

FINANCIAL SERVICES TRIBUNAL

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

BETWEEN:

JAGJIT SINGH CHEEMA

APPELLANT

AND:

INSURANCE COUNCIL OF BRITISH COLUMBIA

and

FINANCIAL INSTITUTIONS COMMISSION

RESPONDENTS

DECISION

BEFORE: JOHN B. HALL, Presiding Member

APPEARANCES: ROYAL J. MORTON, for Mr. Cheema
DAVID T. McKNIGHT, for the Council
RICHARD FERNYHOUGH, for the
the Commission

DATE OF LAST SUBMISSION: May 30, 2006

DATE OF DECISION: June 15, 2006

INTRODUCTION

Mr. Cheema appeals a Decision and Order of the Insurance Council of British Columbia (the “Council”) dated November 16, 2005 which cancelled his license as a Level 2 General Insurance Agent. The cancellation followed an allegation that Mr. Cheema had improperly used the Insurance Corporation of British Columbia’s computer terminal with the intention of sharing confidential and sensitive personal information with an individual he knew to be involved in criminal activity.

Mr. Cheema admits accessing the computer terminal; however, he maintains no confidential information was disclosed. He characterizes his actions as a “mistake”, and argues cases involving temporary lapses of judgment indicate a penalty ranging from a reprimand to a 14-day suspension would be appropriate.

The Respondents portray Mr. Cheema’s conduct in far more serious terms and, additionally, place his credibility in issue. They maintain cancellation of Mr. Cheema’s license was appropriate in the circumstances, and argue the appeal should be dismissed with costs.

THE DECISION AND ORDER

The Decision and Order (which I will refer to as the “decision” or the “Council’s decision”) was made under Section 238(1) of the *Financial Institutions Act* (the “Act”). This provision allows the Council to make an order under Section 231(1)(g) canceling a license without giving the person affected an opportunity to be heard where it “considers that the length of time that would be required to hold a hearing would be detrimental to the due administration of this Act”. I will reproduce the body of the decision in its entirety:

WHEREAS the Licensee is currently licensed as a Level 2 General Insurance Agent;

AND WHEREAS Council conducted an investigation pursuant to section 232 of the Act into an allegation the Licensee improperly used the Insurance Corporation of British Columbia's ("ICBC") computer terminal with the intention to share confidential and sensitive personal information with an individual he knew to be involved in criminal activity ("Third Party");

AND WHEREAS Council found that in June 2005, at the request of the Third Party, the Licensee accessed ICBC's computer system to obtain sensitive personal and confidential information about the registered owner of a motor vehicle.

AND WHEREAS the Licensee knew or ought to have known that releasing information to the Third Party could endanger the safety and security of the vehicle's owner, driver or others;

AND WHEREAS licensees are afforded access to ICBC's computer system for bona fide ICBC business purposes only and Council considers any misuse of a licensee's position for personal reasons or benefit to be a serious breach of trust;

AND WHEREAS Council has determined the Licensee's actions demonstrated he was not trustworthy and cannot publicly carry on the business of insurance in good faith and poses a continuing and imminent risk of serious harm to the public;

AND WHEREAS Council considers it to be in the public interest to cancel the Licensee's licence pursuant to section 231 of the Act;

AND WHEREAS Council considers the length of time required to hold a hearing would be detrimental to the due administration of the Act;

NOW THEREFORE Council orders the Licensee's insurance licence be cancelled pursuant to sections 231 and 238, effective November 15, 2005;

TAKE NOTICE that pursuant to section 238 of the Act, the Licensee has the right to request a hearing on this decision and order before Council by delivering written notice within 14 days of receipt of this order to Council at suite 300 - 1040 West Georgia Street, Vancouver, British Columbia, V6E 4H1; alternatively, the Licensee may appeal this order to the Financial Services Tribunal. (bold in original)

The foregoing might be more accurately described as an "order" than a "decision". The text also appears to fall short of the Council's obligation under Section 238(1)(c) to deliver "a copy of [its] order *and written reasons for it*" (emphasis added). Mr. Cheema does not raise this as a specific ground of appeal. However, his submissions repeatedly note the absence of reasons to support

the Council's determinations and its ruling on penalty. As will be explained in due course, I have found the brevity of the Council's decision to be the most problematic aspect of this appeal.

ISSUES ON APPEAL

Under Section 238(2) of the Act, Mr. Cheema was entitled within 14 days of the Council's decision to: (a) require a hearing before the Council, or (b) appeal to the Tribunal. He elected to pursue the latter avenue, and his appeal submissions identify three issues:

1. Are the Council's Rulings unreasonable in that:
 - (a) there is insufficient clear and cogent evidence that Mr. Cheema is not trustworthy
 - (b) there is insufficient clear and cogent evidence that Mr. Cheema cannot publicly carry-on the business of insurance in good faith; and
 - (c) there is insufficient clear and cogent evidence that Mr. Cheema poses a continuing and imminent risk of serious harm to the public?
2. Even if any of the Council's Rulings are reasonably supported by the evidence, is the Order to cancel Mr. Cheema's license for an indefinite period effective November 15, 2005 unreasonable as being manifestly excessive in the circumstances?
3. If the Rulings cannot be supported or the penalty was manifestly excessive, what penalty should be imposed in the circumstances?

The Respondents take a different view of what must be determined by the Tribunal. The Council says the sole issue is whether its decision to cancel Mr. Cheema's license was just and reasonable in the circumstances. The Commission frames its second issue in similar terms. However, it says the first issue is whether it was reasonable for the Council to find Mr. Cheema's actions demonstrated he was not trustworthy, was unable to carry on the business of insurance in good faith, and poses a continuing and imminent risk of serious harm to the public.

The appropriate standard of review under Section 242 of the Act is evolving and has now been the subject of comment in several Tribunal decisions. My contribution to the discussion (admittedly *in obiter*) can be found in *Kenneth Scott Spong* (FST 05-007). The parties to the present appeal have largely made their submissions based on the approach articulated in *Branislav Novko* (FST 05-008), as followed in *Maria Pavicic* (FST 05-009). With respect, the difficulty I perceive with such an approach is that it conflates the “clear and cogent evidence” standard routinely used in professional conduct inquiries in British Columbia with the standard to be adopted by the reviewing tribunal. The Supreme Court of Canada has explicitly rejected that line of analysis for purposes of the “pragmatic and functional” test on judicial review: see *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC19, followed in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, cited here by Mr. Cheema. Chief Justice McLachlin delivered the unanimous judgment in *Dr. Q* and wrote: “The standard of clear and cogent evidence does not permit the reviewing judge to enter into a re-evaluation of the evidence [and it] does not instruct a reviewing court on how to scrutinize the decision of the administrative decision-maker” (para. 19; see also paras. 16-18).

