BRITISH COLUMBIA

Financial Services Tribunal

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DECISION NO. FST-FIA-20-A002(a)

In the matter of an appeal under section 242(1) of the *Financial Institutions Act*, RSBC 1996, c 141

BETWEEN:	Amarpal Singh Atwal	**APPELLANT**
AND:	Insurance Council of British Columbia	**RESPONDENT**
AND:	British Columbia Financial Services Authority	**THIRD PARTY**
BEFORE:	James Carwana, Member	
DATE:	Conducted by way of written submissions concluding on October 15, 2020	
APPEARING:	For the Appellant: Self-represented For the Respondent: Thea Hoogstraten, Counsel For the Third Party: Jessica Gossen, Counsel	

APPEAL

[1] Amarpal Singh Atwal (the "Appellant" or the "Former Licensee") appeals to this Tribunal from a March 31, 2020 Order (the "Order") of the Insurance Council of British Columbia (the "Council"). The Order of the Council followed a hearing held by a Hearing Committee (the "Committee") on December 16, 2019 concerning the allegations against the Appellant. A transcript of the hearing proceedings has been filed on this appeal (the "Transcript"). The Committee issued its Report (the "Report") on February 27, 2020. The Report made various findings and recommended a penalty which was adopted by the Council in all material respects.

[2] In making its Order, the Council stated that it "considered the Report of the Hearing Committee". The Council's Order against the Appellant (referred to as the Former Licensee) was as follows:

1. The Former Licensee is prohibited from applying to the Council for any licence for a period of 24 months from the date of bankruptcy discharge or the date of this order, whichever is later;
2. If the Former Licensee applies for reinstatement of his licence after the conclusion of the prohibition period, a condition will be imposed on his licence that requires him to be supervised for a period of 24 months starting from the date of any reinstatement;
3. The Former Licensee is fined $7,500, due and payable no later than June 29, 2020;
4. As a term and condition of seeking reinstatement, the Former Licensee is required to successfully complete the "Ethics for Insurance Brokers" course through the Insurance Brokers Association of British Columbia, or an equivalent course as acceptable to Council; and
5. The Former Licensee is assessed hearing costs in the amount of $4,054.72, assessed in accordance with Council's costs schedule, due and payable no later than June 29, 2020.

[3] Regarding the portion of the Order concerning hearing costs, the Council stated that "as a self-funded regulatory body, Council looks to licensees who have engaged in misconduct to bear the costs of their disciplinary proceedings, at least in part, so the costs are not borne by other licensees in general". The Council further noted that "the hearing costs assessed to the Former Licensee were calculated in accordance with Council's applicable policy and schedule".

[4] In an earlier decision of this Tribunal relating to this matter, the Appellant was granted an extension of time to file his appeal.

[5] In his written submissions to this Tribunal, the Appellant seeks the following relief:

i) a decrease in the $7,500 fine;

ii) a shorter prohibition from applying for a licence than the 24 months imposed by the Council; and

iii) the hearing costs be waived or reduced.

[6] The Council opposes the appeal and has made submissions responding to the appeal. The Third Party agrees with and adopts the submissions of the Council.

BACKGROUND

[7] The Appellant was first licensed by the Council on February 14, 1983.

[8] Between 1983 and 1993, the Appellant held a Level 2 Agent licence.

[9] In April 1995, the Appellant applied for a licence reinstatement and again held a Level 2 Agent licence until sometime in 2008. In December 2008, the Appellant filed another application and again held a Level 2 Agent licence between 2009 and 2014.

[10] The Appellant's Level 2 Agent licence was terminated in 2014 for non-filing and, in July 2016, the Appellant again filed an application for a Level 2 Agent licence. He held that Level 2 Agent licence from August 2016 to August 2019, when that licence was terminated again for non-filing.

[11] On each of the Appellant's applications in April 1995, December 2008, and July 2016, he answered the following question in the negative: "Have you personally, or has any business of which you are or were an officer, director, or partner, ever been subject to bankruptcy proceedings?"

[12] In August 2007, an agency of which the Appellant was the nominee was disciplined by the Council: see *Insurance Council of British Columbia v Pritam (Peter) Singh Bola and Silver Wing Insurance Services*, August 24, 2007 ("*Bola*"). The investigation there related to the way a client's non-renewal was handled by the licensee, Mr. Bola, who was a manager and director of the Agency. The Appellant himself was not disciplined.

[13] On June 8, 2009, the Council sent the Appellant a letter about an allegation that he had improperly placed insurance coverage, although the investigation determined that there was insufficient evidence to establish the allegation. The letter further raised other potential concerns including whether the Appellant had made material misstatements, such as not disclosing outstanding civil judgments, on recent licence applications. However, the Council elected not to pursue such concerns and reminded the Appellant of the duty to notify Council within specific time frames when certain events occur.

[14] On February 12, 2012, the Council sent the Appellant a letter indicating that it appeared he had failed to meet the notification requirements relating to a real estate licensing matter. The Council noted the Appellant's explanation regarding the matter and stated that it had determined that no further review was necessary. The Appellant was reminded of the duty to notify the Council within specific time frames when certain events occur.

[15] On July 30, 2018, a Council Rules Officer received an email from a bankruptcy trustee advising that the Appellant had filed an assignment into bankruptcy on December 12, 2017.

[16] On the same day, the Rules Officer wrote to the Appellant indicating that the Council Rules required a licensee notify the Council of a bankruptcy within 5 business days and that the Council had not received such notification from the Appellant. The Rules Officer asked for further information from the Appellant about his bankruptcy.

[17] On August 8, 2018, the bankruptcy trustee provided a copy of the bankruptcy documents to the Council. It was indicated on the documents that the Appellant had declared bankruptcy one previous time, which was in 1993.

[18] In a note dated August 15, 2018, the Appellant replied to the Rules Officer. The Appellant responded that he wasn't aware he had to notify Council of his recent bankruptcy because his licence was inactive and his first bankruptcy was in 1993, which was a long time ago.

[19] On November 6, 2018, the Council's Rules Officer again wrote to the Appellant and asked him to provide the reason for his 2017 bankruptcy, information relating to the 1993 bankruptcy, and explanations for not disclosing his bankruptcy on previous applications.

