FST 08-042

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF THE *FINANCIAL INSTITUTIONS ACT*
R.S.B.C. 1996, c. 141

BETWEEN:

NORTH YORK COMMUNITY CREDIT UNION

APPELLANT

AND:

THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

RESPONDENT

DECISION

BEFORE:	JOHN B. HALL, Presiding Member
DATE OF LAST SUBMISSION:	June 4, 2008
APPEARANCES:	MICHAEL GIANACOPOULOS, for the Appellant NEENA SHARMA and JENNIFER J. STEWART, for the Staff of the Respondent
DATE OF DECISION:	July 22, 2008

THE APPEAL

This appeal arises from an Order dated September 14, 2006 made by the respondent Superintendent of Financial Institutions (the "Superintendent") against the appellant North York Community Credit Union Ltd. (the "Credit Union" or "NYCCU"). The Superintendent ordered the Credit Union to pay an administrative penalty in the amount of $50,000.00 under Section 253.1 of the *Financial Institutions Act* (the "Act") and costs of about $15,000.00 under Section 241.1 of the Act.

The Credit Union's prior appeal and petition to the British Columbia Supreme Court in respect of the Order were dismissed on the basis that the Credit Union had not exhausted its right of appeal to this Tribunal: *North York Community Credit Union v. British Columbia Financial Institutions Commission*, 2007 BCSC 1846. The Chair of the Tribunal later granted an extension of time under Section 24(2) of the *Administrative Tribunals Act* to allow the appeal to be filed: *North York Community Credit Union -and- The Superintendent of Financial Institutions* (February 22, 2008).

The appeal raises six specific grounds. They will be reproduced later in this decision after the events which led to the Order are recounted. In that regard, the material facts are not in dispute.

BACKGROUND

The facts set out below are taken primarily from the written submissions made on behalf of the Superintendent by the Staff of The Superintendent of Financial Institutions (the "Staff"). Those points have been supplemented with additional facts from the Credit Union's submissions.

1. The Credit Union was at material times an Ontario corporation carrying on business as a credit union, with a registered office at Yonge Street, North York, Ontario. It was incorporated in

1955 and, until 1975, was known as the "North York Public School Teachers Credit Union Limited." As a result of an amalgamation completed on March 13, 2007 the Credit Union is now a part of Pace Credit Union.

2. On October 27, 2005 the Superintendent issued a cease and desist order "In the Matter of Bux Cash Card Inc., dba First Cash Card, Philip Thomas Kueber and North York Community Credit Union Ltd" pursuant to Sections 244(2) and 238 of the Act (the "First Order"). The Superintendent issued the First Order without notice to the Credit Union. After setting out the facts relied on and the findings of the Superintendent, the First Order concluded with these words:

> NOW THEREFORE the Superintendent orders pursuant to Sections 244(2) and 238 of the Act that BUX Cash Card Inc., dba First Cash Card, and/or North York Community Credit Union:
>
> 1. Cease from either directly or indirectly carrying on unauthorized deposit business in British Columbia.
>
> TAKE NOTICE THAT BUX Cash Card Inc., dba First Cash Card, and/or North York Community Credit Union, may request a hearing before the Superintendent under section 238(2)(a) of the Act or appeal to the Financial Services Tribunal under section 238(2)(b) of the Act.

3. A "deposit business" is defined in Section 1 of the Act:

> "**deposit business**" means the business of receiving on deposit or soliciting for deposit money that is repayable
>
> (a) on demand,
>
> (b) after notice,
>
> (c) on the expiry of a specified term, or
>
> (d) at specified intervals for a specified term,
>
> whether or not the person undertaking an activity or activities set out in paragraphs (a) to (d) can or does distribute any gain, profit or dividend, or

> otherwise disposes of the person's assets, to a member or shareholder of the person other than during winding up or on dissolution;

4. Only authorized financial institutions, banks, and certain bank subsidiaries may conduct deposit business in British Columbia.

