.

In addressing the test under Section 242.2(8)(b), the Council and the Respondents rely on the judicial standard found in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, where the Supreme Court of Canada established four principles to govern the admissibility of fresh evidence:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases ... ,
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial,
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. (pp. 775-76)

These principles find partial expression in the language of the Act. For instance, the first principle establishes a comparable "diligence" requirement, while the second principle of relevance equates to the requirement for new evidence to be "material". However, in my view, the fourth principle is more restrictive than the Act: under *Palmer*, evidence must be such that "it could reasonably ... be expected to have affected the result"; in contrast, Section 242.2(8)(b)(i) requires only that the evidence be "substantial". In the absence of any authority suggesting otherwise, I would place the stipulation that new evidence be "substantial" somewhere between the third and fourth *Palmer* principles.

I am aware *Palmer* has been applied in at least one administrative appeal from a disciplinary hearing: see *Shpak v. Institute of Chartered Accountants of British Columbia*, [2002] B.C.J. No. 1008 (reversed on other grounds by 2003 BCCA 149). However, there does not appear to have been any specific statutory provision in that case governing the admissibility of fresh evidence, and I am reluctant to interpret Section 242.2(8) more restrictively than warranted on its face given Section 40(1) of the *Administrative Tribunals Act*.

I digress somewhat to address an argument by the Respondents that new evidence should not be admitted here because doing so would offend the principles of administrative fairness. This alternative argument is founded upon the nature of the Order and, more particularly, the fact it was made in circumstances where the Respondents waived their right to a hearing and accepted the Council's intended decision. They submit the circumstances were tantamount to a settlement of the matters in dispute without a hearing; further, the Tribunal should be cautious about exercising its discretion to admit new evidence on application by the Superintendent "when to do so would in effect be to add to an incomplete record, in circumstances in which these Respondents have already waived their right to a hearing".

There are several observations which might be made regarding these submissions, including the perhaps unintended suggestion that the Tribunal should decline to complete the record for purposes of an appeal. But the fairness point can be addressed quite simply: if the Superintendent is permitted to introduce new evidence, any other party may similarly apply to introduce new evidence to ensure its interests are adequately advanced before the Tribunal.

Section 242.2(10)(b)(ii) of the Act

What then of the Superintendent's application to admit "pre-existing evidence" under Section 242.2(10)(b)(ii)? It follows from what has been said already that such evidence can potentially be admitted under Section 242.2(8)(b). The Respondents argue the Superintendent's second application is an attempt to avoid the higher standard for admissibility found in the earlier provision; further, they maintain Section 242.2(10)(b)(ii) only applies to "persons" who are third parties, and not to a "party" to an appeal. The Council makes similar arguments.

I do not agree Section 242.2(10)(b) speaks only to third parties, as opposed to "persons" who are a party to an appeal. The Act must be read as a whole, and Section 242.2(10)(c) expressly contemplates "a person *who is not* a party to the appeal" (emphasis added). It logically follows that there will be persons *who are* parties to the appeal. This conclusion aligns with Section 29 of the *Interpretation Act* which defines a "person" as including a party. Nor am I persuaded there is any logical reason why the Legislature would confine the Tribunal's jurisdiction under Section 242.2(10)(b) to third parties. It is far more likely that the Tribunal will be called upon to make an order for production of an admissible and relevant document in the possession of a party to an appeal, than in the possession of a third party. The Respondents' position would similarly limit the Tribunal's jurisdiction under Section 242.2(10)(b.1) of the Act, where those powers are also more likely to be exercised against parties to an appeal than as against third parties. The interpretations urged by the Respondents would have similar implications for Section 34(3) and (4) of the *Administrative Tribunals Act.*

Nonetheless, while the Superintendent has standing to apply, I have concluded Section 242.2(10)(b)(ii) does not operate in the manner contemplated by the second application. The provision is directed to the *production* of documents or other things which are "admissible and relevant to an issue in an appeal". Whether a document is admissible will depend on its character. For instance, documents which were exhibits before the Council will be admissible because they form part of the record. On the other hand, documents which are "new evidence" will not be admissible unless they meet the requirements of Section 242.2(8)(b). The Superintendent cannot circumvent the specific test for the introduction of new evidence by

relying on the broader power of a member order production of documents and other things. Or as the Council submits, Section 242.2(10)(b)(ii) cannot be used in the manner proposed by the Superintendent or Section 242.2(8)(b) would be rendered superfluous.

