In the Matter of the

***FINANCIAL INSTITUTIONS ACT,* RSBC 1996, c.141**
(the "Act")

and the

INSURANCE COUNCIL OF BRITISH COLUMBIA
("Council")

and

PAUL WILLIAM MOORE
(the "Licensee")

ORDER

Pursuant to section 237 of the Act, Council convened a hearing at the request of the Licensee to dispute an intended decision of Council dated August 9, 2016.

The subject of the hearing was set out in a Notice of Hearing dated March 26, 2018.

A Hearing Committee heard the matter on May 30, 2018 and presented a Report of the Hearing Committee to Council at its November 20, 2018 meeting.

Council considered the Report of the Hearing Committee and made the following order pursuant to sections 231, 236 and 241.1 of the Act:

1. A condition is imposed on the Licensee's life and accident and sickness insurance agent licence that requires him to be supervised by a qualified supervisor, as approved by Council, until such time as the Licensee accumulates an additional 12 months of active licensing;

2. A condition is imposed on the Licensee's life and accident and sickness insurance agent licence that requires him to complete the Advocis course entitled *Making Choices: Ethics and Professional Responsibility in Practice (Parts I and II)*, and the Council Rules Course;

3. The Licensee is fined **$7,500.00**;

4. The Licensee is assessed investigative costs of **$3,875.00**;

5. The Licensee is assessed hearing costs of **$7,920.40**; and

6. A condition is imposed on the Licensee's life and accident and sickness insurance agent licence that failure to pay the fine and costs and successfully complete the

stipulated courses by April 3, 2019 will result in automatic suspension of his licence and he will not be permitted to complete his 2019 annual filing until such time as the fine and costs are paid in full and the courses are successfully completed.

This order takes effect on the 3rd day of January, 2019.

Ken Kukkonen
Chairperson, Insurance Council of British Columbia

INSURANCE COUNCIL OF BRITISH COLUMBIA
("Council")

REPORT OF THE HEARING COMMITTEE

IN THE MATTER OF THE *FINANCIAL INSTITUTIONS ACT*
(R.S.B.C. 1996, c.141)
(the "Act")

AND

PAUL WILLIAM MOORE
(the "Licensee")

Date:	May 30, 2018 9:30 a.m.	
Before:	Darren Lee Bill Bennett Calvin Joe	Chair Member Member
Location:	Suite 300, 1040 West Georgia Street Vancouver, British Columbia V6E 4H1	
Present:	David McKnight Daniel H. Coles Paul William Moore	Counsel for Council Counsel for the Licensee Licensee

BACKGROUND AND ISSUES

The Licensee is licensed with Council as a life and accident and sickness insurance agent nominee. He has been licensed with Council since October 18, 2007 and has direct contracts with [redacted], [redacted], [redacted] and [redacted]. The Licensee is the 100% owner of Priority Wealth Management Ltd. ("Priority") which has held a corporate life agent licence with Council since August 20, 2010. The Licensee is a fellow and a financial management advisor with the Canadian Securities Institute.

On July 19, 2016, Council made an intended decision pursuant to sections 231, 236 and 241.1 of the Act regarding allegations the Licensee engaged in churning activities, conducted trades without client consent, engaged in unauthorized trading and altered a client's trading authorization form in order to conduct a trade for another transaction. On August 9, 2016, Council provided the Licensee with written reasons and notice of the intended decision pursuant to section 237 of the Act. On August 29, 2016, the Licensee requested a hearing before Council to dispute Council's intended decision pursuant to section 237 of the Act.

A Hearing Committee was formed to hold a hearing on May 30, 2018 to determine whether:

1. The Licensee failed to act in a trustworthy, financially reliable and competent manner, in good faith, and in accordance with the usual practice of the business of insurance:

    a. by placing a client's funds into a monthly income Guaranteed Investment Fund ("GIF") and later facilitating withdrawals that resulted in deferred sales charges ("DSC") and an early redemption fee ("ERF"), as well as a commission for the Licensee;

    b. by engaging in or intending to engage in unauthorized trading when he inquired about moving a client's funds in a DSC account to an initial sales charge ("ISC") account without obtaining the client's consent and prior to having met the client;

    c. by forging documents relating to an insurance transaction made on behalf of a client;

    d. by engaging in churning and insurance practices that provided little or no benefit to clients and/or for no other purposes than to generate commissions; and

    e. in any other manner.

2. The Licensee is able to carry on the business of insurance in a trustworthy, financially reliable and competent manner, in good faith, and in accordance with the usual practice, as required under Council Rule 7(8) and pursuant to section 231(1)(a) of the Act.

3. The Licensee should be subject to any disciplinary or other action in the circumstances, and if so, whether Council should do one or more of the following in accordance with sections 231, 236, or 241.1 of the Act:

    a. reprimand the Licensee;

    b. suspend or cancel the Licensee's life and accident and sickness insurance license;

    c. impose conditions on the Licensee's life and accident and sickness insurance license;

    d. fine the Licensee an amount of not more than $10,000.00;

    e. require the Licensee to cease any specified activity related to the conduct of insurance business or to carry out any specified activity related to the conduct of insurance business;

    f. require the Licensee to pay the costs of Council's investigation and/or this hearing.

