**DECISION**

**of the**

**LIFE INSURANCE COUNCIL OF MANITOBA**

**(“Council”)**

**Respecting**

**WILLIAM MACKAY**

**(“Licensee”)**

## INTRODUCTION

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

In response to a complaint received by Council, concerning the Licensee, an investigation was conducted pursuant to sections 113(3), 375(1) and 396.1(7)(e) of the *Act*, and section 7(2)(e) of *Regulation 227/91.* The purpose of the investigation was to determine whether the Licensee had violated the *Act,* its *Regulations,* and/or the Life Insurance and Accident and Sickness Agent’s Code of Conduct (“*Code of Conduct”*). During the investigation the Licensee was given an opportunity to make submissions with respect to Council’s concerns. By its Intended Decision dated November 18, 2015, Council determined, on a preliminary basis, that the Licensee had committed the following violations:

As to the *Act*:

Section 113(1)(c) – Misrepresentation by omission

Section 113(1)(d) – Making false or misleading statements

Section 113(2) – Prohibition on unfair or deceptive act or practice

Section 375(1)(a) – Misrepresentation

Section 375(1)(b) – Has violated any provision, rule or regulation of the *Act*.

As to the *Code*:

Sections 1 and 2 – selling the Complainant a product not suited to his (or his corporation’s interests and/or needs)

Section 4 – Providing misleading advice to the Complainant

Section 7 – General Information Disclosure and Documentation

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Accordingly, based on the foregoing and also pursuant to sections 375(1.1)(a),(c) and (d) of the *Act* and sections 7(1), 7(2)(c) and 7(3), of *Regulation 227/91,* Council's Intended Decision contemplated an Order that:

1. The Licensee be fined $10,000.00 and assessed investigation costs of $2,000.00.

2. The Licensee's Life and Accident and Sickness insurance agent licences be suspended for a period of ninety (90) days.

The Licensee subsequently exercised his right to dispute Council's Intended Decision and to request a hearing before Council. The hearing commenced on April 27, 2016. At that time the Licensee through his legal counsel submitted extensive written materials. The hearing was accordingly adjourned to afford Council the opportunity to carefully review the materials submitted by the Licensee. The hearing resumed and concluded on July 6, 2016.

**ISSUE**

Has the Licensee provided sufficient particulars, whether through evidence or argument, to show why the Intended Decision should not be implemented, either in relation to any of the violations which were determined on a preliminary basis to have occurred, or with respect to the contemplated Order?

**BACKGROUND**

At all material times, the Complainant was single and without dependents. He did not need nor did he think he needed life insurance for its normal and primary intended purpose. The Complainant controlled a private corporation which owned several real estate properties. Though the mortgage debt against these properties was collectively not insignificant, the Complainant's corporation possessed significant equity in those properties. Despite this, the Complainant was comparatively cash poor. Certainly neither he nor his corporation had anything near $250,000.00 in cash at any time which is pertinent to this matter. There is no dispute that access to funds was deemed by the Complainant and known by the Licensee to be crucial for the Complainant's business.

In later 2011, the Complainant was introduced to the Licensee which led to several meetings and conversations between them. Ultimately, on May 18, 2012, the Licensee acted for the Complainant in the completion and submission of a universal life insurance application (the "Application") for a personally owned BMO Maximizer Elite Policy (the "Policy") with a planned annual premium of $250,000.00.

As envisioned by the Licensee and as represented to the Complainant:

a. The Complainant would borrow against the equity in the properties owned by the Complainant's corporation;

b. That money could be placed within the Policy; and

c. The Policy contained a feature (Fund Value Guarantee – FVG) which permitted immediate borrowing of up to eighty percent (80%) of the account value of the Policy.

So, to ensure that the Complainant (or his corporation) had access to funds when needed, the scheme contemplated the Complainant borrowing money to fund the Policy so he could borrow from that Policy. Though it was never explained in detail in any of the communications between the Complainant and the Licensee, the scheme also contemplated the creation of a holding company in the name of which the Policy would ultimately be owned. It was absolutely fundamental that the Complainant be permitted to borrow as and when necessary, up to eighty percent (80%) of the account value within the Policy. There was no other utility or purpose for the Complainant to have this (or any) Policy, at least in the shorter term.

It is undisputed that at the time first proposed by the Licensee (later 2011 or early 2012), at the time of the Application (May, 2012) and at the time the Policy was settled (September, 2012), the FVG did not exist as described by the Licensee to the Complainant.

There is no doubt that the Policy was unsuitable for the Complainant. This was acknowledged by the Licensee at the hearing of July 6, 2016. It was acknowledged that a product which was "half-baked" – or not fully-formed – should not have been recommended, pursued or settled. It follows that the advice given by the Licensee to the Complainant was incorrect, improper and misleading. Thus, the essential findings as to conduct outlined in the Intended Decision remain unchanged.

At the hearing, the Licensee testified. He responded to the best of his ability to questions asked by or on behalf of Council. His legal counsel also made representations, in addition to those in the written brief which had been filed.

The Complainant had denied knowing there was any uncertainty about the existence of the FVG feature in the Policy. The objective evidence available tended to confirm that the Licensee was unaware at the time of the Application that the FVG would be unavailable, learned of this in or about July 2012, and failed to inform the Complainant of

this before the Policy was settled in September 2012. An email of the Licensee's of July 20, 2012 stated:

> ... Please pass on to… that I require 2/3 more weeks to finalize… refinancing of his company. He does want to move ahead but in the absence of the fund value guarantee we have to create a different funding solution. We are working on it. Need a little more time.

