BRITISH COLUMBIA

Financial Services Tribunal

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DECISION NO. 2019-FIA-002(b)

In the matter of an appeal under section 242 of the *Financial Institutions Act*, RSBC 1996 c 141

BETWEEN:	Manjit Kaur Brar	**APPELLANT**
AND:	Insurance Council of British Columbia	**RESPONDENT**
AND:	British Columbia Financial Services Authority	**THIRD PARTY**
BEFORE:	A Panel of the Financial Services Tribunal, Catherine McCreary, Member	
DATE:	Heard by way of written submissions closing October 20, 2020	

APPEARING:	For the Appellant:	Self-Represented
	For the Respondent ICBC:	David T. McKnight and Naomi Krueger, Counsel
	For the Third Party BCFSA:	Jessica Gossen, Counsel

DECISION ON THE MERITS

APPEAL OVERVIEW

[1] Pursuant to section 242 of the *Financial Institutions Act*, RSBC 1996, c 141 (the "FIA"), Manjit Kaur Brar appeals, to the Financial Services Tribunal (the "FST"), an Order made on February 5, 2019, by the Insurance Council of British Columbia (the "Council").

[2] After passing four of her Life Licence Qualifying Program ("LLQP") examinations, Ms. Brar was licensed as a life accident and sickness insurance agent on February 8, 2017. She was affiliated with an insurance agency (the "Agency") in

the Lower Mainland. Soon after she wrote the LLQP exams, the Council became aware of statistical anomalies that appeared to suggest some level of collusion amongst the examinees.

[3] The Council Staff Member conducted an investigation which resulted in an order that Ms. Brar's licence be suspended (the "Suspension Order"). The Suspension Order was followed by an Intended Decision which held that Ms. Brar's licence was to be cancelled.

[4] Ms. Brar contested the Intended Decision and attended a hearing that was held on May 7, 2018 by a three-member Hearing Committee appointed by the Council. The Hearing Committee issued a report on December 20, 2018 (the "Committee Report") which found that Ms. Brar cheated on her LLQP examinations.

[5] At a meeting on January 22, 2019, the Council considered the Committee Report and on February 5, 2019, it made the following Orders pursuant to sections 231.236, and 241.1 of the FIA:

> 1. The Licensee's life and accident and sickness insurance licence is cancelled with no opportunity to reapply for a life and accident and sickness insurance licence for a period of four years, commencing February 5, 2019 and ending at midnight on February 4, 2023;
>
> 2. The Licensee is assessed investigation costs of $3,055.00, which are due and payable no later than May 6, 2019;
>
> 3. The Licensee is assessed hearing costs of $5,196.25, which are due and payable no later than May 6, 2019; and
>
> 4. The Licensee is required to complete an ethics course (or equivalent), as approved by Council, before Council will consider a licence application from the Licensee.

[6] Ms. Brar filed a Notice of Appeal, an application for an extension of time to file her appeal and an application for a stay of the Penalty Order. Ms. Brar's preliminary applications were resolved by the FST Chair in Decision No. 2019-FIA-002(a), released July 31, 2020 (the "Preliminary Decision").

[7] Ms. Brar's Notice of Appeal seeks review of the Order imposing investigative and hearing costs totalling $8,251.25. She claims that:

> I'm sorry to say this decision is wrong because the insurance council of BC made a decision on me that I cheated and the cost for the hearing, investigative cost it's to much to pay for me **at least they should let me know for the cost before the hearing that it will cost this much would you like to go forward... they called me when I was on the way to the hearing let me know that I'm coming for the hearing it will cost me like 30 minutes before and my answer was I can't pay for the hearing even there to but they said don't worry then after almost a year after they send me the cost which is over $8000 that is very**

> **high they should not then went forward with it it's too much for me to pay …**
>
> [emphasis added]

[8] Thus, the basis of Ms. Brar's appeal appears to be that she was not aware that she may be assigned costs of this magnitude. This raises issues of procedural fairness.

[9] The appeal is opposed by the Council. The Council has provided written submissions that have been adopted by the Third Party, British Columbia Financial Services Authority.

[10] The Council argues that the basis for assigning hearing costs against Ms. Brar is that she knew that there could be an award of costs against her. The Council also claims that Ms. Brar had knowledge of what the Council claims was the "overwhelming" evidence against her. The Council argues that Ms. Brar decided to attend the hearing and thereby incur costs, which she should be required to bear.

[11] The Council submits that it fulfilled its duty to provide procedural fairness. It relies on Section 237 of the FIA, claiming that it is a complete code concerning the duty of fairness at a hearing.

PRELIMINARY ISSUES

Narrowing Remedy

[12] Ms. Brar's initial appeal challenged the imposition of the licence cancellation. After the Preliminary Decision, Ms. Brar did not address the finding by the Council that she cheated, and she did not raise this aspect of her appeal again. In her submission of September 16, 2020, Ms. Brar stated: "I don't care about the license anymore and I can't afford to pay for the appeal."

[13] The Council refers to this particular submission by Ms. Brar and submits that she only appears to seek an order that the FST set aside or vary the Costs Order and that Ms. Brar has abandoned all other grounds of appeal, including those raised earlier in these proceedings.

[14] Ms. Brar is a lay person, and she has brought her appeal to the FST without the benefit of the assistance of legal counsel nor does she appear to possess a nuanced understanding of the principles of administrative law. Nevertheless, in her submissions on the merits of this appeal she has clearly raised issues of procedural fairness with respect to the sufficiency of the notice to her of the potential and for hearing costs to be assessed against her as above and as follows:

> Now I have been told I have to pay for the appeal hearing. Just hours before the hearing & someone called me at 7:00 am on the hearing day and said even if I didn't appear I would still have to pay. I feel I should have been informed about having to pay for the appeal much sooner.

[15] I accept that the Ms. Brar is no longer seeking reinstatement of her licence. However, based on her arguments, she has clearly not abandoned her appeal of the assignment of costs of the hearing and of the investigation.

[16] I will evaluate the appeal on the basis of Ms. Brar's position that the assignment of costs against her was not fair because she had insufficient advance knowledge about these potential consequences.

New Evidence

[17] Ms. Brar submitted a doctor's note with her Appeal. Additionally, in her submissions, Ms. Brar references her health status and financial circumstances.

[18] The Council objects to any consideration of medical evidence tendered by Ms. Brar; in particular, any submissions concerning her health as well as the doctor's note attached to the Appeal. The Council notes that Ms. Brar has not applied to admit new evidence on appeal. Council has said that it reserves its right to make full submissions in respect of any such application, should Ms. Brar choose to make one. Council submits in the absence of such an application, Ms. Brar's appeal to the FST must be based on the Record pursuant to s. 242.2(5) of the FIA.

[19] Ms. Brar makes a claim that her personal circumstances should be considered when determining whether to uphold the order for costs. While she mentioned her deteriorating health in her evidence at the hearing, she did not provide other evidence, as she proposes to do now by submission of the Doctor's note.

