ALBERTA INSURANCE COUNCIL
(the "AIC")

In the Matter of the *Insurance Act*, R.S.A. 2000 Chapter I-3
(the "Act")

And

In the Matter of Barton (Trevor) Kesler
(the "Agent")

DECISION
OF
The Life Insurance Council
(the "Council")

This case involved allegations made pursuant to ss. 480(1)(a), 509(1)(c) and 480(1)(e) of the Act. Specifically, it is alleged in Count 1 that the Agent initiated a partial transfer of funds from BA's existing Individual Variable Insurance Contract ("Existing IVIC") with a deferred service charge ("DSC") sales charge option to a new Individual Variable Insurance Contract ("New IVIC") with a front end load ("FEL") sales charge option and this resulted in deductions from both IVIC's. It is alleged that the Agent did not disclose these charges to BA and that he also changed the initial FEL sales charge option instructions on the application for the New IVIC from 0% to 3% without BA's knowledge or consent. In so doing, it is alleged that he is guilty of misrepresentation, fraud, deceit, untrustworthiness, or dishonesty as set out in s. 480(1)(a) of the Act. In addition or in the alternative, it is alleged in Count 2 that he engaged in a coercive or deceptive practice as contemplated in s. 509(1)(c) of the Act. In addition or in the alternative, it is alleged in Count 3 that the Agent acted incompetently pursuant to s. 480(1)(e) of the Act.

Facts and Evidence

This matter proceeded by way of a written Report to Council dated March 17, 2015 (the "Report"). The Report was forwarded to the Agent for his review and to allow the Agent to provide the Council with any further evidence or submissions by way of Addendum. The Agent submitted three separate submissions respectively dated April 8, 13 and 16, 2015 for further consideration to which the AIC provided a submission in rebuttal dated April 27, 2015.

The Report included the Agent's license history. It indicates that he has been licensed to act as an insurance agent in relation to life and accident & insurance ("A&S") insurance since the AIC began keeping electronic licensing records in 1996. The Report further indicates that the Agent held a certificate of authority when the AIC was formed in 1989 but the earliest record on the license history references a 1993 certificate. Nothing of consequence turns on the exact date that the Agent first held a certificate but it is clear that the Agent has been an insurance agent for an extended period of time.

The AIC investigation into the Agent's conduct and activities stemmed from a June 30, 2014 letter from the Mutual Fund Dealers Association of Canada ("MFDA"). This letter referred to a complaint that it had received from BA. Given the fact that BA's complaint arose in the context of the Agent's role as an insurance agent, the MFDA took the view that the complaint was not within its jurisdiction. Consequently, it referred the matter to the AIC. Accompanying the MFDA letter were a number of attachments. One of the attachments was a portion of an MFDA complaint form. In the "Complaint Summary" section BA advised that the "[the Agent] called me and recommended a change to my portfolio, I trusted him so told him to proceed. I later discovered that he redeemed DSC units at a cost of $280.20 and then re invested as FEL units at a cost of $750.00. I had no idea that he was generating extra commissions for himself and don't understand why he recommended I make this change." Also included amongst the MFDA attachments were copies of policy confirmation notices of the Existing IVIC bearing policy number 39443912 and the New IVIC policy that the Agent sold to BA bearing policy number 39497364. The attachments also included fund information pages for the investment funds that identified the fund codes and sales charge options for the Existing IVIC (Manulife CIBC Monthly Income GIF Select-MGF 8999) and the New IVIC (that was called Manulife RetirementPlus Monthly High Income-MRP 1941).

On July 14, 2014 the investigator wrote to "LD", an official with the Manufacturers Life Insurance Company ("Manulife") and requested information and documentation related to BA's Existing IVIC and New IVIC. LD responded by way of letter and accompanying documents dated August 7, 2014. The attachments provided by LD included:

(1) Commission statements indicating that the Agent was paid $10,859.24 gross commission relating to the sale of the Existing IVIC and $738.70 for the New IVIC. ;

(2) the New IVIC policy application form (the "New IVIC Application") dated January 21, 2014;

(3) the Transfer between Manulife Investments Contracts form ("Transfer Form") dated January 21, 2014;

(4) the Confirmation for your Manulife RetirementPlus Contract ("Manulife Confirmation Notice") dated January 27, 2014; and

(5) pages from the applicable Manulife RetirementPlus Information Folder and Contract ("New IVIC Folder") dated October 28, 2013.

