BRITISH COLUMBIA

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DECISION NO. 2019-FIA-003(a)

In the matter of an appeal under section 238(2)(b) of the *Financial Institutions Act,* RSBC 1996 c 141

BETWEEN:	TruNorth Warranty Plans of North America, LLC	**APPELLANT**
AND:	Superintendent of Financial Institutions	**RESPONDENT**
BEFORE:	Michael Tourigny, Member, Financial Services Tribunal	
DATE:	Conducted by way of written submissions concluding on March 20, 2020	
APPEARING:	For the Appellant: Lynda K. Troup, Legal Counsel For the Respondent: Sandra A. Wilkinson, Legal Counsel	

APPEAL OVERVIEW

[1] This is an appeal by TruNorth Warranty Plans of North America, LLC (the "Appellant") from the April 15, 2019 decision (the "Decision") of the Superintendent of Financial Institutions (the "Superintendent"). In the Decision, the Superintendent found that the Appellant breached the *Financial Institutions Act,* RSBC 1996 c 141 (the "*FIA*") by carrying on insurance business (in particular vehicle warranty insurance) in British Columbia without a valid business authorization to do so as required by section 75 of the *FIA.* In result, the Superintendent ordered (the "Order"), pursuant to section 244(2)(f) of the *FIA,* that the Appellant:

i. immediately cease conducting insurance business in British Columbia, including the soliciting, offering, sale, and adjusting of vehicle warranty insurance under the product names TruNorth Superannuated Agreement, TruNorth All-Inclusive Agreement, and TruNorth 6 Month All-Inclusive Agreement;

ii. provide the Superintendent with a copy of every contract issued by it which insures risk located in British Columbia and is in force as of the date of the Order, within 14 days of the date of the Order; and

iii. within 90 days of the date of the Order, arrange for the assumption of all contracts in place as of the date of the Order insuring risk located in British Columbia, including the handling and adjusting of claims related to those contracts, by an insurance company authorized to issue vehicle warranty insurance in British Columbia. The assumption will be at the sole expense of the Appellant and without penalty to any insured under those contracts; or

will otherwise deal with current contracts in a manner satisfactory to the Superintendent.

[2] In making the Decision, the Superintendent was acting under the authority of an Instrument of Delegation dated April 4, 2018, pursuant to which the Financial Institutions Commission ("FICOM")[1] delegated to the Superintendent the power to issue orders under section 244 of the *FIA* by way of summary procedure under section 238 of the *FIA*.

[3] A copy of the Decision and notice of the Appellant's rights under section 238(2) of the *FIA* to either require a hearing before the Superintendent or to appeal the Decision to the Financial Services Tribunal ("FST") were given to the Appellant.

[4] The Appellant has elected to exercise its right under section 238(2)(b) of the *FIA* to appeal the Decision to the FST.

[5] Section 242.2(11) of the *FIA* applies and provides that the FST may confirm, reverse or vary a decision, or send the matter back for reconsideration, with or without directions.

[6] The Appellant's core submission is that the warranty products and services it provides to customers are not "insurance" as defined under the *Insurance Act,* RSBC 2012 c 1 (the "*IA*"), or as contemplated under the *FIA* or its regulations, and accordingly it was not in breach of section 75 of the *FIA.* It asks that the Decision be set aside. Alternatively, the Appellant submits that the remedy provided for in the Decision was excessive and should be varied by the FST.

[7] The Superintendent submits that the Decision and remedy provided for therein were reasonable and the appeal should be dismissed. The Superintendent also seeks its costs on this appeal.

[8] As mandated by subsection 242.2(5) of the *FIA*, this appeal is based on the record that was before the Superintendent (the "Record") and on the written submissions of the parties. It is not a trial de novo. I note that the Appellant raised a preliminary issue in its written submissions concerning the completeness of the Record, which concerns were addressed by the FST and the parties prior to the

[1] As of November 01, 2019, FICOM was replaced by the BC Financial Services Authority. For the purposes of this appeal, because the events in question all took place before the change, I will continue to refer to the organization as FICOM.

close of written submissions. The FST has confirmed that the Record before it is complete as filed by the Superintendent.

BACKGROUND

[9] The Record reveals the following background facts.

[10] FICOM received a complaint in May 2017 alleging that the Appellant was selling vehicle warranty insurance products in BC without a business authorization. This led FICOM to conduct its own investigation.

[11] FICOM staff completed their investigation of the complaint and provided their investigation report together with supporting exhibits (the "Investigation Report") to the Superintendent. In the Investigation Report, FICOM staff advised that the Appellant was carrying on insurance business in BC without a business authorization to do so in breach of section 75 of the *FIA,* and that the activity was ongoing. Accordingly, the Investigation Report recommended that the Superintendent issue a cease and desist order against the Appellant under sections 238(1) and 244(2) of the *FIA*.

[12] In the Investigation Report, FICOM staff advised the Superintendent that if a hearing was to be held it would involve numerous witnesses, would be lengthy and in result would likely not be able to take place until at least six months hence. In considering the recommended order under section 244(2) of the *FIA,* the Superintendent also considered the delay inherent in holding a hearing and found that such delay in the circumstances would be detrimental to the due administration of the *FIA.* In result, the Superintendent proceeded to consider the Investigation Report without affording the Appellant an opportunity to be heard as provided for under section 238(1) of the *FIA* in such circumstances.

[13] The Appellant is a North Carolina company with offices in that US State. The Appellant is not registered to carry on business as a corporation in BC either federally or with the BC Registrar of Companies.

[14] The Appellant describes itself and its business in submissions as follows:

i. Since being founded in 2015 it has become the leading provider of used commercial truck limited warranties covering various, but not all, vehicle components. The vehicles covered are typically used for cross-country and international hauling. The warranties are stated as being subject to North Carolina law.

ii. The Appellant largely operates its business by partnering with used truck dealers who sell trucks that its warranties cover, which "authorized retailers" are primarily located in the US. The Appellant acknowledges the fact that it is aware of various truck dealers located in BC that offer its warranties for sale to their customers, but asserts these dealers are not its "agents".

iii. The Appellant also has a website www.trunorthwarranty.com. The website does not allow a visitor to enter into a contract or make a

purchase directly. The website does not mention BC and the Appellant has not targeted BC in any advertising.

iv. The Appellant provides its warranty-holders with coverage anywhere. Where repairs are covered, the Appellant pays the authorized repair facility directly for the repair cost for the covered components. From time to time a vehicle covered by one of its warranties will break down in BC resulting in the Appellant paying for covered repairs performed in the province.

[15] The Appellant has not been issued a business authorization under the *FIA* to conduct insurance business in BC.

[16] The Appellant is not licenced by the Insurance Council of BC to conduct insurance business in BC under the *FIA.*

[17] The Appellant is not authorized by the federal Office of the Superintendent of Financial Institutions, (which Office has jurisdiction over federally authorized insurers), to conduct insurance business in Canada as a federally authorized insurer.

[18] FICOM staff contacted the Appellant through its website on the premise that they were a small fleet transport operator interested in obtaining warranty coverage for engines and transmissions in its used trucks located in Vancouver BC. The Appellant's representative advised that it did not sell warranties out of its corporate office but that warranties were sold through dealerships and that a list of dealerships in BC would be provided, which dealerships would have all of the details including pricing information. The Appellant subsequently provided FICOM staff with a list of 24 dealerships located throughout BC that sold its warranty products.

[19] FICOM staff contacted a number of the dealerships from the list provided by the Appellant which dealerships confirmed that the Appellant's warranties could be purchased from them quoting prices ranging from $2,300 to $7,500 for warranties from 6 to 48 months duration.

[20] The Appellant's warranties, available for sale in BC through these dealerships, cover components including the engine, transmission and the differential, and include turbo packages and emissions packages. In order to be eligible for warranty coverage, the vehicle must be ten years old or newer and must have less than a maximum stated mileage on the odometer and engine control module.

[21] Two of the dealerships contacted by FICOM staff confirmed that a consumer did not have to purchase the warranty for a truck which was purchased from that dealership.

[22] The dealerships confirmed that an inspection of the truck to be covered would have to be completed before the warranty could be purchased.

[23] FICOM staff contacted the Appellant asking about the identity of the insurer or underwriter for the Appellant's warranties and were advised by the Appellant that it did not have an insurer or underwriter because it was not an insurance

company, explaining that it was a limited warranty company and it was the owner of the warranties.

[24] FICOM staff obtained copies of the Appellant's warranty agreements including its Superannuated Component Breakdown Limited Warranty Agreement ("Superannuated Agreement"), All-Inclusive Component Breakdown Limited Warranty Agreement ("All-Inclusive Agreement") and a 6 Month All-Inclusive Component Breakdown Limited Warranty Agreement ("6 Month All-Inclusive Agreement"), (together, the "Warranty Agreements").

[25] The Warranty Agreements contain the following terms:

a. The Warranty Agreements are uniform in policy wording; however, the coverage period length and the limits of liability differ.

b. The Appellant is described as a heavy truck warranty company based in North Carolina. The Appellant is referred to as "TruNorth" and is designated the Authorized Administrator of the Warranty Agreements, including claims.

c. Each Warranty Agreement states that "This is a Limited Warranty Agreement and is not subject to State Insurance Laws but is regulated by State Laws governing warranties. This warranty gives you specific legal rights and you may also have other rights which vary from state to state or province".

d. The Appellant undertakes to cover a specific vehicle, in the event of loss due to mechanical failure of a number of certain vehicle components listed in the terms of the agreements, to pay, for a specified period (months up to a maximum of kilometers) and up to a maximum dollar amount for certain mechanical components (e.g.$15,000USD per engine, $6,000USD per transmission) with a maximum aggregate dollar amount (e.g. $20,000USD).

e. Payment for parts and labor necessary to repair or replace the approved covered parts are paid directly by the Appellant to the authorized repair facility only.

f. The Warranty Agreements contain a provision for a towing reimbursement to the Customer up to a maximum (e.g. $350USD per occurrence and a limit of three occurrences).

g. The Warranty Agreements contain a deductible provision (e.g. $300USD), as well as a list of excluded coverages.

h. There is an option to have the coverage start immediately after the original equipment manufacturer warranty expires.

i. The Warranty Agreements are drafted to be signed by the "Customer" and the "Authorized Retailer".

j. The All-Inclusive Agreement and 6 Month All-Inclusive Agreement appear to be plans offered to Canadian residents as the "Customer Information" section requires a province and postal code to be provided.

k. Likewise, the "Retailer Information" section of the All-Inclusive Agreement and 6 Month All-Inclusive Agreement appears to refer to Canadian Retailers as it also requires a province and postal code to be provided together with the Retailer's "AR#".

l. The Superannuated Agreement appears to be a plan offered to residents of the US as the "Customer Information" and "Retailer Information" sections require a state and zip code to be provided.

