Financial Services Tribunal

Citation: *Xiaohua (Ava) Tian and Viking Financial Solutions Ltd. v Insurance Council of British Columbia*, 2025 BCFST 5

Decision No.: FST-FIA-24-A001(a)

Decision Date: 2025-05-20

Method of Hearing: Conducted by way of written submissions concluding on January 23, 2025. Additional written submissions concluding on May 12, 2025.

Decision Type: Final Decision

Panel: Dr. Cristie Ford, Panel Chair

Appealed Under: Section 242 of the *Financial Institutions Act*, RSBC 1996, c 141

Between:

Xiaohua (Ava) Tian and Viking Financial Solutions Ltd.

Appellants

And:

Insurance Council of British Columbia

Respondent

And:

Superintendent of Financial Institutions

Third Party

Appearing on Behalf of the Parties:

For the Appellants: Xiaohua (Ava) Tian

For the Respondent: Allan L. Doolittle and Oren Adamson

For the Third Party: Kyle Ferguson

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FINAL DECISION

INTRODUCTION

[1] This matter comes to the Financial Services Tribunal (the "Tribunal" or the "FST") in an unusual way, directly from a January 30, 2024 order (the "Order") of the Insurance Council of British Columbia ("ICBC", "Council", or "Respondent"), without there first having been a hearing before it.

BACKGROUND

[2] For purposes of this appeal, it is sufficient to describe the facts in broad strokes.

[3] Xiaohua (Ava) Tian (the "Individual Appellant") and Viking Financial Solutions Inc. (the "Corporate Appellant" and, together with the Individual Appellant, the "Appellants") bring this appeal. The Individual Appellant was licensed with ICBC as a life and accident and sickness insurance agent. The Corporate Appellant, for which the Individual Appellant is the nominee, held a corporate license with ICBC.

[4] This matter arises from a dispute in March 2020 concerning the Appellants' sale of two life insurance policies, accompanied by a loan agreement package, to a set of clients (the "Clients"). Following those transactions, the relationship between the Clients and the Individual Appellant broke down, as did all parties' relationships with an individual who had introduced the Clients and the Individual Appellant, and whom the Corporate Appellant briefly hired as a consultant. In July 2020, the Clients decided that they did not want to proceed with the two insurance policies or the loan agreement package that the Appellants had arranged for. The Appellants responded with some correspondence to the Clients.

[5] On July 22, 2020, the Clients made a complaint about the Appellants, to the insurer that had underwritten those policies. Following an investigation and a report dated early 2021, that insurer effectively reversed the insurance policy purchases, reimbursing the Clients for their premiums and clawing back the Appellants' commission. The Appellants in turn managed to recoup the funds they had loaned to the Clients in a related transaction. In other words, all parties were returned to the positions they would have been in, had the transactions not taken place at all.

[6] However, on September 15, 2020, the Clients had also filed a complaint with ICBC concerning the Appellants (the "ICBC Complaint"), and it is the result of that complaint that is before me here. The unique circumstances leading to this appeal require me to relate the procedural history from the time the ICBC Complaint was filed.

[7] At some point after October 15, 2020, when ICBC advised the Individual Appellant that the ICBC Complaint had been filed, ICBC initiated an investigation (the "Investigation") pursuant to section 232 of the *Financial Institutions Act*, RSBC 1996, c 141 (the "*Act*"). The

next substantive interaction between ICBC and the Appellants appears to have been an on-the-record interview of the Individual Appellant, in the course of that Investigation, on December 8, 2022.

[8] ICBC subsequently delivered its investigation report (the "Investigation Report") to ICBC's Life Insurance Review Committee. The Investigation Report is dated October 24, 2023, and the Individual Appellant's interview on the record with that Life Insurance Review Committee is also dated October 24, 2023. The Life Insurance Review Committee is a screening body. It in turn prepared its own report (the "Committee Report"). The Committee Report is undated other than by reference to the interview date of October 24, 2023, though the index to the record in this appeal, filed by the Respondent, dates its delivery to ICBC Council as having been on January 8, 2024.

[9] ICBC Council's voting members are empowered to make decisions regarding discipline. They considered the Committee Report and the Investigator's Report, and made an intended decision, at a meeting on January 30, 2024. The essence of that intended decision was communicated to the Appellants' counsel on February 2, 2024, with written reasons dated March 4, 2024 (the "Intended Decision"). I note that the Intended Decision was reached more than forty months after the Clients filed the ICBC Complaint, and approximately three years after all the insurance policy transactions in question had been reversed.

[10] The Intended Decision held that the Appellants' conduct had amounted to breaches of ICBC's *Code of Conduct*[1] including section 4 ("Good Faith"), section 5 ("Competence"), section 7 ("Usual Practice: Dealing with Clients"), and section 13 ("Compliance with Governing Legislation and Council Rules"), and of the professional standards set by that *Code*. The Intended Decision discussed a set of "precedent" cases as guidance for determining penalties, noting that they were not strictly binding on Council. It considered mitigating and aggravating factors, and concluded that the aggravating factors outweighed the mitigating ones.

[11] Pursuant to sections 231, 236, and 241.1 of the *Act*, the Intended Decision set out the following intended penalties, costs, and licensing conditions: the Individual Appellant would be fined $10,000 and required to complete four courses related to ICBC rules, compliance, and the importance of documentation. She would also be subject to supervision for two years by a licensed insurance agent approved by ICBC, and would be prohibited from acting as a nominee for any insurance agency until that period of supervision had been completed. The Corporate Appellant would be fined $5,000. Jointly and severally, the Appellants were to pay ICBC investigation costs of $1312.50. All costs and penalties were to be paid, and all courses completed, within 90 days of the Intended Order. If the Appellants failed to complete the requirements within that time period, their

[1] Insurance Council of British Columbia, "Council Rules and Code of Conduct" (n.d.) https://www.insurancecouncilofbc.com/licensee-resources/council-rules-and-code-of-conduct (accessed 13 May 2025).

licenses would be suspended automatically, with no opportunity to apply for license renewal until the conditions had been complied with.