[20] I have determined that I am able to make my decision on the basis of the material present in the Appeal Record, and I need not consider the medical evidence here.

Appeal Record

[21] The Council provided the FST with the Appeal Record, as mandated by section 242.2(6) and (7) of the FIA. In my review of the Record, I have noted the absence of documents that I expected would have contained evidence that may have been material to the arguments advanced by the Council. Where such a situation arises, I have noted it within the body of this decision.

STANDARD OF REVIEW

[22] The Council submits that the FST applies a standard of correctness for questions of law, reasonableness for questions of fact, discretion and penalty, and fairness for procedural fairness: *Kadioglu v Real Estate Council of British Columbia and Superintendent of Real Estate,* Decision No. 2015-RSA-003(b) ("*Kadioglu*") at para 32.

[23] Ms. Brar makes no submissions on the applicable standard of review.

[24] I agree with and adopt the standards of review set out by Member Baker (as she then was) in *Kadioglu*. As such, I will review questions of procedural fairness on

the standard of fairness, and I will review questions of fact, discretion and penalty on the standard of reasonableness.

[25] Considering the issues in this appeal involve questions of procedural fairness, I find it useful to describe how the FST generally applies the fairness standard. This issue was discussed in *Kadioglu* as follows (at para 31):

> [31] This leaves the standard of review for issues of procedural fairness. It has been held on judicial review that it is not really appropriate to speak in terms of "correctness" and "reasonableness" where procedural fairness is concerned. The more appropriate question is simply to ask whether the decision-maker under appeal or review acted fairly in all the circumstances: *Seaspan Ferries Corp. v. British Columbia Ferry Services Inc*., 2013 BCCA 55 at paras. 47-52. In my view, that test is also appropriately applied by the Tribunal in deciding whether the proceedings below were fair, albeit from our unique perspective with specialized knowledge of the industry sectors that fall within the Tribunal's responsibility

[26] I will look at the questions of process and procedure with an eye to determining if they were fair, considering the nature and context of the underlying disciplinary proceedings, and the special public interest role of the Council.

SUMMARY OF PROCEEDINGS

General

[27] Ms. Brar's evidence was that she was recruited by a person (the "Recruiter") at the Agency. After passing the LLPQ examinations and obtaining her license in February 2017, she became affiliated with the Agency.

[28] That month, the Council was alerted to certain statistical anomalies in a recent sitting of the LLQP examinations that appeared to suggest some level of collusion amongst the examinees. In particular, a collusion detection analysis that had been commissioned by the Canadian Insurance Services Regulatory Organizations with respect to all LLQP exam results across Canada had identified possible collusion amongst recent LLQP exam writers in British Columbia.

[29] The subsequent investigation by the Council showed that there were very many candidates affiliated with the Agency who were identified as having potentially cheated on the LLQP examinations. They each had used a combination of precisely the same answers across certain combinations of the exams. The Council Staff Member determined that Ms. Brar used a common answer sequence on three of her four LLQP exams. The common answer sequences used by Ms. Brar were the same (or very close to the same) as the answer sequences used by many other licensees affiliated with the Agency.

[30] On August 15, 2017 the Council met to consider the results of the investigations that implicated 22 licensees who appeared to have used the Collusion Sequences to pass 38 exams. Those licensees were named in a Memo to Council.

[31] In October, the Council issued the Suspension Order that suspended Ms. Brar's license until a final determination of her competency. It notified her of a right to a hearing before the Council or to appeal to the Financial Services Tribunal. The Order did not alert Ms. Brar to the possibility that she might incur costs if she proceeded with a hearing. Any documentation which may have accompanied the Suspension Order was not included in the Appeal Record.

[32] On October 31, 2017, the Council issued the Intended Decision that stated it had conducted an investigation into allegations that Ms. Brar had cheated or colluded with others to cheat on the pre-licensing exams. The Council advised that at its August 15, 2017 meeting, it had considered an investigation report.

[33] The Intended Decision concluded that Ms. Brar's use of the Collusion Sequence demonstrated that she cheated on the LLQP Exam. By cheating, she failed to demonstrate that she had the required knowledge to hold a life agent licence. The Council stated that by cheating on the LLQP Exam, Ms. Brar brought into question her suitability to hold an insurance licence. The Council determined that Ms. Brar's life agent licence should be cancelled.

[34] The Intended Decision advised that Ms. Brar had a right to a hearing. The Intended Decision did not say that making such a request could incur an award of costs. There is nothing in the Appeal Record which shows that the Council advised Ms. Brar in its written communications about the Intended Decision that she might incur costs of a hearing.

[35] Ms. Brar filed an appeal of the Intended Decision, but the Council did not include that document in the Appeal Record.

The Hearing

[36] The Council appointed a Hearing Committee comprised of three individuals, two of whom were from the life insurance industry and one of whom was a member of the public. A hearing was scheduled.

[37] The Hearing Committee Report states that the Notice of Hearing was dated April 23, 2018. The hearing occurred on Monday May 7, 2018. The Appeal Record does not contain a copy of the notice sent to Ms. Brar about the hearing, nor any details of any accompanying documents, nor has the Council provided documentary evidence of when Ms. Brar obtained all or part of the Notice.

[38] At the commencement of the hearing, the Chairperson introduced himself, and the other panelists. The Hearing Committee was represented by its own counsel, Mr. Shirreff. There were two Counsel for the Council; Mr. N. McKnight and Mr. L. Robinson to whom I shall hereinafter refer by name.

[39] Ms. Brar described herself as being, "all alone."

[40] Shortly after the introductions, the Chairperson commented that the procedure for the hearing would follow what was set out in the Council's Hearing Procedures Guidelines. He stated but did not confirm his assumption that Ms. Brar had already received that document. There was no other oral explanation of how the hearing would proceed.

[41] The Guidelines were not included in the Appeal Record, nor was there any correspondence in the Appeal Record showing that Ms. Brar had received them. According to s 242.2(6) of the FIA, the Guidelines should have been included in the Record if they were before the decision maker as evidence.

[42] The Chairperson then asked if everybody was ready to proceed, which he followed with a statement that he suspected that they were. The Chairperson did not elicit a response from Ms. Brar, nor did she confirm that she was ready to proceed. Also, the Chairperson did not, even briefly, explain to her what was about to occur nor the expectations of her in the hearing.

[43] In Mr. Robinson's brief opening statement, he claimed that Ms. Brar had been involved in collusion, obtaining answers to the qualifying exams that she had passed. He said that they intended to rely upon an expert's report and that:

> ….Ms. Brar has received a copy of that expert report. We canvassed her need to have the expert come in and give evidence in person, and asked her to raise any objections she has to that report. Ms. Brar has not indicated any objections to the report, so we will seek to have that admitted as an exhibit.

[44] I was unable to locate any evidence in the Appeal Record which indicated that Ms. Brar was canvassed in advance about any objections she may have had about the expert's report. There was no testimony about this assertion.

