

In the Matter of the
FINANCIAL INSTITUTIONS ACT, RSBC 1996, c.141
(the “Act”)

and the
INSURANCE COUNCIL OF BRITISH COLUMBIA
(“Council”)

and
DAVID JONATHAN PENNOYER
(the “Licensee”)

ORDER

As Council made an intended decision on May 14, 2019, pursuant to sections 231, 236, and 241.1 of the Act; and

As Council, in accordance with section 237 of the Act, provided the Licensee with written reasons and notice of the intended decision dated June 21, 2019; and

As the Licensee has not requested a hearing of Council’s intended decision within the time period provided by the Act;

Under authority of sections 231, 236, and 241.1 of the Act, Council orders that:

1. the Licensee’s life and accident and sickness insurance agent (“Life Agent”) licence is suspended for a period of two years commencing on July 18, 2019 and ending at midnight on July 17, 2021;
2. a condition is imposed on the Licensee’s Life Agent licence requiring the Licensee to be supervised by a qualified Life Agent, as approved by Council, for a period of two years of active licensing commencing on July 18, 2021 and ending at midnight on July 17, 2023;
3. the Licensee is assessed Council’s investigative costs of \$2,812.50;
4. a condition is imposed on the Licensee’s Life Agent licence requiring him to complete an ethics course and a course in elder planning, as approved by Council; and

5. a condition is imposed on the Licensee's Life Agent licence that requires him to fully pay the investigative costs and complete the above-ordered courses on or before October 16, 2019. If the investigative costs remain unpaid or the courses remain incomplete by the end of the Licensee's suspension, the Licensee's Life Agent licence will automatically remain suspended and his annual filing will not be processed by Council until such time as the investigative costs are paid in full and the courses are completed.

This order takes effect on the **18th day of July, 2019.**



Lesley Maddison
Chairperson, Insurance Council of British Columbia

INTENDED DECISION

of the

INSURANCE COUNCIL OF BRITISH COLUMBIA

(“Council”)

respecting

DAVID JONATHAN PENNOYER

(the “Licensee”)

Pursuant to section 232 of the *Financial Institutions Act* (the “Act”), Council conducted an investigation to determine whether the Licensee acted contrary to his duties to be trustworthy, carry on the business of insurance in good faith, conduct all insurance activities in a competent manner, and act in the usual practice of dealing with clients, specifically by protecting clients’ interests and privacy, evaluating clients’ needs, and acting with integrity, competence and the upmost good faith, as respectively set out by sections 3.2, 4.2, 5.2, and 7.2 of Council’s Code of Conduct, and Council Rule 7(8) which requires compliance with Council’s Code of Conduct. Council also considered whether the Licensee acted in a conflict of interest.

On January 16, 2019, as part of Council’s investigation, a Review Committee comprised of Council members met with the Licensee respecting allegations that he recommended and attempted to facilitate an insurance investment for an elderly client (the “Complainant”), that was not in his best interest and brought into question the Licensee’s competency as a life and accident and sickness insurance agent (“Life Agent”). A copy of an investigation report prepared by Council staff was forwarded to the Licensee in advance of the meeting. A discussion of the report took place at the meeting and the Licensee was provided an opportunity to make further submissions. Having reviewed the investigation materials and after discussing this matter with the Licensee, the Review Committee prepared a report for Council.

The Review Committee’s report, along with the aforementioned investigation report, were reviewed by Council at its May 14, 2019 meeting where it was determined the matter should be disposed of in the manner set out below.

PROCESS

Pursuant to section 237 of the Act, Council must provide written notice to the Licensee of the action it intends to take under sections 231, 236, and 241.1 of the Act before taking any such action. The Licensee may then accept Council’s decision or request a formal hearing. This intended decision operates as written notice of the action Council intends to take against the Licensee.