[20] On November 28, 2018, the Appellant sent a fax to the Council. He indicated that he was going to have his trustee handle the 2017 bankruptcy and he was searching for information regarding the 1993 bankruptcy.

[21] An investigation report was subsequently prepared by Council staff and sent to the Appellant.

[22] The Council took the matter to a review committee in March 2019 and the Appellant was invited to attend. The Appellant had a conversation with the Rules Officer about the matter, during which he indicated that he had decided not to attend at the review committee.

[23] The Council released its findings from the review committee and its proposal for an appropriate penalty (the "Intended Decision") on September 10, 2019.

[24] On September 13, 2019, the Appellant had a discussion with the Council's staff lawyer during which they discussed the fact that the Appellant was considering exercising his right to request a hearing rather than accepting the Intended Decision. Later that day, the staff lawyer wrote an email to the Appellant about the hearing procedure relating to an appeal. The email was entered into evidence at the hearing and indicates that the staff lawyer specifically advised the Appellant about the potential for hearing costs to be ordered against him. The email further advised how hearing costs are formulated and stated that hearing costs have amounted to several thousand dollars in other cases. The email also referenced sources for further information about hearing costs.

[25] On September 16, 2019, the Appellant sent an email advising that he wished to exercise his right to a hearing to dispute the Intended Decision.

[26] The hearing was set for December 16, 2019 in Vancouver. The Appeal Record indicates that legal counsel for the Council asked the Appellant to advise her in advance about whether he would be attending the hearing. A review of the hearing Transcript indicates that the Appellant had not provided confirmation as to whether he would be attending the hearing and the matter was stood down to see if he would arrive. After waiting approximately 20 minutes, the hearing commenced without the Appellant.

[27] At the hearing, the Council led evidence and made submissions. As previously noted, the Committee issued its Report on February 27, 2020.

[28] The Committee's Report is a little over 7 pages long. The Committee's findings and recommendations are set out in 6 paragraphs of the Report, ending with the recommended penalty. The Committee's reasons for its recommendation regarding the penalty are set out in the last paragraph. The whole of the Committee's findings and recommendations are set out below (Report at p 6-8):

> The Hearing Committee has no hesitation in concluding that the Council has met its burden to establish the allegations in the Notice of Hearing against the Former Licensee. The evidence is clear that the Former Licensee failed to notify

the Council about his two personal bankruptcies (2017 and 1993). Further, and even more troubling to the Hearing Committee, the Former Licensee, on three different occasions, filed applications with the Council in which he falsely stated that he had never been subject to a bankruptcy proceeding.

The applications submitted to the Council by the Former Licensee expressly required him to declare that the information provided in the applications was *true and complete*. It was also made clear in the applications that the information was to be used by the Council to investigate the Former Licensee's suitability for licensing.

These breaches of the Rules and Code by the Former Licensee are very concerning to the Hearing Committee and should be regarded as serious misconduct. It would be very challenging for the Council to carry out its public interest mandate without being able to rely on licensees and applicants to provide truthful and complete information to the Council during the license application process. Further, the Former Licensee was an experienced agent and had been licensed with Council off and on for almost 35 years. As an experienced licensee, he would certainly have known that he was required to be careful and honest in his applications with the Council as he pursued additional licences.

The Hearing Committee is also troubled by the Former Licensee's conduct during the course of the Council's investigation and this hearing process. Despite being asked to provide information to the Council about his bankruptcies, the Former Licensee has refused to respond to the Council's requests. In the result, the Council has been unable to determine why the Former Licensee most recently filed for bankruptcy in 2017. All that is known to the Council about those events is that the Former Licensee declared over $2.7 million in liabilities with only $2,101 of assets. It is the Hearing Committee's view that these facts should raise serious concerns for the Council about the Former Licensee's financial responsibility and reliability.

Further, the Hearing Committee also highlights the manner in which the Former Licensee failed to participate in the hearing process *after requesting the hearing* last September. Although the Hearing Committee does not see this as an aggravating factor in terms of the penalty being recommended, it certainly mandates in favour of the Former Licensee being required to pay for the costs of the hearing and it may even cause concerns for the Council about the overall governability of the Former Licensee.

Having reviewed all of the evidence and the authorities that the Council referred us to at the hearing, the Hearing Committee agrees that the *N. Smith* decision is the most helpful in terms of establishing a range of penalty for misconduct of this nature. The Hearing Committee is somewhat reluctant to endorse an approach where a licensee faces a "set penalty amount" for each act of misrepresentation or failure to disclose to the Council, but recommends that the Council consider the totality of a licensee's lack of disclosure and candour in order to establish a penalty that reflects and addresses the global nature of the misconduct. In this instance, even though the Hearing Committee agrees with the Council that the Former Licensee's misconduct is serious, we do not see this as being a case where the maximum fine is necessary to ensure that the Council is fulfilling its public interest mandate. Instead, the Hearing Committee recommends that the Council consider the following penalty:

> a) the Former Licensee be prohibited from applying to the Council for any licence for a period of 24 months from the date of the order;
>
> b) if the Former Licensee applies for reinstatement after 24 months, there be a period of a further 24 months of supervision from the date of any reinstatement;
>
> c) the Former Licensee pay a fine in the amount of $7,500 within 90 days of this order;
>
> d) as a term and condition of seeking reinstatement, the Former Licensee successfully complete an "Ethics for Insurance Brokers" course through the Insurance Brokers Association of British Columbia, or an equivalent course as acceptable to the Council; and
>
> e) the Former Licensee pay the reasonable costs of the hearing, as assessed in accordance with the applicable schedule, also payable prior to being reinstated.

[29] As noted earlier, on March 31, 2020 the Council issued its Order which adopted the recommendations of the Committee in all material respects.

[30] The Appellant received an extension of time and filed his Notice of Appeal to this Tribunal on May 20, 2020. The Appellant filed his written submissions on September 9, 2020, and the Council filed its written submissions on October 1, 2020. The Appellant did not provide a reply submission although he was advised of the opportunity to do so.

POSITIONS OF THE PARTIES

The Appellant

[31] The Appellant admits there is no dispute that he failed to disclose his 1993 and 2017 bankruptcies. He says his "only issue concerns the $7,500 fine, hearing costs of $4054.72, and the 24-month prohibition from obtaining a license".

