BRITISH COLUMBIA

Financial Services Tribunal

Fourth Floor, 747 Fort Street
Victoria BC V8W 3E9
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

Website: www.fst.gov.bc.ca
Email:
financialservicestribunal@gov.bc.ca

DECISION NO. 2018-FIA-001(a)

In the matter of an appeal under section 242 of the *Financial Institutions Act,* RSBC 1996 c 141

BETWEEN:	Varinder Grewal	**APPELLANT**
AND:	Insurance Council of British Columbia and Financial Institutions Commission	**RESPONDENTS**
BEFORE:	Michael Tourigny, Acting Chair	
DATE:	Conducted by way of written submissions concluding on February 20, 2019	
APPEARING:	For the Appellant: Vinay Verma, Legal Counsel For the Respondent Insurance Council of British Columbia: David T. McKnight, Legal Counsel For the Respondent Financial Institutions Commission: Sandra Wilkinson, Legal Counsel	

Application for Admission of New Evidence

The Application

[1] Varinder Grewal (the "Appellant") has appealed to the Financial Services Tribunal (the "Tribunal") from an Order of the Insurance Council of British Columbia (the "Council") dated September 11, 2018 (the "Decision"), which was made following a hearing before a Hearing Committee of the Council on April 26, 2018 (the "Hearing").

[2] The Hearing Committee of the Council found the Appellant in breach of the *Financial Institutions Act,* RSBC 1996 c 141 (the "FIA"), by failing to act in a trustworthy manner in accordance with the usual practice of the business of insurance, or in good faith contrary to Council's Rules.

[3] In particular, the Hearing Committee found that the Appellant cheated and colluded on her Life Licence Qualification Program ("LLQP") exams, as well as actively encouraged at least one other examinee to cheat.

[4] The penalty imposed by Council in its Order included the cancellation of the Appellant's life and accident and sickness insurance license with no opportunity to reapply for a period of 5 years, a fine of $7,500, investigation costs of $3,180 and hearing costs of $7,476.17, with all sums payable by December 10, 2018.

[5] On September 22, 2017, the Council gave the Appellant notice of an intended decision to cancel her life and accident and sickness insurance license based on the results of an investigation into allegations that she cheated and/or colluded with others to cheat on the LLQP exams (the "Intended Decision").

[6] The Appellant exercised her right under section 237(3) of the FIA to require a hearing to dispute the Council's findings or its Intended Decision.

[7] On October 17, 2017 the Council acknowledged the Appellant's request for a hearing and advised the Appellant that she should understand that a hearing may result in a decision that is less or more favourable than that proposed in the Intended Decision, and that depending on the outcome, Council had the authority to assess costs of the Hearing against her.

[8] Prior to the originally scheduled Hearing date in early April 2018, legal counsel for the Council provided legal counsel for the Appellant with copies of the evidence to be relied upon by Council at the Hearing. This evidence disclosure included a copy of a statutory declaration of RK, sworn November 24, 2017, which had been redacted and anonymized to protect the identity of the witness (the "2017 Declaration").

[9] The Notice of Hearing included notice to the Appellant that she may be represented by legal counsel at the hearing, make submissions, and lead evidence. She was further advised that failure to attend the hearing may result in Council making a determination in her absence.

[10] On April 24, 2018, (2 days before the Hearing), legal counsel for the Appellant advised legal counsel for the Council by email (that he marked as being "with prejudice" and requested be brought to the attention of the Hearing Committee) that among other things:

i. The Appellant and he would not be attending the hearing;

ii. The Appellant wished to withdraw her objection to the proposed Order cancelling her license; and

iii. He was sending the email to avoid costs being awarded against the Appellant as the hearing would be unopposed.

[11] The April 24, 2018 email from counsel for the Appellant was entered as an exhibit at the Hearing which proceeded on April 26, 2018 in the absence of the Appellant and her counsel.

[12] The 2017 Declaration was introduced as evidence and entered as an exhibit at the Hearing. The key assertion of fact in the 2017 Declaration is set out in paragraph 8 which reads:

> Sometime around March 2017, while I was in class with Ms. Grewal, she gave me two sequences of letters which she told me were the answer sequences for two different versions of the accident and sickness licensing exam. She told me that she passed by using the answers on the accident and sickness licensing exam and that I should try to use the same answer sequence.