We note that the Agent's managing general agency ("MGA") later confirmed with the investigator that the Agent was paid net commissions of $8,493.48 in regard to the $178,810.29 deposit that purchased the Existing IVIC

In regard to the New IVIC Application, the Report highlighted a number of sections. For example, it noted the instructions on page 1 that required that "[a]ll changes must be initialed by ALL persons signing this application" (emphasis in original). Further, the typed instructions in section 13 stated that 50% of BA's transfer was to be allocated to fund number MRP 1003 and 50% was to be allocated to fund number MRP 1329 and that the FEL sales charge option was 0%. However, these instructions were crossed out by hand and the allocations were changed to 100% to fund number MRP 1941 with a 3% FEL sales charge option. The evidence indicates, and it is not disputed that these changes were made by the Agent and that he initialed them. However, the Agent's changes were not initialed by BA. The New IVIC Application was signed by the Agent and BA on January 21, 2014.

In regard to the Transfer Form, the Report notes that section 2 speaks to the deposit details and fees associated with the purchase of the New IVIC. Specifically, this section would outline percentage breakdowns in the lump sum allocations between plans. It also has columns that would set out the percentage of any front-end fees. The allocation percentages of this section have been left blank and no front-end fee percentages appear. The instruction portions of this section include, among other things, the following references: "See Application for Investment Information" and "**Please see the Information Folder for the maximum Front-end sales charge. If the Front-end sales charge is not indicated, the minimum sales charge applies." Finally, there is an instruction that refers to the fact that section 4 of the Transfer Form must be completed in order to process a "transfer fee reimbursement".

Section 3 of the Transfer Form indicates that BA agreed to a partial net withdrawal from the Existing IVIC in the amount of $25,000.00. In section 4, the "Do not reimburse" option was checked off in relation to the "Transfer fee reimbursement instructions". BA and the Agent signed this document on January 21, 2014.

The Manulife Confirmation Notice evidenced the purchase of the New IVIC. Specifically, it indicated that BA purchased MRP 1941 units in the amount of $25,000.00 and $750.00 was deducted in fees. As a result, BA's fund balance was $24,250.00 as of January 27, 2014.

The New IVIC Folder outlines fund features including the fee and sales charge options that were available to BA. On page 4 it reads that "…[y]ou may pay sales charges at the time of deposit or on a deferred basis depending on the option you choose". One of these options is a FEL option such that "[t]he amount you pay is negotiable and calculated as a percentage of the gross deposit amount". It further indicates, "The minimum sales charge you will pay will be 0%. The maximum sales charge available under this sales charge option is 5%" (emphasis added).

Pages 49 and 50 of the Report describe the Management Expense Ratio ("MER") and "Insurance Fee" provisions of the New IVIC. The Insurance Fee is part of the MER and is paid to Manulife for providing the 75% Death Benefit Guarantee that was applicable to the New IVIC. The "Compensation Paid to Your Advisor" section is found on page 51 of the Report. With the FEL Sales Charge Option "[t]he amount of the sales charge you pay equals the commission paid to your advisor by Manulife Financial". This section also included a reference to the fact that product transfer programs could be available so as to "…potentially reduce or eliminate sales charges through a reduction of advisor compensation." As noted above, "Do not reimburse" was chosen in section 4 of the New IVIC Application.

The Report also contained copies of documents relating to the Existing IVIC. First, it included BA's application form (the "Existing IVIC Application"). This application is dated March 22, 2012. The Report also contained the applicable Manulife "Supplement to the GIF Select Base Information Folder and Contract" ("Supplementary Existing IVIC Folder") for the "Estateplus" series and the Manulife "Information Folder and Contract" ("Existing IVIC Folder") each dated January 1, 2012. We note that the Agent sold this contract to BA less than two years before selling her the New IVIC and that it resulted from the transfer of $178,810.29 from BA's Manulife group RRSP.

The Supplementary Existing IVIC Folder describes the "EstatePlus Fee" which is calculated and charged on an annual basis and paid directly to Manulife through a withdrawal of fund units and provides for an enhanced death benefit guarantee of 100% applicable to the EstatePlus Series contract. The Supplementary Existing IVIC Folder also indicates the "Sales Charge Options" in a section titled "Key Facts" and in a subsection entitled "How Much Will This Cost?" It states that "[b]ack-end sales charges may apply for withdrawals made during the first 7 years following the date of Deposit". Page 94 of the Report references the ability to withdraw 10% of fund units without sales charges in each calendar year.