[45] When Ms. Brar was invited to make her opening statement, she talked about how she came to be involved in the insurance business. She began a fulsome description and when it became clear that Ms. Brar was telling her story, rather than making an opening statement, the Chairperson intervened and said that she could provide all of what she had just said when it was time to give her evidence. He said that he wanted her to merely give a statement about how she did not cheat. He also suggested that she could give evidence about the organization that brought her into the business.

[46] Once the Council was presenting its case, when Mr. Robinson was introducing the documents as evidence, he said that he wanted to:

> … have some documents marked as an exhibit subject to any objections that Ms. Brar might have. They are all documents that Ms. Brar has seen.

[47] Mr. Robinson then said that:

> …**Unless Ms. Brar has any objection to us proceeding that way**, so that we have the documents marked as the exhibit and we hasten the direct examination of [Council Staff Member] as well, so we're not interrupted by introducing documents through the witness.
>
> I don't expect the documents are contentious or controversial.
>
> [emphasis added]

[48] The Chairperson then asked Ms. Brar if she had any objections to doing it that way. Before Ms. Brar answered, Mr. Robinson offered to show her the documents that he sought to have marked as an exhibit. Mr. Robinson said:

> Ms. Brar, what I would like to do is have some documents marked as an exhibit. They're all documents that you would have seen until now. I'm happy to show them to you now, and without -- before [Council Staff Member] comes in to give his evidence, and I would like to have them marked as an exhibit at the outset of the hearing. And again I can show you the documents. They are all documents you would have received as part of a package.
>
> MS. BRAR: Yeah, I received them on Friday.
>
> MR. ROBINSON: These are all documents that you would have seen. This is the package you would have received, right?
>
> MS. BRAR: Yeah, I received it on Friday, yes I did.
>
> MR. ROBINSON: Is there any objection to these documents going in as exhibits?
>
> MS. BRAR.: To be honest, I know you guys have already made the decision, you guys were saying that cancelling it, to be honest I did not even look. I looked at -- when I called you I was looking at them, and I asked you, right? It was me speaking to you, remember? On Friday around three –
>
> MR. ROBINSON: My question, Ms. Brar, is do you have any objection to these documents?
>
> MS. BRAR: No, I don't have any objections. You guys can do what you think is right. My objection is why are you guys calling me a cheater over the phone every five days, every second day.
>
> MR. ROBINSON: We've got a blue book, it's Council's book of documents, to be marked as exhibit 1...

[49] An expert opinion report prepared by Dr. Chris Beauchamp and entered as Exhibit 2, provided a detailed statistical analysis of the probabilities of two candidates taking a multiple-choice examination would have the same answer sequence, both in terms of the questions that were answered correctly, as well as the answers that were given when questions were wrong. Dr. Beauchamp's analysis illustrated that the statistical probability of Ms. Brar’s answer sequences independently matching the answer sequence of another candidate was less than 1 in a billion.

[50] When Mr. Robinson sought to introduce Dr. Beauchamp’s report, he submitted that Ms. Brar had also seen that document. An exchange with Ms. Brar ensued where he asked if she had any objections to it being admitted as an exhibit.

> MR. ROBINSON: The second document, again subject to any objections Ms. Brar might have, is the report prepared by Chris Beauchamp, Ph.D., dated January 26th, 2018, a copy of which Ms. Brar has seen as well.
>
> Any objection to that being admitted as an exhibit, Ms. Brar?
>
> MS. BRAR: Honestly, I received the papers on what, Friday? I told you already over the phone too also, because you guys said you emailed me and that much my email doesn't open that much big files to be honest. You can proceed with all the papers, I did not see anything. You are most welcome to give him those papers.

[51] Mr. Robinson submitted that the documents were emailed. Ms. Brar claimed that she could not open the attachments on the email containing the information. Mr. Robinson submitted they were subsequently couriered to her. Mr. Robinson submitted that the delivery wasn't on Friday, it was the previous week; and that when Ms. Brar said she didn't have them, they were sent to her.

[52] Ms. Brar interjected and claimed the letter was dated the 24th and she described how she got it delivered. Mr. Robinson said that they arranged to have them couriered. He repeated his question about whether she had any concerns with these documents being admitted as an exhibit. Ms. Brar said:

> I don't mind you -- I don't know your lawyer wordings to be honest, what you need to pass on, go ahead pass on, sir. But the thing is you guys are saying that you guys did this, hand this to me that day. It says on here on 24th, which I did not receive this on the 24th, it was mailed to me. It was in an open envelope.

[53] Ms. Brar said that the person delivering the envelope claimed to have come three days earlier. Then, Mr. Robinson stated:

> Yeah, I'm going to assume she's referring to the process server that we arranged it to serve the documents with -- after she said she had not received them by email, was unable to open the attachment given its size. But they were delivered, and then subsequently she expressed concerns with process server. We arranged a process server to serve the documents. Ms. Brar now indicates that the process server attempted to serve them, she wasn't at home, and they were subsequently served on her.
>
> My question again, and subject to the Hearing Committee's views, I would like to have these documents submitted as an exhibit or --

[54] Ms. Brar then invited Mr. Robinson to then "serve" the documents on the Committee. Thereafter there was a five-minute off the record discussion after which Mr. Robinson was instructed by the Chairperson to proceed and he entered the Expert's Report as Exhibit 2.

[55] I note that the Appeal Record contains no evidence of the delivery of any documents to Ms. Brar. I also note that when he sought to enter the documents as exhibits, Mr. Robinson seems to have acknowledged Ms. Brar's unfamiliarity with the documents. He said:

> And it occurs to me that I may not have had enough copies of Exhibit 1 for all of the parties as well as the Hearing Committee members. We do have extra copies here, I'm happy to give my copy of Exhibit 1 to Ms. Brar. It's the same copy of documents and there's some writing on it, but otherwise it's the same document, so that she has the document to review.

[56] Mr. Robinson then elicited evidence from the Council Staff Member. Next, he made submissions about the contents of the Expert's Report of Dr. Beauchamp. He drew the Hearing Committee's attention to Dr. Beauchamp's C.V. and detailed his experience. When he sought to enter the Report as an expert opinion, no one on the Committee had objections and it was indicated that Ms. Brar shook her head. The Report was admitted.

[57] Mr. Robinson next said:

> [T]he report largely speaks for itself and I'm not here giving evidence on the report. I will, however, take the Committee to portions I see as most salient when reviewing the report….

[58] Notwithstanding Ms. Brar's comments about the late delivery of the documents on which the Council would rely, the Chairperson never invited Ms. Brar, as a person who had demonstrated that she was clearly unfamiliar with the legalistic hearing process, to ask for an adjournment, nor did he provide her with time to review the documents on which Mr. Robinson had said he intended to rely.

[59] After the Council concluded its evidence, the Chairperson invited Ms. Brar to tell her side of the story. Ms. Brar denied cheating. Ms. Brar testified that she was called by people from the Council who said that she cheated and that they should meet and negotiate. She was asked for the names of other cheaters. Ms. Brar said she did not know names and that she did not cheat.