PRELIMINARY ISSUE - DELAY

As a preliminary issue, the Licensee submits that Council has no jurisdiction to pursue the allegations set out in the Intended Decision because he submits that Council failed to schedule a hearing within a reasonable period of time.

Section 237(4) of the Act requires Council to hold a hearing "within a reasonable time after the delivery of the written notice." The written notice of the Intended Decision was issued on August 9, 2016. The Intended Decision was scheduled to take effect on August 30, 2016 subject to the Licensee's right to request a hearing pursuant to section 237 of the Act. On August 29, 2016, the Licensee wrote to Council seeking to schedule a hearing at a time "mutually convenient." The hearing took place on May 30, 2018, approximately 21 ½ months after the Intended Decision was issued and approximately 21 months after the Licensee requested that a hearing be set.

By letter dated September 21, 2016, Mr. McKnight on behalf of Council wrote to the Licensee to canvas available hearing dates with the Licensee. The Licensee did not respond to this letter.

On March 2, 2017, Mr. McKnight spoke with the Licensee on the telephone and wrote him an email on the same date. The Licensee was uncertain whether he wanted to proceed with the hearing or withdraw his request for a hearing and accept the Intended Decision. Council granted the Licensee an extension until 5:00 p.m. on March 17, 2017 to consider how he wished to proceed and to seek legal advice.

On March 17, 2017 at 4:01 p.m., the Licensee sent an email to Mr. McKnight stating that "after consideration I intend to stay with my original request for hearing." He requested that all correspondence be copied to his legal counsel, Dan Coles. On March 20, 2017, Mr. McKnight spoke with Mr. Coles regarding scheduling hearing dates and sent an email to Mr. Coles on the same date enclosing his March 2, 2017 email to the Licensee with attachments.

Mr. McKnight did not hear from the Licensee or Mr. Coles regarding scheduling a hearing date, nor did he follow up on behalf of Council until December 13, 2017. On that date, Mr. McKnight wrote to Mr. Coles asking that he contact him to set a hearing date. On December 15, 2017, Mr. Coles wrote to Mr. McKnight to advise that he was no longer acting for the Licensee. Mr. Cole's letter stated that Mr. McKnight's December 13 letter was forwarded to the Licensee. Mr. McKnight did not receive any communication from the Licensee regarding his request for contact to set a hearing date.

On January 22, 2018, Mr. McKnight wrote to the Licensee indicating Council's wish to set the matter down for hearing in February or March, 2018 and indicated that if he did not receive a response by February 2, 2018, that Council would unilaterally set down the hearing. On February 1, 2018, Mr. Coles wrote to Mr. McKnight indicating that he was again representing the Licensee. Mr. Coles and Mr. McKnight spoke on the telephone on that same date about the hearing process, potential witnesses and available hearing dates. Mr. Coles advised that he was not available to attend a hearing until the week of May 28, 2018.

On February 6, 2018, the Licensee through Mr. Coles advised for the first time that his position was that Council has lost its jurisdiction to pursue a hearing because of delay. Council set the matter down for a hearing on May 29, 2018 and 30, 2018, the earliest mutually available dates based on the Licensee's and his counsel's availability. The hearing proceeded on just May 30, 2018.

SUBMISSIONS OF THE LICENSEE BY DANIEL H. COLES ON DELAY

Section 237 of the Act provides Council with the jurisdiction to conduct a hearing related to the matters set out in an intended decision. Sub-section 237(4) requires that such hearing "must be held within a reasonable time after delivery of the written notice under sub-section 237(2)." The Licensee submits that Council has lost jurisdiction on account of the approximately 21 months between the delivery of the intended decision on August 14, 2016 and the hearing date of May 30, 2018.

The Licensee submits that all he has to demonstrate is that the hearing was not conducted within a "reasonable time." He need not demonstrate that the delay has caused him prejudice. Nor does he need to rely on the common law doctrine of abuse of process and inordinate delay as outlined in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44. The "presumptive ceiling" for excessive delay in criminal proceedings is 18 months per *R v Jordan*, 2016 SCC 27 and the principles from that case are "apt in administrative proceedings, notwithstanding the different context": *Henson v British Columbia (Superintendent of Motor Vehicles)*, 2017 BCSC 783 at para 114. Delay of 17 months was found to be "clearly unacceptable" in *Henson*.

SUBMISSIONS OF COUNCIL BY DAVID MCKNIGHT ON DELAY

Council submits that *Blencoe* is the governing authority on the issue of delay in administrative proceedings and is binding on this Hearing Committee. Council says that on that basis there has been no inordinate or unreasonable delay in holding this hearing. If there has been delay, it was caused by the Licensee's failure to respond to Council's inquiries about his availability for the hearing. It lies poorly for the Licensee to complain that there was inexcusable delay while failing to respond to Council's requests to schedule a hearing at a mutually convenient time. In the alternative, if there has been delay, there is no prejudice to the Licensee such that Council loses its jurisdiction to proceed with this hearing.

