

IN THE MATTER OF THE *FINANCIAL INSTITUTIONS ACT*
(RSBC 1996, c. 141)
(the “Act”)

and the

INSURANCE COUNCIL OF BRITISH COLUMBIA
 (“Council”)

and

BARBARA ANN NASH
(the “Licensee”)

ORDER

Pursuant to section 237 of the Act, Council convened a hearing at the request of the Licensee to dispute an intended decision of Council dated August 14, 2019.

The subject of the hearing was set out in an Amended Notice of Hearing dated May 28, 2020.

A Hearing Committee heard the matter on June 24, 2020 and presented a Report of the Hearing Committee to Council at its September 22, 2020 meeting.

Council considered the Report of the Hearing Committee and made the following order pursuant to sections 231, 236 and 241.1 of the Act:

1. A condition is imposed on the Licensee’s life and accident and sickness insurance (“Life Agent”) licence that requires her to complete all of the following courses:
 - a) Advocis Module 911 (Financial Planning Profession & Financial Services Industry Regulation);
 - b) Advocis Module 912 (Financial Analysis);
 - c) the Council Rules Course, available through Advocis; and
 - d) a course in elder planning, as approved by Council (collectively “the Courses”);
2. A condition is imposed on the Licensee’s Life Agent licence that requires her to be supervised for a period of twenty-four months of active licensing by a qualified Life Agent supervisor, as approved by Council, commencing on or before January 8, 2021;

3. A condition is imposed on the Licensee's Life Agent licence that failure to successfully complete the Courses by December 6, 2021 will result in the suspension of her licence and she will not be permitted to complete her 2022 annual filing until such time as she has successfully completed the Courses;
4. The Licensee is fined \$2,500;
5. A condition is imposed on the Licensee's Life Agent licence that requires her to pay the fine in five equal monthly installments of \$500 with the first monthly installment due January 1, 2021 and the remaining monthly installments due on the first of each month thereafter (the "Payment Schedule") and that failure to pay as per the Payment Schedule will result in the suspension of her licence and she will not be permitted to complete her 2021 annual filing until such time as she has fully paid the fine; and
6. Council consider whether to impose investigative and hearing costs on the Licensee, in an amount to be determined, after receipt and review of submissions from both the Licensee and Council on costs to be completed by October 31, 2020, on a schedule determined by Council staff.

At its November 24, 2020 meeting, Council considered the matter of investigative and hearing costs and made the following order pursuant to sections 231, 236 and 241.1 of the Act:

1. The Licensee is assessed Council's investigative costs of \$2,887.50;
2. The Licensee is assessed \$7,457.74 of Council's hearing costs; and
3. A condition is imposed on the Licensee's Life Agent licence that requires her to pay the investigative and hearing costs in monthly installments of \$500 with the first monthly installment due June 1, 2021 and the remaining monthly installments due on the first of each month thereafter (the "Costs Payment Schedule") and that failure to pay as per the Costs Payment Schedule will result in the suspension of her licence and she will not be permitted to complete her 2022 or 2023 annual filing, as the case may be, until such time as she has fully paid the investigative and hearing costs.

A Note on Costs

The Report of the Hearing Committee recommended that Council and the Licensee attempt to come to an agreement as to the amount of investigative and hearing costs payable, and the terms of a payment schedule. The Hearing Committee was of the opinion that consideration

should be given to the fact that the Licensee is in the process of paying a significant debt to the complainant, and that Council should attempt to avoid costs terms that might prevent the Licensee from being able to continue meaningfully repaying the complainant.

The Licensee was given an opportunity to provide submissions concerning investigative and hearing costs. On October 9, 2020, a proposal was received from the Licensee in which she did not dispute the amount of costs as assessed by Council, but requested that she be allowed to pay the amount in monthly installments of \$500. Council considered the request reasonable in the circumstances.

As a self-funded regulatory body, Council looks to licensees who have engaged in misconduct to bear the costs of their disciplinary proceedings so the costs are not borne by other members of the industry in general, particularly when, as in this case, a licensee has been largely unsuccessful.

