DECISION

of the

LIFE INSURANCE COUNCIL OF MANITOBA

(“Council”)

Respecting

WILLIAM MacKAY

(“Former Licensee”)

INTRODUCTION

The Life Insurance Council of Manitoba ("Council") derives its authority from *The Insurance Act C.C.S.M.* c. I40 *("Act")* and the *Insurance Councils Regulation 227/91.*

In response to a complaint received by Council on January 8, 2016, an investigation was conducted pursuant to sections 113(3), 375(1) and 396.1(7)(e) of the *Act*, and section 7(2)(e) of *Regulation 227/91*. Council undertook an investigation of the Former Licensee [note that he only ceased to be licensed as of March 22, 2017] to determine whether he had violated the *Act,* its *Regulations*, and/or the Life Insurance and Accident and Sickness Agent’s Code of Conduct (*“Code”*). During the investigation the Former Licensee was given an opportunity to make a submissions with respect to Council’s concerns.

On December 14, 2016, during a meeting of Council, the evidence compiled during the investigation was presented. Upon review Council determined its then Intended Decision. Pursuant to sections 375(1) and 375(1.1)(a)(c)&(d) of the *Act* and *Regulation 227/91*, Council determined based on its investigation and information received from the Former Licensee that the issues were as follows:

1. Was the life insurance policy sold by the Former Licensee suitable to the Complainant’s interests and needs?

2. Was the Former Licensee incompetent in completing an application for life insurance, in violation of the *Act*, its *Regulations*, and/or the *Code*?

The facts relied upon in its original Intended Decision were as follows:

1. On October 20, 2012, the Former Licensee acted on behalf of the Complainant to complete a universal life insurance application ("the Application") for a Maximizer Select policy ("the Policy") with a planned monthly premium of $11,000.00.

2. The Former Licensee completed the Application to specify that the owner was to be the Complainant's corporation ("the Corporation").

3. On December 7, 2012, the Policy was issued, effective December 11, 2012, with the Corporation as the owner.

4. Dated February 19, 2014, the Former Licensee invoiced the Complainant $11,760.00 to actuarially value the Policy at $561,969.00.

5. On January 8, 2016, Council received the Complainant's complaint alleging:

    a. The Policy was not suitable to his interests and/or needs.

    b. He purchased the Policy with the understanding that it was personally owned and with the intent to ultimately transfer ownership of the Policy to the Corporation.

    c. The Former Licensee erred in initially applying for the Corporation to be the policy owner and therefore there can be no transfer in ownership as the Policy was always owned by the Corporation.

    d. He was invoiced for an actuarial valuation which had no purpose because the Policy was always owned by the Corporation.

6. By email dated December 23, 2015, the Former Licensee advised the Complainant:

    > The Policy was opened directly in your Corporate name... that was not what was intended...

7. By letter dated February 16, 2016, the Former Licensee advised Council:

    > The Policy was intended to provide [the Complainant] with certain tax advantages and to allow him to borrow against the Policy to address

> his living expenses. These benefits are available and best achieved by opening the policy personally and immediately transferring the policy to the ownership of the clients personally owned corporation.
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> The Policy was always intended to be issued initially to [the Complainant] and then subsequently transferred to [the Corporation]; however, in completing the Application for Life Insurance... I identified the owner of the policy to be [the Corporation] rather than [the Complainant] personally. This was a mistake based on my understanding of the application and transfer process of [the Insurer] at the time. Specifically, I misunderstood the application process pursuant to which an insured may transfer a policy on issuance to a non-arm's length corporation.
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> The only purpose for a policy of this nature to be in the name of a corporation is for the individual insured to receive certain tax advantages which only arise if the policy originates in the name of the individual and is subsequently transferred to a corporation.
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> I am sincerely sorry for the error that I made in completing the Policy application and I acknowledge that I am solely responsible for this error...
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> I acknowledge that I made a mistake in completing the initial application for the Policy and that unless this mistake is fixed, there may be tax consequences to [the Complainant].

