

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 Travel Guardian Insurance Ltd.
(the "Agency")

As represented by Designated Representative Jeffrey Desrochers
(the "DR")

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

This case involved an allegation pursuant to s. 452(1) of the Act. Specifically, it is alleged that the Agency compensated Ann Warkentin (the "Former Agent") for acting in the capacity of an insurance agent during a period of time in which she did not hold a valid and subsisting certificate of authority and that this constitutes an offence pursuant to s. 480(1)(b) of the Act.

Facts and Evidence

This matter proceeded by way of a written Report to Council dated January 4, 2016 (the "Report"). The Report was forwarded to the DR for review and to allow the DR to provide the Council with any further evidence or submissions by way of Former Addendum. The DR signed the Report on January 18, 2016 and he provided the Council with further submissions dated January 25, 2016.

This matter is related to a decision issued against the Former Agent under file number 67523. To a great extent, the factual matrix underlying both of these files is the same and the documents in 67523 and this matter are, except as otherwise noted below, the same. The Agency holds an accident & sickness ("A&S") certificate of authority and first held this certificate in 2000. The Former Agent held an A&S certificate through the Agency for a period of time in 2009 and then again between July 3, 2014 and July 15, 2014. A related entity relevant to this matter is Travel Guardian Travel Ltd. ("TGT"). TGT is a travel agency that holds a restricted certificate of authority that authorizes it to sell travel insurance through its employees. It is not entitled to utilize unlicensed independent contractors under its restricted certificate of authority. The DR is also the Designated Individual of TGT. DI's of restricted agents are not

required to hold a license and their responsibilities are limited to receiving notifications and communications from the AIC. A third relevant and related entity is Travel Guardian Insurance (Calgary) (“TGIC”). It held an A&S certificate of authority between 2005 and 2007 and “ES” was its designated representative (“DR”).

The Former Agent submitted an application form to obtain an A&S certificate of authority to represent the Agency. She signed it on June 2, 2014. In section 9 (Employment History for the Previous Five Years), the Former Agent indicated her employer was “Travel Guardian” from 2013 onward.

In a series of e-mails between the AIC and the Former Agent, the AIC sought information about the Former Agent’s activities and whether or not the Former Agent was compensated for acting as an insurance agent when she did not have a valid and subsisting certificate of authority. In a June 20, 2014 email, the Former Agent wrote: “Secondly, I wish to make PERFECTLY clear that I did NOT sell any insurance products prior to being hired at Travel Guardian in July 2013, but MOST DEFINITELY HAVE AND CONTINUE to do so since becoming employed last year.” (underlining added)

On June 26, 2014 the Former Agent sent the AIC an undated four page fax wherein the Former Agent wrote: “Pursuant to our conversation earlier this month, I wish to inform you of my history regarding any insurance activity. I have had NO compensation or sold any products up until July 2013 at which time I was hired by Travel Guardian Insurance in Edmonton. I HAVE been selling and receiving compensation for my work since July 2013” (underlining added). Page three of the fax contained the Former Agent’s errors & omissions insurance information and the named insured on the policy was TGI. Approximately three weeks later “HW” sent a fax to the AIC on TGI letterhead that requested that the AIC remove the Former Agent from the list of agents affiliated with TGI.

The Investigator wrote to “JB” a Royal & Sun Alliance (“RSA”) official on October 31, 2014. In his letter the investigator sought information about the Former Agent’s activities undertaken on behalf of RSA while she was with TGI. The Investigator received an e-mail dated November 21, 2014 with attached letter of the same date from JB with Royal & Sun Alliance. In her letter, JB advised that no sales were made by the Former Agent and that they have no record of any payments made to her. JB further advised that their contract was with TGI.

By letter dated November 15, 2014 the Former Agent advised the AIC that she was hired to assist existing clients who were re-directed to her by staff from the main office in Edmonton. The Former Agent further advised that she had no written contract and when offered to her in July of 2014, she “declined and ceased all activity.” The Former Agent also advised that she was only paid by “Travel Guardian.”

Included amongst the attachments accompanying the letter were documents referencing a commission account under the Former Agent's name and a "Posted Sales Commissions Report" detailing commissions of \$4,322.78. Each of the documents that the Former Agent provided reference TGI.

On January 13, 2015 the Investigator spoke with the DR. The Investigator advised him of the investigation and the time period for which the Former Agent allegedly acted as an insurance agent without a valid and subsisting certificate of authority. The DR advised the investigator that the Former Agent was selling travel insurance as an employee of TGT under its restricted certificate of authority. He said that she was not selling travel insurance through TGI prior to obtaining her certificate of authority to represent TGI. A different TGI official ("AC") later provided the investigator with a series of documents on behalf of TGI. Among the documents that AC provided were Canada Revenue Agency T4 and T4A slips for the Former Agent and other individuals who were paid from TGI's account but allegedly employed by TGT which is a wholly owned subsidiary of TGI.

In an accompanying written statement, the DR referred to the T4 slips as follows: that

As you will see we have also enclosed other individuals [names omitted] T4's who are also paid from Travel Guardian Insurance's account but are all definitely employed by our Wholly owned Subsidiary Travel Guardian Travel Ltd. We just haven't set up a separate payroll account with Ceridian (our payroll company) to pay them out that way. Twice yearly [the Former Agent's] mother ... the manager of the Travel Agency writes a cheque to Travel Guardian Insurance to make up for the funds/monies that are going out to the travel agencies employees. If you will see we are and have been paying for a number of years, fees for a Travel Agency employing 11 – 15 staff. Nowhere in the act, does it require us to list the names of the people we deem, staff, nor do they have to require a written employee agreement as far as we can see.

