INSURANCE COUNCILS APPEAL BOARD OF ALBERTA

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In the Matter of the Appeal of Mr. Gerry Kosior from the Decision of the Life Insurance Council dated September 23, 2013

RANDOLPH LANGLEY	-	Chair of Panel
MICHAEL STEWART	-	Panel Member
OSCAR BUERA	-	Panel Member

REASONS FOR DECISION

PROCEEDINGS TO DATE

The Appellant Gerry Kosior is a licensed insurance agent since July 4, 1981 and during the relevant times held a certificate of authority as a life insurance agent. He is a Certified Financial Planner, a Chartered Life Underwriter and is the principal and designated representative of Kosior Insurance and Financial Services Ltd..

On July 31, 2012 the Alberta Insurance Council ("AIC") received a letter of complaint against the Appellant and Manulife Financial dated July 30, 2012 from DB. DB was a policy holder of Manulife Financial with a Locked In Retirement Account ("LIRA") purchased in 2001 which was converted in January 2008 to a Life Income Fund ("LIF").through his then agent the Appellant.

An investigation of the complaint was undertaken and an Investigation Report attaching a number of exhibits was submitted to the Life Insurance Council (the "Council") on or about June 3, 2013.

Section 480 of the Insurance Act (the "Act") provides that the Minister may impose sanctions affecting certificates or other penalties prescribed by regulation. That section reads as follows:

Sanctions affecting certificates

480(1) If the Minister is satisfied that the holder or a former holder of a certificate of authority

(a) has been guilty of misrepresentation, fraud, deceit, untrustworthiness or dishonesty,

(b) has contravened any provision of this Act or the regulations or similar legislation in another jurisdiction or legislation that is a predecessor of this Act or the regulations,

(c) has unreasonably failed to pay any premium collected by the holder within the time period stipulated in the holder's agency contract to an insurer or an insurance agent who is entitled to the premium,

(d) has placed insurance with an insurer not licensed in Alberta under this Act without complying with the provisions of this Act relating to unlicensed insurers, or

(e) has demonstrated incompetence to act as an insurance agent in the case of an insurance agent's certificate of authority or to act as an adjuster in the case of an adjuster's certificate of authority,

the Minister may revoke, suspend or refuse to renew or reinstate one or more of the certificates of authority held by the holder, impose terms and conditions provided for in the regulations on one or more of the certificates of authority held by the holder and impose a penalty on the holder or former holder.

The investigator's report advanced charges against the Appellant pursuant to section 480(1)(a) of alleging that he has been guilty of misrepresentation in that he represented that DB would be eligible for a pension income tax credit to offset the taxable income from the LIF.

In addition, or in the alternative, it was alleged by the representation he had made a false or misleading statement contrary to section 509(1)(a) of the Act and thus was in contravention of section 480(1)(b) of the Act.

Section 509 of the Act reads as follows:

Unfair practices

509(1) No insurer, insurance agent or adjuster may

(a) make a false or misleading statement, representation or advertisement,

(b) engage in a tied selling practice prohibited by the regulations,

(c) engage in any unfair, coercive or deceptive act or practice, or

(d) make any statement or representation or commit any practice or act that is prohibited by the regulations.

(2) No person may, by means of misleading or false statements, procure or induce or attempt to procure or induce any person to forfeit, surrender or allow the lapse of any policy of insurance.
RSA 2000 cI-3 s509;2008 c19 s26

Under Section 494 of the Act the Minister may delegate his powers to an Insurance Council and under section 9 of the Insurance Councils Regulation, Alberta Regulation 126/01 (the "Regulation") the powers to impose sanctions affecting certificates may also be so delegated by the Minister. That has been done respecting a delegation to the Life Insurance Council.

The Council considered the Investigation Report relating to the complaints and by a motion made and carried at a meeting of the Council a Decision was rendered dated September 23, 2013 and sent to the Appellant by registered mail dated September 25, 2013. The written Decision appears in Section 2 of the Record submitted by the Council pursuant to section 20 of the Regulation. That Record was marked as Exhibit 2 on this Appeal.