FACTS

The Licensee resides in Alberta has been licensed with Council as a non-resident Life Agent since March 2016. He is also licenced with the Alberta Insurance Council and is authorized to represent the same multi-provincial agency (the “Agency”) in both British Columbia and Alberta. The Licensee is also the president of a Christian missionary organization.

The Complainant was 89 years old and residing in an assisted living facility in Langley, British Columbia, when he met the Licensee. He reportedly had mild issues with his memory and carried a memory card with his name and the facility’s contact information. He did not have any family in British Columbia. A nephew in the United Kingdom was his power of attorney and his appointed executor. The Complainant lived off his pension and the proceeds from the sale of his home which were used to pay for the facility’s approximate \$2,500 monthly fee via a pre-authorized bank account debit.

Prior to moving to the assisted living facility, the Complainant had been evicted from a previous residence of only two months. The landlord of that home was a friend of the Licensee’s and a licenced Life Agent himself (the “Landlord”). The Landlord advised Council’s investigator that the Complainant was a terrible tenant and demonstrated odd behaviors such as attempting to heat the house with the oven and stove. He also advised that, in his opinion, the Complainant was illiterate. Council staff asked if he thought the Complainant had dementia or other cognitive issues, to which he answered no. After the eviction, the Landlord stated he was visiting an insurance client of his at the assisted living facility when he saw the Complainant there. He stated he felt tricked because he thought the Complainant was poor and he knew the fees at the facility were between \$2,500 to \$3,500 a month. The Landlord advised that the Complainant once saw him while he was visiting his client and complained to the facility staff who then questioned him.

The Landlord further stated that, after the eviction, he changed the mailing address for many of the Complainant’s services and, whenever letters arrived for the Complainant, he would return them marked “moved” or “wrong address”. However, on August 7, 2017, during a visit from the Licensee, the Landlord asked the Licensee if he would take a letter he had received for the Complainant to the assisted living facility. The Landlord did not wish to drop the letter himself because of animosity from the eviction some months earlier. Given his stated practice of returning the mail, the Landlord had no explanation as to why a single letter needed to be hand-delivered. The letter was reportedly from a hearing-aid company.

On August 7, 2017, the Licensee went to the assisted living facility with the letter. He inquired at the front desk for the Complainant upon which staff pointed him out. The Licensee stated that he sensed the Complainant was lonely so he stayed to visit with him for a while. The

Licensee advised that the Complainant asked him what he did for a living and he replied he was a financial advisor. The Licensee stated he did not discuss investments or interest rates with the Complainant during that first meeting, nor did he attempt to solicit the Complainant's business. However, in contrast, the Complainant advised Council's investigator that the Licensee said he could get 5% higher interest than the banks. The Licensee stated that the Complainant expressed concern about having enough money to pay for the assisted living facility and that he wished someone would help him with his finances. The Licensee offered a free consultation for the next time he was in British Columbia and left his business card. When he returned home to Alberta, he received a call from the Complainant asking to see him.

On August 28 or 29, 2017, the Complainant returned to the assisted living facility with his teenaged son to meet with the Complainant in his apartment to discuss finances and review his financial documentation. The Licensee did not draw up a financial plan because it was apparent to him that the Complainant had enough money to live out his years in the facility so, in his view, the rate of return did not really matter.

The Licensee advised that his son watched TV in a different room in the apartment while he met with the Complainant at the kitchen table. However, the facility's staff advised Council's investigator that the apartment was approximately 525-500 square feet and there was no separation between the kitchen and living room. As such, the son would have been able to hear their conversation.

During their meeting, the Complainant told the Licensee he was earning little or no interest. After discussion, the Complainant agreed to invest \$600,000, almost all his money, into a segregated fund with the Licensee. The Licensee advised that the Complainant had the option of choosing a commission between 0% to 5% and that the Complainant elected 5% himself. The Licensee advised he believed the Complainant did so because he liked and trusted the Licensee. The commission itself was front-loaded.