The foregoing statement was made in relation to the pragmatic and functional approach to judicial review which, in my view, has been properly found in other Tribunal decisions to be inapplicable to appeals under Section 242 of the Act. But the point remains: the requirement for clear and cogent evidence in the first instance is separate from whatever standard is applied on review.

There is no need to dilate on the appropriate standard of review given the common ground found in the parties’ submissions and, for purposes of this appeal, I accept the touchstone is the test of reasonableness. In that regard, Mr. Cheema relies on the explanation of the test found in *Ryan*, *supra*, which requires the reviewing body to look at the reasons given by the tribunal. A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. As

also explained in the same judgment:

... The standard of reasonableness basically involves asking “After a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?” ... Deference is built into the question since it requires that the reviewing court assess whether a decision is basically supported by the reasoning of the tribunal or decision-maker, rather than inviting the court to engage *de novo* in its own reasoning on the matter. ... (para. 47)

The Supreme Court elaborated by saying a court reviewing a decision under the reasonableness standard must stay close to the reasons given by the tribunal and “look to see” whether any of those reasons adequately support the decision (paras. 48-49).

The foregoing articulation was admittedly offered in the context of the pragmatic and functional approach to judicial review. However, I adopt them for present purposes given the parties’ submissions and the nature of the Council’s decision. Thus, the resulting issues are whether the reasons given by the Council adequately support its determinations that Mr. Cheema’s actions demonstrated:

- (a) he was not trustworthy;
- (b) cannot publicly carry on the business of insurance in good faith; and
- (c) poses a continuing and imminent risk of serious harm to the public.

It is also necessary to consider whether there is a line of analysis within the Council’s decision which could reasonably lead it from the evidence to its conclusion that Mr. Cheema’s license should be cancelled. And if any of those issues are answered in the negative, a further question will arise as to the appropriate remedy under Section 242.2(11) of the Act.

PRELIMINARY MATTERS

The Council applied during the submission process to introduce new evidence under Section

242.2(8) of the Act. It sought more specifically to admit a copy of the login message found on the ICBC Autoplan Extranet website, as well as a copy of the ICBC Agent's Manual. The Council argued the evidence is substantial and material as it speaks to Mr. Cheema's knowledge regarding the use of confidential ICBC information, and to the restrictions flowing from the *Freedom of Information and Protection of Privacy Act*. The Council also argued the evidence goes to the integrity and credibility of Mr. Cheema's evidence.

Mr. Cheema did not consent to admission of the new evidence but nor did he oppose it being considered by the Tribunal. The Council's application was supported by the Commission.

In these circumstances, I have admitted the new evidence and considered it in my deliberations. However, I agree with Mr. Cheema that it adds little or nothing to what was already undisputed; namely, he knew the computer database is for ICBC business purposes only, and it contains private and confidential information. I note as well that the new evidence essentially reiterates what was already part of the record in the form of an April 2003 Council Bulletin regarding the use of ICBC's computer system. Indeed, the Bulletin refers in part to what is "explicitly stated on the computer terminal screen when logging in."

After the usual submission process in this appeal had concluded, the British Columbia Supreme Court issued its judgment in *Malik v. British Columbia (Financial Institutions Commission)*, 2006 BCSC 723. Due to the potential relevance, the parties were given an opportunity to make submissions generally regarding *Malik*, as well as respecting two issues flowing from the judgment: (a) whether the Council's decision to not hold a hearing and/or to cancel Mr. Cheema's license is subject to appeal for a lack of reasons (reference was made as well on this point to my decision in *Spong, supra*, where the same issue arose); and (b) whether appellants should be required to "exhaust internal avenues of appeal" by exercising their right to a hearing under Section 238(2)(a) of the Act where their appeals concern questions of fact and/or credibility and they were not given an opportunity to be heard in the first instance.

The Commission and the Council each filed a supplemental submission in response to the Tribunal's invitation. Nothing was received initially from Mr. Cheema; however, he did rely to the Respondents' submissions as permitted.

The Commission's position regarding the opportunity to file further submissions was two-fold: first, I had exceeded my jurisdiction by inviting the parties to make submissions on proposed grounds of appeal not advanced by Mr. Cheema; and second, I had raised a reasonable apprehension of bias by inviting submissions respecting a lack of reasons while referencing my decision in *Spong* where the appeal had been allowed on that basis. For its part, the Council argued the decision and other materials in the record (described more fully below) provide a clear foundation for the outcome and the "reasons" are clear to all parties involved. It also rejected the suggestion that Mr. Cheema had been denied an opportunity to be heard in the first instance. Rather, with the benefit of legal counsel, Mr. Cheema chose to appeal to the Tribunal instead of requesting a hearing and the Tribunal should not "look behind" that decision. The Council additionally suggested there is no authority to "read in" a requirement that appellants exhaust their right of appeal under Section 238(2)(a) of the Act.

Mr. Cheema's reply voiced substantial agreement with the Council's view of the statutory framework, including the absence of any requirement to exhaust internal avenues of appeal and the inappropriateness of looking behind his decision to pursue an appeal as opposed to a hearing.

Mr. Cheema made the following submissions with respect to the British Columbia Supreme Court's recent judgment:

While the *Malik* decision does raise some interesting questions, we agree with [the Council's] submission that the case is distinguishable from the present case. The Appellant is not challenging the legislative scheme that gives the Council the power to cancel an insurance license permanently and without qualification without even an oral hearing. The Appellant's position is simply that if the Council takes such a draconian step, its conduct must at least be reasonably supported by clear and cogent evidence. The absence of any detailed reasons from the Council detracts from the weight and credibility of the Council's conclusions and the penalty it imposed. (p. 2 of supplemental submission dated May 30, 2006)

Mr. Cheema also agreed with the Commission regarding the limitation placed on my jurisdiction, but did not agree I had exceeded that jurisdiction or raised a reasonable apprehension of bias.

When I initially read the *Malik* judgment, I believed there were some instructive parallels to the present appeal. In that case, the Superintendent of Financial Institutions (acting on authority delegated by the Financial Institutions Commission) had removed Mr. Malik as a director of the Khalsa Credit Union. Mr. Malik was not given notice of the intended removal order, was not given an opportunity to be heard, and was not given any reasons for the summary nature of the action taken against him. Instead, the Superintendent acted under Section 238 of the Act -- that is, under the same provision of the statute used to cancel Mr. Cheema's license. There were several issues before the court. One was whether Mr. Malik was entitled to proceed by way of judicial review and statutory appeal to the court because he had not exhausted all adequate alternative remedies provided by the Act; another was whether Mr. Malik ought to have been provided with notice of the intended action against him and given an opportunity to be heard.