[12] The Intended Decision also stated the following (emphasis in original):

> If the Licensee and/or Agency wishes to dispute Council's findings or its intended decision, the Licensee and/or Agency may have legal representation and present a case in a hearing before Council. Pursuant to section 237(3) of the Act, to require Council to hold a hearing, the Licensee and/or Agency **must give notice to Council by delivering to its office written notice of this intention within fourteen (14) days of receiving this intended decision**. A hearing will then be scheduled for a date within a reasonable period of time from receipt of the notice. Please direct written notice to the attention of the Executive Director. **If the Licensee and/or Agency does not request a hearing within 14 days of receiving this intended decision, the intended decision of Council will take effect.**

[13] The Appellants did not request the hearing to which they were entitled under section 237(3) of the *Act* to "dispute Council's findings or its intended decision" (a "Hearing"). As a result, the Intended Decision was converted to an Order, which the Appellants now seek to appeal to the Financial Services Tribunal (the "Tribunal"). Determining whether the Appellants can bring this appeal without having sought a Hearing below requires me to review the exchanges between ICBC and the Appellants after the Intended Decision was rendered.

[14] Appellants' counsel received notice of the essence of the Intended Decision in February, 2024, and correspondence with ICBC about the timeframe for what the Individual Appellant often referred to as an "appeal" from the Intended Decision began then. Further correspondence followed the March 4, 2024 written reasons. On March 15, 2024, the Individual Appellant requested an extension of time for what she called the "hearing decision making period," beyond the statutorily provided for 14 days, and this was agreed to. The Appellants were given until March 29, 2024 to make that decision. On that date, the Individual Appellant advised ICBC that she wished to "appeal." Following a request for clarification from ICBC as to whether she wished to request a Hearing, the Individual Appellant confirmed on April 5, 2024 that she wished to "appeal." Between June 5 and 11, 2024, the Individual Appellant corresponded with ICBC about scheduling a "hearing," as ICBC continually described it, for which ICBC proposed some dates in November 2024.

[15] Then things changed. The Appellants voluntarily cancelled their individual and corporate insurance licenses on July 21 and 22, 2024, respectively, after which ICBC counsel contacted the Individual Appellant to inquire whether the Hearing would be proceeding and, if not, to ensure the Individual Appellant understood the consequence of a decision not to proceed with a Hearing. On August 23, 2024, the Individual Appellant advised ICBC counsel by email that she had "decided to cancel the appeal." The records before me indicate that ICBC counsel followed up with two emails and a video meeting on that date, followed by an email on August 24, 2024 stating, "as discussed, as you have

chosen not to proceed with the hearing, the Insurance Council will make an order based on the Intended Decision (but with some adjustment as you are no longer a licensee)." The Appellants did not respond to ICBC counsel's email by disagreeing with what had been discussed, or with ICBC counsel's description of the choice they had made and its consequences.

[16] On September 24, 2024, pursuant to section 231, 236, and 241.1 of the *Act*, ICBC issued an Order against the Appellants reflecting the determinations in the Intended Decision, though modified to reflect that the Appellants had voluntarily cancelled their insurance licenses. With regard to fines, education, and costs, the Order imposed on the Appellants the penalties, costs, and conditions that had been set out in the Intended Decision, all to be discharged by December 23, 2024 (i.e., 90 days from the date of the Order). On licensing conditions, the Order provided that ICBC would not consider an application for any insurance license from the Individual or Corporate Appellants until the fines, education, and costs aspects of the Order had been complied with.

[17] The Appellants filed a Notice of Appeal to this Tribunal, and paid the required filing fees, on October 10, 2024. The results sought on that Notice of Appeal were the "elimination of fines," "letter to be removed from regulator website," a reprimand of ICBC, and the establishment of "clear guidelines and time restriction for the council to investigate and complete investigations." Appended to the October 10, 2024 Notice of Appeal was a four-page document addressed "To whom it may concern," with the Individual Appellant's name typed at the end, which provided additional information and arguments challenging the Order.

[18] On October 29, 2024, the Appellants amended their Notice of Appeal with respect to the results sought (the "Amended Notice of Appeal"). The only remedy sought in the Amended Notice of Appeal was the "elimination of fines," and the others were removed. An Amended Notice of Appeal supersedes prior versions of a Notice of Appeal. However, there is no indication that the four-page document addressed "To whom it may concern," which was appended to the original Notice of Appeal, was meant also to be superseded when the remedies sought were amended by way of the Amended Notice of Appeal. I have therefore read and considered the substantive points made in that appended four-page document, and include them as part of the Appellants' submissions below.

[19] In keeping with the schedule imposed by this Tribunal, all parties had made their submissions by January 23, 2025. However, following my review of the Appellants' arguments, on April 25, 2025, I invited the Respondent and the Superintendent of Financial Institutions (the "Superintendent"),[2] to provide further submissions regarding delay and procedural fairness, issues which had not been addressed in their initial

[2] The Superintendent of Financial Institutions is a regulator housed within the BC Financial Services Authority and is a third party to this appeal pursuant to section 242(3)(a) of the *Act*.

submissions. I received those additional submissions on May 7, 2025, with a response from the Appellants received May 12, 2025, and they are addressed below.

[20] I have read the entire record and considered all arguments of the parties, whether or not explicitly referenced in this decision. I use the word "record" in a general sense to refer to the materials before me, without making a decision on the Respondent's argument, addressed below, that I do not have a proper evidentiary "record" before me, in the legal sense of the word, because there has been no Hearing.