It was the finding of the Council found the Appellant not guilty of charge under section 480(1)(a) of the Act but did find that he had made a false or misleading statement contrary to section 509(1)(a) and consequently was guilty of contravening section 480(1)(b) of the Act. It was determined that an appropriate sanction was the suspension of the Appellant's certificate of authority for a period of one month and it was so ordered.

By a Notice of Appeal dated October 4, 2013 the Appellant appealed the Council's decision pursuant to section 16 of the Regulation. That Notice of Appeal was marked as Exhibit 3 on this Appeal.

By letter dated October 21, 2013 the Superintendent of Insurance appointed this Appeal Panel pursuant to section 17 of the Regulation. That letter of appointment was marked as Exhibit 1 on this Appeal and no objection was taken at the Appeal Hearing to the makeup or appointment of this Panel or its right to hear this Appeal.

A Record of Evidence was submitted by the Council pursuant to section 20 of the Regulation was marked as Exhibit 2 on this Appeal by consent.

The Panel received a request from the Appellant for an extension of the time period for the date of the hearing. Having heard from the Council the Panel

adjourned the Hearing by a Decision marked as Exhibit 4 on this Appeal to December 16, 2013.

A further Notice of Hearing was subsequently issued by the Panel for a hearing on December 16, 2013. This Notice was marked as Exhibit 5 on this Appeal.

All parties being present and prepared to proceed, the Appeal was heard on December 16, 2013. The Appellant appeared in person and unrepresented and Mr. Warren Martinson appeared for the Council.

FACTS

The Panel had as evidence before it the Record entered as Exhibit 2 by consent, certain admissions by the parties, exhibits entered in evidence and the *viva voce* evidence under oath of the following witnesses:

As lead by the Council, three witnesses being:

Mr. Bernie Van Brabant, investigator

Mr. DB

Mrs. TB, spouse of DB

The Appellant gave evidence in person.

The case for the Council incorporated in the evidence of Mr. Van Brabant a review of the materials assembled by him in his investigative report forming part of the Record entered as an exhibit. Based upon the totality of the evidence before it the Panel finds the facts on this Appeal to be as follows:

The policyholder DB is a *

In 2001 he had been advised by a Mr. Brian Irwin with Manulife Financial to transfer $* he held in a registered pension plan to a LIRA. This was done on October 22, 2001. DB had no RRSP and the LIRA was his retirement fund. He had income of in excess of $* per year and had excess funds that could have been invested. Had the funds remained in the LIRA the fund could have compounded until age 71 at which time he would have been required to transfer the fund to an income plan.

In late 2007 the account with Manulife was transferred to the Appellant. He met with DB and his spouse on a number of occasions and on January 22,

*Please note: To protect the privacy of the complainant, some of their personal information has been removed from this record in accordance with section 40(4) of the Freedom of Information and Protection of Privacy Act (FOIP).

2008 an Application was completed to transfer the balance of $42,025.00 in the LIRA to LIF. That sum capitalized an annual payment to DB of $2,000.00.

In the evidence of both DB and his wife TB it was evident that the process and rationale for the transfer of funds were not clearly understood. DB recalled no discussion of tax impact but did have some recall of discussion of an RRSP. TB recalled the transfer being related to new legislation coming into force and that the annual payment was described as funds "freed up". She recalled no anticipation of any tax consequence but does recall being advised that an RRSP would be a good place to put the freed up cash.

The Appellant in his evidence candidly conceded that the transfer of funds from the LIRA to the LIF was in expectation that a legislative change would be occurring that would give DB and pension credit for the income received. It was his expectation and apparent plan that the freed up cash could then be placed in a spousal RRSP that would create what he described as a double dip: a tax free income receipt and a tax deduction for the anticipated RRSP.