[13] I note that these allegations in the 2017 Declaration, that were relied upon by Council in finding that the Appellant actively encouraged at least one other examinee to cheat, were not referred to in the Intended Decision. Presumably this is because the 2017 Declaration was not obtained by Council until months after the Intended Decision was made.

[14] By written report dated August 13, 2018 (the "Report"), the Hearing Committee provided Council with its findings regarding the Appellant's breach of the FIA and Council's Rules, and made recommendations to Council in relation to penalty.

[15] Having considered the Report of the Hearing Committee, Council made the Decision, which is the subject of this appeal, on September 11, 2018.

[16] This is an application by the Appellant under subsection 242.2(8)(b) of the FIA to permit the introduction of new evidence in this appeal that was not before the Hearing Committee.

[17] The evidence that the Appellant seeks to introduce falls into three categories:

i. Settlement correspondence exchanged between legal counsel for the Appellant and legal counsel for Council in advance of the Hearing dated April 20, 2018 and April 24, 2018 respectively (the "Settlement Correspondence"); and

ii. Evidence that RK both disputes the correctness of the allegation in the 2017 Declaration that the Appellant gave her answer sequences to use when writing her exams or encouraged her to cheat, and claims the 2017 Declaration was obtained under threats and undue pressure from Council investigators (the "New RK Evidence"). This New RK Evidence is set out in a statutory declaration of RK dated November 19, 2018 (the "2018 Declaration").

iii. A May 7, 2018 text message from RK to the Appellant and an exchange of emails between RK and an investigator dated July 23, 2018 and July 26, 2018 respectively, all of which the Appellant asserts recants the 2017 Declaration. (the "RK Recanting Notices").

[18] The Council submits that the application should be dismissed. Alternatively, the Council submits that if new evidence is admitted and raises issues of procedural fairness, the matter should be remitted to the Council for re-hearing so the evidence and credibility issues can be tested by the original trier of fact. In the further alternative, if new evidence is admitted, Council submits it should be given the opportunity to adduce evidence from its investigators in response to the 2018 Declaration.

[19] Counsel for the Respondent Financial Institutions Commission agrees with and adopts the submissions of the Council.

[20] I note at this juncture that a question was raised in the submissions of the parties as to whether two further documents, attached and referred to as Exhibits 5 and 6 to the Appellant's written submissions dated December 3, 2018, were being tendered by the Appellant as new evidence for purposes of this application. Council submits these are no more that penalty precedents at most, and not new evidence. In reply submissions the Appellant has confirmed that these documents are not being presented as new evidence. Accordingly, I am not considering those documents as new evidence or otherwise subject to this application. These precedents may be considered by the Tribunal on the appeal as to penalty, subject to submissions of the parties in that regard.

Allegation of abuse of process

[21] Before addressing the substance of this application under subsection 242.2(8)(b) of the FIA, I will deal with an allegation advanced by the Appellant against the Council in relation to the process of this appeal. In written submissions on this application the Appellant asserts that Council engaged in an "abuse of process". This allegation appears to relate to the fact that the settlement email from legal counsel for the Council dated April 24, 2018 and the exchange of emails between RK and an investigator dated July 23, 2018 and July 26, 2018 respectively that the Appellant now seeks to introduce as new evidence were not included as part of the "disclosure package" provided to the Tribunal on this appeal.

[22] As set out in subsection 242.2(5) of the FIA, subject to subsection (8), an appeal to the Tribunal is an appeal on the "record". Subsection 242.2(7) of the FIA obliged the Council to forward the "record" as defined in subsection 242.2(6) to the Tribunal. Subsection 242.2(6) states:

> (6) For the purposes of subsection (5), the record consists of the following:
>
> (a) the record of oral evidence, if any, before the original decision maker;
>
> (b) copies or originals of documentary evidence before the original decision maker;
>
> (c) other things received as evidence by the original decision maker;
>
> (d) the decision and written reasons for it, if any, given by the original decision maker.

[23] None of the documents referred to by the Appellant in making the allegation of an abuse of process were before the original decision maker, and, accordingly, would not properly form part of the record that Council was obliged to forward to the Tribunal. I find that the Appellant has raised no basis for any concerns regarding the integrity or completeness of the record provided to the Tribunal by Council.

