Financial Services Tribunal

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DECISION NO. 2019-FIA-004(b)

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

BETWEEN:	Luan Charles Xing	**APPELLANT**
AND:	Insurance Council of British Columbia	**RESPONDENT**
AND:	British Columbia Financial Services Authority	**RESPONDENT**
BEFORE:	A Panel of the Financial Services Tribunal Michael Tourigny, Panel Chair	
DATE:	Conducted by way of written submissions concluding on August 16, 2019	
APPEARING:	For the Appellant:	Ravneet Arora, Legal Counsel
	For the Respondent Insurance Council of British Columbia:	David T. McKnight, Legal Counsel
	For the Respondent British Columbia Financial Services Authority:	Sandra A. Wilkinson, Legal Counsel

APPEAL

[1] Luan Charles Xing (the "Appellant") has been licensed under the *Financial Institutions Act*, RSBC 1996 c 141 (the "*FIA*") as a life and accident and sickness insurance agent since 2010.

[2] The Respondent Insurance Council of British Columbia (the "Council") is a statutory body established under section 220 of the *FIA.* The Council has first instance responsibility under the *FIA* for licensing and regulating the conduct of

insurance agents such as the Appellant, as well as insurance salespersons, insurance adjusters and employed insurance adjusters.

[3] Based on professional misconduct admitted to by the Appellant, the Council issued an order under sections 231, 236 and 241.1 of the *FIA* effective April 23, 2019 (the "Penalty Decision") that ordered in general terms:

i. Suspension of the Appellant's Life Agent licence (the "Licence") for a period of 1 year.

ii. Supervision of the Appellant by a supervisor approved by Council for a period of 2 years following the suspension, with restrictions on his ability to serve as a nominee of an insurance agency during that time.

iii. A fine of $2,500.

iv. Assessment of Council's investigation costs of $1,487.50. and

v. Completion by the Appellant of specified professional courses.

vi. Payment of the fine and investigation costs together with completion of the specified professional courses to occur by a specified date.

[4] The Appellant appeals to the Financial Services Tribunal (the "FST") under section 242 of the *FIA* from the Penalty Decision insofar as it ordered that his Licence be suspended for a period of 1 year (the "Suspension Order").

[5] By operation of section 242(3)(a) of the *FIA* the Respondent British Columbia Financial Services Authority (the "Authority") is a party to this appeal.[1]

[6] The Appellant does not appeal any terms of the Penalty Decision other than the Suspension Order and has advised the FST that he has already paid the fine and investigation costs ordered against him and has completed the required professional courses.

[7] 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.

[8] The Appellant submits that he was denied his right to procedural fairness and that the Suspension Order was unreasonable. Accordingly, the Appellant asks the FST to vary the Penalty Decision by setting aside the Suspension Order made against him by Council.

[9] The Council, supported by the Authority, asks that this appeal be dismissed as the Appellant was afforded all due process and the Suspension Order was reasonable. Alternatively, if the FST finds there has been a breach of procedural

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[1] At the commencement of this Appeal the Financial Institutions Commission ("FICOM") had party status pursuant to section 242(3)(a) of the *FIA*, however, on November 01, 2019 FICOM was dissolved and replaced by the BC Financial Services Authority (the "Authority"). Pursuant to section 26(4) of the *Financial Services Authority Act*, 2019, SBC 2019, c 14, the Authority replaced FICOM as a party in this appeal.

fairness in relation to the Suspension Order they submit that the Suspension Order should be set aside and remitted back to Council for reconsideration with directions.

BACKGROUND

[10] In February 2016 an insurance company with whom the Appellant had an agency relationship provided a written investigation report to Council relating to client complaints and compliance concerns the insurer had about how the Appellant conducted business with them as life agent.

[11] The complaint prompted the Council to conduct its own investigation in relation to those complaints under section 232 of the *FIA*. The resulting investigation report was provided to the Appellant for his review and was considered by Council at its April 11, 2017 meeting.

[12] In reliance on the investigation report, Council determined that the Appellant's actions in relation to the client complaints contravened the *FIA*, Council's Rules and its Code of Conduct in that those actions brought into question his competency, trustworthiness, and his ability to carry on the business of insurance in good faith and in accordance with the usual practice of the business of insurance.

[13] Based on its competency finding, along with other stated factors, the Council provided the Appellant on May 30, 2017 with notice as required by section 237(2) of the *FIA* of its intended decision to cancel his Licence, as well as notice of the Appellant's right to require a hearing before Council to dispute Council's findings or its intended decision.

[14] On or about June 16, 2017 the Appellant exercised his right under section 237(3)(b) of the *FIA* to dispute Council's findings and intended decision and gave notice requiring a hearing before the Council.

[15] On June 28, 2018, Council issued a Notice of Hearing setting the matter down for a two-day hearing scheduled for August 20 and 21, 2018.

[16] On August 16, 2018, the Appellant and Council signed an Agreed Statement of Facts (the "ASOF") for purposes of the hearing.

[17] The hearing commenced on August 20, 2018, but was adjourned to be rescheduled to a later day due to a conflict of interest identified by one of the hearing committee members part way through the hearing.

[18] On September 6, 2018 Council issued the Appellant with a second Notice of Hearing (the "Notice of Hearing") scheduling the hearing for September 28, 2018 (the "Hearing"). The Notice of Hearing set out that the purpose of the hearing was to determine whether the Appellant had contravened the *FIA*, Council's Rules and its Code of Conduct in that, among other things:

1. The Appellant failed to act in a trustworthy and competent manner, in good faith, and in accordance with the usual practice of the business of insurance:
    a. By misrepresenting and/or by making false and inaccurate declarations to an insurer that information contained in clients' insurance applications was accurate, including that his agency's address was the residential address

of the clients and that a third party, who paid the clients' insurance premiums, was a relative of clients;

b. By enlisting another individual to impersonate him for the purposes of professional development;

[19] The Notice of Hearing further set out that the purpose of the Hearing was to determine whether the alleged contraventions occurred, and if so, to determine appropriate disciplinary action to be taken by Council, including the possibility of the suspension or cancellation of his Licence.

Joint Submission on Penalty

[20] Prior to the Hearing, counsel for the Appellant and counsel for the Council agreed on a joint submission to be made to Council at the Hearing on the appropriate penalty to be imposed on the Appellant based on the ASOF (the "Joint Submission on Penalty"). The Joint Submission on Penalty and how it was dealt with by Council in making the Suspension Order is at the core of this appeal.

[21] The Hearing proceeded before a committee of three members of Council (the "Hearing Committee") on the evidentiary basis of the ASOF which was entered as an exhibit along with a book of documents relating to the investigation. The Appellant admitted that his conduct fell short in terms of his professional obligations of competence, trustworthiness and good faith. This left the issue of appropriate penalty to be determined.

[22] At the Hearing, legal counsel for the Appellant and Council advanced their Joint Submission on Penalty to the Hearing Committee. The Joint Submission on Penalty advocated that the following penalty was appropriate in the circumstances:

i. Supervision of the Appellant by a supervisor approved by Council for a period of 1 year during which period the Appellant shall not supervise any life agents.

ii. Completion by the Appellant of specified professional courses within 90 days.

iii. Payment of Council's investigation costs in the amount of $1,487.50 within 30 days.

[23] The Joint Submission on Penalty did not propose suspension of the Appellant's Licence as an element of penalty.

[24] It is common ground that the Joint Submission on Penalty was not binding on the Hearing Committee. It is also common ground that the issue before the Hearing Committee was whether the penalty proposed in the Joint Submission on Penalty was appropriate in all the circumstances.

[25] It is an undisputed fact that while the Hearing Committee raised questions about elements of the Joint Submission on Penalty, the specific issue of suspension of the Appellant's Licence as a potential element of penalty being considered was not raised by the Hearing Committee with counsel during the Hearing.

[26] It is also an undisputed fact that counsel for the Appellant made no submissions to the Hearing Committee on suspension as an element of penalty. As

will be addressed later in this decision, Council submits that the Appellant's decision not to do so was taken by him at his peril.

[27] On February 6, 2019, the Hearing Committee submitted its "Report of the Hearing Committee" (the "Report") to Council in relation to the Hearing as mandated by section 223(4) of the *FIA*. In the Report the Hearing Committee set out its findings and made a recommendation on penalty that the Appellant be supervised and be prohibited from supervising other life agents for 2 years rather than the 1 year suggested in the Joint Submission on Penalty. In addition, the Hearing Committee recommended the Appellant complete the courses and pay the investigation costs recommended in the Joint Submission on Penalty within the submitted time frame, and pay a fine of $2,500 within 90 days. On the matter of hearing costs, the Hearing Committee rejected the submission of the Appellant that no costs should be assessed against him, and it recommended Council order the Appellant to pay the costs of the hearing.