ISSUES

[26] In its Notice of Appeal, the Appellant sets out a number of alleged errors of fact and/or law made by the Superintendent leading to the finding in the Decision that the Appellant was offering to sell vehicle warranty insurance in British Columbia contrary to the *FIA.* In its written submissions the Appellant further submits that the reasons for the Decision were not adequate. In alternative submissions, the Appellant submits that the remedy ordered by the Superintendent was excessive.

[27] For purposes of my analysis in this decision I have focused the issues from those set out in the Notice of Appeal and submissions of the parties as follows:

a. Were the Superintendent's findings of fact unreasonable?

b. Did the Superintendent err in finding that the Warranty Agreements are "insurance", in particular "vehicle warranty insurance" as defined under the *IA* and *FIA*?

c. Did the Superintendent err by failing to provide adequate reasons for the Decision?

d. Was the remedy ordered by the Superintendent unreasonable?

DISCUSSION AND ANALYSIS

Standard of Review

[28] The Appellant set out in the Notice of Appeal seven grounds of appeal, all submitting that the Superintendent erred in fact and/or law in finding that the Warranty Agreements were contracts of insurance.

[29] The Superintendent submits that the standard of review for questions of fact and law and mixed fact and law, where the law in question is that within the expertise of the Superintendent, should be reasonableness. Deference is inherent in the reasonableness standard.

[30] In reply, the Appellant submits that the Superintendent's Decision is only afforded deference, (and therefore a reasonableness standard of review), when making findings of fact and applying the correctly interpreted law to the facts. Deference is not owed to questions of law, which are reviewable on a correctness standard. The Appellant submits that the Decision failed to interpret or alternatively incorrectly interpreted the governing statutory authority. This is described as an

error of law which should be set aside on a correctness standard of review. The Appellant further submits that the reasons provided in the Decision were inadequate, alleging this is an error of law also reviewable on a correctness standard.

[31] On December 19, 2019, after the original period for making written submissions had closed in this appeal, the Supreme Court of Canada released its decision in *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 ("*Vavilov*"). In *Vavilov* the SCC explained that it was taking the opportunity to consider and clarify the law applicable to the judicial review of administrative decisions as addressed in *Dunsmuir v New Brunswick,* 2008 SCC 9 ("*Dunsmuir*") and subsequent decisions. The first aspect of the current framework that the SCC sought to clarify in *Vavilov* was the analysis for determining the standard of review (reasonableness or correctness) applicable to judicial review by a court of a given administrative decision. The second aspect the SCC sought to clarify was how to properly apply the reasonableness standard, including an explanation as to what the standard means and how it should be applied in practice.

[32] For context and for purposes of this appeal I quote two paragraphs from the majority reasons as briefly identifying the approach set out in *Vavilov* to determine the applicable standard of review where a court reviews the merits of an administrative decision by way of judicial review, and the different approach to be taken when the review is by way of statutory appeal.

[33] At the outset of its analysis, the SCC introduced its new approach to the standard of review framework to be applied by courts conducting judicial review of administrative decisions as follows [at para 10]:

> [10] This process has led us to conclude that a reconsideration of this Court's approach is necessary in order to bring greater coherence and predictability to this area of law. We have therefore adopted a revised framework for determining the standard of review where a court reviews the merits of an administrative decision. The analysis begins with a presumption that reasonableness is the applicable standard in all cases. Reviewing courts should derogate from this presumption only where required by a clear indication of legislative intent or by the rule of law.

[34] *Vavilov* gives extensive guidance on the proper application of this reasonableness standard, reference to relevant portions of which will be made later in this decision.

[35] The SCC also addressed the standard of review on a statutory appeal from an administrative decision to a court, as distinct from the reasonableness standard applicable on judicial review by a court of an administrative decision as follows [at para 37]:

> [37] It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative

> decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen*…. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see *Housen*, at paras. 10, 19 and 26-37. Of course, should a legislature intend that a different standard of review apply in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute.

[36] As a matter of procedural fairness, the FST in March 2020 invited submissions from each party to this appeal on whether and how the *Vavilov* decision affects the issue of the applicable standard of review in the present appeal. Both the Appellant and the Superintendent provided written submissions in response to this invitation.

[37] For purposes of this appeal, the Appellant submits that *Vavilov* did not change the applicable questions or categories for which the appropriate standard will be correctness. Specifically, the Appellant maintains the position that the alleged errors made in the Decision by failing to or incorrectly interpreting the statutory framework and the alleged failure to give adequate reasons were errors of law subject to a correctness standard of review.

[38] In its *Vavilov* submissions, the Superintendent observes that the focus of the SCC decision in *Vavilov* is clarification of the standard of review on judicial reviews from decisions of administrative tribunals to the court. *Vavilov* also distinguishes the standard of review applicable on statutory appeals of administrative decisions, from the standard of review applicable on judicial review.

[39] The Superintendent submits that *Vavilov* does not expressly address the standard of review to be applied by tribunals like the FST when conducting appeals of decisions made by other administrative decision-makers. Accordingly, the distinction on standards of review for the types of review conducted by a court as set out in *Vavilov* is not applicable to the type of inter-level administrative appeals which the FST decides.

[40] The Superintendent maintains its original submission that reasonableness is the applicable standard of review for all issues on this appeal. The FST has adopted a type of reasonableness standard, specifically guided by the jurisprudence on the standard of review on judicial review. In the circumstances, *Vavilov's* additional guidance on the application of the reasonableness standard, including questions of statutory interpretation, may provide some assistance to the FST in how it applies its version of the reasonableness standard in future appeals. However, just as the FST previously chose not to adopt all elements of the existing jurisprudence on standard of review, the SCC's decision does not require the FST to adopt all elements of the *Vavilov* approach, or to abandon its reliance on previous jurisprudence.

[41] In reply submissions on *Vavilov*, the Appellant agrees with the Superintendent's acknowledgment that the FST has set its own standard of review

and repeats its original submissions that the FST has consistently held that questions of law, (including interpretation of the decision-maker's home statutes), are reviewable on a correctness standard, which standard is applicable on this appeal.

[42] The Appellant further submits in its *Vavilov* reply, that if the FST does apply the reasonableness standard, (which the Appellant contends would be an error of law), then the FST must consider *Vavilov's* directives that require the reasonableness review to be robust and to set aside orders that only contain peremptory conclusions. Should the FST rely upon or seek guidance from *Vavilov* in rendering its decision and determine that the appropriate standard is reasonableness, the Appellant submits that, given the complete lack of analysis in the Decision, together with the Superintendent's failure to articulate any justification, interpretation or "reasoning process" for reaching the conclusion that it did, the Decision is unreasonable and should be set aside.

Questions of law

[43] The Superintendent submits that reasonableness is the standard of review to be applied by the FST to the Superintendent's interpretation of certain statutory definitions set out in the legislation and regulations, which definitions are material to the finding that the Appellant was offering to sell vehicle warranty insurance in British Columbia contrary to the *FIA.*

[44] The Superintendent refers to *Dunsmuir* for the proposition that on judicial review by the courts of the decisions of statutory decision makers, deference is built into the judicial review through the standard of review.

[45] The Superintendent then refers to subsequent decisions that have considered *Dunsmuir* and the standard of review to be applied by the courts on an appeal or judicial review of an administrative decision maker's interpretation of its home statute or closely connected statutes. These authorities include *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association,* 2011 SCC 61, ("*Alberta Teachers'*").

[46] In *Alberta Teachers* the Supreme Court of Canada stated [at para 34]:

> … the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

[47] As submitted by the Superintendent, this deference is grounded in a presumed expertise where a tribunal or other statutory decision maker has accumulated experience in a discrete and specialized context. Such statutory decision makers are presumed to hold expertise in the interpretation of the legislation that gives them their mandate.

[48] The Superintendent finds further support for this principle in the decisions of the Supreme Court of Canada in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 ("*Edmonton*") and *McLean v British Columbia (Securities Commission),* 2013 SCC 67, ("*McLean*").

[49] The position of Superintendent is established under section 207 of the *FIA.* The Superintendent submits that its statutory mandate includes safeguarding confidence and stability in BC's financial sector, and protection of consumers of financial services from loss and unfair market conduct by regulated entities.

[50] The Superintendent further submits, and the Appellant does not dispute, that the *IA,* the *FIA* and regulations under the *FIA* constitute the Superintendent's home statutes. I agree. I also agree, based on the above referenced authorities, that in relation to these home statutes the Superintendent is presumed to possess expertise based on accumulated experience and habitual familiarity with the legislative scheme.

[51] On my reading of *Dunsmuir, Alberta Teachers, Edmonton* and *McLean,* the deference afforded by the courts to the interpretation by statutory decision makers of their home statutes is rooted in the acknowledgement of both the legislative purpose in establishing specialized administrative decision making bodies, and the statute-specific "expertise" possessed by such administrative decision maker's that is not necessarily possessed by generalist courts.

[52] In *Vavilov,* the SCC addressed the question of deference afforded by the courts to decisions of specialized administrative decision-making bodies based on their "expertise" in part as follows [at paras 30 -31]:

> [30] While specialized expertise and these other rationales may all be reasons for a legislature to delegate decision-making authority, a reviewing court need not evaluate which of these rationales apply in the case of a particular decision maker in order to determine the standard of review. Instead, in our view, it is the *very fact* that the legislature has chosen to delegate authority which justifies a default position of reasonableness review. The Court has in fact recognized this basis for applying the reasonableness standard to administrative decisions in the past. In *Khosa*, for example, the majority understood *Dunsmuir* to stand for the proposition that "with or without a privative clause, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision-maker rather than to the courts": para. 25. More recently, in *Edmonton East*, Karakatsanis J. explained that a presumption of reasonableness review "respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts": para. 22. And in *CHRC*, Gascon J. explained that "the fact that the legislature has allocated authority to a decision maker other than the courts is itself an indication that the legislature intended deferential review": para. 50. In other words, respect for this institutional design choice and the democratic principle, as well as the need for courts to avoid "undue interference" with the administrative decision maker's discharge of its functions, is what justifies the presumptive application of the reasonableness standard: *Dunsmuir*, at para. 27.
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> [31] We wish to emphasize that because these reasons adopt a presumption of reasonableness as the starting point, expertise is no longer relevant to a determination of the standard of review as it was in the contextual analysis. However, we are not doing away with the role of expertise in administrative decision making. This consideration is simply folded into the new starting point and, as explained below, expertise remains a relevant consideration in conducting reasonableness review.