[24] The statutorily defined procedures for appeals to the Tribunal set out in section 242.2 of the FIA do not involve production of a "disclosure package" by

Council. The Appellant's submissions referring to a "disclosure package" in the context of this appeal are ungrounded in fact or law.

[25] The Appellant's allegations of unfairness and/or an abuse of process in this context are without merit.

ISSUE

[26] Should any of the Settlement Correspondence, the New RK Evidence, or the RK Recanting Notices be admitted and added to the record as evidence on this appeal?

DISCUSSION AND ANALYSIS

Statutory provisions related to the introduction of new evidence before the Tribunal

[27] Subsection 40(1) of the *Administrative Tribunals Act,* SBC 2004, c 45 (the "ATA") which applies to the Tribunal by virtue of section 242.1(7) of the FIA, provides that the Tribunal may receive and accept any information it considers relevant, necessary and appropriate, whether or not it would be admissible in a court of law, subject to stated exceptions including:

> 40(3) Nothing is admissible before the tribunal that is inadmissible in a court because of a privilege under the law of evidence.
>
> 40(4) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence.

[28] Subsection 242.2(8)(b) of the FIA states:

> (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 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.

[29] The language of subsection 242.2(8)(b) of the FIA grants the Tribunal discretion in deciding whether it will permit the introduction of new evidence and if so, on what basis, *if* satisfied that the requirements of sub-subsections (i) and (ii) have been met.

[30] My interpretation of subsection 242.2(8)(b) of the FIA is that the Tribunal must be satisfied on a balance of probabilities that the requirements of sub-subsections (i) and (ii) have been met *before* deciding whether to admit the new evidence. The burden of proof under sub-subsections (i) and (ii) is on the applicant.

[31] I also interpret sub-subsections 242.2(8)(b)(i) and (ii) of the FIA as expressly limiting the extent to which any testimony, documents or things may be admitted in evidence as contemplated in subsection 40(4) of the ATA. In result, I find that those specific provisions of the FIA are not overridden by the broad discretion afforded to the Tribunal under subsection 40(1) of the ATA. The burden on the applicant to prove that the requirements of sub-subsections (i) and (ii) have been met must be satisfied *before* the Tribunal can admit the new evidence.

[32] This interpretation is consistent with section 242.2(5) of the FIA which mandates that subject to subsection 242.2(8), appeals to the FST are to be on the record and must be based on written submissions.

[33] In considering this application I have taken into account the fact that the issues addressed before the Hearing Committee, as well as on this appeal are significant to the Appellant; involving findings of dishonesty and misconduct that have had a significant impact on her career in the insurance industry. I have also taken into account the public protection objectives of the FIA and the need for public confidence in the disciplinary processes followed by the Council under the FIA. Both the Appellant and the Council are entitled to a high degree of procedural fairness before the Tribunal on this appeal in general, and on this application in particular.

Admissibility of the LR Affidavit on this application

[34] It is convenient at this point to address an evidentiary issue that has arisen on this application by reason of the fact that the written submissions of Council referred to and were supported by an affidavit sworn by LR dated January 25, 2019 (the “LR Affidavit”). LR was legal counsel for the Council leading up to and during the Hearing.

[35] Council submits that the evidence contained in the LR Affidavit is necessary to provide context to this application and to assist the Tribunal in the determination of the issues. Council has not made an application seeking the admission of the LR Affidavit as new evidence on this appeal under subsection 242.2(8)(b) of the FIA.

[36] The Appellant submits that the LR Affidavit should not be considered by the Tribunal as it “could’ve been produced at the time of the hearing and does not bring in any new information material to this appeal on the basis of fairness.” While it is not particularly clear, I read this submission to be made in opposition to the admissibility of the LR Affidavit as new evidence on this appeal under subsection 242.2(8)(b) of the FIA. However, in the event I am mistaken as to the Appellant’s objective for her submission, I will also treat it as being in opposition to the admissibility of the LR Affidavit, even for the limited purpose of this application.

[37] As noted above, Subsection 40(1) of the ATA vests the Tribunal with broad discretion to receive and accept any information it considers relevant, necessary and appropriate, whether or not it would be admissible in a court of law. This broad discretion is subject to stated exceptions (also referred to above), which I find are not applicable to the admissibility of the evidence in the LR Affidavit in the context of, and for the sole and limited purpose of, this application.