The one and only time that the investigator and Agent spoke with one another occurred on September 24, 2014. The Report indicates that the Agent returned the investigator's call and that the investigator advised the Agent of the complaint in relation to his conduct in the BA transaction. The investigator states that he outlined the nature of BA's complaint and that it related to the withdrawal of funds from the Existing IVIC and resulting purchase of the New IVIC. Specifically, he states that he told the Agent there were concerns about the reasons for the partial transfer and alleged lack of disclosure in regard to the FEL fee. The investigator recounts that he asked the Agent to comment about the partial transfer. In response, the Agent advised the investigator that BA's husband ("RA") had raised concerns about the "fees" associated with the Existing IVIC so the Agent recommended the partial transfer. The Agent advised that the Existing IVIC had "fees" that were deducted from the account value to pay the guarantees related to the contract which the New IVIC did not have. The Agent further advised that the Existing IVIC had a 10% free provision whereby the redemption of up to 10% would not incur any DSC charges. According to the investigator, the Agent stated that he "dropped the ball" in disclosing the FEL fees and how he was compensated for the New IVIC. The investigator told the Agent that he would be writing to the Agent to request information and documentation. The investigator did so on September 26, 2014. Among other things, the investigator requested that the Agent explain the meaning of "dropped the ball" from their telephone conversation.

The Agent responded through his counsel on October 8, 2014. The Agent's recollection of events was that "…during the initial meeting [BA] decided to transfer certain of her investments to an account established with [the Agent]. An explanation of the services to be provided and the types of charges that would be incurred would have been explained to the client at that time as part of my standard practice. It is unclear whether any written documentation would have been provided at that time."

The letter also referred to the fact that the Agent contacted BA in late 2013 or early 2014 and that:

> [The Agent] was finding that numerous clients were becoming concerned about the lack of performance with their portfolios and concerns about the high administrative fees. This particular account was subject to an annual 0.45% 'estate plus' fee on the total value of the portfolio which included both her Segregated Fund and her RRSP. An alternative account could be considered which would not be subject to this annual fee. In addition, the client was entitled to take advantage of a policy that entitled them to transfer up to 10% of the value of their account without incurring any deferred sales charges. [The Agent] advised that the new product would result in lower fees overall. [RA] spoke on behalf of his wife throughout the meeting and advised that they would consider transferring the [Existing IVIC] to the [New IVIC] in order to avoid the 0.45% 'estate fee' and take advantage of the 10% policy for no deferred commissions.

Through counsel, the Agent also indicated as follows:

> The application dated January 21, 2014, was prepared by [the Agent] in anticipation of the meeting with [BA]. The application is a pre-populated form which is generated based upon the client's existing information in the Manulife Investments system. As such, the information which appeared in typed format in clause 13 is automatically inserted to include the client's current products. The agent must then delete that information by hand and insert any new product information. [The Agent] deleted the references to the client's existing funds MRP 1003 and MRP 1329 together with the applicable lump sum allocations and front end changes since these would not be applicable to the client if a change was requested. Once the client elected to proceed with the transfer of the Segregated Fund to MRP 1941, this additional information was handwritten onto the form in clause 13. This information including [the Agent's] initials noting the deletion of the typed information in clause 13 was all completed prior to [BA] signing the form on January 21, 2014. In retrospect, [the Agent] regrets that he did not also have [BA] initial the deletions in clause 13, however it should be noted that it would be nonsensical to have left the typed information in clause 13, because this was a reference to her existing products. [The Agent], [BA] and [RA] were the only persons present during the signing. (emphasis added)

The Agent also advised that:

> …his comments with respect to having 'dropped the ball' were in reference to the fact that he failed to protect himself by ensuring that he had written documentation confirming his advice to his clients with respect to all of the fees, as well as for failing to have the clients initial the changes on clause 13 of the application. In addition, despite his having advised the client that fees would be incurred for the transaction it is apparent that they are now claiming that they did not properly understand the nature of those fees. Despite the fact that he 'dropped the ball' with respect to the documentation, he stands behind the fact that he made it clear to the client that there would be fees associated with the transaction, but that they would eventually recoup those fees by avoiding the annual 0.45% 'estate plan' fees.