Upon questioning as to why he would recommend a risk-based investment to an 89 year old, the Licensee advised he did so because the Complainant told him he wanted his money to earn more interest. The Licensee explained that the segregated fund had guarantees and would bypass probate. He also explained that the investment was recommended by the fund's representative. However, in contrast, the fund's manager of dealer services advised Council's investigator that the responsibility to make a specific recommendation for a particular customer remains fully with the advisor. Council's investigator also spoke to the Licensee's manager who advised that he worked with the Licensee to choose the particular segregated fund. He felt the fund was appropriate for the Complainant despite the large front-loaded commission, the Complainant's advanced age, the lack of close relatives and the

Complainant's primary concern with having enough money to pay the assisted living facility's monthly fee.

The Complainant reportedly had money in three different bank accounts. The Licensee advised him to amalgamate the accounts into one to more easily facilitate the payment to the Agency. To enable the amalgamation, the Licensee drove the Complainant to various banks while the son stayed alone in the Licensee's apartment. Before they left, the Complainant moved his financial documentation to the bedroom and closed the door. The Licensee then assisted the Complainant to transfer his money to one account at a major Canadian chartered bank (the "Bank") and two payments totaling \$600,000, payable to the Agency in trust, were set up for the purchase of the segregated fund. The amalgamation left no money in the account from which his monthly assisted living facility fee was debited.

While at the Bank, a teller and a manager began to question the transactions and the nature of the relationship between the Licensee and the Complainant and eventually asked the Licensee to leave. The Licensee advised he was very upset with how the Bank manager treated him and so he made a complaint to the Bank via his Agency. He stated that the Bank manager then telephoned him to apologize for the "mix-up", for the way he was treated, for not processing the requested transaction, and for asking him to leave. However, in contrast, Council's investigator spoke to the manager who advised that when tellers are not comfortable with a situation, they are to involve management. He reported the teller in this incident observed the Complainant was confused, not able to respond to her questions, and kept asking the Licensee how he should respond. The teller called the manager and, as per further procedures, he asked to speak with the Complainant alone. The manager advised Council's investigator that, as his particular branch is close to several care facilities, they have many elderly customers and that, in his experience, it was clear the Complainant had dementia. The manager advised that, after his conversation with the Complainant, the Licensee said he was offended by the insinuation he was a criminal. The manager apologized at that time and explained he was only following procedures. The manager also confirmed he was subsequently contacted by a Bank vice president to discuss the situation. The manager advised he understood the Licensee had complained to an Agency manager who then escalated the complaint to the Bank. The manager advised that, as a result, he emailed the Licensee apologizing for offending him and "primarily for making [the Licensee] feel like a criminal". He advised, however, he did not apologize for following bank procedures.

After leaving the Bank, the Licensee drove the Complainant back to the assisted living facility to fill out forms and applications. At this point, the Complainant was hesitant to sign due to his conversation with the Bank manager. The Licensee began to pack up and told him he was going back to Alberta at which point the Complainant agreed to sign the forms.

On August 30 and 31, 2017, the Licensee emailed the Complainant's power of attorney, the nephew in the United Kingdom. He advised the nephew he was a missionary and president of a Christian ministry and was assisting the Complainant with an investment and choice of beneficiary. He did not, however, advise the nephew he was a Life Agent representing the Agency, nor did he send the email from a business address. Rather, the emails were sent from the Licensee's personal email account.

On September 1, 2017, the Complainant contacted the RCMP to advise he believed he had been defrauded. The RCMP intervened and arranged with the Bank to freeze the Complainant's account to prevent any funds from transferring to the Agency. The RCMP Constable advised Council's investigator that the Licensee contacted the Complainant to have him lift the freeze so the transfers totalling \$600,000 could go through. The Constable advised that when the Complainant refused, the Licensee began sending invoices of \$3,000 for his services, which the Licensee denies. The Constable also advised that he believed the Complainant had issues with his memory.

