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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

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	)	for the applicant
- and -	)	
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INSURANCE COUNCIL OF MANITOBA, LIFE INSURANCE COUNCIL OF MANITOBA and SUPERINTENDENT OF INSURANCE OF MANITOBA,	)	for the respondents, Insurance Council of Manitoba and Life Insurance Council of Manitoba
	)	
respondents.	)	NO ONE APPEARING
	)	by or on behalf of the respondent, Superintendent of Insurance of Manitoba
	)	
	)	JUDGMENT DELIVERED:
	)	MARCH 13, 2020

GRAMMOND J.

INTRODUCTION

[1] The applicant is an insurance agent licenced by the respondent Insurance Council of Manitoba ("ICM"). On October 16, 2015, the respondent Life Insurance Council of Manitoba ("LICM") issued a decision (the "2015 Decision") disciplining the

applicant for violations of ***The Insurance Act***, C.C.S.M. c. I40 (the "***Act***"), and LICM's Code of Conduct.

[2] The 2015 Decision was posted to ICM's website and to "a publicly available national database of insurance regulators", making it accessible through public web-based search services such as Google. In an email dated March 28, 2019, the applicant asked LICM to "exonerate" him and "remove [his] name from the public record" relative to the 2015 Decision (the "Request"), which LICM denied on April 5, 2019 (the "2019 Decision"). In this proceeding, the applicant sought:

a) an order of *certiorari* quashing the 2019 Decision; and

b) an order of *mandamus* requiring LICM to remove the 2015 Decision from his record and to make its best efforts to prevent internet access to the 2015 Decision.

BACKGROUND

[3] The Request was made pursuant to section 396(4) of the ***Act***, which provides:

> **Removal of reprimands, suspensions or conditions**
> 396(4) Records of reprimands, suspensions and conditions of licences may at the discretion of the superintendent be removed from the record of an agent ... at the end of three consecutive years during which the agent ... has not received any further reprimand, suspension or condition of licence.

[4] The parties agreed that the authority of the superintendent conferred by section 396(4) has been delegated to LICM.

[5] Also relevant to this proceeding is the ***Insurance Councils Regulation***, Man. Reg. 227/91 (the "***Regulation***"), which provides:

Publishing information about administrative decisions
7.1(1) After an administrative decision is made in respect of an agent ... the insurance council that made the decision may... publish the following information about the decision:

(a) the name and address of the agent ...;

(b) a summary of the decision, including a description of the action to be taken in respect of the agent ...;

(c) a statement of the reasons for the decision;

(d) any other information about the administrative decision that the insurance council considers necessary for it to be properly understood by members of the public.

ISSUES

[6] The issues are:

1. Does section 8(1) of the ***Act*** provide LICM immunity from judicial review?
2. Did LICM improperly fetter its discretion when making the 2019 Decision?
3. Did LICM pre-judge the 2019 Decision?
4. Did LICM breach the principles of natural justice and procedural fairness relative to the 2019 Decision?
5. Was the 2019 Decision unreasonable?
6. If the 2019 Decision should be quashed, should LICM be required to remove the 2015 Decision from the applicant's record and make its best efforts to prevent internet access to the 2015 Decision?
7. Should portions of the affidavit of Barbara Palace Churchill, the Executive Director of ICM ("Ms. Churchill"), sworn August 6, 2019 (the "Affidavit"), be expunged?

ISSUE 1: DOES SECTION 8(1) OF THE *ACT* PROVIDE LICM IMMUNITY FROM JUDICIAL REVIEW?

[7] Section 8(1) of the ***Act*** provides:

> **Immunity of superintendent and others**
> 8(1) No action or proceeding may be brought against any of the following persons for anything done, or omitted to be done, in good faith, in the exercise or intended exercise of a power or duty under this Act or the regulations:
>
> (a) the superintendent or a person employed in the office of the superintendent or acting under the superintendent's instructions;
>
> (b) an insurance council established under section 396.1 or a member or employee of an insurance council.

[8] ICM and LICM argued that section 8(1) is a privative clause that bars judicial review of the 2019 Decision, given that there is neither evidence of bad faith by LICM nor an argument that section 8(1) is unconstitutional. They pointed to ***Crevier v. A.G. (Québec) et al.***, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220, where the court stated, at pages 236-7:

> ... It is now unquestioned that privative clauses may, when properly framed, effectively oust judicial review on questions of law and, indeed, on other issues not touching jurisdiction. ...