The Agent and his counsel raised no issues with regard to the investigator's conduct or the September 24, 2014 telephone conversation between the Agent and the investigator.

While the Agent asserted that portions of the forms he used were pre-populated with certain information that had to be subsequently changed by hand, the Agent's MGA later confirmed that section 13 on the Manulife application for Retirement Plus and GIF Select did not pre-populate and that an agent had to input this information. This fact was also independently verified by Manulife. Given the discrepancy between this and the Agent's October 8, 2014 submission, the investigator wrote to the Agent's counsel on December 16, 2014 and asked that the Agent provide further information on this and other points.

By fax dated December 19, 2014, new counsel for the Agent ("DJM") wrote to the investigator to confirm his firm had been retained with respect to this matter. On January 8, 2015 DJM indicated that he had "… spoken at length to [the Agent] and reviewed the relevant documents" and that he had "…sought and obtained the clarifications…" that the investigator requested. Through this letter, the Agent confirmed, among other things, that the fund numbers in the New IVIC Application form were not pre-populated as earlier suggested. Rather, fund numbers were available to the Agent by way of a drop-down menu and the Agent incorrectly chose MRP1003 and MRP1329 when filling out the application. The Agent admits that he corrected this error by hand.

DJM further advised:

> This handwritten insertion, along with the lump sum allocation of 100% and the Front End Load fee of 3%, was made before meeting with [RA] and [BA]. He initialed the change as you know. During the meeting with [RA] and [BA] on January 21, 2014, [the Agent] explained the commissions including the Front End Load fees and trailer fees and what these fees represented. [BA and RA] were familiar with such fees based on their dealing with their other agent. They accepted that a Front End Load fee would be payable on the transfer.
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> As you know, the fund into which [BA] was transferring money allowed for a 10% withdrawal from another fund for deposit into the new fund without penalty on an annual basis. [The Agent] was therefore wholly unaware that a DSC would be charged and therefore did not raise or discuss anything about DSCs with [RA] or [BA]. He remains unaware why such a fee would be payable but realizes now that out of an abundance of caution, he could have performed a computer inquiry about whether such a charge would be incurred. Simply put, it never entered his mind that a DSC charge would be payable. He acknowledges his error in this regard. (emphasis added)

However, by letter dated January 9, 2015, DJM clarified the information that he gave on the Agent's behalf in the January 8, 2015 letter. Specifically, he recognized that the Existing IVIC had a 10% penalty-free withdrawal provision rather than the New IVIC. This letter arose because the investigator contacted DJM

to alert him to the fact that the Agent's submissions seemed to suggest that the 10% provision was in the New IVIC.

The investigator also obtained information in regard to the fees associated with the Existing IVIC and New IVIC. On October 21, 2014, a Manulife official ("CC") emailed the investigator a copy of a "Products and funds at a glance" document (the "EstatePlus Guide"). The EstatePlus Guide features information for the "InvestmentPlus" and "EstatePlus" series of individual variable insurance contracts issued by Manulife, including the fund name and number, for each of the InvestmentPlus and EstatePlus series as of September, 2014. The Existing IVIC (Fund number MGF 8999 Manulife CIBC Monthly Income GIF Select) with a DSC (BE) sales charge option indicates an MER of 2.83%, a Fund Fee Rate Level of 4, and a Fund Fee Rate (%) of 0.55. The Agent's MGA also provided the investigator with documents showing that the New IVIC's MER with a front-end fee was 2.80% as of September 19, 2014.

As noted at the outset, the Report was forwarded to the Agent (through counsel) and the Agent provided the Council with additional evidence and submissions by way of three separate letters. The April 8, 2015 submissions were as follows:

