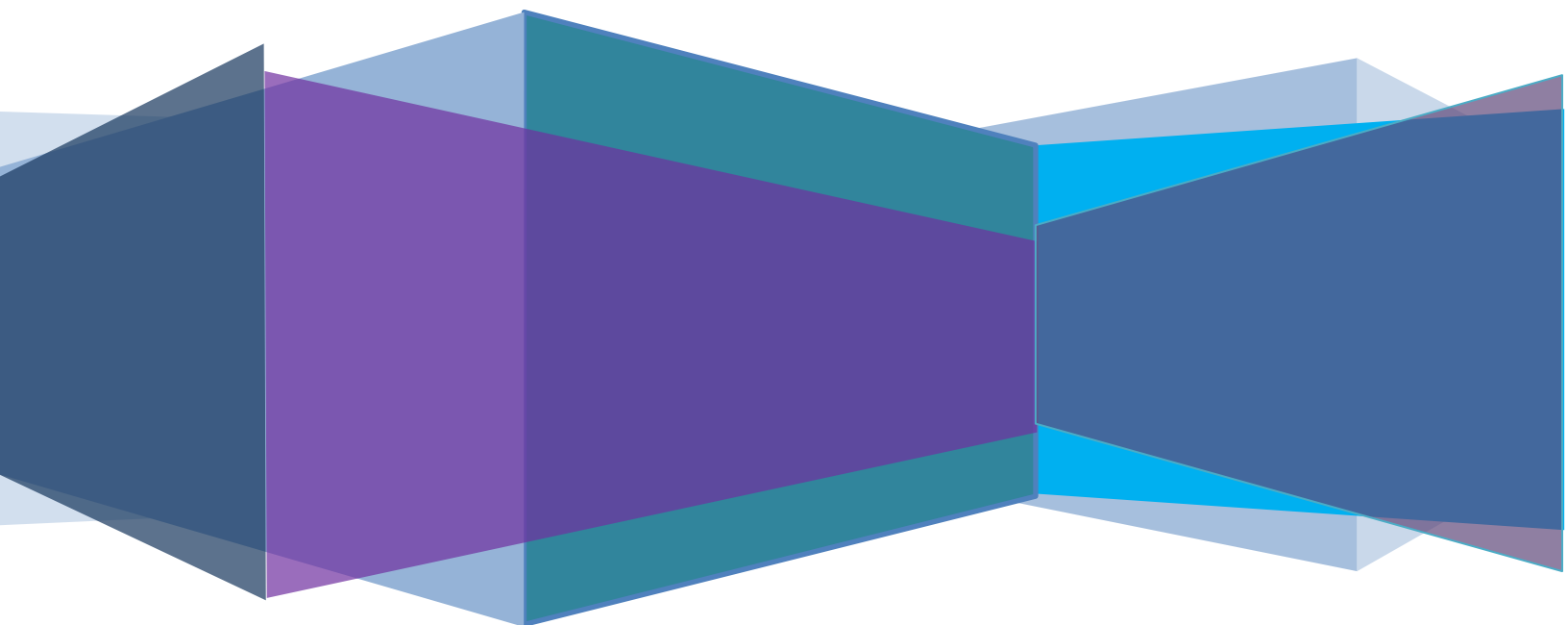




# Financial Services Tribunal

## *2020-2021 Annual Report*

Covering the reporting period from  
April 01, 2020 – March 31, 2021





July 9, 2021

The Honourable David Eby, Attorney General  
Ministry of Attorney General  
Parliament Buildings  
Victoria, British Columbia  
V8V 1X4  
[AG.Minister@gov.bc.ca](mailto:AG.Minister@gov.bc.ca)

Dear Minister Eby:

**Re: Financial Services Tribunal 2019-2020 Annual Report**

I respectfully submit the Annual Report of the Financial Services Tribunal for the period April 1, 2020 to March 31, 2021.

Sincerely,

George Hungerford, Chair  
Financial Services Tribunal

Enclosure

## *Message from the Chair*

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I am pleased to submit the Annual Report of the Financial Services Tribunal (“FST”) for the fiscal year beginning April 1, 2020 and ending March 31, 2021. This report is submitted pursuant to section 242.1(5)(d) of the *Financial Institutions Act* and section 59.2 of the *Administrative Tribunals Act*.

### ***Operations during Reporting Period***

Section 59.2(a) of the *Administrative Tribunals Act* requires the Tribunal to provide a review of its operations during the preceding reporting period.

***New Appeals*** - During this reporting period, a total of five new appeals were filed with the Tribunal. Three new appeals were filed under the *Real Estate Services Act*, and two new appeals were filed under the *Financial Institutions Act*. Further details regarding these appeals are provided later in this report pursuant to section 59.2(c) of the *Administrative Tribunals Act*.

No new appeals were filed under the *Credit Union Incorporation Act*, the *Pension Benefits Standards Act*, the *Mortgage Brokers Act* or the *Real Estate Development Marketing Act* during this reporting period.

***Appeals Carried Over*** – seven appeals were carried over from the previous reporting period. During this reporting period the FST closed five of the seven carried-over appeals.

***Matters Outstanding*** - Of the 12 total appeals which were before the FST in the current reporting period, eight appeals were closed. Four appeals remained outstanding at the close of the reporting period.

***Hearings*** - Five of the eight appeals which were closed during the reporting period proceeded to a full hearing on their merits during the reporting period. These hearings were conducted in writing, before a single panel member.

### ***Judicial Reviews and Court Appeals during Reporting Period***

During this reporting period no new applications for judicial review of FST decisions were filed with the BC Supreme Court. Similarly, no new appeals or applications for leave were filed with the BC Court of Appeal or the Supreme Court of Canada.