DECISION OF THE HEARING COMMITTEE ON PRELIMINARY ISSUE – DELAY

The Hearing Committee notes that both the Licensee and Council provided and made lengthy written and oral submissions with respect to the preliminary issue of delay. Those submissions and authorities are not all summarized herein, but have been considered.

We conclude that *Blencoe* applies to a consideration of what constitutes "reasonable time" as set out in section 237 of the Act. In particular, we are guided in our decision on this point by the following passages from *Blencoe*:

> [para 101] …delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period… In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay.
>
> [para 102] There is no doubt that the principles of natural justice and the duty of fairness are part of every administrative proceeding. Where delay impairs a party's ability to answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy…

Sub-section 237(4) of the Act requires that a hearing requested as a result of the issuance of an Intended Decision must be held within a "reasonable time." There is no express time set out in the Act within which the hearing must take place. That is, there is no statutory limitation period within which the hearing must take place. It is clear, therefore, that we must consider what is a "reasonable time" within the context of the Act and Council's statutory mandate set out therein. It is also clear in our view, based on *Blencoe*, that we must consider what impact any delay to getting to the hearing date has had on the ability of the parties to present their cases and otherwise have a fair hearing.

Reasonableness cannot be considered and determined in a vacuum. Length of a delay to a hearing may be so inordinate that the elapsed time alone would result in presumed prejudice and mandate a finding that the delay has been unreasonable and a stay of the proceedings is the appropriate remedy. But that would be an extremely rare and egregious case. Aside from the most egregious of cases, what is unreasonable delay in one matter may not be unreasonable delay in another. Impact on procedural fairness and prejudice to the affected party are clearly important considerations on a case by case basis.

We did not hear the Licensee to complain that the delay in this matter caused him prejudice that amounted to a denial of natural justice in that he could no long receive a fair hearing. We note that the evidence before us was in the form of an Agreement Statement of Facts and a couple of uncontested affidavits.

Blencoe further provides:

> [para 115] …The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for other than evidentiary reasons brought about by delay. It must however be emphasized that few lengthy delays will meet this threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute.

…

> [para 121] To constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate…There is no abuse of process by delay *per se*. The respondent must demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings…
>
> [para 122] The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case…the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.

The Licensee has a heavy burden to bear where he asks for a stay of proceedings (*Blencoe*, para 117). He has not demonstrated that the delay of approximately 21 months was to the point of being so oppressive as to taint the proceeding. Further, we conclude that the Licensee contributed to the delay by failing to respond on multiple occasions to an invitation to set a mutually convenient hearing date. There is little doubt that Council should have followed up with the Licensee or his counsel more frequently than it did in trying to set a hearing date, but as Mr. McKnight notes in his submissions, a complaint of delay does not come well from the Licensee's mouth when he initially requests scheduling a hearing date at a time "mutually convenient" and then meets requests that he provide dates for a hearing with silence. Even if we acceded to the Licensee's submission that length of time alone determines whether a hearing is conducted within a reasonable time, which we do not, we would not find the delay unreasonable given his role in delaying the hearing date. We have little doubt the hearing could and would have occurred much sooner had he or his counsel simply provided available dates for a hearing upon request.

The Licensee's preliminary request that the Amended Notice of Hearing be dismissed, or stayed on the basis of inordinate delay and Council's lack of jurisdiction is denied.

EVIDENCE

Evidence reviewed by the parties and considered by the Hearing Committee consisted of:

- Exhibit 1 – Agreed Statement of Facts;
- Exhibit 2 – Council's Book of Documents;
- Exhibit 3 – Affidavits on behalf of Council regarding delay/jurisdiction; and
- Exhibit 4 – Affidavit of Paul William Moore made May 30, 2018.

The parties agreed to an Agreed Statement of Facts. The Agreed Statement of Facts and supporting documents set out in Exhibit 2 were presented and reviewed by Mr. McKnight at some length.

In 2014, Council staff received complaints against the Licensee from two separate complainants. One complaint involved allegations primarily related to churning activities. The other involved allegations primarily related to unauthorized trading by the Licensee. No disciplinary action from Council was initially brought against the Licensee with respect to these complaints. The Alberta Insurance Council, however, conducted an investigation pertaining to similar matters and came to a decision in July, 2015 to fine the Licensee $47,500.00 and revoke his certificate of authority for one year. The Licensee appealed the Alberta Council's decision, the result of which was that sanction was reduced to a fine alone in the amount of $12,350.00.