[60] Ms. Brar testified at length about many things related to her motivation for seeking the licence. She also testified about her personal circumstances. The testimony got emotional, leading to the Chairperson to call a break to allow Ms. Brar to collect herself.

[61] After the break, Mr. Robinson cross-examined Ms. Brar. He did not ask Ms. Brar any questions about the notice she received about the hearing or about when she received documents, and which documents she received. He did not ask her anything about her knowledge of being potentially responsible to pay costs of the hearing. He did not put to her the contents of any conversation they may have had on the Friday before the hearing. Mr. Robinson did not ask Ms. Brar to elaborate on her non-evidentiary statements made early in the hearing that on the Friday afternoon before the hearing she had spoken to someone and told him she had not yet reviewed the documents. Mr. Robinson asked many questions about the

structure and operation of the Agency. He asked her whether she was familiar with a number of people at the agency. She said she was not. The names listed by Mr. Robinson corresponded to those identified as cheaters in a memo to Council dated August 15, 2017.

[62] Following Mr. Robinson's cross-examination, the Chairperson invited Committee Members to ask questions of Ms. Brar. In response to questions from one Committee Member, Ms. Brar testified that someone had called her two or three times and this person told her that it would "cost her" if she went to the hearing. In response to further questions, she said he told her "This is how it works. you have to pay". Ms. Brar said that she replied that she didn't "have the money to get a lawyer, to be honest, right? I don't have the money to pay anything." Ms. Brar said the person replied that "Oh, we will collect afterwards to your -- what you assets or something, we'll go after them."

[63] In response to questions from the other Member, Ms. Brar confirmed that she had received documents from the Council the preceding Friday and she called a man that day to discuss. The identity of the man was not clear.

[64] The other Committee Member asked her if she had reviewed the books over the weekend. Ms. Brar said that she had, "a little bit." Ms. Brar went into detail about her lack of review of the Expert's Report before the hearing. It became apparent that she did not appear to know what the Expert's Report said, nor the impact of it being admitted as an exhibit.

[65] When responding to questions by the Committee Member, Ms. Brar said that she told an (unidentified) person who had called her, that she didn't understand "what you guys send me." She said she told him that she didn't cheat. Ms. Brar testified:

> I go, "I don't understand." I said the same thing to him. He goes, "Okay, what's your decision? What's your decision?" And I said, "I'm going to come to there," right? And he goes, "Do you know where?" Like, okay, and I said -- "Do you aware about the charge here," and I go, "Nobody told me about the charge," right. And I don't have the money to pay charge. He goes, "Still, are you aware," because he was probably trying scare me or something, "and if you don't come, it's still you're going to be guilty." And I said, "No, I'm not guilty and I'm going to come."

[66] This assertion, that she would still be guilty if she did not come, was never explored by any Committee Member's questions nor by questions advanced by Mr. Robinson.

[67] While Ms. Brar was being questioned by the second Committee Member, Mr. Robinson made the following statement:

> I mean no disrespect, but Ms. Brar has not indicated any prejudice with respect to the documents. She had not indicated that she required an adjournment of today's hearing. If she does require an adjournment for today's hearing, I mean we're happy to entertain

> that notion. But she hasn't disclosed any prejudice with respect or the documents.

[68] Nothing occurred in the hearing as a result of this statement.

[69] The Hearing Procedure Guidelines[1] that were referred to by the Committee Chairperson at the outset of the hearing, and were not included in the Record, contain the following direction regarding adjournments:

> 22. Adjournments are generally granted where it is shown to the satisfaction of the Committee that the adjournment is required to permit an adequate hearing to be held. The Committee, when deciding whether or not to grant an adjournment, must balance the interests of ensuring that a fair hearing is held with the protection of the public interest by means of an expedient resolution to the matter. Adjournment requests will be considered by the Committee on their own facts bearing in mind these interests.
>
> The Hearing Committee may adjourn on its own motion.

The Hearing Committee's and Council's Decisions

[70] On December 20, 2018, the Hearing Committee filed its Report with the Council. The Committee Report noted at the outset of its description of facts that:

> **The factual background to this matter has already been canvassed extensively by another Committee in the Varinder Grewal hearing report**. For the most part, Council introduced very similar evidence as against the Licensee herein, particularly the expert opinion from Dr. Beauchamp which addressed the statistical likelihood of LLQP examinees having the same or similar answer sequences.
>
> What was unique about this proceeding was that the Hearing Committee also had the opportunity to hear directly from the Licensee and was able to ask her questions about the circumstantial evidence of collusion that was introduced by Council.
> …
>
> **The same statistical evidence was tendered by Council in this hearing as had been relied on in the Varinder Grewal matter.** The expert opinion report prepared by Mr. Beauchamp provided a detailed statistical analysis of the probabilities of two candidates to a multiple choice examination having the same answer sequence, both in terms of the questions that were answered correctly, as well as the answers that were given when questions were wrong (Exhibit 2).
>
> [emphasis added]

[71] The Committee Report stated that in view of the circumstantial evidence of collusion that had been introduced by the Council, the Hearing Committee

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[1] Publicly available on the Council's website at the following location - https://www.insurancecouncilofbc.com/about-us/policies/

welcomed the opportunity to hear directly from Ms. Brar with respect to whether or not she had cheated or colluded on the LLQP examinations. It described Ms. Brar's testimony and summarized her evidence, noting that Ms. Brar testified that she did not cheat, nor did she meet with the Council Staff Member while he conducted the investigation. The Committee Report stated that Ms. Brar's evidence was difficult to follow, and that she spent considerable time during her evidence outlining her own personal circumstances.

[72] The Hearing Committee made the finding that Ms. Brar cheated and colluded on her LLQP examinations by using the collusion sequence on three of her four exams. The Committee found that the evidence revealed Ms. Brar participated in a calculated and intentional scheme to collude on the LLQP exams. It found that she:

> …engaged in conduct that is diametrically opposed to the standards that a licensee is expected to uphold and represent. A willingness by the Licensee to cheat on the qualifying examinations, and then to attend a hearing and continue to deny the collusion while under oath, should cause Council great concern about the Licensee's competency, but even more importantly, her character and honesty.

[73] The Hearing Committee found that Ms. Brar's actions were contrary to the public interest mandate of Council and a serious violation of a number of provisions of the Code of Conduct.

[74] The Hearing Committee made the following recommendations to the Council:

1. the Licensee's licence be cancelled for a period of 4 years;
2. the Licensee be required to pay Council's costs of the hearing, in an amount to be determined (with such costs to be paid prior to the Licensee reapplying for a licence); and
3. before reapplying to obtain a licence, the Licensee must also complete, at her own expense, an ethics course (or equivalent) that is approved by Council.