There were five applications for Judicial Review of FST decisions which were outstanding before the BC Supreme Court at the commencement of this reporting period (Supreme Court file No.: S179917; S-193245; S-1913100; S221047, and S1611725), and four of the five remain outstanding as of the close of this reporting period. The fifth application for Judicial Review which was

outstanding at the close of the last reporting period (File No. S1611725) was dismissed in January of 2021.

### ***Forecast of workload for the next reporting year and trends noted***

Section 59.2(f) of the *Administrative Tribunals Act* requires the Tribunal to provide a forecast of the workload for the following reporting period. The FST's workload for the current reporting period was consistent with the trend over the past several years of a generally increasing number of appeals. The average number of appeals filed over the past three reporting periods remains higher than in previous reporting periods (2018-2019 – 5 new appeals; 2019/2020 – 9 new appeals; 2020/2021 – 5 new appeals) but does not seem to be increasing as much as in previous years. The 2021/2022 reporting period is expected to continue to reflect this trend of increased appeals.

Section 59.2(g) of the *Administrative Tribunals Act* requires the Tribunal to report any trends or special problems it foresees. As reported in the last fiscal period, due to the increased volume and complexity of appeals filed with the FST, the Tribunal commenced recruitment of new members. Although the membership of the Tribunal has never been greater than four members, the Tribunal worked with the appointing authority to recruit for an additional three members. The Tribunal undertook outreach to different financial and legal sectors and sought out equity seeking groups in its recruitment efforts. I am pleased to report that in June 2020, the Tribunal welcomed three new members to the Board, one of whom was appointed the Tribunal's Vice Chair. The Tribunal allocated resources over this reporting period to orient and onboard its new members, and now, with a compliment of seven highly qualified appointees, is in a position to handle the increasing case numbers and appeal complexities.

### ***Plans for improving the Tribunal's operations***

Section 59.2(h) of the *Administrative Tribunals Act* requires the Tribunal to report its plans for improving operations in the future. During this reporting period, the appeals office cluster responsible for providing administrative support to the Tribunal continued its in-depth review of service delivery which has resulted in several organizational realignments within the cluster. Registry staff have been increased, providing greater case management capacity for all the tribunals within the cluster, including the FST. Notably, in June 2020, the Tribunal Cluster welcomed a new Vice Chair of Service Delivery<sup>1</sup>, who has been providing administrative support and guidance with respect to cluster wide service-delivery initiatives.

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<sup>1</sup> The Vice Chair Service Delivery is cross-appointed, by OIC, to the Environmental Appeal Board, Forest Appeals Commission, and Oil and Gas Appeal Tribunal, and is not a member of the FST. However, this position assists with oversight of registry functioning for the Tribunal Cluster overall.

Service delivery will continue to be reviewed over the next reporting period, and further technological and organizational change is expected to occur. The FST will continue to capitalize on technological improvements over the next reporting period.

### ***Reconciliation Initiatives***

As part of the Tribunal's commitment to Reconciliation with Indigenous people and in response to the Calls to Action of the Truth and Reconciliation Commission of Canada, the Tribunal has supported staff and appointed members to undertake training on issues such as the incorporation of Indigenous Legal Systems into administrative justice contexts, the history and legacy of residential schools, and intercultural competency and bias in adjudication.

Additionally, as a Tribunal Chair of Indigenous heritage, I have worked closely with the Tribunal Transformation and Supports Office on Indigenous-specific initiatives including Reconciliation in administrative justice.

### ***COVID-19 and Pandemic Response***

During the reporting period, the COVID-19 pandemic and resultant state of emergency in British Columbia continued and intensified.

In response to the pandemic, the FST operated with the guidance of the Provincial Health Officer, and within the framework of its business continuity plan (BCP). The Tribunal's BCP focusses on ensuring ongoing service delivery to the users of the Tribunal, while maintaining health and safety of Tribunal staff and members.

Over the course of this reporting period the physical Tribunal office limited public access on several occasions, however, the Tribunal continued to conduct business and appeals were processed electronically and/or via mail.

As reported in the last fiscal period, as a result of restrictions on in-person meetings and the province-wide mandate for appropriate social distancing, the Tribunal quickly shifted its operations from primarily paper-based to primarily electronic. The public was advised of the modification of Tribunal Rules to promote electronic filings, and were encouraged to flag pressing and/or sensitive matters to tribunal staff so that the FST could prioritize such matters in case of service disruption.

Thanks to the dedication and flexibility of staff in the tribunal cluster, and to the adaptability of tribunal Members to a new way of working and interacting, the tribunal did not suffer any service disruptions or adverse health consequences related to the pandemic during this reporting period. I would, again, like to take this opportunity to extend my sincere thanks to all the individuals in the cluster who have worked hard to keep the tribunal open and accessible to the public it serves. This

pandemic has continued for longer than most of us expected, and you work as government employees and appointees has been consistent, professional, adaptive, and exceptional.

At the time of publication of this report the pandemic remains ongoing, and the FST continues to adapt to ever changing circumstances. As such, the Tribunal will report on additional pandemic-related measures and outcomes in the next reporting period.



George Hungerford

Chair, Financial Services Tribunal

## *Mandate*

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The Financial Services Tribunal (FST) hears appeals from institutions and individuals who want to contest enforcement decisions made by the:

- Insurance Council of British Columbia;
- Real Estate Council of British Columbia;
- Superintendent of Real Estate;
- Superintendent of Pensions;
- Registrar of Mortgage Brokers; and,
- Superintendent of Financial Institutions.