This order takes effect on the **4th day of December, 2020.**



Janet Sinclair, Executive Director
Insurance Council of British Columbia

INSURANCE COUNCIL OF BRITISH COLUMBIA
(“Council”)

REPORT OF THE HEARING COMMITTEE

IN THE MATTER OF THE *FINANCIAL INSTITUTIONS ACT*
(the “Act”)
(S.B.C. 1996, c. 141)

and

BARBARA ANN NASH
(the “Licensee”)

Date: June 24, 2020
9:30 a.m.

Before: Karl Krokosinski Chair
Claire Wang Member
Gurbinder Amar Member

Location: By video conference

Present: Thea Hoogstraten Counsel for Council
Benjamin Lorimer Counsel for the Licensee
Barbara Ann Nash In Person
Elizabeth J. Allan Counsel for the Hearing Committee

BACKGROUND AND ISSUES

On June 18, 2019, Council issued an intended decision, pursuant to sections 231 and 236 of the Act, to impose discipline against the Licensee with respect to allegations that she breached the requirements of Council Rules and Code of Conduct by failing to identify a conflict of interest with a client and failing to act in the client’s best interest.

In accordance with the Act, on August 14, 2019, Council provided the Licensee with written reasons and notice of its intended decision. On August 20, 2019, the Licensee requested a hearing before Council to dispute the intended decision, as provided for in section 237(3) of the Act.

As set out in the Amended Notice of Hearing, the purpose of the Hearing was to determine whether the Licensee:

1. breached the requirements of the Act, Council Rules and Council's Code of Conduct and acted in a conflict of interest with a client by entering into a loan agreement with the client and facilitating the redemption of the client's investment funds in order to lend the Licensee money;
2. is able to carry on the business of insurance in good faith, in a trustworthy and competent manner, and in accordance with the usual practice, as required under Council Rule 7(8) and pursuant to section 231(1)(a) of the Act; and
3. should be subject to any disciplinary or other action in the circumstances; and if so, whether Council should do one or more of the following in accordance with sections 231, 236, or 241.1 of the Act:
 - (a) reprimand, suspend or cancel the Licensee's life and accident and sickness insurance agent ("Life Agent") licence;
 - (b) impose conditions on the Licensee's Life Agent licence;
 - (c) fine the Licensee an amount no more than \$10,000;
 - (d) require the Licensee to pay the cost of Council's investigation and/or this hearing;
 - (e) take any other measures that Council deems appropriate.

The hearing of this matter was originally set for April 16 and 17, 2020 but was adjourned due to the coronavirus pandemic. It was re-set to proceed by video conference on June 24 and 25, 2020 but due to an Agreed Statement of Facts and substantial admissions by the Licensee, discussed further below, was completed in one day on June 24, 2020.

The Hearing Committee was constituted pursuant to section 223(1) of the Act. This is the written report of the Hearing Committee prepared in accordance with section 223(4) of the Act.

EVIDENCE

Exhibits

The following exhibits were entered at the beginning of the hearing, by consent:

Exhibit 1 Agreed Statement of Facts

Exhibit 2 Council's Book of Documents

Exhibit 3 Licensee's Book of Documents

Council and the Licensee each also provided written submissions and a Book of Authorities.

Witnesses

Council called one witness, the Licensee's former client (the "Complainant"). The Licensee also testified on her own behalf.

Facts

The facts of this matter are set out in Exhibit 1 and the testimony of the witnesses. As there was little dispute about the central facts, the witnesses' respective evidence is not separated but is summarized together with the evidence from Exhibit 1, below. In the view of the Hearing Committee, the only point of note where the evidence from the witnesses diverged is whether the Licensee paid the Complainant a sum of money equivalent to a deferral charge.

The Licensee has been licensed as a life and accident sickness insurance agent in British Columbia since 2004. She was also licensed in Alberta from July 2016 until her licence was terminated in April 2018. The Licensee's Alberta Insurance Council licence was renewed in December 2018 and is currently active.