[75] The Hearing Committee Report did not make any findings regarding whether Ms. Brar had adequate notice of the hearing, or whether she had reasonable access to the materials ultimately introduced as evidence by the Council and then relied on by the Committee. There were no findings about whether Ms. Brar had knowledge that costs could be assessed, including the possible amount of such costs. There was nothing in the Committee Report that addressed the issue of the assignment of investigation costs.

[76] On February 5, 2019, without providing any of its own reasons, the Council made the Order (set out at para 5 of this decision) cancelling Ms. Brar's licence, assessing hearing and investigation costs against her, and ordering that she was required to take an ethics course prior to future licensure.

ARGUMENTS

Ms. Brar

[77] As noted above, Ms. Brar has abandoned her appeal of the cancellation of her licence. I shall only refer hereafter to arguments concerning the assignment of hearing and investigation costs.

[78] In her closing submission at the hearing, Ms. Brar emphasized that she was not informed until the Friday prior to the hearing that she might have to pay costs of the hearing. She specifically argued that the potential for costs to be assigned should have been included in the documentary material that was provided to her. Thus, an issue of procedural fairness was raised by Ms. Brar at the time of the hearing.

[79] As set out above in paragraph 7, in her Notice of Appeal to the FST, Ms. Brar stated that it was too much for her to pay and she should have been told before the hearing of the potential for such an award.

[80] In her appeal submission of September 16, 2020, Ms. Brar claimed:

> Now I have been told I have to pay for the appeal hearing. Just hours before the hearing & someone called me at 7:00 am on the hearing day and said even if I didn't appear I would still have to pay. I feel should have been informed about having to pay for the appeal much sooner.

[81] In a further submission on October 20, 2020, Ms. Brar said:

> I can't recall the name of the person who told me over the phone one day before the appeal, that I was responsible for the cost, as I told the guy who came to drop my papers in an open bag which held all my private information

[82] Thus, while there appears to be no evidence that Ms. Brar was ever advised how extensive an order for costs could be, it is clear that before the hearing Ms. Brar was aware that there might be an order against her that she pay costs, of some sort.

The Council

[83] The Council submits that it has met any duty of fairness owed to Ms. Brar in the circumstances. The Council argues that the common law requirements of procedural fairness are set out in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699 ("*Baker*"). The Council further submits that, at a minimum, the principle of *audi alteram partem* requires that licensees are given adequate notice of the case to be met, the right to present evidence and the right to make argument about the matters at issue. The Council submits that the exact procedures required by the principle will vary from case to case depending on the particular circumstances, the nature of the inquiry, the rules which the tribunal is acting under and the subject matter: *Mavi v Canada (Attorney General)*, 2011 SCC 30.

[84] The Council argues that where the essential purpose of a decision-maker is to serve the public interest, even though the decision may be directed at an individual, the procedural requirements may be lower: *British Columbia (Securities Commission) v. Pacific International Securities Inc.*, 2002 BCCA 421 at paras 6-8 (*"Pacific International Securities Inc"*).

[85] In terms of the question of whether notice of potential costs awards was required, the Council points to section 241.1(1) of the FIA as setting out its authority to assess hearing costs:

> 241.1 (1) If an order results from an investigation or hearing, the commission, the superintendent or the council may by order require the financial institution, licensee, former licensee or other person subject to the order to pay the costs, or part of the costs, of either or both of the following in accordance with the regulations:
>
> (a) an investigation;
>
> (b) a hearing.
>
> (2) Costs assessed under subsection (1)
>
> (a) must not exceed the actual costs incurred by the commission, superintendent or council for the investigation and hearing, and
>
> (b) may include the costs of remuneration for employees, officers or agents of the commission, superintendent or council who are engaged in the investigation or hearing... [2]

[86] The Council also argues that section 237 of the FIA requires written notice of an order under section 231, and if requested, a hearing before Council. The Council submits that Section 237 is a complete code concerning the duty of fairness at a hearing and that neither section 237(2)(a) nor section 241.1 require notice of an order for hearing costs, or create a right to be heard by Council in relation to the same. The Council argues that based on Ms. Brar's own evidence, she was aware prior to the Hearing that costs could be assessed against her. The Council argues that Ms. Brar's submissions as to why they should not be assessed were considered and rejected by the Hearing Committee.

[87] The Council submits that it's exercise of discretion to assign hearing costs against the Appellant was fair because:

> a) she knew that there could be an award of costs against her (either from the call the morning of the hearing or one on the previous Friday afternoon)

[2] I note that this section of the FIA has since been amended and the language reproduced in this decision was that which was in force on February 05, 2019, when the Order under appeal was made.

and she decided to attend the hearing and thereby potentially incur costs, and

b) the Council had "proved overwhelmingly that the Appellant had cheated and colluded on her LLQP exams".

[88] While the Council makes no claim that Ms. Brar had been told the possible extent of an order for costs, the Council's submission is that it has met any duty of fairness owed to her in the circumstances.

[89] I emphasize that in its argument, the Council acknowledges a requirement that licensees are to be given adequate notice of the case to be met, the right to present evidence and the right to make argument about the matters at issue. This submission therefore raises the question of whether the Council provided Ms. Brar with adequate notice of the case she was to meet such that her decision to proceed with the hearing was informed by her knowledge of the extent of the evidence against her and the potential cost consequences of attending the hearing.

ISSUES

[90] From my review of the parties' submissions and in accordance with my comments above on the narrowed remedy sought by Ms. Brar and the inadmissibility of Ms. Brar's proposed new evidence, I am of the view that the key issue for consideration on this appeal concerns whether the assignment of hearing and investigation costs against Ms. Brar was done in accordance with a fair process.

[91] In order to decide that issue, I must answer the following three questions:

a. As a matter of fairness, was Ms. Brar entitled to notice that costs could be assigned against her?

b. If so, did Ms. Brar have sufficient notice of the potential costs consequences of attending the hearing?

c. Did Ms. Brar have sufficient notice of the Council's case against her, insofar as that information may have informed her decision to attend the hearing and thereby incur costs?

ANALYSIS

a. As a matter of fairness, was Ms. Brar entitled to notice that costs could be assigned against her?

[92] As set out above, the Council argues that section 237 of the FIA is a complete code insofar as procedural fairness requirements for Council hearings are concerned. I disagree.

[93] The Council does not set out section 237 of the FIA in its submissions, nor does it explain how section 237 relates to/governs the duty of fairness at the hearing. The Council merely states that:

Section 237 requires written notice of an order under section 231, and if requested, a hearing before Council. Section 237 is a complete code concerning the duty of fairness at a hearing. Neither s. 237(2)(a) nor s. 241.1 require notice of an order for hearing costs, or create a right to be heard by Council in relation to the same.

[94] Section 237 of the FIA[3] states as follows:

Hearing requirements

237 (1) This section applies to hearings by the commission, superintendent or council under this Act.