In fact the legislative change the Appellant anticipated did not occur and the LIF income each year was taxable. The Appellant in oral evidence and in his letter to the investigator at page 74 of 75 indicated that he made an error in interpretation of the legislation. In fact, it appears his views on the pension income credit were not based upon a review of actual legislation but on a discussion with an unidentified Canada Revenue Agency representative. As the Appellant indicated in his letter dated June 20, 2013 to the investigator:

"The single most important fact in this investigation is that I made a mistake in the advice that I gave to (DB)"

The account was subsequently transferred to another agent from the Appellant and DB indicates it is at that point he became aware of the error in the Appellant's advice.

The Appellant is a long standing agent within the Province. Although he asserted in his evidence that he had not had any prior complaints it appears that the records of the AIC do indicate complaints in 1994, 1996 and 2001. These complaint records were marked as Exhibit 6 on this Appeal. It does not appear that any of these complaints were from clients but rather from other agents on the occasion of policy replacements. No sanctions affecting the Appellant's certificate of authority occurred although it appears he was admonished on technical, albeit serious, documentary omissions or delays.

ISSUES

The issues appear to the Panel to be as follows:

1. Is the decision of this Panel constrained by the law respecting standards of review to a review of the Life Insurance Council's decision only as to the reasonableness of that decision?

2. Was the Appellant guilty of a contravention of section 480 of the Act?

3. If so, what is the appropriate sanction to be imposed?

REASONS FOR DECISION

1. **Is the decision of this Panel constrained by the law respecting standards of review to a review of the Life Insurance Council's decision only as to the reasonableness of that decision?**

At the outset of the hearing and subsequently in argument counsel for the Council referred to a decision of the Insurance Councils Appeal Board dated July 9, 2013 (the "July Decision"). In that case the Appeal Panel considered "What is the appropriate standard of review to be applied in this case" being an appeal from a decision of the General Insurance Council that the Appellant in that case had contravened section 480(1)(a) of the Act. In consideration of the question of the standard of review the July Decision Appeal Panel considered at some length the Alberta Court of Appeal decision of **Newton v. Criminal Trial Lawyers' Association** [2010] CarswellAlta 2461. The Panel concluded:

> "There are only two possible standards of review: reasonableness, which is the more deferential standard, or correctness."

The consideration then proceeded to a review of factors (a) through (g) from paragraph 43 of the Newton decision with a conclusion that the appropriate standard of review is reasonableness (reference paragraph 29 of the Appeal Board Decision). It is critical to note that on the July Decision hearing the only evidence presented was the Record of the General Insurance Council, entered by consent, and there was no new evidence from either party presented to the Appeal Board.

This Panel takes the argument of the Council on this Appeal to be that this Panel should consider the July Decision as instructive and persuasive in respect of the fundamental nature of this Appeal: i.e. that it is an appellant review based upon whether the decision of the Council was "reasonable", that is whether it fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (reference July Decision paragraph 30).

Mr. Kosior chose not top be represented by counsel. This particular issue is of however some legal subtlety and the Panel believes of considerable significance to the current and future operations of these Appeal Panels.

Attached is a table of Authorities and References that were consulted on the issue of the standard of review and will be referred to in this Decision. .

All appeals are by statute (**Calgary General Hospital v. Williams**, Tab 2, at paragraph 9). In this case the appeal derives from section 482 of the ***Insurance Act*** which reads:

> Appeal
>
> 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.

The decision of the Minister has been delegated as noted to the Life Insurance Council, a tribunal established by the Act and that Council's composition is stipulated by section 3 of the Regulation. Under that Regulation there are six members: two appointed from the public, two from the Life Companies and two life agents. It is assumed that all members participated in the Motion that generated the Decision from which Mr. Kosior appeals.

The Insurance Councils Appeal Board is the next level tribunal and its composition is stipulated by the Regulation. In the current case it consists of an appointed chair and two life agents.

The Courts have addressed in the standards of review by which each succeeding level of review considers the prior level. In this case it addresses the tests by which the Appeal Board considers the decision of the Life Insurance Council.