There is no email or other written communication thereafter (or before) to the Complainant about this problem. The Policy should not have been settled in the circumstances. The Licensee should have advised the Complainant in writing of this problem.

The Licensee testified at the hearing or submitted through his counsel that:

1. The Licensee never thought the Policy had the FVG feature, it was a new product, not yet fully formed, and he had been told and believed that this feature would be available in the reasonably foreseeable future.

2. He advised the Complainant of this fact.

3. At the time he was dealing with the Complainant, the Licensee was dealing with several other clients and the Maximizer Elite product was discussed with them and those clients affirm that the Licensee told them that there was uncertainty about the FVG term and told them that the product was not yet fully formed and fully defined.

4. The Complainant had sold or was about to dispose of a farm property and the net proceeds of that would be put against the Policy, which would have yielded tax sheltered growth for the Complainant.

5. The Complainant was more sophisticated than is suggested in his complaint and he had access to more cash than he suggested in his financial disclosure to the Licensee.

6. The Licensee cannot explain the meaning of the July 20, 2012 email quoted above, given that he always knew there was uncertainty about the FVG benefit. (A charitable interpretation might be that though he had been uncertain about it before then, he had just learned it would not be available.)

7. The Complainant was experiencing significant asset growth over time. (Council pointed out that asset growth and the ready availability of funds are two distinct things.)

8. After the hearing, in response to a request of Council for confirmation of the notion that the Complainant had told the Licensee he expected soon to be coming into

some cash, counsel for the Licensee on July 7, 2016 sent Council a letter which states:

> We write further to the request by the Insurance Council of Manitoba that we advise as to the listing and sale price of certain farm land owned by [the Complainant].
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> [The Complainant] purchased the farm and related real property in 1997 for $735,000.00. We attach a property listing for the farm in question printed in or around March, 2010 showing a listing price of $3,390,000.00. We also attach the Transfer for the SE ¼ of that property which shows that it was sold by [the Complainant] and his brother on or about December 30, 2013 for the sum of $335,000.00. This is consistent with the information [the Complainant] told our client.

This (the proceeds may have been taxable, would have had associated costs and were to be shared between the Complainant and his brother) means that the Complainant would have received less than the $250,000.00 suggested on the Licensee's behalf at the hearing and less than the required minimum loan amount of $500,000.00 once the FVG was approved in 2013 for use on another type of policy.

In the course of the hearing it was acknowledged by the Licensee that:

a. his internal procedures at the material times had been deficient;

b. his procedures had since then been improved, relying on expert advice received;

c. there were many communications which he should have confirmed in writing and/or in notes to his file;

d. he should not have handled as he did his request for a release from the Complainant; and

e. he should have ensured better and more effective collaboration with Complainant's tax advisor and should have been sure that the Policy was in the name of the contemplated holding corporation which though intended appears never to have been created.

Council is aware that it is not uncommon for announced new products not to come to fruition. It is also not unusual for a client to not fully understand or recall matters communicated to him or her by a Licensee. That is why communications should be confirmed in writing; and that is why a Policy should not be settled if it does not have and especially is known not to have the chief intended or desired benefit.

The primary concern of Council is the protection of the public. Though essential findings described in the Intended Decision were confirmed through the show cause hearing of July 6, 2016, the Licensee has acknowledged his errors and poor practices and assured Council that the former will not occur again and that the latter have been reformed. What appeared to be a deliberate and calculated effort to obtain a commission on the sale of a Life Insurance Policy, might be more properly or fairly characterized as the result of confusion, misunderstanding and incompetence. What on its face was a fraudulent misrepresentation (the failure to communicate to the Complainant that the promised benefit was unavailable after discovering this fact) was merely a misunderstanding based on poor communication resulting in misrepresentation to the Complainant.

For these reasons, Council has determined that consumer protection does not require that the Licensee's licences be suspended as had been determined in the Intended Decision. Given the seriousness of the Licensee's errors, however, the fine of $10,000.00 and the costs of $2,000.00 are well and truly justified.

**DECISION AND ORDER**

Council concluded that the following violations have occurred:

As to the *Act*:

Section 113(1)(c) – Misrepresentation by omission

Section 113(1)(d) – Making false or misleading statements

Section 113(2) – Prohibition on unfair or deceptive act or practice

Section 375(1)(a) – Misrepresentation

Section 375(1)(b) – Has violated any provision, rule or regulation of the *Act*.

Section 375(1)(e) – Incompetence

As to the *Code*:

Sections 1 and 2 – selling the Complainant a product not suited to his (or his corporation's interests and/or needs)

Section 4 – Providing misleading advice to the Complainant

Section 7 – General Information Disclosure and Documentation

## PENALTY AND FINAL DECISION

Having regard to the determination of the violations aforesaid, and pursuant to sections 375(1.1)(c) and (d) of the *Act,* the following penalty is imposed upon the Licensee, namely:

1. The Licensee is hereby fined $10,000.00.

2. The Licensee is hereby assessed investigation costs of $2,000.00.

As part of its Decision, Council further informed the Licensee of his right to request an Appeal to dispute Council's determinations and its penalty/sanction. The Licensee expressly declined his right and chose not to pursue a statutory Appeal; he instead expressly accepted the terms of the Decision and duly paid the levied fine and investigation costs.

This Decision is therefore final. In accordance with Council's determination that publication of its decisions are in the public interest, this will occur, in accordance with sections 7.1(1) and (2) of *Regulation 227/91*.

Dated in Winnipeg, Manitoba on August 8, 2016.