[38] I have reviewed the evidence in the LR Affidavit and find this evidence to both provide context and to be of assistance to me in determining the issues on this application. I have accordingly exercised my discretion to admit the evidence in the LR Affidavit for the sole and limited purpose of providing background and context for this application. It is not otherwise being admitted as new evidence in this appeal.

Settlement Correspondence

[39] The Appellant submits that the Settlement Correspondence, and in particular the April 24, 2018 email from legal counsel for the Council (marked as being a 'Without Prejudice' communication) rejecting the settlement offer from counsel for the Appellant dated April 20, 2018 and setting out settlement terms required by Council, "supports the reasons of why Grewal did not attend the hearing" and "provides the circumstances of the reasons why Grewal did not attend the hearing." The Appellant does not say how, in fact, it does so.

[40] The Appellant further submits that she did not attend the Hearing based on legal advice she received from her former legal counsel. Any questions or concerns about that legal advice leading to her decision not to attend the Hearing are matters between the Appellant and her former legal counsel and are not a proper subject of this appeal.

[41] The record on this appeal includes the "with prejudice" April 24, 2018 email from counsel for the Appellant. This email, (summarized above), addressed the non-attendance at the Hearing and stated reasons for it provided by legal counsel for the Appellant to Council.

[42] On a plain reading of the April 24, 2018 "without prejudice" email from legal counsel for the Council I find that it would add no probative evidence one way or the other as to why the Appellant decided not to attend the Hearing, even if her reason for not attending was a proper issue on this appeal.

[43] I also note the fact that the Council's intention to proceed with the hearing in the absence of a settlement on its terms was clearly set out in the April 24, 2018 "without prejudice" email. It could not reasonably be misconstrued as suggesting that the Appellant should not attend the Hearing.

[44] I find that the Settlement Correspondence does not meet the threshold of being "substantial and material to the decision" as required by sub-subsection 242.2(8)(b)(i) of the FIA.

[45] The Settlement Correspondence also clearly existed at the time the original decision was made and was in the possession of counsel for the Appellant. I find that the requirement of sub-subsection 242.2(8)(b)(ii) of the FIA has likewise not been met.

[46] Council further submits that, because this was without prejudice settlement communication, it cannot properly be included as evidence in this matter. Reference in support of this submission is made to the decision of the Alberta Court of Appeal in *Calgary (City) v Costello*, 1997 ABCA 281 (at para 60) ("*Costello*").

[47] I agree with and adopt the analysis of evidentiary privilege over settlement negotiations set out in paragraphs 54 through 60 in *Costello*. The Settlement Correspondence satisfies all three of the conditions described in *Costello* in that the email arose in the course of litigation, there is an express intention for the email to be without prejudice, and the email is in relation to a *bona fide* attempt to resolve issues before Council.

[48] As previously noted above, subsection 40(3) of the ATA states that nothing is admissible before the Tribunal that is inadmissible in a court because of a privilege under the law of evidence. I find that the evidentiary privilege over settlement negotiations is subject to section 40(3) of the ATA, that the Settlement Communications are afforded that privilege and accordingly are not admissible on this appeal.

[49] The application in relation to the Settlement Correspondence is dismissed.

New RK Evidence

Is the New RK Evidence "substantial and material to the decision"?

[50] The Appellant submits that the New RK Evidence is both substantial and material to the decision as it contradicts the 2017 Declaration.

[51] My review of the record filed on this appeal leads to the conclusion, (at least for purposes of this application), that the 2017 Declaration was relied upon by the Hearing Committee of the Council in support of the finding that the Appellant had actively encouraged at least one other examinee to cheat on the LLQP exams, and in imposing the penalty.

[52] On the question of whether the New RK Evidence would be "material" to the decision, the Council concedes that the 2018 Declaration is material if its contents are true. I agree with and accept this concession by Council. However, Council does not accept that the contents of the 2018 Declaration are true, or that its authorship is valid. There is a clear dispute as to the credibility of the New RK Evidence.

[53] The finding that the Appellant actively encouraged at least one other examinee to cheat as well as the penalty imposed were obviously significant to the Appellant. I find that procedural fairness dictates that the interpretation as to what was "material" to these matters must be given a broad interpretation.