On the first issue, Madame Justice Wedge held the matter was properly before the court. On the second, she found Section 237 of the Act codifies the common law right of individuals to be heard before actions are taken against their interests. She regarded Section 238 an "extraordinary right to proceed without a hearing", and expressed the following opinion:

... particularly in light of the Commission's obligation to provide notice and a hearing under s. 237, that the Commission must have good and sufficient reasons to proceed against an individual without notice or the opportunity to be heard.

The Superintendent did not say why, in the circumstances, he was of the view that the due administration of the FIA required Mr. Malik's summary removal. ... *If the Superintendent had reasons for his decision to proceed without notice, he ought to have provided them at the time. Once again, it is not for this Court to search the record for reasons or to speculate as to why the Superintendent decided to issue the removal order without first providing Mr. Malik an opportunity to be heard.* (paras. 68-69; emphasis added)

The circumstances and parties in *Malik* can be distinguished. However, I do not resile from my initial assessment that the disposition of the legal issues had a potential bearing on this appeal. Further, my experience as both an advocate and adjudicator suggests counsel generally prefer being given the opportunity to address issues of concern to a decision-maker before a final ruling is made. I do not accept a reasonable person would perceive bias because a decision-maker invites submissions regarding a newly released judgment (where the parties would otherwise not have an opportunity to comment), and raises specific questions based on the issues determined in the judgment (including drawing the parties' attention to one of the decision-maker's past rulings on an issue, in part because only one counsel in the matter being decided had been counsel in the earlier proceeding).

Nonetheless, the potential ramifications of *Malik* to disciplinary penalties imposed by the Council must be properly left for another day. Mr. Cheema does not appeal based on an alleged failure to comply with the rules of natural justice. More particularly, he does not assert the Council's decision should be reversed or varied because he was not heard by the Council; nor does he assert the Council failed to provide reasons for its decision to proceed without notice to him, or failed to provide reasons for its decision to cancel his license in accordance with the requirements of procedural fairness. On that account, I accept the Respondents' position that the Tribunal does not have authority to dispose of an appeal on grounds which have not been pursued by an appellant. However, Mr. Cheema has from the outset raised a lack of reasons as the central flaw in the Council's decision (i.e. there is no "line of analysis" as described in *Ryan, supra*), and has argued the absence of factual findings means there is no reasonable basis for the Council's determinations.

BACKGROUND AND CHRONOLOGY

The following timeline of pertinent events in 2005 is supported by the record and is not contested by the parties in any material respect:

- (i) June 14 - Insurance Corporation of British Columbia special investigator Greg Bodin discovered that someone had conducted a license plate search on the ICBC vehicle he had used earlier that day. The vehicle was registered to ICBC and operated by its Special Investigation Unit.
- (ii) June 23 – Mr. Bodin investigated the incident and discovered Mr. Cheema was the person who had conducted the license plate search. Mr. Cheema was employed at the time with Meier & Company Insurance Ltd. (“Meier & Company”) in Mission.
- (iii) July 21 – Mr. Bodin and another ICBC special investigator interviewed Mr. Cheema. They learned he had checked the license plate at the request of an individual referred to as the “Third Party” in the Council’s decision. The Third Party was a high school friend and continuing acquaintance of Mr. Cheema, and he knew the Third Party was involved in criminal activity and had just been released from prison.
- (iv) August 4 – Mr. Bodin and another ICBC special investigator interviewed Mr. Cheema a second time based on what they believed were irregularities in the information provided during the earlier interview. Mr. Bodin knew Mr. Cheema was prohibited at the time from operating a motor vehicle and had driven to the interview. Mr. Bodin did not report this apparent breach to the Superintendent of Motor Vehicles, but instead asked Mr. Cheema to contact someone for a ride home.
- (v) November 4 – ICBC reported concerns to the Council that Mr. Cheema had improperly used his position as an insurance agent to conduct a license plate search on one of its vehicles. There is no explanation in the record for the delay from June (when Mr. Bodin knew of Mr. Cheema’s conduct) to November (when ICBC reported its concerns); nor is there any explanation for ICBC’s delay in reporting after the second interview in early August. The Council assigned James Chee to investigate the matter.

- (vi) November 7 – Mr. Chee spoke with Kerry Meier, the nominee of Meier & Company; he also spoke with an ICBC field supervisor who reported no past issues of concern with Mr. Cheema’s activities as an Autoplan agent.
- (vii) November 8 – Mr. Chee interviewed Mr. Cheema and Mr. Meier at the Council’s office.
- (viii) November 9 – Mr. Chee spoke again with Mr. Bodin. He also prepared a private and confidential report to all voting members of the Council which summarized his various conversations and interviews.
- (ix) November 10 – Mr. Chee prepared a second private and confidential investigation report in anticipation of a Full Council meeting scheduled for November 15. The report provided a synopsis; summarized the investigations by Mr. Bodin and Mr. Chee; provided extracts from the relevant legislation; identified the resulting issues; and attached various documents. The latter comprised copies of Mr. Bodin’s “will say” statements from his two interviews with Mr. Cheema (Exhibit 1); Mr. Chee’s first investigation report (Exhibit 2); a copy of a Council Bulletin from April 2003 regarding use of the ICBC computer system (Exhibit 3); and excerpts from the Council’s Code of Conduct dealing with trustworthiness, good faith and competence (Exhibit 4).
- (x) November 15 – The Council met as scheduled and this is the effective date of the Council’s decision canceling Mr. Cheema’s License.
- (xi) November 16 – The Council issued its decision (reproduced earlier) and mailed it to Mr. Cheema. The covering letter stated “[t]he reasons for Council’s decision can be found in the attached order”, and advised Mr. Cheema of his appeal rights under Sections 238 and 242 of the Act.
- (xii) December 12 – Mr. Cheema’s Notice of Appeal was received by the Tribunal. Neither

Respondent has taken issue with the timeliness of the appeal.

FACTS AND EVIDENCE

Mr. Cheema admits the Council's decision contains two express findings of fact: in June 2005, at the request of the Third Party, he accessed ICBC's computer system to obtain sensitive personal and confidential information about the registered owner of a motor vehicle; and he knew, or ought to have known, that releasing information to the Third Party could endanger the safety and security of the vehicle's owner, driver or others. Mr. Cheema also allows the decision was based on two implicit findings of fact given the allegation before the Council; namely, he did obtain personal information, and he knew the Third Party was involved in criminal activity.