RELEVANT LAW

[21] Relevant provisions of the *Act* are as follows:

> **237** (1) This section applies to hearings by the Authority, superintendent or council under this Act.
>
> (2) The Authority, superintendent or council, depending on which of them has the power to take the action, must give written notice in accordance with the regulations of the intended action to any person who will be directly affected by it, before taking any of the following actions:
>
> > (a) making an order under section ... 231(1), 241.1(1)(a) ... ;
>
> (3) Not later than 14 days after receiving notice under subsection (2) of an intended action, a person directly affected,
>
> > (a) by delivering notice in writing to the Authority may require a hearing before the Authority in any case in which it is the Authority that intends to take the action, or
> >
> > (b) by delivering notice in writing to the superintendent or the council, as appropriate, may require a hearing
> >
> > > (i) before the superintendent in any case in which it is the superintendent who intends to take the action, and
> > >
> > > (ii) before the council in any case in which it is the council that intends to take the action.
>
> ...
>
> (6) After
>
> > (a) the expiry of the 14 day period referred to in subsection (3) if no hearing has been required within that period, or
> >
> > (b) after the hearing, if one has been required within that period,
>
> the Authority, the superintendent or the council, as the case may be, may proceed in the exercise of the powers conferred under this Act in respect of the matter that was the subject of the notice delivered under subsection (2).

238 (1) If the superintendent or the council, depending on which of them has the power to make the order,

(a) intends to make an order under section 93 (1) or (2) [prohibition against unfair, misleading or deceptive documents] or 231 (1) (g), (h), (i) or (j) [council may suspend, cancel or restrict licences], and

(b) considers that the length of time that would be required to hold a hearing would be detrimental to the due administration of this Act,

then, despite section 237, the superintendent or council, as applicable, may make the intended order without giving a person directly affected by it an opportunity to be heard, but the superintendent or council, as soon as practicable after making the order, must deliver to that person

(c) a copy of the order and written reasons for it, and

(d) written notice of the person's rights under subsection (2).

(2) A person directly affected by an order made under subsection (1) may, within 14 days of receiving a copy of the order,

(a) require a hearing before the superintendent or council, as applicable, by delivering written notice to the superintendent or council, or

(b) appeal the order to the tribunal.

(3) Within a reasonable time after receiving written notice referred to in subsection (2) (a), the superintendent or council, as applicable, must hold the required hearing and following the hearing must confirm, revoke or vary the order.

238.1 (1) If the superintendent, or the Authority, depending on which of them has the power to make the order,

(a) intends to make an order under section 48 (2), 99 (2), 144 (3), 244 (2) or (5), 245 (1), 275 or 277 (1) (d) or (2) (a) or (c), and

(b) considers that the length of time that would be required to hold a hearing would be detrimental to the due administration of this Act,

then, despite section 237, the superintendent or Authority, as applicable, may make the intended order without giving a person directly affected by it an opportunity to be heard, but the superintendent or Authority, as soon as practicable after making the order, must deliver to that person

(c) a copy of the order and written reasons for it, and

(d) written notice of the person's rights under subsection (2).

(2) The person directly affected by an order made under subsection (1) may, within 14 days of receiving a copy of the order,

(a) require a hearing before the superintendent or Authority, as applicable, by delivering written notice to the superintendent or Authority, or

(b) appeal the order to the Supreme Court, and, for this purpose, section 242.4 (2) to (4) applies.

(3) Within a reasonable time after receiving written notice referred to in subsection (2) (a), the superintendent or Authority, as applicable, must hold the required hearing and following the hearing must confirm, revoke or vary the order.

242 ...

(1) A person directly affected by any of the following decisions of the superintendent or the council, depending on which of them has the power to make the decision, may appeal the decision to the tribunal:

(a) an order under any of the following provisions:

...

(vi) section 231 (1) *[council may suspend, cancel or restrict licences and impose fines]*;

...

(a.1) an order under section 241.1 [assessment of costs] that is not related to a decision that may be appealed to the Supreme Court under section 242.4 (1);

...

(3) The superintendent

(a) is a party to an appeal of a decision of the council to the tribunal, and

(b) may appeal a decision of the council to the tribunal.

242.2 ...

(2) Subject to subsection (10)(a), a decision is not stayed by the filing of an appeal.

...

(5) Subject to subsection (8), an appeal is an appeal on the record, and must be based on written submissions.

(6) For the purposes of subsection (5), the record consists of the following:

(a) the record of oral evidence, if any, before the original decision maker;

(b) copies or originals of documentary evidence before the original decision maker;

(c) other things received as evidence by the original decision maker;

(d) the decision and written reasons for it, if any, given by the original decision maker.

...

(8) On application by a party, the member considering the appeal may do the following:

(a) permit oral submissions;

(b) permit the introduction of evidence, oral or otherwise, if satisfied that new evidence has become available or been discovered that

(i) is substantial and material to the decision, and

(ii) did not exist at the time the original decision was made, or, did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.

(9) If oral submissions or new evidence are permitted under subsection (8), the member considering the appeal may

(a) require the parties to participate in any proceeding that might assist in clarifying or narrowing the facts or issues, or otherwise facilitating the appeal,

(b) make any order in respect of matters arising from a proceeding held under paragraph (a),

(c) subject to this Act, the regulations and any rules set by the chair under section 242.1 (5) (c), determine the manner in which a proceeding held under paragraph (a) or an appeal is conducted,

(d) require the party requesting the attendance of a witness to pay the costs in connection with the attendance of that witness, and

(e) proceed with a proceeding held under paragraph (a) or an appeal in the absence of the appellant, if the appellant has been given at least 10 days notice of the proceeding or the appeal, as applicable.