[32] The Appellant acknowledges and apologizes for his failure to comply with the requirement to notify of his bankruptcies under the Council's Rules, for making material misstatements, and for "consequently breaching various provisions" in the Council's Code of Conduct. While not seeking to excuse his actions, in his submission the Appellant explains that he feared he would lose the means to earn a livelihood and the ability to support himself and his family if he lost his licence.

[33] The Appellant submits that he understands that his financial responsibility and reliability have been put into question because of this matter, but he hopes that his overall record as an insurance agent for the last 35 years can be more indicative of his abilities and mitigate the concerns raised.

[34] The Appellant requests a smaller fine and shorter prohibition period based on the previous Council decisions in *Insurance Council of British Columbia v R. Carreno,* March 5, 2019, ("*Carreno*") and *Insurance Council of British Columbia v N. Smith,* February 17, 2015, ("*Smith"*). He says those cases are "factually similar" to

his case and involve breaches of the same Council Rules regarding the notification of bankruptcies and making material misstatements.

[35] Regarding the amount of the fine at issue here, in *Carreno* the licensee was fined $2,000 for breaching the Rule regarding bankruptcy disclosure and for making a material misstatement regarding his one bankruptcy. In *Smith*, the licensee was fined $5,000. There the licensee had been subject to two prior disciplinary actions in Ontario, in addition to having two personal bankruptcies in 1993 and 2008 which were not declared on two different applications by Ms. Smith. The Appellant says that his fine of $7,500 was "quite harsh comparatively".

[36] With respect to the length of the Appellant's prohibition from practice, in *Carreno* there was no suspension, but the licensee was required to take two courses and "to be supervised for a period of two years of active licensing by a Life Agent supervisor as approved by Council". In *Smith*, the licensee had her licence terminated for one year where, the Appellant submits, Ms. Smith's misconduct "was arguably more serious". Again, the Appellant asserts that his two-year prohibition period is "quite harsh comparatively".

[37] Regarding the relief sought in respect of hearing costs, the Appellant says he was "not informed of the potential hearing costs that may be levied as a result of conducting the hearing". Regarding his non-attendance at the hearing, the Appellant says in his submission that he spoke to an individual from the Council and was told that his attendance was optional, leaving him with the impression he was not required to attend. In the Appellant's Notice of Appeal, he states he missed the hearing because he was feeling ill. He requests that the hearing costs "be reduced or waived".

[38] In terms of the three items for which relief is sought, the Appellant says he worries about how he will "be able to pay the $7,500 fine and $4,054.72 hearing costs while continuing to be suspended for a further 24 months".

The Respondent Council

[39] The Council says that the Appellant appears to be challenging the fine and prohibition from practice on the basis that they were unreasonably harsh. The Council says that the standard of review for questions of penalty is one of reasonableness.

[40] The Council says the Appellant appears to be challenging the hearing costs ordered because he claims he did not know they could be assessed against him and, as such, it was procedurally unfair to make such an award. The Council says the standard of review for questions of procedural fairness is fairness.

[41] The Council cites various cases regarding the reasonableness of the penalty: *Financial Institutions Commission v Insurance Council of BC et al*, Decision No. 2017-FIA-002(a)-008(a) ("*FICOM*"); *Mann v Insurance Council of British Columbia*, Decision No. 2015-FIA-002(a) ("*Mann*"); *Dunsmuir v New Brunswick*, 2008 SCC 9, ("*Dunsmuir*"); and *Kia v Registrar of Mortgage Brokers*, Decision No. 2017-MBA-002(b) ("*Kia*"). The Council argues that to reduce the Council's penalty, it must be

shown that the penalty was not arrived at in a "justified, transparent and intelligible manner", and was outside the range of acceptable outcomes.

[42] Regarding procedural fairness, the Council cites *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699 ("*Baker*"); *Kadioglu v Real Estate Council of British Columbia and Superintendent of Real Estate*, Decision No. 2015-RSA-003(b) ("*Kadioglu*"); *Mavi v Canada (Attorney General)*, 2011 SCC 30; and *British Columbia (Securities Commission) v Pacific International Securities Inc.* 2002 BCCA 421. The Council argues that the duty of fairness will vary from case to case depending on the context and particular circumstances, including the subject matter of the alleged unfairness and the legitimate expectations of the person challenging the decision.

[43] The Council relies on the decision in *Financial Services Commission v Insurance Council of British Columbia and Maria Pavicic*, November 22, 2005 ("*Pavicic*"), for the factors to be considered in dealing with penalty. Those factors include "the need to promote specific and general deterrence and thereby protect the public"; the "need to maintain the public's confidence in the integrity of the …profession"; and "the range of sentencing in other similar cases" (*Pavicic*, p 12).

[44] The Council says that while it is not bound by precedent, it "accepts that the principle of proportionality applies in terms of penalties for similar misconduct". The Council acknowledges that its "decisions regarding other licensees who were suspended for the same or similar misconduct provide guidance to the Hearing Committee".

[45] The Council says that at the hearing it "submitted this case is most similar to *N. Smith*". The Council notes that in the *Smith* case the licensee had been licensed "as a life and accident and sickness insurance agent and a Level 2 general insurance agent since 2010". The discipline there arose from the licensee's failure to disclose on her licence applications "that she had been disciplined twice by the Registered Insurance Brokers of Ontario", and that she had two personal bankruptcies prior to submitting her applications.

[46] The Council notes that in December 2014, a hearing committee of the Council in *Smith* determined that the licensee's actions warranted discipline, terminated both her licences for one year, fined her $5,000, and required her to pay the Council's investigative and hearing costs.

[47] The Council takes issue with the Appellant's argument that the misconduct in *Smith* was arguably more serious than in the present case. The Council says that here the Appellant did not explain his lack of response to the Council's communications with him or his bankruptcies, and he did not participate in the hearing. The Council points to the existence of previous communications in 2009 and 2012 with the Appellant where, although he was not disciplined, he was reminded of the need to notify the Council within specific time frames when certain events occurred. The Council further references the *Bola* matter from 2007 where the agency for which he was the nominee was sanctioned, although the Appellant was not himself disciplined.