Two of the standards are outlined in the July Decision: Correctness and Reasonableness. There is however a hearing format described as a hearing *de novo* which has had application to the hearings of the Appeal Board and that will be discussed shortly. The issue then is whether the Appeal Board hearing is indeed a review of the Council |Decision at all or whether it is a completely new hearing, albeit with some cross reference.

The Courts have developed templates for analysis of the various relevant factors for the decision on the standard of review that a tribunal adopts on appeal

from a lower tribunal or court. In the 2010 **Newton** decision (Tab 13, paragraph 41), considered by the July Decision Panel, Slatter J.A. stated:

> 42 The determination of the standard of review to be applied by an appellate administrative tribunal (here the Board) to the decision of an administrative tribunal of first instance (here the presiding officer) requires a consideration of many of the same factors that are discussed in **Housen** and **Dunsmuir/Pushpanathan**, (Supreme Court of Canada) adapted to the particular context: College of Physicians & Surgeons (Ontario) v. Payne ((Ont. Div. Ct.)) at paragraph 20.
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> 43 The following factors should generally be examined:
> (a) the respective roles of the tribunal of first instance and the appellate tribunal, as determined by interpreting the enabling legislation;
>
> (b) the nature of the question in issue;
>
> (c) the interpretation of the statute as a whole;
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> (d) the expertise and advantageous position of the tribunal of first instance, compared to that of the appellate tribunal;
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> (e) the need to limit the number, length and cost of appeals;
>
> (f) preserving the economy and integrity of the proceedings in the tribunal of first instance; and
>
> (g) other factors that are relevant in the particular context.

This analysis builds upon the earlier Supreme Court of Canada analyses which dealt with reviews by the Courts of lower decisions and specifically referenced four factors (Reference **Pushpanathan** Tab 4 at paragraph 29):

> 29 The factors to be taken into account in determining the standard of review have been canvassed in a number of recent decisions of this Court, and may be divided into four categories.
>
> (i) Privative Clauses
>
> (ii) Expertise
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> 32 Described by Iacobucci J. in Southam, supra, at para. 50, as" the most important of the factors that a court must consider in settling on a standard of review", this category includes several considerations. If a tribunal has been constituted with a particular expertise with respect to

achieving the aims of an Act, whether because of the specialized knowledge of its decision-makers, special procedure, or non-judicial means of implementing the Act, then a greater degree of deference will be accorded

(iii) Purpose of the Act as a Whole, and the Provision in Particular

36 As Iacobucci J. noted in Southam, supra, at para. 50, purpose and expertise often overlap. The purpose of a statute is often indicated by the specialized nature of the legislative structure and dispute-settlement mechanism, and the need for expertise is often manifested as much by the requirements of the statute as by the specific qualifications of its members. Where the purposes of the statute and of the decision-maker are conceived not primarily in terms of establishing rights as between parties, or as entitlements, but rather as a delicate balancing between different constituencies, then the appropriateness of court supervision diminishes.

(iv) The "Nature of the Problem": A Question of Law or Fact?

37 As mentioned above, even pure questions of law may be granted a wide degree of deference where other factors of the pragmatic and functional analysis suggest that such deference is the legislative intention...

In general, deference is given on questions of fact because of the' signal advantage' enjoyed by the primary finder of fact. Less deference is warranted on questions of law, in part because the finder of fact may not have developed any particular familiarity with issues of law. While there is merit in the distinction between fact and law, the distinction is not always so clear. Specialized boards are often called upon to make difficult findings of both fact and law. In some circumstances, the two are inextricably linked. Further, the 'correct' interpretation of a term may be dictated by the mandate of the board and by the coherent body of jurisprudence it has developed. In some cases, even where courts might not agree with a given interpretation, the integrity of certain administrative processes may demand that deference be shown to that interpretation of law

In the **Dunsmuir** case (Tab 7, paragraph 62) the Court, in further refining the analysis, stated:

62 In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry

proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

63 The existing approach to determining the appropriate standard of review has commonly been referred to as "pragmatic and functional". That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails. Because the phrase "pragmatic and functional approach" may have misguided courts in the past, we prefer to refer simply to the "standard of review analysis" in the future.