The Licensee and the Complainant met at a recreation centre in approximately 2010, possibly as early as 2007, and she became his insurance agent. They also developed a friendship. The Complainant and the Licensee both gave evidence that they went out for coffee and dinner occasionally, went for a ride on his motorcycle on at least one occasion and visited each other's homes sporadically. From time to time they would discuss purchasing property together and possibly "flipping it" for a profit. The Complainant, who was 63 at the time of the hearing, retired in approximately 2012 [REDACTED]. He testified that he relies primarily on a pension for income, supplemented by his investments, and that he is not sophisticated when it comes to financial knowledge. His financial goals were to maintain a reliable steady income and have some money to leave for his three children when he passed. He relied upon the Licensee for financial advice and to achieve those goals.

In early 2018, the Complainant complained to [REDACTED] and, subsequently, Council, regarding the financial consequences of a loan he provided to the Licensee for her to make a down payment on a home. The circumstances which led to that complaint

were that when the Complainant offered to loan the Licensee money, the Licensee recommended that he redeem \$78,507.17 from his [REDACTED] non-registered and TFSA segregated funds accounts (the "Redemption") in order to provide the funds to her. He accepted this advice and made the Redemption on September 17, 2017. The Redemption incurred a redemption charge of \$1,387.72, leaving a net redemption amount of \$77,119.45. The Licensee did not realize that the redemption charge would be incurred and therefore did not advise the Complainant about it. Of those funds from the Redemption, the Complainant contributed \$77,000 to the down payment and the Licensee contributed \$37,600. The \$77,000 was approximately 1/3 of the value of the Complainant's investments.

The Licensee's purchase of her home closed on September 27, 2017. She added the Complainant to title. The Complainant gave evidence that he did not understand that he was put on title to the property. He stated that the Licensee did not advise him about putting him on title or the consequences to him as a result of doing so (e.g. what happened if she stopped paying the mortgage, property taxes, etc.) and he discovered this is what had happened only when he received notice about property taxes.

On or about October 6, 2017, the Licensee obtained a \$500,000 Life Term 20 insurance policy naming the Complainant as a 50% beneficiary (revocable) and a disability income insurance policy providing an income of \$1,000 per month.

On October 9, 2017, the Licensee and the Complainant entered into a loan agreement. The Licensee prepared the loan agreement based on generic loan agreements which she found on the internet. Some of the terms of the loan agreement that the Licensee prepared were as follows:

5. *If the Borrower defaults in payment as required under this Agreement or after demand for six (6) months, the Security will immediately be sold and the proceeds used to pay the amount of the balance owing as a secured party.*
6. *Upon the death of Barbara Nash, the house will be sold and proceeds of the house will be paid to the estate of Barbara Nash.*
- ...
8. *Upon the death of [the Complainant], any remaining loan proceeds will be payable to his estate. The property stated above is not part of this loan agreement and does not fall under [the Complainant]'s estate in any way.*
9. *Upon loan repayment, [the Complainant] will be removed from title and all accompanying documentation and mortgage regarding the property.*

(the "Agreement")

The day after the Complainant entered into the Agreement, he inquired about obtaining legal advice. The Licensee informed the Complainant that she was not willing to pay for him to seek independent legal advice about the Agreement, and the Complainant never sought legal advice about the Agreement.

Commencing on October 10, 2017, the Licensee began making payments of the principal plus interest under the Agreement. The Licensee's last payment to the Complainant prior to the hearing was on May 1, 2020 in the amount of \$500, leaving an outstanding balance of \$65,224.14. To date, the Licensee had never missed a payment nor made a late payment. She stated that continuing to make payments to the Complainant under the Agreement was her number one priority.

As the weeks and months passed, the Complainant had questions about his arrangement with the Licensee and they engaged in email communication about the issue. The Licensee gave evidence that there were many more email communications and text messages than what was produced but gave no explanation as to why she did not produce them. The emails which were produced in Exhibit 1 read, in part, as follows:

[From the Complainant]

I have to tell you that I have been quite disturbed about this \$77,000 as I am wondering that your payment every month which covers loss of payment from my investment will be gone once you finish paying out your balance owing. Will you please explain this. I know your[sic] in the middle of RRSP season but I'm also as a client I'm looking for clarification.