5. The unauthorized deposit business described in the First Order involved the issuance by Bux Cash Card Inc., dba First Cash Card ("Bux"), of cash cards linked to funds held on behalf of customers and repayable on demand. The cash cards physically look like credit or debit cards. They are electronically loaded with a sum of money and can be used at points of sale, ATM's and other locations. The cash cards bore the name of North York Community Credit Union and were backed by the Credit Union's license to access the Interac system. Neither the Credit Union nor Bux was authorized to conduct deposit business in British Columbia.

6. As noted, the First Order required that Bux "and/or" the Credit Union cease either directly or indirectly carrying on unauthorized deposit business in British Columbia. There is no evidence that Bux continued its operations in British Columbia after the First Order, or that Bux itself continued doing what it was ordered to cease doing.

7. On November 14 and 17, 2005 counsel for the Credit Union wrote to the Superintendent to require a hearing pursuant to Section 238(2)(a) of the Act with regard to the First Order. Bux did not contest the First Order.

8. On March 24, 2006 the Superintendent issued a cease and desist order "In the Matter of Uniclear Payment Systems Inc., Unigo Global Payment Systems Inc., and North York Community Credit Union Ltd." pursuant to Sections 244(2) and 238 of the Act (the "Second Order"). Similar to the First Order, the Second Order set out the facts relied on and the findings of the Superintendent, and concluded:

> NOW THEREFORE the Superintendent orders pursuant to Sections 244(2) and 238 of the Act that Uniclear Payment Systems Inc., Unigo Global Payment Systems Inc., and North York Community Credit Union Ltd.:
>
> 1. Cease from either directly or indirectly carrying on unauthorized deposit business in British Columbia.
>
> TAKE NOTICE THAT Uniclear Payment Systems Inc., Unigo Global Payment Systems Inc., and North York Community Credit Union Ltd., each, may request a hearing before the Superintendent under section 238(2)(a) of the Act or appeal to the Financial Services Tribunal under section 238(2)(b) of the Act.

9. The unauthorized deposit business described in the Second Order involved the issuance by Uniclear Payment Systems Inc. ("Uniclear") of cash cards linked to funds held on behalf of customers and repayable on demand. The cash cards bore the logo of Unigo Global Payment Systems Inc. ("Unigo") and the name North York Community Credit Union, and were backed by the Credit Union's license to access the Interac system. The Credit Union was not authorized to conduct deposit business in British Columbia; nor were Uniclear and Unigo so authorized.

10. The Credit Union did not request a hearing before the Superintendent with respect to the Second Order; nor did it appeal the Second Order to the Financial Services Tribunal. On March 29, 2006 Ken Crause of Uniclear advised the Superintendent's office that:

> Uniclear does not wish to enter into a hearing or court battle with the Superintendent's office and as a result has opted to have its mailing of debit cards transferred to the Province of Ontario. Henceforth, debit cards will be mailed out from Ontario and not the Parksville office.

11. On March 27, 2006 counsel for the Credit Union wrote to the Superintendent to withdraw the request for a hearing with regard to the First Order. In his letter to the Superintendent, Donald Sorochan, QC, the Credit Union's then counsel, stated: "North York Community Credit Union Ltd. will observe and has been observing, the cease and desist order".

12. On April 4, 2006 the Acting Superintendent wrote to the Credit Union and attached an intended order for an administrative penalty pursuant to Section 253.1 of the Act (the "Intended

Order"). The Acting Superintendent's letter informed the Credit Union that it could request a hearing before the Superintendent with regard to the Intended Order, pursuant to Section 237(3) of the Act.

13. The Intended Order set out the facts relied on, including the issuance of the First and Second Orders; it also set out the findings of the Superintendent, including the finding that:

> North York Community Credit Union Ltd. continued to conduct unauthorized deposit business in British Columbia after October 27, 2005 and continues in contravention of the Superintendent's Order of October 27, 2005, issued under section 244(2)(f) of the Act;

and ordered the Credit Union to pay an administrative penalty in the amount of $50,000 pursuant to Section 253.1 of the Act within 30 days of receipt of the Intended Order.