64 The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

In **Pushpanathan** (Tab 4, paragraph 27) the reasonableness standard was described as a continuum or "spectrum" with a more exacting end and a more deferential end. In furtherance of this the **College of Physicians v Payne** case(Tab 6, paragraph 21) case noted:

21 This approach was put succinctly by the Supreme Court of Canada in *Canada (Director of Investigation & Research) v. Southam Inc.* (S.C.C.), at p. 18:

In the final result, the standard of reasonableness simply instructs reviewing courts to accord considerable weight to the views of tribunals about matters with respect to which they have significant expertise. While a policy of deference to expertise may take the form of a particular standard of review, at bottom is the issue of weight that should be accorded to expert opinions. In other words, deference in terms of a "standard of reasonableness" and deference in terms of "weight" are two sides of the same coin.

The Alberta Court of Appeal in **Imperial Oil Resources Ltd. v. 826167 Alberta Ltd**. (Tab 8, paragraph 8) stated:

8 The respondent submits that the pragmatic and functional analysis is not applicable where a statute provides for a hearing *de novo*. We

disagree. The authorities support the proposition that a **Pushpanathan** analysis is required even when a statutory appeal from an administrative body to a court is said to be by way of a hearing *de novo*.

11 It is helpful to bear in mind that even before the development of the pragmatic and functional analysis, the wording *de novo* in an appeal provision from a statutory board did not in itself mean that no deference was to be given to the original decision.

In the 2008 Court of Appeal application for leave in **Newton v. Criminal Trial Lawyers Association** , Tab 9, Watson J.A. comments:

> Indeed, part of the question here may be what one means by "*de novo*". One sometimes sees the term "*de novo*" used to refer merely to an ability of a higher court or tribunal to substitute a completely different decision for the lower court or tribunal even on the lower court's record. One also sees the term "*de novo*" used to refer to an ability of a higher court or tribunal to conduct a complete "do over", meaning a completely fresh hearing with new evidence as if the proceedings before the lower court or tribunal did not matter.
>
> 11 The concept of *de novo* appeals or reviews is dependent on statutory language as well as on policy considerations, including principles of justice and fairness: see *e.g. Calgary (City) v. Nortel Networks Corp*

The Court of Appeal in **Imperial Oil Resources Ltd. v. 826167 Alberta Ltd**. (Tab 8, paragraph 8) stated:

> 8 The respondent submits that the pragmatic and functional analysis is not applicable where a statute provides for a hearing *de novo*. We disagree. The authorities support the proposition that a **Pushpanathan** analysis is required even when a statutory appeal from an administrative body to a court is said to be by way of a hearing *de novo*.
>
> 11 It is helpful to bear in mind that even before the development of the pragmatic and functional analysis, the wording *de novo* in an appeal provision from a statutory board did not in itself mean that no deference was to be given to the original decision.

The structure of the analysis in **Dunsmuir/Pushpanathan,** as modified for statutory appellate tribunals such as the Insurance Councils Appeal Board in 2010 **Newton,** is what applies. It is however a two steps process and we do not read Justice Slatter in **Newton** as modifying that element of the analysis. The 2010 Newton approach has been applied in the **Kikino Metis Settlements** decision (Tab 15).

To examine the first step of Dunsmuir, has there been jurisprudence that has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Although not abundant, and all being prior to the **Newton** decision, there are two cases that have considered the Insurance Appeal process, or statutory language similar and certainly a significant number of Insurance Councils Appeal Board decisions.

The 1980 **Alberta v. Harder** case there was a discussion of an appeal process under section 9 of the **Licensing Act**. That section, and specifically subsection 9(4) set out at paragraph 25 of Justice Miller's decision, is substantially the same as section 23 of the Regulation prior to the 2011 amendment to that section. At paragraph 26 Justice Miller considered three options:

a) a hearing strictly on a consideration of the record of the decision (below);
b) a de novo hearing where both (parties) would present their positions and introduce such viva voce evidence and exhibits as they deemed necessary;
c) a hearing based on the record ... with the right of the appeal board to hear or consider further evidence if they wished.

