

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

and

The *INSURANCE COUNCIL OF BRITISH COLUMBIA*
(“Council”)

and

JAMES WILLIAM DUKE
(the “Licensee”)

ORDER

As Council made an amended intended decision on June 22, 2013, 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 amended intended decision dated July 3, 2013; and

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

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

1. The Licensee’s life and accident and sickness insurance licence is suspended for a period of 12 months.
2. A condition is imposed on the Licensee’s life and accident and sickness insurance licence that requires him to complete the courses necessary to obtain either the Chartered Life Underwriter (“CLU”) designation or the Certified Financial Planner (“CFP”) designation.
3. A condition is imposed on the Licensee’s life and accident and sickness insurance licence that requires him to remain under the direct supervision of a qualified life and accident and sickness insurance agent until such time as he has completed the CLU or CFP courses.
4. The Licensee is assessed Council’s investigative costs of \$1,925.00.

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5. A condition is imposed on the Licensee's life and accident and sickness insurance licence that requires him to pay the above-ordered investigative costs no later than **October 23, 2013**. If the Licensee does not pay the ordered investigative costs in full by this date the Licensee will not be permitted to complete any annual filing until such time as the investigative costs are paid in full.

The Licensee's suspension will begin on **August 7, 2013**, and end on **August 6, 2014** at midnight.

This order takes effect on the **23rd day of July, 2013**.



Rita Ager, CFP, CLU, RHU, CSA
Chairperson, Insurance Council of British Columbia

AMENDED INTENDED DECISION

of the

INSURANCE COUNCIL OF BRITISH COLUMBIA
(“Council”)

respecting

JAMES WILLIAM DUKE
(the “Licensee”)

INTRODUCTION

Pursuant to section 232 of the *Financial Institutions Act* (the “Act”), Council conducted an investigation to determine whether the Licensee acted in compliance with the requirements of the Act.

As part of Council’s investigation, on February 18, 2013, an Investigative Review Committee (the “Committee”) met with the Licensee to discuss allegations that the Licensee made inappropriate recommendations to a client (the “Client”) regarding investments in exempt market securities, in light of the Client’s age, risk tolerance, and financial profile.

The Committee was comprised of one voting member and three non-voting members of Council. Prior to the Committee’s meeting with the Licensee, an investigation report was distributed to the Committee and the Licensee for review. A discussion of this report took place at the meeting and the Licensee was provided an opportunity to clarify the information contained therein and make further submissions. Having reviewed the investigation materials and after discussing this matter with the Licensee, the Committee made a recommendation to Council as to the manner in which this matter should be disposed.

A report setting out the Committee’s findings and recommended disposition, along with the aforementioned investigation report, were reviewed by Council at its March 12, 2013 meeting. At the conclusion of its meeting, Council determined that further time was required to thoroughly review submissions made by the Licensee. After reviewing the Licensee’s submissions and considering the matter further at its April 16, 2013 meeting, Council made an intended decision dated May 8, 2013.

The Licensee accepted the findings as contained in the original intended decision and set out below, but requested the educational component of the intended decision be amended to allow an option to complete the Certified Financial Planner (“CFP”) courses instead of the Chartered Life Underwriter (“CLU”) courses. Council accepted this request and 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/or 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 is a life and accident and sickness insurance nominee, who operates Duke Wellington Financial Group Inc. He has been licensed with Council since June 2008, and has been licensed with the Alberta Insurance Council since 1985.

The Client's Background

The Client is a 61-year-old widow. Due to health issues, she does not work and has not worked since prior to the Licensee becoming her agent. She was married to her husband for 35 years. The Licensee acquired her as a client around 2008, when he purchased a book of business from the Client's former agent. Between November 2008 and July 2009, the Client stayed in Calgary and Edmonton, as her husband was ill and hospitalized. He died on July 23, 2009.

At the time the Licensee became her agent, the Client's monthly income was as follows: \$800.00 from her disability pension, \$120.00 from her husband's pension, and \$200.00 from her survivor pension. Additionally, she was making monthly net withdrawals of approximately \$393.54 from her Canada Life Generations account, and approximately \$250.00 from her Canada Life Generations No-Load account.

The Client owned her home, which had a market value of approximately \$380,000.00 to \$400,000.00, with no mortgage. Long term, it was the Client's desire to continue to live in her home.

The Client received the following funds following her husband's death in July 2009:

- \$100,043.84 from a death benefit from her husband's The Great-West Life Assurance Company policy
- \$44,464.81 from her husband's Canada Life Generations account
- \$36,838.77 from her husband's British Columbia Government and Service Employees' Union pension

All the above amounts were received by October 30, 2009, and were either deposited into her bank account or her Canada Life Generations account. Excluding her home and, prior to the investments in the exempt market securities products, the Client had approximately \$210,000.00 in cash and investments.