[53] While *Vavilov* sets out a new approach of presuming reasonableness of the administrative decision as the starting point on judicial review that discounts the previous "expertise" analysis, it acknowledges the role of expertise in administrative decision making and continues to consider expertise a relevant consideration in conducting reasonableness review. Curial deference remains at the heart of this presumption of reasonableness.

[54] In deciding whether deference should be afforded by the FST to the Superintendent's interpretation of statutory definitions set out in the *IA,* the *FIA* and regulations under the *FIA,* I must consider the statutory role and "expertise" of the FST relative to the Superintendent in the context of the interpretation of these statutes.

[55] The FST is established under section 242.1 of the *FIA.* The FST hears appeals from decisions made by the Insurance Council of British Columbia, the Real Estate Council of British Columbia, the Superintendent of Real Estate, the Superintendent of Pensions, the Registrar of Mortgage Brokers and the Superintendent of Financial Institutions under six specific statutes, including the *FIA.* The FST is currently made up of a Chair and three members, all of whom are lawyers.

[56] Under section 242.3(1) of the *FIA,* the FST has exclusive jurisdiction to:

> (a) inquire into, hear and determine all those matters and questions of fact and law arising or requiring determination, and
>
> (b) make any order permitted to be made.

[57] Section 242.3(2) of the *FIA* further provides that a decision of the FST on a matter in respect of which it has exclusive jurisdiction is final and conclusive and is not open to question or review in any court. However, FST decisions are subject to proceedings under the *Judicial Review Procedure Act*, RSBC 1996 c 241.

[58] Section 58(1) of the *Administrative Tribunals Act,* SBC 2004 c 45 (the "*ATA*") also applies to the FST and the judicial review of FST decisions by the courts. Sections 58(1) and (2) of the *ATA* state as follows:

> 58(1) If the Act under which the application arises contains or incorporates a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> > (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
> >
> > (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
> >
> > (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

[59] Accordingly, from this brief review of the statutory mandate of the FST it can clearly be stated that the FST possesses a statutorily acknowledged "expertise" and is accorded deference by the courts on judicial review over matters within its exclusive jurisdiction. This exclusive jurisdiction includes, as in this case, the subject matter of appeals under section 238(2)(b) of the *FIA* from decisions of the Superintendent.

[60] I find that the FST, as a specialized administrative appeal tribunal with statutorily acknowledged expertise, is presumed to possess its own expertise in the interpretation of its home and closely related statutes. The home and closely related statutes over which the FST possesses this presumed expertise include the *IA, FIA* and regulations under the *FIA* that were subject to interpretation by the Superintendent in reaching the Decision under appeal. As acknowledged by the courts in *Dunsmuir, Alberta Teachers, Edmonton* and *McLean,* this presumed expertise distinguishes specialized administrative tribunals from generalist courts.

[61] Both parties have referred to *Kia v Registrar of Mortgage Brokers,* Decision No. 2017-MBA-002(b) ("*Kia*") in which the standard of review by the FST for Registrar of Mortgage Brokers decisions was canvassed based on the specific issues raised in that appeal.

[62] In *Kia* the FST applied correctness as the standard of review to the Registrar of Mortgage Brokers' interpretation of certain provisions of the *Mortgage Brokers Act,* RSBC 1996, c 313, treating that interpretation as a question of law.

[63] In *Kia*, the FST made extensive reference to and placed reliance upon the decisions of Chair Strocel Q.C. of the FST in both *Hensel v Registrar of Mortgage Brokers,* Decision No. 2016-MBA-001(a) ("*Hensel*") and *Financial Institutions Commission v Insurance Council of BC et al,* Decision No. 2017-FIA-002(a)-008(a) ("*Bridge Tolls*") in relation to the standard of review to be applied by the FST.

[64] In *Hensel,* the Chair observed that the *FIA* does not prescribe a particular standard of review to govern FST appeals. However, he observed that the FST is protected by a privative clause and a legislated standard of review vis-à-vis the courts through section 242.3 of the *FIA* and section 58 of the *ATA,* both of which provisions I have referred to above. The Chair in *Hensel* then held as follows [at paras 15-18]:

> [15] Because the Tribunal is a specialized appeal tribunal and not a generalist court, it is appropriate to approach with a degree of caution those judicial authorities that, in recognition of the distinct institutional roles of courts of law and tribunals, have addressed the standard of review to be applied by generalist courts to specialized tribunals. I therefore respectfully differ from the Registrar when she submits that given the lack of statutory direction, the "starting point" in determining the standard of review to be applied by the Tribunal to the Registrar's decision is *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. In my view, the correct starting point is to recognize that when the legislature creates a statutory right of appeal, each right of appeal must be considered contextually, on its own terms and in view of its larger purposes. As noted in *British Columbia (Chicken Marketing Board) v. British Columbia (Marketing Board)*, 2002 BCCA 473 at para 15, the words ["may appeal"] do not have a fixed meaning and must be read having regard for the legislative scheme and for the purposes of the Act.

> [16] In the absence of a legislated standard of review, the Tribunal should not proceed by reflex as if it were a generalist court hearing a judicial review or appeal from a specialized first instance decision-maker. It would make little sense for the legislature to create a specialized administrative appeal tribunal to merely parrot a court. The legislature, by vesting the Tribunal with a strong privative clause, has made clear that the Tribunal, within its exclusive jurisdiction, is deemed to possess expertise that a generalist court does not have: *Administrative Tribunals Act*, section 58(1).
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> [17] In recognition of these principles, the Tribunal has developed its own appellate "standard of review" jurisprudence. It has held that the case for deference to a first instance regulator is most compelling where the first instance regulator has made findings of fact. Since the Tribunal, unlike the Commercial Appeals Commission it replaced, is required to hear appeals on the record rather than conduct hearings *de novo*, the Tribunal's decisions properly accord deference where an appeal takes issue with evidentiary findings and related assessments. The rationale for this deference is the same rationale appellate courts use in granting deference to factual findings of trial judges. As noted by this Tribunal in *Nguyen v. Registrar of Mortgage Brokers*, July 20, 2005, p.9. "Deference must be given to the findings of fact and the assessments of credibility made by the Registrar who actually experienced the hearing procedure, heard the witnesses, saw the documentary evidence and, combined with his experience and knowledge given his position as Registrar of Mortgage Brokers, was in the best position to make the findings of fact found in his decision.
>
> [18] On the other hand, where the first instance regulator has made a finding of law, the Tribunal has generally held that deference is not required. Indeed, just as our court system proceeds based on the institutional premise that an appeal judge knows as much about the law as does a trial judge, the Tribunal is also entitled to proceed on the premise that the legislature intended that the specialized Tribunal would correct legal errors made by the first instance regulator. I note that the British Columbia Court of Appeal has considered this position to be a reasonable one in *Westergaard v British Columbia (Registrar of Mortgage Brokers)*, 2011 BCCA 344.

[65] In *Bridge Tolls* the standard of review to be applied by the FST on penalty appeals was considered in depth. In conducting his analysis, the Chair, as he did in *Hensel*, held that the FST, as a specialized appeal tribunal, has established its own standard of review of first instance decisions reflecting the fundamental distinction between generalist courts and specialized appeal tribunals and concluded as follows [at para 63]:

> [63] Unless the legislature expressly prescribes the standard of review the tribunal must apply, the relevant question for an appeal tribunal is not "what would a court do?" but "what standard of review would be most consistent with the legislature's intent in creating the tribunal given its purpose and the larger purposes of the statute?" There is and should be no starting assumption that *Dunsmuir* applies.

[66] While the FST is not bound by its prior decisions, it is certainly desirable to strive for consistency wherever it can rightly be found. The Chair in *Hensel* and

Bridge Tolls made it clear that it is sensible for the FST to adopt a consistent approach to the standard of review applied in all appeals within its jurisdiction. I agree.

[67] I agree with and adopt the above quoted analysis and conclusions by the Chair in *Hensel* and *Bridge Tolls* in relation to the applicable standard of review on this appeal.

[68] I also find that the quoted analysis and conclusions in *Hensel* and *Bridge Tolls* remain sound and continue to apply in the post *Vavilov* legal landscape. There is and should be no starting assumption that *Vavilov* dictates the framework for determining the standard of review to be applied by the FST when conducting an appeal of an administrative decision within its statutory mandate.

[69] The FST's jurisprudence is consistent insofar as appeals from questions of law are concerned in applying correctness as the standard of review. I find that this approach is reinforced by *Vavilov* insofar as it holds [at para 37] that judicial statutory appeals from administrative decisions will review for correctness on questions of law.

[70] Accordingly, and further given my findings as to the presumed expertise and statutory mandate of the FST, I find that deference is not owed by the FST on this appeal to the Superintendent's interpretation of the *IA,* the *FIA* or regulations under the *FIA* or on questions of law generally. As pointed out in *Hensel,* just as our court system proceeds based on the institutional premise that an appeal judge knows as much about the law as does a trial judge, the FST is also entitled to proceed on the premise that the legislature intended that it would correct legal errors made by the first instance regulator. I will apply correctness as the standard of review on this issue.

[71] Before leaving this issue, I acknowledge the reference to and reliance placed by the Superintendent in submissions upon the FST decision in *Brewers' Distributor Ltd. v Brewery, Winery & Distillery Workers' Union, Local 300,* 2010 PBA-001 (December 10, 2010) ("*Brewers' Distributor*"). In *Brewers' Distributor,* the FST was hearing an appeal from a decision of the Superintendent of Pensions made under the *Pension Benefits Standards Act,* RSBC 1996, c. 342 (the "*PBSA*"). The decision under appeal involved the interpretation by the Superintendent of Pensions of provisions of the *PBSA* and *PBSA* regulations. The standard of review applied was reasonableness based on the presumed expertise of the Superintendent of Pensions and in reliance upon *Dunsmuir.* In the course of his analysis the Panel stated [at para 25]:

> [25] The present proceeding of course is not a judicial review *per se* but rather an appeal to a separate administrative tribunal. The Appellant has not objected to Staff's attempt to apply the reasoning of *Dunsmuir*, on that basis or otherwise and, in any event, I would see no reason to conclude other than that the judgment in *Dunsmuir* is instructive in a matter such as this. The FST is a body entirely independent of the Superintendent of Pensions and there is no reason in principle why the general considerations set out in *Dunsmuir* should not be applicable here.

