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VIA COURIER

Our File: 13660

Financial Services Tribunal
#1200 - 13450 102nd Avenue
Surrey, BC V3T 5X3

Attention: Graham Kennedy

Dear Mr. Kennedy:

Re: Appeal Decision – FST-06-028 – William Craig Blackwood

I have received a copy of the Ministry of Attorney General's letter dated February 7, 2007 requesting clarification with respect to certain portions of the FST Appeal Decision dated January 30, 2007.

The first request relates to my statement at page 10 of the Appeal Decision which refers to Council choosing to use the "intended decision" procedure in a case where the licensee or another interested person appeals the eventual decision to the FST. My reading of sections 237, 238 and 239 of the *Financial Institutions Act* (the "**Act**") shows a distinction between the procedures that are available to Council. Under section 237, Council may provide notice to a licensee of its "intended action" (see subsection 237(2)) before taking any of the actions listed in subsection 237(2). A person directly affected by the intended action may then require a hearing before Council which hearing must be held within a reasonable time after delivery of the notice by the person directly affected requiring the same. If no request for a hearing is provided or if a hearing is requested and is held, Council may proceed with the exercise of its powers incurred under the Act. It can be seen, therefore, that pursuant to section 237 of the Act, by Council providing its notice of intended action, either a hearing will be held or the requirement for a hearing will be deemed to have been waived and the intended action may proceed. If the hearing is held, thorough consideration of all matters material to the issues involved in the intended action would be expected to take place. If no hearing is requested and Council takes the intended action, an appeal to the FST by any of the parties who initially received the notice of intended action may reasonably be expected to be met with a critical eye by the FST. However, any appeal process would proceed in the ordinary course.

Section 238 of the Act provides for a summary or abbreviated procedure with respect to certain matters of importance or urgency before Council, or where Council believes that the length of time that would be required for a hearing would be detrimental to the due administration of the Act. In that case, Council may give notice of an "intended order" to the persons directly affected by it but Council need not provide an opportunity to any said person to be heard. In this latter event, Council must deliver a copy of its order and written reasons for it as well as written notice of the persons' rights to either require a hearing or to appeal the order pursuant to subsection 238(2).

Finally, section 239 of the Act provides that hearings will be open to the public unless undue prejudice to a party or a witness is determined by Council.

The reason for my brief review of these three sections of the Act is to indicate that although Council does not have a right to require a hearing in either of the "intended action" or "intended decision" situations found in sections 237 and 238 of the Act respectively, the "intended decision" procedure set out in section 238, in my view, opens the door for an appeal to the FST without Council having the benefit of a hearing in order to thoroughly review the matter (see subsection 238(2)(b)). Rather, if Council proceeds under section 237, which is the "intended action" procedure, affected parties have an immediate opportunity to request a hearing and if they do not do so, Council will take its intended action and the affected parties will be hard pressed to argue that they are aggrieved by the action thereafter. It therefore appears to me that there is a choice available to Council as to how it proceeds in many of the matters that are presented to it. I do, however, acknowledge that both of sections 237 and 238 of the Act refer to possible orders under certain sections of the Act only and there may be instances where one or the other of the procedures is mandated.

In this case, Council refers to an "intended order". A review of the decision shows that it is actually an "intended action" procedure.

It is important to keep in mind that pursuant to section 232 of the Act, Council has the ability to conduct as thorough an investigation as it chooses prior to determining which procedure it will use if it feels that the action or an order is appropriate. Its powers on investigation are set out in section 232.1 which includes the receipt of evidence from witnesses, the production of records, and so on. Thus, Council has the ability to benefit from considerable resources before deciding whether to use the intended action or intended decision procedure. My point in this Appeal was that pursuing the intended decision route has a greater probability of leading to an appeal to the FST without the benefit of a hearing having taken place than by proceeding with the intended action route. The normal procedures undertaken by Council may indicate that from a practical perspective the intended decision route is preferred or that the intended action route is too restrictive or otherwise not looked upon favorably by Council in certain situations including that dealt with in this Appeal. If that is the case, then by my stating "...this, however, is a consequence of Council choosing to use the 'intended decision' procedure..." must be clarified so as to state that this would be a consequence of Council choosing to use the intended decision procedure in those cases where it has a choice between it and the intended action procedure. Although I did not comment on the matter in the Appeal decision, a review of Council's order

under Appeal does indicate that Council intended its decision to be provided under section 237 (the intended action procedure) although it referred to it as an intended decision. I refer to the comments of the FST, Member John Hall presiding, in the appeal decision *Jagjit Singh Cheema and Insurance Council of British Columbia and Financial Institutions Commission*, FST 05 – 019, at page 4, 5, 10, 30 and 31 where Mr. Hall faced a situation where Council made a penalty determination under section 238 of the Act in the absence of factual findings that arguably could reasonable support the same. Mr. Hall comments about the deficiencies inherent in that procedure. I am of the same view in this Appeal.

When I referred to Council thoroughly considering the principles which it has an obligation to review in relation to the Code of Conduct and also to consider the applicability of previous decisions or penalties imposed, and that Council would be expected to require a hearing, submissions or other forms of relevant evidence or research that would enable Council to properly fulfill duties, I was referring to the investigative powers Council has available to it. Here again, however, by using the intended action procedure, where Council is able to proceed in that fashion, the likelihood of an appeal to the FST without the benefit of the thorough research and consideration of the matters described would be lessened.

Finally, with respect to the directions regarding the time frame in which Council's reconsideration of this matter is to take place, it seems to me that the Act establishes the principle that hearings, at least, must be held within a reasonable time (see, for example, subsection 37(4)). I am satisfied to allow Council to work within that principle, but an application to the FST for further direction in the event that any affected person feels that a delay is unreasonable or potentially prejudicial to a person affected by this matter is available.

Yours truly,

CLEVELAND DOAN LLP
Per:
DALE R. DOAN

DRD/ts