The investment was ultimately not transacted and no financial harm was suffered by the Complainant. He passed away in May, 2018.

LEGAL FRAMEWORK

Council Rule 7(8)

A licensee must comply with the Council's Code of Conduct, as amended from time to time.

Code of Conduct

Section 3. Trustworthiness

3.2 Requirement

You must be trustworthy, conducting all professional activities with integrity, reliability and honesty. The principle of trustworthiness extends beyond insurance business activities. Your conduct in other areas may reflect on your trustworthiness and call into question your suitability to hold an insurance licence.

Section 4. Good Faith

4.2 Requirement

You must carry on the business of insurance in good faith. Good faith is honesty and decency of purpose and a sincere intention on your part to act in a manner which is consistent with your client's or principal's best interests, remaining faithful to your duties and obligations as an

insurance licensee. You also owe a duty of good faith to insurers, insureds, fellow licensees, regulatory bodies and the public.

Section 5. Competence

5.2 Requirement

You must conduct all insurance activities in a competent manner. Competent conduct is characterized by the application of knowledge and skill in a manner consistent with the usual practice of the business of insurance in the circumstances.

You must continue your education in insurance to remain current in your skills and knowledge.

Section 7. Usual Practice: Dealing with Clients

7.2 Requirement

When dealing with clients you must:

- protect clients' interests and privacy;*
- evaluate clients' needs;*
- disclose all material information; and*
- act with integrity, competence and the utmost good faith.*

7.3 Guidelines

Conflict of Interest

A conflict of interest exists when your loyalty to, or representation of, a client or insurance company could be materially or adversely affected by your interest or duty to another party. A conflict of interest may be real, potential or apparent.

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ANALYSIS

In considering this matter, Council held that, on a balance of probabilities, the evidence shows the Licensee attempted to take advantage of an elderly, unsophisticated client who put his complete trust and faith in him.

Council does not accept the Licensee's submission that his intention of initially visiting the assisted living facility was to deliver the Complaint's mail. Rather, the Committee finds the Licensee attended for the sole purpose of soliciting insurance business from the Complainant.

Council finds the Licensee should not have accepted the maximum commission of 5% from the Complainant and that, in doing so, he was in a conflict of interest because, given the Complainant's age, it was unlikely the money would be recovered in the Complainant's lifetime through the investment. As a result, the commission essentially amounted to a gift to the Licensee. The existence of a conflict of interest is also supported by the fact the Licensee took advantage of the Complainant's inexperience, lack of sophistication, advanced age, and mild cognitive impairment.

Council finds the Licensee's recommendation of a segregated fund was inappropriate for the Complainant's age. The Licensee was not able to provide any corroborating evidence of a proper analysis or that he went through the projections of the investment for the Complainant. Council found the Licensee's explanation of why he thought the product was appropriate for the Complainant inadequate.

Council finds the Licensee's actions were self-serving and without regard for the consequences to a vulnerable client and that such conduct was egregious and offending to the usual practice of the business of insurance. Council was particularly troubled by the fact the Licensee did not identify himself to the Complainant's nephew and power of attorney as a Life Agent representing the Agency.

As a result, Council finds the Licensee breached Council Rule 7(8) and Council's Code of Conduct, particularly sections 3.2, 4.2, 5.2 and 7.2, which requires licensees to be trustworthy, carry on the business of insurance in good faith, conduct all insurance activities in a competent manner, and act in the usual practice of dealing with clients, specifically by protecting clients' interests and privacy, evaluating clients' needs, and acting with integrity, competence and the upmost good faith. Council also finds the Licensee was in a conflict of interest. As such, Council finds a sanction is warranted.