14. On April 18, 2006 counsel for the Credit Union wrote to the Superintendent to request a hearing with regard to the Intended Order.

15. On May 2, 2006 a Notice of Hearing was issued by the Superintendent setting the hearing down for June 20, 2006.

16. On May 18, 2006 an Amended Notice of Hearing was issued by the Superintendent setting the hearing down for August 29-31, 2006.

17. Both the Notice of Hearing and Amended Notice of Hearing contained the following paragraph regarding representation by counsel and attendance at the hearing:

> **AND TAKE NOTICE** that you may be represented by legal counsel at the hearing and may make representations, cross examine any witnesses and lead evidence. If you fail to appear at the hearing, on proof of service of this Notice, the hearing may proceed in your absence and orders may be made against you.

18. On April 21, 2006 counsel for the Staff disclosed to the Credit Union the materials that provided the basis for the Intended Order, including materials in support of the First and Second Orders.

19. In the period leading up to the commencement of the hearing on August 29, 2006 counsel for the Staff provided ongoing disclosure of witnesses and materials that counsel intended to rely on at the hearing.

20. Counsel for the Staff also indicated to the Credit Union that someone was required to attend the hearing in person on behalf of the Credit Union, in addition to counsel for the Credit Union.

21. On August 11, 2006 the Credit Union requested better particulars of the alleged contravention(s) committed by the Credit Union. On August 11, 2006 counsel for the Staff wrote back to say:

> I also fail to see how the allegations are "so general". Of course, you are free to make submissions on this point.

22. By letter dated August 17, 2006 the Credit Union reiterated the request for particulars of the alleged contravention(s). In response, the Credit Union was told that its request was "disingenuous". It was referred back to paragraph 31 of the Intended Order and documents filed in support of the Second Order.

23. The hearing began on August 29 and continued on August 30 and September 14, 2006. At the outset of the hearing, counsel for the Credit Union appeared, but no principal of the Credit Union was in attendance.

24. The Credit Union's counsel attended the hearing intending to make submissions on behalf of the Credit Union on matters including:

(a) the need for allegation particulars;

(b) that, on the basis of the wording of the First Order alone, there could be not be a contravention of the First Order; and

(c) any penalty and costs were not warranted.

25. During the course of the hearing, the Superintendent made the following rulings and orders which are now the subject of this appeal:

(a) The Credit Union received adequate notice in order to prepare for the hearing; further, proper written notice was given in accordance with the common law, and the Intended Order was specific enough.

(b) The failure of a "controlling mind" of the Credit Union to attend the hearing amounted to an abandonment of the Credit Union's request for a hearing. Having abandoned its right to a hearing, its counsel would not be allowed to participate further in the hearing.

(c) The Superintendent ruled that the hearing would be adjourned for 24 hours to allow the Credit Union to comply with the requirement that a controlling mind attend the hearing. However, after a brief adjournment, counsel for the Credit Union indicated that, while the Credit Union was aware of the Superintendent's ruling, no controlling mind would appear.

(d) By not appealing the Second Order, the Credit Union admitted to breaching the First Order.

(e) An administrative penalty of $50,000 pursuant to Section 253.1 of the Act was appropriate in the circumstances.

(f) An order for costs in the amount of $14,735.36 pursuant to Section 241.1 of the Act was appropriate in the circumstances.

26. The subject Order was delivered to counsel for the Credit Union on September 19, 2006. The transcript of the decision came separately.

27. As recorded above, on February 22, 2008 the Chair of the Financial Services Tribunal granted the Credit Union an extension of time to appeal the Order, after the Credit Union's petition for judicial review and appeal to the Supreme Court of British Columbia were dismissed on the basis of prematurity/failure to exhaust statutory remedies.