[72] With all due respect to the decision of the Panel in *Brewers' Distributor,* he did not have the benefit of the analysis of the Chair in either *Hensel* or *Bridge Tolls,* both of which decisions post-date *Brewers' Distributor.* I have found that there are indeed reasons in principle why the standard of review framework set out in *Dunsmuir* or the revised framework for determining the standard of review where a court reviews the merits of an administrative decision set out in *Vavilov* should not be applicable to the FST's review of the Superintendent's interpretation of the *IA,* the *FIA* or regulations under the *FIA*. In any event, I decline to apply *Brewers' Distributor*.

Questions of mixed fact and law

[73] Questions of mixed fact and law involve the application of a legal standard to a set of facts.

[74] The Notice of Appeal filed by the Appellant alleges numerous errors of "fact and/or law". Certain findings of the Superintendent in the Decision should be characterized as involving issues of mixed fact and law requiring the standard of review for such issues to be addressed.

[75] The Appellant does not clearly draw a distinction between issues of law from issues of mixed fact and law and maintains correctness is the standard of review on all issues on this appeal other than "findings of fact and applying the correctly interpreted law to the facts". The Superintendent argues that reasonableness is the standard for all issues.

[76] The FST has considered the standard of review applicable to issues of mixed fact and law in *Robert Bruce Schoen v Real Estate Council of BC and Superintendent of Real Estate,* Decision no. 2017-RSA-002(b) ("*Schoen*"), finding [at para 34]:

> [34] With respect to the issues in this appeal which can best be characterized as issues of mixed fact and law, I have decided that the appropriate standard of review is reasonableness. Although the standard of review for issues of mixed fact and law may vary based on the particular context of each case, the more fact-intensive and the less law-focussed the issues are, the more deference this Tribunal should give to the original decision-maker…

[77] In *Vavilov* [at para 37], in referring to the standard of review on statutory appeals to courts from administrative decisions, the leading decision of the SCC in *Housen v Nikolaisen,* 2002 SCC 33 ("*Housen*") was applied which sets out a correctness standard of review for questions of law, including statutory interpretation, and a review standard of "palpable and overriding error" on questions of fact as well as for mixed fact and law where the legal principle is not readily extricable.

[78] Having considered both *Schoen* and *Housen*, as a matter of consistency I will apply the FST decision in *Schoen* quoted above in reviewing questions of mixed fact and law on this appeal. The more fact-intensive and the less law-focussed a particular issue on this appeal is, the more deference I will give to the original decision-maker in applying a reasonableness standard of review. The converse will apply where a particular issue is less fact-intensive and more law-focussed. As

contemplated in *Vavilov* such reasonableness review will take account of the context.

Questions of fact and discretion including remedy

[79] As was done in *Kia,* and consistent with previous decisions of the FST, reasonableness will be the standard of review applicable to questions of fact and discretion, including the exercise by the Superintendent of his discretion in formulating the remedy in the Decision under section 244 of the *FIA.* Deference will be accorded to the Superintendent's findings of this nature.

Reasonableness review post Vavilov

[80] The *FIA* does not mandate a standard of reasonableness for the FST for issues of fact or discretion – the FST has adopted that standard itself.

[81] I have found above that the FST has developed its own appellate standard of review jurisprudence and there is and should be no starting assumption that *Vavilov* dictates the framework for determining the standard of review to be applied by the FST when conducting an appeal of an administrative decision within its statutory mandate.

[82] However, the FST must strive to conduct its appeal processes in a manner consistent with applicable judicial authority. This is particularly so when the SCC expressly provides guidance to provide greater coherence and predictability, as was the stated intention of the majority decision in *Vavilov.*

[83] When the FST applies a reasonableness standard of review it should, as much as practicable and within the context of its statutory appeal framework, apply a reasonableness standard that accords with the guidance provided to the courts by the SCC on this matter in *Vavilov.*

[84] *Vavilov* provides that the proper application of the reasonableness standard is concerned with the decision-making process and its outcomes. The SCC held as follows [at paras 82-83]:

> B*. Reasonableness Review Is Concerned With the Decision-making Process and Its Outcomes*
>
> [82] Reasonableness review aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law…
>
> [83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to review, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General),* 2015 FCA 117,

> 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

[85] In applying a reasonableness standard of review, the FST should take into account the guidance from *Vavilov*. Being so guided, when conducting reasonableness review the FST should focus on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. When applying the reasonableness standard the FST should not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. Instead, the FST should consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable. This is the approach that will be taken in applying the reasonableness standard of review on this appeal.

[86] In *Vavilov* the SCC described reasonableness as a single standard that accounts for context finding as follows [at paras 88 – 90]:

> C. *Reasonableness Is a Single Standard That Accounts for Context*
>
> [88] In any attempt to develop a coherent and unified approach to judicial review, the sheer variety of decisions and decision makers that such an approach must account for poses an inescapable challenge. The administrative decision makers whose decisions may be subject to judicial review include specialized tribunals exercising adjudicative functions, independent regulatory bodies, ministers, front-line decision makers, and more. Their decisions vary in complexity and importance, ranging from the routine to the life-altering. These include matters of "high policy" on the one hand and "pure law" on the other. Such decisions will sometimes involve complex technical considerations. At other times, common sense and ordinary logic will suffice.
>
> [89] Despite this diversity, reasonableness remains a single standard, and elements of a decision's context do not modulate the standard or the degree of scrutiny by the reviewing court. Instead, the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case. This is what it means to say that "[r]easonableness is a single standard that takes its colour from the context"…
>
> [90] The approach to reasonableness review that we articulate in these reasons accounts for the diversity of administrative decision making by recognizing that what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt. The fact that the contextual constraints operating on an administrative decision maker

> may vary from one decision to another does not pose a problem for the reasonableness standard, because each decision must be both justified by the administrative body and evaluated by reviewing courts in relation to its own particular context.

[87] In light of the *Vavilov* analysis of reasonableness as a single standard that accounts for context, I refer to the pre *Vavilov* decision of the FST in *Bridge Tolls.* In *Bridge Tolls* the FST held that it should apply a modified and more robust reasonableness test to questions of penalty [at paras 68-78]. In subsequent decisions of the FST relying on *Bridge Tolls,* including *Kia,* the *Bridge Tolls* test has been referred to as a "less deferential reasonableness standard of review" or as a "modified" reasonableness test. These descriptors were not used in *Bridge Tolls* itself. Guided by *Vavilov,* the *Bridge Tolls* approach to assessing reasonableness on penalty appeals to the FST should more accurately 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 (for all the reasons set out in that decision) as being the approach that best suits the administrative context when the FST is reviewing penalty decisions.

Issue a. Were the Superintendent's findings of fact unreasonable?

[88] I will apply a reasonableness standard of review to the Superintendent's findings of fact.

[89] As a starting point I quote for context the relevant portion of section 75 of the *FIA* that the Superintendent found the Appellant to be in breach of. It reads:

> *Unauthorized insurance business prohibited*
>
> 75 A person must not carry on insurance business in British Columbia unless the person is
>
> (a) an insurance company or extraprovincial insurance corporation that has a business authorization to carry on insurance business,

[90] The finding that the Appellant had not been issued a business authorization as required under section 75 of the *FIA* to conduct insurance business in BC is not in dispute.

[91] The Appellant does challenge certain factual findings in the Decision underpinning the ultimate finding in the Decision that the Appellant's activities constituted carrying on insurance business in BC for purposes of section 75 of the *FIA.*

[92] In the Decision the Superintendent made the following findings [at paras 41 and 43-44]:

> [41] Based on the terms of the Warranty Agreements, the TruNorth Warranty website, and the corporate searches, I find that the Warranty Agreements are offered and issued by TruNorth Warranty Plans of North America, LLC which does business under the name TruNorth Warranty in British Columbia.

> …
>
> [43] I find that TruNorth Warranty is offering to undertake to insure British Columbia residents and soliciting for sale vehicle warranty insurance without the necessary authorization to do so.
>
> [44] I also find that TruNorth Warranty is enlisting British Columbia motor vehicle dealers and their employees to act as sales agents and/or sales persons on its behalf. …

[93] In addition to submitting that its Warranty Agreements are not "insurance', the Appellant submits that it does not actively market its products and services in BC through its website or otherwise which puts in issue findings of fact embedded in the quoted findings from the Decision.

[94] The Appellant submits that the BC based motor vehicle dealers that are offering its Warranty Agreements for sale in BC are not its agents, and by implication that the Appellant is not responsible for their activities. In particular, the Appellant submits that:

> While TruNorth is aware of various dealers in British Columbia who – regardless of the fact that TruNorth's relationship with the dealer was originally formed in the U.S. – offer TruNorth limited warranties to their customers, these dealers are not TruNorth's agents. The dealers act with complete autonomy as to the price at which they sell TruNorth's warranties; they are not paid by TruNorth; and TruNorth does not have any means of controlling the dealers' activities. Moreover, TruNorth does not require dealers to report if the dealer begins selling TruNorth warranties in new regions or territories.

[95] I find that the record discloses a significant body of evidence in support of the Superintendent's findings that the Appellant was offering and issuing its Warranty Agreements in BC and that BC based motor vehicle dealers were acting as its sales agents in that regard, including the following:

i. The Appellant's representative advised FICOM staff that its warranties were sold through dealerships and that a list of dealerships in BC would be provided, which dealerships would have all of the details including pricing information. The Appellant subsequently provided FICOM staff with a list of 24 dealerships located throughout BC that sold its warranty products.

ii. Dealerships in BC contacted by FICOM staff confirmed that the Warranty Agreements could be purchased through them covering used trucks located and operating in BC.

iii. The terms of the Warranty Agreements themselves, in particular the All-Inclusive Agreement and 6 Month All-Inclusive Agreement obtained from BC dealerships, are consistent with the finding that these dealerships were acting as authorized representatives of the Appellant in relation to the Warranty Agreements. The "Retailer Information"

section of the All-Inclusive Agreement and 6 Month All-Inclusive Agreement appears to refer to Canadian Retailers as it requires a province and postal code to be provided together with the Retailer's "AR#".

iv. The All-Inclusive Agreement and 6 Month All-Inclusive Agreement appear to be plans offered to Canadian residents, (which would include BC residents), as the "Customer Information" section requires a province and postal code to be provided.

[96] I find that both the rationale for and the Superintendent's finding of fact that the Appellant was offering and soliciting for sale its Warranty Agreements in BC through enlisting BC motor vehicle dealers and their employees to act as sales agents and/or salespersons on its behalf was reasonable and justifiable on the evidence before him.