Council is not bound by precedent to follow the outcomes from prior decisions, but similar conduct should result in similar outcomes within a reasonable range depending on the particular facts of the case. Accordingly, Council reviewed the facts and disposition from three previous cases before Council involving similar situations:

1. In *Alan John Farey* (March 23, 2011), the licensee recommended a retired client (72 years old) of modest resources and limited income redeem a portion of a variable annuity contract to invest in an unregulated, risky, and inappropriate investment for a short period of time. Council found the licensee acted irresponsibly because, had he done due diligence on the investment, it would have been obvious to him the investment was not suitable for the client. This reflected on his competency, and his actions were also found to be somewhat self-serving since he stood to benefit financially from his actions. Council

cancelled the licensee's licence for two years, fined him \$10,000, assessed investigation costs of \$1,750 and hearing costs of \$2,979.35.

2. In *Roberta Merlin McIntosh* (November 21, 2012), the licensee solicited funds from her existing and former insurance and mutual fund clients for investment in an unregulated private equity investment company she worked for and subsequently went bankrupt. Due to the age (80s, 50s, and 60s) and financial status of the clients involved, the significant investments were clearly unsuitable, and resulted in serious financial harm to the clients. Council cancelled the licensee's licence for a period of five years and assessed her investigation costs of \$2,700.
3. In *James William Duke* (July 23, 2013), the licensee made inappropriate recommendations to a client, regarding investments in exempt market securities, in light of the client's age, risk tolerance, and financial profile. The licensee was an experienced insurance agent who knew, or ought to have known, the risk posed by the investment was too high for his client and he should not have recommended the investments. Council suspended the licensee's licence for a period of 12 months, required him to complete courses, required him to be supervised until such time as he completed one of the courses, and assessed Council's investigative costs of \$1,925.00.

INTENDED DECISION

Pursuant to sections 231, 236, and 241.1 of the Act, Council made an intended decision to:

1. suspend the Licensee's Life Agent licence for a period of two years from the date of Council's order;
2. impose a condition on the Licensee's Life Agent licence requiring the Licensee to be supervised by a qualified Life Agent, as approved by Council, for a period of two years of active licensing commencing on the conclusion of the above-noted suspension;
3. assess Council's investigative costs of \$2,812.50 against the Licensee;
4. impose a condition on the Licensee's Life Agent licence requiring him to complete an ethics course and a course in elder planning, as approved by Council; and
5. impose a condition on the Licensee's Life Agent licence that requires him to fully pay the investigative costs and complete the above-ordered courses within 90 days of Council's order. If the investigative costs remain unpaid or the courses remain incomplete by the end of the Licensee's suspension, the Licensee's Life Agent licence will automatically remain

suspended and his annual filing will not be processed by Council until such time as the investigative costs are paid in full and the courses are completed.

RIGHT TO A HEARING

If the Licensee wishes to dispute Council's findings or its intended decision, the Licensee may have legal representation and present a case at a hearing before Council. Pursuant to section 237(3) of the Act, to require Council to hold a hearing, the Licensee must give notice to Council by delivering to its office written notice of this intention within fourteen (14) days of receiving this intended decision. A hearing will then be scheduled for a date within a reasonable period of time from receipt of the notice. Please direct written notice to the attention of the Executive Director. If the Licensee does not request a hearing within fourteen (14) days of receiving this intended decision, the intended decision of Council will take effect.

Even if this decision is accepted by the Licensee, pursuant to section 242(3) of the Act, the Financial Institutions Commission still has a right to appeal this decision of Council to the Financial Services Tribunal ("FST"). The Financial Institutions Commission has 30 days to file a Notice of Appeal, once Council's decision takes effect. For more information respecting appeals to the FST, please visit their website at fst.gov.bc.ca or contact them directly at:

Financial Services Tribunal
PO Box 9425 Stn Prov Govt
Victoria, British Columbia, V8W 9V1
Reception: 250-387-3464, Fax: 250-356-9923
Email: financialservicestribunal@gov.bc.ca

Dated in Vancouver, British Columbia, on the **21st day of June, 2019**.

For the Insurance Council of British Columbia



Janet Sinclair
Executive Director
604-695-2001

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