(2) The commission, superintendent or council, depending on which of them has the power to take the action, must give written notice in accordance with the regulations of the intended action to any person who will be directly affected by it, before taking any of the following actions:

(a) making an order under section 26 (1) or (2), 48 (2), 67 (2), 93 (1) or (2), 99 (2), 109 (2), 125 (1), 137, 143, 144 (3), 193, 197, 231 (1), 244 (2) or (5), 245 (1), 247 (2) or (4), 249, 275 or 277 (d) to (g);

(b) refusing an order under section 245 (5);

(c) giving a consent referred to in section 235 (2) subject to conditions;

(d) imposing or varying conditions on a previously made order referred to in section 235 (1);

(e) imposing or varying conditions on a previously given consent referred to in section 235 (2);

(f) refusing to give a consent referred to in section 235 (2);

(g) issuing

(i) a business authorization,

(ii) a permit under section 187 (1), or

(iii) a licence under Division 2 of Part 6,

subject to conditions;

(h) imposing or varying conditions in respect of a previously issued

(i) business authorization,

(ii) permit under section 187 (1), or

(iii) licence under Division 2 of Part 6;

(i) refusing to issue a

(i) business authorization,

---

[3] As it was at the time the Intended Decision was sent to the Appellant: version in force between Nov 28, 2016 and May 30, 2018.

> (ii) permit under section 187 (1), or
>
> (iii) licence under Division 2 of Part 6.
>
> (3) Not later than 14 days after receiving notice under subsection (2) of an intended action, a person directly affected,
>
> (a) by delivering notice in writing to the commission may require a hearing before the commission in any case in which it is the minister or the commission that intends to take the action, or
>
> (b) by delivering notice in writing to the superintendent or the council, as appropriate, may require a hearing
>
> (i) before the superintendent in any case in which it is the superintendent who intends to take the action, and
>
> (ii) before the council in any case in which it is the council that intends to take the action.
>
> (4) A hearing required under subsection (3) must be held within a reasonable time after delivery of the written notice under subsection (2).
>
> (5) [Repealed 2004-48-102.]
>
> (6) After
>
> (a) the expiry of the 14 day period referred to in subsection (3) if no hearing has been required within that period, or
>
> (b) after the hearing, if one has been required within that period,
>
> the commission, the superintendent or the council, as the case may be, may proceed in the exercise of the powers conferred under this Act in respect of the matter that was the subject of the notice delivered under subsection (2).

[95] Section 237(2) says that before taking one of the "actions" listed in subsections a-i, the Council must give written notice of "the intended action" to any person who will be directly affected by it. The list of "actions" which trigger this written notice requirement includes cancellation or suspension of a license, or the attachment of conditions to a license, but does not include orders made under section 241.1, which, as set out above, sets out the Council's ability to award costs of the hearing and investigation.

[96] Subsection 237(3) states that *after* receiving the written notice under section 237(2), an affected licensee may require a hearing. Therefore, it appears to me that the section 237(2) notice requirements could not, logically, contain a provision requiring notice of potential hearing costs, as that notice would come even before a person had the opportunity to request a hearing.

[97] If section 237(2) included a requirement for notice of an "action" being taken under section 241.1(1)(b) (assignment of hearing costs), the "action" would have to be an order for *actual* hearing costs which were incurred at a hearing which would have already taken place. A notice requirement that costs *might* be incurred if a hearing were requested could not be an "action" as contemplated in section 237(2).

[98] Further, if section 241.1(1)(b) were included in section 237(2), then under section 237(3) an individual could, through force of legislation, request a separate hearing to contest the intended costs order. The legislature may well have determined that the issue of whether a separate and additional costs hearing should be held should be left to the Council, and not mandated in the legislation.

[99] I find the purpose of section 237(2) is to prevent the Council from taking action against an individual without allowing that individual the opportunity to contest the action. That opportunity to contest the proposed action is the hearing, and because the hearing is contingent on an individual contesting the proposed action, the *possibility* of hearing costs is rightly not included in the list of potential actions.

[100] Having made the above finding, I must still answer the question of whether, outside of the requirements of section 237(2), the Appellant was entitled as a matter of fairness to know that hearing costs might be assessed against her if she requested a hearing. I find the answer to this question is yes.

[101] In the context of disciplinary proceedings of the Council against an individual licensee, even apart from the basic procedural right of the individual to know the case against them, in order to meaningfully decide whether to request a hearing the individual should be made aware of the potential consequences of doing so where the consequences may be significant. This is even more important where the individual is not represented by legal counsel who can advise them of potential consequences.

[102] For the above reasons, I find that section 237 is *not* a complete code governing fairness at Council hearings, and that as a matter of procedural fairness Ms. Brar was entitled to know that costs could be assessed against her prior to making the decision of whether to maintain her request for a hearing.

b. Did Ms. Brar receive meaningful notice of the potential magnitude of costs consequences of her attending the hearing?

[103] I note that neither the Hearing Committee nor the Council provided reasons for the making the award of costs, nor did they make any findings regarding Ms. Brar's notice of potential costs consequences.

[104] The Council's submission to the Committee was that Ms. Brar was fully apprised of the implication of proceeding to the hearing, including being aware that hearing costs were going to be sought. Thus, the Council argues that the basis for imposing the award of costs was that Ms. Brar made a knowledgeable decision to proceed to the hearing. The Council seems to be claiming that Ms. Brar knew what could happen if she proceeded and therefore, she must accept the consequences.

[105] The Council argues that Ms. Brar's submissions as to why they should not be assessed were considered and rejected by the Hearing Committee. The lack of reasons precludes me from coming to such a conclusion.

[106] I have reviewed the entire appeal record and have been unable to find any documentary evidence showing that Ms. Brar was advised that costs could be assessed against her if she proceeded to the hearing. In addition, the Council's

submissions on this appeal do not refer to any documents which were provided to Ms. Brar which show that she was provided with written notice of the potential for costs to be assessed against her.

[107] The only evidence before the Hearing Committee was that provided orally by Ms. Brar, describing what she was told by various unidentified individuals, presumably on behalf of the Council. There was no evidence, nor any submission that Ms. Brar was advised of the extent of the possible costs order. Likewise, Ms. Brar does not appear to have been advised what the costs impact would be if she did not attend the hearing. There does not appear to have been evidence before the Committee upon which it could conclude that Ms. Brar made an informed decision for which she should be required to accept the consequences. The Hearing Committee made no such finding.

[108] The Committee Report recommends assigning hearing costs to Ms. Brar. However, it does so without addressing the points brought up in her submissions and her testimony. Nor does the Report explicitly accept the position put forward on behalf of the Council. Thus, I cannot discern the reasons why the Hearing Committee determined to recommend that Ms. Brar be held responsible for hearing costs.