This is unsettling for me and I remember comments made by yourself which are for me a bit unsettling. Please respond via e-mail as nerves sometimes get the better of me, thank you Barb.

The Licensee responded to her client, as follows:

I have explained this over and over and over again. It seems like nomatter[sic] how many times I review this with you, inevitably you will email me 2 - 3 weeks later and complaint about something. I can't even begin to the level [sic] frustration I am feeling right now.

And the fact that you are pestering me a second time at the busiest, most stressful time of year for me, even after I have told you I can't deal with this right now, shows a complete lack of respect or regard on your part and an appalling level of self absorbed narcissism.

If your goal is to back out of this deal then say so now and I will start tracking down another source of funds, pay you out and have you removed from the

title. I have always dealt with you fairly and honestly. I'm paying you a ridiculously high interest rate on this loan (twice the prime rate), you're making tax free income, you'll be paying less in income tax from investments, you've already received an extra payment, you'll be paid off in 2 – 3 years with lots of money to put back into your investments and you continue to complain. I'm not going through this for [sic] another 2 – 3 years. You are pushing me to my limit [Complainant] and you need to stop before you do irreparable damage to our friendship. Now go back and read the email I sent you on Jan 9th where I spelled this all out for you [sic] because I am not having this conversation again.

...

How dare you try to play the victim!!! I have made you over \$75,000 since taking you on as a client. I have given you exceptional service as an [sic] advisor and for you to denigrate that in a temper tantrum because I won't tolerate your self-centered narcissism regarding this house deal is an affront!!! You have badgered me constantly since buying this house and I have answered and explained things over and over again and yet you continue to badger me.

You have shown an appalling disregard for me. You seem incapable of respecting that I am swamped with work and you're too self-absorbed to realize that the world DOES NOT revolve around YOU. MY WORLD DOES NOT REVOLVE AROUND YOU!!! This house deal does not give you the right to badger, pester or constantly annoy me and your neurotic whim!! Given that I'm not the first to call out your narcissism, perhaps you should take a look at your own behaviour and see that it is unacceptable to most people with a modicum of regard for others.

...And for you to try to guilt me into dealing with your neurotic, asinine badgering by saying I'm neglecting you as a client over something that has nothing to do with your investments is the height of manipulation on your part. HOW DARE YOU TRY TO MANIPULATE AND BULLY ME!!!!

So feel free to move your investments elsewhere. Good luck finding someone to make you as much money as I have and put up with your bullshit. I will start the search for alternative finding to buy you out and be done with this.

...

You are no longer my client. Find someone else to deal with you and have them start the process of transferring your accounts The [sic] only contact between us will be my emailing of payments in accordance with the contract and nothing more. I see that you have come to my house uninvited. Please be advised that you are not to come to my home without my express permission

and any further emails, phone calls, texts or appearances at my home will be considered harassment/stalking and will result in legal action.

After receiving these emails, the Complainant complained to [REDACTED]. [REDACTED] terminated the Licensee's contract in April 2018 and offered to refund the Complainant the charges incurred due to the Redemption. Following the cancellation of her licence by [REDACTED], the Licensee engaged legal counsel and instructed him to send a demand letter to the Complainant about his complaint to [REDACTED], stating the following:

...you impugned Ms. Nash's professionalism and integrity without any basis for such accusations.

...

In our opinion, the above-referenced letter is defamatory...Beside the letter, we are advised that you may have made further defamatory publications or spoke with persons alleging the same sort of defamatory content...We will be seeking instructions to investigate this. We have also advised our client that she has a right of action against you in the Supreme Court of British Columbia and advised her of the scope of remedies available to her.

Your statements...have caused her both personal, emotional and economic damage. You are responsible in law for these damages, and we will be seeking instructions from our client to recover those damages from you. To date, Ms. Nash has suffered in excess of \$10,000 in economic losses as a direct result of your actions and those losses are accruing daily.