[28] At its February 26, 2019 meeting Council considered the Report and penalty recommended therein by the Hearing Committee but did not adopt it, deciding instead that a more significant penalty was called for. In the Penalty Decision issued to the Appellant April 23, 2019, in addition to the penalty recommended by the Hearing Committee, (modified slightly), the Council made the Suspension Order, which is the subject of this appeal. Council did not comment on the issue of hearing costs and did not include hearing costs as part of its Order.

[29] I note that concurrently with the filing of this appeal on May 7, 2019 the Appellant applied under section 242.2(10)(a)(i) of the *FIA* to the FST for a stay of the Suspension Order pending final determination of this appeal. By Decision No. 2019-FIA-004(a), made in these proceedings dated August 2, 2019, I granted the requested stay on conditions.

ISSUES

[30] On this appeal the Appellant has raised specific issues relating to whether he was denied procedural fairness in the process leading to the Suspension Order, whether the reasons given by Counsel for making the Suspension Order were adequate and whether the Suspension Order was reasonable in the circumstances.

[31] For purposes of articulating this decision, I have reworked the wording and have focused the issues from those set out in the Notice of Appeal and submissions of the parties as follows:

a. Given that the Joint Submission on Penalty did not propose suspension as a penalty, and further given that the specific issue of suspension of the Appellant's Licence as a potential element of penalty being considered was not raised by the Hearing Committee with counsel during the Hearing, did Council breach the Appellant's right to procedural fairness by imposing the Suspension Order as it did?

b. Is the fact that the Suspension Order was made by members of Council, who were different from the persons comprising the Hearing Committee

and whose identity was unknown to the Appellant, in and of itself, unfair to the Appellant?

c. Did Council err by failing to provide adequate reasons for its decision to impose the Suspension Order?

d. Was the imposition by Council of the Suspension Order as an element of penalty reasonable in all the circumstances?

DISCUSSION AND ANALYSIS

Standard of Review

Questions of Procedural Fairness

[32] In submissions as to the applicable standard of review for questions of procedural fairness, both the Appellant and Council make reference to the decision of the FST in *Kadioglu v Real Estate Council of BC and Superintendent of Real Estate,* Decision No. 2015-RSA-003(b)("*Kadioglu*"), and subsequent decisions of the FST that have considered *Kadioglu*. The Appellant submits that based on those decisions the standard of review is whether, in the FST's view, the Suspension Order was imposed in a manner that was fair in all of the circumstances. I agree with and will apply this standard of review to my consideration of procedural fairness issues. In doing so I will be further guided by *Kadioglu,* where it was held that the FST is to ask that question from its' unique perspective with specialized knowledge of the industry sectors that fall within the Tribunal's responsibility.[2]

Questions of Penalty

[33] In summarizing the standards of review applied by the FST, *Kadioglu* held that reasonableness is the standard "for questions of fact, discretion, and penalty"[3].

[34] In a subsequent decision of the FST, *Financial Institutions Commission v Insurance Council of BC et al,* Decision No. 2017-FIA-002(a)-008(a) ("*FICOM*"), the issue of the appropriate standard of review to be applied by the FST in penalty appeals was considered by Chair Strocel Q.C. in some detail. In *FICOM*, Chair Strocel highlighted the difference between the FST and generalist Courts, and set out the FST's own standard of review as a specialized tribunal.

[35] At paragraph 63 of *FICOM* the Chair stated:

> 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 or 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.

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[2] *Kadioglu* at para 31.
[3] *Kadioglu* at para 32.

[36] After reviewing previous decisions of the FST and the Courts, the Chair in *FICOM* held as follows regarding the standard of review to be applied by the FST to penalty appeals (at paras 77-78):

> [77] Taking all these factors into account, it is my view that the Tribunal should unapologetically accept that the Legislature expected it to intervene in any penalty appeal where it finds that there has been an error in principle as opposed to an "error" in line-drawing by the Insurance Council, and that it is for the Tribunal to determine where an error in principle has occurred. The Tribunal should apply this test not as if it were a court, but should apply it from its specialized institutional vantage point and with a careful eye to the public interest. It is for the Tribunal to arrive at its own specialized judgments about what is a reasonable penalty range. In this way, the Tribunal can grant appropriate respect to Insurance Council decisions and precedents without treating those decisions and precedents as if only the Insurance Council had a legitimate say in how to protect the public interest. The Tribunal s not required to define the range of reasonable outcomes in the same way as would a court.
>
> [78] The approach cautions against the Tribunal simply substituting its discretion for that of the body appealed from. However, it also recognizes the special role entrusted to the Tribunal in cases where the debate centers, as it does here, on whether the penalties in question fall below the standard necessary to protect the public interest in cases involving dishonest conduct.

[37] 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 *FICOM* made it clear that it is sensible for the FST to adopt a consistent approach to the standard of review applied in all penalty appeals within its jurisdiction. I agree.

[38] As was done in *Kia v Registrar of Mortgage Brokers,* Decision No. 2017-MBA-002(b) ("*Kia*"), I agree with and will apply what I referred to in *Kia* as the "less deferential reasonableness standard" quoted above from *FICOM* as the standard of review applicable to my review of penalty on this appeal.

Issue a. Given that the Joint Submission on Penalty did not propose suspension as a penalty, and further given that the specific issue of suspension of the Appellant's Licence as a potential element of penalty being considered was not raised by the Hearing Committee with counsel during the Hearing, did Council breach the Appellant's right to procedural fairness by imposing the Suspension Order as it did?

Does the common law duty of procedural fairness apply to Council's decision to impose the Suspension Order?

[39] The Appellant submits that it is uncontroversial that procedural fairness must be afforded to individuals or organizations that are the subjects of the decision-making functions by administrative bodies.

[40] In support of this proposition the Appellant relies on the decision of the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship & Immigration),* 1999 SCC 699 ("*Baker*"), and quotes selections from *Baker* as follows (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 state… 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.

[41] The Appellant submits that being a professional facing a disciplinary hearing before his governing body he was entitled to a high degree of procedural fairness, especially in light of the Suspension Order which could have grave consequences upon his career.

[42] The Appellant refers to the fact that the Hearing before the Hearing Committee proceeded on the basis of the Joint Submission on Penalty which did not encompass a term of suspension as an element of penalty to be imposed against him. The Appellant submits that in imposing the Suspension Order on him without *de facto* giving him a hearing wherein he made submissions regarding the appropriateness of a term of suspension as a penalty, Council unfairly denied his right to be heard.

[43] In response, Council submits that the common law right to procedural fairness cannot override the procedure prescribed by statute. In the case of conflict, the statutory procedure governs. The common law duty to be fair may be applied only where the statute is silent as to the procedure to be followed. In support of these propositions Council refers to *Ocean Port Hotel Ltd. v British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2001 SCC 52 ("*Ocean Port*") and *Berg v British Columbia (Police Complaint commissioner),* 2006 BCCA 225 ("*Berg*").

[44] The actual language used by the Courts in *Ocean Port* and *Berg* bears repeating. In *Ocean Port* wherein the SCC was considering the degree of independence required of tribunal members empowered to impose penalties, the court stated (at paras 21 and 22):

> [21] Confronted with silent or ambiguous legislation, courts generally infer that parliament or the legislature intended the tribunal's process to comport with the principles of natural justice…

> [22] However, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication. …It is not open to a court to apply a common law rule in the face of clear statutory direction.…Courts engaged in judicial review of administrative decisions must defer to the legislator's intention in assessing the degree of independence required of the tribunal in question.

[45] Further, in the BCCA decision in *Berg* relying on *Ocean Port* the Court stated (at paras 48 and 49):

> [48] Any *prima facie* common law right to procedural fairness in an administrative process "may be ousted by express statutory language or necessary implication." …
>
> [49] Where the legislation is silent or ambiguous, courts generally infer that Parliament intended the administrative process to comply with the principles of natural justice: see *Ocean Port Hotel Ltd.*, at para. 21. The question therefore is whether the statute is *unequivocal* in stating a complainant's rights to participate.

