ALBERTA INSURANCE COUNCIL
(the "AIC")

In the Matter of the *Insurance Act*, R.S.A. 2000 Chapter I-3
(the "Act")

And

In the Matter of James D. Kew
(the "Agent")

DECISION
OF
The Life Insurance Council
(the "Council")

This case involved an allegation pursuant to s. 467(1)(c) of the Act. Specifically, it is alleged that the Agent failed to disclose any other occupation or employment other than as an insurance agent in relation to exempt market securities on renewal applications for agents certificates of authority, specifically his online renewal applications for life and accident and sickness ("A&S") insurance submitted on January 9, 2006 through to his online renewal applications for life and A&S insurance submitted on December 31, 2009. In so doing, it is alleged that this constitutes an offence pursuant to s. 467(1)(c) of the Act.

Facts and Evidence

This matter proceeded by way of a written Report to Council dated September 21, 2015 (the "Report"). The Report was forwarded to the Agent for his review and to allow the Agent to provide the Council with any further evidence or submissions by way of Addendum. The Agent signed the Report on October 2, 2015 and submitted an addendum by way of a letter.

The Agent has been licensed since at least February 8, 1994 to act in the capacity of a life and A&S insurance agent. Between 2006 and 2011 the Agent submitted applications to renew his certificates of authority. In each of the application forms the Agent was asked whether or not he was engaged in any other business or occupation other than insurance. In the applications he submitted between January, 2006 and January, 2008 the Agent answered "No" to this question. However, when the Agent submitted his renewal application in January, 2009 he checked the "Yes" box and disclosed the occupation or business of "Financial Planning".

By letter dated March 20, 2015 a Mutual Fund Dealers Association of Canada ("MFDA") representative advised ("EM") provided the AIC with information regarding a complaint that two of the Agent's clients ("BM" and "DM") registered with the MFDA. As the matter was not within the MFDA's jurisdiction, EM forwarded the file to the AIC. Amongst the accompanying file material was a letter from BM and DM which advised of their concerns in relation to the purchase of the exempt securities on July 15, 2008. BM and DM advised that they were "requested" to sign a subscription to purchase units of Investicare Seniors Housing Corp. ("ISHC"). Also enclosed was a copy of a letter signed by BM and DM that requested the cancellation of one of their insurance policies. This letter appeared on the Agent's agency letterhead and directed that the funds resulting from the cancellation be forwarded to BM's self-directed RRSP with Canadian Western Trust ("CWT"). The letter also advised, "The above noted policy was sold to me/us. It was not an appropriate investment under our circumstances." A statement of transactions for the cancelled policy and copies of "Subscription for Units" agreements in relation to the purchase of real estate investment units in ISHC, by BM and DM were also among the documents provided to the AIC.

On April 1, 2015 the AIC investigator wrote to the Agent and requested that he provide information about the BM/DM transaction and the Agent replied by letter dated April 8, 2015. In his reply he wrote, among other things, as follows:

> …4) Your comments that James Kew is listed as the "Advisor" on CWT account summary document is worthy of comment in so much as all transactions related to that account are done on a self-administered basis. All accounts with CWT are self-administered as in the client is responsible for and makes any trades as an individual responsibility. Any fees associated with the account are the sole responsibility of the client directly with CWT. Kewcorp and or [sic] James Kew does not receive any compensation from CWT and the use of the term "Advisor" is completely arbitrary on the part of CWT. The wording of your letter implies the use of the term "Advisor" is a misrepresentation of some kind however no such representations have been made as noted!...

In addition to the letter, the Agent provided a copy of a "Referral Fee Agreement" dated October 4, 2005. The agreement is between ISHC and the Agency and indicates, "AND WHEREAS the [Agency] has agreed to introduce the Offering to certain individuals and refer them to the Corporation on the terms and conditions hereinafter contained (the 'Clients')." Section 4 of this agreement, "Payment of Referral Fees", sets out the compensation payable to the Agent's agency. It indicates that 8% of the aggregate subscription proceeds received from purchasers of units introduced to the Corporation by the Agency. However, it also

anticipated the Agent's role as being no more than providing a copy of the offering memorandum to an individual.