Your statements are contemptuous in their manipulation of Ms. Nash's business relations to further your own ulterior motives. We have advised Ms. Nash that such actions also constitute tortious interference with economic relations and that she has a cause of action against you in that respect as well.

We hereby demand that you immediately provide a copy of this letter to our client forthwith by mailing or delivering the writer a true copy of the letter sent to [REDACTED]. If litigation is commenced, our client will seek full reimbursement from you with respect to all of her legal costs.

You should be under no doubt as to the high seriousness of the matter. We have warned you of our client's serious intention to protect her good name and professional reputation.

Conduct yourself accordingly.

The Complainant sought legal advice as a result of this letter, at a cost of \$2,500 to him, and later complained to Council. The Licensee took no further legal steps against him after sending this letter.

Due to the capital gains incurred as a result of the Redemption the Complainant paid more than \$2,000 in income tax in 2017, in addition to the \$1,387.72 in deferred sales charges. The Complainant also gave evidence about other financial consequences as a result of the loan to the Licensee and being on title to her home, including being unable to co-sign on a vehicle for one of his children. In cross-examination, the Complainant confirmed that [REDACTED] did eventually reimburse him for the deferred sales charges.

The Licensee has no previously disciplinary history with her regulatory bodies in either British Columbia or Alberta.

SUBMISSIONS OF COUNCIL

Council prepared written submissions which detailed certain facts of this matter, the legal test to be applied by the Hearing Committee and applied the facts to the law. In terms of the applicable principles to guide the Hearing Committee in recommending any penalty, Council provided the leading passage from Professor Casey's text *Regulation of the Professions in Canada* which states:

A number of factors are taken into account in determining how the public might best be protected, including specific deterrence of the member from engaging in further misconduct, general deterrence of other members of the profession, rehabilitation of the offender, punishment of the offender, isolation of the offender, denunciation by society of the conduct, the need to maintain the public's confidence in the integrity of the profession's ability to properly supervise the conduct of its members, and ensuring that the penalty imposed is not disparate with penalties imposed in other cases.

Council also supplied the three factors to be considered in sentencing elucidated in *Financial Services Commission v. The Insurance Council of British Columbia and Maria Pavicic*: (1) the need to promote specific and general deterrence, and, thereby protect the public; (2) the need to maintain the public's confidence in the integrity of the...profession; and (3) the range of sentencing in other similar cases.

In terms of the seriousness of the misconduct, Council pointed to the case of *Financial Institutions Commission v. The Insurance Council of BC et al*, Decision No. 2017-FIA-002(a) – 008(a) which states:

Trust in the licensee lies at the foundation of the grant of the licence. Repeated conduct that calls into question the trustworthiness of a licensee can only reasonably be addressed by a regulator taking action on the licence. Subject only to mitigating factors evidence in the record before the Council at the time

of the intended decision or after a hearing, it is only licensing action in the form of a suspension, cancellation or conditions (in addition to whatever other conditions the regulator may wish to attach) that can adequately protect the public, secure its confidence, achieve general deterrence and express the denunciation that such conduct warrants.

Council supplied seven previous cases which it submitted were instructive on penalty notwithstanding that the factual matrix was not identical. Each of the seven cases, *Braun, Moore, Simo, Kao, Parkin, Duke* and *McIntosh* were summarized in Council's submissions and the Hearing Committee will not repeat those summaries here but has reviewed each of these authorities. The penalties in those cases ranged from cancellation of the licensee's licence for five years and a \$10,000 fine in *Braun* and *Kao* on the more severe end of the penalty spectrum to supervision for a period of 24 months and remedial education in *Parkin* on the lighter end of the penalty spectrum. Council acknowledged that some of the precedent decisions concerned far more serious misconduct than the misconduct of the Licensee but it included those decisions as the discussion of the key principles could assist the Hearing Committee in assessing any penalty.