The FST has jurisdiction to hear appeals under the following British Columbia statutes:

- *Financial Institutions Act*;
- *Credit Union Incorporation Act*;
- *Mortgage Brokers Act*;
- *Pension Benefits Standards Act*;
- *Real Estate Services Act*; and,
- *Real Estate Development Marketing Act*.

## *Contact Information*

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<b><i>MAILING ADDRESS:</i></b>	Financial Services Tribunal PO Box 9425 Stn Prov Govt Victoria BC V8W 9V1
<b><i>LOCATION:</i></b>	4 <sup>th</sup> Floor, 747 Fort Street Victoria BC V8W 3E9
<b><i>TELEPHONE:</i></b>	250 387-3464
<b><i>FAX:</i></b>	250 356-9923
<b><i>EMAIL:</i></b>	<a href="mailto:FinancialServicesTribunal@gov.bc.ca">FinancialServicesTribunal@gov.bc.ca</a>
<b><i>WEBSITE:</i></b>	<a href="http://www.fst.gov.bc.ca/">http://www.fst.gov.bc.ca/</a>

## *Tribunal Membership*

During this reporting period, the FST membership consisted of the following individuals:

<i>TRIBUNAL MEMBER</i>	<i>ROLE</i>	<i>TERM EXPIRY/RESIGNATION</i>
George N.F. Hungerford	Chair	June 17, 2022
(James) Keith Bracken	Vice Chair	June 30, 2022
Michelle Good	Member	June 11, 2021
Jane A.G. Purdie, Q.C.	Member	May 29, 2021
Michael Tourigny	Member	December 17, 2021
Catherine McCreary	Member	June 30, 2022
James Carwana	Member	June 30, 2022

### ***BIOGRAPHIES FOR THE TRIBUNAL MEMBERSHIP DURING THE REPORTING PERIOD ARE AS FOLLOWS:***

#### ***GEORGE N. F. HUNGERFORD, CHAIR***

George Hungerford is an Indigenous finance and economic development executive and lawyer. He was formerly senior counsel with the British Columbia Securities Commission and has extensive experience in the regulation of securities, in particular investment products. Formerly, he has a background in investment banking and consulting. Outside of work, he is an active board member on a number of Indigenous business and policy organizations. He holds an MBA from Stanford University and a law degree from UBC. He holds the CFA and CAIA designations and is called to the bars of British Columbia and the Northwest Territories. He is a member of the Gwich'in First Nation of the Northwest Territories and Yukon.

#### ***(JAMES) KEITH BRACKEN, VICE CHAIR***

Keith Bracken was a member of the RCMP in Saskatchewan for eight and one-half years before leaving to attend University. He received a B.A. and LL.B from the University of Saskatchewan, graduating in 1976. He practiced law in Victoria until he was appointed as a judge of the Provincial Court of British Columbia (Victoria) in 1991. He was appointed to the British Columbia Supreme Court in 2007 and retired from the Court in 2018. He has been a sessional lecturer in law at the University of Victoria and Thompson Rivers Law Schools. He is the co-author of British Columbia Courtroom Procedure, Lexis Nexis, 2013, 2018 (2d Ed.).

#### ***MICHAEL TOURIGNY, MEMBER***

Mike Tourigny obtained his Bachelor of Law degree from UBC in 1978, was called to the bar of British Columbia in 1979 and retired from the private practice of law in 2015. Mike has extensive trial court, appeal court, administrative tribunal and alternate dispute resolution counsel experience. During his more than 30 years of private practice as a commercial litigation partner in



the Vancouver office of a large Canadian law firm, Mike acted on numerous occasions for commercial real estate, business and lending clients and in the process acquired a substantive knowledge of the financial services industry in the province. From December 31, 2015 – December 31, 2017 Mike was an appointed member of the British Columbia Environmental Appeal Board, Forest Appeals Commission and Oil & Gas Appeal Tribunal, and in those capacities adjudicated appeals from decisions of statutory decision makers in the province. Since September 2015 Mike has been an appointed member of the Board of Governors and Chair of the Finance and Audit Committee of Vancouver Community College.

***JANE A.G. PURDIE, Q.C., MEMBER***

Jane graduated from the University of Manitoba Law School after completing a B.A. (Economics/English) at the University of Saskatchewan. She practised in Manitoba and then moved to British Columbia where she has practised since 1980 in the White Rock area. Jane was appointed Queen’s Counsel in 1992. Her practice has given her broad experience in the solicitor’s area, though she has appeared in all 3 levels of the B.C. courts. She was the Chair of the Joint B.C. Real Estate Association/Canadian Bar Association provincial real estate contract standardization committee, and was a member of the B.C. Real Estate Association Forms committee for 10 years. Jane has been an elected member of the Canadian Bar Association Provincial Bar Council, Chair of the CBA National Elder Law Section and a board member of the General Practice Forum. Jane has taught courses and seminars in various topics including: mortgages and foreclosures, advanced real estate issues, ethics, wills, estates, elder law and family issues. She has been a presenter for the Continuing Legal Education Society, the People’s Law School, the Law Society of B.C., the Canadian Bar Association, and various community and corporate organizations. Jane has also served on the board of St. Jude’s nursing home in Vancouver and Seniors Come Share, a society providing day centre and outreach services to seniors.