(10) In respect of an appeal,

(a) on application, the member hearing the appeal may

(i) stay the decision under appeal for any length of time, with or without conditions, ...

...

(11) The member hearing the appeal may confirm, reverse or vary a decision under appeal, or may send the matter back for reconsideration, with or without directions, to the person or body whose decision is under appeal.

POSITIONS OF THE PARTIES

Appellants' Position

[22] The Appellants were represented by counsel at some points during this process, but appear to be self-represented before this Tribunal. I have therefore reviewed the record as a whole as well as all the Appellants' submissions, including the Amended Notice of Appeal; the "To whom it may concern" document attached to the first Notice of Appeal; a document entitled "Appeal of Insurance Council of British Columbia Order to Financial Services Tribunal" dated December 9, 2024, and received (as a fourth and final version following some evidentiary issues, which were resolved) on December 11, 2024 (the "Submissions in Chief"); and written submissions in reply to the Respondent's submissions (the "Reply Submissions"). Overall, the Appellants argue that the Order should be "invalidated," and make what I see to be three general categories of arguments.

[23] First, implicit in the Appellants' filings is an argument that they are entitled to an appeal before this Tribunal, notwithstanding that they did not seek a Hearing as they were entitled to do. For the first time in their Submissions in Chief, the Appellants argue that "they had no faith that the council could run an impartial appeal of the matters and that is why the appellant chose to bypass the appeal with the council and move straight to an appeal with the FST." I read this as arguing that bypassing the Hearing was an option that the Appellants were entitled to exercise, either as of right or if they had no confidence in the Superintendent's impartiality.

[24] Second, the Appellants challenge the substance of the Order below. For example, they dispute findings in the Order as to whether they had maintained records sufficient to demonstrate that they had carried out an appropriate needs analysis or affordability assessment. The Appellants' submissions, particularly their Submissions in Chief, take issue with several other aspects of the facts described in the Order, and with the conclusions contained in it. The Appellants also argue that the financial penalties and licensing conditions imposed are excessive and disproportionate. The Appellants argue that the analogous cases set out by ICBC in the Intended Decision are inappropriate comparators, and take issue with the Order's treatment of aggravating and mitigating factors.

[25] Third, the Appellants raise procedural fairness arguments concerning the process below, really around three issues: delay, reasonable investigation, and bad faith.

[26] On delay, the Appellants argue that ICBC did not act in a timely manner. For example, ICBC "took 3.5 years to review the case and have a hearing on the matter." (I understand the word "hearing" here to refer to the January 30, 2024 meeting of ICBC Council at which the Intended Decision was reached.) There were "gaps of over 6 months when the council would email an update on the progress of the investigation." The Appellants argue that the Respondent "failed to keep appellant informed as indicated in their own guidelines" and that "to then have this file investigated for over three years, and

to receive such a concerning decision challenges the very fairness of the process itself." The Appellants say that "the respondent did not act in a timely manner. The council took excessive time in reviewing the case. A 965-day period is not 'timely'. The council offered no explanation as to the delay."

[27] As well, the Appellants argue that ICBC did not act reasonably in the conduct of its investigation, and did not act in good faith. The Respondent had an obligation to behave as well as licensees were required to do, yet "did not exercise any level of care in the conduct of their investigation" and "misrepresent[ed] the facts." The Appellants argue that ICBC "did not conduct a complete investigation" and that the Life Insurance Review Committee did not have all relevant documents at the time that it prepared the Committee Report.

[28] The Appellants also make several assertions about the propriety of ICBC's conduct or motives. The Appellant argues that ICBC "did not act in good faith" when it came to the Individual Appellant; that it misrepresented the facts; that it engaged in "intentional negligence," that it was "placing their own gain ahead of the Appellant"; and that it "made a fraudulent statement" in the Order.

[29] I read the submissions with respect to delay, reasonable investigation, and bad faith as arguing that I should reverse the Order for failures of procedural fairness.

[30] There is inconsistency among the Appellants' documents in terms of remedies sought before this Tribunal. The Amended Notice of Appeal seeks the "invalidation of fines". The Submissions in Chief seek, in addition, that the Order be set aside, the Individual Appellant's ability to act as a nominee be reinstated, the Order be redrafted to correct statements that the Appellants assert to be false or unproven, and that ICBC "publicly acknowledge that they misstated the facts."

[31] The Appellants do not ask to have this matter remitted to ICBC for a Hearing. On the contrary, the Appellants say that they sought to appeal to this Tribunal precisely because they had "no faith" in ICBC's impartiality.

[32] With respect to costs, the Appellants' Reply Submissions "reject[ ] that they should be responsible for cost of the appeal and that the respondent be responsible for their own costs."

[33] Per section 242.2(2) of the *Act*, filing this appeal does not stay the decision below. The Appellants have not sought a stay of the Order. In her cover email to the original Notice of Appeal, the Individual Appellant said that she was requesting "a temporary stop to the decision while the appeal is underway." On October 16, 2024, Tribunal staff advised the Individual Appellant in writing of the steps required to request a stay. The Tribunal received nothing further in this regard, so there is no stay application before me.

[34] In their additional submissions dated May 12, 2025, the Appellants argue that they raised concerns about inordinate delay on multiple occasions. They reiterate their concerns about abuse of process and say that that delay caused significant prejudice to the Individual Appellant in the forms of "mental stress, sleeplessness, anxiety, and

depression." The Appellants argue that the Respondent's unwillingness to engage with the issue of delay, or to agree with the Appellants' position that the Respondent is bound by the guidelines that bind its licensees, amounts to an assertion that "because the act does not provide for a time frame of investigation, they can act in any manner that they desire even if it is detrimental to the public good and legitimacy of their stated goals." The Appellants further argue that this Tribunal has all the information it needs to make a decision on the merits here.