Mr. Cheema does not challenge any of the foregoing findings. His appeal sets out various additional "relevant facts". Many of these are not disputed; others are contested on the basis they are not facts, but are better characterized as assertions made by Mr. Cheema. Further, both Respondents challenge the truthfulness of some of those assertions. Mr. Cheema responds by saying the Respondents misunderstand his use of the word "facts" and their arguments highlight a critical problem with the Council's decision. As noted in Mr. Cheema's initial appeal submissions, he submits the "relevant facts" are reasonably established by the record and are most pertinent to assessing the Council's decision. The Council only made two express findings of fact, gave no written reasons for why it made those findings, and did not give any reasons setting out any additional findings or conclusions it drew from the evidence. Thus, the parties are left to look at the evidence (as opposed to written reasons) and surmise what evidence the Council may have relied upon to make its decision.

I find Mr. Cheema's description of the circumstances is accurate. In making their submissions, the parties have been driven to rely almost exclusively – and extensively – on evidence in the record. Much of this evidence is in the form of "will say" statements, and was not given under oath or subject to cross-examination. Some of the evidence on critical points is double hearsay:

for instance, Mr. Chee reporting to the Council what Mr. Bodin advised had been admitted to him by Mr. Cheema. It is fair to say there are inconsistencies in some of the evidence which have led to arguments over credibility in the parties' appeal submissions. And in some areas where there is minimal dispute over the evidence, the parties maintain the record supports significantly different findings which go directly to the rulings made by the Council and the penalty it imposed. As Mr. Cheema submits at several junctures, one cannot know what findings of fact the Council actually made given the lack of detailed reasons.

For the time being, and primarily to provide a context for the analysis which follows, I will set out with minor amendment many of the points advanced by Mr. Cheema as "relevant facts", supplemented by "facts" from the Council's submission which are not disputed (supporting references to the record have been omitted from both sources and some names have been anonymized):

1. Mr. Cheema first obtained his Level I general insurance agent license on August 4, 2000 and was licensed as a Level II general insurance agent as of January 8, 2001. He resides in Mission, B.C.
2. Mr. Cheema was continuously employed by Meier & Company from August 4, 2000 and has not worked for any other employer in the insurance industry.

Mr. Meier described Mr. Cheema's duties as being a "roadrunner for ICBC Autoplan transactions servicing the Mission, B.C. area", apart from selling "at most 5 private auto policies a year with Family Insurance", Mr. Meier confirmed Mr. Cheema's duties at the agency did not encompass other forms of personal lines or commercial lines of insurance.

3. ICBC lodged a complaint with the Council regarding Mr. Cheema's suitability as a licensee as a consequence of Mr. Cheema accessing ICBC's computer terminal for purposes other than an insurance transaction.

ICBC's investigation of Mr. Cheema's conduct originally stemmed from its interest in interviewing AB in relation to the theft of a truck claim involving AB's friend. At 9:00 a.m. on June 14, 2005, Mr. Bodin and another ICBC special investigator visited AB's residence in Mission. AB was not home, and the ICBC investigators left business cards with an individual who identified himself as the "brother" of AB.

One hour after visiting AB's residence, Mr. Bodin conducted a licence plate search of his ICBC vehicle and discovered that someone had conducted an ICBC database search of the licence plate of his vehicle. Subsequent investigation identified Mr. Cheema's user identification number confirming that he had conducted the ICBC vehicle search.

4. Mr. Cheema accessed ICBC's computer terminal on June 14, 2005 via remote access from his home. Mr. Cheema did so with the intention of determining the name of the registered owner of a motor vehicle based on a plate number provided to him by the Third Party.
5. Mr. Cheema understood that the Third Party had been involved in criminal activity and knew that he had just been released from prison. Mr. Cheema had attended high school with the Third Party in Mission and used to party a lot with him.
6. On the morning of June 14, 2005 the Third Party first asked Mr. Cheema two times to conduct a motor vehicle license plate search, but Mr. Cheema refused to do so. Mr. Cheema could not recall the time of the requests, except that they were in the morning.
7. When the Third Party asked Mr. Cheema to conduct the search, Mr. Cheema understood from his statements and behaviour that the Third Party was concerned that the occupants of the vehicle were "looking to kill him" or that he was "being followed and his life was in danger". According to Mr. Cheema, the Third Party was "speaking a lot of weird nonsense".
8. Mr. Cheema was not threatened by the Third Party, but Mr. Cheema saw him as "a local bad guy who just got out of jail" and "he [Mr. Cheema] is afraid of these guys". Mr. Cheema also understood the Third Party to be a friend of AB who is known in the community as a drug dealer in Mission.
9. The Third Party told Mr. Cheema that the person who normally did searches for him could not. When Mr. Cheema refused to conduct a search the first two times the Third Party requested it, Mr. Cheema tried to "shut him off" and said "I don't know what you are talking about, I can't do this type of thing".
10. The Third Party left Mr. Cheema's house and then returned with the same request made for the third time. After the third request Mr. Cheema accessed ICBC's licensing database to determine the registered owner of the plate number the Third Party had provided to Mr. Cheema. According to Mr. Bodin, Mr. Cheema did the plate search an hour after Mr. Bodin had knocked on AB's door.
11. At the time of the third request, Mr. Cheema described the situation: "Just the way he was storming around, the look on his face and in that type of situation. It totally caught me off guard. My judgment at that point – who knows what I am thinking?"
12. Mr. Cheema may have left his computer screen running and tended to some other matters