***MICHELLE GOOD, MEMBER***

Michelle is of Cree ancestry and a descendent of the Battle River Cree and a member of the Red Pheasant Cree Nation. She has worked with indigenous organizations since she was a teenager and at 40 decided to approach that work in a different way obtaining her law degree from UBC at 43. She has practiced law in the public and private sector since then. In 2011 she took her life-long passion for writing and entered the UBC Master of Fine Arts (Creative Writing) program at UBC, graduating in 2014. Her poetry, and short stories have appeared in W49, The Puritan and Gatherings. Her poem, Defying Gravity was selected for inclusion in Best Canadian Poetry I English in 2016 and then again for inclusion in Best of the Best Canadian Poetry, A Tenth Anniversary Edition. Most recently her essay, A Tradition of Violence was selected for inclusion in a peer reviewed anthology out of the University of Alberta Press entitled Keetsahnak, Our Sisters: Walking with Murdered Indigenous Women, Girls and Two-Spirit Peoples. Her soon to be released novel Five Little Indians won the 2018 HarperCollins/UBC Best New Fiction Prize. She currently sits on a number of administrative boards and tribunals.

***CATHERINE MCCREARY, MEMBER***

Catherine McCreary attended law school and practiced law in Calgary until she moved to Vancouver in 1997. She worked as in-house counsel for a union and then served as a Vice-Chair at

the BC Labour Relations Board. She worked independently for several years and then was appointed as a Member of the BC Human Rights Tribunal. Ms. McCreary has been active in the credit union industry, serving on the board of VanCity and Central 1 credit unions.

***JAMES CARWANA, MEMBER***

Mr. Carwana holds his Bachelor of Arts and Bachelor of Laws degrees from the University of Toronto. In 1985, he was called to the Bar of British Columbia and practised labour, employment, and administrative law in Vancouver. He has worked with a broad group of clients in both the private and public sectors and has provided advice in many areas including workplace reorganizations, collective bargaining, and legislative changes. Mr. Carwana has appeared before Committees of the House of Commons and Senate in Ottawa and acted as legal counsel in matters before all levels of court and various administrative bodies. His work has earned him a peer review legal rating of “Distinguished for High Professional Achievement with High Ethical Standing”. From 2012 to 2018 Mr. Carwana served as Vice Chair at the BC Labour Relations Board, where he adjudicated and mediated many disputes. He has been involved in the writing of approximately 200 published Labour Board decisions and is the author of over 40 published articles on Risk Management topics. Active in his community, Mr. Carwana has previously volunteered at the Salvation Army Pro Bono Legal Clinic; been a Director and Past President of the Crescent Beach Swimming Club in Surrey; and is currently a Director of the Beach House Theatre Society in Surrey.

## *Operations*

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Effective April 1, 2010, the administrative support functions of the FST were moved from the Financial Institutions Commission (FICOM) in Vancouver and consolidated with the Environmental Appeal Board/Forest Appeals Commission Appeals Office (Appeals Office) in Victoria.

In addition to the FST, the Appeals Office provides administrative support to five other adjudicative tribunals. This clustering of the administrative support for eight independent appellate tribunals has been done to assist government in achieving economic and program delivery efficiencies by allowing greater access to resources while, at the same time, reducing administration and operating costs. The additional tribunals include the:

- Community Care and Assisted Living Appeal Board;
- Health Professions Review Board;
- Hospital Appeal Board;
- Industry Training Appeal Board; and,
- Oil and Gas Appeal Tribunal.

This move has resulted in significant savings to government for the operation of the FST through a shared services cluster approach which takes advantage of synergy and assists government in

achieving economic and program delivery efficiencies. This arrangement has been in operation for 9 years now and has proven to be a very effective and efficient means for providing administrative support to the FST, which in turn enables the FST to effectively and efficiently fulfill its appellate mandate to the public.

Effective April 1, 2017, host Ministry responsibilities for administration of the Financial Services Tribunal (including budget oversight and member appointments, as well as facilities and records supports, etc.) were transferred to the Ministry of Attorney General as part of the Tribunal Transformation Initiative.

## *Appeal Activity and Decisions Issued*

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### **APPEALS FILED**

There were five new appeals filed during this reporting period. Seven appeals remained open from the previous reporting period. The new appeals filed are described below.

***FST-FIA-20-A002 – FILED BY AMARPAL SINGH ATWAL ON MAY 20, 2020*** – Appeal of an Order of the Insurance Council of BC prohibiting the Appellant from applying for licensure for a period of 24 months, imposing conditions on future licensure, and requiring that a fine and hearing costs be paid on or before June 29, 2020. During this reporting period, the appeal was granted and the 24 month prohibition from practice was reduced to 12 months.

***FST-FIA-20-A0001– FILED BY XIAOMEI (MAY) ZOU ON APRIL 14, 2020*** – Appeal of a reconsideration decision and resultant order of the Insurance Council of BC finding the Appellant liable to pay hearing costs in the amount of \$5875.71. During this reporting period the appeal was dismissed.

***FST-RSA-20-A005 - FILED BY JACOB G. SIEMENS ON JULY 02, 2020*** - Appeal of a decision of the Real Estate Council finding the Appellant committed professional misconduct and ordering that the Appellant pay a discipline penalty in the amount of \$5000, that he register in remedial courses, and that he pay enforcement expenses in the amount of \$26,000. The appeal was before an adjudicator at the close of this reporting period.

***FST-RSA-20-A003 - FILED SHAHIN BEHROYAN ON APRIL 22, 2020*** - Appeal of a reconsideration decision of the Real Estate Council of BC cancelling the Appellant’s Licence for a period of five years and imposing enforcement costs of \$50,000. The appeal was before an adjudicator at the close of this reporting period.