Respondent ICBC's Position

[35] The Respondent submits that ICBC conducted the Investigation, produced its Intended Decision, and gave the Appellants notice of their opportunity to contest the Intended Decision at a Hearing, all in accordance with the *Act*. When the Appellants chose not to pursue a Hearing, the Intended Decision was converted into the Order, which imposed fines and other conditions, also in accordance with the *Act*. Having then failed to challenge ICBC's Intended Decision at a Hearing, the Appellants chose to accept that Intended Decision and cannot appeal the Order that resulted from the Appellants' own decision not to seek a Hearing.

[36] The Respondent argues that, because the Appellants chose not to seek a Hearing, the Order functions like a consent order: where a party consents to a legal agreement, absent extenuating circumstances such as fraud, duress, or unconscionability, that party is generally bound by the agreement they consented to even if they change their mind later.

[37] The Respondent says that the Appellants' arguments in support of overturning the fines imposed in the Order "consist entirely of arguments that could and should have been raised at a hearing before Council." That is, if the Appellants wanted to challenge the facts found during the Investigation, as the Appellants seek to do in their submissions before this Tribunal, then they could and should have done so at a Hearing. Because they did not, no findings of fact were made and there is no Hearing record. As a result, there is nothing for the Appellants to appeal to this Tribunal.

[38] The Respondent further argues that allowing this Tribunal to hear this appeal with respect to the merits would undermine the intent of the *Act*. The Legislature's intent, as reflected in the *Act*, gives Council, and not this Tribunal, the authority to make findings of fact. To allow an appeal of the Order would improperly convert the Tribunal into a trier of fact. The Respondent argues that the documents before me are not a "record" of the kind that can be appealed: they do not amount to an "evidentiary record following a hearing on the merits." There are some exceptions to the general rule that this Tribunal cannot hear a matter where there is no such evidentiary record, for example where a licensee did not receive effective notice of an intended decision before the 14-day deadline to request a Hearing, or where Council made an order that exceeded its statutory jurisdiction, but the Respondent submits that none of these exceptions apply.

[39] In the alternative, if I find that I can hear this appeal, the Respondent argues that it should be dismissed. The standard of review for penalty decisions imposed by ICBC is reasonableness, and the Respondent argues that the penalties are reasonable. The Respondent further says that since there is no proper evidentiary record before me, I must assume the facts in the Intended Decision to be true. Given those facts, the Respondent says the penalties imposed on the Appellants were in line with past practice and are reasonable or, at least, are not so out of line with past practice as to be unreasonable.

[40] The Respondent further says that the Appellants have not presented this Tribunal with any evidence of procedural irregularity, fraud, or failure of impartiality, and so there is no basis on which to vary or overturn the fines imposed in the Order.

[41] In response to my invitation to provide further submissions regarding delay and procedural fairness, the Respondent's additional submissions argue strenuously against my ability to consider delay. The Respondent's submissions take the position that the Appellants' failure to raise inordinate delay before the time of this appeal means that I cannot consider the issue, for the same reasons that I cannot consider the appeal as a whole; that is, because making determinations about delay would involve a fact-finding inquiry that I am not statutorily empowered to undertake. The Respondent says that delay ought to have been raised at a Hearing, which the Appellants chose not to seek, such that there is no evidentiary record before me on which to decide the issue now. The Respondent argues in the alternative that if I decide to consider delay, I must first decide, as a threshold issue, that I can do so. Then, if I decide to consider it, the Respondent says that I ought to order the parties to submit evidence and ought to order a full *viva voce* hearing. In keeping with this position, the Respondent makes no substantive submissions with respect to procedural fairness, in general or in this matter.

[42] The Respondent seeks costs of this appeal but made no submissions on costs, and did not refer to any authorities to support this position.

Superintendent's Position

[43] The Superintendent supports and adopts the Respondent's submissions, arguing that "absent extraordinary circumstances, a licensee should first exercise their right to a hearing under s. 237 of the [Act] before commencing an appeal," and that the Appellants' decision to abandon their Hearing means there is no proper evidentiary record before me.

[44] The Superintendent further points me to some provisions of the *Act* under which an appeal can proceed without a Hearing first being held. The first is section 242(3)(b), which allows the Superintendent itself to bring an appeal to the FST, after an ICBC intended decision but before a Hearing. The second set of provisions are sections 238 and 238.1 of the *Act*, under which any affected person may appeal a matter directly to the FST or request a Hearing. The Superintendent argues that none of these provisions apply here.

[45] In the event that I decide I can hear this appeal on its merits, the Superintendent supports and adopts the Respondent's submissions to the effect that the fines imposed in the Order, and the reasons for those fines, are reasonable and should not be disturbed.

[46] In response to my invitation to provide further submissions regarding delay and procedural fairness, the Superintendent takes no position and declines to make additional submissions.

ISSUES

[47] On review of the parties' submissions, I see three issues to be addressed on this appeal:

a. Under what circumstances, if any, can I hear this matter on the merits without a Hearing having been held below?

b. Have those circumstances been met?

c. If those circumstances have been met and I can hear this matter on the merits, should I allow this appeal?

DISCUSSION AND ANALYSIS

Under what circumstances, if any, can I hear this matter on the merits without a Hearing having been held below?

[48] There is no dispute that the Appellants did not request the Hearing to which they were entitled, the purpose of which would have been to challenge the Intended Decision. At a Hearing, all parties would have had an opportunity to present their respective cases through witness testimony and documentary evidence. The Council would have made findings on the merits, based on the evidence presented. Because the Appellants did not seek a Hearing, witness testimony was not given, documentary evidence was not introduced, cases were not presented, and the facts that the Appellants now want to challenge were not in fact challenged. The Intended Decision was converted into the Order pursuant to the provisions of the *Act*. The question is whether this Tribunal can hear the Appellants now seeking to challenge that Order, even though they did not seek a Hearing.