[54] If true, I find that the New RK Evidence would be material to the issue of the reasonableness of the Council's finding that the Appellant actively encouraged at least one other examinee to cheat, as well as to the issue of the reasonableness of the penalty imposed by Council.

[55] The Council further submits that the 2018 Declaration is not "substantial" to the decision under appeal in light of the unchallenged expert evidence entered at the Hearing that provided ample, clear and cogent evidence for Council to find that the appellant cheated and/or colluded on her LLQP exams. While I agree that there appears to have been evidence at the Hearing in support of the finding against the Appellant of cheating and collusion, and that the New RK Evidence would not constitute evidence "substantial" to the decision in that regard, I find that the New

RK Evidence, if true, would be "substantial" to the aspect of the decision that the Appellant actively encouraged at least one other examinee to cheat, as well as to the penalty imposed by Council.

[56] The Hearing Committee found as a fact that the Appellant encouraged another person to cheat. While the decision does not make the significance of this finding to the penalty imposed particularly clear, it is clear that the penalty imposed was based upon all the findings of improper conduct by the Appellant.

[57] As I have already stated, the finding that the Appellant actively encouraged at least one other examinee to cheat, as well as the penalty imposed, were obviously significant to the Appellant. As with the interpretation as to what is "material" to these matters, I find that procedural fairness dictates that the interpretation as to what was "substantial" to these matters must be given a broad interpretation.

[58] I find that the Appellant has established, on a balance of probabilities, that the New RK Evidence would be both substantial and material to the decision as required by sub-subsection 242.2(8)(b)(i) of the FIA.

Did the New RK Evidence "exist" or not at the time the original decision was made as contemplated by sub-subsection 242.2(8)(b)(ii) of the FIA?

[59] The Appellant references the November 19, 2018 date of execution of the 2018 Declaration and submits that the New RK Evidence did not "exist" and had not been "discovered" by the Appellant at the time the original decision was made.

[60] It is stating the obvious to say that the 2018 Declaration setting out the New RK Evidence in writing was created after the time of the original decision. However, given that the substance of the New RK Evidence is that the 2017 Declaration was incorrect in material respects and was obtained under threats and undue pressure from Council investigators, I cannot logically accept that this evidence did not "exist" at the time of the Hearing. If the 2017 Declaration was incorrect in material respects and obtained under threats and undue pressure from Council investigators, it was so from and after the execution by the Appellant of the 2017 Declaration. I find that the New RK Evidence, if true, "existed" from the time of the events in question. The date of execution of the 2018 Declaration does not change this fact.

[61] Having found the evidence to have been in existence, however, I accept the submissions of the Appellant and find as a fact that the New RK Evidence was not "discovered" by the Appellant until after the Hearing. The question then remains as to whether this evidence could not through the exercise of reasonable diligence have been discovered as contemplated by sub-subsection 242.2(8)(b)(ii) of the FIA.

Could the New RK Evidence have been discovered at the time the original decision was made through the exercise of reasonable diligence?

[62] For the analysis of this issue it is important to keep in mind the chronology of the process by which the Decision under appeal was made. The April 26 Hearing

was followed by the Report to Council on August 13, 2018 followed by the Decision of Council on September 11, 2018.

[63] On April 3, 2018 counsel for the Appellant was provided with an anonymized copy of the 2017 Declaration as part of the disclosure of evidence that Council intended to lead at the Hearing that was then scheduled for April 12 and 13, 2018.[1]

[64] As previously stated, the 2017 Declaration had not been referred to in the Intended Decision which the Appellant was given in September 2017. This April 3, 2018 disclosure was the first opportunity the Appellant had to see or consider the 2017 Declaration and its relevance to the Hearing.

[65] On April 4, 2018 counsel for the Appellant emailed counsel for the Council stating:

> I am instructed to apply to adjourn Ms. Grewal's hearing that is scheduled for next week. As you can appreciate, she learned of the stat dec today for the first time It drastically changes the nature of the hearing. She needs time to consider her options, including if she even wants to pursue this matter to a full hearing. Please provide me with your position on an adjournment as soon as you can.

[66] The adjournment request was agreed to and the Hearing rescheduled to commence April 26, 2018.

[67] On April 18, 2018 counsel for the Appellant advised counsel for the Council that he did not require the attendance of witnesses at the Hearing, his instructions being to resolve everything.