***FST-RSA-20-A004 FILED BY JAE RYANG KIM ON MAY 27, 2020*** - Appeal of both liability and penalty decisions of the Real Estate Council of BC finding that the Appellant committed professional misconduct and conduct unbecoming and ordering his Licence be suspended for three months, that he pay a discipline penalty of \$5000 and enforcement costs of \$36,073.29, and imposing other conditions. During this reporting period the appeal was withdrawn and dismissed.

## **TRIBUNAL DECISIONS – SUMMARY**

During the current reporting period, the following numbers and categories of decisions were issued by the FST:

- **Five** decisions were issued on the merits of appeals
- **Two** costs decisions were issued
- **One** decision on jurisdiction was issued
- **Nine** other significant preliminary decisions were issued

### ***Preliminary and Post-Hearing Decisions***

The eleven preliminary and post-hearing decisions issued during the reporting period generally dealt with the following issues:

- whether new evidence should be admitted;
- whether to allow an extension of time to file an appeal;
- whether a matter was a new appeal or a continuation of a previously filed appeal;
- whether to allow an extension of time to file submissions in contested circumstances;
- whether to grant a stay of an underlying decision pending appeal;
- whether to lift a stay which was in effect by operation of the statute;
- whether to exercise discretion to allow withdrawal of an appeal; and
- whether to award costs, and in what amount.

### ***Final decisions on the merits***

The following is a summary of the five final decisions on the merits issued during the reporting period:

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#### ***FST-FIA-20-A002 (α)***

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Decision Date:	March 03, 2021
Appellant:	Amarpal Singh Atwal
Respondent(s):	Insurance Council of British Columbia
Third Party:	British Columbia Financial Services Authority
Act:	<i>Financial Institutions Act</i> RSBC 1996, c 141 (“FIA”)
Issue(s):	Whether the penalty and enforcement expenses assessed against the Appellant were reasonable.
Summary:	The Appellant failed to notify the Insurance Council of British Columbia (the “Council”) about two bankruptcies which he had experienced over the course of his licensure. He also filed three applications with the Council in

which he falsely stated that he had never been subject to a bankruptcy proceeding. As a result, the Council issued an intended decision which proposed to impose a penalty on the Appellant. The Appellant exercised his right to a hearing to dispute the intended decision but did not end up attending the hearing. In his absence, the hearing committee found that the Appellant's breaches of the Council's Rules and Code amounted to serious misconduct and raised concerns about his financial responsibility and reliability. As a result, the Council ordered that the Appellant be unable to apply for licensure for two years, that he pay a fine of \$7500 as well as enforcement expenses. The Council also ordered that as a term of reinstatement, the Appellant would have to take an ethics course and would be subject to a two-year period of supervision upon future licensure. The Appellant appealed the order and acknowledged that his financial responsibility and reliability had been put into question based on his actions. Despite this, he submitted that that order was unreasonably harsh and that the FST should impose a shorter prohibition period based on other Council decisions which were similar to his case. He also argued he shouldn't have to pay enforcement expenses as he was not aware that hearing costs could be assessed against him. On the question of penalty, the FST held that the fine was not overly harsh and was reasonable in the circumstances. However, the FST held the prohibition from licensure was an overly harsh penalty that could not stand. In particular, the FST held that a prohibition from practising is a more serious fine, and must be supported by sufficient and thorough reasons. The FST found that although the Council found the Appellant's situation was comparable to another Council case, the Council did not explain why, or why it deviated from the penalty that was imposed in the other case. This amounted to a decision-making process which was not reasonable, and an outcome which could not flow from the Council's analysis. On the issue of costs, the FST dismissed the Appellant's argument, finding that he clearly had notice that costs could be assessed against him and that the costs award was supported by reasons and was reasonable.

Disposition: ***The appeal was allowed in part and the FST reduced the prohibition from practice from 24 months to 12 months.***

Appeal Decision: <http://www.fst.gov.bc.ca/decisions.htm>

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***FST-FIA-20-A001(b)***

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Decision Date: December 24, 2020

Appellant: Xiaomei (May) Zou

Respondent(s): Insurance Council of British Columbia (the "Council")

Third Party: British Columbia Financial Services Authority

Act: *Financial Institutions Act* RSBC 1996, c 141 ("FIA")

Issue(s):	Whether the Council’s Reconsideration Decision was reasonable insofar as it was supported by transparent and adequate reasons which were responsive to the issues raised by the FST in its reconsideration instructions?
Summary:	The Appellant appealed a decision of the Council which levied fines, applied conditions to her licences and levied hearing costs against her. A decision was rendered in December 2019 by the Financial Services Tribunal upholding the decision of the Council with the exception of the matter of whether the order for the Appellant to pay hearing costs in the amount of \$5,875.71 was reasonable (FST Decision No. 2019-FIA-001(a)). The FST found that the order was not reasonable as the Council failed to articulate adequate reasons for its decision to levy hearing costs against the Appellant. As a remedy, the FST ordered the Council to reconsider the aspect of its decision relating to the imposition of hearing costs. The FST provided specific instructions for the scope of that reconsideration and on February 11, 2020 the Council reconsidered their decision and decided to uphold the original order regarding hearing costs and issued an order to that effect with supporting reasons. The Appellant appealed this second order to the FST and argued that it was still unreasonable as Council provided inadequate reasons which were not in accordance with the FST’s reconsideration instructions. The FST reviewed the second order and noted that in the reasons the Council placed significant emphasis on the fact that the Appellant knew her obligations with respect to CE and failed to meet those obligations. The Council also referenced its role as a self-funded regulatory body and pointed out the additional considerations that go along with that role. The FST found that the Council’s reasons, while not lengthy, clearly set out the chain of reasoning the Council followed in coming to its ultimate decision to levy hearing costs. The FST ultimately held that the Reconsideration Decision was transparent and intelligible, and the Council considered relevant factors and the specific issues remitted back to it for reconsideration by the FST.
Disposition:	<b><i>The appeal was dismissed.</i></b>
Appeal Decision:	<a href="http://www.fst.gov.bc.ca/decisions.htm">http://www.fst.gov.bc.ca/decisions.htm</a>