[48] Turning to the Appellant's reliance on *Carreno*, the Council indicates the penalty in that case involved a total of $2,000 in fines, being a $1,000 fine for Mr.

Carreno failing to notify of his one bankruptcy, and a further $1,000 fine for making a material misstatement on his subsequent licence reapplication. In addition, there were conditions imposed on Mr. Carreno regarding professional education and requiring two years of supervision.

[49] The Council says there are aggravating factors in the Appellant's case which make it different than *Carreno* "including repeated reminders, lack of participation in the hearing, his role in the *Bola* discipline decision, and a complete lack of mitigating factors".

[50] The Transcript of the hearing indicates that, before the Committee, the Council argued that the starting point for the fine against the Appellant should be $1,000 per breach, relying on the fine levied in *Carreno* as a precedent. The Council further cited *Smith* where there was a $5,000 fine and argued the fine here should be the $10,000 maximum, being $1,000 for each of the three material misstatements and the two failures to notify the Council of bankruptcy (equaling $5,000), plus an additional $5,000 for the Appellant's "blatant disregard" of the Rules. The Council also sought an order prohibiting the Appellant from applying for a licence for a minimum period of 3 years.

[51] The Council quotes the paragraph from the Report which deals with penalty, including the penalty recommendation. The Council submits the penalty items imposed on the Appellant, including both the fine and the prohibition from practice, were reasonable, having been "reached in a justified, transparent and intelligible manner" and falling within the range of possible, acceptable outcomes in the circumstances.

[52] With respect to the Appellant's argument regarding hearing costs, the Council says the Appellant's position as stated in his submission is different than his position as stated in his Notice of Appeal. In his submission, the Appellant states that "after speaking with an individual from the Council", he was told that his attendance was optional and was under the impression he did not need to attend. However, in the Notice of Appeal, he states he did not attend because he was ill.

[53] The Council says the evidence presented at the hearing shows the Appellant was advised that he could be required to pay the costs of the hearing. The email from the staff lawyer for the Council which was entered into evidence demonstrates the Appellant was advised about the potential for hearing costs to be ordered against him, how hearing costs are formulated, the fact that hearing costs have amounted to several thousand dollars in other cases, and the sources for more information about hearing costs.

[54] The Council argues that the costs to prosecute the misconduct of a licensee should not be borne by other innocent members of the insurance industry and submits that the decision to award hearing costs here was reasonable and fair in all the circumstances.

RELEVANT LEGISLATION

[55] This appeal is brought under Section 242 of the *Financial Institutions Act,* RSBC 1996, c. 141 (the "*Act*") which provides for decisions of the Council to be appealed to this Tribunal.

[56] The broad remedial discretion of this Tribunal on such an appeal is set out in section 242.2 (11) of the *Act*:

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

ISSUES

[57] As previously noted, the Appellant seeks a decrease in the $7,500 fine; a shorter prohibition from applying for a licence than the 24 months imposed by the Council; and that the hearing costs be waived or reduced.

[58] I will consider the issues raised on this appeal as follows:

a. What is the standard of review to be applied to each of the matters raised on this appeal?
b. Does the penalty determination involving the fine and prohibition from practice meet the applicable standard of review?
c. Does the hearing costs order meet the applicable standard of review?
d. Does the Appellant's allegation that he was unaware of the potential to have hearing costs ordered against him constitute a basis to set aside the hearing costs order?

ANALYSIS

a. Standard of Review

[59] I will examine the standard of review to be applied in respect of each of the different issues here involving: the penalty determination matters; the exercise of discretion in ordering hearing costs; and the Appellant's allegation about being unaware of the potential hearing costs order. The Tribunal has its own internal jurisprudence regarding the standard of review to be applied with respect to different types of issues.

Penalty Determination

[60] The Council has cited the decision in *FICOM* regarding the standard of review to be applied in reviewing penalty matters. In *FICOM*, the former Chair of the Financial Services Tribunal (the "FST") engaged in an in-depth consideration of the standard of review to be applied regarding penalty decisions. The Chair quoted from a previous FST decision which held that, in determining the standard of review to be applied by the FST, "the correct starting point is to recognize that when the

legislature creates a statutory right of appeal, each right of appeal must be considered contextually, on its own terms and in view of its larger purposes" (*FICOM*, at para 64).

[61] In *FICOM*, the Chair reviewed the case law and factors involved in determining the standard of review to be applied in penalty appeals. The Chair identified a greater willingness for the FST to actively engage in penalty appeals where no rationale has been provided for the penalty chosen by the Council. On appeals involving penalty, the Chair stated that "it is for the Tribunal to arrive at its own specialized judgments about what is a reasonable penalty range" (at para 77).

[62] At the same time, the Chair recognized there are "valid arguments in favour of a measure of restraint in penalty appeals" and the Tribunal should not simply substitute its discretion for that of the body appealed from. In particular, the FST ought not to engage in "excessively narrow line drawing" when dealing with penalty appeals (*FICOM*, at para 76).

[63] Taking all the various factors into account, the Chair summarized the appropriate approach for the FST on penalty appeals as follows (at para 77):

> …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.

[64] The decision in *FICOM* was subsequently considered by the FST in *TruNorth Warranty Plans of North America, LLC v Superintendent of Financial Institutions,* Decision No. 2019-FIA-003(a) ("*TruNorth*") where the panel reviewed the law regarding the standard of review in light of the Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*").

[65] In *TruNorth*, the panel held that the standard of review on questions of penalty was reasonableness. In applying the reasonableness standard, the panel in *TruNorth* referred to *Vavilov* and held "the proper application of the reasonableness standard is concerned with the decision-making process and its outcomes" (at para 84). Stated another way, the decision under review must be reasonable in respect of <u>both</u>: 1) the rationale for the decision which was made by the decision maker; and 2) the outcome to which it led. The Supreme Court of Canada in *Vavilov* stated it this way (at paras 86-7):

> …In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.
>
> …that a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome was recently reaffirmed in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6, at para. 12. In that case, although the outcome of the decision at issue

> may not have been unreasonable in the circumstances, the decision was set aside because the outcome had been arrived at on the basis of an unreasonable chain of analysis. (emphasis in original)

[66] When conducting a penalty review, the panel in *TruNorth* referenced the guidance from *Vavilov* about the importance of context. The panel quoted from *Vavilov* to the effect that reasonableness is to be evaluated in light of the context and "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*TruNorth*, at para 86). The panel stated that the "approach to assessing reasonableness on penalty appeals to the FST should more accurately be described as reasonableness taking its colour from the context" (*TruNorth*, at para 87).