[97] I cannot find that any of the Superintendent's findings of fact in the Decision were unreasonable.

Issue b. Did the Superintendent err in finding that the Warranty Agreements are "insurance", in particular "vehicle warranty insurance" as defined under the *IA* and *FIA*?

[98] The core issues on this appeal are whether the Warranty Agreements are "insurance", in particular "vehicle warranty insurance" as those terms are defined in the *IA* or the *FIA* and regulations, such that the Appellant's actions constituted carrying on "insurance business" in BC without the requisite business authorization to do so. The Appellant's fundamental argument is that they are not.

[99] A review of the Record shows that the Superintendent reviewed evidence including copies of the Warranty Agreements and supporting documentation, website content, emails and transcripts of conversations with representatives of the Appellant and dealerships as well as the Investigation Report.

[100] The Superintendent in the Decision explicitly considered the relevant statutory provisions and held that the Warranty Agreements were contracts of "insurance" in British Columbia, in particular contracts for "vehicle warranty insurance", as set out in the *FIA* and *IA,* and accordingly that this activity was not in compliance with the *FIA*.

[101] While I find that interpretation by the Superintendent of his home statutes, including the definitions of "insurance", "vehicle warranty insurance" and "insurance business" engage questions of law and a correctness standard of review, I find that the application by the Superintendent of those legal standards to the set of facts before him, being the actual terms of the Warranty Agreements, engage issues of mixed fact and law subject to a reasonableness standard of review.

[102] In the Decision, the Superintendent considered the actual terms of the Warranty Agreements and applied those facts to the statutory definitions (being therefore a question of mixed fact and law) and found as follows, [at para 42]:

> [42] Based on the terms of the Warranty Agreements, I find they are contracts of insurance in British Columbia, in particular contracts for vehicle warranty insurance, as set out in the Act and the *Insurance Act*, for the following reasons:
>
> a. TruNorth Warranty undertakes to cover a specific vehicle, in the event of loss or damages to the vehicle due to mechanical failure of a number of certain vehicle components listed in the terms of the agreements, to pay, for a specified period (months up to a maximum of kilometres) and up to a maximum dollar amount for certain mechanical components (e.g. $15,000USD per engine, $6,000USD per transmission) with a maximum aggregate dollar amount (e.g. $20,000USD) after the motor vehicle is purchased.
>
> b. The warranties contain a provision for a towing reimbursement up to a maximum (e.g. $350 per occurrence and a limit of three occurrences) incurred by reason of loss incurred due to mechanical failure of a motor vehicle.
>
> c. The warranties contain terms which are other hallmarks of insurance:
>
> i. A deductible provision (e.g. $300USD), as well as a list of excluded coverages;
>
> ii. Excluded coverages provisions;
>
> iii. Information on making claims and contact information as to who administers claims; and
>
> iv. There is a separate and distinct charge for the warranty coverage.
>
> d. A distinct hallmark of third-party vehicle warranty coverage is the fact that there is an option to have the coverage start immediately after the original equipment manufacturer warranty expires.

[103] In the Decision, the Superintendent set out the statutory provisions relevant to this finding [at paras 29-35].

[104] Section 1 of the *FIA* defines “contract of insurance” to have the same meaning as “contract” in the *IA.* Section 1 of the *IA* defines “contract” as follows:

> "contract" means a contract of insurance and includes a policy, certificate, interim receipt, renewal receipt or writing evidencing the contract, whether sealed or not, and a binding oral agreement;

[105] Section 1 of the *IA* also defines the term “insurance”. By operation of section 2(1) of the *IA* the *IA* definition of “insurance” applies to every contract of insurance made or deemed made in BC. The definition reads as follows:

> "insurance" means the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value on the happening of a certain event;

[106] The definition of “vehicle warranty insurance” is set out in the *Classes of Insurance Regulation,* BC Reg 204/2011 (the “*Classes of Insurance Regulation*”) made under the *FIA.* This regulation defines some 20 different classes of insurance

for purposes of the *FIA.* This includes the class of “vehicle warranty insurance” defined in section 1 therein as follows:

> "vehicle warranty insurance" means insurance, not being insurance included in or incidental to automobile insurance, under which the insurer undertakes, in the event of loss of, or damage to, a motor vehicle arising from mechanical failure, to pay, for a specified period after the motor vehicle is purchased,
>
> (a) the cost of repairing or replacing the motor vehicle,
> (b) towing fees,
> (c) the cost of renting a substitute motor vehicle, or
> (d) the cost of accommodation required because of the mechanical failure.

[107] As section 75 of the *FIA* prohibits the carrying on of “insurance business” in BC in the absence of a business authorization to do so, the definition of that term set out in section 1 of the *FIA* was considered by the Superintendent. It reads in part as follows:

> "insurance business" means
>
> (a)undertaking or offering to undertake to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed,
> (b)soliciting or accepting any risk,
> (c)soliciting an application for a contract of insurance…

[108] The reasons given in the Decision at paragraph 42(a) (quoted above) for the Superintendent’s finding that the Warranty Agreements were contracts of vehicle warranty insurance clearly show that the Superintendent was applying the statutory definitions when considering the terms of the Warranty Agreements. I find that the language used by the Superintendent in para 42(a) is consistent with the language of the statutory definitions of both "insurance" and "vehicle warranty insurance". The finding that the Warranty Agreements include an undertaking to pay a sum of money in the event described is consistent with the statutory definition of “insurance”. More significantly, the specific language used very closely tracks the language of the definition of "vehicle warranty insurance".

[109] Likewise, the reasons given in the Decision at paragraph 42(b) (quoted above) for the Superintendent’s finding that the Warranty Agreements were contracts of vehicle warranty insurance referring to the provision for a towing reimbursement clearly contemplates the specific provision of the definition of "vehicle warranty insurance" covering towing fees.

[110] In its Notice of Appeal the Appellant alleges that the Superintendent erred in fact and/or law when finding that the Warranty Agreements contained “hallmarks of insurance” as referred to in paragraphs 42 (c) and (d) quoted above.

[111] While no definition of the term “hallmarks” is provided in the Decision, I will apply the ordinary meaning of that term, as used by the Superintendent in context, as referring to standard attributes or standard terms of insurance contracts. No contrary meaning has been advanced by the Appellant.

[112] I have already held in relation to the Superintendent's home statutes that the Superintendent is presumed to possess expertise based on accumulated experience and habitual familiarity with the legislative scheme. I further find that the Superintendent, through the exercise of his statutory mandate, would reasonably become familiar with the standard attributes or standard terms of insurance through dealing with contracts of insurance on a regular basis, and that his findings in that regard should be afforded deference on this appeal.

[113] I observe that the Appellant does not advance a substantive argument that terms such as deductibles, excluded coverages, etc as identified by the Superintendent at paragraphs 42(c) and (d) as hallmarks of insurance are not standard terms found in insurance contracts.

[114] The Superintendent's finding that the referenced terms of the Warranty Agreements constituted hallmarks of insurance was reasonable.

[115] Having considered the reasons given by the Superintendent (including those at para 42) in light of the relevant statutory definitions, I cannot find it was unreasonable for the Superintendent to find, as he did, that the Warranty Agreements are contracts of insurance in British Columbia, in particular contracts for vehicle warranty insurance, as set out in the *FIA* and the *IA.*

[116] The Appellant advances numerous legal interpretation arguments in support of its position that the Warranty Agreements are not "insurance" as defined in the *IA* that will now be addressed.

Is Indemnification required?

[117] The Appellant submits that the *IA* definition of "insurance" requires indemnification and asserts further that as a matter of law, a contract must provide for indemnification to be considered insurance. The Appellant submits that the Warranty Agreements do not provide for indemnification and accordingly the Superintendent erred in law in finding the Warranty Agreements to be "contracts of insurance". I will apply a correctness standard to my review of this question of law.

[118] I point out at the outset that we are addressing the interpretation of a statutory definition of "insurance" on this appeal and not insurance contract law generally.

[119] The definition of "insurance" in the *IA* states that ""insurance" means the undertaking by one person "**to indemnify another person against loss or liability for loss**" followed by the phrase "in respect of a certain risk or peril to which the object of the insurance may be exposed," and concluding with the phrase "**or to pay a sum of money or other thing of value on the happening of a certain event;**" (highlighting added for emphasis)

[120] The Appellant's submissions completely ignore the concluding phrase of the definition of "insurance". The concluding phrase begins with "or". On a straightforward reading, I interpret the definition of "insurance" more broadly to cover both an undertaking to indemnify as well as a separate and alternative undertaking to pay a sum of money or other thing of value on the happening of a certain event.

[121] A broad interpretation of the definition of "insurance" in the *IA* is consistent with its purpose. The definition is applicable to at least 20 different classes of insurance defined in the *Classes of Insurance Regulation*, including, for example "life insurance", which, according to C. Brown, *Insurance Law in Canada*[2] ("*Brown*") referenced by the Appellant, is not indemnity insurance.

[122] Accordingly, I find that the definition of "insurance" in the *IA* does not "require" indemnification as submitted by the Appellant.

[123] The Superintendent held that the Warranty Agreements included an undertaking by the Appellant to pay a sum of money in the event of loss or damage to the covered vehicle due to mechanical failure, as a reason for his finding that the Warranty Agreements were contracts for vehicle warranty insurance. This finding is in accord with the definition of "insurance" including an undertaking to "pay a sum of money or other thing of value on the happening of a certain event" and with the definition of "vehicle warranty insurance" that also requires an undertaking to "pay" the listed costs.

Meaning of "indemnify" as used in the definition of "insurance"

[124] In the Decision, the Superintendent made no specific finding that the Warranty Agreements included an undertaking by the Appellant to "indemnify against a loss or liability for loss". However, as dealt with above, the Appellant submits that indemnification is required by the definition. While I have not accepted the Appellant's submissions in this regard, both parties have made substantive submissions on the meaning of "indemnify" as used in the definition of "insurance" in the IA. In the event that I am incorrect in the above finding, and indemnification is required as submitted by the Appellant, I have chosen to address these further submissions of the parties on the meaning of "indemnify" as used in the definition of "insurance". This is a question of law.

[125] The Appellant submits that under the Warranty Agreements, the holder is not indemnified or otherwise paid. Instead, the Warranty Agreements state that "Claims are paid directly to the repair facility only". The Appellant refers to a definition of "indemnify" in *Black's Law Dictionary* as being, "to reimburse (another) for a loss suffered", and argues that reimbursement does not occur under the Warranty Agreements. In essence, the Appellant submits that to "indemnify" requires reimbursement to the Customer.