The Forgery Claim

In May, 2013, the Licensee bought a book of business from another life agent (the "Life Agent"). The Life Agent agreed to assist the Licensee by transitioning his clients to the Licensee over a two-year period. Further to this agreement, the Life Agent facilitated meetings with the Licensee and his former clients to make introductions and review the clients' portfolios, but the physical client files remained in the Life Agent's possession and he retained a substantive relationship with his former clients.

The Licensee had in his possession signed, but otherwise blank signature pages of [redacted] Change Forms and [redacted] Withdrawal Forms for WM, a former client of the Life Agent. In November, 2013, the Licensee completed an [redacted] Change Form for WM to facilitate the sale of an [redacted] Guaranteed Investment Fund ("GIF") deferred sales charge ("DSC") and the purchase of an [redacted] GIF initial sales charge ("ISC") in the same amount of $2,457.68.

The Licensee photocopied the November, 2013 [redacted] Change Form, changed the date on it, altered the bottom of the form using whiteout or erasable ink and used the altered form to facilitate a similar sale of an [redacted] GIF (DSC) and purchase of an [redacted] GIF (ISC) both in the amount of $2,876.18 in early January, 2014.

In June, 2014, $5,783.17 of WM's [redacted] GIF (ISC) was sold and a different [redacted] GIF (DSC) was purchased in the same amount.

WM stated that he did not authorize the Licensee to conduct these transactions and he did not sign any blank [redacted] forms for such transactions.

In July, 2014, [redacted] expressed concern that there was no Trading Authorization in place for WM and requested that the Licensee ensure that WM sign off on the Licensee's transactions. WM requested that the [redacted] reverse all the transactions that the Licensee had done for him, resulting in a financial loss to WM.

Intention to Engage in Unauthorized Trading

In November, 2013, the Licensee sent emails to the Life Agent indicating he would like to move funds for two of the Life Agent's former clients (PC and MC). The Licensee did not have a Trading Authority Form in place for PC and MC at the time and neither PC nor MC had instructed the

Licensee to conduct the intended transaction or indicate that they would need funds available for any reason. The intended transaction did not occur.

Churning

In April, 2014, certain clients of the Licensee invested $4,400,000.00 in a segregated fund through [redacted]. In July, 2015, the Licensee received instructions from the clients to move the funds into a low sales charge ("LSC") [redacted] Money Market GIF. On July 24, 2015, while completing the [redacted] Change Form, the Licensee wrote "115" instead of "110" as the fund number for the transaction. By doing so, the Licensee put the clients' funds into an [redacted] instead of a [redacted] fund. These series carry different net asset values and guarantees. The Licensee's error resulted in a DSC of $53,648.70, an early redemption fee (ERF) of $40,916.04 and a commission for the Licensee in the amount of $40,908.29.

On August 18, 2015, following the Alberta Insurance Council's July 22, 2015 decision, [redacted] wrote to the Licensee stating that effective August 24, 2015 all active trading authorizations on file for his clients would be revoked and invalid and all business processed for his clients must have a current signature authorization from his clients. The letter further stated that it served as a final written warning that if there was any unsuitable activity by the Licensee or his company, [redacted] would immediately terminate his contract.

On August 23, 2015, the clients instructed the Licensee to return their funds from the [redacted] Money Market (GIF) (LSC) back into the [redacted] (LSC) that they were held in prior to the July, 2015 transaction. The Licensee acted on this instruction, but [redacted] declined to process the transaction (the "August, 2015 Transaction").

On September 1, 2015, [redacted] asked the Licensee to have the clients sign a letter to state they were aware of the DSC fees and the ERF for the July, 2015 transaction. The Licensee and [redacted] sent emails back and forth on this matter. [redacted]'s correspondence noted that when the funds were moved in July there was a DSC charge and commission paid to the Licensee and going back now from the [redacted] to [redacted] would trigger the same type of DSC Charge and commission. [redacted] stated that if the clients' intention in July was to go into a [redacted] fund rather than an [redacted] Fund, [redacted] could make an adjustment upon receipt of a letter of indemnity from the Licensee that would result in the DSC and commission being reversed.

The Licensee provided a letter of indemnity to [redacted] and included in it a request that [redacted] adjust the July 2015 transaction "from 1410 to 115 to 1410 to 110." [redacted] amended the July, 2015 transaction and put the clients' funds in fund number 110. [redacted] reversed the DSC fee and took back the Licensee's commission, but it did not reverse the ERF charge.

Had the August, 2015 Transaction been processed, the clients would have incurred further fees in excess of $96,000 and the Licensee would have received a further commission of approximately $41,000.00.

By letter dated September 9, 2015, [redacted] cancelled the Licensee's contract and sponsorship with [redacted] Life. The letter stated:

> "Further to our Final Warning letter issued August 18 2015 this letter will serve as notification of termination of your contract…
>
> As a result of trades that you placed on July 27, 2015 and attempted to place on August 28, 2015 we do not believe you are acting in the best interest of your client(s) or [redacted]. This is a continuation of your churning and market timing activities that were previously discussed with you and reported to the Insurance Council of British Columbia and the Alberta Insurance Council."