[46] The Council's submissions also refer to and rely upon the subsequent decision of the Supreme Court of Canada in *Canada (Attorney General) v Mavi*, 2011 SCC 30 ("*Mavi")*. I find *Mavi* of assistance in my consideration of the direction from the SCC in *Ocean Port* quoted above. In *Mavi* the Supreme Court was considering the extent to which, if at all, the government is constrained by considerations of procedural fairness in relation to the enforcement and collection of statutory debts of the sponsors of family class immigrants under undertakings given by them to the government as required by the *Immigration and Refugee Protection Act,* SC 2001, c 27 ("*IRPA*"). The SCC in *Mavi* began it analysis as follows (at paras 38-39):

> [38] The doctrine of procedural fairness has been a fundamental component of Canadian administrative law since *Nicholson v Haldimand-Norfolk (Regional Municipality) Commissioners of Police (1978),* [1979] 1 SCR 311 (SCC) where Chief Justice Laskin for the majority adopted the proposition that "in the administrative or executive field there is a general duty of fairness" (p.324). …The question in every case is "what the duty of procedural fairness may reasonably require of an authority in the way of specific procedural rights in a particular legislative and administrative context"…
>
> [39] Accordingly, while the content of procedural fairness varies with circumstances and the legislative and administrative context, it is certainly not to be presumed that Parliament intended that administrative officials be free to deal unfairly with people subject to their decisions. On the contrary, the general rule is that a duty of fairness applies. See G. Regimbald, *Canadian Administrative Law* (2008), at pp. 226-27, but the general rule will yield to clear statutory language or necessary implication to the contrary: *Ocean Port Hotel Ltd. v British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2001 SCC 52, [2001] 2 SCR 781 (SCC) at para 22. There is no such exclusionary language in the *IRPA* and its predecessor legislation.

[47] In deciding whether the common law rights to procedural fairness outlined in *Baker* and as advocated for by the Appellant apply to the decision of Council to impose the Suspension Order, I will be guided by the decisions and analysis of the courts in *Ocean Port, Berg* and *Mavi* quoted above.

[48] Council submits that the hearing process prescribed by the *FIA* is clear and unambiguous such that the Appellant's submissions concerning the common law duty to be fair are not applicable in the circumstances.

[49] For greater clarity, Council submits the *FIA* is not silent as to the procedure to be followed when a hearing is required, nor is it silent as to the procedure to be followed by Council when making a decision after a hearing.

[50] This leads us to a consideration of the provisions of the *FIA* relating to hearings before Council or a Hearing Committee.

Provisions of the FIA relevant to hearings before Council

[51] As occurred in this case, section 232 of the *FIA* empowers Council to conduct an investigation of a licensee to determine whether he or she acted in compliance with the requirements of the *FIA.*

[52] Section 231(1) of the *FIA* states that if, after due investigation, the Council determines that the licensee has failed to act in compliance with the requirements of the *FIA* it has the power to penalize the licensee as specified therein, including cancellation of the licence of the licensee under section 231(1)(g), which was Council's intended decision in this case.

[53] Section 237(2) of the *FIA* obliges Council to give written notice of its intended action under section 231(1) to the licensee who will be affected by it before taking such action. Section 235(5) of the *FIA* also requires that written reasons for orders under section 231(1) be given. In this case, Council provided the Appellant with the requisite written notice which included a copy of the intended decision to cancel his Licence and the reasons therefor ("Notice of Intended Decision").

[54] Section 237(3)(b) of the *FIA* gives the licensee who will be affected by the intended action the right to require a hearing before Council.

[55] Section 223(1), (3) and (4) of the *FIA* provide:

> 223(1) The council may delegate any duty of the council to hold a hearing that is required under this Act to one or more committees composed of 3 or more members of the council.
>
> (3) The chair of a committee referred to in subsection (1) must be a voting member of the council.
>
> (4) If the council delegates the duty to hold a hearing to a committee under subsection (1), the committee must hold the hearing and make a written report of the hearing to the council, and after receiving and considering the report the council may decide on the matter that was the subject of the hearing.

[56] In the Appellant's case, Council delegated its duty to hold the hearing that he was entitled to under section 237(3)(b) of the *FIA* to the Hearing Committee under the authority of section 223(1).

[57] The Notice of Hearing, a formal document signed by the Chair of the Hearing Committee, set out the time and place of the Hearing, as well as the purpose of the Hearing being to "determine" whether:

i. the Appellant had contravened the *FIA*, Council's Rules and its Code of Conduct in the manner alleged;

ii. and if so, any disciplinary action to be taken by Council in accordance with sections 231, 236, or 241.1 of the *FIA* as again particularized.

[58] Council also refers to section 225.1(2)(h) of the *FIA* as statutory authority for Council to make rules: "establishing the criteria to be applied and the procedures to be followed by the council or a committee of the council respecting hearings and suspension, cancellation or restriction of licences and the imposition of fines;".

[59] Council submits that together, section 223(4) and section 225.1(2)(h) of the *FIA* grant broad discretion to Council to establish the criteria to be applied and the procedures to be followed respecting hearings, and to decide matters that were subject to the Hearing.

[60] As made clear in *Baker, Ocean Port, Berg and Mavi,* the fact that a decision is administrative and affects the rights, privileges or interests of an individual is sufficient to attract the application of the common law duty of procedural fairness on a *prima facie* basis. As such, I find that the Hearing before the Hearing Committee and the decision of Council to impose the Suspension Order in this case were *prima facie* subject to the common law duty of procedural fairness.

[61] *Ocean Port, Berg and Mavi* all also acknowledge that the legislative branch can oust or limit the application of the principles of natural justice through the language used in any particular legislation that would otherwise be *prima facie* subject to the common law duty of procedural fairness.

[62] Having reviewed the above provisions of the *FIA* relating to disciplinary hearings before Council or a hearing committee, and as directed by *Ocean Port, Berg and Mavi*, I ask whether it can be said that the common law principles of natural justice or procedural fairness have been ousted by express statutory language in the *FIA* or necessary implication.

[63] Faced with an intended disciplinary decision of Council against a licensee, the licensee is entitled by the *FIA* to:

i. Notice and written reasons for the intended disciplinary decision;

ii. Notice of and the right to require a hearing before Council to dispute the findings of wrongdoing or the intended decision;

iii. Council's duty to hold the hearing can be delegated to a hearing committee which must hold the hearing and make a written report of the hearing to the Council;

iv. After considering the written report of the hearing committee, Council may decide the matter that was the subject of the hearing.

v. Council may make rules establishing the criteria to be applied and the procedures to be followed by the Council or a hearing committee respecting hearings.

[64] While section 225(1)(h) of the *FIA* authorizes Council to make rules establishing the criteria to be applied and the procedures to be followed by the Council or a hearing committee respecting hearings, I find that right, in and of itself, cannot reasonably be read to oust the *prima facie* common law right to procedural fairness.

[65] Reading the relevant provisions of the *FIA* in the overall context of the act I cannot agree with the submissions of Council to the effect that the common law principles of natural justice or procedural fairness have been ousted by express statutory language in the *FIA* or by necessary implication.

[66] Contrary to Council's submissions, I find that the statutory language of the *FIA* is silent, or at most ambiguous, as to the procedures to be followed when a hearing is required and is silent as to the procedure to be followed by Council when making a decision after a hearing.

[67] Council submits that the legislature saw fit to grant Council a broad decision-making authority following a hearing before a Hearing Committee through the language of section 223(4) of the *FIA,* which states: "after receiving and considering the report the council may decide on the matter that was the subject of the hearing". Council goes on to submit that this discretion cannot be displaced by the common law principles of procedural fairness in the circumstances.

[68] While it is correct to observe that Council is granted discretion in making its decision on the matter after considering the report as set out in section 223(4) of the *FIA*, I find the submission of Council that this discretion ousts the common law principles of procedural fairness in the circumstances to be incorrect. While the discretion of Council is to be exercised reasonably, I find it must also be exercised in accordance with the common law principles of procedural fairness. I refer in support to the decision of the Supreme Court of Canada in *Mavi.*

[69] In *Mavi* the appellant had argued that the governing legislation (the *IRPA*) imposed a duty (not a discretion) to collect sponsorship debts in full and as such there was no obligation of procedural fairness. The SCC did not agree and held that on a proper interpretation of the governing legislation the Crown did have a limited discretion in these collections and that in the exercise of this discretion the Crown was bound by a duty of procedural fairness[4].

[70] I further disagree with the submission of Council that its discretion to decide the matter that was the subject of the Hearing was not limited or altered by the recommendations on penalty in the Report to the Council that was mandated by section 223(4) of the *FIA.* The Report is all that Council had properly before it upon which to exercise its discretion. To submit that the recommendations in the Report

[4] *Mavi* at paras 4-5.

can be ignored by Council in exercising its discretion smacks of arbitrariness. As stated in *Mavi* quoted above (at para 39): "while the content of procedural fairness varies with circumstances and the legislative and administrative context, it is certainly not to be presumed that Parliament intended that administrative officials be free to deal unfairly with people subject to their decisions."

[71] The Report to Council mandated by section 223(4) of the *FIA* was to be "of the hearing" which Hearing in this case was to determine the appropriate penalty considering the Joint Submission on Penalty on the admitted contravention of the *FIA* based on the ASOF. Any "report of the hearing" in these particular circumstances must logically involve a recommendation on penalty. If not, the Hearing would have been pointless. Section 223(4) directs Council to "consider" the Report before making its decision, ergo Council was bound to consider the Report, including the recommendations on penalty, when exercising its discretion.