[126] While the Appellant is correct in referencing the provision of the Warranty Agreements stating that payment for the cost of repairs is to be made to the repair facility only, I note the Appellant ignores the express provision of the Warranty Agreements providing for a towing reimbursement to the Customer up to a maximum (e.g. $350USD per occurrence and a limit of three occurrences). The inclusion in the Warranty Agreements of the towing reimbursement undermines the factual foundation for the Appellant's submissions on this issue.

[127] As to the meaning of "indemnify" as used in the definition of "insurance", the Superintendent submits that by paying the costs of repair or replacement, which

[2] Brown, Craig. *Insurance Law in Canada*, vol. 1. Scarborough: Carswell, 1999 (loose-leaf).

would otherwise be borne by the consumer, by necessity indemnifies the Customer from those costs.

[128] In the Decision, the Superintendent referred to *Re Bridgepoint Indemnity Company (Canada) Inc.,* Order of the Superintendent dated June 30, 2016 ("*Bridgepoint*"). In *Bridgepoint* the Superintendent considered the meaning of "indemnify" as used in the definition of "insurance" under the *IA,* which analysis I have found to be of assistance on this issue [at paras 27-29]:

> [27] The *Act* definition of "insurance business" and the *Insurance Act* definition of "insurance" both refer to a party agreeing to indemnify another against loss or liability for loss. BICO itself refers to its product as an "indemnity" throughout the LCP contract.
>
> [28] Common usage and legal usage definitions are very similar. The *Oxford English Dictionary,* online edition, defines "indemnity" and "indemnify" as:
>
> *indemnity:*
> 1. *Security or protection against contingent hurt, damages, or loss; safety;*
> 2. *…*
> 3. *a. Compensation for loss or damage incurred; indemnification;*
> *b. a sum paid by way of compensation.*
>
> *indemnify;*
> 1. *To preserve, protect, or keep free from, secure against (any hurt, harm, or loss). to give an indemnity to;*
> 2. *a. To compensate (a person, etc.) for loss suffered, expenses incurred, etc.*
>
> [29] The *Dictionary of Canadian Law,* Third Edition has definitions of indemnify, indemnity, and indemnity insurance, all of which speak to obligations to protect from loss by way of repayment or otherwise making the person who is indemnified whole. The dictionary cites from *Arklie v Haskall* (1986), 33 D.L.R. (4th) 458, in which the British Columbia Court of Appeal states "…The concept of indemnity has central to it the idea of compensation, of making good, or paying moneys to a person, to reimburse them for losses sustained…".

[129] No statutory definition of "indemnify" is set out in the *IA*, the *FIA* or the regulations. As a matter of statutory interpretation, I start from the ordinary meaning of the term as used in the context of the specific statutory provision in question in order to find the meaning of the term intended by the legislature in drafting the definition of "insurance" in the *IA.*

[130] I repeat the phrase in question from the definition: "to indemnify another person against loss or liability for loss"**.**

[131] Considering the ordinary meaning of the term "indemnify" as used in the context of the above quoted phrase, I find that the intended meaning of "indemnify" is broader than submitted by the Appellant. It not only contemplates a person being indemnified against "loss" suffered as set out in the *Black's Law Dictionary* definition relied upon by the Appellant, which would involve reimbursement, it also contemplates a person being indemnified against "liability for loss", which I find does not contemplate reimbursement as a requirement.

[132] I find support for my interpretation from the broader definitions of "indemnify" quoted above [in *Bridgepoint*] from the *Oxford English Dictionary*: "To preserve, protect, or keep free from, secure against (any hurt, harm, or loss)", and from the *Dictionary of Canadian Law* definitions which speak to obligations to protect from loss by way of repayment or otherwise making whole the indemnified person.

[133] I find that this broader interpretation is also consistent with the overarching public protection objectives of both the *IA* and *FIA***.** A more restrictive definition of "indemnify", as advocated for by the Appellant, would compromise this public protection objective by exempting products that do not provide for reimbursement to the Customer from the regulatory control to which insurance is subject in the province of BC.

Fortuity as an implied requirement under the definition of "insurance" in the IA

[134] The Appellant refers to *Brown* in support of the proposition that fortuity is a key distinguishing principle of insurance law. The Appellant then submits that because the Warranty Agreements do not expressly exclude coverage of repairs caused or contributed to by "normal wear and tear" that fortuity of a certain risk or peril is not at play and therefore the Warranty Agreements are not "insurance" as defined under the *IA.* The Appellant submits that for this reason the Decision was in error. This is a question of law reviewable on a correctness standard.

[135] The Appellant quotes from *Brown* as follows:

> As we have seen, insurance only works if the losses it covers occur randomly; if they are fortuitous. The assumptions on which insurance is based are undermined if successful claims arise out of loss which is not fortuitous. To address this, the rules pertaining to the interpretation of insurance contracts include two presumptions. Unless the words are very clear that the contrary is intended, contracts are presumed to provide cover neither for loss that is certain to occur, such as normal wear and tear, nor for loss that is deliberately caused by a person who will benefit from the insurance. Accordingly, a murderer cannot recover under insurance on the life of his/her victim, and an arsonist who burns down his/her own house cannot collect fire insurance.

[136] I cannot read this quoted extract from *Brown* as support for the Appellant's submission. The quotation refers to two presumptions in the rules pertaining to the interpretation of insurance contracts – including that "Unless the words are very clear that the contrary is intended, contracts are presumed to provide cover neither for loss that is certain to occur, such as normal wear and tear…".

[137] This appeal engages the interpretation of the statutory definition of "insurance" under the *IA* and whether the Warranty Agreements fall under that definition for purposes of the regulatory regime covering insurance in BC. It is not an issue on this appeal as to whether the coverage provisions of the Warranty Agreements could be interpreted by the courts as not covering a loss caused by normal wear and tear in the event of a dispute between a Customer and TruNorth over a specific claim for coverage.

[138] Likewise, I find the decision of the Supreme Court of Canada in *Non-Marine Underwriters, Lloyd's of London v Scalera,* 2000 SCC 24 ("*Scalera*"), referred to by the Appellant to be of no relevance to the issues on this appeal. In *Scalera* the Supreme Court of Canada was engaged in the interpretation of a provision of a homeowner insurance policy which excluded coverage for defence of claims for injuries caused by intentional actions by the insured.

[139] *Scalera* is clearly distinguishable on the facts and the reference therein to *Brown* and the underlying economic rationale for insurance does not support the Appellant's submission that the Warranty Agreements are not "insurance" as defined in the *IA.* As found by the Superintendent in the Decision, the warranties offered by the Appellant are expensive with a quoted price range of $2,300 to $7,500 for warranties from 6 to 48 months. There is nothing in the record on this appeal to suggest that the coverage provided by the Warranty Agreements would not make economic sense from the Appellant's perspective.

[140] The Superintendent submits that mechanical breakdown and the consequential costs of that breakdown is a fortuitous event. The Superintendent further submits that the coverage under the Warranty Agreements does not take them outside the bounds of insurance. I agree.

[141] Support for the proposition that the Warranty Agreements have an element of fortuity to them, even if reasonable wear and tear is covered, can be found by analogy to life insurance as described in the extracts from *Brown* provided by the Appellant on this appeal. In particular, I quote from 1.1 The Nature of Insurance in *Brown*:

> …Life insurance is also based on the random occurrence of events but in a slightly different way. Although everyone whose life is insured is certain to die, each death is still random in its timing. The premiums for insuring a life are calculated on the basis of its expected duration. Whether an individual life exceeds this expectation or falls short of it is fortuitous.

In the case of the mechanical failure of components covered by the Warranty Agreements, the timing of such a failure, whether caused by reasonable wear and tear or not, is random such that whether it occurs within the coverage period is a fortuitous event. The likelihood of a claim arising within the coverage period would logically have been considered by the Appellant and priced into the premiums charged.

[142] If the Appellant is correct in submitting that fortuity is a requirement for the Warranty Agreements to be "insurance" as defined in the IA, I find that the requisite fortuity is present.

[143] I cannot find that the Decision was incorrect for this reason as alleged by the Appellant.

Do the Warranty Agreements provide coverage "arising from" mechanical failure as required by the definition of "vehicle warranty insurance"?

[144] The Appellant submits that while the definition of "vehicle warranty insurance" refers to an undertaking to pay in the event of loss of, or damage to, a

motor vehicle "arising from" mechanical failure, the Warranty Agreements only cover the events "leading to" the mechanical failure. In particular, the Appellant submits: "[t]hat is, while TruNorth covers the broken or failed components, its warranties specifically exclude "increased damages caused by the continued operation" and "incidental or consequential damages … resulting from a breakdown."

[145] In result, the Appellant submits the Superintendent's finding that the Warranty Agreements were contracts of "vehicle warranty insurance" was in error. This alleged error relates to the Superintendent's application of the facts to the statutory definition and is in result an issue of mixed fact and law reviewable on a reasonableness standard.

[146] I find this argument of the Appellant to lack merit. The Appellant's submission ignores the specified categories of payments "arising from" mechanical breakdown listed in the definition of "vehicle warranty insurance" as including:

> (a) the cost of repairing or replacing the motor vehicle,
> (b) towing fees,

both of which are covered by the Warranty Agreements. I find that the definition of "vehicle warranty insurance" clearly contemplates the payment of such amounts covered by the Warranty Agreements as being payments "arising from" mechanical failure. The Appellant's suggestion that such payments are excluded under the Warranty Agreements as "increased damages caused by the continued operation" and "incidental or consequential damages … resulting from a breakdown" is inconsistent with both the language of the Warranty Agreements, which provides coverage for such claims, and common sense.

[147] Accordingly, I cannot find the Superintendent's finding was unreasonable or in error for this reason as submitted by the Appellant.

Do the Warranty Agreements include an undertaking to pay for a specified period "after the motor vehicle is purchased" - as required by the definition of "vehicle warranty insurance"?

[148] The Appellant concludes its submissions on the definition of "vehicle warranty insurance" by reference to the undertaking required in the definition to pay the listed categories of payments for "a specified period after the motor vehicle is purchased". The Appellant then argues that the Warranty Agreements do not meet the definition of "vehicle warranty insurance" because:

i. The Warranty Agreements are not connected with the purchase of a motor vehicle and need not be associated with the sale of a vehicle; and

ii. The product is made available for vehicles that are up to 10 years old.