- while he was on the system, but after he found out that the plate belonged to ICBC he aborted his search.
13. Mr. Cheema stopped the search not only because he saw ICBC's address, but also because "I knew what I was doing was wrong and by the end of the day, I was glad I didn't pass any information along".
 14. Mr. Cheema did not share any information with the Third Party, and lied to the Third Party by telling him "I can't do this, it is not working", and the Third Party then stormed out of Mr. Cheema's house.
 15. Mr. Bodin told Mr. Cheema that Mr. Cheema's "life will be made miserable by Mr. Bodin" if Mr. Bodin found out that Mr. Cheema did in fact share information and anyone in Mr. Bodin's family is affected.
 16. Mr. Cheema has no prior disciplinary record.
 17. Mr. Cheema has never accessed information unrelated to an insurance transaction except for the one incident involving the Third Party, despite having been asked to do so on at least 5 to 10 occasions in the past. Mr. Cheema did not advise his nominee of the incident, but fully cooperated with the ICBC investigator, Mr. Bodin, and the Council investigator, Mr. Chee.
 18. Mr. Cheema's superior at the Agency, Mr. Meier, confirmed that there have been no previous complaints from either the public or ICBC about Mr. Cheema's insurance practice and was convinced that Mr. Cheema's unauthorized access was an isolated occurrence.
 19. At Mr. Cheema's request, Mr. Bodin did not contact the Third Party to ascertain whether he could corroborate Mr. Cheema's evidence.
 20. Mr. Cheema knows of the Third Party's and AB's illegal activities through gossip in a small East Indian community in Mission. Mr. Cheema "does not ask these guys what they are doing because he does not want to get caught up in their activities". With respect to the Third Party, AB and the drug trade, Mr. Cheema stated: "I don't want anything to do with those kind of people or that kind of stuff".
 21. As a result of Mr. Cheema's conduct, Mr. Bodin interviewed him on two occasions: July 21 and August 4, 2005.
 22. As a result of what he believed were irregularities in Mr. Cheema's evidence, Mr. Bodin investigated further and noted that Mr. Cheema queried the licence plate the morning Mr. Bodin was in Mission and within one hour after knocking on AB's door. Mr. Bodin also found the Esplanade address that Mr. Cheema claimed he saw is not on the computer system and the ICBC vehicle is registered to 625 Francis Avenue, Victoria, B.C.

23. On November 8, 2005 Mr. Cheema was interviewed by Mr. James Chee. Mr. Cheema advised that the Third Party had approached him as he was leaving his home on the morning of June 14, 2005 and stated that there was “somebody who was stalking him and following him around”. Mr. Cheema also stated that the Third Party was concerned about his safety and he “asked me to somehow figure out who this person may be. He had a licence plate number.”
24. Mr. Cheema advised Mr. Chee that the Third Party “showed up at his door” on two occasions asking him to run the plate, then went away and came back “very quickly after. Five minutes I say”. Further, Mr. Cheema said “I only ran the plate on the 3rd request”, “I seen this address come up onscreen. I hit abort on the computer screen”.
25. Mr. Chee questioned Mr. Cheema as to why ICBC records reflect that he conducted a “two minute search on his computer date base” in contrast to the statement that he aborted the query after reaching a second screen and discovering an ICBC address for the vehicle. In response, Mr. Cheema said that he “hit the abort right there” to stating he “may have left the screen running and tended to some other matters during the two minutes he was on the system”.

ANALYSIS

I will address in turn each of the issues identified in the third part of this decision.

Trustworthiness

The first issue is whether the reasons given by the Council adequately support its determination that Mr. Cheema’s actions demonstrated he was not trustworthy.

Mr. Cheema allows there “was perhaps justifiable suspicion about [his] trustworthiness”, but argues there was insufficient clear and cogent evidence upon which to reasonably infer he lied about anything in particular or to a degree which makes him permanently untrustworthy. The Respondents rely on various statements in the record and the Code of Conduct (Exhibit 4) to support the Council’s ruling on this point. The Commission goes further and relies on other portions of the evidence to demonstrate untrustworthiness (e.g. Mr. Cheema driving to the

interview with Mr. Bodin while his license was revoked).

I find the Commission's submissions cast too wide a net. The Council took action against Mr. Cheema based on the allegation contained in Mr. Chee's report of November 10, 2005 and essentially repeated in its decision of November 16, 2005; specifically, Mr. Cheema improperly used ICBC's computer terminal with the intention of sharing confidential and sensitive personal information with an individual he knew to be involved in criminal activity. Additional allegations such as driving without a license cannot be raised on appeal, especially when there is no indication on the face of the Council's decision that they were relied upon in the first instance.

In terms of the central allegation, Mr. Cheema admits he accessed ICBC's computer terminal on June 14, 2005 via remote access from his home. Some of his submissions suggest the purpose was not proven by clear and cogent evidence; however, paragraph 4 of his "relevant facts" attests he did so "with the intention of determining the name of the registered owner of a motor vehicle based on a plate number provided to him by [the Third Party]". In any event, it would be a logical inference based on all the evidence in the record that Mr. Cheema originally accessed the ICBC computer system with the intention of sharing confidential and sensitive personal information. Further, Mr. Cheema does not contest the Council's implicit finding that he knew the Third Party was involved in criminal activity.

The April 2003 Council Bulletin provides that licensees are "afforded access to ICBC's computer system *for valid ICBC business purposes only*" (emphasis added). Although Mr. Cheema was apparently not aware of the Bulletin, he must be taken to have been aware of its import. This conclusion is consistent with his statements that he refused two requests by the Third Party, and terminated the search after the third request because "I knew what I was doing was wrong".

Trustworthiness is a fundamental element of each requirement in the Council's Code of Conduct (Section 3.1). The standard is articulated in Section 3.2 as follows:

You must be trustworthy, conducting all professional activities with integrity, reliability and honesty. The principle of trustworthiness extends beyond insurance business activities. Your conduct in other areas may reflect on your trustworthiness and call into question your suitability to hold an insurance licence.

The Guidelines in Section 3.3.1 of the Code describe conduct that reflects adversely on trustworthiness, including “improper use of your position or knowledge as a licensee for personal benefit”. Section 3.3.2 provides acts of dishonesty outside a licensee’s professional life may reflect on their trustworthiness to hold an insurance licence. A specific example of untrustworthy conduct identified in Section 3.4.3 is “us[ing] confidential client information provided by an insurer for a purpose other than intended”.

If pressed to adopt the reasonableness standard articulated in other Tribunal decisions, I would find there was sufficient clear and cogent evidence to support the reasonableness of the Council’s decision concerning Mr. Cheema’s trustworthiness. Alternatively, there is a “tenable explanation” in the form of findings and analysis in the decision to support its determination that he was not trustworthy:

AND WHEREAS Council found that in June 2005, at the request of the Third Party, the Licensee accessed ICBC's computer system to obtain sensitive personal and confidential information about the registered owner of a motor vehicle.

AND WHEREAS the Licensee knew or ought to have known that releasing information to the Third Party could endanger the safety and security of the vehicle's owner, driver or others;

AND WHEREAS licensees are afforded access to ICBC's computer system for bona fide ICBC business purposes only and Council considers any misuse of a licensee's position for personal reasons or benefit to be a serious breach of trust;

AND WHEREAS Council has determined the Licensee's actions demonstrated he was not trustworthy ...

Accordingly, and quoting the language founding the decision, I have concluded the Council reasonably determined Mr. Cheema’s actions “demonstrated he *was* not trustworthy” (emphasis

added).