> My client has asked me to submit a further statement of his position with respect to this matter to be submitted for Disciplinary Review. The pages and paragraphs referred to below refer to the [Report] that has been prepared.
>
> Firstly, on page 5, point 10, it is stated that [BA] indicated that the initial "R" was not made by her husband. In fact, these are the initials of [the Agent]. The "T" and the "K" being his initials, blend together at times and look like an "R".
>
> Secondly, on page 8, paragraph 2 the Report is incorrect. [RA] did not raise concerns about fees. Rather, he stated that he was going to move the funds to his advisor with another company. He asked [the Agent] if there were any fees to which [the Agent] responded affirmatively. [The Agent] explained that the fees charged would be 5% of the total account value if the client intended on moving the funds at that point in time.
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> [The Agent] also explained the decreasing DSC fee each year until year 8. As this was being explained to [RA], [RA] was seen to write this down on [BA's] year-end statement.
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> It must be emphasized that at no time did [the Agent] say anything about the lack of performance on the investments of [BA and RA] or any other clients' holdings. [The Agent] simply explained that many client accounts were attracting fees and this had caused some level of concern to certain clients.

Thirdly, on page 6, item 12, in response to having "dropped the ball", what [the Agent] was not allowed to mention was that by this phrase, he meant that he should have had the client initial the changes that had been made.

[the Agent] informs me that the intent was to open the account and then transfer the file to the PFP because his focus was, at the time, more on insurance planning. The PFP was unable to meet with the clients because she had gone back to Nova Scotia to see her father.

Kindly ensure that this additional submission of [the Agent] is forwarded for consideration in relation to the Disciplinary Review.

The Agent's submissions of April 13, 2015 were:

You and the Council ought to be aware that [the Agent] has been caring for his ailing father for an extended period of time and has more recently been taking his father to his cancer treatments. For this reason, his time has been at a premium but he has now had an opportunity to further and more carefully review the [Report] and has the following further submissions to make:

1. With reference to page 9, paragraph 2, under "Opinions and Recommendations of Investigator", the Investigator indicates that:

> …it is possible to conclude that the Agent made the changes in section 13 of the New IVIC Application ***after*** BA had signed the New IVIC Application.

This unsupported assumption is incorrect. [The Agent] did not make the changes after [BA] signed the Application as the Investigator alleges. The changes were made before [BA] came to [the Agent's] office.

2. [BA] was made aware by [the Agent] as to how he was compensated because [RA and BA] asked [the Agent] how he was compensated. [The Agent] then proceeded to explain commissions and trail fees to them. [The Agent] also explained that there would be a fee going into the contract but no fees going out.

3. At no time did [the Agent] mention anything about performance in relation to recommending a transfer. The subject meeting was to discuss the annual fees charged against the contract on an annual basis.

4. If the client had a contract in place with ManuLife, and a new contract is purchased any new Application forms can be prepopulated.

[The Agent] is continuing to review the [Report] and may have further comments and will provide them as soon as he is reasonably able having regard to his current circumstances. Kindly ensure that these further submissions are put before [the Council] for the purpose of the Disciplinary Review. I have assumed that this matter is a paper review on the record and that no appearance or oral submissions are necessary. If I am wrong and an appearance is either available or required, please note that I was not consulted on the date that the

> Disciplinary Review will take place and am in a Hearing the entire week of May 11, 2015, including May 13, 2015, and would need an adjournment if an appearance and oral submissions are requested or required.

The Agent's submissions dated April 16, 2015 state, among other things, that the facts set out in the Report do not give rise to findings of dishonesty, untrustworthiness, coercion or deception. Further, he states that the evidence does not substantiate a finding of incompetence. Instead, it is submitted that any errors should be characterized as "…momentary errors with no malice or forethought but rather of the nature that we all make on a regular basis in our daily lives, vocationally and avocationally. It is not every error that rises to a character of a violation of professional standards."

The Agent's submission then alleges that the AIC investigator, in his September 24, 2015 phone call with the Agent, referred to a subcommittee of the Council and that this subcommittee would decide whether to charge the Agent with a crime. He argues that this, in addition to a subsequent request for information that may have been subject to solicitor-client privilege, evidenced some sort of inappropriate conduct on the investigator's behalf and should be kept in mind in terms of our review of the evidence.

The Agent's submissions make reference to electronic notes of the meeting that the Agent had with BA and RA. The notes indicate that this meeting took place on January 21, 2014 and the Agent recounts the details as follows:

> Met with [BA] and her husband. Spoke about changing their ManuLife contract to a Retirement Plus contract because the GIF Select had annual fees which other clients are not happy about. We moved the contract into a FEpolicy (sic). At the time of the meeting, her husband said that he was just recently retired and wanted to move his wife (sic) RRSP and LIRA to the person he deals with. I advised them at that time that the original contracts were Deferred Sales Charge and that [BA] would have another 5 years before the plan was free of any fees. He made these notes on the annual statement he received from ManuLife for the 2013 year-end and said that he would wait then to move the $$. In the meantime, we would start to transfer the funds annually taking advantage of the 10% free move. (emphasis added)

The Agent then submits that "…BA would have saved $137.50 per year in in administrative fees had she kept the contracts in place…."