[109] In the absence of any reasons for the Hearing Committee's assignment of hearing costs, and in an attempt to understand the basis for its award of costs, I reviewed the submissions made on the issue. In his oral argument to the Hearing Committee, Mr. Robinson submitted that:

> In addition to an order cancelling her licence, I would submit this is appropriate in this case to order Ms. Brar to pay the hearing costs. And I am compelled for a moment to address the hearings costs issue, because we heard Ms. Brar talk about how she was told she had to pay, and things of that nature.
>
> **I'm not here to give evidence**, but I think as a matter of course it's important that I clarify any misperceptions that may have been created by that. **I wanted Ms. Brar to be fully aware before she came here today** that that was something that would be sought, hearing costs. That was not done to threaten her. **That was done so that Ms. Brar was fully apprised of the implication of proceeding today.** And proceeding with this hearing generally. It wasn't done to threaten her, it was **simply done so she came into this hearing with her eyes open**. So there was no threats.
>
> [emphasis added]

[110] In Ms. Brar's closing submissions, concerning costs, she said:

> First he said over the phone on Friday when I called him that hearing costs going to be mine, which are you coming or not. Wasn't it supposed to be documented in here? The papers that he send me with these papers? Shouldn't it be in there? Like the hearing cost is going to be yours? Not when I call him, not to let me

> know at that time? He is saying the hearing cost is going to be yours, number one …

[111] Ms. Brar emphasized that she was not informed until a few days prior to the hearing that she might have to pay costs of the hearing. She specifically said that the potential for costs to be assigned should have been included in the documentary material that was provided to her as follows:

> … And if you guys did -- I understand that, okay, you mentioned it to me on Friday, which I know, and that is when I was mad. I could not make a decision at 3:30 about coming here or not. I had everything arranged. "Oh you have to pay for your fees." That was like almost threating. **If you wanted me do, you should have put it in, Council has – in the Council hearing you have to put your fees, this is what the fees is going to be, it's your choice to come or not.**
>
> [emphasis added]

[112] Mr. Robinson's statement during the hearing, which was not either tendered or expressly accepted as evidence by the Hearing Committee, seems to support this notion that she was only advised of hearing costs the Friday before the Monday hearing.

[113] Ms. Brar testified that the possible amount of the costs of the hearing was not described to her. While she had a conversation with someone, perhaps Mr. Robinson, on the Friday before the hearing, her evidence was that she did not know the amount she might be assessed for going to the hearing. In addition, Ms. Brar testified that the conversation about costs caused her to feel threatened.

[114] There was no evidence before the Hearing Committee that refuted Ms. Brar's claims that she was not aware of the possibility of costs being assessed against her until the Friday before the hearing. Nevertheless, despite the issue of procedural fairness having been raised by Ms. Brar, the Hearing Committee did not explicitly accept or reject Ms. Brar's evidence and argument.

[115] The hearing concerned the loss of a license to practice which, is very serious and deserving of significant procedural protections. The Council relies on *Baker* which held (at paras 22, 25 and 28):

> [22] ...the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected[.]
>
> …
>
> [25] A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then

> was) in *Kane v Board of Governors of the University of British Columbia,* [1980] 1 SCR 1105 (SCC) at p. 1113:
>
> > A high standard of justice is required when the right to continue in one's profession or employment is at stake... A disciplinary suspension can have grave and permanent consequences upon a professional career.
>
> [28] ...The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

[116] While Ms. Brar did know that there might be costs assigned as a result of her attendance at the hearing, she did not know that the hearing costs assigned were not insignificant and could amount to $5,196.25. There was no mention, either before or during the hearing, that costs of $3,055.00 for the investigation may eventually be assigned to her.

[117] I have concluded that Ms. Brar did not have adequate notice of the potential costs consequences of attending the hearing. In order for the notice to have been meaningful and to have given Ms. Brar an opportunity to decide whether she should continue her appeal requiring attendance at a hearing, the notice should have come at a much earlier time; probably either before or at the time that she elected to contest the intended decision. Although certainly an argument can be made that it might deter hearing requests if the Council were to advise licensees of costs consequences at the same time they are advising them of the right to a hearing, the benefit of full disclosure of potential consequences at an early stage (which in this case, may have prevented the Appellant from requesting a hearing in the first place) outweighs the risk of such an effect. Early disclosure would, at the least, prevent self-represented licensees like the Appellant from perceiving the Council to be threatening them with costs consequences on the eve of the hearing.

[118] The strong likelihood is that if a licensee elects to proceed to hearing, they may incur costs as a result; which consequence may be a material consideration for such individuals in their weighing of the pros and cons of requesting a hearing.

[119] Second, there is no evidence that Ms. Brar was ever (even when she received the Friday call from the representative of Council) advised of the potential *scope* of any cost consequences. The legislation is clear that costs may be assessed at up to the "actual costs incurred by the commission, superintendent or council for the investigation and hearing", which in some cases might be quite high. The legislation allows for significant costs awards and individuals who are considering requesting a hearing should be aware of the scope of the potential cost consequences.

[120] My findings on the adequacy of notice of potential cost consequences in this case should not be taken to be determinative of adequate notice in all cases. What will be adequate notice will depend on the facts of each case. In the context of this case, notice of the possibility of costs consequences the Friday before a Monday

hearing was inadequate, as was the apparent failure to disclose the possible scope/extent of such cost consequences.

[121] In these reasons I have recommended early notice for potential cost consequences as it may be relatively simple to include as a sentence concluding an Intended Decision, however, shorter notice may also be adequate in some circumstances.

c. Did Ms. Brar have sufficient notice of the Council's case against her, insofar as that information could have informed her decision to attend the hearing?

[122] Although I have already determined that Ms. Brar was both entitled to notice of potential costs consequences, and did not receive adequate notice of same, I wish to address the Council's argument that the costs award was justified because the Appellant chose to attend where the case against her had been "proved overwhelmingly".

[123] Procedural fairness requires that the Council disclose the case Ms. Brar was required to meet. It was only with the benefit such disclosure that Ms. Brar could have made an informed decision about whether or not it was worthwhile to proceed. The Council and the Committee Report both refer to the overwhelming evidence against her. That evidence came from the expert's report.

[124] My review of the transcript shows that by very early in the hearing, the Committee knew (or should have known) that Ms. Brar had not accessed the Expert's Report which constituted the bulk of the case against her. I note that no findings were made by the Hearing Committee on this issue.

[125] I also note that due to there being no reasons for the decision to award costs against Ms. Brar, there was no discussion of whether the Hearing Committee or the Council had found that Ms. Brar had knowledge of the Expert's Report notwithstanding the many indications in the hearing that she did not actually have that knowledge.

[126] As I have already set out above, the notice of the potential cost consequences which was provided to Ms. Brar was not sufficient for her to fully consider the consequences of proceeding with the hearing. Coupled with the discussions at the hearing which indicated that Ms. Brar had not yet accessed the Expert's Report, which was the source of what the Committee Report described as the "overwhelming" evidence against her.

[127] Contrary to the Council's submissions in this appeal, I find that the Hearing Committee knew or ought to have known that Ms. Brar was unaware of the details in the Expert's Report which made up most of case against her. What was or should have been clear at the hearing was that Ms. Brar had not made a decision to proceed that was based on the material provided to her.

[128] The Hearing Committee had evidence of the problems with service of the documents, as well as the consideration by Ms. Brar that she was being threatened about costs and told that if she did not come to the hearing, she would be guilty

anyway. Despite being aware of this information, the Hearing Committee did not discuss these issues, either at the hearing or in its Report.