Good Faith

The next issue is whether the reasons given by the Council adequately support its second determination that Mr. Cheema cannot publicly carry on the business of insurance in good faith.

Section 4.2 of the Code of Conduct describes the requirement of good faith in these terms:

You must carry on the business of insurance in good faith. Good faith is honesty and decency of purpose and a sincere intention on your part to act in a manner which is consistent with your client's or principal's best interests, remaining faithful to your duties and obligations as an insurance licensee.

You also owe a duty of good faith to insurers, insureds, fellow licensees, regulatory bodies and the public.

The Guidelines in Section 4.3.1 describe the types of conduct which reflect adversely on a licensee's intention to practice in good faith. They include "unauthorized access, use or disclosure of confidential information" and "making improper use of your position as a salesperson, agent or adjuster".

I accept the Council's submissions on appeal that Mr. Cheema owed a duty of good faith to ICBC and to the public. And regardless of whether Mr. Cheema passed on any information to the Third Party, he breached the good faith requirement in the Code and acted contrary to the Bulletin when he gained "unauthorized access" to the ICBC database. However, I disagree with the Respondents' further submission that the Council's decision provides reasonable support for the determination Mr. Cheema cannot (i.e. can no longer) carry on the business of insurance in good faith. The basis for my conclusion will be explained under the next heading as the issues raise similar considerations.

Continuing Risk

The third issue flows from the Council's determination that Mr. Cheema poses a continuing and imminent risk of serious harm to the public. Mr. Cheema argues the absence of factual findings and the lack of detailed reasons means there is no reasonable basis for this determination (as well as for the determination that he cannot carry on the business of insurance in good faith). The Respondents submit it was reasonable for the Council to reach this determination.

The brevity of the Council's decision becomes particularly problematic when one turns to the parties' arguments concerning the question of continuing risk. For instance, the Commission makes these submissions:

It would appear that the Appellant was motivated to do an unauthorized search by a combination of loyalty to [the Third Party], a friend, and fear of [the Third Party] and his associates, if the Appellant is to be believed.

It is submitted that those motivational factors are still present and if [the Third Party] or any of his criminal associates approach the Appellant with a similar request in the future, it is likely that the Appellant will again find himself in a position where he will feel compelled to engage in conduct which will put the safety of the public at risk. (paras. 47-48)

The Council's submissions echo this concern and implicitly confirm the linkage between the second and third issues:

The fact that Cheema was willing to access the confidential information knowing that he was dealing with a criminal illustrates that he is untrustworthy and has a blatant disregard for public safety and the regulations by which he is licensed. The only reasonable conclusion that can be garnered from Cheema's actions is that Cheema would have provided the address to [the Third Party] if he had not discovered that the vehicle belonged to ICBC. This in and of itself is evidence of a licensee's conduct that is unbecoming and untrustworthy, and illustrates that Cheema is unfit to carry on the business of insurance in good faith. (para. 61)

On the other hand, Mr. Cheema points to evidence in the record which he maintains confirm this

was an isolated incident:

- He admitted being asked 5 - 10 times to do unauthorized searches in the past and refused (para. 2 of p. 11 of his appeal submissions).
- There were no previous incidents of unauthorized access and no public complaints (para. 32 on p. 23 of his appeal submissions).
- He stopped what he was doing not only because of the ICBC address but because he realized what he was doing was wrong (para. 65 of his reply submissions).
- Mr. Meier described Mr. Cheema's conduct as "very out of character" and advised Mr. Cheema "feels terrible about this situation" (para. 66 of his reply submissions).

I note as well Mr. Chee's report of November 9, 2005 quotes Mr. Meier as being convinced Mr. Cheema "has learned his lesson and that this will be a one time error in judgement". Similar evidence is found at page 4 of Mr. Chee's report summarizing statements made by Mr. Meier to the Council. Further, once Mr. Bodin knew who had searched his vehicle license plate, he waited almost a month to interview Mr. Cheema. Three months passed after the second interview before he reported the incident to the Council. There is no indication in the record of any further impropriety by Mr. Cheema during this combined period.

I agree with the Council's position that the right of appeal under Section 242 of the Act does not contemplate the Tribunal "re-trying" cases. Unlike the process before the former Commercial Appeals Commission, appeals are heard on the record and do not proceed by way of a hearing *de novo*. Further, as explained in *Ryan*, the reasonableness standard directs the reviewing body to look at the reasons given by the decision-maker and not engage *de novo* in its own reasoning on the matter. The difficulty here is that the parties' submissions implicitly invite -- and effectively require -- the Tribunal to make an independent assessment of the evidence and come to its own

conclusions based on all information in the record, as well as various case authorities which were not even before the Council.

This is not a criticism of the parties; they have been forced to make their submissions in this manner because the Council's decision is essentially an order confirming its three determinations and its conclusion on penalty. I have already noted the Council's obligation in Section 238(2) of the Act to provide "written reasons". This obligation is consistent with the common law requirement for administrative tribunals to provide a written explanation for a decision where there is a statutory right of appeal or the decision has important significance for the individual (e.g. a professional license may be cancelled). Likewise, the reasonableness standard relied upon by Mr. Cheema means a decision must be supported by a tenable explanation, even if the explanation is not one that the reviewing body finds compelling: *Ryan, supra*, at para. 55.

The determination that Mr. Cheema poses a continuing and imminent risk of serious harm to the public is largely (if not exclusively) a conclusion to be distilled from the evidence. The primary rationale for giving deference on appeal to findings of fact by a professional body is that it saw and heard the witnesses, and was in a superior position to weigh their testimony and make any necessary judgments about credibility. The usual rationale does not apply in this appeal because the Council proceeded without an oral hearing and the same record (augmented by the Council's decision) is before the Tribunal.

A general theme in Mr. Cheema's appeal is that the Council's limited findings make it "difficult" to know how it interpreted the evidence. When it comes to the specific issue of whether Mr. Cheema poses a continuing risk to the public, I find it impossible to discern how the Council interpreted the evidence -- particularly in light of the parties' competing submissions on appeal. There is no explanation in the decision, let alone a "line of analysis" which leads reasonably from the evidence to the Council's determination. The same statement applies to the Council's determination that Mr. Cheema cannot publicly carry on the business of insurance in good faith.