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### ***2019-FIA-003(a)***

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Decision Date:	May, 22, 2020
Appellant:	TruNorth Warranty Plans of North America, LLC
Respondent(s):	Superintendent of Financial Institutions
Act:	<i>Financial Institutions Act</i> RSBC 1996, c 141 (“FIA”)
Issue(s):	Following issuance by the Supreme Court of Canada of the <i>Vavilov</i> decision, what was the proper standard of review the FST should apply? Was the decision of the Superintendent correct and reasonable, and in particular,

did the Superintendent err in finding that the Warranty Agreements are “insurance”, as defined under the IA and FIA?

Summary:

The Appellant, an American company, appealed to the FST from an order of the Superintendent of Financial Institutions issuing a “cease and desist” order arising from a finding that the Appellant breached section 75(1)(a) of the FIA prohibiting the carrying on of insurance business in BC without proper authorization. A “cease and desist” order under the FIA is a unique remedy. Because it is issued without first providing the subject of the order with an opportunity to be heard, the legislation gives the subject of the order the choice after the order is issued – the choice to have a hearing before the Superintendent, or to appeal directly to the FST. The Appellant elected appeal directly to the FST. It was common ground on the appeal that the Appellant was in the business of offering “used commercial truck limited warranties” in the US, that it has authorized dealers in the US and that its warranties were offered in B.C., though it denied they were authorized dealers. The Appellant argued that the Superintendent’s order was tainted by errors of fact, law, and discretion.

As a result of the release of the decision of the Supreme Court of Canada in *Vavilov*, the appeal also raised the issue of what the appropriate standard of review ought to be. The FST reviewed the relevant law and held that for questions of law, correctness was the appropriate internal standard of review for the FST to apply. For questions of mixed fact and law the FST held that reasonableness was the appropriate internal standard of review, and emphasised that the nature of the question and context of the case would colour how reasonableness would be applied. Similarly, the FST held reasonableness would apply to questions of fact, discretion and remedy, with the FST according deference to the original decision-maker. On the specific issue of the review of remedy/penalty decisions the FST, again, emphasised that *“assessing reasonableness on penalty appeals to the FST should...be described as reasonableness taking its colour from the context, and as reflecting the FST’s right to “flex” a common law concept to enable more robust review... as being the approach that best suits the administrative context”*.

On the key issue of whether the Superintendent erred the “warranty agreements” in question were “warranty vehicle insurance”, the FST found that the Superintendent correctly interpreted the term “insurance” and reasonably applied that legal interpretation to the warranty agreements in question. On the factual questions, the FST found that the Superintendent reasonably found that the Appellant was in fact actively marketing its products in BC. On the issue of remedy the FST held that “The terms of the remedy ordered by the Superintendent were based on the findings that the Appellant was pursuing a course of conduct that was not in compliance with the FIA and which might reasonably be expected to harm the interests of the BC public, including Customers of the Appellant.” The FST held that the Superintendent’s concerns about protection of the public were reasonably held on the facts of the case.

Disposition: ***The appeal was dismissed.***  
 Appeal Decision: <http://www.fst.gov.bc.ca/decisions.htm>

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***2018-FIA-001(b)***

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Decision Date: February 03, 2021

Appellant: Varinder Grewal

Respondent(s): Insurance Council of British Columbia (the “Council”)

Third Party: Financial Institutions Commission

Act: *Financial Institutions Act* RSBC 1996, c 141 (“FIA”)

Issue(s): Did the Council breach the rules of procedural fairness during the course of or after the hearing? Were the hearing costs assessed against the Appellant reasonable?

Summary: The Appellant was alleged to have cheated and colluded on her examinations for licensure with the Council. The Appellant denied cheating and a hearing was held. The Appellant did not attend the hearing and her counsel advised that it wanted to keep costs to a minimum. The hearing committee held the hearing in the Appellant’s absence and found the Appellant had cheated and colluded. In so finding, the hearing committee relied on a statutory declaration made by a third party who declared that the Appellant had given her the answers to the test questions. After the hearing had concluded but before the decision was rendered, a Council investigator was contacted by the witness who had made the statutory declaration. In an email exchange between the witness and the Council investigator the witness provided information which was not present in her statutory declaration. These emails were not disclosed to the Appellant or to the hearing committee.

As a remedy for the finding of cheating and collusion, the Council cancelled the Appellant’s licence, fined her \$7500 and assessed approximately \$10,500 in hearing and investigation costs against her.

The Appellant argued she shouldn’t have to pay the hearing costs as she was not informed costs could be assessed against her. The FST dismissed this ground of appeal holding that the appeal record evidenced that her counsel clearly had notice of the possibility of costs. The Appellant also argued that she was denied procedural fairness by not having the email exchange between the witness and the Council Investigator disclosed. The FST agreed with the Appellant on this point and found that the failure of the Council investigator to disclose the email exchange to the hearing committee “prevented the Hearing Committee from considering all available relevant evidence for the purpose of rendering a decision and/or engaging in further exploration of [the witness’] evidence. It also prevented the Appellant from knowing that evidence which was presented against her



was purportedly being recanted, and thus deprived her of the opportunity to respond fully to the case against her.” The FST held that whether or not the emails were exculpatory (which issue it did not rule on), the Council should have brought the emails to the attention of the Appellant and should have put them before the hearing committee. Because it did not, the FST found that it had breached the Appellant’s right to procedural fairness. On the issue of whether the hearing costs were reasonable, the FST held that convening a hearing was necessary and that the hearing costs levied against the Appellant were reasonable.