[9] Section 8(1) is not, however, a privative clause that governs the scope of judicial review of decisions of LICM or any other entity. It is an immunity clause, intended to provide protection from civil liability and damages. In ***Ernst v. Alberta Energy Regulator***, 2017 SCC 1 (CanLII), the court stated:

> [33] ... the statutory immunity clause cannot bar access to judicial review: *Crevier v. Quebec (Attorney General)*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220.

[10] Accordingly, section 8(1) does not provide LICM immunity from judicial review of the 2019 Decision, or any other decision.

ISSUE 2: DID LICM IMPROPERLY FETTER ITS DISCRETION WHEN MAKING THE 2019 DECISION?

ISSUE 3: DID LICM PRE-JUDGE THE 2019 DECISION?

[11] I have joined these two issues for the purposes of my analysis because of overlap in the relevant evidence.

Relevant legal principles – fettering discretion

[12] As stated in Guy Régimbald, *Canadian Administrative Law*, 2nd ed. (Markham: LexisNexis Canada Inc., 2015), at page 236:

> Discretion must be exercised on an individual basis. While decision makers may take into account guidelines, general policies and rules,[98] or try to decide similar cases in a like manner, a decision maker cannot fetter its discretion in such way that it mechanically or blindly makes the determination without analyzing the particulars of the case and the relevant criteria.[99] ...
>
> . . .
>
> The decision maker may not adopt inflexible policies, as the existence of discretion inherently means that there can be no rule dictating a specific result in each case, and the flexibility and judgment that are an integral part of discretion may be lost.[101] Discretion, by its nature, can lead to different results in similar or different cases, and every individual may expect an independent assessment of their situation. Failure to do so may lead to judicial review of the decision maker's decision for failure to exercise discretion, which is akin to a jurisdictional error.

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98 *Canada (Attorney General) v. Mavi*, [2011] S.C.J. No. 30, 2011 SCC 30, [2011] 2 S.C.R. 504 at para. 65 (S.C.C.); see also *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 36, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 60, 85, 98 (S.C.C.).

99 *Maple Lodge Farms Ltd. v. Canada*, [1980] F.C.J. No. 171, 114 D.L.R. (3d) 634 at 645 (F.C.A.), affd [1982] S.C.J. No. 57, [1982] 2 S.C.R. 2, 44 N.R. 354 (S.C.C.); *Testa v. British Columbia (Workers' Compensation Board)*, [1989] B.C.J. No. 665, 58 D.L.R. (4th) 676 (B.C.C.A.).

. . .

101 Sara Blake, *Administrative Law in Canada*, 5th ed. (Toronto: Butterworths, 2011) at 102, citing *Dawkins v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 505, [1992] 1 F.C. 639 (F.C.T.D.).

Relevant legal principles - pre-judgment of an outcome

[13] Reasonable apprehension of bias is a serious allegation, and the threshold of proof is high (***Smith v. Brockton (Municipality)***, 2016 ONSC 6781, paragraph 33). The applicable test, per ***Wewaykum Indian Band v. Canada***, 2003 SCC 45, paragraph 60, is whether an informed, reasonable person, viewing the matter realistically and practically, would think that the decision maker would probably not decide the matter fairly, either consciously or unconsciously.

[14] In ***Baker v. Canada (Minister of Citizenship and Immigration)***, 1999 SCC 699 (CanLII), the court considered a decision of an immigration officer and determined that the notes of a subordinate officer, who was not the decision-maker, gave rise to a reasonable apprehension of bias because the decision-maker "was simply reviewing the recommendation prepared by his subordinate". The court stated:

> 45 Procedural fairness ... requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker. ... the duty to act fairly and therefore in a manner that does not give rise to a reasonable apprehension of bias applies to all immigration officers who play a significant role in the making of decisions, whether they are subordinate reviewing officers, or those who make the final decision. The subordinate officer plays an important part in the process, and if a person with such a central role does not act impartially, the decision itself cannot be said to have been made in an impartial manner. In addition ... the notes of [the subordinate officer] constitute the reasons for the decision, and if they give rise to a reasonable apprehension of bias, this taints the decision itself.