THE EVIDENCE IN DISPUTE

I will now address the evidence which the Superintendent seeks to introduce under each application.

The First Application to Admit "New Evidence"

All of the documents under this heading came into existence following the close of submissions before the Council. Tab A1 is an email dated September 8, 2006 from Tony Arnold of the Financial Services Authority's Enforcement Division. The Superintendent submits this new information should be introduced because the documents in the record may lead to the impression the FSA had concluded its investigation into CIC Insurance Company, and the Council may have been left with the same impression. In response, the Council states it was well aware at the time of its decision that the FSA investigation was ongoing, and that there were inherent risks and problems with placing CIC policies.

I was not directed to any portions of the Record which reflect the Council's statements regarding its knowledge of the ongoing FSA investigation and the risks associated with CIC policies. However, as there appears to be no dispute about these facts (and leaving aside the Respondents' position on whether they bear on the penalty imposed), there is no need to admit the email.

Tab A2 is a June 14, 2006 letter from Cunningham Lindsey Canada Limited to the Financial Services Commission, along with various letters to numerous insureds with adjusted claims. The Superintendent submits the evidence is substantial and material to the appeal because it shows the ongoing efforts made to seek enforcement of CIC policy terms, and also shows "after shocks continue". The Superintendent makes similar submissions in respect of the evidence at Tabs A3 through A8. In reply, the Council states it was aware throughout its investigation of the inherent

risks associated with dealings the Agency and Licensee had with CIC; that is why the latter was found to be "incompetent". The Respondents similarly argue the Council was aware of the failure of CIC to honour claims, and of the ongoing nature of that problem for those clients who had insurance through CIC. Thus, the documents put forward by the Superintendent "are simply more of the same evidence which the Council had before making its decision".

Given the admissions of the Council and the Respondents, it is difficult to describe the evidence at Tabs A2 through A8 as "*substantial* ... to the decision". But as the Respondents also argue more generally in respect of the Superintendent's first application, the evidence cannot be characterized as "*material* to the decision" because the issues on appeal concern the appropriateness of the penalties imposed by the Council. The specific grounds of appeal were reproduced near the beginning of this ruling. Stated more simply, the issues are two-fold: (1) whether the decision is supported by adequate reasons in that the Council failed to consider certain factors which should have been addressed when imposing the penalties on the Licensee and the Agency; and (2) whether the penalties imposed were reasonable in the circumstances.

In my view, there is no need to go beyond the decision under appeal to determine whether the Council provided adequate reasons. Further, the issues raised by the Superintendent's grounds of appeal necessarily involve an inquiry directed to the circumstances which existed at the time of the Council's decision. Evidence which did not exist at that time could not have been taken into account.

This does not mean evidence arising after an original decision will never be admissible under Section 242.2(8)(b) because, of course, the provision contemplates evidence which "did not exist at the time the original decision was made". But it is important to note the provision refers in paragraph (i) to "the decision" and in paragraph (ii) to "the *original* decision" (emphasis added). Given this distinction, the first reference must necessarily be interpreted to mean the decision to be made by the Tribunal. So the question becomes whether the evidence proffered is "substantial and material" to what must be decided on appeal. As noted, the issues raised by the Superintendent's grounds of appeal in this case focus on the Council's decision and the circumstances it considered.

Further, I note the courts have taken a stringent approach to evidence which did not exist at the time of an original decision for policy reasons articulated in *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (C.A.):

> Most of the cases dealing with the admission of fresh evidence on appeal involve evidence which though in existence prior to trial, for some reason other than lack of diligence, was not tendered at trial. This case involves evidence which did not exist prior to trial. One obvious problem with admitting on appeal evidence which did not exist at the time of trial is that such evidence could not possibly have influenced the result at trial. It is argued for the appellant that admitting such evidence on appeal would result in there being no finality to the trial process, that it would tend to turn appeal courts into trial courts, and that it would unacceptably protract legal proceedings. All of these objections are valid and compelling. However, in a case where the evidence is necessary to deal fairly with the issues on appeal, and *where to decline to admit the evidence could lead to a substantial injustice in result*, it appears to me that the evidence must be admitted. (p.211; emphasis added)

In my view, the Tribunal should be mindful of these considerations when deciding whether new evidence arising after an original decision is "substantial and material" to the decision to be made on appeal. The documents found at Tabs A2 through A8 -- which can reasonably be described as "more of the same" evidence considered (or contemplated) by the Council -- fall well short of this threshold.

