



# 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](http://www.fst.gov.bc.ca)  
Email:  
[financialservicestribunal@gov.bc.ca](mailto:financialservicestribunal@gov.bc.ca)

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## **DECISION NO. 2018-RSA-001(b)**

In the matter of an appeal pursuant to section 54 of the *Real Estate Services Act*, SBC 2004, c 42, to the Financial Services Tribunal under section 242.2 of the *Financial Institutions Act*, RSBC 1996, c 141.

**BETWEEN:** DOUGLAS WELDER **APPELLANT**

**AND:** REAL ESTATE COUNCIL OF BRITISH COLUMBIA **RESPONDENT**

**BEFORE:** JANE A. G. PURDIE, Q.C., PANEL CHAIR

**DATE:** WRITTEN SUBMISSIONS  
CONCLUDING April 18, 2019

**APPEARING:** For the Appellant: Self-Represented  
For the Respondent: Catherine Davies

## **RULING ON EXTENSION OF TIME TO FILE SUBMISSIONS ON COSTS**

### **BACKGROUND**

[1] On February 21, 2019, I issued my decision in this appeal and gave the parties the opportunity to address the issue of costs in further submissions.

[2] No submissions were received by the dates set out in the decision.

[3] On April 4, 2019, Ms. Catherine Davies, Legal Counsel for the Real Estate Council of British Columbia (the "Council") emailed the Financial Services Tribunal (the "Tribunal") requesting an extension of time for the filing of submissions on costs due to inadvertence on the part of the Council not receiving the Decision, and thus not being aware of the time frame for submissions on costs. The Council had changed the lawyer of record for this matter but had not advised the Tribunal, though apparently it had set up a response message on the original lawyer's email account. The Tribunal did not receive any response message after forwarding the Decision by email.

[4] The Appellant responded to the request for an extension of time in a letter and submissions sent April 15, 2019, arguing that the Tribunal was *functus officio* pursuant to section 53(1) of the *Administrative Tribunals Act* [the "ATA"] which provides:

Amendment to final decision

53 (1) If a party applies or on the tribunal's own initiative, the tribunal may amend a final decision to correct any of the following:

- (a) a clerical or typographical error;
- (b) an accidental or inadvertent error, omission or other similar mistake;
- (c) an arithmetical error made in a computation.

(2) Unless the tribunal determines otherwise, an amendment under subsection (1) must not be made more than 30 days after all parties have been served with the final decision.

(3) Within 30 days of being served with the final decision, a party may apply to the tribunal for clarification of the final decision and the tribunal may amend the final decision only if the tribunal considers that the amendment will clarify the final decision.

(4) The tribunal may not amend a final decision other than in those circumstances described in subsections (1) to (3).

(5) This section must not be construed as limiting the tribunal's ability, on request of a party, to reopen an application in order to cure a jurisdictional defect.

[5] The Appellant further refers to the Supreme Court of Canada case *Chandler v Alberta Association of Architects*, [1989] 2 SCR 848 [*Chandler*], where in a dissenting judgment, Justices L'Heureux-Dube and La Forest held:

[A]n adjudicator, be it an arbitrator, an administrative tribunal, or a court, once it has reached its decision cannot afterwards alter its award except to correct clerical mistakes or errors arising from an accidental slip or omission.

[6] The Respondent responds by arguing that the Tribunal is not *functus officio*. The Respondent argues that the above excerpt from *Chandler* is taken out of context, and represents the view of dissenting judges. The Respondent points out that the majority in *Chandler* held:

[I]f the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task.

[7] The Respondent further quotes from *Barop Construction Ltd. v Zaleschuk Pubs Ltd.*, 68 BCLR (2d) 340 (BCSC), which specifically deals with a costs issue arising from an arbitration. In that decision, the Supreme Court of BC found that an arbitrator was not *functus officio* on the matter of deciding costs as the decision specifically provided that he would deal with costs by way of an addendum to the decision. The Judge in that case also referred to the decision in *Canadian National Railways v McIntyre Mines et al*, now cited as 1978 CanLII 1978 (ABQB) [*McIntyre Mines*], where Justice Hope held that (at p 538):

In the result I am of the opinion that the Board did not decide all the questions submitted to it by the parties to the arbitration; that it is in law, its duty to decide all questions and that until it does make that decision it is not *functus officio*.

## ANALYSIS

[8] There are two questions which I must determine on this application. First, I must decide whether the Tribunal is precluded by law from allowing the Respondent to make submissions on costs; in other words, whether the Tribunal has rendered a final decision and is now *functus officio*. If the answer is yes, then the Respondent must rely on section 53 of the *Administrative Tribunals Act* for relief. Second, if I determine it is legally permissible for the Tribunal to allow the Respondent to make submissions on costs, I must nevertheless determine whether the Tribunal should exercise its discretion to grant an extension of time to the Respondent as a matter of procedural fairness.

[9] I agree with the finding in *McIntyre Mines* that it is the duty of the tribunal to decide all questions before it, and that until it has done so, it is not *functus officio*. While there may be instances where it is not clear whether the decision was a final one, the decision rendered in this case clearly contemplated further input with respect to the issue of costs, and until that matter is decided the Tribunal is not *functus officio*. The arguments raised on the basis of section 53 of the ATA need only be considered after the rendering of a final decision which I have determined is not the situation here as the costs issue remains outstanding.

[10] The second question which I must consider is whether I should exercise my discretion to grant an extension of time for the parties to make submissions on the issue of costs as a matter of procedural fairness. The rules of procedural fairness are not written in stone, but are to be applied in context.

[11] Both the ATA and the Tribunal's Practice Directives and Guidelines contemplate various means of service or provision of documents by the Tribunal, which include (Tribunal Guideline No. 3.12) ..."sending a copy to the person by: ordinary mail; e-mail if the party gives an email address; or telephone transmission of a facsimile.". All parties must provide an address for service or delivery.

[12] When it provided the Appeal Record, the Council provided an email address of the lawyer handling this matter. However, when that lawyer left the Council, the FST was not specifically notified or given a change of address for service or delivery. The Council relied on a vacation message on the original lawyer's email.

[13] Although, the obligation was on the Council to ensure that the Tribunal was informed of the change in counsel and change of address, I find that the failure to provide submissions on the issue of costs on time was unintentional. Further, the Council has been consistent throughout this appeal in its position on seeking costs. As the Tribunal is not *functus officio* and the issue of costs remains outstanding, I find that it would be unfair to the Respondent not to allow an extension of time for the parties to deal with the matter of cost. Any prejudice to the Appellant results from the delay in a decision regarding costs, but given the overarching duty of

fairness which is equally applicable to institutional and individual parties, the exercise of the discretion in granting the extension to the Respondent outweighs any such prejudice.

**DECISION**

[14] The Tribunal is not *functus officio* and may consider the issue of costs. I will allow the extension request on the matter of costs to be dealt with in an expedited matter. The Respondent will have until **May 22, 2019** to file its submissions. The Appellant will then have until **May 29, 2019** to file his response. The Respondent will then have until **May 31, 2019** to file its final reply.

Jane A. G. Purdie, Q.C.  
Panel Member, Financial Services Tribunal

“Jane Purdie”

Jane A.G. Purdie, Q.C.  
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May 15, 2019