Analysis

[15] The applicant argued that LICM fettered or failed to exercise its discretion relative to the 2019 Decision, and that it pre-judged the 2019 Decision, because:

a) Ms. Churchill denied the Request prior to the 2019 Decision; and

b) LICM considered a memorandum dated April 2, 2019 (the "Memorandum") prepared by Ms. Churchill when it made the 2019 Decision.

Initial denial of the Request

[16] The applicant contacted ICM in the fall of 2018 and asked for a review of the 2015 Decision. On November 10, 2018, Ms. Churchill advised him over the telephone (the "Telephone Call") both that a review would not be considered until seven years from the date of the 2015 Decision and that he could submit a request to be reviewed by LICM. This advice was, on its face, incongruous.

[17] The applicant persisted, and on March 4, 2019 Ms. Churchill advised him by email (the "Email") of the following additional details:

a) LICM had developed a specific process and policy (the "Policy") with regard to the searchability of disciplinary decisions through external search engines such as Google;

b) the Policy provided that:

i) decisions are published and fully searchable online for seven years;

ii) after seven years:

A) LICM would reduce the broad public searchability of decisions, but they would remain on ICM's website;

B) upon request, a licence holder may apply for a review of whether a decision should remain on ICM's website; and

C) lICM would then exercise its discretion, and if potential harm to the individual unfairly outweighed the public benefit of transparency, the decision would be removed from ICM's website but would remain on the individual's file as a disciplinary record;

c) the Policy was considered by the Manitoba Ombudsman's office and found to be as a reasonable exercise of ICM's discretion relating to publication of disciplinary decisions under the ***Regulation***;

d) the seven year period relative to the 2015 Decision had not yet expired, and under the Policy it would remain searchable until October 2022;

e) section 396(4) of the ***Act*** provides for LICM:

> ... to exercise its discretion whether or not to remove a record of reprimand, suspension or condition. The section is silent as to removal of a record of any fine. This section does not require or impose a positive duty or requirement on [ICM] to remove records of disciplinary actions after any specific length of time.
>
> [Emphasis in Email]; and

f) the applicant could submit a review request to LICM and it would have discretion to decide a request, with the Policy as a factor in its determination.

[18] Ms. Churchill is not a member of LICM. The first question to consider is whether her communications with the applicant played a significant or central role in LICM's decision-making. I cannot answer that question because there is no evidence before me of whether, in making the 2019 Decision, LICM was aware of or considered the

Telephone Call or the Email. Accordingly, I cannot conclude that either communication fettered LICM's discretion, or constituted a pre-judgment of the Request.

[19] If, however, I am wrong, I have reviewed the substance of the Telephone Call and the Email. In both communications the distinction between a request under the Policy and a request under section 396(4) appears to have been blurred. It is important to remember that the Policy pertains to the online searchability of disciplinary decisions, while section 396(4) relates to the removal of sanctions from an agent's record. These topics are related, but different.

[20] In the Email, Ms. Churchill advised the applicant that section 396(4) pertains to the removal of discipline from an agent's record, but she invited him to request that LICM "review whether or not to continue with the posted publication of your disciplinary decision", which better describes a request under the Policy. Ms. Churchill also stated that under the Policy the 2015 Decision would remain searchable until October 2022.

[21] In addition, Ms. Churchill expressly pointed to the Policy as a factor that LICM would consider in deciding the Request. Although the ***Act*** is silent as to what factors LICM should consider in exercising its discretion under section 396(4), it is unclear whether LICM recognized, as is trite law, that the provisions of the ***Act***, including section 396(4), override the contents of the Policy. In other words, LICM was bound to consider the Request on its merits and without pre-judgment, relative to the Policy or otherwise. Since neither the Telephone Call nor the Email included any reference to the relationship between the Policy and the ***Act***, the implication given was that the Policy may override the ***Act***.

[22] In addition, and although Ms. Churchill informed the applicant of his right to file a request, the overall tone and content of the Email was discouraging and suggested that his request would likely not be granted.

[23] For all of these reasons, I would have concluded that an informed, reasonable person, considering the Telephone Call and the Email realistically and practically, would conclude that LICM, as represented by Ms. Churchill, would likely not decide the Request fairly, either consciously or unconsciously, and may do so without analyzing the particulars of the case. Accordingly, both the Telephone Call and the Email would have fettered LICM's discretion and given rise to a reasonable apprehension of bias, had LICM been aware of and considered them.