GROUNDS OF APPEAL

The Credit Union says its grounds for appeal arise from three "problems" with the proceeding before the Superintendent: first, the Superintendent failed to provide particulars of what the Credit Union was alleged to have done in contravention of the First Order; second, the Superintendent denied the Credit Union the right to defend itself against "vague, generic and legalistic" allegations; and third, the Superintendent failed to appreciate that the wording of the First Order directed Bux *and/or* the Credit Union (as opposed to Bux *and* the Credit Union) to cease and desist, and erroneously concluded the Credit Union had contravened the First Order. The Credit Union frames its six specific grounds of appeal in these terms:

(i) The Superintendent was not authorized to act (nor should he have acted) under Section 253.1 in light of the First Order's failure to specify the acts and course of conduct to be ceased;

(ii) The Superintendent had no authority to act under Section 253.1 without having first given the Credit Union notice of the specific contraventions alleged;

(iii) The Superintendent exceeded any jurisdiction he may have had by denying the Credit Union its opportunity to be heard and by prohibiting it from otherwise participating in the hearing;

(iv) The Superintendent erred in finding that the Credit Union had contravened the First Order without also finding that Bux itself had continued its operations after the First Order doing what it had been ordered to cease;

(v) In the circumstances, a penalty was not warranted; and

(vi) There was no authority for a costs award and, if so, that it should not have been made, in that amount, or at all.

The Credit Union asks the Tribunal to set aside the Order in its entirety on "one or more" of the above grounds; alternatively, it seeks leave to make further submissions on the matters of penalty and costs once a decision has been made on the first four grounds (and, if necessary, to adduce new evidence on those matters).

According to the Staff, this appeal turns on the Credit Union's second and third grounds which challenge on procedural fairness grounds the Superintendent's decisions that the Credit Union had been given sufficient notice of the Intended Order and the Credit Union had abandoned its right to a hearing when no controlling mind of the Credit Union appeared at the hearing, although counsel for the Credit Union was in attendance. The Staff submits that the Superintendent acted within his jurisdiction and did not err with regard to either of those decisions, and that the second and third grounds of appeal should be dismissed. Furthermore, the remaining grounds should be dismissed on the bases that they amount to a collateral attack on the underlying cease and desist

order (the first ground), and that the Superintendent acted within his jurisdiction and the Credit Union cannot now attack the merits of his decision, having abandoned its right to a hearing (the fourth, fifth and six grounds).

Alternatively, if the Tribunal concludes the Superintendent erred with regard to procedural fairness, the Staff submits the matter should be remitted to the Superintendent and there is no need for the Tribunal to consider other grounds of appeal.

ANALYSIS

I have some difficulty finding merit in the Credit Union's first ground of appeal to the extent it alleges that the "broad, vague and ambiguous wording" of the First Order failed to specify the acts or course of conduct Bux and/or the Credit Union were to cease. It will be recalled that the Credit Union's then solicitor advised the Superintendent in March 2006 that his client "will observe and has been observing, the cease and desist order". Therefore, it must necessarily be implied that the Credit Union had a sufficiently clear understanding of the First Order to instruct counsel to make this assurance. Further, the submission by the Staff that this ground of appeal constitutes an improper collateral attack on the First Order appears to be sound -- at least insofar as the Credit Union challenges the actual terms of the Order, as opposed to the interpretation to be placed on those terms (i.e. its fourth ground of appeal).

In relation to the Credit Union's second ground of appeal, the August 17, 2006 letter from counsel for the Superintendent to counsel for the Credit Union appears to confirm that the "unauthorized deposit business" allegedly carried out in British Columbia by the Credit Union was confined to the matters supporting the Second Order and, moreover, that counsel would be relying on the Second Order alone to prove a contravention of the First Order:

> It remains our position that the Superintendent has already found that North York is in breach of the October 27, 2005 order by virtue of his March 24, 2006 order. In my opinion, the only issues at the upcoming hearing will be whether North

> York was properly served with the previous orders, and what, if any, administrative penalty is appropriate. (letter dated August 17, 2006 at page 2)