[67] Although not bound by earlier decisions of this Tribunal, I agree with and adopt the above reasoning in both the *FICOM* and *TruNorth* decisions. As such, I find that when assessing the determinations of the Council in relation to penalty here, I will apply the reasonableness standard as set out in those decisions.

[68] In applying a contextual analysis, the Supreme Court of Canada in *Vavilov* referred to its previous decision in *Baker* and identified a number of factors to be considered. Such factors include the past practices and past decisions of the administrative body, as well as the impact of the decision on the individual.

[69] With respect to whether the decision is consistent with the past decisions and practices of the administrative body, the Court stated that where a decision maker departs "from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons" (*Vavilov*, at para 131). In that regard, the legitimate expectations of the parties, based on such past decisions and practices, "help to determine both whether reasons are required and what those reasons must explain" (*Vavilov*, at para 131, and see also *Baker* at para 26).

[70] Regarding the impact of the decision under review, the Court in *Vavilov* stated that a review based on reasonableness requires that "where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes" (*Vavilov*, at para 133). In particular, where a decision has consequences that threaten an individual's livelihood, the requirement for reasons explaining the result is at the higher end of the spectrum. In *Baker*, the Court quoted an earlier decision holding that "a high standard of justice is required when the right to continue in one's profession or employment is at stake" (*Baker* at para 25), and in *Vavilov* the Court held such a principle was applicable both for procedural fairness and on a reasonableness review (*Vavilov* at para 133).

Exercise of Discretion to Award Hearing Costs

[71] Turning to the issue of the hearing costs ordered, I note that the Appellant is requesting that the hearing costs be reduced or waived as allegedly being punitive. As indicated in *Vavilov*, there is a general presumption that decisions are subject to a reasonableness review (*Vavilov*, at paras 16-17, and 25). Moreover, an order of hearing costs involves a matter of discretion and the standard of reasonableness

has been applied by this Tribunal when reviewing other matters of discretion such as enforcement costs (see *Inglis v Real Estate Council of British Columbia,* Decision No. 2019-RSA-001(a), June 9, 2020). Thus, as with my above analysis in relation to the issues of penalty, I find the standard of review is reasonableness for the issue of whether the hearing costs should be reduced or waived as allegedly being punitive.

Procedural Fairness Regarding Hearing Costs

[72] As previously noted, in addition to challenging the hearing costs as being allegedly punitive, it appears that the Appellant is challenging the costs order based on his claim that he did not know such costs could be assessed against him. I find this is a question of procedural fairness regarding the hearing costs order, and I agree that the standard of review in that regard is fairness as submitted by the Council (see also *Kadioglu*, at para 32).

Summary

[73] To summarize, the standard of review I will apply is reasonableness regarding the penalty matters here, and the issue of whether the hearing costs order is punitive. That reasonableness review will take its colour from the context of each issue, and will consider both the rationale for the decision which was made by the decision maker and the outcome to which it led. With respect to the issue of procedural fairness relating to the hearing costs order, the standard of review I will apply is one of fairness.

b. Are the Penalty Determinations Reasonable?

The Fine

[74] In the Report, the Committee found the Appellant's breaches of the Council's Rules and Code to be "serious misconduct". The Committee noted that the Appellant had been a licensed agent with the Council on and off for almost 35 years, was an experienced licensee, and would have known to be careful and honest in his applications with the Council. Further, the Committee was "troubled" by the Appellant's conduct during the Council's investigation and the hearing process. The Committee stated that the Appellant had refused to respond to the Council's requests for information, which resulted in the Council being unable to determine why the Appellant had filed bankruptcy in 2017.

[75] The Committee found that the *Smith* decision was the "most helpful in terms of establishing a range of penalty" for the type of misconduct in the present case, and then discussed the penalty amount. The Committee held that the maximum fine was not necessary to fulfill the Council's public interest mandate. In terms of what the penalty amount should be, the Committee recommended that the global nature of the misconduct be considered and stated it was "somewhat reluctant to endorse an approach where a licensee faces a 'set penalty amount' for each act of misrepresentation or failure to disclose to the Council" (at p 7).

[76] In applying a contextual analysis to its review of penalty matters, the FST has taken into account past decisions where penalties have been imposed and has recognized the legitimate expectations of the parties that there should be "an avoidance of imposing penalties which are disparate with penalties imposed in other cases" (*FICOM*, at para 97). While each case will depend on its own particular facts, in its submissions the Council as well has indicated it "accepts that the principle of proportionality applies in terms of penalties for similar misconduct". This has been called the "principle of parity" (*Kia*, at para 246), and it follows that the imposition of a disparate penalty may amount to an error in principle.

[77] The Appellant accepts his circumstances are factually similar to *Smith* and does not challenge the applicability of *Smith*. Although the Appellant has also referred to *Carreno*, that case involved an individual who failed to report his one bankruptcy and subsequently failed to disclose that bankruptcy on one occasion when he reapplied for his licence after it had been terminated for non-filing. Unlike Mr. Carreno*,* the Appellant acknowledges he has a "history in failing to make the necessary disclosures". When one looks at the *Smith* decision one can see there are similarities to the present case, and that *Smith* assists with a contextual analysis of the present case which takes into account past decisions. I find that it was reasonable for the Committee to rely on *Smith*.

[78] With respect to the amount of the fine imposed here, the range was established based on the *Smith* case and the fine was set at $7,500. I find the decision, read as a whole, establishes that the *Smith* decision was being used for setting the range and, on its face, a $7,500 fine (as imposed here) may be said to be within the range of a $5,000 fine (as imposed in *Smith*). Although the amount here may be at the higher end of the range, the Committee gave a rationale for the fine and its findings referenced matters relating to the Appellant's lack of disclosure and candour. The reasons for the outcome are intelligible and justifiable and I find the penalty amount is sufficiently similar to *Smith* that it does not violate the parity principle in terms of reasonableness. I further find that attempting to draw a line between the amount of the fine here and that in *Smith* would involve engaging in "excessively narrow line drawing" (*FICOM*, at para 76).