[49] Looking first to the *Act* and the provisions under which an appeal can proceed without a Hearing first being held, the Superintendent is correct that none applies here.

[50] The first such provision is section 242(3)(b), which allows the Superintendent itself to bring an appeal to the FST, after an ICBC intended decision but before a Hearing. This is a provision under which the Superintendent can appeal an Order made when a licensee did not contest an Intended Decision and so when no Hearing was held. The cases

generated pursuant to this appeal provision involve situations where the Superintendent seeks to challenge ICBC decisions to ensure that ICBC is discharging its regulatory responsibility, and that penalties are justified by reasons and are not unreasonably low: see, e.g., *Financial Institutions Commission v Insurance Council of British Columbia,* 2018 BCFST 5; *Superintendent of Financial Institutions v Insurance Council of British Columbia*, 2007 BCFST 10. In these kinds of situations, where the Superintendent's responsibility is to ensure that ICBC is adequately protecting the public interest, it makes sense to provide for such an appeal route since, for example, licensees who were treated very leniently would not be likely to seek a Hearing to challenge those lenient Intended Decisions. If the problem is that ICBC is issuing penalties that are unreasonably low and that are not in line with its regulatory responsibility to protect the public, the fact that a Hearing is available to those licensees does not cure the underlying problem. However, it is not the Superintendent that is bringing this appeal, and the Superintendent is not here engaging with whether ICBC is properly discharging its regulatory responsibilities. The *Act* is clear about which party may bring an appeal under section 242(3)(b), and I cannot go beyond what the *Act* provides for.

[51] The second set of situations under which an appeal can proceed without a Hearing first being held is provided for under sections 238(2) and 238.1(2) of the *Act*. However, these statutory provisions refer to a specific set of circumstances that do not apply here. Sections 238 and 238.1 provide for summary procedures under which ICBC, the Superintendent, or the BC Financial Services Authority may make an order *before* holding a Hearing, if they consider that the length of time required to hold the Hearing "would be detrimental to the due administration of [the] Act": ss 238(1)(b), 238.1(1)(b). For example, section 238 has been used to impose a cease-and-desist order against a business that was carrying on an ongoing insurance business in BC without a business authorization to do so: *TruNorth Warranty Plans of North America, LLC v Superintendent of Financial Institutions*, 2020 BCFST 2 ("*TruNorth*"). While such orders can take effect immediately, an affected person is entitled to demand a Hearing, which must take place within a reasonable time after the order is imposed: ss 238(3), 238.1(3). Section 238(2)(b) also gives any affected person the option to appeal such an order made before a Hearing directly to this Tribunal, and section 238.1(2)(b) permits an appeal to the Supreme Court of British Columbia. It makes sense to allow affected persons to challenge orders that were imposed before a Hearing was held, including by bringing an appeal to this Tribunal, because orders made before a Hearing could raise procedural fairness concerns: see, e.g., *Malik v BC (Financial Institutions Commission)*, 2006 BCSC 723. However, no section 238 or section 238.1 order was made here, and the Appellants voluntarily declined to seek a Hearing. Moreover, section 238.1 deals with orders made under sections of the *Act* that are not engaged here.

[52] Although these sections of the *Act* do not apply here, they do demonstrate an intention on the part of the Legislature to ensure that, in exceptional circumstances, this Tribunal has supervisory jurisdiction to consider Council orders that have been made before or without a Hearing. The exceptional circumstances contemplated seem to include those in which an intended decision or order made by Council could raise procedural

fairness concerns, or concerns for public confidence in the administration of justice, of a kind or degree that either cannot be cured by a Hearing, or that involve a significant enough departure from normal procedural fairness obligations that a party is justified in bypassing a Hearing.

[53] Similarly, *William Craig Blackwood*, 2007 BCFST 8 ("*Blackwood*") does not completely preclude this Tribunal considering an appeal from an order that was not challenged at a Hearing, though it makes clear that the threshold for doing so would be high. Although prior FST decisions are not strictly binding on me, it is still good practice to align decisions with Tribunal past practice in the interest of consistency (*TruNorth* at para 66; *Jacob Giesbrecht Siemens v Real Estate Council of British Columbia*, 2021 BCFST 3 at para 15).

[54] *Blackwood* states that, where there has been a Hearing, "thorough consideration of all matters material to the issues involved ... 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." *Blackwood* also notes that, under section 237, "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."

[55] The Respondent's submissions acknowledge that there can be some situations, for example where a licensee did not receive effective notice of an intended decision before the deadline to request a Hearing, or where Council made an order that exceeded its statutory jurisdiction, in which this Tribunal can consider an order made below even though the affected party did not seek a Hearing. The Superintendent's submissions, also, say that "absent extraordinary circumstances, a licensee should first exercise their right to a hearing under s. 237 of the [Act] before commencing an appeal." Both the Respondent and the Superintendent submit, however, that no such exceptional circumstances are present here.

[56] Based on these statutory provisions, cases, and submissions, I conclude that there can be exceptional circumstances in which this Tribunal may hear an appeal of an order or intended decision, even though there has been no Hearing below. The burden of establishing those exceptional circumstances lies with the Appellants.

Have those circumstances been met?

[57] In determining whether exceptional circumstances exist here, which would justify my hearing this appeal although there was no Hearing below, I turn first to the Respondent's two examples, of failure of notice or excess of jurisdiction.

