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November 7, 2017 Appeal File: 2017-FIA-005

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Re: Appeal to the Financial Services Tribunal ("FST") – Financial Institution Commission (FICOM) v. Insurance Council of British Columbia (Council) and Jacqueline Nicole Babcock

DECISION ON APPLICATION FOR A STAY

[1] By letter from her counsel of October 12, 2017, Ms. Babcock sought a stay of the Order below of the Insurance Council of British Columbia ("Council") that she pay a $5,000 fine by October 19, 2017, failing which her general insurance licence would be suspended. Her submission was simply that, as the appeal concerns the reasonableness of the penalty, the Order should be stayed pending an appeal decision.

[2] Council advised that it did not oppose this request, but FICOM delivered a submission in opposition to it in the form of an October 16, 2017 letter to this tribunal. Ms. Babcock was then afforded a very short time (given the need for a decision prior to the payment date of October 19, 2017) to deliver a reply submission, but did not do so.

[3] In a letter sent to the parties in the afternoon of October 18, 2017, I advised that the application was dismissed, with reasons to follow at a later time. These are those reasons.

[4] I had two difficulties with the application.

[5] First, there is case law governing or at least providing guidance on such applications, and which enunciates the test to be applied in respect of them, but the applicant's very brief submission, made close to the deadline for payment as ordered by Council, did not

address the legal principles to be applied on such an application. It may be that the applicant did not expect opposition to the application, but in any case I am compelled to say that the submission she made lacked the substance that was needed.

[6] Second, the more detailed submissions made by FICOM, and which review the three components of the test for a stay of a tribunal's order as set out in RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 334, being the existence of a serious issue, proof of irreparable harm if the motion is refused, and the balance of convenience between the parties, tends to demonstrate that a stay would not be appropriate on the facts of this application. I particularly have in mind that there is no evidence (or even a statement) here to the effect that Ms. Babcock would suffer harm if required to pay the $5,000 fine by October 19, 2017 (something she agreed to do in the consensual process below), and certainly nothing on the lines of proof of irreparable harm. Depending on the outcome of the appeal, it is possible that the fine would be set aside (that is, replaced with another form of sanction), in which case Council will be obligated to repay the $5,000 to Ms. Babcock, but the impact of any such issues upon her is unstated in her application material. For that reason, it is also difficult to find that the balance of convenience would weigh in Ms. Babcock's favour.

[7] I should add that I do not find it necessary to conclude that the elements of the RJR-MacDonald test must be applied to a stay motion before the FST, being a point on which there has been no argument in this case. I discussed that leading authority on a motion to lift a statutory stay, in a legislative context distinct from the current appeal, in Lin v. Real Estate Council of British Columbia and Superintendent of Real Estate, 2016 – RSA – 002(c), and where I indicated that a broader, interests of justice approach should govern the issue of that day (at para. 30). Despite the factual differences between that case and this, I would extend the following observations from that decision equally to the application before me now:

> "23. An application for a stay is a request that a decision of an authoritative legal body be temporarily constrained. Decisions of courts and tribunals take effect from pronouncement and are to be treated as correct unless and until an appellate body holds otherwise. To stay an authoritative order, otherwise in effect and to be accepted as correct and binding, is a serious matter. It is, accordingly, unsurprising that a stay applicant's need to show irreparable harm has come to be accepted. This requirement also makes sense in the context of its origin in the principles around injunction applications, and from which the entire RJR-MacDonald test derived: common law courts have traditionally favoured interim maintenance of the status quo over the granting of injunctive relief and fixed on the idea that if damages would be an adequate remedy at trial there was no need for prior intercession in the form of an injunction; assuming success at trial, damages would make the claimant whole regardless of what had gone before and all would be as it should. If, however, irreparable harm could be established, damages would clearly fall short and, depending on other considerations, the court might then be persuaded to step in early and alter the state of affairs in some particular way. As the case law evolved, this sort of paradigm was extended in some situations to non-monetary public interest claims, such as in RJR-MacDonald."

[8] On the slender facts of this application, and for the above reasons, I am not persuaded to exercise this tribunal's discretion to enter a stay of the Order below.

"Patrick F. Lewis"

Patrick Lewis
Vice-Chair
Financial Services Tribunal