8. By letter dated September 6, 2016, the Former Licensee reinforced that his February 16, 2016 letter was accurate in that the Policy was always intended to be issued to the Complainant personally and subsequently transferred to the Corporation to receive certain tax advantages only available if a policy for life insurance is initially placed in the name of an insured individual and then subsequently transferred to the insured's corporation.

9. By letter dated August 31, 2016, the Insurer advised the Former Licensee that they would no longer accept applications from him on "concept" leverage sales and that he will be required to provide all details of any new sale or policy change for review.

In its original Intended Decision dated February 7, 2017, Council reasoned as follows. Based on the Former Licensee's representations to Council, the Former Licensee had intended in 2012 that the Complainant would purchase the Policy in his name personally. The Former Licensee believed he had done so. The Former Licensee intended that at a later date the ownership of the Policy would be transferred from the individual Complainant to the Corporation. The Former Licensee asserted that he acted on that basis to obtain an actuarial valuation of the Policy and the Policy was valued at $561,969.00. The Former Licensee issued an invoice for the sum of $11,760.00 to the Complainant in connection with the actuarial opinion and other costs in obtaining the actuarial opinion. Based on the communications received by Council from the Former Licensee, the Complainant believed that his Policy should have been in his name personally at the time it was issued and that if that had been done he would have been able to receive from the Corporation more than $500,000.00 tax free. When the Former Licensee learned that the Policy had been issued initially in the name of the Corporation, he asserted that the insurer had erred in doing so. The Former Licensee insisted to Council throughout the investigation that the issuance of the Policy to the Corporation was done in error and contrary to the intentions of the parties. The insurer refused to alter the name of the owner of the Policy. The Former Licensee offered to pay the Complainant's legal costs for a court application for a court order rectifying the Policy to have it placed in the name of the Complainant personally. He offered to reimburse the Complainant for the cost of the actuarial report. All of this is consistent with the Former Licensee's then narrative that he was aware in 2012 of the strategy permitted by section 148(7) of the *Income Tax Act* ("ITA") and that he had intended to follow that strategy in connection with the Complainant's Policy.

Accordingly, in its original Intended Decision, Council determined, subject to the Former Licensee showing cause why the determination should not be made final, that:

1. The Former Licensee had acted incompetently in having the Policy taken out in the name of the Corporation and in doing so he breached section 375(1)(e) of the *Act*.
2. The product had not been suited to the Complainant's interests and needs in violation of sections (1) and (2) of the *Code* and the Former Licensee failed to act with due diligence and skill in violation of section (4) of the *Code*.
3. Accordingly, and pursuant to sections 375(1.1)(a), (c) and (d) of the *Act* and sections 7(1), 7(2)(c) and 7(3) of *Regulation 227/91*, the Former Licensee would be fined $15,000.00, assessed investigation costs of $3,000.00, and his Life and Accident and Sickness licences would be suspended for a period of four months.

The originally Intended Decision was dated February 7, 2017. It was promptly delivered to the Former Licensee and his legal counsel. On February 16, 2017, Council received

notice from the Former Licensee's legal counsel indicating that the Former Licensee desired a hearing by Council to show cause why he disputed the Intended Decision. On February 16, 2017, the dates of March 29, 2017, April 26, 2017, and May 30, 2017 for the hearing were offered to the Former Licensee and his legal counsel. The Former Licensee's legal counsel indicated counsel was not available on those dates and requested a date in June 2017. The hearing occurred on June 28, 2017.

SHOW-CAUSE HEARING

At the hearing on June 28, 2017, the Former Licensee testified under oath. A witness ("the Witness") who was also involved in dealings with the Complainant at the time that the Policy was originally sold, also testified under oath. Representations were made, orally and in writing, by the Former Licensee's legal counsel. The most salient evidence and submissions by the Witness, the Former Licensee, and/or the Former Licensee's legal counsel for present purposes were as follows:

1. In 2012, at the time the Policy was created:

    (a) The Former Licensee was unaware of the existence, meaning and potential benefits of section 148(7) of the ITA, which is to say that it never occurred to the Former Licensee at that time that the Policy should be in the name of the Complainant and later transferred to the Corporation with a view to obtaining a significant tax benefit.