[79] The Appellant seeks a reduction in the fine. In assessing the reasonableness of the fine, I have looked at both the amount of the fine imposed, and the rationale of the Committee for setting that amount. In the circumstances and context, and for the reasons set out above, I find the fine was reasonable.

The Prohibition from Practice

[80] I turn now to consider the reasonableness of the penalty prohibiting the Appellant from practice for 24 months.

[81] I begin by finding that the case law under the *Act* establishes such a prohibition from practice is more serious than a fine. In *FICOM*, the Council had imposed a $5,000 fine on each of the respondents without a prohibition from practice and the Financial Institutions Commission appealed seeking a suspension from 6 to 9 months for each of the respondents. The FST held that a prohibition from practice was a more serious form of penalty than a fine and stated that

"suspensions are reserved for the more serious demonstrations of misconduct" (at para 104). The FST went on to find that a $5,000 fine was insufficient for the misconduct involved, and that a baseline suspension of six months for each of the respondents was a more stringent and more appropriate penalty for the misconduct involved.

[82] My determination that a prohibition from practice constitutes a more serious penalty than a fine is also consistent with the case law previously cited where the Supreme Court of Canada found that "a high standard of justice is required when the right to continue in one's profession or employment is at stake" (*Baker*, at para 25). Thus, I find the context for a penalty decision prohibiting a licensee from practice requires more in terms of reasoning than a decision about the amount of a fine.

[83] In the present case, the Committee referred to *Smith* in terms of the range of penalty to be imposed. However, in terms of the penalty imposed respecting the Appellant's prohibition from practice, there are a number of problems with the Committee's reasoning.

[84] First, in adopting *Smith*, the focus of the Committee was on the amount of the fine and the Committee did not analyze the *Smith* case in terms of the prohibition from practice. It did not discuss the length of Ms. Smith's prohibition from practice or the absence of the other practice matters in *Smith* which the Committee was recommending for the Appellant – the requirements that he take an ethics course and undergo an extensive period of supervision. Second, if the Committee was intending to apply the range from *Smith* in determining the Appellant's prohibition from practice, it did not do so. Preventing someone from working in their profession and using their professional skills for a 24-month period is significantly longer, and the loss of income is significantly greater, than a 12-month period. A prohibition of 24 months (as imposed here) is not within in the same range as a prohibition of 12 months (as imposed in *Smith*). Third, the Committee did not analyze or compare the circumstances in *Smith* to the Appellant's circumstances to explain why it was recommending a 24-month prohibition for the Appellant as opposed to the 12 months imposed in *Smith*.

[85] The result of the foregoing is that if the Committee was relying on *Smith* for all penalty matters, the Committee's reasoning process does not adequately explain its decision to prohibit the Appellant from applying for any licence for a period of 24 months while Ms. Smith's prohibition was only for 12 months. On the other hand, if the Committee was not relying on *Smith* for penalty matters other than the fine, then there is no explanation whatsoever for the 24-month prohibition from practice and the Committee's reasoning does not explain why it chose a 24-month prohibition from practice as opposed to some other period. In either case, I cannot ascertain from the Report what the Committee's rationale was for choosing the 24-month prohibition.

[86] Having made that finding, however, I am cognizant that there may be circumstances where, as indicated in *Vavilov*, the history and context of the matter "may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency (*Vavilov*, at para 94). In that respect, while there were no reasons stated for departing from *Smith* on the severity of the

prohibition penalty, there are a number of factors relating to penalty which have been put forward by the Council in an attempt to justify the Committee's decision.

[87] In its submissions at the hearing, the Council noted that the licensee in *Smith* had been licensed since 2010 and stated that the Appellant was more experienced than Ms. Smith (Transcript, at p 47). Similarly, the Committee referred to the Appellant being an experienced agent and having been licensed on and off for almost 35 years in its finding about the Appellant's misconduct. As a point of comparison with *Smith*, however, a review of that decision indicates Ms. Smith had been a licensed general insurance broker in Ontario since 1981, and a licensed life agent since 1994. Therefore, although Ms. Smith had been licensed in British Columbia since 2010, prior to the December 2014 decision in *Smith* she had approximately 33 years in the insurance business with her experience in Ontario. While the Appellant's experience was in British Columbia, and the bulk of Ms. Smith's experience was in Ontario, I do not view there is a significant difference in terms of their length of experience.

[88] An examination of the Report indicates that the Appellant's experience was relied upon by the Committee in order to find that the Appellant would have known about the need to be careful and honest in his applications. In other words, it was referred to as a basis for establishing his wrongdoing and not in terms of justifying the length of his prohibition from practice. Regarding whether the Committee's finding in this regard could have been a basis for the significantly longer prohibition than in *Smith*, the finding regarding Ms. Smith was that she actually "knew that what she was doing was wrong at the time, but proceeded to do it anyway" (*Smith*, at p 5). The FST has found that there is a higher level of culpability where an individual knowingly provides incomplete or misleading information - as in *Smith* - as opposed to the situation of a person who "knew or ought to have known" the information provided was incomplete or misleading – as in the present case (*Kia* at para 252). In all the circumstances, I am not satisfied that the Committee relied upon the Appellant's length of time as an agent to establish a significantly longer prohibition period than in *Smith,* or that it would have been reasonable to do so.

[89] The Council has relied on the letters sent to the Appellant in June 2009 and February 2012, as well as the decision involving Mr. Bola, in arguing there is support for a greater penalty for the Appellant than Ms. Smith. For a number of reasons, I find those matters do not support the significantly longer prohibition from practice which the Committee recommended for the Appellant. First, the Committee did not find those previous matters were of sufficient significance to rely on them in its findings to support its decision to prohibit the Appellant from practising for 24 months. Second, unlike the decision in the present case, the committee in *Smith* found Ms. Smith's record to be of significance and actually referenced her record in imposing the 12-month prohibition from practice. Third, the Appellant was not disciplined in respect of the previous matters relied upon by the Council, while Ms. Smith's record included two earlier disciplinary actions in Ontario and one in 2014 for furnishing false, misleading, and incomplete information in her 2013 Ontario licence renewal application.