Additionally, the Agent takes issue with the Report's reference to contract performance between the Existing IVIC and the New IVIC and the statement that it would be "improper" to say that the Agent's

recommendations were based on performance. However, the Agent says that the New IVIC has outperformed the Existing IVIC in the long and short-term periods. Finally, the Agent submitted additional evidence in the form of character reference letters. These letters are glowing in their praise of the Agent as a person and professional.

Discussion

In order to conclude that the Agent has committed an offence pursuant to s. 480(1)(a) of the Act, the Report must prove, on the basis of clear and cogent evidence, that it is more likely than not that the Agent committed the act as alleged. The requirement of clear and cogent evidence reflects the fact that our findings can dramatically impact an insurance agent's ability to remain in the industry.

Additionally, the elements of s. 480(1)(a) offences have been discussed by the Alberta Court of Queen's Bench in *Roy* v. *Alberta (Insurance Councils Appeal Board)*, 2008 ABQB 572 (hereinafter "*Roy*"). In *Roy*, the Council found that an Agent committed an offence pursuant to s. 480(1)(a) of the Act when he attested to completing the applicable CE when he did not, in fact, have the required CE. The agent also held a securities license and stated that he believed that the CE he required to maintain his securities license was applicable to his insurance agent requirements. The Insurance Councils Appeal Board also found the agent guilty of an offence and the agent appealed to the Court of Queen's Bench. In his reasons for judgment, Mr. Justice Marceau reviewed the requisite test to find that an offence pursuant to s. 480(1)(a) of the Act has been made out and expressed it as follows at paragraphs 24 to 26:

> [24] The Long case, albeit a charge under the Criminal Code of Canada where the onus of proof is beyond a reasonable doubt (not on a preponderance of evidence as in this case), correctly sets out the two step approach, namely the court or tribunal must first decide whether objectively one or more of the disjunctive elements have been proven. If so, the tribunal should then consider whether the mental element required has been proved. While the Appeal Board said it was applying the Long decision, it did not make a finding as to whether step 1 had been proved with respect to each of the disjunctive elements. Rather it immediately went into a step 2 analysis and found that the mental element required for untrustworthiness might be less than the mental element required for fraud (as a given example).
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> [25] I am of the view that statement was in error if it was made to convey a sliding scale of mens rea or intent depending on which of the constituent elements was being considered. In my view, the difference between the disjunctive elements may be found in an objective analysis of the definition of each and certainly, as demonstrated by the Long case, what constitutes fraud objectively may be somewhat different from untrustworthiness. However once the objective test has been met, one must turn to the

> mental element. Here to decide the mental element the Appeal Board was entitled, as it did, to find the mental element was satisfied by the recklessness of the Applicant.
>
> [26] While the language used by the Appeal Board may be characterized as unfortunate, on this review on the motion of the Applicant I need not decide whether the Appeal Board reasonably could acquit the Applicant on four of the disjunctive elements. Rather, the only matter I must decide is whether the Appeal Board acting reasonably could conclude, as they did, that the Applicant's false answer together with his recklessness justified a finding of "untrustworthiness". (emphasis added)

The Report alternatively alleges that the Agent acted in a coercive or deceptive manner pursuant to s. 509 of the Act. Oxford defines deceptive as "likely to make you believe something that is not true; misleading." We believe that this provision looks at an agent's conduct from the vantage point of the consumer or client and whether or not it would tend to mislead. As such, we do not believe that it requires a specific finding as to the Agent's intent in order to prove that the offence has been committed.

As to the question of incompetence, we generally agree with the Agent's submission that simple errors do not automatically attract professional sanction pursuant to s. 480(1)(e) of the Act. However, we are of the view that individual errors or practices could be of such a nature that basic competence is called into doubt. As a body that is predominantly made up of industry professionals, this Council is well-situated to determine if the Agent's competence fell below the level expected of similar agents in similar situations.