[72] In result of all of the forgoing, I find that the common law principles of natural justice or procedural fairness have not been ousted by express statutory language in the *FIA* or necessary implication from either the Hearing before the Hearing Committee or the decision of Council to impose the Suspension Order.

[73] The Supreme Court of Canada in *Mavi* held that once the duty of procedural fairness has been found to exist, the particular legislative and administrative context is crucial to determining its content (at para 41). The Court went on to state (at para 42):

> [42] A number of factors help to determine the content of procedural fairness in a particular legislative and administrative context. Some of these were discussed in *Cardinal*, a case involving an inmate's challenge to prison discipline which stressed the need to respect the requirements of effective and sound public administration while giving effect to the overarching requirement of fairness. The duty of fairness is not a "one-size-fits-all" doctrine. Some of the elements to be considered were set out in a non-exhaustive list in *Baker* to include (i) "the nature of the decision being made and the process followed in making it" (para. 23); (ii) "the nature of the statutory scheme and the 'terms of the statute pursuant to which the body operates"' (para. 24); (iii) "the importance of the decision to the individual or individuals affected" (para. 25); (iv) "the legitimate expectations of the person challenging the decision" (para. 26); and (v) "the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances" (para. 27). …

Procedural guidelines for hearings before Council

[74] Given that section 225.1(2)(h) gives Council a discretionary power to make rules establishing the criteria to be applied and the procedures to be followed by it or a hearing committee respecting hearings, I will now consider the relevant procedural guidelines Council has in place to assist me in determining the content of the appropriate common law principles of natural justice or procedural fairness applicable to the case under appeal.

[75] Council submits that it is entitled to choose its own procedures as long as those procedures are consistent with statutory requirements citing *Seaspan Ferries Corp. v British Columbia Ferry Services Inc.*, 2013 BCCA 55 ("*Seaspan*") at para 52. This proposition is not in dispute.

[76] Council has approved policy J.5 – Hearing Guidelines (July 2018), which is published for licensees on Council's website (the "Guidelines"). I note that the term "guidelines" is used in policy J.5 as opposed to "rules". While no definition of the term "guidelines" is set out in the *FIA,* the word is generally understood to mean a guide that provides direction to action or behaviour, as opposed to a "rule" which is generally understood to mandate action or behaviour more like a regulation or law. Use of the term "guidelines" suggests to me the intention was to afford flexibility to Council in its application of the Guidelines depending upon the circumstances of any particular hearing.

[77] The introductory language of the Guidelines refers to the fact that Council conducts hearings under the *FIA* on matters pertaining to discipline, licence conditions, and where Council has refused to issue a licence to an applicant. The Guidelines are stated to form the basis upon which such hearings are conducted.

[78] Accordingly, the Guidelines apply to hearings by Council called for by licensees under section 237(3)(b) of the *FIA* who have been given notice of disciplinary action intended by Council to be taken against them under section 231(1) of the *FIA,* as is the case under appeal.

[79] While section 223(1) of the *FIA* makes the delegation of its duty to hold a hearing a matter of discretion of Council, the Guidelines make clear it is the practice of Council to have its discipline hearings conducted by a Hearing Committee as a matter of course.

[80] The process before the hearing committee set out in the Guidelines is similar in many ways to a trial court proceeding with the burden on Council to prove the allegations of misconduct on a balance of probabilities standard. The licensee has the right to be represented by legal counsel, as is Council. The licensee is provided with a Notice of Hearing which sets out the matter under consideration. Pre-hearing disclosure is provided to the licensee. A court reporter records the proceedings of the hearing and a record is kept. Evidence is introduced and the witnesses are examined and cross-examined under oath. The Guidelines provide for evidence to be admitted by way of Agreed Statements of Fact.

[81] The Guidelines state that the hearing committee has authority to subpoena the attendance of witnesses and to reasonably limit some cross-examination of a witness where it is satisfied that the cross-examination of the witness has been sufficient to disclose fully and fairly the facts in relation to which evidence has been given.

[82] The Guidelines state that the hearing committee will decide on the suitability of any line of questioning and may also ask questions to clarify or expand on the evidence introduced in the matter. The hearing committee is not bound by the strict rules of evidence and may rule on the admissibility and the weight to be given to admitted evidence.

[83] The Guidelines state that after hearing the submissions of the parties, the hearing committee will retire to consider their findings and proposed decision.

[84] While section 223(4) of the *FIA* states that the hearing committee "must hold the hearing and make a written report of the hearing to council", the Guidelines state:

> REPORT of the HEARING COMMITTEE
>
> The Committee makes findings of fact and may make recommendations as to the disposition of the case. Any findings and recommendations must have the agreement of a majority of the Committee members.
>
> The Committee reports its findings and recommendations to Council in a *Report of the Hearing Committee.*

I note that this Guideline specifies that the "written report of the hearing" required by section 223(4) of the *FIA* is to address "findings of fact" and "may" include "recommendations as to the disposition of the case". This Guideline purporting to give the hearing committee a discretion as to whether to make a recommendation on penalty may or may not be consistent with the section 223(4) requirement that the hearing committee must make a report of the hearing to Council. On the facts of this appeal I need not decide this issue as the determination of the appropriate penalty considering the Joint Submission on Penalty on the admitted facts was the primary issue for the Hearing and the Hearing Committee properly made a recommendation on penalty to Council.

[85] The Guidelines then address the decision of Council following its receipt of the *Report of the Hearing Committee* in two brief sentences as follows:

> "DECISION of COUNCIL
>
> Council considers the *Report of the Hearing Committee* and reaches a final decision on the matter. Council is not bound to accept the Committee's recommendations in making its decision.
>
> Council's final decision is provided to the Party in writing."

Section 223(4) of the *FIA* simply states Council has discretion to decide on the matter that was the subject of the hearing "after receiving and considering the report". I note that this Guideline specifies that Council "is not bound to accept the Committee's recommendations in making its decision" but is silent on whether Council is bound to accept the findings of fact in the report. This would seem to imply that Council is bound by the Hearing Committee's findings of fact set out in its Report. I further note that I read this particular Guideline as a guide to Council's interpretation of section 223(4) of the *FIA* as opposed to a "criteria to be applied" or a "procedure to be followed" as contemplated in section 225.1(2)(h) of the *FIA.*

[86] While the introductory language of the Guidelines states that they are intended to form the basis upon which hearings are conducted, I find no statement in the Guidelines to the effect that they are intended to be comprehensive.

[87] Where the Guidelines are silent or ambiguous as to a circumstance that arises in the context of a hearing before a hearing committee or a decision of Council following a hearing, I find that the common law principles of procedural fairness will apply to fill that gap to ensure that the licensee subject to the process is dealt with fairly. This is the circumstance we are faced with in this appeal in the context of the Joint Submission on Penalty.

[88] The *FIA*, and in particular the Guidelines, are silent as to any procedures or policy to be applied by either a hearing committee or Council following a hearing in relation to how to deal with a joint submission on penalty advanced by legal counsel for Council and the licensee before the hearing committee. In result, I find that it is fair in these circumstances that the common law of procedural fairness be relied upon to fill this gap in the *FIA* and Guidelines.

[89] In these circumstances, I will now determine what the duty of procedural fairness may reasonably require of Council in making the Suspension Order in the way of specific procedural rights in the particular legislative and administrative context of the *FIA.*

What is the content of procedural fairness applicable to the case under appeal in light of the FIA and the Guidelines?

[90] I agree with the submission of the Appellant that the principles set out in *Baker* are applicable in the circumstances of this appeal. I find that the Appellant is entitled to a high level of procedural fairness given that his livelihood is at stake in the disciplinary process under the *FIA* and that he had the right to be heard as a matter of procedural fairness.

[91] The Council submits in an alternative argument that if the common law duty of procedural fairness applies, (which I have held it does), then the Appellant's right to be heard as set out in *Baker,* in the context of the *FIA* and the Guidelines, was fully afforded to him before the Hearing Committee. Council submits that the Appellant was well aware the Hearing was his opportunity to make submissions about all matters relevant to the allegations made against him, including any penalties that could have been imposed against him under the *FIA,* all of which, (including suspension), were set out in the Notice of Hearing.

[92] Council goes on to submit that despite knowing a suspension was a possible penalty, the Appellant chose not to make submissions on why such a penalty would be inappropriate. His choice as to submissions was a strategic decision that he cannot now distance himself from for the purpose of his appeal. The fact that he would have made a different decision if he had known Council would not agree with him is not an appealable issue.