[58] With respect to notice, there is no dispute that the Appellants received adequate notice of their opportunity to challenge the Intended Decision. Looking just at timing of

notice, the essence of the Intended Decision was communicated to Appellants' counsel on February 2, 2024. Written reasons for the Intended Decision are dated March 4, 2024. On March 15, 2024, the Individual Appellant requested an extension of time for the "hearing decision making period," beyond the statutorily provided for 14 days. This was agreed to, and the Appellants were given until March 29, 2024 to make that decision.

[59] The Individual Appellant initially advised that she wished to "appeal," but then advised on August 23, 2024 that she had "decided to cancel the appeal." Although she used the word "appeal" rather than "hearing" when referring to the opportunity to challenge the Intended Decision, in context her words can only mean that she intended to "cancel" the Hearing to which she was entitled under section 237 of the *Act*.

[60] The record further shows that the Individual Appellant had notice of the consequences of not requesting a Hearing. She was clearly informed that the Intended Decision would be converted to an Order if the Appellants did not seek a Hearing to dispute it. The Intended Decision itself said so, in bold print.

[61] This amounts to adequate notice of the Appellants' ability to request a Hearing to contest the Intended Decision, and the consequences of not doing so, but it is not all the notice the Appellants received. On August 23, 2024, when the Individual Appellant advised ICBC counsel in writing that she had "decided to cancel the appeal," ICBC counsel followed up with the Individual Appellant. Counsel recorded in an email to her the next day that "as discussed, as you have chosen not to proceed with the hearing, the Insurance Council will make an order based on the Intended Decision (but with some adjustment as you are no longer a licensee)." The Appellants did not question or seek to correct this statement.

[62] Second, with respect to statutory jurisdiction, there is no dispute as to whether ICBC had the statutory authority to engage in the Investigation it did, to impose the fines, conditions, and costs of investigation it did, or to produce the Intended Decision it did (though the Appellants argue that ICBC was incorrect to impose the particular fines, conditions, and costs of investigation it did in this case). There is no dispute that ICBC had the statutory authorization to convert an Intended Decision into an Order, if the Intended Decision was not contested at a Hearing.

[63] These two examples of exceptional circumstances that the Respondent provides are helpful, but they are not comprehensive. Common law principles of procedural fairness apply to ICBC, subject to any express statutory language to the contrary: *Luan Charles Xing v Insurance Council of British Columbia*, 2019 BCFST 13 at paras 68-72. Other failures of procedural fairness, beyond lack of notice, could conceivably justify bringing an appeal to this Tribunal without a Hearing having been held below. In order to justify bypassing a Hearing and proceeding directly to this Tribunal, however, such procedural fairness concerns would have to amount to genuinely exceptional circumstances.

[64] The Respondent's suggestion that this Tribunal should properly order a *viva voce* hearing if it wants to consider a procedural fairness issue strikes me as unfounded. This Tribunal has the power to control its own processes. It may receive and accept

information it considers relevant, necessary and appropriate, whether or not it would be admissible in a court of law: *Administrative Tribunals Act*, SBC 2004, c 45 ("*ATA*"), ss 11(1), 40(1); see also *Rashin Rohani v Superintendent of Real Estate*, 2024 BCFST 4 at paras 26-35. This Tribunal has previously held that, while "an appellate body does not generally consider new issues on appeal, … there are possible exceptions to this general rule" and that in exercising its discretion to consider new issues, this Tribunal should be "guided by procedural fairness as well as the interests of justice": *Shahin Behroyan v Real Estate Council of British Columbia*, 2021 BCFST 5 at para 71. In particular, this Tribunal has the discretion to make findings regarding procedural fairness, and to allow evidence relating to it: *Wei Qing (Wendy) Yang v Superintendent of Real Estate*, 2022 BCFST 1 at para 17; *Varinder Grewal v Insurance Council of British Columbia*, 2019 BCFST 3 at para 87.

[65] Therefore, if a party, in this case the Appellants, can establish that there has been a failure of procedural fairness in the proceedings below sufficient to justify bypassing a Hearing, I have the authority under section 242.2(11) of the *Act* to confirm, reverse or vary a decision under appeal, or to send the matter back for reconsideration. That said, procedural fairness concerns that could have been cured at a Hearing cannot, almost by definition, amount to the kind of exceptional circumstances that would justify bypassing that Hearing.

[66] The Appellants raise three procedural fairness arguments concerning the process below, with respect to delay, reasonable investigation, and bad faith.

[67] The fact that it took more than two years, from the time the ICBC Complaint was lodged on September 15, 2020, for an ICBC Investigator to interview the Individual Appellant, on December 22, 2022, is concerning from a procedural fairness perspective. It is also concerning that it took another ten months for ICBC to deliver the Investigation Report to ICBC's Life Insurance Review Committee, on or around October 24, 2023. It is concerning that the January 30, 2024 Intended Decision respecting the Appellants was reached more than forty months after the ICBC Complaint was filed. Even if the Appellants had sought a Hearing below, that hearing was being scheduled for November, 2024 – more than four years after the ICBC Complaint was filed. Unexplained delay affects Council's obligation to protect the public, and it affects the public perception of the administration of justice by ICBC. From the Appellants' perspective, it no doubt seems unfair to experience such seemingly unexplained delay followed by, before this Tribunal, a refusal on the part of the Respondent to even acknowledge its obligation to discharge its responsibilities in a timely manner. Regrettably, this level of delay does not seem to be unusual in recent cases coming before this Tribunal, although not on appeals from ICBC decisions: see, e.g., *Billie Aaltonen v Registrar of Mortgage Brokers*, 2024 BCFST 2 at para 90; *Wei (Vicky) Wang and Vicky Wang Personal Real Estate Corp. v Superintendent of Real Estate*, 2024 BCFST 5 at para 162; *Manjot Khunkhun v Registrar of Mortgage Brokers*, 2025 BCFST 3 ("*Khunkhun*") at paras 124-27.