It was his decision that "it seems apparent (from this section 9(5) on qualifications of the Board members) that the legislators intended to ensure that a majority of the members of the appeal board would be members knowledgeable in the ... industry who could bring to any hearing the benefit of their special expertise". He concluded that the "fairest and best procedure designed to make the fullest use of the appeal board's special expertise is to have a hearing before it in the form of a de novo procedure ... This will then enable the appeal board to conduct the fullest examination and to be apprised of all relevant facts in order to protect, not only the individual applicant, but also to protect the public interest".

Justice Miller's policy decision and approach was echoed in the Court of Appeal in **Calgary General Hospital v. Williams** (Tab 2) and again in **National-Oilwell Canada v. Madsen** (Tab 3). In the decision of **Roy v. Alberta** (Tab 3) the Board having proceeded on the basis of a de novo hearing was not challenged and in **Gilbert v. Alberta Insurance Council** (Tab 11) the Court stated that the proceeding before the Insurance Councils Appeal Board is a hearing de novo (paragraph 3).

The jurisprudence therefore appears to support the characterization of the Appeal Boards hearing as de novo. What precisely that means, as indicated above, however is not entirely resolved.

In **National Oil-well** (Tab 3 at page 3) the Court of Appeal found in 1991:

> We so conclude on the ground that the appeal is to be a de novo hearing. That being the case, the employee must prove his claim, and no doubt the officer will be the first witness. What happened before is essentially irrelevant, and the grounds of appeal are merely a guide to what the issues at the hearing are likely to be.
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> It is true that the statute does not contain an express statement that the appeal hearing will take the form of a trial, as opposed to a review of the record. (The Act has since been repealed and replaced: see *Employment Standards Code* , S.A. 1988, c. E-10.2. The provisions under review have not been changed.) But the scheme of the Act, and the established practice as reported by Mr. Lisevich for the Attorney General, is that the hearings are in the form of a trial.

This is the "do over" that Justice Watson described and is the meaning ascribed to de novo in other decisions. Reference can be made to **Calgary General** (Tab 2), **National Oil-well** (Tab 3) and **Osteria** (Tab 10). The **Harder** decision suggests that the Appeal hearing is a "do over"

The Record filed under section 20 does commonly come into evidence, is referenced and is accorded weight as the case dictates. In the case of the July Appeal, that Record was it appears all of the evidence and entered by consent. It therefore would receive significant, indeed overwhelming weight whether the hearing was de novo or not.

In the event that the Panel is in error and the existing jurisprudence does not support the "do over" de novo hearing we examine the factors identified by Justice Slatter in **Newton** and its predecessor in **Dunsmuir**.

The foundation statute does not specify a de novo hearing. The Act does however in section 482.1 indicate:

> Evidentiary provisions
>
> 482.1 Sections 4, 5, 8, 9, 10, 11 and 12 of the *Public Inquiries Act* apply where
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> (a) the Minister holds a hearing for the purposes of exercising powers under section 480, or
>
> (b) an appeal body holds a hearing for the purposes of an appeal referred to in section 482.

The **Public Inquiries Act** (Tab 18) in the referenced sections provides uthority for tribunals to summon witnesses and compel document production, to authorize

certain uses of photocopies, to compel disclosure and order commission evidence. More significantly it provides in section 12 as follows:

> Right to call witnesses
>
> 12 Any witness who believes his or her interests may be adversely affected and any person who satisfies a commissioner or commissioners that any evidence given before a commissioner or commissioners may adversely affect the person's interests shall be given an opportunity during the inquiry to give evidence on the matter, and at the discretion of a commissioner or commissioners, to call and examine or cross-examine witnesses personally or by that person's counsel in respect of the matter.

The Insurance Councils Regulation also provides for the appeal referenced in section 482 of the Act in section 16 and following. Section 16 provides for the notice of appeal but includes no privative clause respecting the Life Insurance Council decision. Indeed, that decision is suspended if involving a suspension or revocation of a certificate of authority.