The Investments in Exempt Market Securities

Deercrest Construction Fund Inc. (“Deercrest”), The Falls Capital Corp. (“Falls Capital”), and UrbanStar Glendale Manor Inc. (“UrbanStar”) are companies involved in the real estate development industry. As stated in their Offering Memorandums, all of these companies represent high-risk, illiquid investments, which should only be considered by persons who can afford to lose their entire investment. The Licensee stated that he was familiar with these exempt market securities through his managing general agent, and he had also conducted his own due diligence. All three exempt market securities were presented to the Client over a period of a year by the Licensee, and he received commissions for each sale.

The Client’s financial goals were to generate income and remain in her home. She met with the Licensee in August 2009 to discuss her options. In September 2009, approximately two months following the death of the Client’s husband, the Licensee again met with the Client. During this period, the Licensee presented the Falls Capital exempt market security to the Client. The Licensee stated that he also presented the option of a guaranteed investment certificate (“GIC”) to the Client as an alternate investment option, but she rejected this option because it did not provide enough income.

On September 7, 2009, the Client signed a Risk Acknowledgement form with respect to the Falls Capital exempt market security. The Risk Acknowledgement form stated that the investment was risky, and the investor could lose the entire investment. The Client invested \$45,000.00 into Falls Capital.

The Licensee presented the Deercrest exempt market security to the Client in December 2009. The Deercrest exempt market security promised a return of 12.5 percent. The Client signed a Risk Acknowledgment form and invested \$50,000.00 into Deercrest.

In September, 2010, the Client invested \$45,000.00 into the UrbanStar exempt market security. As with the other two exempt market securities, this was presented to her by the Licensee. The Client signed the Risk Acknowledgment form as well as Letters of Indemnity.

Prior to engaging the Licensee as her agent, 100 percent of the Client's investments were apportioned into segregated funds. By December 2010, the Client's investments, which included the funds received from her husband's death, were distributed approximately 35 percent in segregated funds, and 65 percent in exempt market securities. The Licensee stated that the Client had a moderate-to-high risk tolerance and understood the risks associated with the exempt market securities. This position was inconsistent with the Client's subsequent complaint to Council.

The Licensee's position was that he acted reasonably and in good faith in presenting the exempt market securities to the Client and facilitating her investments. The Licensee maintained that the percentage of investments in the exempt market securities was appropriate for the Client.

ANALYSIS

The Client was retired, recently widowed, and in possession of relatively modest resources. After presenting unregulated, illiquid, and high-risk investments to the Client, the Licensee facilitated the redemption of investments which had a level of guarantee and security in order to invest in the high-risk products he was offering. Council determined that the Licensee's conduct and, in particular, the facilitation of the investment of 65 percent of the Client's available investment funds into high-risk products, was objectively unreasonable.

Council held that even an inexperienced life and accident and sickness insurance agent ("life agent") would have recognized the inappropriateness of the risk assumed by the Client. In light of this determination, Council found the Licensee's continued justification for his investment recommendations to the Client to be concerning. Accepting that the Licensee believed that the exempt market securities were viable investments, Council held that a life agent with over 28 years of experience such as the Licensee, knew or ought to have known that the level of risk posed by the illiquid, unregulated investments was far too great for the Client. Council determined that the Licensee's conduct in failing to recognize or acknowledge the risk to the Client reflected on his competency.

Council determined that the eventual performance of the exempt market securities was irrelevant to the appropriateness of the recommendation. In light of the Client's overall financial profile, as well as the recent death of her spouse, Council found that it was objectively unreasonable for the Licensee to present the Client with such high-risk investments. Further, Council noted that even if it had been the Client who brought these exempt market securities to the attention of the Licensee, a prudent and competent life agent would have pointed out the risks to the Client, and strongly recommended against such an investment.

Council further found that by facilitating the investment of such a significant percentage of the Client's funds into highly speculative securities, the Licensee failed to act in the Client's best interests.

In response to the Licensee's submissions that the Client was fully aware of the risks associated with the exempt market securities, Council determined that the Licensee failed to adequately document his discussions with the Client in this regard. Council held that, as an experienced life agent, the Licensee should have recognized his duty to clearly convey to the Client that the exempt market securities were not appropriate for her financial and emotional situation. Further, as the Client's trusted financial advisor in a time of personal hardship, the Licensee should have recognized the enhanced reliance that the Client would likely have placed on his investment recommendations.

Council found that the Licensee not only erred in recommending these products to the Client, but compounded the err by not providing the Client with viable alternatives. Other than proposing a GIC at the time of presenting the Falls Capital exempt market security to the Client, the Licensee stated he considered no other investment opportunities, such as an annuity or other form of insurance product.