Memorandum

[24] The Memorandum was reviewed by LICM when it considered the Request. It included the following content with respect to the Request:

a) LICM would assess whether to grant the Request;

b) LICM had the discretion to consider and remove records on a case by case basis, in accordance with broad public policy aims; and

c) LICM had no positive duty to remove records under the ***Act***.

[25] The Memorandum also included the following excerpts from a legal opinion given to LICM in early 2016:

a) section 396(4) "has little policy application in the modern public interest world";

b) ICM and LICM might want to recommend that section 396(4) be repealed, but until then any applications should be addressed on a case by case basis, after appropriately balancing the individual circumstances against the public interest considerations of paramount importance; and

c) section 396(4) is discretionary, which should remain absolute. A separate policy to guide consideration of requests should not be implemented, because additional criteria may either restrict or fetter the discretionary power of LICM.

[26] The Memorandum included the following excerpts from the minutes of LICM's March 9, 2016 meeting:

> ICM has received previous requests to remove published decisions but has never done so in keeping with the protocol agreement and the interests of public protection and disclosure.
>
> ... section 396(4) ... is contrary to the protocol agreement requiring publication and the clear trend towards consumer protection.

[27] The Memorandum also reflected that ICM denied two previous requests for removal of an agent's disciplinary record, and included the details of the Policy.

[28] The applicant argued that the Memorandum contained the following flaws, relied upon by LICM in its decision-making, such that it failed to consider section 396(4) adequately:

a) an emphasis that LICM did not "have to" clear the applicant's record;

b) an emphasis that there were no known cases of relief being granted under section 396(4) of the ***Act***;

c) the inclusion of excerpts from the legal opinion and meeting minutes in which section 396(4) was dismissed as inconsistent with LICM's fundamental purpose of protecting the public; and

d) a reference to a protocol agreement (not on the record in this proceeding) that requires LICM to publish its decisions, ostensibly stating that granting the Request would be inconsistent with the protocol.

[29] Having reviewed the Memorandum closely, I do not accept that any aspect of its contents was emphasized more or differently than the rest of its content, to the detriment of the applicant. The Memorandum contained little repetition and was written in an even tone, and without tools of emphasis, aside from a few underlined words. Unlike the facts in ***Baker***, the Memorandum did not contain a summary of the Request or a recommendation as to its outcome.

[30] The historical content of the Memorandum, including excerpts of the legal opinion, and reference to past decisions, was factual context of which LICM should have been advised or reminded before considering the Request. An administrative body tasked with making a decision should be aware of relevant context, particularly where that context arose years before. The institutional knowledge of any administrative body is important, especially where there has been a passage of time, and the possible turnover of individual council members. In other words, LICM members who considered the Request needed a frame of reference, which the Memorandum contained.

[31] The fact that the 2016 legal opinion raised the possibility of ICM recommending a request to repeal section 396(4) does not equate to a dismissal of that provision by legal counsel, or a recommendation that relief sought under it should not be granted. The legal opinion stated expressly that until a repeal (which has not occurred to date), requests should be considered on a case by case basis. In addition, the author of the legal opinion clearly turned his mind to the risk of unduly restricting or fettering LICM's discretionary power, which is why he recommended against a policy to guide the consideration of section 396(4) requests. The only problem with the Memorandum is the comment of Ms. Churchill that the "[l]egal opinion supports the continuing decline of [section 396(4)] requests", which is simply incorrect. To the contrary, the opinion provided clearly that each case must be considered and decided on its own facts.

[32] I have also considered the reference to the protocol agreement in the Memorandum. That document is not in evidence and its contents are unclear, though it appears to pertain to the publication of disciplinary decisions, as opposed to the removal of sanctions from an agent's record. There is no evidence of whether LICM reviewed the protocol agreement when it considered the Request, and, accordingly, I am not persuaded that the reference to the protocol in the Memorandum fettered LICM's discretion or gave rise to a reasonable apprehension of bias.