Council identified an aggravating factor in terms of penalty as the nature of the misconduct. It submitted that identifying and preventing a conflict of interest was a core responsibility as a licensee. In terms of mitigating factors, Council conceded that this was an isolated matter. Other possible mitigating factors to consider were whether there was a risk of harm to the public, whether the person has made rehabilitative efforts and whether an employer is aware of the matter and supports the person having a licence with Council.

SUBMISSIONS OF THE LICENSEE

The Licensee also prepared written submissions which outlined certain facts of this matter and authorities relied upon.

In oral submissions the Licensee agreed that the central facts were not in dispute with the exception that she paid the Complainant the equivalent of the deferred sales charges in cash in October 2017 and that the nature of the relationship was such that the Complainant was more than happy to provide her with the loan and she did not encourage him to do so. In fairness to the Complainant, it was not his evidence that he was pressured by the Licensee to provide her with the loan, his issues were that he did not understand the intricacies of what he was doing and the associated consequences. The Hearing Committee did not understand there to be a serious dispute about the

nature of the relationship between the Licensee and the Complainant, as they both agreed that it started as a professional relationship and they became friends such that they would spend time socially together but also discuss business. In the Hearing Committee's view, the exact details of how many times they met for dinner or coffee or the social activities that they engaged in were not material.

In terms of the authorities, the Licensee also relied upon *Pavicic* for the principles of sentencing and *Parkin*, where the licensee sold an unsuitable product and demonstrated a lack of understanding about the product, was subject to a period of 24 months' supervision. The Licensee brought Council's attention to the only authority that she was aware of where a licensee had borrowed money from a client. The Licensee submitted that that decision, *Kao*, was distinguishable on the basis that, among other things, the loan had been obtained under false pretenses and was never paid back. The Licensee also stated that *Braun* and *McIntosh* were distinguishable on their facts. The Licensee did not take issue with any of the other authorities relied upon by Council.

The Licensee agreed that her misconduct attracted discipline but pointed to the mitigating factors of her attempts to protect the Complainant by acquiring life and disability insurance to cover his returns on the loan and her strict adherence to repayment under the Agreement. She also relied on the fact that her conduct, while misconduct, was transparent and that the Complainant had experienced minimal losses. The Licensee sought a penalty similar to *Parkin*, i.e. a lengthy period of supervision and completion of remedial education. The Licensee submitted that the imposition of a fine went beyond the principles elucidated in *Pavicic*, and if the Hearing Committee recommended a fine it should be no more than \$1,000.

FINDINGS OF THE HEARING COMMITTEE

Although not expressly admitted to in the Agreed Statement of Facts, it became apparent in the Licensee's evidence that she now acknowledged that there was a conflict of interest by entering into the Agreement with her client that she did not appreciate at the material time. When expressly asked about this she agreed, although she still struggled somewhat to explain the nature of the conflict of interest.

In response to a question from the Hearing Committee, the Licensee also admitted to the other elements of the Amended Notice of Hearing and her counsel confirmed for the Hearing Committee that the Licensee was open to remedial education and supervision and the only dispute was whether there should be a fine and, if so, the amount of that fine.

As the parties agreed at the conclusion of the hearing that this was just a matter of a single aspect of a disciplinary penalty the Hearing Committee will not provide a comprehensive analysis of the applicable sections of the Act, Rules, Code of Conduct and Policies and Guidelines.

The Hearing Committee finds that the elements of the Amended Notice of Hearing were met and that the Licensee was in a conflict of interest and did not carry on the business of insurance in good faith, in a trustworthy and competent manner and in accordance with the usual practice.

In particular, the Hearing Committee has concerns about the Licensee's competence and carrying on in the usual practice. The Licensee freely admitted that she did not adequately explain the Redemption to the Complainant and the documentation was limited to a single piece of paper upon which there were haphazard calculations described by the Licensee as a "chaotic doodle". Not only did the Licensee not adequately explain the Redemption to the Complainant, the advice she gave surrounding the entire arrangement was at best misguided and at worst incorrect. It could have had catastrophic consequences for the Complainant in terms of capital gains tax, the effect on his income, the legal consequences of him being on title to the property, what would happen if the mortgage rules changed or one of the two of them died or the implications of making him a revocable beneficiary on an insurance policy.