[68] As previously set out above, after being advised by counsel for the Appellant that he and the Appellant would not be attending, the Hearing proceeded on April 26, 2018, and the 2017 Declaration was entered as evidence without objection from the Appellant.

[69] The Appellant submits that she "could not" ask to cross-examine the author of the 2017 Declaration because her legal counsel advised her to not attend the Hearing in order to "avoid fines/costs". The Appellant, therefore, asserts that the New RK Evidence was not discoverable at the time of the Hearing.

[70] Although the Appellant concedes being in possession of the 2017 Declaration prior to the Hearing, she asserts that due to the redactions it was impossible to identify the author with reasonable diligence. The Appellant's point being that not knowing the identity of the declarant materially impeded her ability to discover the New RK Evidence.

[71] The Appellant asserts she did not know the identity of the declarant until receiving the May 7, 2018 text message from RK, which text was the first in time of the RK Recanting Notices.

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[1] I note that while Council submits that the redacted version provided disclosed the residential address of the otherwise anonymized deponent, the Appellant has submitted that the version received was completely anonymized. I find on the evidence that the submission of Council in this regard is in error and that the version received by counsel for the Appellant was completely anonymized.

[72] From and after receipt of the May 7, 2018 text message I find that the Appellant could no longer be heard to say that not knowing the identity of the declarant of the 2017 Declaration was an impediment to her taking any steps to challenge the 2017 Declaration. While it is correct that the Hearing had already concluded on April 26, 2018, the Hearing Committee had not yet made its Report to Council and the Decision of Council had not yet been made. The Appellant could have brought the text message to the attention of Council seeking to reopen the Hearing before the Decision was made, but did not do so.

[73] The Council submits that despite being aware of the evidence that the Council intended to lead at the Hearing, including the 2017 Declaration, the Appellant elected not to attend. Council alleges that by doing so, the Appellant passed on the opportunity to put her evidence and arguments before the Council.

[74] The Council submits that the New RK Evidence was reasonably discoverable. The Council submits that the Appellant could have attended the Hearing and led evidence to counter the 2017 Declaration. Alternatively, the appellant could have required that the declarant be present at the Hearing to be cross-examined. Neither of these steps was taken by the Appellant despite the knowledge that the 2017 Declaration would be relied upon by Council at the Hearing.

[75] Council submits that as a result, the Appellant has failed to meet the requirement of sub-subsection 242.2(8)(b)(ii) that the New RK Evidence could not, through the exercise of reasonable diligence, have been discovered. Had the Appellant attended the Hearing she would have had the opportunity to identify RK as the declarant and to challenge the evidence in the 2017 Declaration. In result, Council submits it is not open for the Appellant to do so now.

[76] Has the Appellant established on a balance of probabilities that she "could not through the exercise of reasonable diligence" (as required by sub-subsection 242.2(8)(b)(ii) of the FIA), have discovered the New RK Evidence through attending and exercising her rights to challenge the 2017 Declaration at the Hearing?

[77] I am not persuaded by the Appellant's submission that she could not have attended the Hearing or have exercised her rights to testify or to cross-examine RK. It is clear on the evidence that the Appellant could have participated in the Hearing.

[78] The Appellant, with knowledge of the substance of the allegations against her set out in the 2017 Declaration, and being in the unique position of knowing whether those allegations about her conduct were accurate or not, chose, with the advice of legal counsel, not to attend the Hearing and exercise her rights to challenge that evidence. The Appellant knew that evidence would be introduced against her at the Hearing, and made the decision not to exercise any of the powerful rights she would have been afforded at the Hearing to challenge the 2017 Declaration.

[79] The nature of the New RK Evidence, if true, is a recantation of sworn evidence against the interest of the Appellant set out in the 2017 Declaration. I find that the "exercise of reasonable diligence" called for in sub-subsection 242.2(8)(b)(ii) in the circumstances of this case required the Appellant to attend the Hearing and challenge the 2017 Declaration.

[80] As to whether requiring RK to attend to be cross-examined by the Appellant at the Hearing could or "could not" have led to the discovery of the New RK Evidence, the preponderance of the evidence submitted on this application is to the effect that it could have been so discovered. RK, on her own initiative, approached the Appellant through the May 7, 2018 text message and contacted one of the investigators by email dated July 23, 2018 purporting to recant the 2017 Declaration. RK also willingly provided the Appellant with the 2018 Declaration. The Appellant has provided no evidence or submission on this application to suggest that this information would not have been forthcoming from RK if required by the Appellant to attend the Hearing to be cross examined.