[93] Council submits it was entitled to proceed on the basis that the Appellant had been advised of Council's discretion to impose any penalty it saw fit despite any submissions by the parties as to penalty when he elected to proceed by way of the ASOF and the Joint Submission on Penalty at the Hearing. Council submits that the Appellant's procedural rights, as provided for in the *FIA*, were met in this case.

[94] Council further submits that the Appellant's arguments imply a claim he had a legitimate expectation (as referenced in *Baker)* that a certain result would be

reached in his case based on the Joint Submission on Penalty or that he would have an opportunity to make further submissions in the event the Hearing Committee and/or Council did not accept the Joint Submission on Penalty. The Council submits there was no reasonable basis for any such expectation as the Appellant was both well aware of the range of potential penalties he faced and that the Joint Submission on Penalty was not binding on the Hearing Committee. The Appellant was further aware that the ultimate decision on penalty lay within the discretion of Council after the Hearing.

[95] I do not interpret the Appellant's arguments as being based on an expectation that a certain result would be reached in his case based on the ASOF and the Joint Submission on Penalty. His appeal is not based on a "legitimate expectation" argument as submitted by Council. Rather, the Appellant submits that he was entitled to be heard as a matter of procedural fairness which he was denied in the circumstances under appeal.

[96] In the circumstances under appeal, the Appellant submits that he was *de facto* not given, and as a matter of procedural fairness he should have been given, an opportunity to make submissions on suspension as an element of penalty to Council before it made the Suspension Order.

[97] While the Appellant acknowledges that the potential penalties he faced under section 231(1) of the *FIA* included suspension and that he could have theoretically made submissions regarding the inappropriateness of suspension as an element of penalty before the Hearing Committee, he submits he did not do so for sound practical reasons. The reasons for not addressing the inappropriateness of suspension given by the Appellant were that the Hearing proceeded on the basis of the ASOF and the Joint Submission on Penalty which did not contemplate suspension as an element of penalty and the Hearing Committee did not specifically raise suspension with counsel as an element of penalty being considered at the Hearing.

[98] The Appellant does not dispute that it was open to the Hearing Committee to reject the Joint Submission on Penalty but submits it was reasonable for him to only make submissions as to the Joint Submission on Penalty in the absence of questions by the Hearing Committee about a possible suspension. In support the Appellant relies upon *Gavrilko v The College of Dental Surgeons of British Columbia,* 2004 BCSC 1506 (CanLII) ("*Gavrilko*").

[99] In *Gavrilko* the Court concluded on the facts that there was a joint submission before the disciplinary panel on the core issue of cancellation versus suspension of the appellant's licence and that the panel made no reference to a possible rejection of the joint submission that a suspension order rather than cancellation was the appropriate remedy. Relying on the *audi alteram partem* principle referenced in an earlier authority, the Court held (at paras 16-17):

> [16] I conclude that when there is a joint submission on a critical point, while a Panel may reject such a submission, it is an error to fail to take the step of notifying counsel that the joint submission may not be accepted and giving them an opportunity to make submissions.

> [17] Aside from the fairness issue, there are good policy reasons for such a requirement. Hearings before a disciplinary Panel of a professional body are part of an advocacy process akin to that which characterized proceedings in a court. Counsel respond to one another's submissions. It would not be appropriate if the law required all defence or respondent's counsel to make submissions on any and every possible sentence when both sides have sought a lesser penalty from the Panel.

[100] I agree with the above quoted finding and analysis from *Gavrilko* and find that it is applicable to the Hearing before the Hearing Committee. As I have already noted, the process before a hearing committee set out in the Guidelines is similar in many ways to a trial court proceeding. It is a typically adversarial process where counsel respond to one another's submissions on penalty. However, where as in this case, the parties make a Joint Submission on Penalty which did not contemplate suspension as an element of penalty and the Hearing Committee did not specifically raise suspension with counsel as an element of penalty being considered at the Hearing, I find it was reasonable for the Appellant to have only made submissions as to the Joint Submission on Penalty.

[101] The Appellant's submissions refer to authorities in support of his right to be heard in the circumstances, including James T. Casey, *The Regulation of Professions in Canada ("Casey"),*[5] for the procedure to be followed when there is a joint submission regarding penalty:

> [A]n agreement [regarding joint submission on the appropriate penalty] cannot usurp the discretion of the disciplinary tribunal which is still duty bound to impose what they consider to be an appropriate sentence. However, where a disciplinary tribunal rejects a joint submission on penalty and imposes a sentence of a more severe nature, then the role of *audi alteram partem* should be invoked and the tribunal should give counsel the opportunity to make representations addressing the issue of the more serious penalty being considered.

[102] As further guidance for the proper procedure to be followed when parties make joint submissions on a proposed penalty the Appellant refers to *Law Society of Upper Canada v Cooper,* 2009 ONLSAP 0007 No. 81 ("*Cooper*"). While *Cooper* was decided in the context of a policy adopted by the Law Society of Upper Canada addressing joint submissions on a proposed penalty (which is distinguishable from the case of Council under the *FIA*) I am guided by the following comments of the Tribunal (at para 20):

> [20] Another important point arises from the jurisprudence. If a hearing panel is seriously contemplating a departure from the joint submission, the parties should not learn about it for the first time when the decision is rendered or reasons are delivered. Given the presumed acceptability of a joint submission, the panel should indicate to the parties that it recognizes the high threshold for rejecting a joint submission, inform the parties that the panel may be disinclined

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[5] James T. Casey, *The Regulation of Professions in Canada*, Toronto, ON: Carswell, 1994)(loose-leaf 2014 supplement), ch 14 at 14-14.3.

> to accept the joint submission and afford them an opportunity to make further submissions on the matter. The parties may even be permitted in the panel's discretion (if they initiate a request) to re-open the evidence to call additional penalty evidence (such as from the licensee) to support the joint submission.

[103] Even though there is no "presumed acceptability of a joint submission on penalty" in discipline hearings before Council under the *FIA* as there was in *Cooper,* I am persuaded by the above quoted extracts from *Cooper* and *Casey,* as well as by the basic fairness principle of *audi alteram partem,* that Council should have given the Appellant the right to be heard on the issue of suspension as a penalty. When Council was considering rejecting the Joint Submission on Penalty inherent in its decision to make the Suspension Order, it should have informed the parties that it may be disinclined to accept the Joint Submission on Penalty or the recommended penalty in the Report and afford them an opportunity to make further submissions on the more serious penalty of suspension being considered, before making the Suspension Order. I find that Council's failure to do so in this case was unfair and breached the Appellant's right to procedural fairness. I also find that *Gavrilko* provides further support for my finding in this regard.

[104] The Appellant's submissions also refer to the decision of the BC Commercial Appeals Commission in *Thompson v Insurance Council of British Columbia,* [1998] B.C.C.O. No. 9 ("*Thompson"),* which was an appeal under the *FIA* from a decision of Council wherein Council considered but largely rejected the recommendations of a hearing committee on penalty and substituted a more serious penalty without giving the licensee an opportunity to make submissions before Council. The Panel in *Thompson* found this to be a breach of the *audi alteram partem* rule of natural justice.

[105] The Council on this appeal submits that *Thompson* is of minimal or no precedential value as it predates *Baker, Ocean Port* and *Mavi,* and that important facts before the Panel in *Thompson* are not apparent from the decision. I note that in *Thompson* the Panel refers to the rejection of recommendations from an "investigatory committee" in the context of recommendations from a hearing committee. I have not been advised in submissions as to whether the language of the *FIA* in effect at the time of *Thompson* was different in any material respect from its current wording concerning the process or the mandate of a hearing committee. I am also uninformed as to whether a previous version of the Guidelines was in effect at the time. Regardless, I need not rely on *Thompson,* but I do read that decision to be consistent with the findings I have made in the particular circumstances faced in this appeal involving the Joint Submission on Penalty.

[106] In conclusion on this issue I find, given that the Joint Submission on Penalty did not propose suspension as a penalty, and further given that the specific issue of suspension of the Appellant's Licence as a potential element of penalty being considered was not raised by the Hearing Committee with counsel during the Hearing, that Council did breach the Appellant's right to procedural fairness by imposing the Suspension Order without giving the Appellant an opportunity to make submissions on suspension as an element of penalty to Council before it made the Suspension Order.

Issue b. Is the fact that the Suspension Order was made by members of Council, who were different from the persons comprising the Hearing Committee and whose identity was unknown to the Appellant, in and of itself, unfair to the Appellant?

[107] In his Notice of Appeal and in his written submissions the Appellant identifies this particular issue as a matter of fairness. In his written submissions the Appellant expands this issue as follows: "The Appellant submits that the imposition of the ultimate penalty against him by way of a closed door decision making process by decision-makers unknown to the Appellant, without an opportunity to make submissions regarding the more severe and different in kind penalty being considered to be imposed against the Appellant before the ultimate decision-makers amounts to a fundamental breach of the high standard of procedural duty owed to him by Council."