    (b) Accordingly, the Complainant never received any advice and could not have expected reasonably to receive any benefit associated with section 148(7) of the ITA.

    (c) The Former Licensee acted competently in connection with the advice given and services rendered to the Complainant.

    (d) What the Complainant received was suitable for his interests and needs at that time.

2. In 2014 (or later 2013):

    (a) The Former Licensee learned of the existence and potential benefit of section 148(7) of the ITA.

    (b) The Former Licensee did not inquire about or confirm who owned the Policy.

    (c) He discussed with the Complainant the potential benefits of transferring the Policy from the Complainant to the Corporation.

(d) He then discovered that the Policy had been taken out in the name of the Corporation and explored the possibility of the insurer changing the name of the owner of the Policy.

(e) Before confirming Policy ownership, he had engaged an actuary to value the Policy for the purposes of 148(7) of the ITA and incurred the associated expense.

CURRENT ISSUES

1. Was it incompetent and a breach of section 375(1)(e) of the *Act* and paragraphs 4 and 7 of the *Code* for the Former Licensee to fail to ascertain in 2014 who actually owned the policy?

2. Was it incompetent for the Former Licensee to advise the Complainant about the availability of the strategy made possible by section 148(7) of the ITA, and to incur the actuarial expense referred to above in breach of section 375(1)(a) and (e) of the *Act* and sections 4 and 7 of the *Code*?

3. Was the Former Licensee incompetent and unprofessional in breach of section 375(1)(a) and (e) of the *Act* and paragraphs 4 and 9 of the *Code* in advising Council as he did in the course of the investigation of the complaint that:

   (a) He had originally intended in 2012 for the policy to be in the name of the Complainant personally; and

   (b) That the insurer had erred in placing the policy in the name of the Corporation?

DISCUSSION

The original complaint appears to have been prompted by communications from the Former Licensee to the Complainant. The Former Licensee told the Complainant that based on section 148(7) of the ITA the Policy could be transferred from the Complainant to the Corporation with an associated significant tax benefit. The strategy was not possible because the Policy was already owned by the Corporation. The necessary transfer thus could not occur. The actuarial opinion obtained was without any value or purpose. The Former Licensee led the Complainant to believe that he would receive a significant tax benefit when in fact it was impossible that it be received. Thus the complaint.

In the course of the investigation the Former Licensee advised Council that:

(a) He had intended the Policy to be in the name of the Complainant personally; and

(b) The insurer had erred in placing the Policy in the name of the Corporation.

The originally Intended Decision was based in large part on what the Former Licensee told and represented to Council in the course of its investigation of the complaint.

At the outset of the show-cause hearing, it was explained to the Former Licensee and his legal counsel that the purpose of the hearing was to permit the Former Licensee to explain why the then Intended Decision should not be made final.

At the show-cause hearing, the Former Licensee's version of events changed entirely. Whereas he had told Council during the investigation of the complaint that he had originally intended that the Policy be in the name of the Complainant personally, he testified under oath at the hearing of June 28, 2017, that he had actually never thought of, much less intended, that the Policy be personally owned at the time the Policy was originally purchased. Whereas he had represented in the course of the original investigation that the insurer had erred in placing the Policy in the name of the Corporation, he testified under oath at the hearing on June 28, 2017, that it had always been his intention to have the Policy in the name of the Corporation. He could not have intended to transfer ownership of the Policy from the individual Complainant to the Corporation, he said, because he was entirely unaware of any possible associated benefit of doing this. The Former Licensee stated at the show cause hearing that he was entirely unaware of section 148(7) of the ITA until in or about 2014.