The Licensee and Priority obtained authority to represent [redacted] again in March, 2016.

The Licensee provided an affidavit sworn May 30, 2018. It has three exhibits attached. The first exhibit is a letter from [redacted] to the Licensee dated May 25, 2018 indicating that from approximately April 25, 2016 to September 15, 2017 the Licensee was under the supervision of the Business Development Manager-Western Region, [redacted]. The letter states that "we were satisfied with the results of the review and have no further concerns related to the alleged activity for the matter which is currently before the insurance council." The second exhibit is a Notice of Course Completion Certificate from the Canadian Securities Institute certifying that the Licensee successfully completed Culture of Compliance: Working in Financial Services on November 16, 2016. The final exhibit is a further Notice of Course Completion from the Canadian Securities Institute certifying the Licensee's successful completion of Ethical Practice in the Financial Service Industry on January 17, 2017.

SUBMISSIONS OF COUNCIL BY DAVID MCKNIGHT

Mr. McKnight reviewed the legislation and guidelines relevant to this proceeding and Council's mandate to protect the public in overseeing the business of insurance. Where Council determines that there has been a breach of conduct by a licensee, it must determine the appropriate sanction keeping in mind that the fundamental purpose of sanctioning misconduct is to ensure the public is protected from further acts of misconduct by the licensee and to deter other licensees from committing similar acts.

Mr. McKnight for Council submitted that the Licensee's conduct considered in this matter is not trifling and not isolated in nature and raises issues of trustworthiness, competence and good faith.

The Licensee admitted he created a "forged" document and altered a trade authorization form by using a photocopy of a client's signature. He also admitted he had previously completed forms in pencil or erasable ink so that he could re-use the client's signature and that he had kept blank, pre-signed forms to conduct trades.

Council submits that it is immaterial whether the Licensee had the consent of clients to forge documents to facilitate transactions. Under no circumstances is cutting and pasting of documents,

altering documents using white-out or erasable ink or keeping blank, pre-signed forms to conduct trades, conduct which falls within the usual practice of the business of insurance. Such conduct is a direct contravention of the Code of Conduct principles of trustworthiness, good faith, competence, and proper dealing with clients.

With respect to the intention to engage in unauthorized trading, the Life Agent was asked by the Licensee if he could move 10% of certain clients' funds in a DSC to an ISC account. The Licensee had not met with the clients and did not have their instructions or authorization to engage in the proposed transaction. The Licensee explained that he asked the Life Agent if he could make that transaction out of an abundance of caution and that no trade in fact occurred.

Council submits that this conduct raises serious concerns about his insurance business practices and his ability to carry it on in a competent and good faith manner and in accordance with the usual practice.

Council submits that the Licensee's moving of a DSC account into a ISC account and then back into a DSC account is churning. Council submits that there was no benefit to the clients for such trading activity, but there was a financial benefit to the Licensee by generating a commission for himself.

With regard to an appropriate penalty, Mr. McKnight provided and made submissions with respect to four prior Council decisions:

1. Khamsouei Phovixayboloum (February, 2018);

2. Patie Kaur Johl (May, 2015);

3. Roel Reyes Bernandino (May, 2015); and

4. Clayton Daniel Snow (September, 2015).

Council is not bound by precedent to follow the outcomes and penalties from prior decisions on similar matters, but similar conduct should result in similar outcomes within a reasonable range and penalties imposed should not be disparate with those imposed in similar cases.

Council submits that the Licensee should be: subject to a period of direct supervision by a qualified life agent for 24 months of active licensing; required to successfully complete E&O and ethics courses within a time period to be imposed by Council; fined in an amount of up to $10,000; required to pay Council's investigation costs in the amount of $3,875.00; and required to pay Council's costs associated with the Hearing in an amount to be determined.

SUBMISSIONS OF THE LICENSEE BY DANIEL H. COLES

The Licensee accepts the facts set out in the Agreed Statement of Facts and takes no position on whether or not those facts constitute misconduct. If Council determines that it has jurisdiction to

proceed with the hearing, that the facts agreed to support the contraventions outlined in the Amended Notice of Hearing and that further sanction or disciplinary action is warranted, the Licensee submits that the sanctions should be at the lowest end available on account of the following facts:

1. the Licensee has already been sanctioned by the Alberta Insurance Council for the same conduct that is subject of this hearing;

2. the short dispute with [redacted] wherein [redacted] terminated the Licensee's contract was promptly resolved by [redacted] reinstating the contract and it remains in place to date;

3. the Licensee had the benefit of informal supervision through [redacted] from April, 2016 into September, 2017;

4. in November, 2016 and January, 2017 respectively, the Licensee successfully completed the Canadian Securities Institute's Culture of Compliance: Working in Financial Services and Ethical Practice in the Financial Services Industry courses; and

5. there have been no further complaints made against the Licensee since September, 2015.