It is clear that the Agent initiated contact with BA and her husband and that he advised them to withdraw $25,000.00 from the Existing IVIC so as to fund the purchase of the New IVIC. The Agent says that he advised them to do this with the singular view to reduce "fees". Indeed, he stated a number of times that he was not motivated by the performance of the Existing IVIC and his meeting notes state that the basis for this advice was that other clients were unhappy about the fees that they were paying. The Agent's meeting notes state that he told BA and RA that moving funds to a new agent would trigger DSC's on the Existing IVIC. However, he told them that he would structure transfers to the New IVIC without incurring any DSC's. Notwithstanding these assurances DSC's were deducted. This is the case because the withdrawal exceeded the Existing IVIC's 10% withdrawal limit.

Upon considering the evidence and submissions before us, we are not prepared to conclude that the Agent contravened s. 480(1)(a) of the Act. However, we do find that the Agent made a deceptive

statement to BA and RA in relation to the DSC's. Therefore, we find that the Agent committed an offence pursuant to s. 509 of the Act.

As to the question of the Agent's competence, we are concerned with his conduct in a number of respects. First, the Agent states that his sole motivation in recommending the transaction was to reduce fees and that he did not conduct any insurance needs analysis. The difficulty with this is that fees cannot be examined in isolation. Fees are but one consideration that inform a competent agent's analysis and recommendations. In this case, the "fee" upon which the Agent focused was not simply a management fee that was part-and-parcel of the investment product. The "estate fee" in the Existing IVIC paid for the 100% death benefit guarantee that it offered. While the New IVIC did not have an additional insurance fee outside the MER, its death benefit guarantee was only 75%. Additionally, at the time that the Agent completed BA's application she was more than sixty years of age. A competent advisor would have analyzed the implications of these facts before recommending the purchase of the New IVIC. Perhaps the 100% death benefit feature was not worth the fee in the context of these clients. Maybe other features of the New IVIC or its performance outweighed the fact that it only had a 75% death benefit guarantee. The problem is that the Agent's focus was on the question of fees rather than conducting an analysis to determine whether the New IVIC was appropriate.

Second, the Agent states that he did not review the Existing IVIC and its DSC provisions before recommending the purchase of the New IVIC and completing the application. One would expect a competent agent to do so if the rationale of his recommendation was to reduce fees and do so in a manner that did not incur DSC's in the process. However, one of the Agent's submissions states that the triggering of DSC's never entered his mind in connection to the $25,000.00 withdrawal. In another submission he states that he still does not understand why this occurred.

As to the issue of his competence, the Agent stated, among other things, that the New IVIC has outperformed the Existing IVIC and that he believes that BA would have saved $137.50 per year had she followed his advice. We believe that the Agent's view of competence and how it is measured and assessed is somewhat misconstrued. Ultimate performance or return that a client sees is but one measure of competence. That BA might have been better off had she followed the Agent's advice does not necessarily mean that the Agent acted competently. It would be equally wrong to conclude that an agent is incompetent simply because a client suffers poor returns or losses. The assessment of insurance agent

competence is more than simply judging the results of isolated transactions with the benefit of hindsight. Given the evidence in its totality and the concerns set out above, it is our conclusion that the Agent demonstrated incompetence as alleged in the Report.

Before moving on to the question of the appropriate sanction, we feel it necessary to comment on the Agent's assertions regarding the investigator and their telephone conversation. After the conversation between the investigator and the Agent took place, the Agent was represented by counsel throughout. The Agent's original lawyer raised no concern over the investigator's conduct during this telephone call. The same can be said in regard to the many communications between DJM and the investigator. The only reference to the investigator and what he allegedly said in a conversation that took place on September 24, 2014 is in the Agent's final submissions on April 16, 2015. Even if the Agent was distracted by familial matters, it is odd that these issues were never raised before. Further, it was the investigator who proactively alerted DJM to the fact that the 10% withdrawal provision was not in the New IVIC as suggested on the Agent's behalf in a letter dated December 9, 2014. From our review of the file, the investigator was forthright and fair throughout and there really is no basis for the Agent's allegations. However, nothing really turns on the issue as the evidence before us is almost completely documentary in nature.