[108] I have already held when addressing the previous issue that the Appellant's right to procedural fairness was breached by Council denying him his right to be heard in relation to the appropriateness of the Suspension Order in the circumstances of the Joint Submission on Penalty. Accordingly, I will limit my consideration of this current issue to whether or not it was a breach of procedural fairness, in and of itself, for the Suspension Order to have been made by members of Council who were different from the persons comprising the Hearing Committee and whose identity is unknown to the Appellant.

[109] The Appellant submits that where the statutory procedure for the discipline of a professional contains a 2-step process with the first committee holding a hearing and making a recommendation or report to a second committee, that natural justice requires a hearing not only before the first committee, but also before the second committee where that body is not required to accept the recommendation of the investigating committee. The Appellant relies on *Casey* at pages 8-9 which cites *Reich v College of Physicians & Surgeons (Alberta),* (1970), 13 DLR (3d) 379 at 382-383 ("*Reich*") for this proposition.

[110] *Reich* dealt with a discipline process under the *Medical Professions Act,* RSA 1955, c 198 as amended (the "*MPA*"), under which a finding of unbecoming and unprofessional conduct was made against the appellant by his regulator (the "council"). The *MPA* directs council to appoint a committee of its members, (the "discipline committee"), with the mandate to investigate the facts regarding a practitioner who is charged with unbecoming or unprofessional conduct and to make recommendations to council. Section 46 of the *MPA* stated:

> 46. Unbecoming or improper conduct, whether in a professional capacity or otherwise, within the meaning of this Act is a question of fact for the sole and final determination of the discipline committee or of the council on review…

[111] The Alberta Court of Appeal in *Reich* described the process set out in the *MPA* dealing with charges against doctors as follows (at p 382)):

> [7] The procedure envisaged by these sections requires that council shall appoint and maintain a committee of its members to investigate complaints against members of the corporation. When this committee has heard the evidence and any representations made, it shall make its recommendation to the council. This

> includes a finding (s.46) as to whether the member complained of is guilty of unbecoming or unprofessional conduct and a recommendation as to the "sentence to be imposed" (s.44(4)). The council then convenes and considers the committee's recommendation. It may, (s.44(3)), adopt, amend or reject the recommendation of the discipline committee and may impose any other penalty or conditions permissible under the Act. Although the adjudication of the complaint is thus divided into two stages, it is only one procedure.

[112] The Appellant in *Reich* participated in the investigation conducted by the discipline committee but was not given a copy of the recommendations of the discipline committee that he be found guilty of unbecoming and unprofessional conduct and that he be reprimanded and fined therefore until after council held its meeting and made its decision to accept the recommendations of the discipline committee. He was not given notice of or an opportunity to be heard at the meeting of council when this decision was taken. The appellant sought to quash this finding on this basis.

[113] The Alberta Court of Appeal held that the *audi alteram partem* rule was infringed by Council in the circumstances and held (at p 382-383):

> [8]… Surely a body that is not required to accept the recommendation of its investigating committee but may amend or reject it and is not bound by its recommendations as to punishment is an important part of the *quasi*-judicial process by which this man's rights were determined. He had a right to appear and argue that the finding of unbecoming and unprofessional conduct was improperly made against him, and to induce the council, if he could, to revise this finding. This the council was empowered to do under that portion of s.46 which has been quoted above.

[114] The forgoing summary review of *Reich* leads me to conclude that it is distinguishable from both the statutory framework of the *FIA* and the facts that we are addressing on this appeal. Accordingly, I have concluded that *Reich* does not assist the Appellant in his argument on this issue for the following reasons:

i. The activities of the discipline committee in *Reich* could be seen as being comparable to that of the investigation of the complaint against the Appellant conducted by Council under section 232 of the *FIA.* As set out in the Notice of Intended Decision, the Appellant in the present case was entitled to participate in that investigation process but did not for scheduling reasons. The investigation report led Council to its intended decision to cancel the Appellant's Licence.

ii. While in *Reich,* the appellant was denied a hearing before council to address the recommendations of the discipline committee, the Appellant here was given notice of Council's intended decision under section 237(2) of the *FIA* and was granted a hearing before Council to challenge its intended decision following from the investigation report that he was entitled to under section 237(3)(b) of the *FIA.*

iii. Contrary to the facts in *Reich*, the Appellant here was given:

a. the Notice of Intended Decision which included the reasons therefore based on the investigation,

b. notice of his right to require a hearing before Council to dispute Council's findings or its intended decision, and

c. the Hearing before the Hearing Committee to determine whether the alleged misconduct occurred and if so, what penalty was appropriate in the circumstances of the ASOF and Joint Submission on Penalty.

[115] Council submits that *Reich* is of no precedential value in respect of the duty of procedural fairness given that it was decided long before *Baker, Mavi* and *Ocean Port.* I have found *Reich* to be of no precedential value in this appeal for the reasons I have stated above. Whether the decision of the court in *Reich* would have been different with the benefit of the analysis in *Baker, Mavi* and *Ocean Port* is not an issue I need consider on this appeal.

[116] As set out by the Supreme Court of Canada in *Mavi*, once the duty of procedural fairness has been found to exist, the particular legislative and administrative context is crucial to determining its content.[6] Elements to be considered include "the nature of the statutory scheme and the 'terms of the statute pursuant to which the body operates"[7].

[117] As reviewed in my analysis of the provisions of the *FIA* relevant to hearings before Council under **Issue a.** above, a licensee, faced with an intended disciplinary decision of Council against him or her is entitled under the *FIA* to:

vi. Notice and written reasons for the intended disciplinary decision;

vii. Notice of and the right to require a hearing before Council to dispute the findings of wrongdoing or the intended decision;

viii. Council's duty to hold the hearing can be delegated to a hearing committee which must hold the hearing and make a written report of the hearing to the Council;

ix. After considering the written report of the hearing committee, Council may decide the matter that was the subject of the hearing.

[118] I find that this statutory scheme of the *FIA* generally affords a licensee facing discipline a high degree of procedural fairness. The discretionary decision of Council after consideration of the report of the hearing from the hearing committee under section 223(4) of the *FIA* is only one part of that process. It is a part of the process expressly mandated by the *FIA* pursuant to which Council operates.

[119] In that context, I find the fact that the Suspension Order was made by members of Council who were different from the persons comprising the Hearing

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[6] *Mavi* at para 41.
[7] *Mavi* at para 42.

Committee and whose identity is unknown to the Appellant was not, in and of itself, unfair to the Appellant in the circumstances.

Issue c. Did Council err by failing to provide adequate reasons for its decision to impose the Suspension Order?

[120] It is not in dispute on this appeal that Council was required by section 235(5) of the *FIA* to give written reasons for its decision to impose the Suspension Order.

[121] 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.

[122] The Appellant couches the issue of the adequacy of reasons as a matter of natural justice which implies this issue would attract a fairness standard of review. However, where, as here, there are reasons given but the adequacy of those reasons is challenged, reasonableness is the standard of review to be applied.

[123] Both the Appellant and Council refer to the Supreme Court of Canada decision in *Law Society (New Brunswick) v Ryan,* 2003 SCC 20 at para. [55] ("*Ryan*") which reads:

> [55] A decision will be unreasonable only if there is no 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. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam, supra,* at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation, even if this explanation is not one that the reviewing court finds compelling (see *Southam, supra,* at para. 79).

[124] Council also relies on the more recent decision of the Supreme Court of Canada in *N.L.N.U. v Newfoundland & Labrador (Treasury Board),* 2011 SCC 62 ("*NLNU*"). In *NLNU* the Court discussed the reasons requirement as follows (at paras 12, 15 and 16):

> [12] It is important to emphasize the Court's endorsement of Professor Dyzenhaus's observation that the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support of a decision". In his cited article, Professor Dyzenhaus explains how reasonableness applies to reasons as follows:
>
> > "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right

> that among the reasons for deference are the appointment of the tribunal and not the court as the front-line adjudicator, the tribunal's proximity to the dispute, its expertise, etc., then it is also the case that its decision should be presumed to be correct even if its reasons are in some respect defective.
>
> ...
>
> [15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para.48). This means that courts should not substitute their own reasons, but they may, if they find in necessary, look to the record for the purpose of assessing the reasonableness of the outcome.
>
> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*S.E.I.U., Local 333 v Nipawin District Staff Nurses Assn.* (1973), [1975] 1 SCR 382 (SCC) at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[125] When considering the reasonableness of the reasons given by Council for imposing the Suspension Order I will be guided by both *Ryan* and *NLNU* as quoted above. Based on *Ryan* I will consider whether the reasons given in support of the Suspension Order are tenable in the sense that they can stand up to a somewhat probing examination. Based on *NLNU* I ask if the reasons allow the FST on appeal to understand why the Council made its decision to impose the Suspension Order and if the reasons permit the FST to determine whether that penalty is reasonable as falling within the range of possible, acceptable outcomes.