Lastly, Tab A9 to the first application contains licensing information pertaining to the Licensee's son, as well as an announcement the son has taken over as President of the Agency. The Superintendent states this evidence shows the son is now the Agency's nominee, and goes to whether the penalty against the Agency was reasonable because the conditions imposed allowed the son to take over as the new nominee. The Respondents and the Council state the Licensee's son was not part of the original investigation and decision, and argue his later approval as nominee of the Agency is a separate administrative act which has no place in this appeal.

The Superintendent seeks to vary the penalty imposed on the Agency by having the Tribunal "prohibit the Agency from having as its nominee a person who is a related party to the Licensee or who was an officer or director or employee of the agency between 2002 and May, 2006". Whether the son has become the nominee need not be established as a fact in order to determine

whether the original penalty was reasonable in the circumstances. It is evident from the terms of the Order that the Council's decision left open the possibility of the Licensee's son becoming the Agency's nominee. Therefore, Tab A9 is not "substantial and material to the decision" to be made on appeal.

The Second Application to Admit "Pre-existing Evidence"

I have already determined the Superintendent cannot rely on Section 242.2(10)(b)(ii) to introduce what is properly classified as "new evidence". That conclusion might initially be seen as fatal to the second application because of the Superintendent's concession the evidence encompassed by the second application "does not qualify under the requirements of Section 242.2(8)". However, there is more to be considered.

Tab B1 which the Superintendent seeks to introduce is a listing of CIC policies sold between November 2003 and October 2004 prepared by the Licensee and provided to the Council on November 4, 2004. The Superintendent submits the amount of risk to Canadian customers is a material fact which the Council should have been made aware of, and should be taken into account by the Tribunal. The Council says the evidence should not be admitted for these reasons:

> In response to the evidence under Tab B1 Council submits that it was fully aware of the amount of money at risk as was demonstrated in its Investigative Committee Report at paragraphs 32 - 35. *Council was apprised of, and considered this evidence, in its decision.* Further reference to this evidence does not add anything substantial to the record or to the issues before Council. ... (emphasis added)

The "record" for purposes of an appeal to the Tribunal is defined under Section 242.2(6)(b) and (c) as including "copies or originals of documentary evidence before the original decision maker [and] other things received as evidence by the original decision maker". Given the Council's acknowledgment that the information at Tab B1 was considered in the original decision, it is admissible on appeal as part of the Record.

The same ruling regarding admissibility applies to documents at Tab B2 (which the Council acknowledges "were considered"); at Tab B6 (which was a response to the Council's request for documents "in relation to [the Licensee's] suitability to retain a license to conduct insurance business"); at Tab B7 (which the Council concedes "that if they had this information in front of them they may have considered it"); at Tab B8 (which the Council was aware of "but considered that they were not germane to the present investigation"); and at Tab B9 (which is referred to in paragraph 31 of the original decision, and the Council says was "considered and used ... to form its decision pertaining to the Licensee"). I appreciate the Council, along with the Respondents, dispute the relevance of many of these documents. However, those arguments go to weight, as opposed to the preliminary question of whether they should be admitted as part of the Record. I note as well the Council does not oppose admission of the Tab B9 document.

THE PROCEDURE FOR INTRODUCING NEW EVIDENCE

On September 19, 2006 the Deputy Registrar wrote as follows to the respondents:

> If you would like to make a submission on the application to submit new evidence, please do so by **4.30 P.M.** on **September 29, 2006**. If you choose to make submissions on the new evidence, Ms. Wilkinson will be given **10 days** from receipt of those submissions in which to make any final reply she may wish to make in support of the application to submit new evidence. If you feel that you cannot comply with this deadline, please advise as soon as possible.
>
> Please note that you will be given **21 days** from the date of the receipt of Ms. Wilkinson's final reply submissions regarding her application to submit new evidence to file your respondent submissions. The FST will confirm this date with the distribution of Ms. Wilkinson's final reply in support of her application to submit new evidence. (bold in original)

The Council took the position these directions were "not manageable" because the timeline for replying to the merits of the appeal presumed the Superintendent's applications would be granted. Further:

> ... in its appeal submissions (Part 1 - Statement of Facts), the Appellant references the "new and pre-existing evidence". If [the Tribunal] rules that the evidence is inadmissible then the Appellant will have to amend and re-file its

> appeal submissions to exclude references to the new and pre-existing evidence. Accordingly, it is our view that the commencement of time for the Respondents' reply submissions should not start to run until [the Tribunal] has determined whether [the Superintendent's] application for new and pre-existing evidence has been granted.