Sanctions and Orders

In regard to our finding under s. 509 of the Act, we have the ability to levy civil penalties in an amount not exceeding $1,000.00 pursuant to s. 13(1)(b) of the *Certificate Expiry, Penalties and Fees Regulation*, A.R. 125/2001. We also have the ability to order that the Agent's certificates of authority be suspended for a period of time or revoked for one year. The Agent has been in the industry for a lengthy period of time and has no previous disciplinary offences. We also reviewed the numerous letters that he provided. We order that a civil penalty in the amount of $500.00 be levied against the Agent. We decline to order that his license be suspended or revoked. The civil penalty must be paid within thirty (30) days of receiving this notice. In the event that the civil penalty is not paid within thirty (30) days, the Agent's certificate of authority will be automatically suspended pursuant to s. 480(4) of the Act.

As to our finding pursuant to s. 480(1)(e), we have similar authority to levy civil penalties in amounts not exceeding $1,000.00. In addition to suspensions and revocations, s. 11 of the *Insurance Agents and*

Adjusters Regulation permits us to require an agent to take written examinations or courses. This section reads as follows:

> If the Minister is satisfied that a holder of an insurance agent's certificate of authority has demonstrated incompetence to act as an insurance agent, one of the conditions that the Minister may impose under section 480(1) of the Act is that the certificate of authority will not be renewed or reinstated unless the individual who holds the certificate of authority takes a written examination, or courses, approved by the Minister and achieves a mark specified by the Minister.

In cases such as these, public protection and ensuring that all agents possess a basic level of competence are of the utmost importance. The levying of a civil penalty here would not further either goal. However, we believe it appropriate for the Agent to objectively demonstrate that he meets the entry-level competency standard expected of insurance agents. As such, pursuant to s. 480 of the Act and s. 11 of the Regulation, we order as follows:

1) That the Agent successfully pass the full Life Licensing Qualification Program examination as administered by the AIC (the "LLQP Exam") within 14 days of this Decision;

2) That in the event that the Agent does not successfully pass the LLQP Exam within that period we order that his certificates of authority be suspended and that they not be reinstated or renewed until such time as he successfully passes the LLQP Exam;

3) If he so chooses, the Agent is permitted to write the examination without first being certified by an LLQP Course Provider.

Examinations are offered weekly in the AIC's Calgary and Edmonton offices. It is the Agent's responsibility to make arrangements to sit the examination and pay the applicable examination fee. If the Agent cannot write the examination during a regular sitting, he must request a special sitting of the examination on an alternate day or time at the AIC offices during regular business hours. Pursuant to s. 482 of the Act (copy enclosed), the Agent has thirty (30) days in which to appeal this decision by filing a notice of appeal with the Office of the Superintendent of Insurance.

This Decision was made by way of a motion made and carried at a properly conducted meeting of the Life Insurance Council. The motion was duly recorded in the minutes of that meeting.

Date: August 12, 2015 Original Signed By

Kenneth Doll, Chair
Life Insurance Council

Extract from the *Insurance Act*, Chapter I-3

Appeal

482 A decision of the Minister under this Part to refuse to issue, renew or reinstate a certificate of authority, to impose terms and conditions on a certificate of authority, to revoke or suspend a certificate of authority or to impose a penalty on the holder or former holder of a certificate of authority may be appealed in accordance with the regulations.

Extract from the *Insurance Councils Regulation*, Alberta Regulation 126/2001

Notice of appeal

16(1) A person who is adversely affected by a decision of a council may appeal the decision by submitting a notice of appeal to the Superintendent within 30 days after the council has mailed the written notice of the decision to the person.

(2) The notice of appeal must contain the following:

a) a copy of the written notice of the decision being appealed;

b) a description of the relief requested by the appellant;

c) the signature of the appellant or the appellant's lawyer;

d) an address for service in Alberta for the appellant;

e) an appeal fee of $200 payable to the Provincial Treasurer.

(3) The Superintendent must notify the Minister and provide a copy of the notice of appeal to the council whose decision is being appealed when a notice of appeal has been submitted.

(4) If the appeal involves a suspension or revocation of a certificate of authority or a levy of a penalty, the council's decision is suspended until after the disposition of the appeal by a panel of the Appeal Board.

Address for Superintendent of Insurance:

Superintendent of Insurance
Alberta Finance
402 Terrace Building
9515-107 Street
Edmonton, Alberta T5K 2C3