As noted section 20 provides for the filing of the evidence submitted. It does not include any record of the actual hearing or more precisely the discussion on the motion, and indeed the practice is that the hearing is without the presence witnesses or the subject of the investigation notwithstanding section 12 of **Public Inquiries Act**.

Section 21 of the Regulation provides for written submissions however the practice appears to have developed of proceeding under section 21(4) with the hearing of evidence. In the current case this was done and both parties led evidence under oath. The section 20 production does not indicate evidence before the Council was under oath. What the Council had is what the Investigator provided in his report, albeit commonly that includes a written comment by the subject agent.

The Regulation further indicates in section 22(3) that the panel is confined in making its decision to the submissions and evidence submitted to it. The status of the section 20 record, if not entered as an exhibit by consent, is unclear as a basis for the Panel's decision.

Finally, section 23, which had been in the wording of the provision under consideration in **Harder**, was altered to provide:

> 23**(1)** A panel may by order confirm, reverse or vary the decision of the council being appealed **or make any decision that the council had the authority to make in the first instance**.

On the face of the legislative provisions, the Panel is of the view that the clear intent in the legislation is that the subject, in this case Mr. Kosior, will have the fullest opportunity to present his case and position and that the decision will be made on evidence before the Appeal Board. It is a clear description of a "do over".

The composition of the Council and the Appeal Panel are essentially identical in respect of expertise represented by life insurance agents. Indeed both have two life insurance agents and only the Appeal Panel has a majority of that qualification.

Based upon the **Dunsmuir** criteria, with no privative clause, at least equal expertise and clear evidence of a purpose to provide a skilled and comprehensive hearing on appeal the Panel finds a de novo new hearing is intended. The factors in **Newton** supplementing **Dunsmuir**, such as number, length and costs of appeals and the preserving of the integrity of the Council proceedings do not out weight the factors supportive of the Panel's analysis.

Having entered the section 20 production by consent the Panel has had reference to elements of it throughout the hearing, largely by references in the oral evidence of the Investigator, and as supported by evidence before the Panel it has by reference been given appropriate weight.

It is the Panel's decision that the hearing before it is a de novo hearing and is not confined to a review of the Council Decision on reasonableness as defined in a law alone.

2. Was the Appellant guilty of a contravention of section 480 of the Act?

The core facts of the case are not complex. As noted the Appellant conceded:

> "The single most important fact in this investigation is that I made a mistake in the advice that I gave to (DB)"

The "error" was clearly advising DB to transfer of funds from the LIRA to the LIF in expectation that a legislative change would be occurring that would give DB and pension credit for the income received. This in the Panel's view constitutes a contravention of section 509 in that it was a misleading statement and thus a contravention of section 480(1)(b) of the Act. The statement made was contrary to the normal good practice of a life insurance agent in that it induces the client to make a decision, and indeed an irrevocable decision, based upon a state of the law which did not exist. Sound advice requires that it be grounded in reality and the advice given was not, and was therefore misleading.

The Panel does not find clear and cogent evidence that the Appellant contravened section 480(1)(a) consistent with the discussion in **Roy v. Alberta** (Tab 8).

3. If so, what is the appropriate sanction to be imposed?

It is the decision of the Panel that the appropriate penalty is the suspension of the Appellant certificate of authority for a period of 30 days. Having heard evidence that such a suspension will impact on the agency of which he is the designated representative the Panel directs that this decision shall take effect 30 days following the date of this decision to allow the Appellant to make whatever arrangements are required to appoint a replacement designated representative.

Pursuant to section 24 of the Regulation, and taking into account the results of the appeal and the conduct of the parties, the Panel directs that the appeal fee be remitted to the Alberta Insurance Council.

DATED at Edmonton, Alberta, this 7 day of January, 2014.