[129] Ms. Brar clearly did not avail herself of the limited time which she had to review the Expert's Report. Notwithstanding that failure, it became readily apparent to members of the Committee that Ms. Brar had no understanding of the importance of the Expert's Report or how it was being used in her hearing. The Committee should have halted the proceedings to ensure that Ms. Brar became aware of the significance of the Expert's Report and allow her time to reconsider her position, even seek an adjournment. It did not do so, in fact, it continued as if she understood the possible consequences, notwithstanding they ought to have realized she did not.

DECISION

[130] I have determined that at the earliest, Ms. Brar was informed the Friday prior to the commencement of the hearing that unquantified costs could be assessed against her. This did not amount to proper notice. As a matter of procedural fairness, Ms. Brar was entitled to proper notice that costs could be assessed against her if she proceeded to hearing.

[131] I reject the Council's submission to this tribunal that costs were properly assessed against Ms. Brar because the Council had "proved overwhelmingly" that she cheated and colluded. I find that the Hearing Committee either knew or ought to have known that Ms. Brar was unaware of the evidence against her, and it should have dealt with that fairness issue at the hearing. On the facts of this case, Ms. Brar's knowledge of the evidence against her and her decision to proceed to hearing cannot properly form the basis for an award of costs against her.

[132] For the reasons above, I find that the Council breached its duty of fairness to the Appellant when it assessed hearing and investigation costs against her without providing her with proper notice that such costs could be assigned.

REMEDY

[133] Section 242.2(11) of the FIA applies to this appeal, and provides that the FST may confirm, reverse, or vary a decision or send the matter back for reconsideration, with or without directions, to the person or body whose decision is under appeal.

[134] I have concluded that the Council breached its duty of fairness to the Appellant when it failed to provide sufficient notice of potential costs consequences. The question which remains, is what remedy is appropriate in the circumstances.

[135] Ms. Brar was insufficiently aware of the strength of evidence against her and was unaware, until just prior to the hearing, that there was a possibility of a significant award of costs against her. There is no evidence or submissions which indicate that she knew how much costs might amount to, nor even a range of the possible liability. There is also no evidence that she was told about the possibility of investigation costs being awarded. In fact, the Hearing Committee did not

recommend an award of investigation costs and the Council awarded them without further submission and without providing reasons.

[136] I have decided to allow the appeal in part, and to overturn the decision awarding investigation and hearing costs against Ms. Brar.

[137] For breaches of procedural fairness, the usual remedy is to send the matter back to the original decision-maker for reconsideration, free from the procedural defect that tainted the original decision. This avoids the need to speculate about what substantive outcome would have ensued had the proper procedure been followed.

[138] In this case, remedying the Council's breach of procedural fairness would require that Ms. Brar be given the opportunity to reconsider her decision to challenge the Intended Decision with a full appreciation for the potential costs consequences, and the extent of the evidence arrayed against her. This could be achieved by sending the matter back for reconsideration, subject to Ms. Brar's deciding to renew her challenge to the Intended Decision.

[139] In my view, however, remitting this matter to the original decision-maker would serve no purpose in the unique circumstances of this case. Ms. Brar has abandoned her appeal of the decision on the merits. She says she no longer cares about the license, and objects only to the award of costs against her. In these circumstances, the proper remedy, in my opinion, is to reverse the award of costs without remitting the matter for reconsideration. In other words, these circumstances constitute one of the "limited scenarios" alluded to in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 142, in which "remitting the matter would stymie the timely and effective resolution of matters."

[140] For these reasons, I invoke my remedial discretion to cancel the hearing and investigation costs ordered against Ms. Brar. It seems to me to be most fair to all parties and to the public in general not to protract this matter any longer.

ADDITIONAL COMMENTS REGARDING ACCESS TO JUSTICE

[141] Although I have found that the notice requirement here was not met and that answers the appeal (as narrowed by the Appellant), after reviewing the appeal record I find it important to comment on other procedural irregularities which I observed in my review of the appeal record.

[142] My comments primarily concern the difficulties that have arisen due to Ms. Brar being a self-represented litigant. There are some matters that I wish to bring to the Parties' attention. I did not need to have regard to these issues to arrive at the above conclusion. However, these pitfalls are easily avoided and will enhance the efficacy of such hearings in the future, should they be adopted.

[143] First, I acknowledge that Ms. Brar appears to have presented much difficulty for the Council in its dealings with her. She seems to have refused efforts to include her in the investigation. Apparently, she was also not responsive to efforts to engage her about the topic of the hearing. In short, she was a difficult person to help.

[144] I also recognize that it was her choice to not have counsel and to appear on her own behalf. However, Ms. Brar's behaviour throughout the hearing showed that she was clearly unfamiliar with even the basics of what was required to represent herself. The Committee did not recognize or ameliorate this adversity.

[145] I was struck by the many times that Ms. Brar behaved in a way that showed her lack of familiarity with the hearing process. The Committee did not use such behaviour as an opportunity to identify and correct mistakes. Ms. Brar was abandoned to her ongoing failures. The people at the hearing seemed to ignore Ms. Brar's demonstrated lack of skill and knowledge, and the way they treated her seemed to exacerbate the inadequacy that she demonstrated.

[146] The Committee appears not to have modified its procedure to account for Ms. Brar's lack of legal representation. This was a serious matter and Ms. Brar was entitled to be treated in with procedural fairness. This requires more effort from a decision-maker, to ensure justice in the resulting decision.

[147] I recommend that the Council adopt appropriate measures from the Canadian Judicial Council's 2006 Statement of Principles which provides direction to judges about dealing with self-represented litigants. I suggest that the Council and other administrative tribunals should consider these principles and adopt those that are appropriate to their individual organizations and in view of the particular matter before them.

[148] The Canadian Judicial Council suggests that many participants in the justice system have responsibility to ensure that self-represented persons are provided with fair access and equal treatment, particularly to understand and meaningfully present their case, regardless of representation.

[149] The Canadian Judicial Council also suggested that when a party is proceeding without representation, case management may be needed to:

> (a) explain the process;
>
> (b) inquire whether both parties understand the process and the procedure;
>
> (c) make referrals to agencies able to assist the litigant in the preparation of the case;
>
> (d) provide information about the law and evidentiary requirements;
>
> (e) modify the traditional order of taking evidence; and
>
> (f) question witnesses.

[150] I recognize that there is no legislative requirement for the Hearing Committee to have regard to principles such as these adopted for Judges. However, it is clear that the Council's appointment of the Hearing Committee was for it to administer justice in the matter of the Intended Decision. That was a weighty

matter, involving Ms. Brar's occupation and, potentially, her livelihood. It was a serious matter, deserving of procedural safeguards to ensure that a just result was obtained.

"Catherine McCreary"

_____

Catherine McCreary,
Member, Financial Services Tribunal

July 16, 2021