Disposition: ***The appeal was allowed in part, and the matter was returned to the Council for reconsideration with directions.***

Appeal Decision: <http://www.fst.gov.bc.ca/decisions.htm>

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### ***2019-RSA-001(a)***

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Decision Date: June 09, 2020

Appellant: Trevor Inglis

Respondent(s): Real Estate Council of British Columbia (the “Council”)

Third Party: Superintendent of Real Estate

Act: *Real Estate Services Act, SBC 2004, c 42 (“RESA”)*

Issue(s): Did the Committee make legal and factual errors in coming to the conclusion that the Appellant was guilty of professional misconduct? Did the Committee consider irrelevant factors when determining the appropriate penalty? Did the Committee impose unreasonable enforcement expenses?

Summary: The Appellant appealed a discipline decision which found that he (a) engaged in deceptive dealing by fabricating or altering an offer on a property he had listed for sale, (b) made a false statement to the Council, and (c) committed conduct unbecoming a licensee by threatening retaliation against his co-listing agent for making a complaint to the Council (Liability Decision). Following the Liability Decision, the discipline committee imposed a penalty that suspended his licence for 9 months, prohibited him from acting as an “unlicensed assistant” during the suspension period, fined him \$7500, required him to take an educational course and imposed \$39,022.87 in enforcement costs (Enforcement Decision). The Appellant challenged the Liability Decision on the grounds that it mis-stated the standard of proof, misapprehended the evidence, reversed the onus of proof, made inconsistent findings of fact, and erred by finding that the offer was deceptive dealing. The Appellant challenged the Penalty Decision on the grounds that the committee had no legal authority to prevent him from acting as an unlicensed assistant, that it took

irrelevant factors into account in fixing the penalty, and in imposing unreasonable enforcement expenses.

The FST rejected the argument that the discipline committee misstated the standard of proof when it stated that the Council's onus is "to prove the allegation ... on a balance of probabilities based on evidence that is clear, convincing and cogent". The FST held that this was entirely in line with the Supreme Court of Canada's decision in *F.H. v. McDougall*, 2008 SCC 53, which held that there is only one standard of proof in civil proceedings, and that it was not an error to later refer to the standard simply as the "balance of probabilities". Similarly, the FST rejected the Appellant's argument that the Committee misapprehended the evidence by improperly relying on the evidence of a handwriting expert. The FST held that it was "open to the Appellant to specifically question [the expert] on cross-examination as to whether his opinion would have been different had he known that the Appellant's handwriting did appear on the...Offer. This question was never put to [the expert]".

The FST also rejected the Appellant's arguments regarding an alleged inconsistency flowing from the evidence, and regarding an allegation that the Appellant was improperly required to corroborate the Council's evidence.

With respect to the penalty appeal, the Appellant argued that the Council had no jurisdiction to prohibit work that is not "real estate services". The Council argued that the appellant is "estopped" from making that argument as he agreed to the term during the penalty hearing. While the FST found it "unusual and problematic" that the Appellant would advance this argument on appeal given the position he took at the underlying hearing, the FST addressed the issue on the merits. Noting that the Council's remedial power allows it to prohibit a licensee from carrying out "any specified activity related to their real estate business", the FST held that "While the term "real estate services" is defined by the RESA, "real estate business" is not. ... this is because a real estate business is not limited to the scope of that which is defined as real estate services....". The FST held that the purpose of prohibiting the Appellant from acting as an unlicensed assistant was to ensure he would not undermine the suspension by engaging in real estate services while working as an unlicensed assistant. The FST held the Council's inclusion of this prohibition in the penalty was reasonable in all the circumstances.

The FST similarly rejected the Appellant's argument that the penalty decision placed too much emphasis on the matters of public perception and public confidence. The FST noted that these purposes are set out in the Council's Sanctions Guidelines, and further held that these purposes were not used as a "standalone" basis for the penalty imposed. Rather, the Council specifically structured its analysis taking into account all relevant factors, including the nature, gravity and consequences of the conduct.

On the matter of enforcement expenses, the FST held that beyond arguing that enforcement expenses were discretionary, the Appellant did not offer

any basis for arguing that the particular expenses imposed was unreasonable. As such, the FST dismissed this ground of appeal as well.

Disposition: ***The appeal was dismissed.***

Appeal Decision: <http://www.fst.gov.bc.ca/decisions.htm>

## *Matters Outstanding at end of Period*

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There were four matters outstanding at the end of this reporting period. Decisions on the merits of these outstanding matters will be summarized in the next reporting period.

## *Performance Indicators and Timelines*

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Section 59.2(b) and (d) of the *Administrative Tribunals Act* requires the Tribunal to report on performance indicators, and provide details of the time from filing to decision of matters disposed of by the Tribunal in the reporting period.

The FST appeal process has been designed to be fast, efficient and cost effective. Appeals are “on the record” and are primarily conducted in writing. Conducting a hearing in writing generally saves time and expense for both the parties and the Tribunal. A single member of the Tribunal hears and decides each appeal, again keeping the cost to government for the tribunal at a minimum. The Tribunal has established timelines for the parties to file their written submissions on appeal in order to keep the process moving.