INSURANCE COUNCILS APPEAL BOARD OF ALBERTA

Per: _____
Randolph Langley – Chair of Panel

AUTHORITIES AND REFERENCES

	Authority	Citation	Court
1	Alberta (Superintendent of Real Estate) v. Harder	1980 CarswellAlta 3	Alberta Q.B.
2	Calgary General Hospital v. Williams	1982 CarswellAlta 266	Alberta C.A.
3	National-Oilwell Canada Ltd. v. Madsen	1991 CarswellAlta 264	Alberta C.A.
4	Pushpanathan v. Canada (Minister of Employment & Immigration)	1998 CarswellNat 831	S.C.C.
5	College of Physicians & Surgeons (Ontario) v. Payne	2002 CarswellOnt 3064	S.C.J.
6	Imperial Oil Resources Ltd. v. 826167 Alberta Inc.	2007 CarswellAlta 473	Alberta C.A.
7	New Brunswick (Board of Management) v. Dunsmuir	2008 CarswellNB 124	S.C.C.
8	Roy v. Alberta (Insurance Councils Appeal Board)	2008 CarswellAlta 1283	Alberta Q.B.
9	Newton v. Criminal Trial Lawyers' Assn.	2008 CarswellAlta 1823	Alberta C.A. Motion
10	Osteria de Medici Restaurant Ltd. v. Yaworski	2009 CarswellAlta 1921	Alberta Q.B.

	Authority	Citation	Court
11	Gilbert v. Alberta Insurance Council	2009 CarswellAlta 1899	Alberta Q.B.
12	Transglobal Communications Group Inc., Re	2009 CarswellAlta 464	Alberta Q.B.
13	Newton v. Criminal Trial Lawyers' Assn.	2010 CarswellAlta 2461	Alberta C.A.
14	Moll v. College of Psychologists (Alberta)	2011 CarswellAlta 517	Alberta C.A.
15	Kikino Métis Settlement v. Métis Settlements Appeal Tribunal	2013 CarswellAlta 462	Alberta C.A.
16	July 9, 2013 Insurance Councils Appeal Board of Alberta Decision		
17	Insurance Act chapter I-3	Sections 482 and 482.1	
18	Public Inquiries Act chapter P-39	Sections 4, 5, 8 through 12	
19	Insurance Councils Regulation Alta Reg. 126/2001	Sections 3, 13 through 28	

adjourned the Hearing by a Decision marked as Exhibit 4 on this Appeal to December 16, 2013.

A further Notice of Hearing was subsequently issued by the Panel for a hearing on December 16, 2013. This Notice was marked as Exhibit 5 on this Appeal.

All parties being present and prepared to proceed, the Appeal was heard on December 16, 2013. The Appellant appeared in person and unrepresented and Mr. Warren Martinson appeared for the Council.

FACTS

The Panel had as evidence before it the Record entered as Exhibit 2 by consent, certain admissions by the parties, exhibits entered in evidence and the *viva voce* evidence under oath of the following witnesses:

As lead by the Council, three witnesses being:

Mr. Bernie Van Brabant, investigator

Mr. DB

Mrs. TB, spouse of DB

The Appellant gave evidence in person.

The case for the Council incorporated in the evidence of Mr. Van Brabant a review of the materials assembled by him in his investigative report forming part of the Record entered as an exhibit. Based upon the totality of the evidence before it the Panel finds the facts on this Appeal to be as follows:

The policyholder DB is a *

In 2001 he had been advised by a Mr. Brian Irwin with Manulife Financial to transfer * he held in a registered pension plan to a LIRA. This was done on October 22, 2001. DB had no RRSP and the LIRA was his retirement fund. He had income of in excess of $* per year and had excess funds that could have been invested. Had the funds remained in the LIRA the fund could have compounded until age 71 at which time he would have been required to transfer the fund to an income plan.

In late 2007 the account with Manulife was transferred to the Appellant. He met with DB and his spouse on a number of occasions and on January 22,

* Please note: To protect the privacy of the complainant, some of their personal information has been removed from this record in accordance with section 40(4) of the Freedom of Information and Protection of Privacy Act (FOIP)