[149] For these reasons, the Appellant submits the Superintendent's finding that the Warranty Agreements were contracts of "vehicle warranty insurance" was made in error. This alleged error also relates to the Superintendent's application of the facts to the statutory definition and is in result an issue of mixed fact and law, again reviewable on a reasonableness standard.

[150] In reply, the Superintendent submits the Warranty Agreements are time and mileage based. They are sold by used vehicle sales dealerships both at the time of vehicle purchase and independently by those dealers to customers already owning a truck. In cases where the warranty is sold as a stand-alone product, to submit that the warranty is not "vehicle warranty insurance" because it can be purchased separately from the vehicle itself would result in an absurd interpretation of the legislative requirements for "vehicle warranty insurance".

[151] The fact that the Warranty Agreements provide coverage for "a specified period" based on time and mileage is not in dispute.

[152] The Appellant, in essence, argues for an interpretation of the word "after" as used in the phrase "after the purchase of the motor vehicle" to require that such "specified period" must begin "on" or "upon" the purchase of the motor vehicle. I find this to be an incorrect and rather tortured interpretation of the word "after" as used in the phrase.

[153] The ordinary meaning of "after" in the context of its use in the definition should be applied to the interpretation of the word. I find that the ordinary meaning of "after" being "later in time, following in time, later than," as set out in the *Concise Oxford Dictionary* to be applicable, as opposed to the meaning advocated for by the Appellant. For this reason, I agree with the Superintendent that the Appellant's submission is incorrect, and I find that the Warranty Agreements provide coverage for a specified period after the purchase of the motor vehicle as required by the definition of "vehicle warranty insurance".

[154] Accordingly, I cannot find the Superintendent's finding was unreasonable or in error for this reason as submitted by the Appellant.

[155] In conclusion on this issue, and for all of the foregoing reasons, having considered both the rationale for the Decision and the outcome to which it led, I find that the Superintendent's Decision was reasonable in finding that the Warranty Agreements were contracts of "insurance", and in particular "vehicle warranty insurance", as defined, and that the Appellant was carrying on "insurance business" in BC without a business authorization to do so contrary to section 75 of the *FIA*.

Issue c. Did the Superintendent err by failing to provide adequate reasons for the Decision?

[156] The Appellant submits that while the Superintendent in the Decision rightly referenced the legislation at issue, he failed to undertake any analysis or provide adequate reasons for the Decision. The Appellant asserts that the Superintendent failed to:

i. Consider whether purchasers of Warranty Agreements were entitled to indemnification;

ii. Consider what the risk or peril at issue was as required by the *IA* definition of "insurance";

iii. Consider whether the Warranty Agreements cover fortuitous events as a basic requirement of insurance in Canada;

iv. Consider whether the risk or peril at issue arises from a mechanical failure;

[157] The Superintendent submits that the Decision explicitly considered the relevant provisions of the *IA*, *FIA* and the regulations in analysing whether the Warranty Agreements were a form of "insurance" in BC, which analysis the office of the Superintendent is very familiar with as the day to day administrator of the *FIA*. The Superintendent specifically considered the legislative scheme as it relates to "insurance" and "vehicle warranty insurance" and applied the scheme to the terms of the Warranty Agreements, concluding that the agreements were "vehicle warranty insurance" under the *FIA.* The Superintendent further submits that the Decision applied the facts to the law in coming to that conclusion, which decision was reasonable as falling within a range of possible outcomes.

[158] In reply, the Appellant submits that the Decision provides an overview of the findings of fact, cites the applicable statutory provisions, then, in its conclusion, simply recites the findings of facts and, without justification or analysis, makes a determination that the Appellant contravened the applicable statutory provisions, without even citing the applicable provision or provisions that were contravened. The Appellant submits specifically that the Decision does not allow it to understand the path taken by the Superintendent in coming to the conclusion that he did, and, in fact, the reasons do not show that the Superintendent "grappled with the substance of the matter" at all. On that basis, the Appellant submits that the Superintendent erred in law and the Decision ought to be set aside.

[159] The Appellant further argues that should the FST rely upon or seek guidance from *Vavilov* in rendering its decision and determine that the appropriate standard is reasonableness, given the complete lack of analysis in the Decision, together with the Superintendent's failure to articulate any justification, interpretation or "reasoning process" for reaching the conclusion that it did, the Decision is unreasonable and should be set aside.

Standard of review

[160] The Appellant submits that the Superintendent's failure to undertake any analysis or to provide adequate reasons was an error of law reviewable on a correctness standard.

[161] The Appellant relies on the Supreme Court of Canada decision in *R v Sheppard,* 2002 SCC 26 ("*Sheppard*") for the proposition that inadequate reasons amount to an error of law. *Sheppard* was a criminal law case. The entirety of the trial judge's reasons under appeal consisted of the following [*Sheppard* at para 2]:

> Having considered all the testimony in this case and reminding myself of the burden on the Crown and the credibility of witnesses, and how this is to be assessed, I find the defendant guilty as charged.

[162] In *Sheppard,* the Supreme Court of Canada held that the trial judge's reasons were so "generic" as to be no reasons at all, and in confirming the lower appeal court decision to set aside the conviction, held that [at para 68] "the failure

of the trial judge to deliver meaningful reasons for his decision in this case was an error of law within the meaning of s. 686(1)(a)(ii) of the *Criminal Code."*

[163] The Appellant then submits that the Sheppard analysis is not restricted to criminal cases and has been adopted in many cases including *Guttman v Law Society of Manitoba*, 2010 MBCA 66 ("*Guttman*"), in which a lawyer appealed the Law Society's discipline committee decision to disbar him. However, contrary to the inference in the Appellant's submission, the standard of review applied by the Court to the reasons of the discipline committee in *Guttman* was reasonableness, not correctness. In *Guttman* the Court stated [at para 49]: "The parties agreed that the standard of review by this court applicable to the Society's decision to disbar the appellant is that of reasonableness."

[164] I do not accept the Appellant's submission that the Decision was so "generic as to be no reasons at all" as found on the facts in *Sheppard.* Accordingly, the correctness standard of review applied in *Sheppard* will not be applied on this appeal. Where reasons are given, as in this case, reasonableness is the standard of review to be applied by the FST.

Reasonableness approach when reasons are given in light of Vavilov

[165] In providing guidance on the proper application of the reasonableness standard, the SCC in *Vavilov* dealt specifically and in detail with the situation where reasons for the administrative decision are required.

[166] Under section 238(1)(c) of the *FIA,* both a copy of the order by the Superintendent under section 244(2) of the *FIA* and written reasons for it must be provided to the person affected by the order. Accordingly, reasons were legally required for the Superintendent's Decision.

[167] It is generally accepted that the objectives of giving written reasons include the following:

1. To justify and explain the result;
2. To tell the losing party why he or she lost;
3. To provide for informed consideration of the grounds of appeal; and
4. To satisfy the public that justice has been done.

[168] In *Vavilov,* after finding that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome, the SCC held in part as follows [at paras 84, 91, 94, 99 and 102]:

> [84] As explained above, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion.
> …

> [91] A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside… The review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.
> …
> [94] The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body…
> …
> [99] A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision
> …
> [102] To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error…. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived". Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment".

[169] When considering the adequacy and reasonableness of the reasons given by the Superintendent in the Decision, I will be guided by *Vavilov* generally and in particular as quoted from above.

Adequacy of reasons

[170] In assessing the adequacy of the reasons in the Decision from a contextual perspective, the statutory framework within which the Decision was made must be considered. The summary procedure under section 238 of the *FIA* followed by the Superintendent in this case did not afford the Appellant a hearing or an opportunity to be heard. The process was ex parte by statutory design. In result, the Superintendent did not have the benefit of any submissions from the Appellant when making the Decision. This fact is crucial to the assessment of the reasonableness of the reasons given in the Decision.

[171] The Superintendent had before him the Investigation Report, in which a cease and desist order against the Appellant was recommended, together with supporting evidence contained in the Record. The analysis conducted by the Superintendent in the Decision must be considered in the context of the Record and the live issues before him in this proceeding.

[172] As set out in *Vavilov* (at paras 91 and 94), I must bear in mind that the written reasons must not be assessed against a standard of perfection. The review cannot be divorced from either the institutional context in which the Decision was made or from the history and context of the proceedings.

[173] The Appellant's submissions acknowledge that in the Decision the Superintendent provided an overview of his findings of fact and cited the applicable statutory provisions. However, the Appellant submits that the Superintendent, without justification or analysis, then made a determination that the Appellant contravened the applicable statutory provisions, without even citing the applicable provision or provisions that were contravened.

[174] Contrary to the submissions of the Appellant, the Superintendent, after setting out the relevant legislative provisions, considered the facts in the context of those provisions in finding the Warranty Agreements were contracts of "insurance" in British Columbia, in particular contracts for "vehicle warranty insurance". In support of that finding, the Superintendent set out his reasons based on his review of the terms of the Warranty Agreements.

[175] I find it to be readily apparent that the reasons expressly set out by the Superintendent in paragraphs 42(a) through (d) of the Decision are clearly linked to key aspects of the statutory definitions of "insurance" and "vehicle warranty insurance" as reviewed earlier in this decision.

[176] I find in the reasons a line of analysis that could reasonably lead the Superintendent from the evidence before him to the conclusion at which he arrived. The Superintendent's reasoning, although brief, was both rational and logical as contemplated in *Vavilov*.

[177] On this appeal, the Appellant has raised a number of interpretation arguments based upon which it challenges the Superintendent's conclusion that the Warranty Agreements were contracts of "insurance", in particular "vehicle warranty insurance". The Appellant submits that as the Decision does not explicitly address these issues, the reasons are inadequate. I have described these interpretation arguments addressed in this decision as (together the "Interpretation Issues"):

i. Is indemnification required?

ii. The meaning of "indemnify" as used in the definition of "insurance".

iii. Fortuity as an implied requirement under the definition of "insurance".

iv. Do the Warranty Agreements provide coverage "arising from" mechanical failure as required by the definition of "vehicle warranty insurance"? and

v. Do the Warranty Agreements include an undertaking to pay for a specified period "after the motor vehicle is purchased" as required by the definition of "vehicle warranty insurance"?

[178] As the Decision was made without the benefit of submissions from the Appellant, none of the Interpretation Issues were raised before the Superintendent. In those circumstances, and contrary to the submission of the Appellant, I find it would be unreasonable to require that the Decision expressly address any and all potential questions of interpretation of the statutory definitions of "insurance" and "vehicle warranty insurance" including those, such as the Interpretation Issues, that were not raised for consideration before the Superintendent. These Interpretation Issues were not "live issues" before the Superintendent.