For those appeals closed within this reporting period, the overall average time from the date of filing an appeal to its disposition was 323 (last reporting period was 289 days). The shortest time from open to close was 55 days and the longest was 846 days. Five out of eight of the appeals closed in this reporting period proceeded to full hearing.

The Tribunal’s *Practice Directives and Guidelines*, which are available on the Tribunal’s website, provide that the Tribunal will endeavour to issue a copy of the final decision or order, including written reasons, to each party within 120 days from receiving the last submissions of the parties. In 40 percent (2 of 5) of the appeals involving a hearing on the merits that were completed within the reporting period, the decisions were released within those timelines. In the three appeals

where the practice directive was not met, the respective decisions were released and average of 328 days after the close of submissions<sup>2</sup>.

In this reporting period, the Tribunal has increased the number of days from the filing of an appeal to its final disposition by 34 days on average. Conversely, it has improved in its ability to issue final decisions within its practice directive timelines after the close of submissions (from 17 to 40 percent of files achieved in this fiscal).

The Tribunal has reviewed its workload and individual appeal files and has determined that a high number of appeals paired with a relatively new group of adjudicators contributed to the Tribunal's increase to the time between filing and final disposition. Due to Member availability, several files had to be transferred between members which increased the time to final disposition.

Additionally, as identified in the previous reporting cycle, over the past several reporting periods the Tribunal has noted that appeals which are coming before the FST have been of increasing complexity, and many have been subject to numerous complex pre-hearing applications. Because appeals are written and "on the record" oftentimes these pre-hearing matters are determined as part of the final decision on the merits (rather than as stand-alone matters prior to final determination), thus expanding the scope of the final decision and adjudication process.

The FST continues to hear an increasing number of appeals from self-represented individuals who may have financial sector expertise, but who are unfamiliar with the legalistic process of appellate adjudication. The FST has attempted to design its process to be as accessible as possible to all users, regardless of representation, however the Tribunal continues to face unique challenges with respect to hearing appeals involving self-represented parties.

Moving forward into the coming reporting cycles, the FST will continue to review its procedures and operations to ensure accessibility to all users, and will also be reviewing its practice directives to ensure that the Tribunal has set realistic expectations for users of the Tribunal considering the increasing volume and complexity of FST appeals.

Finally, section 59.2(e) of the *Administrative Tribunals Act* requires the Tribunal to report the results of any surveys carried out by the Tribunals during the reporting period. The Tribunal did not conduct any surveys during this reporting period.

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<sup>2</sup> Actual number of days for each of the three appeals was as follows: 132, 265, 588.

## *Judicial Review of FST Decisions*

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During this reporting period no new applications for judicial review of FST decisions were filed with the BC Supreme Court. Similarly, no new appeals or applications for leave were filed with the BC Court of Appeal or the Supreme Court of Canada.

There were five applications for Judicial Review of FST decisions which were outstanding before the BC Supreme Court at the commencement of this reporting period (Supreme Court file No.: S179917; S-193245; S-1913100; S221047, and S1611725), and four of the five remain outstanding as of the close of this reporting period.

The fifth application for Judicial Review which was outstanding at the close of the last reporting period (File No. S1611725) was withdrawn and dismissed by consent in January of 2021.

## Statement of Financial Performance

(For the fiscal year ending March 31, 2021)

In fiscal year 2020/2021, the FST received \$4,250 from appellants respecting appeal filing fees, and incurred expenses of \$157,034 as detailed below. We have provided a six year chart for comparative purposes. In addition to the appeals filed during this reporting period, the FST also provided professional development to members and retained legal counsel to manage several judicial review applications.

<b>Operating Result</b>	<b>2015/2016</b>	<b>2016/2017</b>	<b>2017/2018</b>	<b>2018/2019</b>	<b>2019/2020</b>	<b>2020/2021</b>
	\$	\$	\$	\$	\$	\$
<b>Appellant Fees</b>	5,950	4,250	11,050	4,250	6,800	<b>4,250</b>
<b>Funding</b>	45,383	86,013	80,459	122,391	150,406	<b>152,784</b>
<b>Direct Expenses</b>	(51,333)	(90,263)	(91,509)	(126,641)	(157,206)	<b>(157,034)</b>
<b>Net</b>	0	0	0	0	0	<b>0</b>
<b>Direct Expenses</b>	<b>2015/2016</b>	<b>2016/2017</b>	<b>2017/2018</b>	<b>2018/2019</b>	<b>2019/2020</b>	<b>2020/2021</b>
	\$	\$	\$	\$	\$	\$
<b>Salaries and Benefits</b>	0	0	0	0	0	<b>0</b>
<b>Professional Services</b>	24,177	42,931	41,511	56,379	36,650	<b>25,621</b>
<b>Board Fees &amp; Expenses</b>	26,920	46,588	48,635	69,821	120,556	<b>131,413</b>
<b>Other</b>	236	744	1363	441	0	<b>0</b>
<b>Total Direct Expenses</b>	<b>51,333</b>	<b>90,263</b>	<b>91,509</b>	<b>126,641</b>	<b>157,206</b>	<b>157,034</b>
<b>Total FST Expenses</b>	<b>\$51,333</b>	<b>\$90,263</b>	<b>\$91,509</b>	<b>\$126,641</b>	<b>\$157,206</b>	<b>\$157,034</b>

<b># of active Appeals</b>	<b>8</b>	<b>10</b>	<b>17</b>	<b>16</b>	<b>15</b>	<b>12</b>
<b># of active Court Proceedings</b>	<b>3</b>	<b>3</b>	<b>4</b>	<b>5</b>	<b>5</b>	<b>5</b>