But there is no need to express a final opinion on the first two grounds because I have concluded without hesitation that the Credit Union was denied its opportunity to be heard as contended by the third ground of appeal. Somewhat as an aside, I have at the same time been left in doubt about the intended nature of the proceeding below because the Superintendent at one juncture stated it was *not* a hearing. The Record discloses the following exchange between the Superintendent and counsel for the Superintendent, after counsel for the Credit Union and his associate were directed to remove themselves from the hearing table:

> MR. FERNYHOUGH: At this time, Mr. Superintendent, I just ask that we stand down for a minute to allow my friends time to remove themselves, at least from the hearing table, and then we can continue with the hearing.
>
> THE CHAIRPERSON: Well, what we're doing is you're going to proceed with putting the facts before me –
>
> MR. FERNYHOUGH: Yes.
>
> THE CHAIRPERSON: -- *as opposed to a hearing. Is that more accurate?*
>
> MR. FERNYHOUGH: Well, I would say that we would continue with the hearing, it's going to be recorded, and I wish to make a formal record of this proceeding, and proceed that way.
>
> THE CHAIRPERSON: All right.
>
> MR. GIANACOPOULOS: I guess I can't object to it being a hearing, I don't think it is a hearing, but –
>
> THE CHAIRPERSON: *I don't think it's a hearing either.* I think the facts are being placed before me the same as they would in any other sort of -- but, however, I think we're quibbling over which hand is picking up the glass, the left hand or right hand. Does it matter if it gets to the mouth? Okay? (Transcript from August 30, 2006 at pages 14-15; emphasis added)

Nonetheless, assuming the proceeding below was a hearing in some form, basic

principles of administrative law have long established that there can only be a fair hearing if parties affected by a tribunal's decision know the case to be made against them and are given the opportunity to present their side of the matter: Jones and deVillars, *Principles of Administrative Law* (Third Edition), at page 260. The Credit Union also had a right under Section 237(3)(b) of the Act to require a hearing after it received notice of the Intended Order. As stated in *Malik v. British Columbia (Financial Institutions Commission)*, 2006 BCSC 723, Section 237 codifies the common law right of individuals to be heard before actions are taken against their interests; once notified, an individual "must be given the opportunity to be heard if he or she so chooses" (paragraph 68).

There is no dispute about these basic principles, and the questions raised by the third ground of appeal are whether the Superintendent had the right to require a "controlling mind" of the Credit Union to be present at the hearing, and whether the Credit Union abandoned its right to be heard when it failed to comply with this requirement. On that account, the Superintendent made the following ruling on the second day of the hearing:

> ... I have decided that the failure of a director, senior officer or otherwise controlling mind of North York Credit Union to attend a hearing they requested can only be interpreted as they have decided to abandon their request for a hearing. So I rule today, this matter will be adjourned for 24 hours to give North York a further opportunity to have a controlling mind attend this hearing. Failure to do so will be construed as they have decided, once and for all, to give up their right to be heard and have abandoned their request for a hearing.
>
> This hearing will continue in their absence if they fail to attend and their counsel will be invited to attend as a member of the public, but will not otherwise be allowed to participate in the proceedings. (Transcript from August 30, 2006 at page 8)

The Superintendent made this ruling in part because he had made the same ruling in a prior proceeding (*ibid*), and because he wanted someone "to offer evidence to convince me one way or the other" (Transcript from August 29, 2006 at page 93). The Staff submit on appeal that the Superintendent had the authority to make this ruling by virtue of his

power to control his own process, and cite various circumstances where parties are required to personally attend a proceeding.

I accept the Staff's submission that administrative tribunals are not obliged to follow the same rules as the courts, and may develop their own practices and procedures. However, any such practices and procedures must comply with the strictures of procedural fairness in the particular context: *British Columbia (Securities Commission) v. Pacific Institutional Securities Inc.*, 2002 BCCA 421, at paragraphs 6-7. In my view, the Superintendent's ruling here went beyond mere practice and procedure, and substantively interfered with the Credit Union's right to be heard. In fact, the Credit Union was not heard at all, and it is evident from the Record that the Superintendent sought to impose his preference regarding how the Credit Union should present its appeal (i.e. with a controlling mind in attendance):