[179] In paragraph 43 of the Decision, the Superintendent found that the Appellant was offering to undertake to insure BC residents and soliciting for sale vehicle warranty insurance without the necessary authorization to do so, and that such activity was not in compliance with the *FIA.*

[180] While it would have been preferable for the Superintendent to expressly state in paragraph 43 that he was finding the activity to be not in compliance with section 75 of the *FIA*, I find it is readily apparent from a reading of the Decision that the Superintendent was referring to section 75. Both the phrases "offering to undertake" to insure and "soliciting for sale" vehicle warranty insurance are consistent with the definition of carrying on "insurance business", which activity is prohibited in section 75 of the *FIA* in the absence of a "business authorization" to do so. Likewise, the reference to the Appellant doing so without the "necessary authorization" clearly is in reference to the requirement for a "business authorization" under section 75 of the *FIA.* As stated in *Vavilov,* a reasonableness review of reasons is not a "line-by-line treasure hunt for error".

[181] I find the reasons in the Decision to be both adequate and reasonable as providing a transparent and intelligible justification for the conclusion reached by the Superintendent in the circumstances of this case.

Issue d. Was the remedy ordered by the Superintendent unreasonable?

[182] The Appellant submits, in the alternative, that if the Decision was not in error in finding the Appellant in breach of section 75 of the *FIA,* then the remedy ordered by the Superintendent was excessive.

[183] The remedy was ordered under section 244(2)(f) of the *FIA*, the relevant provisions of which read:

> 244 (1) In this section, "committing an act or pursuing a course of conduct" includes failing or neglecting to perform an act or failing or neglecting to pursue a course of conduct.
>
> (2) If, in the opinion of the Authority, a person is committing an act or pursuing a course of conduct that
>
> (a) does not comply with this Act or the regulations,
>
> ...
>
> (c) might reasonably be expected to result in a state of affairs not in compliance with
>
> (i) this Act or the regulations,
>
> ...
>
> then, the Authority may

> …
>
> (f)order the person to
>
> (i) cease doing the act,
>
> (ii) cease pursuing the course of conduct, or
>
> (iii) do anything that the Authority considers to be necessary to remedy the situation…

[184] As the Superintendent was acting under a delegation of authority, the word "Authority" is section 244 of the *FIA* should be read as referring to the Superintendent in this case. As section 244(2) provides that the Superintendent "may" make the orders listed including "(iii) do anything that the Authority considers to be necessary to remedy the situation" the imposition of a remedy is a matter of discretion. As such, the remedy imposed by the Superintendent is subject to reasonableness review.

[185] The elements of the remedy that the Appellant submits are excessive are contained in paragraphs 1 and 3 of the Order contained in the Decision which order that the Appellant:

> 1. immediately cease conducting insurance business in British Columbia, including the soliciting, offering, sale, and adjusting of vehicle warranty insurance under the product names TruNorth Superannuated Agreement, TruNorth All-Inclusive Agreement, and TruNorth 6 Month All-Inclusive Agreement;
>
> …
>
> 3. within 90 days of the date of the Order, arrange for the assumption of all contracts in place as of the date of the Order insuring risk located in British Columbia, including the handling and adjusting of claims related to those contracts, by an insurance company authorized to issue vehicle warranty insurance in British Columbia. The assumption will be at the sole expense of the Appellant and without penalty to any insured under those contracts;…

[186] I observe at this point that the Appellant does not address in its submissions the provision of the Order that contemplates an alternative remedy to the provisions of paragraph 3 of the Order. Paragraph 4 of the Order provides as an alternative remedy that the Appellant:

> 4. will otherwise deal with current contracts in a manner satisfactory to the Superintendent.

[187] The Appellant asserts that the remedy recommended to the Superintendent in the Investigation Report, which is more limited in scope, should have been adopted by the Superintendent. The recommendation was that the Appellant:

> immediately cease sales of all insurance products, including vehicle warranty insurance, in British Columbia, until authorized or licensed to do so.

[188] The elements of the Order that were not recommended in the Investigation Report that the Appellant argues are excessive are the provisions that:

> 1. Prohibit the Appellant from adjusting the claims of current warranty holders; and

2. Impose a duty on the Appellant to hand its business off to a separate company.

[189] The Appellant submits these measures require it to breach its agreements with its Customers by refusing to adjust claims itself. Further, handing the business off to a competitor goes beyond what is reasonably required in order to protect the public from any perceived risk, and in fact could harm its warranty holders who would be forced to deal with a third party that may well provide a lower quality of service than what the Appellant would have done.

[190] The Appellant asks further that going forward, any order made against it include time to properly transition its warranties to an appropriate third party or remain with the Appellant following proper regulation as an insurer should the FST determine that to be required of it.

[191] The Appellant also refers to the original complaint leading to the investigation of the Appellant as being brought by a "competitor" of the Appellant, as opposed to a complaint coming from a member of the public or a Customer of the Appellant claiming an actual risk of harm to the BC public. The Appellant asserts that this competitor is using the Superintendent as its "pawn" in trying to take business away from the Appellant.

[192] I find the identity of the original complainant to be irrelevant to the issues on this appeal. The question of risk of harm to or protection of the public were addressed by the Superintendent reasonably within the statutory framework of the *FIA.* Based on my review of the Record, the identity or any ulterior motives of the original complainant as suggested by the Appellant played no part in the Decision.

[193] The Superintendent observes that the *FIA* is remedial in nature and that the Superintendent took into consideration the general purposes of the legislative scheme when deciding to take action.

[194] I agree with the Superintendent's submission that the *FIA* is remedial in nature and that its primary objective is the protection of the public. The *FIA* has as an overriding legislative purpose, to protect the public in the financial services sector in BC, including insurance business such as that which the Appellant was found to have been engaging in. I also agree it is apparent from a reading of the Decision that the Superintendent was guided by his public protection mandate in formulating the remedy.

[195] The Decision reasonably outlined the risks to the public of the Appellant's conduct, and the public protection concerns the Superintendent wished to address in the remedy imposed [at paras 44-47]:

> [44] I also find that TruNorth Warranty is enlisting British Columbia motor vehicle dealers and their employees to act as sales agents and/or sales persons on its behalf. Those dealers are required to be licensed under the Act to sell the Warranty Agreements since they are not being sold incidentally to the sale of motor vehicles. This results in activity which might reasonably be expected to result in a state of affairs not in compliance with the Act or its regulations, including the *Insurance Licensing Exemptions Regulation.*

> [45] These warranties are costly, and they are insuring very costly heavy vehicle equipment. TruNorth Warranty is not subject to any regulatory supervision in British Columbia, nor anywhere else in Canada. Because TruNorth Warranty is not regulated as an insurance company, it is not subject to any licensing suitability rigour, ongoing capital requirements, or regulatory oversight. This means consumers may become vulnerable if TruNorth Warranty is unable to fulfill its financial obligations. Purchasers of the Warranty Agreements also have no recourse to the Property and Casualty Insurance Compensation Corporation fund.
>
> [46] As set out in *Re Bridgepoint Indemnity Company (Canada) Inc.,* Order dated June 30, 2016, absence of market conduct oversight and control from a regulatory body in the distribution of TruNorth Warranty's insurance products means there is no protection for certificate holders if TruNorth Warranty is operating in a way that is harmful to the public.
>
> [47] The unauthorized operation of TruNorth Warranty is recent and ongoing, its insurance activities are non-compliant with the Act and pose a risk to the public.

[196] 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. I find that the Superintendent's concerns over the protection of the public were reasonably held on the facts found in this case.

[197] The Superintendent had before him a number of prior decisions wherein enforcement action was taken against parties carrying on unauthorized insurance business in BC. I note that the Decision makes particular reference to the decision in *Bridgepoint.* In *Bridgepoint,* in a factual context similar to that in this case, the Superintendent imposed an order essentially the same as that imposed by the Superintendent in this case. From my review of the previous decisions before the Superintendent, I find the remedy imposed by the Superintendent to be consistent with those prior decisions on similar facts.

[198] The Appellant submits that the Superintendent's discretion was limited to the adoption of staff's recommendation and that the Superintendent could not elect to impose a more stringent remedy "without any reason".

[199] The statutory discretion of the Superintendent acting under section 238 and making orders under section 244(2)(f) of the *FIA* is not limited to the adoption of staff's recommendations. Nor is it "unfettered". Rather, it is subject to review on a standard of reasonableness to be assessed within the statutory context of its exercise.

[200] Contrary to the submissions of the Appellant, I find that the Superintendent did provide reasons for the scope of remedy he ordered.

[201] As pointed out earlier in this decision, I am to be guided by *Vavilov* on the proper application of the reasonableness standard on this appeal. In assessing the reasonableness of the remedy, I have considered whether the remedy – including

both the rationale given for the remedy imposed as well as the remedy to which it led – was unreasonable. On that standard, I cannot find the remedy to be unreasonable.

[202] I further find that the remedy ordered by the Superintendent was reasonable in its scope in that it addressed the prohibition against all aspects of carrying on unauthorized insurance business in the province.

[203] I am further of the view that any concerns that the Appellant has with respect to the potential negative impact of the remedy on its Customers should be reasonably addressed between the Appellant and the Superintendent as contemplated by paragraph 4 of the Order.

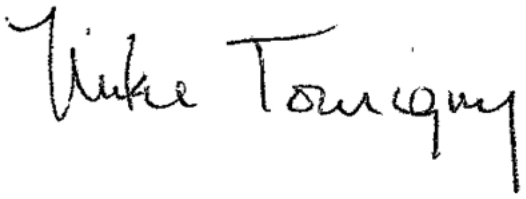
[204] Whether or not the Appellant intends to apply for authorization to carry on insurance business in BC on a going forward basis is also a matter between the Appellant and the regulators.

DECISION

[205] In making this decision, I have carefully considered all the evidence before me and the submissions and arguments made by each of the parties, whether or not they have been referred to in these reasons.

[206] Following on my findings above that each ground of appeal advanced by the Appellant fails, I dismiss this appeal in its entirety and hereby confirm the Decision of the Superintendent.

[207] The Superintendent has sought costs on this appeal. Either party shall be entitled to make submissions regarding costs by **June 05, 2020**, to which the other party will have a right of reply until **June 19, 2020**. In the event both parties make an initial submission, the right of reply will exist for both parties to the extent of dealing with matters not already addressed.



Michael Tourigny
Member, Financial Services Tribunal

May 22, 2020