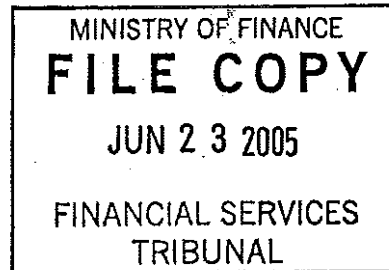


June 22, 2005

Financial Services Tribunal
Suite 1200 – 13450 102nd Avenue
Surrey, B.C.
V3T 5X3



Attention: Graham Kennedy
Deputy Registrar
Financial Services Tribunal

Dear Mr. Kennedy:

Re: Financial Services Tribunal ("FST") Appeal of the Decision of the Insurance Council of British Columbia ("ICBC"), dated February 28, 2005, regarding Ms. Maria Pavicic (the "Appeal")
File FST 05-005

The Chair of the FST appointed the writer as the member of the FST to consider the Appeal (letter dated April 6, 2005). I received notification from the FST that counsel for the Superintendent of Financial Institutions had initiated the Appeal and that copies of the submissions were distributed to Ms. Maria Pavicic and to counsel for ICBC (May 16, 2005). Prior to considering the Appeal, I received notification that counsel for the Superintendent of Financial Institutions had filed additional appellant's submissions with respect to the Appeal (letter dated May 26, 2005). Counsel for ICBC, Ms. Maria Pavicic and M. Grist, FICOM Insurance Department, were sent the same notification.

In a submission dated May 26, 2005 counsel for the Superintendent of Financial Institutions notified the FST that the Appeal had been filed pursuant to section 242(3) of the *Financial Institutions Act*. Counsel noted that "On January 1, 2005 the Superintendent no longer had the right to appeal. That right was moved up a level to the Financial Institutions Commission. I am also counsel for the Financial Institutions Commission." The submission of May 26, 2005 goes on to note that: "Based on counsel error, the appeal in this matter was filed on behalf of the incorrect party."

Counsel, acting for the Financial Institutions Commission, applied for "leave of the Tribunal for an Order of Substitutions of Parties pursuant to section 14 of the *Administrative Tribunals Act* to correct the record and substitute the Financial Institutions Commission as the proper appellant in this matter." Section 14 of the *Administrative Tribunals Act* reads:

14. In order to facilitate the just and timely resolution of an application the tribunal, if requested by a party or an intervener, or on its own initiative, may make any order
 - (a) for which a rule is made by the tribunal under section 11,
 - (b) for which a rule is prescribed under section 60, or
 - (c) in relation to any matter that the tribunal considers necessary for purposes of controlling its own proceedings.

The *Administrative Tribunals Act*, section 1, states: "application" includes an appeal, a review or a complaint but excludes any interim or preliminary matter or an application to the court.'

Counsel for ICBC and Ms. Maria Pavicic were notified by the FST of the Application for Substitutions of Parties. In a submission dated May 26, 2005, counsel for ICBC noted: "We have reviewed the Act and are unable to find any authority on which Council, or any other party, can consent to the Superintendent's right to bring an appeal if it does not have standing in the first instance." The submission goes on to note: "Further, as this issue may have a profound effect on the Respondents Ms. Pavicic's and Mr. Novko, it is our view that prior to making any decision in this regard we need to hear from both of these parties as to their position on this issue." The reference to Mr. Novko relates to a separate appeal. In a subsequent submission dated June 2, 2005, counsel for ICBC noted: "The Council will not make any further submissions in opposing the substitution. If Tribunal members Mr. Doan and Professor Hamilton believe it is right and just in the circumstances to allow the substitution, then Council is prepared to proceed as required." Mr. Doan is the member of the FST assigned to consider the Novko appeal.

Ms. Pavicic was allowed additional time to consider this matter, but she did not provide any submissions to the FST on this matter.

Counsel for the Financial Institutions Commission (who is also counsel for the Superintendent of Financial Institutions) submitted that the incorrect party had filed the initial Appeal submission due to counsel error. I am very sympathetic to the fact that counsel errors, unless they present an unreasonable prejudice to the other parties to the proceedings, should not interfere with "the just and timely resolution of an application". The fact that counsel for ICBC has agreed to proceed as required and the fact Ms. Pavicic has made no submission relating to the Application for Substitutions of Parties are supportive of ensuring counsel errors do not interfere with a just and timely resolution.

Counsel for the Financial Institutions Commission cited section 14 of the *Administrative Tribunals Act* as the basis for the application for an Order of Substitutions of Parties. Section 14 makes specific reference to section 11 of the *Administrative Tribunals Act* that states:

"11(1) Subject to this Act and the Tribunal's enabling Act, the tribunal has the power to control its own processes and may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.

11(2) Without limiting subsection (1), the tribunal may make rules as follows:
(1) respecting amendments to an application or responses to it;"

Section 11(1) provides the tribunal with power "to facilitate the just and timely resolution of matters before it". Section 11(2) grants the tribunal authority to make rules respecting amendments to an "application". Section 14 provides the tribunal with power to facilitate the just and timely resolution of an application...". In this context I have taken "application" to imply an appeal. It is my view that in order to consider approval of the Application for Substitutions of Parties there must be an "application" and the application must be before the tribunal.

The Appeal documents were originally filed by the Superintendent of Financial Institutions and, as clearly noted in the submissions, at the time of the filing the Superintendent did not have authority to file such an appeal. It is my view that if the Superintendent of Financial Institutions did not have authority to file an appeal, then no legal appeal exists. If there is no legal appeal, then it is my view that there is no application before the tribunal. Under these circumstances I do not believe I can rely upon section 14, 11(1) and 11(2) as my authority for approving the Application for Substitutions of Parties. I have not been directed to any other specific authority that grants me the power to approve the Application for Substitutions of Parties. In these circumstances I am reluctant to extend any general powers that might be vested in the tribunal to what I would view as the creation of an appeal where none exist. I therefore order that the Application for Substitutions of Parties dated May 26, 2005 be denied. The Financial Institutions Commission is at liberty to apply for leave for late filing of an appeal of the February 28, 2005 decision of ICBC.

Yours truly,



Stanley W. Hamilton

By appointment as Hearing Officer dated April 6, 2005.