[68] Given ICBC's unexplained delay, and in line with the reasoning in *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29, under normal circumstances I would be giving

serious consideration to ordering a remedy such as, at an absolute minimum, waiving the costs of investigation below. However, this appeal has not come to me in the normal way. Because the Appellants did not seek a Hearing below, procedural fairness concerns would have to amount to genuinely exceptional circumstances in order to overcome the high threshold for appeal that *Blackwood* and the reasoning above impose. The Appellants have not established that procedural fairness concerns here, or concerns for public confidence in the administration of justice, were severe, significant, or exceptional enough to justify their bypassing a Hearing.

[69] With respect to reasonable investigation, the Appellants' arguments also cannot succeed. If the Appellants were concerned that ICBC "did not exercise any level of care in the conduct of their investigation," that ICBC was incorrect about the facts, and/or that ICBC "did not conduct a complete investigation," then the Appellants were entitled to request a Hearing. At such a Hearing, the Appellants would have been able to call witnesses, introduce documentary evidence (including evidence from the Appellants that corrected facts and addressed any failures in the Investigation), and make arguments and submissions with respect to all aspects of the Order (including mitigating and aggravating factors, the appropriateness of the fines and conditions imposed, and the applicability of other cases referred to in the Order). Because the Appellants chose not to seek a Hearing, it is not open to them now to argue that failures in the investigation should result in the Order being reversed for reasons of procedural fairness.

[70] The Appellants' arguments about bad faith, misrepresentation, "intentional negligence," conflict of interest, and making a "fraudulent statement" are also not sufficient to make out a case for lack of procedural fairness, let alone for exceptional circumstances justifying bypassing a hearing. With respect to alleged misrepresentation or false statements, the answer is, again, that challenges to those facts could have and should have been made at a Hearing. To the extent that Appellant is making a further argument that ICBC acted in bad faith, in a conflict of interest, or with intentional malice, I note that mere allegations without supporting evidence are insufficient. To succeed, the fact that the Appellants "had no faith that the council could run an impartial appeal of the matters" would have had to be supported by some "substantial evidence" of bias: *A.T. v British Columbia (Mental Health Review Board),* 2023 BCCA 283 ("*A.T.*") at para 90. None was provided. Nor was bias raised at the first opportunity, as it should have been: *A.T.* at para 106.

[71] Bypassing the Hearing and proceeding directly to the FST is not an option that the Appellants are entitled to exercise, in the absence of exceptional circumstances. The Appellants have not established that such exceptional circumstances are present here.

If those circumstances have been met and I can hear this matter on the merits, should I allow this appeal?

[72] Because the Appellants have not established that exceptional circumstances are present, sufficient to justify hearing this appeal even though the Appellants declined a Hearing below, I decline to hear this appeal on its merits.

[73] I also decline to decide, as the Respondent invites me to do, whether in the circumstances of this case the Order functions in a fashion similar to a consent order.

[74] I decline to decide, as the Respondent urges me to do, whether there is a proper evidentiary record before me, or whether this Tribunal has the statutory authority to make findings of fact. The Respondent's arguments on these points are overbroad. Deciding these questions could have unintended consequences for other statutory provisions, including sections 242(3)(b), 238, and 238.1 above, and also for this Tribunal's ability to permit submissions per, for example, section 242.2(8). The modern rule of statutory interpretation mandates that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 at para 21, [1998] 1 SCR 27 (SCC).

[75] Making a determination as to whether there is a proper evidentiary record before me, or whether this Tribunal has the statutory authority to make findings of fact, would also undermine this Tribunal's ability, under exceptional circumstances related to ensuring public confidence in ICBC and the proper administration of justice, including around procedural fairness, to hear an appeal of an Order or Intended Decision where there has been no Hearing. This is an ability that both the Respondent and the Superintendent concede this Tribunal to have.

DECISION

[76] The appeal is dismissed.

[77] I have the authority to order costs under section 242.1(7)(g) of the *Act*, which incorporates section 47(1) of the *ATA*. That said, costs are discretionary, and not routinely awarded by this Tribunal: *Khunkhun* at paras 137-38. This Tribunal's practice is not to award costs solely based on success in the appeal: *TruNorth* at para 16. The normal practice is for costs not to be ordered, see, e.g., *Andrew Brian Laity v Superintendent of Real Estate*, 2022 BCFST 3, and so the question is whether factors present in this appeal would justify moving beyond that normal practice.

[78] A recent decision of this Tribunal comprehensively reviewed considerations around costs, with a view to recent cases and this Tribunal's *Practice Directives and Guidelines*: *Wei (Vicky) Wang and Vicky Wang Personal Real Estate Corp. v Superintendent of Real Estate*, 2025

BCFST 1. One issue there was whether this Tribunal could order costs that flowed from pre-appeal conduct. The Tribunal found at paragraph 35 that:

> … conduct [justifying awarding costs against a party] should relate to the appeal process itself. … costs under section 47 of the *ATA* may flow from pre-appeal conduct, but only where the underlying conduct as reflected in the events giving rise to appeal were manifestly unfair, biased, or capricious. A mere finding of procedural unfairness (or unreasonableness) is not sufficient to ground an award of costs unless they rise to this level.

[79] The Appellants have not provided evidence sufficient to establish that the conduct below was so manifestly unfair, biased, or capricious that costs before this Tribunal should flow from pre-appeal conduct. None of the parties' conduct on this appeal warrants moving away from this Tribunal's normal practice not to order costs, and so I make no costs order.

"Cristie Ford"

Dr. Cristie Ford, Panel Chair
Financial Services Tribunal