[90] There are two other factors which the Council has put forward in arguing that the present case deserves a more severe sanction than that imposed in *Smith*: a)

the failure of the Appellant to explain his bankruptcies; and b) the Appellant's failure to participate in the hearing.

[91] Dealing first with the Appellant's failure to explain his bankruptcies, this was a matter referred to by the Committee in its findings. However, while this may have raised concerns about the Appellant's financial responsibility and reliability, similar concerns were present in the *Smith* case. Ms. Smith's record included "misappropriating premiums received in trust from clients" (*Smith*, at p 2), and the committee in *Smith* said her "conduct brought into question her ability to act in a trustworthy manner, in good faith and in accordance with the usual practice of the business of insurance" (*Smith*, at p 5).

[92] Although the Council raises the Appellant's failure to explain his bankruptcies, the Committee did not indicate it was relying on this matter in setting the length of the Appellant's prohibition from practice. In addition, there is no rationale provided for why this matter would warrant a significantly different penalty than in *Smith*, given the parity principle and that the committees in both cases had similar concerns about the financial responsibility and reliability of the licensees. In the circumstances, I do not accept the Council's argument that this supports the Committee establishing a significantly different outcome in terms of a significantly longer period of prohibition for the Appellant than Ms. Smith.

[93] I turn now to the Council's submission that the Appellant's failure to participate in the hearing is an aggravating factor warranting the Committee's determination of a more severe penalty than for Ms. Smith. I begin by noting, however, that the Committee itself specifically said that it did not see the Appellant's failure to participate in the hearing as an aggravating factor in terms of the penalty being recommended. While the Committee made a comment about potential concerns for the Council about the overall governability of the Appellant, it specifically referred to the failure to participate in the hearing as not going to penalty (at p 7).

[94] The Committee's statement that the lack of participation by the Appellant in the hearing is not an aggravating factor in establishing penalty makes sense. The opportunity to attend a hearing and challenge the Council's evidence is for an appellant's benefit. If he does not attend, or if he chooses not to participate in the hearing by asking questions and making submissions, it does not mean his penalty should be greater than an accused licensee who attends at a hearing and challenges the Council's evidence and submissions. Thus, I do not agree with the Council's submission that the Appellant's lack of participation in the hearing supports the significantly longer prohibition from practice ordered here, particularly since the Committee itself did not see it that way.

[95] As previously noted, the Committee and the parties have accepted the *Smith* case as being helpful or applicable in determining the penalty matters at issue for the misconduct here. In his submission, the Appellant says his prohibition from practice is "quite harsh" compared to *Smith*. The Appellant's argument is, in effect, that the length of his practice prohibition is unreasonable in the context of previous decisions and the parity principle. While the Appellant argues that the misconduct in *Smith* is more serious than in his case because Ms. Smith "breached her obligations in three different provinces", I do not find such a circumstance warrants a greater

penalty for Ms. Smith than the Appellant. In my view, the type of the Appellant's misconduct involving either failures to disclose or misstatements was similar to that in *Smith*, the number of incidents of misconduct is similar, and in both cases the misconduct raised similar concerns for the Council. The Committee, again, did not analyze or compare the circumstances in *Smith* to the Appellant's circumstances to explain why it was recommending a 24-month prohibition for the Appellant as opposed to the 12 months imposed in *Smith,* nor did the Committee explain why it was recommending a significantly longer prohibition period for the Appellant in addition to the sanctions which were not present in *Smith* - the requirements that he take an ethics course and undergo an extensive period of supervision. In terms of the parity principle and in the context of the previous decision in *Smith*, I find the prohibition from practice here was disproportionate and unreasonable.

[96] In all the circumstances, and given the context for a decision prohibiting someone from practising his or her profession and earning a livelihood, I find the Committee's decision regarding the Appellant's prohibition from practice for 24 months was not arrived at in a justified, transparent, and intelligible manner and its decision-making process was not reasonable. I further find that even upon examination of the history and context of the matter, the outcome imposing the 24-month prohibition from practice cannot reasonably flow from the analysis undertaken and in particular is inconsistent with the parity principle.

c. Is the Hearing Costs Order Reasonable?

[97] The Appellant submits that the hearing costs should be reduced for two reasons. First, he submits that the costs should be reduced or waived because he was not informed costs of the hearing could be assessed against him. I will deal with this procedural fairness argument later in these reasons. His second argument is that the hearing costs should be reduced because they contribute to a penalty which is "quite punitive" in comparison to other cases.

[98] With respect to the Council's decision to order hearing costs in the amount of $4,054.72, I note that the Committee specifically spoke to the matter of hearing costs in its Report. It stated that the Appellant's failure to participate in the hearing after making such a request mandated in favour of requiring the Appellant to pay the costs of the hearing. As part of the Order, the Council stated that the Appellant, having been found to have engaged in misconduct, ought to bear at least part of the costs of the disciplinary proceedings so the costs are not borne by other licensees in general and further stated the amount of costs was based on the Council's costs schedule. I do not find that the Council exercised its discretion to award hearing costs in an unreasonable manner.

[99] The context for a decision ordering that hearing costs are to follow the event, as here, does not require detailed reasoning where an argument has not been raised before the Committee as to why it should be otherwise. The Appellant did not raise hearing costs as an issue before the Committee, nor has the Appellant identified why the amount of hearing costs is quite punitive. As previously noted, the Appellant was provided with a significant amount of information regarding hearing costs by the Council's staff lawyer, and he has not identified anything from that information as a reason for saying the hearing costs are quite punitive. The

amount of hearing costs in each case will depend on the particular circumstances and nothing has been demonstrated in the present case to establish the Council exercised its discretion regarding hearing costs unreasonably.

[100] In the circumstances and context, I find that the Council's decision-making process in ordering hearing costs, including its rationale that those who have engaged in misconduct ought to bear at least some of the costs of disciplinary proceedings, makes sense and was reasonable.