> THE CHAIRPERSON: I've made my decision. We're moving past that. North York Credit Union requested a hearing. It is incumbent upon them, in my opinion, and consistent with the procedures I have adopted in the past, for them to show up. If they fail to do so, I can only come to one conclusion, they have abandoned their right to [a hearing].
>
> * * *
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> MR. GIANACOPOULOS: I know what you mean. Okay. See, that's what I wanted to communicate, is I know that I have some good arguments on the merits, that I think if you hear them, they would represent North York and they could influence you, but -- and you're telling me that I can't make those any more.
>
> THE CHAIRPERSON: I'm telling you that unless there's a controlling mind of this entity which is the subject of the hearing, which has requested the hearing, here, then I can come to no other conclusion but they have abandoned their request for a hearing.
>
> MR. GIANACOPOULOS: But I'm here because I want you to hear me. I want you to hear me and I want my client's right -- to exercise my client's right to be heard because I have some good arguments that I think, if you hear it, will

> dissuade you. I actually have confidence, or you know, I think there's a good chance that it may dissuade you, and you're telling me that I can't make those unless I have my -- I mean, do you want to hear them now?
>
> MR. FERNYHOUGH: Mr. Superintendent, you made your ruling.
>
> THE CHAIRPERSON: I've made my ruling, and I'll only comment on this, that another path that North York could have taken, instead of requesting a hearing, would have had you correspond with me and say, oh, wait a minute now, have you considered this, have you considered that. But no, they said, we want a hearing. I have blocked out time in my calendar. I'm not the most important guy in the world, I understand that, but my time is important to me.
>
> MR. GIANACOPOULOS: Yes.
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> THE CHAIRPERSON: And as I said to you yesterday, and I will repeat it, I am appalled at their failure to attend, on a whole bunch of levels. This is their hearing. It isn't my hearing. It isn't your hearing. It is their hearing. They have requested a hearing.
>
> MR. GIANACOPOULOS: And here it is, they have their lawyer here.
>
> THE CHAIRPERSON: *Well, unfortunately, or fortunately, depending on where you sit, I have adopted the position in the past, you have to be here. If you want a hearing, you have to be here. It is your opportunity to be heard.* (Transcript from August 30, 2006 at pages 10-12; emphasis added)

The Superintendent properly recognized the "opportunity to be heard" belonged to the Credit Union. I have not been directed to any authority which allows that fundamental right to be denied, for the reason given here, in the absence of an express regulatory provision. All of the authorities relied on by the Staff can accordingly be distinguished: cf. *Executive Inn Inc. v. 688571 British Columbia Ltd.*, 2008 BCCA 93, where the issue concerned the interpretation of the *Notice to Mediate Regulation*, B.C. Reg. 127/98; Rule 60E of the *Supreme Court Rules*, B.C. Reg. 221/90; and Rule 7(4) of the *Small Claims Rules*, B.C. Reg. 261/93. Further, all of the foregoing provisions can be seen as having a different legislative objective; i.e. having the parties directly involved in a without prejudice mediation intended to settle a dispute.

I recognize the Superintendent wanted to have a "controlling mind" present at the hearing to give evidence and, in fairness to the Credit Union, he made plain the need to "convince me one way or the other". The Credit Union risked not convincing the Superintendent when it persisted with its desire to rely on legal submissions alone. But the Credit Union should have been given the opportunity to exercise its right to be heard and "meet the case" against it in that manner if it so elected. The fact the Superintendent had made the same ruling in the past is not compelling for at least two reasons: first, the prior ruling cannot establish jurisdiction which does not otherwise exist; and second, while administrative tribunals should strive for consistency, they cannot fetter their discretion by failing to consider exceptions to even properly established rules.