The Licensee stated in direct evidence that in advance of accepting money from the Complainant she visited Council's website and reviewed the guidelines and determined that it was unacceptable to have an unsecured loan but that a secured loan was acceptable. She also stated that she viewed it more as a joint business venture than a loan but now accepted that it was a loan. Council noted that conflict of interest guidelines were available for the Licensee at the relevant time.

The Complainant was obviously confused about his arrangement with the Licensee and had a limited grasp of his potential financial risk. While the Hearing Committee accepts that the Complainant offered to loan the money to the Licensee absent any pressure from her, this is not something that the Licensee should have ever accepted, whether or not they were, at one time, friends. It also does not matter whose idea it was when it involved the Complainant cashing in investments for which the Licensee was responsible. The Complainant was a client first and he relied upon the Licensee for financial advice and trusted her in that position. There is an inherent power imbalance in this situation and it was the Licensee's obligation as the regulated professional to the Complainant's interests.

There were deficiencies in the Agreement that the Licensee prepared and it was concerning to the Hearing Committee that she had prepared it, and given the

Complainant advice about its enforceability and protections, based on internet searches that she had conducted. She was practicing far outside of her scope of business and capabilities in doing so.

The Hearing Committee is also very troubled by the language used by the Licensee and her treatment of the Complainant in her email communication. The Licensee explained her conduct, specifically the emails that she sent, by stating that her emotions were high and she had been in contact with the Complainant at 23 different points in time prior to sending those final emails and she had become frustrated. The Hearing Committee wants to make clear to the Licensee that no matter how many times a client contacts a licensee, there is no excuse to respond in the manner that she did. There were other ways of addressing the situation rather than resorting to the aggressive, disrespectful, inflammatory and highly personal language that she used, particularly if she had concerns that a client in his 60s did not adequately comprehend his investments and her advice. The Hearing Committee does not entirely accept the Licensee's explanation that she was sending those emails to a friend rather than a client, as she purports to terminate their professional relationship within those communications.

The Hearing Committee is also concerned that this situation was more than emails sent in an emotional state as the Licensee engaged legal counsel and instructed him to send a strongly worded demand letter to the Complainant alleging defamation, among other things, when she apparently had not even seen the letter that the Complainant sent to [REDACTED], as a copy of it was requested in that correspondence. The Licensee also maintained much of her position through her meeting with Council, which she also attributed to her being highly emotional and not properly reflecting on the situation.

The Hearing Committee did not find there to be any true aggravating factors in terms of penalty. The Licensee's misconduct was a breach of a fundamental principle but in the Hearing Committee's view this was reflective of a competency issue and was not an aggravating factor *per se*.

In terms of mitigating factors in assessing penalty, the Hearing Committee acknowledges that there are some. The Licensee's transparency on the situation is more properly a lack of aggravating factor than a mitigating one but the Hearing Committee recognizes she did attempt to put some protections in place for the Complainant, albeit she did not execute these protections in the best way.

In cross-examination, counsel for the Licensee suggested to the Complainant that the Licensee had paid him the equivalent of the deferred sales charges during a lunch that they had on October 30, 2017. The Complainant did not recall this. The Licensee gave further evidence in direct that after the lunch they walked to the credit union together

where she withdrew bills from the ATM and then broke one of them at a coffee shop to give him the exact amount owed. This appeared to be corroborated by the documentation submitted by the Licensee in Exhibit 3. The Hearing Committee finds that it is more likely than not that the Licensee repaid this amount to the Complainant. This is also a mitigating factor in terms of the global concept of penalty although not specifically in terms of a dollar for dollar reduction in the amount of any fine imposed, as a fine is punitive and does not flow through to the Complainant to his benefit.

The Hearing Committee accepts that the Licensee is not an ongoing risk to the public and this is also a mitigating factor. She exhibited poor judgment and incompetence with respect to this client but there is nothing to suggest that once she has completed the remedial education she has agreed to pursue that there is a risk that this will happen again.