[101] I further find that the decision to order hearing costs against the Appellant was not a disparate outcome from other decisions such as *Smith*. In ordering hearing costs against Ms. Smith, the committee there found the holding of the hearing "rested solely" with Ms. Smith and was a result of Ms. Smith's failure to make proper disclosures. The same can be said here with respect to the Appellant and the Council's order in awarding costs against the Appellant.

[102] In all the circumstances, I find the assessment of hearing costs to the Appellant in the amount of 4,054.72, based on the Council's costs schedule, was a reasonable outcome.

d. The Procedural Fairness of the Hearing Costs Order

[103] As previously indicated, it appears the Appellant's challenge to the hearing costs order is also based on a claim of procedural unfairness. The alleged procedural unfairness arises from the Appellant's assertion that he did not know hearing costs could be awarded against him. However, I find the evidence demonstrates that the Council's staff lawyer did advise the Appellant about the potential for hearing costs to be ordered against him. In that respect, the Appellant was further advised by the Council's staff lawyer how hearing costs are formulated, that they have amounted to several thousand dollars in other cases, and about sources for further information regarding hearing costs. Despite knowing the potential for hearing costs to be awarded, the Appellant did not attend the hearing or make submissions in respect of the hearing costs. I find the awarding of hearing costs against the Appellant was not procedurally unfair.

[104] On his appeal, the Appellant has stated that he worries about how he will be able to pay the hearing costs. The time for the Appellant to have raised such concerns was at the hearing and the Appellant cannot say it was procedurally unfair for the Council to make such a costs order when he did not raise such matters before the Committee.

DECISION

[105] For the reasons set out, I have found the part of Council's Order prohibiting the Appellant from practice for 24 months is unreasonable. With respect to the penalty amount of $7,500 and the hearing costs, I have found those portions of the Order to be reasonable and procedurally fair in the circumstances.

[106] With the foregoing in mind, I set aside the portion of the Council's penalty whereby the Appellant was "prohibited from applying to the Council for any licence for a period of 24 months from the date of bankruptcy discharge or the date of this

order, whichever is later". The appeal regarding the $7,500 fine and the hearing costs is dismissed.

REMEDY

[107] Having determined that the Appellant's 24-month prohibition from practice should be set aside, the next question is what remedy should follow. While it is open to me to send that aspect of the penalty back for reconsideration, I find it would be appropriate for me to determine that matter exercising my power to vary the decision under appeal pursuant to section 242.2 of the *Act*. The facts are not at issue and the parties have referred to the applicable law. The parties ought not to be put to the time and expense of further proceedings to determine the matter. Furthermore, the additional delay in referring the matter back ought to be avoided. The issues here came to the attention of the Council in July 2018 – approximately two-and-one-half years ago – and some of the incidents of misconduct date back to 1993. If the matter was to be referred back for reconsideration, there would be a further delay in determining this aspect of the penalty, with the potential for even more delay and expense in the event of another appeal.

[108] My decision to determine the matter of the Appellant's prohibition from practice on this appeal, rather than to remit the matter, is consistent with the application of various factors identified in *Vavilov* regarding whether to remit a matter (*Vavilov*, at para 142). In addition to the concern for delay and avoiding expense to the parties, which have been previously noted, there is some urgency in providing a resolution to the dispute since the Appellant has already been unable to practice for a lengthy period of time. In addition, the nature of the regulatory regime here is one where the FST is recognized as a specialized tribunal with the ability to make its own specialized judgments regarding penalty matters (*FICOM*, at para 77).

[109] I turn now to considering a prohibition from practice for the Appellant. The factors to be considered from the case law include ensuring the public is protected from further acts of misconduct by the licensee, rehabilitation of the offender, and maintaining public confidence in the integrity of the profession, as well as ensuring the penalty imposed is not disparate with penalties imposed in similar cases (*Pavicic*, at p 12).

[110] I begin by noting that a one-year removal from practice is considered a significant censure on a professional's record (*Mann*, at para 102). It involves depriving an individual from earning their livelihood in their chosen profession for a significant period of time and constitutes a significant monetary and professional sanction. It will be a general deterrent for others from engaging in similar misconduct, as well as a specific deterrent for the Appellant who could face even more severe penalties in the future due to having this on his record. In my view, a one-year prohibition from practice in the present case takes into account the factor of being similar to other similar cases (i.e., *Smith*), as well as providing the appropriate denunciation of the serious misconduct here and maintaining public confidence in the integrity of the profession.

[111] In making this finding about the Appellant's prohibition from practice, I have also taken into account the other conditions which have been placed on the Appellant being able to practice. As noted earlier, the Appellant is required to take an ethics course and to be supervised in his practice for a further period of 2 years after any reinstatement. I find these additional conditions should be maintained for a number of reasons. First, they have not been challenged by the Appellant in the appeal here. Second, given the potential concerns referred to by the Committee about the Appellant's governability, I find that these conditions going forward and, in particular, the requirement that he be supervised for 2 years, will help to ensure the protection of the public and the maintenance of public confidence in the integrity of the profession. Third, through the educational requirement and interacting with those supervising him, these conditions will assist in promoting the Appellant's rehabilitation.

[112] Having found a one-year prohibition from practice to be appropriate for the Appellant, the next question is when that period should begin. I find it should be from the date of the Order under appeal (i.e., March 31, 2020) or the date of the Appellant's discharge from bankruptcy, whichever is later. This recognizes the Appellant has already been out of practice since the date of the Order.

ORDER

[113] Following from the above, the Appellant's appeal relating to the $7,500 fine and the hearing costs is dismissed. The Appellant's appeal relating to the length of his prohibition from practice is allowed on the bases previously set out. I uphold the terms of the Order apart from varying the first item in the Order relating to the period of prohibition as follows:

(a) the Former Licensee is prohibited from applying to the Council for any licence for a period of 12 months from the date of bankruptcy discharge or March 31, 2020, whichever is later.

[114] Without the benefit of submissions regarding the costs of this appeal, and given the divided success on this appeal, my present inclination is that no costs of the appeal should be awarded. If, however, either party wishes to make a submission regarding the costs on this appeal, they may do so within 14 days of this decision, following which I will set a time frame for the completion of costs submissions.

"James Carwana"

_____

James Carwana,
Member, Financial Services Tribunal

March 03, 2021