[33] Having considered the language of the Memorandum as a whole, I have concluded that in general it was balanced, and neither encouraged nor discouraged LICM to grant or deny the Request. It reflected facts and context, and made clear that LICM had discretion to decide the Request. The Request and supporting documents

were attached. An informed, reasonable person would not say that the content of the Memorandum, on the whole, viewed realistically and practically, was unfair to the applicant, such that LICM would probably not decide the Request fairly. Although Ms. Churchill misinterpreted the substance of the 2016 legal opinion in the Memorandum, that error is insufficient to taint the clear language of the legal opinion itself, and of the Memorandum generally.

[34] I have concluded, therefore, that LICM's review of the Memorandum did not constitute either a fettering of its discretion relative to the 2019 Decision or a pre-judgment of the Request giving rise to a reasonable apprehension of bias.

ISSUE 4: DID LICM BREACH THE PRINCIPLES OF NATURAL JUSTICE AND PROCEDURAL FAIRNESS RELATIVE TO THE 2019 DECISION?

[35] The applicant argued that LICM breached natural justice and procedural fairness by:

a) issuing a decision letter dated April 5, 2019 (the "Letter") prepared by Ms. Churchill who is not a member of LICM; and

b) failing to provide sufficient reasons for the 2019 Decision.

[36] In ***Baker***, the court identified the following non-exhaustive list of factors to be considered when determining what is required by the duty of procedural fairness in a given case:

a) the nature of the decision being made and the process followed in making it;

b) the nature of the statutory scheme and the terms of the statute pursuant to which the administrative body operates;

c) the importance of the decision to the individual affected;

d) the legitimate expectations of the person challenging the decision; and

e) the choices of procedure made by the agency itself.

[37] With respect to the provision of reasons, the court stated:

> 37 ... the traditional position at common law has been that the duty of fairness does not require, as a general rule, that reasons be provided for administrative decisions ...
>
> . . .
>
> 39 Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review ... Those affected may be more likely to feel they were treated fairly and appropriately if reasons are given ... I agree that these are significant benefits of written reasons.
>
> 40 Others have expressed concerns about the desirability of a written reasons requirement at common law. ... the concern that a reasons requirement may lead to an inappropriate burden being imposed on administrative decision-makers, that it may lead to increased costs and delay, and that it "might in some cases induce a lack of candour on the part of the administrative officers concerned" ... In my view, however, these concerns can be accommodated by ensuring that any reasons requirement under the duty of fairness leaves sufficient flexibility to decision-makers by accepting various types of written explanations for the decision as sufficient.
>
> . . .
>
> 43 In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. ...
>
> 44 In my view, however, the reasons requirement was fulfilled in this case, since the appellant was provided with the notes of [the subordinate officer]. The notes were given to Ms. Baker when her counsel asked for reasons. Because of this, and because there is no other record of the reasons for making the decision, the notes of the subordinate reviewing officer should be taken, by

> inference, to be the reasons for decision. Accepting documents such as these notes as sufficient reasons is part of the flexibility that is necessary ... when courts evaluate the requirements of the duty of fairness with recognition of the day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured. It upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that in the administrative context, this transparency may take place in various ways. ...

[38] With respect to the preparation of reasons, in ***Wolfrom v. Assn. of Professional Engineers and Geoscientists of the Province of Manitoba***, 2001 MBCA 152 (CanLII), the court, quoting R. W. Macaulay – *Practice and Procedure Before Administrative Tribunals*, vol. 2 (Toronto: Carswell, 1988), pages 22-10.39-10.40, stated:

> 23 ... A proper decision is the result of the decision-makers having gone through a reasoning process from which the decision emerges. Thus, once a decision has been reached, the substance of the reasons, however rough in form, must also have been developed by the decision-makers. This is the core function of the agency which cannot be assigned to someone else to perform. However, having performed this task, there is little, I suggest, to *demand* that the decision-makers also be the ones who must, as a matter of principle, be the ones who physically record the decision or reasons ... . The question, as in so many aspects of administrative law, is the degree to which this can be done in order to maximize efficiency and expedition (the public interest) without unduly compromising the rights of the individual parties.

[39] The Letter was signed by Ms. Churchill and reflected that LICM:

a) was provided with the Request and supporting documents;

b) considered the Request and all materials very carefully;

c) considered s. 396(4) of the ***Act***; and

d) "[a]fter due consideration ... determined that it is declining [the Request]".

[40] The Letter included no reference to any of the specific points raised by the applicant in the Request or supporting documents, and no explanation of why the Request was declined.