The reasons given by the Council cannot withstand “a somewhat probing examination”. Short of drawing inferences about what findings the Council made or simply accepting its determinations on their face, the only means of testing the reasonableness of the decision would be to embark upon a detailed examination of the record. That would necessarily entail addressing the parties’ submissions where they differ over the factual findings to be distilled from the evidence, and resolving their arguments over credibility where they assert controversies in the evidence. Put simply, it is not the Tribunal’s role to examine the record in this form of a “re-hearing” (see also *Branislav Novko, supra*, at p. 4). The consequence is that the Council’s second and third determinations cannot be upheld regardless of how one defines the standard of reasonableness.

Penalty

The remaining issue is whether there is a line of analysis within the Council’s decision which could reasonably lead it from the evidence to the conclusion that Mr. Cheema’s license should be cancelled.

The immediate hurdle to upholding the reasonableness of the Council’s decision on penalty is my conclusion that the two determinations by the Council which most logically support cancellation cannot be supported by its reasons. The Council’s ruling on penalty also suffers from the same frailty as those impugned determinations; namely, a lack of adequate reasons. But there are further and related grounds for not upholding this aspect of the decision.

I accept the deference which should be given to decisions by professional bodies where the appeal concerns a disciplinary penalty. The original decision involves an exercise of discretion, and the professional body will typically be in a better position to assess evidentiary factors relevant to the imposition of discipline. Thus, the Tribunal should be reluctant to interfere where the professional body has turned its mind to the relevant factors, unless a particular penalty falls outside an acceptable range and no extenuating circumstances are apparent.

The usual emphasis when imposing professional discipline is protection of the public interest. However, the parties' submissions aptly recognize discipline may be based on other criteria such as general and specific deterrence, denunciation and punishment, and maintaining public confidence in the integrity of the profession. The Council and Mr. Cheema additionally cite and address the list of mitigating factors which may be considered and are found at page 14-6 of *The Regulation of Professions in Canada*, James T. Casey (Thomson Carswell: Toronto).

The Council's decision records only that it "considers it to be in the public interest" to cancel Mr. Cheema's license. This and the remaining paragraphs of the decision seem to be a rote recitation of "boilerplate" language. There is no indication of whether the Council considered other factors and, if so, why the public interest prevailed over Mr. Cheema's interest is not losing his professional career. As a consequence, the parties are driven once again to making detailed submissions based on the evidence in the record, as well as comparing the present situation to circumstances and sanctions imposed in other cases.

For example, the parties hold quite disparate views regarding the seriousness of the incident. Mr. Cheema argues for this interpretation of the record:

Mr. Cheema made a mistake in accessing ICBC's database for purposes unrelated to an insurance transaction. However, far from being a threat to the public, Mr. Cheema's lie to a known criminal to stop harassment and his refusal to disclose any confidential information despite pressure to do so, indicate that Mr. Cheema would protect the public when called upon.

Mr. Cheema cooperated fully with investigators and does not want anything to do with [the Third Party] or his criminal friends. A single, momentary and unprecedented lapse in judgment does not reasonably support the inference that Mr. Cheema cannot carry-on the business of insurance in good faith or is trustworthy.

Mr. Cheema has no prior disciplinary record. His transgression was minor and is deserving of a reprimand. ... (paras. 3-5 on p. 11 of his appeal submissions)

Once again, Mr. Cheema submits cases involving temporary lapses in judgment similar to what

happened here indicate that penalties ranging from a reprimand to a 14-day suspension would be appropriate. In seeking to support the penalty of cancellation, the Council responds as follows:

In the present case, Cheema admits that he knowingly accessed the ICBC computer terminal for an improper purpose. However, he attempts to minimize the severity of his misconduct by characterizing it as a minor transgression. In response, the Respondent submits that such a characteristic is inaccurate and illustrates that Cheema does not acknowledge or appreciate the severity of his misconduct.

There can be no question that prior to and at the time of logging onto the ICBC Autoplan screen Cheema knew that he was using the site for an improper and potentially life threatening purpose, in breach of a provincial statute (FOIPPA), and contrary to Council's Code of Conduct.

Cheema knew, or should have known, that using his position as an insurance agent for an improper purpose contravened Council's Code of Conduct and the explicit ICBC and Autoplan log-in directives. Further, Mr. Cheema knew or should have known that ... disciplinary action for such a breach could include the suspension or cancellation of an individual's insurance license.

* * *

The implication of Cheema's impugned conduct cannot be overstated and extends far beyond the "simple act" of logging onto the ICBC website. ...

The significance of Cheema's actions illustrate a complete and total disregard for public safety and speaks to the very essence of Cheema's suitability. His complete disregard for the regulations and rules by which he is licensed, and the potential safety of innocent members of the public, flies in the face of the position of trust that was afforded to him as a licensee. (paras. 43-48 of Council's submissions)

The parties also take divergent views about whether the evidence shows Mr. Cheema has been remorseful. He submits the penalty of cancellation was "excessive in the circumstances for a first time offender who has shown remorse and co-operated with investigators" (para. 33 at p. 24 of his appeal submissions). The Council maintains Mr. Cheema sought to avoid responsibility and has not been remorseful:

Further, upon discovering the Mr. Bodin's vehicle was registered to ICBC, Mr.

Cheema did not take any steps to contact ICBC, his employer, the police, or Council regarding [the Third Party]'s request. While he claims that once he logged onto the site he knew what he was doing was wrong, he did not take any steps to contact ICBC or any other party to advise what had transpired. This is significant because it goes to the issue of Mr. Cheema's remorse and character. If Mr. Bodin had not conducted his own search of the ICBC vehicle Mr. Cheema's misconduct would not have been discovered. This is an additional factor that weighs upon the reasonableness Mr. Cheema's penalty. (para 65 of Council's submissions)

I will not belabour matters by other quotations from the parties' submissions. Suffice it to say there are significant differences between them concerning what the evidence establishes about the nature and timing of the Third Party's request; the period of time Mr. Cheema accessed the ICBC website; the nature of Mr. Cheema's relationship to the Third Party; whether the relationship presents a continuing threat to the public interest; and other considerations relevant to determining penalty. Further, the parties rely on a number of authorities and their submissions present competing arguments over how the outcomes in those cases apply to Mr. Cheema's situation.

The point is that these and other vital differences in the appeal submissions over whether Mr. Cheema's license should be cancelled cannot be resolved unless the Tribunal makes an independent assessment of the evidence, considers the factors relevant to professional discipline, and compares its findings to the facts disclosed in prior authorities. At the risk of undue repetition, that form of *de novo* reasoning is not the Tribunal's role on appeal and the brevity of the Council's decision undermines the reasonableness of its conclusion on penalty.