On July 30, 2015 the investigator wrote to the Agent and to request further information as to the Agent's involvement in preparing and drafting the July 15, 2008 letter to TLC. In further regard to this letter to TLC, DM and BM faxed the investigator on August 11, 2015 and indicated that the Agent typed the letter on their behalf for them to sign. They also enclosed ISHC documents that the Agent provided to them. Among other things, these documents state that "Investicare Units are ONLY made available through an exclusive network of Financial Professionals." They said that the handwritten notations on this document were made by the Agent and that they were part of his "sales pitch." The clients also provided a letter from the Agent, dated February 15, 2014. This letter, on Kewcorp Financial Inc. letterhead reads as follows:

> [SB} has sent or will be sending another Unit Holders Report! The highlight is that he has sold the Kelowna property (a good offer this time in theory). We are going to get a chance to vote on the terms and conditions and I am recommending we vote "No". I am not usually a contrary person however I feel that the sale price, combined with the fact that the building is now finished (and ready for lease) are frankly - lousy! Please call me to discuss if you are of a mind to however, as with the first vote please note: "a no vote means a cash call and is not the easy way out" [sic] All of these properties are first class, both from a construction perspective and aesthetics. In addition the investment perspective itself remains, since the demographics and the real property security have not changed!
>
> As to the write-down of assets mentioned in [SB]'s last Unit Holders report (perhaps 2nd last depending on timing). This was done at my behest (albeit with a little arm twisting). [SB] has on a number of occasions mentioned that we could be facing a loss of up to 50% so in my negotiations with [CWT] I used that number. The big question would be why? – it is fairly simple! We have a number of Retirement Income Holders (RRIF) that were receiving active income from CWT via their Investicare holdings. These RRIF holders received some income in 2012 (the 1st full year of no income payments from Investicare) but due to RRIF regulations they received an income slip for something more than they actually received. In other words they were required to pay income tax on income they did not receive. The same thing will happen for 2013 except in the 2013 calendar year these RRIF holders will receive an income slip for the entire year. The write down reduces the income reporting requirements by approximately 50% so needless to say our (all) RRIF holders will only be required to report income based on the 50% slip. [sic] (bearing in mind that these people have not received anything – yet). There is no escaping the RRIF regulations so this softens the blow for income tax – albeit temporarily (this income when received will not be taxed since the tax will already have been paid). Are we going to lose 50% of our investment? We may or may not be facing a 50% loss but that remains to be seen! As noted please contact me should you wish to discuss the matter.

In his addendum dated October 2, 2014 the Agent characterizes his action in and around the transactions as nothing more than him referring business to someone else. He then comments on the clients and other investments they have, the nature of the application forms and whether the questions are asked multiple times, the number of referrals he made in this case and in other types of referrals (such as mortgages and tax free savings accounts) and then refers to recent controversies related to "Uber". Finally, he alleges bias on the part of the investigator and alleges that the clients did not initiate a complaint with the AIC notwithstanding the fact that the clients repeatedly corresponded with the investigator to raise their concerns and provide additional information.

Decision of the Council

Section 467 of the Act requires that agents disclose whether or not they engaged in a business or occupation other than insurance since the date of their last application. While there are a number of reasons for this requirement, the main one is public protection in that a person cannot hold a certificate of authority to act as an insurance agent if another occupation places them in a position where they could exercise undue influence or coercion or puts them in a potential conflict of interest. There are many businesses and occupation that do not raise any such concern. However, it is not up to an applicant to decide whether or not another occupation or business falls into these categories.

In order to prove that the Agent contravened a section of the Act as alleged in the Report, we must be satisfied that the activities undertaken by the Agent constitute another business or occupation. The evidence must then also prove that the Agent did not disclose the information to the AIC on his renewal documents. As this is a strict liability matter, it is not necessary for the AIC to prove that the Agent intentionally withheld information or intended to mislead the AIC and these objective elements of the offence are proven by examining his activities and the application forms. If we find that the information should have been disclosed, the onus would then shift to the Agent to prove that he took all reasonable means to avoid the offence.

The evidence before us proves that the Agent (through his corporate agency) entered into a "Referral Agreement" whereby he and the agency would "introduce" clients to certain investments and "…provide them with a copy of the Offering Memorandum…." In exchange for this referral, ISHC

agreed to pay the Agent's agency "…8% of the aggregate subscription proceeds received from purchasers of units introduced…" by the Agent's agency.

The clients indicated that the Agent met with them and advised them to sign the subscription agreement and invest in ISHC units. The Agent provided the subscription documents to them and witnessed their signatures. They are dated July 8, 2008. The clients also indicated that the Agent told them that the investment was secure and that he had also purchased units. As a result of making the investment, the Agent prepared a letter on the clients' behalf that instructed Transamerica to cancel an existing insurance policy. This letter was written on the Agent's corporate letterhead. They said that over the next number of years the Agent instructed them to sign a number of documents related to the investment. As noted above, the Report also contained a letter that the Agent wrote to the clients regarding the state of the ISHC investment and advice as to how the clients should vote on an upcoming vote.