[81] The submissions of the Appellant on discoverability of the New RK Evidence are further weakened by her having received the May 7, 2018 text message from RK. The Appellant, through the exercise of reasonable diligence, could have brought the text message to the attention of Council and sought to reopen the Hearing before the Decision was made, but did not do so.

[82] I find that the Appellant has failed to prove on a balance of probabilities that the New RK Evidence could not through the exercise of reasonable diligence have been discovered either at the time of the Hearing or later when the Decision was made.

[83] The requirements of sub-subsection 242.2(8)(b)(ii) of the FIA have not been met by the Appellant. The application in relation to the New RK Evidence is dismissed.

RK Recanting Notices

[84] I have already addressed the May 7, 2018 text message in the preceding section of this decision. This document did exist and was discovered by the Appellant prior to the time of the Decision under appeal. The Appellant has failed to prove on a balance of probabilities that the requirements of sub-subsection 242.2(8)(b)(ii) of the FIA have been met. In the circumstances I need not address whether the May 7, 2018 text message would be substantial and material to the decision as required by sub-subsection 242.2(8)(b)(i) of the FIA.

[85] The exchange of emails between RK and an investigator dated July 23, 2018 and July 26, 2018, however, raise a substantively different issue from the other evidence being considered on this application.

[86] The Appellant has argued that these emails should be admitted as they are relevant and Council had possession of them and failed to include them as part of the Record on this appeal. I have already found that these emails, which were not provided by the investigator to Council, were accordingly not required to be included in the Record. However, the Appellant's submissions in relation to these emails do raise serious questions of procedural fairness.

[87] While the exchange of emails between RK and an investigator were brought before the Tribunal as part of an application to introduce new evidence under subsection 242.2(8)(b)of the FIA, I have decided to exercise my discretion to consider the admissibility of this evidence as an overriding question of procedural

fairness, whether or not it would be admissible on the above subsection 242.2(8)(b) analysis. Both an investigator of Council as well as the Appellant were aware of this email exchange before the Decision was made and such evidence was arguably not "new evidence" as contemplated by subsection 242.2(8)(b) of the FIA. I need not make a finding in this regard.

[88] The overriding question is whether the Appellant's entitlement to procedural fairness was compromised where the Council's investigator, while aware of this potentially exculpatory evidence before the date of either the Report by the Hearing Committee to Council or the Decision was made, did not provide it to the Hearing Committee?

[89] A basic administrative law principle calls for the admissibility of evidence relating to the issue of procedural fairness. The Tribunal's power to make findings regarding procedural fairness necessarily includes the power to admit available evidence to make such a finding. Relying on this principle of fairness, I will admit the exchange of emails between RK and an investigator dated July 23, 2018 and July 26, 2018, to be added to the record on this appeal.

[90] I emphasize that I am making no finding as to whether, on the merits, there has been a breach of procedural fairness in the failure of the Council investigator to bring this email exchange to the attention of the Hearing Committee or to the Council prior to issuance of the final Decision. However, the email exchange is admissible as it is relevant and necessary to enable this argument to be made.

DECISION

[91] In conclusion, I find as follows:

i. The Settlement Correspondence is not admitted on this appeal;

ii. The New RK Evidence and the 2018 Declaration are not admitted on this appeal;

iii. The May 7, 2018 text message from RK is not admitted on this appeal; and

iv. The exchange of emails between RK and an investigator dated July 23, 2018 and July 26, 2018 are admitted and added to the record on this appeal.

[92] In view of this decision, I am granting leave to the Appellant to revise or replace her December 3, 2018 written submissions to remove reference to evidence that I have ruled to be inadmissible on this appeal and to make whatever additional written submissions she considers appropriate in light of this decision in order to advance her appeal. These submissions are to be filed by **May 08, 2019**. Once these submissions have been filed, there will be a response from the Council and

the Financial Institutions Commission to be filed by **May 29, 2019**, with a final reply by **June 05, 2019**.

"Michael Tourigny"

Michael Tourigny
Acting Chair
Financial Services Tribunal

April 16, 2019