[41] LICM filed in evidence an excerpt from the minutes of the meeting at which the Request was denied (the "Minutes"), which reflect the following additional information not found in the Letter:

a) the names of the mover and seconder of the 2019 Decision;

b) that the 2019 Decision was unanimous; and

c) that LICM noted:

i) the severity of the violations for which the applicant was disciplined;

ii) the applicant's agency was aware of his disciplinary matter at the time he was hired; and

iii) the conduct for which the applicant was disciplined included fraudulent statements to the public.

[42] LICM argued that it had no duty to provide reasons for the 2019 Decision because it had absolute discretion relative to the Request, and that if reasons were required the Minutes were sufficient.

[43] In determining whether reasons were required, I will address the most relevant of the ***Baker*** factors set out above, beginning with the importance of the 2019 Decision to the applicant. A June 2019 Google search of the applicant's name reflected ICM's website as the third and fourth hits on the list, and another website's posting of the

2015 Decision as the fifth hit on the list. I have no evidence of the actual impact of the 2019 Decision upon the applicant, but I accept that a "Google hit" of a disciplinary decision could have an impact upon a professional. I also accept and take judicial notice of the reality that in modern society the public is likely to conduct online research of a professional by name.

[44] Having said that, I also note that the 2015 Decision arose from the applicant's admissions of wrongdoing, and that the nature of his actions was serious. While I do not doubt that both the applicant's record and the searchability of the 2015 Decision are important to him subjectively, from an objective perspective the importance of the 2019 Decision is at the lower end of the spectrum. For example, in ***Baker*** the court considered a deportation order that affected the residency of the applicant and her children, which was "critical to their future". The importance of the 2019 Decision to the applicant is significantly less by comparison, and this is so particularly given that it relates to the maintenance of a disciplinary record in place since 2015. In other words, the issue was whether the status quo should be maintained.

[45] I have also considered the straightforward nature of the decision made, that it was in the absolute discretion of LICM and that it involved an element of the protection of the public. It is well-established law that "[t]he fundamental purpose of sentencing for professional misconduct is to ensure that the public is protected from these kinds of acts" (see ***Kuny v. College of Registered Nurses of Manitoba***, 2018 MBCA 21, paragraph 6). This principle is echoed in the ***Regulation*** at section 7.1(1)(d), which

references public understanding as a factor relevant to the related topic of publishing a disciplinary decision.

[46] With respect to the process followed in making the 2019 Decision, the applicant argued that LICM did not appear to have considered his circumstances, including the credit hours that he earned, his work towards a new designation, his work under a mentor, and his clear record for three years prior to the Request. In the absence of evidence to the contrary, I accept that LICM did so, because the Letter reflects that LICM considered the Request and supporting documents, and the Minutes include an express reference to the applicant's agency.

[47] As set out in ***Baker***, giving reasons for a decision is beneficial in many ways. It is unfortunate that the Letter included no reasons, because it would have been fairly simple to explain the 2019 Decision in a couple of sentences, rather than leave the applicant to wonder why the Request was denied. Having said that, he could have asked LICM to provide reasons, and had he done so, he may have received the Minutes prior to the filing of the Affidavit in this proceeding.

[48] Taking all factors into account, I have concluded that LICM was not required to provide reasons for the 2019 Decision, and, accordingly, the lack of reasons in the Letter was not procedurally unfair.

[49] If, however, I am wrong, I have concluded that the Minutes reflect the reasons for the 2019 Decision. It is not difficult to infer from a review of the Minutes that the Request was denied because of the nature and severity of the applicant's record.

[50] I have also considered the fact that the Letter was issued under Ms. Churchill's signature. There is no evidence of who wrote the Letter, so it could have been written by a member of LICM. I do not fault LICM for sending the Letter under Ms. Churchill's signature, because as Executive Director of ICM she is a representative of the organization and can communicate its decisions. Similarly, there is no evidence of how or when the Minutes were prepared, and by whom. I will not assume, therefore, that they were prepared or issued improperly.

ISSUE 5: WAS THE 2019 DECISION UNREASONABLE?