Council's treatment to date of the Licensee has not been fair, intelligible or in the public interest. Council first investigated the Licensee between September, 2014 and July, 2015 regarding allegations of churning, forgery and unauthorized trading. The Review Committee of Council determined in July, 2015 not to pursue the investigation further and informed the Licensee the investigation was concluded.

In October, 2015, Council opened a second investigation of the Licensee involving the same allegations investigated in the concluded first investigation and a report from [redacted] reporting "further unsuitable activity" from the Licensee in the form of churning in July and August, 2015. [redacted] advised Council it had terminated the Licensee's contract. This second investigation was the product of the [redacted] report and a letter from the Life Agent dated September 25, 2015 setting out WM's request that Council review his complaint. The Life Agent's letter did not contain any new evidence or allegations. The [redacted] report raised concerns about trading strategies employed on behalf of a client who resides in Alberta.

The Licensee submits that the December, 2015 Insurance Councils Appeal Board of Alberta's order made on appeal from the Alberta Insurance Council's July, 2015 decision sanctioned him for conduct that was in substance the subject of the second investigation by Council. Further, in March, 2017 [redacted] "re-issued" its contract to the Licensee to sell life insurance policies in British Columbia. Despite the substance of the second investigation being resolved with [redacted] and otherwise sanctioned by the Alberta Council, the second investigation proceeded and Council issued its intended decision on August 9, 2016.

The Licensee submits that the doctrine of res judicata applies to the subject matter of the second investigation that resulted in Council's intended decision on August 9, 2015 and the hearing herein. Res judicata may be applied to preclude unsuccessful parties from re-litigating that which has already been unsuccessfully litigated before an administrative tribunal.

The constituent elements of the issue estoppel form of re judicata are that:

1. the same question has been previously decided;

2. the judicial decision which is said to create the estoppel was final; and

3. the parties to the judicial decision or their privies were the same parties to the proceedings in which the estoppel is raised or their privies.

The Licensee submits that the subject matter of the within hearing has been previously decided by the Review Committee in July, 2015 following the first investigation by Council and/or by the Insurance Councils Appeals Board of Alberta, that the parties to these determinations are in substance the same and/or the regulatory parties were privies of the other.

The Licensee submits that Council, having completed its first investigation without finding substantial wrongdoing by him, cannot restart the process and that the Alberta December, 2015 decision was a final decision. In the alternative, the Licensee submits that if the doctrine of res judicata does not apply, Council ought to nevertheless consider the underlying purpose of the doctrine when determining what penalty should by applied.

With respect to the authorities submitted by Council, the Licensee submits that they are factually different on intention; that the licensees' conduct considered in those cases was intentionally misleading, often for the express benefit of the licensee. In this matter, although there is an Agreed Statement of Facts with respect to the subject conduct being considered, there is no agreement on the Licensee's intention in engaging in that conduct and it is open to the Hearing Committee to decide.

The subject transactions were generally unwound and the Licensee did not end up making commissions. The July and attempted August, 2015 Transaction were understood by the Licensee to be what the clients wanted and the Licensee simply recorded the code incorrectly. The Licensee was generally trying to proceed in the best interest of his clients. He has apologized. He has been working with a managing general agent. He made some mistakes three to four years ago, but he has taken steps to ensure that those mistakes will not occur again.

Mr. Coles on behalf of the Licensee submits that should Council conclude that disciplinary action is warranted, an appropriate penalty would be:

1. a reprimand;

2. a fine of $2,500.00;

3. an order that the Licensee pay Council's investigative costs in the amount of $3,875.00; and

4. that any publication of Council's decision on its website should be published as if it were made in August, 2016, or reflect that it relates to old conduct.

The Licensee further submits that conditions that he complete course work on ethics and compliance or work under formal supervision would not be appropriate given that he has already voluntarily undertaken both.

REPLY SUBMISSIONS OF COUNCIL BY DAVID MCKNIGHT

Council submits that the doctrine of res judicata does not apply for a number of reasons. There was no Council decision that flowed from the first investigation. The investigator determined that there was not enough evidence to refer the matter for hearing at that time, but there was no bar to re-opening the investigation. Council was compelled to re-investigate because it received a complaint from the public requesting that it do so. New evidence and facts were discovered in respect of the forgery claim in the course of the second investigation. The [redacted] complaint arose after the first investigation was concluded and the July, 2015 Alberta Insurance Council decision was rendered. The Alberta Council and Council are not the same parties nor each other's privy. Council is certainly entitled to consider what conduct the Alberta Council considered and what decision it came to when considering what penalty it may apply, but it is not bound to do so.

With respect to what has transpired as between the Licensee and private parties, such as [redacted] in respect to the complaints being considered by Council, that has no bearing on Council's mandate to protect the public in dealing with insurance licensees. With respect to the education and supervision that the Licensee voluntarily undertook, the Licensee did not seek Council's input or approval. Appropriate supervision and courses are for Council to determine.