[126] There is a dispute between the parties as to what constitutes the reasons given by Council for imposing the Suspension Order.

[127] The Appellant submits that Council's reasons for its decision to impose the Suspension Order are set out in a single paragraph of the Penalty Decision after referring to the Hearing before the Hearing Committee and its Report, as follows:

> After considering the Report, Council determined that the Licensee's misconduct, specifically his repetitive and deliberate dishonesty as detailed in the Report, raises serious concerns about his competency and trustworthiness and that, in order to achieve specific and general deterrence, protect the public, and maintain public confidence in the insurance industry, a more significant sanction is warranted than that recommended by the Hearing Committee.

[128] Council responds that the quoted extract from the Penalty Decision should be read as supplementing the reasons set out in the Report, as opposed to supplanting the Report. In support, Council points to the fact that the Penalty Decision was provided to the Appellant and posted on Council's website together with the Report.

Council refers to the above quotation from the Penalty Decision as "Additional Reasons".

[129] Council observes that the Appellant has accepted that the Report provided a thorough written analysis of the applicable sentencing principles by considering the facts in this matter and past decisions of Council and then submits the Additional Reasons taken together with the Report adequately support the conclusions reached by Council.

[130] The "Additional Reasons", (as described by Council), in the Penalty Decision do both refer to and acknowledge the consideration of the Report by Council. The Additional Reasons specifically refer to the findings in the Report concerning the Appellant's misconduct being "specifically his repetitive and deliberate dishonesty as detailed in the Report".

[131] From my reading of the Guidelines I am prepared to accept, as addressed under **Issue a.,** that Council operates under section 223(4) of the *FIA* on the basis that when considering a hearing committee report it is bound by the findings of fact set out therein. While the Additional Reasons do not expressly state that Council adopts the findings of fact set out in the Report, I find it is both logical and reasonable to read the Additional Reasons through the lens of the Guidelines as being based upon and incorporating the findings of fact from the Report as part of Council's reasons.

[132] However, in light of the fact that the Report did not consider or address a suspension order as an element of penalty being recommended by the Hearing Committee, I find the submission of Council that its reasons for its decision to impose the Suspension Order should be read to include the "reasons set out in the Report", to lack any logical or factual foundation and I reject it.

[133] The decision by Council to impose the Suspension Order as an element of penalty was a significant deviation from the recommendation in the Report and it is the reasons for this deviation that is in issue here. In the Penalty Decision Council states "After considering the Report" it made its determination on penalty. While this statement acknowledges the statutory duty of Council under section 223(4) of the *FIA* to consider the Report before exercising its discretion, it does not state, as Council's submission implies, that Council adopts all or any particular portion of the analysis of the appropriate penalty in light of the Joint Submission on Penalty and ASOF set out by the Hearing Committee in the Report.

[134] Accordingly, I find that Council's reasons for its decision to impose the Suspension Order are as set out in the "Additional Reasons" read together with the findings of fact from the Report but not including the analysis of the appropriate penalty.

[135] The Appellant submits that in imposing a penalty that was more severe than that recommended by the Hearing Committee, the Council made no attempt to provide an explanation of its decision-making process other than making a bald assertion that the Council deemed the penalty recommended by the Hearing Committee to be inadequate. The provision of detailed reasons was necessary, in addition to the statutory requirement of section 235(5) of the *FIA*, for two reasons in this matter being:

i. The Council's decision led to the loss of livelihood of the Appellant; and

ii. Council's deviation from the Joint Submission on Penalty and from the Hearing Committee's recommendation imposing a more severe penalty necessitated detailed reasons from which insight could be gained as to why the Council determined that the recommended penalty was unfit, unreasonable, or contrary to public interest as required by the principles of natural justice.

[136] Referencing the applicable sentencing principles approved by the FST in *FICOM* the Appellant submits that Council made no attempt to engage with the applicable sentencing principles and mitigating factors to demonstrate why the recommendation of the Hearing Committee or the underlying Joint Submission on Penalty was unfit, unreasonable, or contrary to the public interest.

[137] The Appellant submits that the mere "determination" by Council that the penalty recommended by the Hearing Committee was inappropriate is inadequate because it shifts the burden on the Appellant upon appeal to show that the penalty recommended by the Hearing Committee and the underlying Joint Submission on Penalty was not unfit, unreasonable, or contrary to the public interest in the circumstances. Relying on the decision in *Cooper*[8]*,* the Appellant submits that the burden properly rests with Council. By not engaging in any meaningful discussion of the applicable sentencing principles, mitigating factors, and past authorities the Appellant submits Council failed to discharge its burden.

[138] Council submits that *Cooper* should be disregarded to the degree that it contradicts the subsequent direction from the Supreme Court of Canada in *NLNU.*

[139] In alternative submissions, Council submits that I must seek to supplement the Additional Reasons from the record, including the reasons set out in the Report based on the decision of the SCC in *NLNU.* I note that the language used in *NLNU* is (at para 12):

> That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them.

[140] In particular, Council submits I should glean from the Report that Council was alive to and was indeed guided by the decision in *FICOM* wherein the FST directed Council to consider serious sanctions for dishonest conduct that calls into question a licensee's trustworthiness and ability to act in good faith.

[141] Council submits the wording of the Additional Reasons mirrors almost exactly the FST's wording in *FICOM* and that accordingly, I can infer that Council was primarily concerned with protecting the public, maintaining public confidence in the insurance industry and achieving specific and general deterrence when it determined a suspension was more appropriate than the recommendations in the

[8] At paras 19 and 22.

Report given the Appellant's "repetitive and deliberate dishonesty as detailed in the Report".

[142] Council is correct to state that the Hearing Committee considered *FICOM* in its penalty analysis and referred to *FICOM* in its Report. I am also prepared to accept that Council was well aware of the decision in *FICOM* and that its views of the appropriate penalty may well have been influenced by *FICOM.* However, to infer, as submitted by Council, that its reason for its decision to impose the Suspension Order was based on its reading of *FICOM* applied to the particular circumstances of the ASOF and the Joint Submission on Penalty would be a speculative exercise at best that I am not prepared to engage in. I take from my reading of *NLNU* that when considering supplementing the reasons from the record in the search for reasonableness, I should not substitute my own reasons for those of Council.

[143] If I were to infer from the words used in the Additional Reasons that Council decided to impose the Suspension Order based on *FICOM* as submitted by Council, am I also to infer that Council, in doing so, considered and rejected the presence of mitigating factors that would support a penalty short of suspension? As observed by the FST in in *FICOM* (at para 104)*:* "In these cases, I have no hesitation in concluding that it was an error in principle for the Insurance Council to fail to impose licence suspensions in the absence of a clear identification of mitigating factors that might be present in a particular case."

[144] In its Report the Hearing Committee stated (at p 8):

> In light of the admission of misconduct by the Licensee, together with the joint submission on the proposed penalty, the primary issue for the Hearing Committee is to assess whether or not the proposed joint penalty satisfies Council's public interest mandate when one considers the nature of the misconduct raised in this hearing, together with the penalties assessed in other previous matters involving other licensees that have been disciplined by Council. There is of course a need for the penalty in this instance to be consistent with penalties received by other licensees in similar circumstances in the past.

[145] At page 10 of the Report it states:

> During the hearing, the Hearing Committee was referred by Council to the following four decisions as being potentially relevant in terms of establishing the range of an appropriate penalty for the Licensee:
>
> 1. *Jack Leonard Parkin* (January 2015);
> 2. *Patie Kaur Johl* (May 2015);
> 3. *Roel Reyes Bernardino* (May 2015); and
> 4. *Pamela Peen Hong Yee* (December 2014)

[146] None of the four decisions advanced by Council to the Hearing Committee as being potentially relevant in terms of establishing the range of an appropriate penalty for the Appellant included suspension as an element of penalty. The reasons of Council for its decision to impose the Suspension Order make no attempt

to explain why these decisions were not relevant and why a more severe penalty was called for.

[147] It is a significant fact on this appeal that Council was a party to the Joint Submission on Penalty that did not call for suspension. While the Hearing Committee provided reasons as to why it believed a longer period of supervision and a fine were called for in the circumstances, the reasons of Council for its decision to impose the Suspension Order are silent in this regard.

[148] The reasons of Council for its decision to impose the Suspension Order, which was a significant departure from the Joint Submission on Penalty as well as the recommendation of the Hearing Committee, do not even acknowledge the existence of the Joint Submission on Penalty let alone provide any reasons why the public interest and/or the jurisprudence cannot support the penalty that was jointly proposed or that was recommended by the Hearing Committee.