There is no issue of progressive discipline as the Licensee gave evidence that she had no previous disciplinary history, and Council did not suggest otherwise.

RECOMMENDATIONS OF THE HEARING COMMITTEE

Penalty

In light of all of the evidence before it and in considering the factors identified by Professor Casey and in *Pavicic*, the Hearing Committee recommends the following penalty:

1. Imposing a condition on the Licensee's Life Agent licence that requires her to complete CFP 231 – Financial Planning Fundamentals, CFP 232 – Contemporary Practices in Financial Planning, CPF 233 – Comprehensive Practices in Risk and Retirement Planning, Council Rules course and a course in Elder Planning as acceptable to Council (the “Courses”);
2. Imposing a condition on the Licensee's Life Agent licence that requires her to be supervised by a qualified and Council-approved Life Agent for 24 months of active licensing, or successful completion of the Courses, whichever is longer;
3. Fining the Licensee \$2,500; and
4. Imposing on the Licensee a payment schedule for the fine.

The Hearing Committee is recommending that the Licensee complete additional courses to the ones identified by Council, namely, Council Rules Course and a course in

Elder Planning, as she has demonstrated that she lacks the skills and abilities to handle the affairs of clients who are retired or are at the age of retirement. The Hearing Committee felt that remedial education and supervision until the Licensee completes those courses or for a significant period of time is warranted due to the competency issues identified, as agreed to by the Licensee. The Hearing Committee recommends to the Licensee that she consider completing her designation as a Certified Financial Planner, although it is not making that part of its recommended order.

With respect to a fine, the Hearing Committee recognizes that any misconduct is governed by the previous sections of the Act which have lower limits on any fine imposed. The Hearing Committee would have been prepared to recommend a fine of \$5,000 as sought by Council as it is consistent with the authorities and justified by the facts of this matter (even when the mitigating factors are considered) but had a significant concern about the Licensee's ability to continue to make payments to the Complainant, a member of the public whom Council must also protect, considering the Licensee's submissions on her finances and expected income in 2020. For this reason, the Hearing Committee is also recommending a payment schedule for the \$2,500 fine. The Hearing Committee does not want to do anything to jeopardize the payments that the Licensee is obligated to make to the Complainant but must balance this with the principles of sentencing. The Hearing Committee is satisfied that a fine of \$2,500 on a payment schedule over a reasonable period of time will accomplish this objective.

The Licensee gave evidence that her plan was to pay off and buy out the Complainant in two to three years from the date of the Agreement and take him off title. Obviously, that has not yet transpired. The Hearing Committee *strongly* encourages the Licensee to do whatever she can to separate her affairs from the Complainant as quickly as possible.

Costs

Council sought its investigative and hearing costs and asked to make written submissions on the issue. The Licensee took no position on costs.

Council was substantially successful in this hearing with the Hearing Committee accepting its submissions on penalty except for a slightly reduced fine. The Licensee maintained a position defending her actions through her dealings with Council and only admitted her misconduct during the latter part of the hearing. Indeed, although there was an Agreed Statement of Facts, which the Hearing Committee appreciated, the Licensee did not make the admissions at the core of this hearing until part way through the hearing.

The issue of costs is discretionary and the Hearing Committee is exercising its discretion to recommend that the Licensee be responsible for Council's costs in both its investigation and this hearing. Any costs should be ordered payable on a reasonable schedule for the same reason that the Hearing Committee is recommending that the Licensee be permitted to pay the fine on a schedule. The Hearing Committee must consider the unique situation that the Complainant has been put in because of the Licensee's misconduct and not create a situation where he is further at risk or whether the situation becomes punitive and unmanageable to the Licensee.

The Hearing Committee encourages the parties to come to an agreement the amount of costs payable and a payment schedule so that further submissions are not necessary; however, Council shall be permitted to provide further written submissions on costs if needed. The Hearing Committee recommends that any further submissions on costs be provided by Council within 30 days of an order with the Licensee having 15 days to respond.

Dated in Vancouver, British Columbia, on the **10th day of August, 2020.**



Karl Krokosinski
Chair of Hearing Committee