LEGISLATION AND GUIDELINES

Pursuant to the Act, Council is responsible for maintaining standards of professional conduct within the insurance industry to provide protection to the public relating to the sale of insurance products and services. Council's Code of Conduct for insurance agents, salespersons and adjusters requires them to:

1. be trustworthy, conducting all professional activities with integrity, reliability and honesty;

2. carry on the business of insurance in good faith; and

3. conduct all insurance activities in a competent manner.

Council's Policies and Guidelines, January 2014, Section 4 Suitability Policies are intended to assist Council in assessing the suitability of an applicant or licensee where Council learns of a

possible suitability concern. Council considers the nature of a matter to determine if it is relevant to the individual's trustworthiness, competence, good faith and to determine the individual's overall fitness to be a licensee.

When considering the suitability of a person for ongoing licensing, Council can take aggravating factors into account, such as:

- if there is possible risk of harm to the public in the licensee's conduct of the business of insurance;
- if the licensee has been subject to more than one relevant matter; and
- if it is likely that the relevant matter or something of a similar nature may be repeated.

Council may also take mitigating factors into account such as:

- if the relevant matter is isolated in nature;
- if there are no outstanding or unfulfilled obligations related to the matter;
- if there is little to no risk of harm to the public;
- if the person has made rehabilitative efforts to improve his suitability through education, employment or other means.

Pursuant to section 231 of the Act:

> Council may suspend, cancel or restrict licences and impose fines
>
> (1) If, after due investigation, the council determines that the licensee or former licensee or any officer, director, employee, controlling shareholder, partner or nominee of the licensee or former licensee
>
> (a) no longer meets a licensing requirement established by a rule made by the council or did not meet that requirement at the time the licence was issued, or at a later time,
>
> …
>
> then the council by order may do one or more of the following:
>
> (f) reprimand the licensee or former licensee;
>
> (g) suspend or cancel the licence of the licensee;

(h) attach conditions to the licence of the licensee or amend any conditions attached to the licence;

(i) in appropriate circumstances, amend the licence of the licensee by deleting the name of a nominee;

(j) require the licensee or former licensee to cease any specified activity related to the conduct of insurance business or to carry out any specified activity related to the conduct of insurance business;

(k) in respect of conduct described in paragraph (a), (b), (c), (d), (e) or (e.1), fine the licensee or former licensee an amount

(i) not more than $20,000.00 in the case of a corporation, or

(ii) not more than $10,000.00 in the case of an individual.

FINDINGS OF THE HEARING COMMITTEE

Most of the relevant facts are not in dispute in this matter and are set out at length in Exhibit 1, Agreed Statement of Facts supported by the documents contained in Exhibit 2, Council's Book of Documents. Further evidence reviewed and considered by this Hearing Committee were the Affidavit of James Robert Craig, an investigator with Council, sworn May 24, 2018 (part of Exhibit 3) and the Licensee's affidavit sworn May 30, 2018 (Exhibit 4). Mr. Craig's affidavit canvassed his work in investigating the Licensee's conduct in both the first and second investigations. The Licensee's affidavit dealt with the voluntary supervision and courses he undertook.

The submissions made on behalf of the Licensee were not to take issue with the fact of his conduct as set out in Exhibits 1 and 2, but to submit that:

1. his conduct has already been the subject of investigation by Council and sanction by the Alberta Insurance Council and the doctrine of res judicata prevents further review decisions by Council, or alternatively, earlier sanctions should be taken into account in determining penalty;

2. the Licensee did not act with improper motive or intention;

3. commissions he earned on impugned transactions were unwound; and

4. the impugned conduct is from several years ago, the Licensee has taken pro-active steps to ensure such conduct is not repeated and the conduct has not been repeated.

Dealing firstly with the argument relating to res judicata, we find that the doctrine does not apply to prevent Council's further (second) investigation and the decisions that flow therefrom for a number of reasons. We agree with Council's submission that closing an investigation without referring the matter to Council for a decision does not constitute a final decision. An investigation

is just that. It is not akin to a judicial decision involving a formal hearing with an evidentiary record and appointed decision makers. An analogy can be drawn to a criminal investigation. Closing such an investigation without charges on the basis of insufficient evidence does not prevent re-opening the investigation nor charges should other evidence come to light. Here, the first investigation did not consider the [redacted] complaint, which arose after the first investigation was closed. As well, further evidence came to light during the second investigation in respect of the subject matter of the first investigation relating to the use of forms to conduct transactions for WM. The Alberta Insurance Council is not the same party nor decision-maker as Council. We also note that, while the Alberta Council was considering similar conduct, it was dealing with different complaints than those before Council and its July, 2015 decision and the Appeal decision therefrom in December, 2015 did not and could not have dealt with the [redacted] complaint made to Council in September, 2015. We do not know whether Alberta Council knew about the September, 2015 complaint, but one can rightly question whether the Insurance Councils Appeal Board of Alberta would have agreed to a reduction of the Licensee's penalty on appeal had it known about that complaint.