[149] I agree with the Appellant's submission that in imposing a penalty that was more severe than that recommended by the Hearing Committee, the Council made no attempt to provide an explanation of its decision-making process other than making a bald assertion that the penalty recommended by the Hearing Committee was inadequate. I further agree with the Appellant that Council failed to engage in any meaningful discussion of the applicable sentencing principles, mitigating factors or relevant sentencing authorities to demonstrate why the recommendation of the Hearing Committee or the underlying Joint Submission on Penalty was unfit, unreasonable, or contrary to the public interest.

[150] In result, I find that the reasons given by Council in support of the Suspension Order were not adequate or reasonable. The reasons are not tenable in the sense that they cannot stand up to a somewhat probing examination. I also find that the reasons do not allow me to understand why the Council made its decision to impose the Suspension Order such as to permit me to determine whether that penalty is reasonable as falling within a range of possible, acceptable outcomes.

Issue d. Was the imposition by Council of the Suspension Order as an element of penalty reasonable in all the circumstances?

[151] Given my findings that the Appellant's procedural fairness rights were breached by Council in effectively denying him a hearing in the context of the Suspension Order, and that Council's reasons for its decision to impose the Suspension Order were inadequate, taken together with the remedies flowing from these findings that I am considering, I need not determine on this appeal whether the imposition of the Suspension Order as an element of penalty was otherwise unreasonable in all the circumstances.

[152] In light of my finding that the reasons do not allow me to understand why the Council made its decision to impose the Suspension Order such as to permit me to determine whether that penalty is reasonable as falling within a range of possible, acceptable outcomes, I believe it would be inappropriate for me to engage on an analysis of the reasonableness of this penalty based on the state of Council's reasons.

Remedy

[153] As previously stated, 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. This provides the FST member hearing an appeal with a broad discretion in crafting a remedy.

[154] The Appellant asks that the Penalty Decision be varied by removing the Suspension Order against him. He also asks that I vary the Penalty Decision and restore the recommendation of the Hearing Committee as the penalty to be imposed against him.

[155] Council submits that in the event of a finding of breach of procedural fairness in respect of the Suspension Order, such breach is most appropriately remedied by setting aside the Suspension Order, remitting the matter of the Suspension Order only back to Council with directions that:

a. Council permit written submissions from the parties within a time to be determined by the FST on the issue of whether a suspension is an appropriate sanction in the circumstances; and

b. After receiving the parties' submissions on the Suspension Order, prepare written reasons for its determination in accordance with the principles of natural justice.

[156] Council submits it would be inappropriate in the circumstances to set aside the ASOF or to order a new hearing on the merits, given that the Appellant has admitted to the alleged misconduct and appeals only the Suspension Order. I agree.

[157] The Appellant submits that the requested variance of the Penalty Decision is preferable to a remittance of the matter back to Council because this matter has been ongoing for a lengthy period of time, the Appellant has already had to bear the expense of attending hearings on two separate occasions, and a well-reasoned and analyzed recommendation has already been made by the Hearing Committee.

[158] To simply vary the Penalty Decision by removing the Suspension Order, or to grant the Appellant's request that I accept the Hearing Committee's recommendation as the reasonable penalty, would not properly or fairly address the errors made by Council, the public interest or the interests of justice in my view.

[159] In exercising my discretion as to how best to proceed with the matter of remedy I have considered the alternatives available to me under section 242.2(11) of the *FIA*, including those suggested by the parties. I have concluded that the fairest remedy for all concerned, including the public, that best serves the interests of justice, would be to set aside the Suspension Order and remit only the matter of suspension as a potential penalty back to Council for reconsideration with directions that I will address below. If Council delegates this reconsideration hearing to a hearing committee under section 223(1) of the *FIA,* I direct that if practicable, the members of the Hearing Committee should make up the reconsideration hearing committee.

Directions

[160] The broad discretion granted to the FST under section 242.2(11) of the *FIA* also applies to the scope and nature of directions I can provide to Council.

[161] Given that the harm suffered by the Appellant included the failure to be afforded a hearing by Council on the matter of the Suspension Order, and the failure of Council to provide adequate reasons for imposing the Suspension Order, I find that the proper remedy should include directions that ensure, as best they can, that these harms are rectified.

[162] I Order that Council must provide the Appellant with an opportunity to be heard on the appropriateness of a suspension order as an element of penalty before it can decide the matter. Thereafter, Council must provide written reasons for whatever decision it chooses to make, which reasons are required to be adequate and reasonable as guided by this decision under **Issue c.**

[163] As to the nature of the hearing before Council, I agree with Council that both the Appellant and Council should be afforded the right to make written submissions.

[164] Council's submissions make no mention of any additional evidence from the Appellant being admitted upon which such written submissions may be based. However, its submissions could be read as being against this by omission.

[165] In the context of the reconsideration hearing I am ordering, I find it appropriate that the Guidelines stated as being applicable to hearings before a hearing committee be applied where relevant.

[166] In circumstances such as we are dealing with where the Appellant is facing the jeopardy of a suspension of the Licence required by him to earn his living, it is reasonable to assume that he may wish to present further evidence to Council in support of submissions he may make against the imposition of suspension as an element of penalty. In the normal course of a hearing before a hearing committee, the Guidelines clearly contemplate such evidence being presented to the decision-makers. As a matter of fairness, the Appellant must be afforded this right in the reconsideration hearing.

[167] The Guidelines also clearly provide for hearings before a hearing committee to be in-person hearings where witnesses attend and give their evidence under oath. Evidence by way of Affidavit is also contemplated in hearings before a hearing committee.

[168] Given that it was the Appellant whose right to be heard was disregarded, as a matter of fairness I grant the Appellant the right to elect whether or not to introduce further evidence on the issue of suspension as an element of penalty, and the right to elect whether that evidence will be presented in affidavit form and/or by in-person testimony. Under the Guidelines that I am importing into this process, Council retains its ability to control the process, including the amount, admissibility of and weight to be given to any such evidence.

[169] For the same fairness reasons, I grant the Appellant the right to elect whether the reconsideration hearing before Council will include the right of full oral submissions in addition to written submissions.

DECISION

[170] In making this decision, I have carefully considered all of 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.

[171] Following on my conclusions above, I order that the Suspension Order be set aside and that only the matter of suspension as a potential penalty be remitted back to Council for reconsideration with the following directions:

i. If Council delegates this reconsideration hearing to a hearing committee under section 223(1) of the *FIA,* I direct that if practicable, the members of the Hearing Committee should make up the reconsideration hearing committee;

ii. The Guidelines stated as being applicable to hearings before a hearing committee will apply to the reconsideration hearing;

iii. The "record" to be considered by Council on its reconsideration is to be made up of the following:

   a. The record on this appeal;

   b. This decision;

   c. Written and any oral submissions from the parties, (as addressed below); and

   d. Any additional evidence tendered by the Appellant, (as addressed below), and admitted by Council in accordance with the Guidelines.

iv. Written submissions on the matter of suspension as a potential penalty will be exchanged between the parties on a schedule to be set by Council.

v. The Appellant is granted leave to elect whether to introduce further evidence upon which to base his submissions, and the right to elect whether that evidence will be presented in affidavit form and/or by in-person testimony.

vi. The Appellant is also granted leave to elect whether the reconsideration hearing before Council will include the right of full oral submissions in addition to written submissions.

vii. Following the close of written submissions and after the elections of the Appellant referred to above have been made, the date, time and place of the reconsideration hearing before Council shall be set by Council following consultation between legal counsel for the parties.

viii. Given the protracted nature of the process to date, I encourage Council to conduct this reconsideration hearing as expeditiously as possible.

ix. Based on my reasons for requiring this reconsideration hearing, I direct that costs of the reconsideration hearing are not to be imposed on the Appellant by Council.

x. Upon completion of the reconsideration hearing, Council will make its decision on the matter and provide written reasons for whatever decision it then may make, which reasons are required to be adequate and reasonable as guided by this decision under **Issue c.**

[172] Before completing this decision, I identify an issue that should be addressed by the parties outside this appeal, relating to the two-year supervision provision of the Penalty Decision which was written to have the supervision period commence upon completion of the one-year suspension period provided for in the Suspension Order. As this decision sets aside the Suspension Order, it logically follows that the two-year supervision order would commence now. I also note that the stay of the Suspension Order granted to the Appellant in these proceedings [Decision No. 2019-FIA- 004(a)] that expires with this decision included a condition of supervision during the currency of the stay.

"Michael Tourigny"

Michael Tourigny
Member, Financial Services Tribunal
December 13, 2019