The Licensee was instrumental in presenting the high-risk investments to the Client. He benefitted financially through the receipt of commissions. The Licensee failed to advise the Client that the amount of her available funds invested in these high-risk products was unreasonable. Council concluded that the Licensee's conduct in all the circumstances reflected on his competence, and demonstrated a failure to act in accordance with usual practice of the business of insurance.

Council considered the precedents *A. Farey*, *R. McIntosh*, and *S. Matthews*.

In *A. Farey*, the licensee recommended that a retired client 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 that 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. The licensee's licence was cancelled for two years, and he was fined \$10,000.00.

The Licensee submitted that this decision should be distinguished from the present case on the basis that the investments at issue in *A. Farey* were "*fraudulent scams*," whereas the exempt market securities that the Licensee presented to the Client were not. The Licensee also submitted that the Client's net worth was higher than the client in *A. Farey*, resulting in a higher risk-tolerance. Council agreed that there is no indication that the Licensee was aware of, or participated in any fraud in this case. Council determined, however, that the investments presented by the Licensee were clearly inappropriate given the Client's financial profile, as were the investments in *A. Farey*.

In *R. McIntosh*, the licensee solicited funds from her existing and former insurance and mutual fund clients for investment in an unregulated private equity investment company that she worked for and subsequently went bankrupt. Due to the age and financial status of the clients involved, the significant investments were clearly unsuitable, and resulted in serious financial harm to the clients. The licensee was found unsuitable to hold a licence for a minimum period of five years.

The Licensee submitted that *R. McIntosh* should be distinguished on the basis that the licensee was working for the investment company at issue, and had a particular influence over her elderly former clients. Council accepted that the facts of the *R. McIntosh* case are distinct from that of the Licensee. Both cases, however, address the important principle that a licensee, whether current or former, cannot reasonably expect a client to appreciate the real risk of investments that are presented to them as viable options by a trusted financial advisor. In both *R. McIntosh* and the present case, the significant percentage of available funds invested was clearly unsuitable given the financial status of the clients involved.

In *S. Matthews*, the licensee failed to act in the best interests of three clients and made unsuitable insurance recommendations when she had them purchase similar insurance policies, regardless of their individual needs and financial circumstances. She was found unsuitable to hold a licence for a minimum period of three years, fined \$10,000.00, and ordered to complete the courses in the Certified Financial Planner curriculum.

The Licensee submitted that the *S. Matthews* decision should be distinguished as the Licensee did not exhibit the same pattern of pursuing personal benefit to the detriment of his clients, and did not make an error as a result of incompetence. Council determined that the Licensee's conduct in this case did reflect on his competency, as he failed to acknowledge the inappropriateness of the products he recommended to the Client. Further, the Licensee benefitted financially from his conduct.

Based on a consideration of all the evidence and submissions before it, Council determined that a penalty was required that would have a deterrent effect, and address the issues of competency and failure to act in accordance with the usual practice of the business of insurance.

Of particular concern to Council was the Licensee's failure to acknowledge the inappropriateness of his recommendations. Accordingly, Council concluded the Licensee poses a risk to the public which cannot be mitigated solely through supervision, education, or licence conditions. Council further determined that education and supervision conditions were required to address the issue of competency.

AMENDED 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 and accident and sickness insurance licence for a period of 12 months.
2. Impose a condition on the Licensee's life and accident and sickness insurance licence requiring that he complete the courses necessary to obtain either the CLU designation or the CFP designation.
3. Impose a condition on the Licensee's life and accident and sickness insurance licence requiring him to remain under the direct supervision of a qualified life agent until such time as he has completed the CLU or CFP courses.
4. Assess the Licensee Council's investigative costs of \$1,925.00.

The Licensee is advised that should the intended decision become final, the investigative costs will be due and payable in full within 90 days of the date of the order. If the ordered investigative costs are still outstanding once the licence suspension is served, the Licensee's licence will remain suspended until such time as the fine and investigative costs are paid in full and the education condition is met.

The intended decision will take effect on **July 23, 2013**, subject to the Licensee's right to request a hearing before Council pursuant to section 237 of the Act.

The Licensee's suspension will begin on **August 7, 2013**, and end on **August 6, 2014** at midnight.

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 by **July 22, 2013**. 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 by **July 22, 2013**, the intended decision of Council will take effect.

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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 www.fst.gov.bc.ca or contact them directly at:

Financial Services Tribunal
PO Box 9425 Stn Prov Govt
Victoria, British Columbia
V8W 9V1

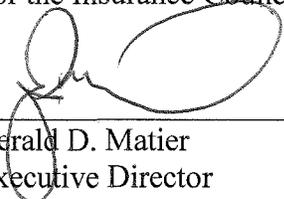
Reception: 250-387-3464

Fax: 250-356-9923

Email: FinancialServicesTribunal@gov.bc.ca

Dated in Vancouver, British Columbia, on the 3rd day of July, 2013.

For the Insurance Council of British Columbia



Gerald D. Matier
Executive Director

GM/cp