[51] At the hearing of this matter, the applicant relied upon ***Dunsmuir v. New Brunswick***, 2008 SCC 9 (CanLII), where the court stated:

> [47] ... A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[52] The Supreme Court of Canada has since released a trilogy of decisions, including ***Canada (Minister of Citizenship and Immigration) v. Vavilov***, 2019 SCC 65, and ***Canada Post Corp. v. Canadian Union of Postal Workers***, 2019 SCC 67 (CanLII). The applicable standard of review in this matter continues to be reasonableness (***Canada Post***, paragraph 27). More particularly, as stated in ***Canada Post***:

> [32] A reviewing court should consider whether the decision as a whole is reasonable: "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" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and

> legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).

[53] I must note at the outset of this analysis that the Request as written could not have been granted by LICM. Section 396(4) does not permit either the "exoneration" of the applicant or the removal from his record of the fine and costs included in the 2015 Decision. Accordingly, those parts of the Request were always doomed to fail.

[54] LICM had the discretion to remove from the applicant's record the suspension and conditions of licence included in the 2015 Decision. I have already concluded that it refused to do so because of the nature and severity of the applicant's record. This outcome, on the whole, was justified within the legal and factual context of balancing public protection against the applicant's interests. In addition, by issuing the Letter and preparing the Minutes, LICM did just enough to make the 2019 Decision transparent and intelligible.

ISSUE 6: IF THE 2019 DECISION SHOULD BE QUASHED, SHOULD LICM BE REQUIRED TO REMOVE THE 2015 DECISION FROM THE APPLICANT'S RECORD AND MAKE ITS BEST EFFORTS TO PREVENT INTERNET ACCESS TO THE 2015 DECISION?

[55] Since I have upheld the 2019 Decision, the applicant's request for an order of *mandamus* is denied.

ISSUE 7: SHOULD THE AFFIDAVIT BE EXPUNGED?

[56] The applicant requested that certain paragraphs in the Affidavit be expunged, or, in the alternative, be given no weight, on the basis that they contain statements and

exhibits that are an abuse of process, and offend Court of Queen's Bench rule 39.01(5), which provides:

> 39.01(5) An affidavit for use on an application may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit.

[57] In ***Fawley et al. v. Moslenko***, 2017 MBCA 47 (paragraph 76), the court confirmed that this rule reflects the pre-conditions to admissibility of evidence on an application that is otherwise inadmissible.

[58] Technically, the impugned paragraphs of the Affidavit offend rule 39.01(5) because Ms. Churchill did not attest to her information and belief of the facts to which she swore, though she did state that she obtained certain information and exhibits from a variety of websites.

[59] In addition, as the applicant argued, pursuant to administrative law principles, only material that was considered by the original decision-maker is relevant on a judicial review (see Sara Blake, *Administrative Law in Canada*, 5th ed. (Toronto: Butterworths, 2011). I accept that this is a general rule. The applicant also argued that the impugned evidence is irrelevant, hearsay and/or opinion.

[60] The impugned evidence can be categorized into two subject areas:

a) general consumer protection (first half of paragraph 11 of the Affidavit); and

b) the publication and collection of disciplinary decisions in the insurance industry (second half of paragraph 11, paragraphs 12, 13, 14, 15 and 16 of the Affidavit).

[61] I agree with the applicant that Ms. Churchill's evidence on general consumer protection borders on opinion, but as the Executive Director of ICM, she can give evidence as to its mandate. Her evidence that it is "common today" for disciplinary findings against professionals to be published and accessed by the public is not contested and could have been addressed by judicial notice. For these reasons, the first three sentences of paragraph 11 will remain on the record.

[62] The balance of the impugned evidence, obtained from various websites, relates to the practices of other tribunals or organizations regarding the publication of disciplinary decisions in the insurance industry, including the length of time for which the public can access those decisions. The Affidavit includes as a specific example a 2009 decision from another province.

[63] This evidence, as presented, does not comply with rule 39.01(5), and is hearsay. In addition, it has no relevance to the issues before me, because it does not relate to LICM's denial of the Request. Accordingly, the last four sentences of paragraph 11, and the whole of paragraphs 12, 13, 14, 15 and 16 are inadmissible, and I have disregarded them in deciding the application.

CONCLUSION

[64] The 2019 Decision is upheld, and the request for an order of *mandamus* is denied.

[65] The following portions of the Affidavit are inadmissible: the last four sentences of paragraph 11, paragraphs 12, 13, 14, 15 and 16.

[66] If costs cannot be agreed upon as between the parties, time can be set to argue that issue before me.

J.