REMEDY

Section 242.2 (11) of the Act allows a Tribunal member hearing an appeal to confirm, reverse or vary a decision under appeal, or to send the matter back for reconsideration, with or without directions. The Council submits that to overturn its decision and reinstate Mr. Cheema would throw the profession into dispute and call into doubt the Council's ability to regulate itself, as well as send inappropriate messages to the industry and the general public. It accordingly seeks a

declaration upholding the finding Mr. Cheema was in breach of the Act and canceling his license. The Commission argues the appeal should be dismissed, and asserts in its supplemental submission that the Tribunal does not have jurisdiction to order the Council to hold a hearing. As already recorded, Mr. Cheema urges the Tribunal to substitute a lesser penalty. Rather than undermining public confidence, he suggests substituting a reasonable penalty “in place of the Council’s harsh and patently unreasonable revocation of [his] license” would restore public confidence in the administrative review process. Further, Mr. Cheema argues the length of time which has elapsed since the Council’s decision, and the lack of any reasons and analysis, mitigate strongly in favour of a conclusive ruling and against sending any matter back to the Council for reconsideration.

To confirm the conclusions set out above, I have held in relation to the issues raised by this appeal that: (a) the Council reasonably determined Mr. Cheema’s actions demonstrated he *was* not trustworthy when he accessed ICBC’s computer system; (b) while Mr. Cheema did not act in good faith for the same reason, the Council’s decision does not reasonably support the determination he cannot carry on the business of insurance in good faith; and (c) the Council’s decision does not reasonably support the determination he poses a continuing and imminent risk of serious harm to the public. The latter conclusions, combined with the brevity of the Council’s decision, undermine the reasonableness of its Order canceling Mr. Cheema’s license. The question which logically arises is whether the Tribunal should proceed to determine the appropriate penalty, or should send the matter back to the Council for reconsideration.

The answer to this question has likely been foreshadowed by my comments that the parties’ submissions on appeal effectively require the Tribunal to make an independent assessment of the evidence in the record. The Supreme Court of Canada in *Dr. Q, supra*, faulted the lower court judge for undertaking such an exercise when reviewing the decision of the professional disciplinary body. Madame Justice McLachlin wrote: “... the reviewing judge’s task is not to substitute his or her views of the evidence for those of the tribunal, but to review the decision with the appropriate degree of curial deference”; further, the “first erroneous assumption was that

because the standard was that of clear and cogent evidence, the reviewing judge was required to revisit the Committee's findings of credibility and fact" (paras. 17-18). Unless this Tribunal ignores the Supreme Court of Canada's admonition -- or is prepared to uphold a decision which lacks a reasonable explanation for two key determinations and the outcome -- it must remit the matter for reconsideration.

None of the parties have suggested that the members of the Council will not be able to reconsider Mr. Cheema's circumstances with an open mind. Moreover, I am persuaded remitting his case is consistent with the legislative scheme. The Council notes it is comprised of nine members who work in the insurance industry and two laypersons representing consumers. It submits this composition and expertise puts it in the best position to assess and establish standards for the insurance profession, assess the gravity and consequences of misconduct, and determine appropriate penal sanctions in situations of misconduct. I accept those submissions insofar as they concern making decisions in the first instance. But the Legislature has also entrusted the Tribunal with the responsibility of ensuring the Council's decisions (and those of other professional bodies) comply with fundamental principles of administrative justice found in the common law and the Act. Complying with those principles will compliment the Council's stated objective of maintaining public confidence in the profession, as well as the confidence of the professionals it regulates. In particular, the obligation to provide reasons has been expressly recognized by the courts as reinforcing public confidence and ensuring the fairness of decisions.

I have accordingly concluded Mr. Cheema's case should be remitted to the Council with directions. Sending the matter back for reconsideration under Section 242.2(11) of the Act allows the Council to reach the same or a different decision. This raises a question as to Mr. Cheema's status in the meantime. In *Malik, supra*, the removal order was set aside because the Superintendent had breached the rules of procedural fairness. Mr. Cheema did not appeal on that ground. Further, my conclusions in this decision support some form of discipline being imposed. On the other hand, I am acutely aware Mr. Cheema has already served a *de facto* suspension of seven months. In all the circumstances, I am remitting the matter for reconsideration along with

directions that within thirty (30) days of this decision the Council:

1. make a new order and reasons for it which include findings of fact and an explanation for the penalty the Council believes is appropriate; or
2. rescind the cancellation of Mr. Cheema's license pending its new order and reasons consistent with paragraph 1 above.

In selecting a thirty (30) day period, I am mindful the Council originally cancelled Mr. Cheema's license within twelve (12) days of being notified of ICBC's concerns.

I have deliberately refrained from directing the Council to hold an oral hearing. Without considering whether the Commission is correct in submitting the Tribunal lacks this power, such a direction would not be appropriate when Mr. Cheema elected to not pursue that avenue of appeal. However, the absence of a direction to hold a hearing may not preclude the Council proceeding under Section 237 of the Act if that now appears advisable given the evidentiary differences highlighted by the parties' appeal submissions. And the parties could conceivably agree on a "paper hearing" based on those submissions in order to expedite the process and avoid additional expense.

I anticipate none of the parties may be enamoured with my disposition of this appeal. I am additionally conscious of the resulting delay in providing a final resolution for Mr. Cheema. But as I have endeavoured to explain throughout this decision, the predicament faced by the Tribunal and the outcome are due largely to the lack of reasons in the Council's decision, the parties' extensive reliance on evidence in the record to support their respective positions, and the fact that appeals no longer proceed by way of a hearing *de novo* under the Act.

Finally, I note Section 238(2) set out two avenues of appeal. While the Tribunal may not be able to insist on appellants "exhausting internal avenues of appeal", they may wish to evaluate

the wisdom of appealing directly to the Tribunal where the grounds will inevitably raise credibility and other evidentiary disputes which are inherently incompatible with the Tribunal's statutory jurisdiction.

CONCLUSION

Mr. Cheema's appeal is allowed in part, and the matter is remitted for reconsideration under Section 242.2(11) of the Act with directions that within thirty (30) days the Council:

1. make a new order and reasons for it which include findings of fact and an explanation for the penalty the Council believes is appropriate; or
2. rescind the cancellation of Mr. Cheema's license pending its new order and reasons consistent with paragraph 1 above.

No order for costs is made under Section 47(1) of the *Administrative Tribunals Act* as the parties have had divided success on appeal.

DATED at Vancouver, British Columbia, this 15th day of June 2006.

FOR THE FINANCIAL SERVICES TRIBUNAL


JOHN B. HALL
PRESIDING MEMBER