We agree with both the Licensee's and Council's submissions, however, that we can consider the fact of the Alberta Council decision and penalty when considering what penalty is appropriate in the matter before us and we have done so.

The Hearing Committee also was invited to and does take into account that the conduct complained of dates back to the 2013-2015 time period and that the Licensee has not been the subject of any further complaint since the [redacted] complaint of September, 2015. On the other hand, the complaints received by Council and the complaints received and adjudicated upon by Alberta Council reveals that the Licensee's conduct was not isolated in nature.

We find that the Licensee, as admitted, used a previously used [redacted] Change Form (November, 2013) to complete a later transaction (January, 2014) by changing the date on the form and altering the bottom of the form using whiteout or erasable ink. We also find that the Licensee was engaging in churning by putting through sales from a DSC account to an ISC account and then back into a DSC account. The Licensee stated that he had in his possession signed, but otherwise blank, signature pages of [redacted] Change Forms and [redacted] GIF Withdrawal Forms for WM. WM stated that he did not sign any blank [redacted] Change Forms or [redacted] GIF Withdrawal Forms for either the Licensee or the Life Agent. WM stated that he did not authorize the Licensee to conduct the transactions nor did the Licensee seek or obtain permission to do the transactions. WM requested that [redacted] reverse all the transactions the Licensee had done for him, resulting in a financial loss to WM.

At best, the Licensee's conduct in respect of these transactions for WM was incompetent and did not meet the standards expected of a licensee. His use of blank forms with only the client's signature (disputed by the client) or his alteration of previously used forms to conduct further transactions is a completely unacceptable practice regardless of motive or intent. Such practice may be perceived to be for convenience of a client or may simply be for the self-interest of a licensee to earn commissions, but it is clear WM did not authorize the transactions and they were reversed. While there is certainly reason to question the Licensee's motive in engaging in this practice and his intention to engage in an unauthorized trade for clients PC and MC, we are not

prepared to find his intention was confined to benefitting himself through commissions on the basis of the agreed facts before us. That said, we wish to emphasize to the Licensee and to licensees generally that such practices are totally unacceptable and do not meet the standard of conduct required in the business of insurance.

We also find that the conduct from which the September, 2015 [redacted] complaint arose reflects at best incompetence on the part of the Licensee. The Licensee was paid a significant commission of approximately $41,000.00 for the July, 2015 transaction on account of, according to the Licensee, his error in recording the fund number for the transaction. The error also caused the clients to incur a DSC and ERF in the approximate total of $95,000.00. Notwithstanding that the Licensee reviewed his individual [redacted] commission statements on several occasions throughout August, 2015, he stated he did not notice the commission that was paid to him for the July, 2015 transaction. Had [redacted] not raised concern with this transaction and the proposed August, 2015 Transaction, the clients would have incurred further fees in the approximate amount of $96,000.00 and the Licensee would have been paid a further commission of approximately $41,000.00.

We again are not prepared to find, on the basis of the evidence before us, that the Licensee's motive in conducting the July, 2015 and his actions in respect of the proposed August, 2015 Transaction was his own financial benefit. Nonetheless, his actions and conduct were at best incompetent, not to the standards required and even after correction resulted in loss to the clients of the ERF for the July, 2015 transaction in the amount of approximately $41,000.00.

We have taken into account a number of factors in considering the Licensee's suitability for ongoing licensing and appropriate penalty. We note that the Licensee has been the subject of multiple complaints for conduct stretching over three years. His impugned conduct certainly raised risk of harm to his clients in terms of fees, potential tax consequences and unauthorized trades. We also note, however, that the conduct complained of is now several years past, that there have been no further complaints since September, 2015, that we are not aware of any outstanding or unfulfilled obligations relating to the complaints, and that we do not believe that there is significant risk of the Licensee misconducting himself further or harm to the public going forward.

We also take notice of the sanctions imposed by the Alberta Insurance Council in considering our recommendations for penalty. We do not take into account the supervision the Licensee has worked under nor the Canadian Securities Institute courses he has completed, on the basis that neither such supervision nor courses were sanctioned or approved by Council.

RECOMMENDATIONS OF THE HEARING COMMITTEE

The Hearing Committee recommends the following disciplinary action:

1. impose a condition on the Licensee's license which requires that he be supervised by a life agent supervisor, as approved by Council, until such time as the Licensee accumulates an additional 12 months of active licensing;

2. impose a condition on the Licensee's licence that he complete an ethics course and Council Rules course within 12 months of Council's order;

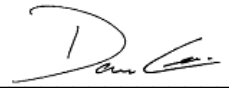
3. the Licensee be fined $7,500.00;

4. the Licensee be required to pay Council's investigation costs in the amount of $3,875.00;

5. the Licensee be required to pay Council costs associated with this hearing in an amount to be determined; and

6. the fine and costs are to be paid within 90 days of Council's order.

Dated at Vancouver, British Columbia on November 6, 2018



Darren Lee, Chair of Hearing Committee
Insurance Council of British Columbia