The Agent's general response is that his activities did not constitute another business or occupation and that they were nothing more than a referral arrangement and that insurance agents commonly refer clients to other businesses. His point is that making a referral to another business does not mean that an agent is engaging in that business. While he raises a number of issues about other investments that the clients made and questions who authored the MFDA complaint form, he does not take issue with the remaining documents or the factual assertions that the clients made.

We agree with the Agent that the critical question before us is whether or not his activities were just referrals rather than another occupation or business. However, the analysis of this question is not limited to concluding that he was referring clients because the agreement between his agency and ISHC was called a "Referral Agreement."

In light of all of the evidence, we believe that the Agent was engaged in another business or occupation and that this should have been disclosed to the AIC. In this case the Agent did not simply refer his clients to a third party who, in turn, conducted business with the clients. The Agent gave the clients promotional material and advice as to the investment. He witnessed the signature of the documents and sent them additional documents for their signature after the investment was made. He also wrote to them with advice as to how they should vote on one particular corporate matter or transaction.

The Agent states that he was engaged in the same sort of referral arrangement that one would have with a mortgage broker whereby an insurance agent might recommend that a client contact a particular broker in the event that they required a mortgage. This comparison is disingenuous at best. When an insurance agent refers a client to a mortgage broker, one would not expect to see the insurance agent complete mortgage application forms with clients and witness their signatures or promote one mortgage company over another. Likewise, a referring insurance agent would not be the person to provide additional mortgage documents to the clients for their signatures on an ongoing basis or update them on the status of their mortgage. In light of his activities, references to him being the "Advisor" on the account documents are completely accurate. He explained the investment to the clients and advised them to proceed. He clearly was their advisor and any contrary suggestion is not borne out by facts.

Given that we have concluded that the Agent's activities do constitute another occupation or business that should have been disclosed, we now turn to the question of whether he did so as required by the Act. The Report contains the application forms that he electronically submitted to the AIC in order to renew his certificates of authority. To do so, the Agent would have had to log in to the AIC's online system with an individual user name and password. Each of the questions on the application were asked of the Agent and it was the Agent that provided the answers and he did not disclose his activities as alleged in the Report. Therefore, we find that he contravened a section of the Act as contemplated in s. 480(1)(b) on six occasions.

As to the applicable sanction, we normally have the ability to levy civil penalties in an amount not exceeding $1,000.00 per offence pursuant to s. 480 of the Act and 13(1)(b) of the *Certificate Expiry, Penalties and Fees Regulation,* A.R. 125/2001. However, the applications at issue were submitted more than three years ago and the three year limitation period to issue civil penalties has passed. Therefore, we cannot issue a civil penalty in regard to our finding. We also have the ability to suspend an agent's

certificate of authority for a period of time or revoke it for one year. However, the imposition of this type of sanction would be unusual given factors such as the length of time that the Agent has held a certificate, the fact that this is his first offence and the nature of the non-disclosure. Therefore, we decline to levy any further sanction. This does not, however, change the fact that we found the Agent guilty of the offences as alleged.

Pursuant to s. 482 of the Act (copy enclosed), the Agent has thirty (30) days in which to appeal this decision by filing a notice of appeal with the Office of the Superintendent of Insurance.

This Decision was made by way of a motion made and carried at a properly conducted meeting of the Life Insurance Council. The motion was duly recorded in the minutes of that meeting.

Date: January 19, 2016

Original Signed By
Kenneth Doll, Chair
Life Insurance Council

Extract from the *Insurance Act*, Chapter I-3

Appeal

482 A decision of the Minister under this Part to refuse to issue, renew or reinstate a certificate of authority, to impose terms and conditions on a certificate of authority, to revoke or suspend a certificate of authority or to impose a penalty on the holder or former holder of a certificate of authority may be appealed in accordance with the regulations.

Extract from the *Insurance Councils Regulation*, Alberta Regulation 126/2001

Notice of appeal

16(1) A person who is adversely affected by a decision of a council may appeal the decision by submitting a notice of appeal to the Superintendent within 30 days after the council has mailed the written notice of the decision to the person.

(2) The notice of appeal must contain the following:

a) a copy of the written notice of the decision being appealed;

b) a description of the relief requested by the appellant;

c) the signature of the appellant or the appellant's lawyer;

d) an address for service in Alberta for the appellant;

e) an appeal fee of $200 payable to the Provincial Treasurer.

(3) The Superintendent must notify the Minister and provide a copy of the notice of appeal to the council whose decision is being appealed when a notice of appeal has been submitted.

(4) If the appeal involves a suspension or revocation of a certificate of authority or a levy of a penalty, the council's decision is suspended until after the disposition of the appeal by a panel of the Appeal Board.

Address for Superintendent of Insurance:

Superintendent of Insurance
Alberta Finance
402 Terrace Building
9515-107 Street
Edmonton, Alberta T5K 2C3