Additional submissions were received, including a submission from the Superintendent which noted "it has been the past practice of this Tribunal [in other cases] not to provide new/material evidence rulings in advance of final decisions".

The Deputy Registrar wrote again to the parties on September 26, 2006:

> ... Mr. Hall has decided to amend the FST's letter of September 19, 2006 (copied to all parties to this appeal) to:
>
> - grant Mr. McKnight and Ms. Cohen's request for an extension until **4.30 PM** on **October 6, 2006** to file their responses to Ms. Wilkinson's application to admit new and pre-existing evidence;
>
> - permit Ms. Wilkinson **10 days** from the date of receipt of Mr. McKnight's and Ms. Cohen's submissions to file any final reply she may wish to make in support of her application to submit new and pre-existing evidence.
>
> Mr. Hall will then make a decision on what new or pre-existing evidence, if any, to admit in this appeal. At that time, Mr. Hall will also issue directions, including new timelines for submissions on the substantive issues in the above-mentioned appeal. (bold in original)

This letter was followed by a request from the Superintendent that I provide reasons for the procedure adopted in this case.

The Tribunal's Directives and Practice Guidelines describe the usual procedure where a party applies to introduce new evidence:

> 3.13
> New Evidence
>
> Under section 242.2 (8)(b) of the Act, the Tribunal Member has the discretion to permit the introduction of new evidence (i.e. evidence that was not introduced at the original hearing), ...

* * *

> Usually, an application to submit new evidence is filed by the appellant at the time they file their Notice of Appeal. The respondent party will be given an opportunity to file a response to the new evidence application, and the appellant will then be given a final opportunity to make a final reply in support of their new evidence application.
>
> If a respondent party wishes to submit an application to submit new evidence, they usually will file their application when they file their respondent submissions. If a respondent files an application to submit new evidence, the appellant will be given an opportunity to file any response they wish to make regarding the application. The respondent party will then be given a last opportunity to file any final reply they may wish to make in support of their new evidence application.
>
> * * *
>
> *The Tribunal Member may make an order regarding the application to introduce new evidence in advance of the appeal decision, especially if the new evidence is admitted and must therefore be produced and added to the record, or the order may be included in the appeal decision.* (emphasis added)

Thus, the Practice Guidelines contemplate rulings being made under Section 242.2(8)(b) in advance of the appeal decision *or* as part of the appeal decision. In my view, the procedure adopted in any particular appeal will be influenced by the evidence which a party seeks to introduce.

This is not the first occasion where an appellant has sought to introduce new evidence. However, a quick review of past decisions indicates the Superintendent's applications were considerably more comprehensive than prior cases. Moreover, the Superintendent's submissions concerning the merits of the appeal relied at numerous points on the additional information. I find the Deputy Registrar's letter of September 19, 2006 appropriately initiated a procedure which would deal with the Superintendent's evidence applications "in advance of the appeal decision". The difficulty was the letter also set a deadline for submissions from the respondents regarding the merits of the appeal before they would know what evidence would be admitted.

In many appeals, it will be a simple exercise to concurrently run the submission process for a new evidence application with submissions concerning the merits of the appeal. Indeed, that might be viewed as the preferable option in order to avoid delay, particularly where the area of new evidence is relatively discrete. In this appeal, however, the Superintendent sought to introduce a substantial amount of new material to the record which was relied upon extensively throughout the appeal submissions as initially filed. The respondents were entitled to know the case they were required to meet, rather than attempt to anticipate the Tribunal's eventual ruling and/or make what would be extremely lengthy submissions in the alternative.

SUMMARY AND DIRECTIONS

For the reasons given in this preliminary ruling, the Superintendent's applications under Sections 242.2(8)(b) and 242.2(10)(b)(ii) of the Act are dismissed. However, the documents found at Tabs B1, B2, and B6 through B9 of the Superintendent's second application are admissible under Section 242.2(6) because they form part of the Record.

The Superintendent is directed to file amended appeal submissions within 10 days of this ruling which omit any reference to evidence which has not been admitted (subject to extension by the Deputy Registrar if appropriate). The Council and the Respondents will have 21 days from receipt of the Superintendent's amended appeal submissions to file their replies to the merits of the appeal (again, subject to the Deputy Registrar's discretion to grant an extension).

DATED at Vancouver, British Columbia, this 10th day of November 2006.

FOR THE FINANCIAL SERVICES TRIBUNAL

JOHN B. HALL
PRESIDING MEMBER