The contention that the Credit Union "abandoned" its right to be heard borders on sophistry. It should be abundantly apparent from the portions of the Transcript reproduced already that counsel for the Credit Union (presumably acting on instructions from his client) wanted to make various submissions, but was removed from the hearing table. Counsel was even more fervent in his entreaties on the first day of the hearing:

> I am here pursuant to my right -- my client's right, and it's an absolute right under section 237, to have a hearing. I've told you why I don't intend to call evidence, but I am here to have my right to a hearing. I want to be here, and I want to be heard, and I want notice, and we've already dealt with the notice. And I want the right to be heard and I want the right to cross-examine, and I want the right to do everything. That's my client's right that I am here to exercise. That's the hearing part.
>
> * * *
>
> ... But I say it with the greatest of respect, we are here - and I don't know how I can say it in greater, and stronger, and clearer terms -- I want my right to be heard. And the stuff that I've given you so far, hopefully -- you may not think it's worthy, but it is, in part, a demonstration of what I have -- of what I suppose the right to be heard is all about, so I can give you my position -- my client's position. And I have a lot more to give you, and that's why I want my right to be heard. (Transcript from August 29, 2006, at pages 89 and 95)

In the two primary authorities advanced by the Staff on abandonment, the parties withdrew from

the proceedings on their own volition: *Sharma v. British Columbia Veterinary Medical Association*, 2008 BCSC 240, citing *Violette v. New Brunswick Dental Society*, 2004 NBCA 1. Those cases bear no resemblance to the present circumstances, and it cannot be said the Credit Union waived on otherwise abandoned its right to participate in the hearing.

I have accordingly determined that the Superintendent's decision must be set aside. The question which next arises is whether the Tribunal should adjudicate the merits of the appeal or should refer the matter back to the Superintendent. The Staff advocate the latter approach based on *Keith Bryan Westergaard and GET Acceptance Corporation v. Registrar of Mortgage Brokers* (FST 05-017), while the Credit Union argues "the only appropriate remedy here is to revise the decision and put an end to the problem".

I am sensitive to the interests of both parties in receiving a final decision without expending undue time and resources. But there are several countervailing factors to consider. The most cogent reason for the Tribunal to not proceed further at this stage is the Credit Union's request to adduce certain unspecified "new evidence" on the matters of penalty and costs. The Superintendent is by far the more appropriate forum for conducting an evidentiary hearing, and the Tribunal only hears new evidence as an exception to the normal written submission process. The Credit Union does not argue that the Superintendent will be unable to revisit the matter objectively. Instead, it submits "the matter cannot be remitted because of the 6 month time limitations". That submission runs counter to the usual outcome on judicial review. According to Brown and Evans, *Judicial Review of Administrative Action in Canada* (Canvasback Publishing), a tribunal may decide a dispute for the second time where its decision has been quashed for breaching the duty of fairness; in that event, the tribunal and the parties are left in the position they were in prior to the invalid decision being made (paragraph 12:6310). It seems reasonable to assume the same state of affairs results where the Tribunal sets aside a decision and refers the matter back pursuant to its statutory authority. But this observation does not preclude the Credit Union arguing the point before the Superintendent, especially as the Staff have sought to have the matter remitted. On balance, I have decided to remit the matter to the Superintendent with

directions.

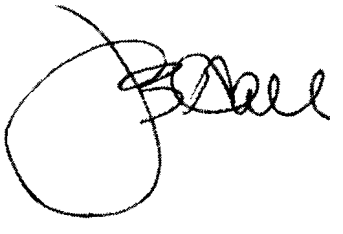
CONCLUSION

Under Section 242.2(11) of the Act, the Credit Union's challenge to the Intended Order is remitted to the Superintendent for reconsideration, together with the direction that the Credit Union be heard regardless of whether a director, senior officer or "otherwise controlling mind" attends the hearing.

No award is made for costs due to the divided success on appeal: while the subject Order has been set aside based on the Credit Union's third ground of appeal, the Staff have prevailed in having the matter remitted to the Superintendent without the Tribunal determining the remaining grounds.

DATED AT VANCOUVER, BRITISH COLUMBIA, THIS 22ND DAY OF JULY 2008.

FOR THE FINANCIAL SERVICES TRIBUNAL



JOHN B. HALL
PRESIDING MEMBER