At the show-cause hearing, the Former Licensee's legal counsel objected to any questions of the Former Licensee about what occurred in 2014. He contended that the then Intended Decision dealt with what occurred in 2012. What occurred in 2014 could not be relevant to what was done in 2012. Council's counsel acceded to those objections and the proceedings were adjourned accordingly.

Council in the Revised Intended Decision accepted what the Former Licensee and the Witness and the Former Licensee's legal counsel all stated at the show-cause hearing of June 28, 2017, namely: the Policy was properly in the name of the Corporation as always intended and thus that fact does not support any finding of incompetence or unprofessional conduct in 2012.

But it follows that the Former Licensee in 2014 (or later 2013), when he learned of the potential tax benefit of the transfer of ownership of an insurance policy from an individual

to a corporation, that he did not recall and he did not ascertain who owned the Policy before:

(a) Advising the Complainant of a significant possible tax benefit associated with 148(7) of the ITA; and

(b) Incurring expenses for a strategy which could not in fact ever be realized.

It also follows that the Former Licensee misrepresented to Council in the course of the investigation of the original complaint: when he knew about section 148(7) of the ITA; what he intended at the time the Policy was sold to the Complainant and placed in the name of the Corporation; and what was the strategy contemplated and discussed at the time the Policy was created.

Legal counsel for the Former Licensee stated at the show cause hearing that:

1. ". . . the errors [of the Former Licensee] made in 2014 aren't subject to your Intended Decision, nor are they cited as evidence in your Intended Decision as a basis upon which your penalty is occasioned."

2. There is no doubt mistakes were made [by the Former Licensee] in 2014. "Did he make a hash of it in 2014? No doubt."

3. "if your Intended Decision said, We believe the information that you provided to the Council was in error, that's a separate heading and a separate charge under a regulatory offence".

4. The Former Licensee gave information to Council in the course of its investigation which was not factually accurate.

Policy ownership is a fundamental issue of insurance. The Former Licensee's failure to ascertain in whose name the Policy was when he learned of the strategy made possible by section 148(7) of the ITA was an instance of incompetence in breach of section 375(1)(e) of the *Act*, and sections 4 and 7 of the *Code*. The Former Licensee's erroneous advice to the Complainant about the availability of a strategy under section 148(7) of the ITA was an instance of incompetence in breach of sections 375(1)(a) and (e) of the *Act*, and sections 4 and 7 of the *Code*. The Former Licensee's statements to Council in the course of its investigation of the original complaint, which misstated the original strategy and intention in connection with the sale of the Policy to the Complainant's corporation, represent manifest breaches of sections 375(1)(a) and (e) of the *Act*, and sections 4 and 9 of the *Code.*

PENALTY AND FINAL DECISION

Council's Decision dated October 25, 2017 was delivered to the Former Licensee by registered mail on October 26, 2017. The Decision outlined the foregoing background, analysis, and conclusions. In consideration of the foregoing violations, Council imposed the following penalty and sanction pursuant to sections 371(2), 375(1.1)(c) and (d) of the *Act* and sections 7(1), 7(2)(a), and 7(3) of *Regulation 227/91*:

1. The Former Licensee be fined $15,000.00 and assessed investigation costs of $6,000.00.

2. Any future application for Life and Accident and Sickness licences would require approval by Council.

Pursuant to section 389.0.1(1) of the *Act*, the Former Licensee had the right to appeal this Decision within twenty-one (21) days of receipt. The Former Licensee was advised of this right in the Decision and was provided with the Notice of Appeal form, in accordance with section 389.0.1(2) of the *Act*. As an appeal was not requested in this matter, this Decision of Council is final.

In accordance with Council's determination that publication of its Decisions are in the public interest, this Decision is published, in accordance with sections 7.1(1)&(2) of *Regulation 227/91*.

Dated in Winnipeg, Manitoba on the 22nd day of November, 2017.