The DR further advised that "We relied on [the Former Agent's] licensing, to be under the umbrella of [TGT's] Certificate of Authority, and the restricted insurance definition from the Act below. We have always co-operated with the AIC and have done so for 25 yrs." In copies of the Former Agent's 2013 and 2014 T4A statements the payer's name is set out as "Travel Guardian Health Insurance Ltd." and the amounts paid to the Former Agent are found in Box 020 which are "Self-employed commissions."

In response to a further request for information, AC provided the investigator (by letter dated February 5, 2015) additional documents including, among other things, a further written statement from JD. In this statement JD wrote:

Because [TGT] is a wholly owned subsidiary of [TGI] we, for expediency and convenience sake run the Travel Agencies pay through the one payroll account of the Parent company (Travel Guardian Insurance Ltd.) *sic*. We have done this for years and twice yearly the Travel Agency writes a cheque to the insurance company to balance the books. In every sense of the word, we considered [the Former Agent] an Employee of Travel Guardian Travel Ltd. Although the insurance act mentions employee 132 times there is no definition of the term employee listed."

We have paid for a staffing level of 10 to 15 people for our restricted Travel Agency license for years now. At one time, years ago, I believe we had to list the people covered in this license. Sometime ago, I believe this naming requirement was abolished, but we have paid the appropriate fees for situations just like [the Former Agent's]. As far as [the Former Agent's] pay, being paid straight commission; I thought that for tax purposes, her income had to be reported that way.

Years ago when we first set up the *payroll* of Travel Guardian Insurance Ltd., I made a mistake with the enrollment forms concerning the company name. I have always thought in my own mind that because we sell only Health insurance (disability, individual health, travel health insurance) that in a sea of insurance agencies and marketers that we would be better defined if we had the term '**Health**' inserted. I think of us as a **Health** insurance agency. We never caught on to it at the time, never realized it would be a problem (Revenue Canada and the Bank of Montreal with whom the monies for payroll derive have had no problem with it, even though with BMO they have us as Travel Guardian Insurance Ltd.). We have now contacted the payroll company that we use, Ceridian, and have taken steps to correct this oversight. At all times, both the Travel Agency and the Insurance Agency had all of our people licensed through the Council.

[The Former Agent] applied for an A&S certificate to be under the umbrella of Travel Guardian Insurance Ltd. This way she wouldn't be governed by the 'restricted Certificate of Authority' that she was under with Travel Guardian Travel Ltd. (for example; if she wanted to get licensed in another province she would need an A&S license). It was applied for at the beginning of June 2014 but somewhere between then and July 15, 2014, we decided to mutually and amicably go our separate ways. We had provided her with office furnishings and office equipment which we reclaimed in the summer of that year. We did have a verbal agreement at the time she started with us and the topic of 'being under the Travel Agency's wing for licensing' was mentioned (only once and briefly) before we went on to other matters. Because her Mother...is the Manager of the Travel Agency we didn't require a formal written agreement.

By letter dated February 13, 2015 the DR wrote, in part, as follows:

With regard to your request for copies of contracts between [TGT] and the underwriters that [the Former Agent] sold through [TGT], [the Agency] acts as an MGA [managing general agency] for all the companies concerned as we do with several Travel Agencies across the country, and independent financial advisors, General Agencies, etc. As such, the contract with the Travel Agencies that we work with (Travel Guardian Travel Ltd. Included) is similar to how Hub or PPI contracts with their down line agents or representatives. Because I own both companies I didn't think that [TGT] (and it is a full-fledged IATA Certified Travel Agency meeting all their stringent requirements) would require separate contract documentation. We Pay [TGT] wages from [the Agency], [the Agency] receives commissions from the insurers, which we use to offset the wages that [the Agency] pays to [TGT]. It is all done internally and the insurers all know that we sell their products (in some cases) with representatives working under the umbrella of our legitimate Restricted Travel Agency Certificate of Authority. We feel that we have done nothing outside of the scope of our licensing and reiterate that our clients/the public have always been our first priority.

Finally, in his additional submission the DR wrote:

While I cannot dispute the majority of the facts that the investigator has presented, I can only say that we at [the Agency] have now and in the past worked with and market to literally hundreds of thousands of Canadian Travelers. We take protection of the public as a serious matter and our

Agents are highly trained to make sure that the Traveling public is not hurt by the actions of our employees.

I am confident if you check your records you will see that The AIC has never received a Complaint from people who are unsatisfied with [the Agency's and TGT's] interaction with them.

The fact that we are both an Insurance Agency and Travel Agency can sometimes lead to a blurring of the lines between our two entities. I must take personal responsibility for the way this situation with [the Former Agent] was handled. When we established [TGT] yrs. Ago [sic] I was aware of the very liberal rules regarding Travel Agency Certificates of Authority to sell Travel Insurance. When [LT] (our Travel Agency Manager) came to me an [sic] her Daughter [the Former Agent] was interested in becoming an Agent I thought the [sic] we could treat her as being under the wing or umbrella of [TGT].

Because we use only one Payroll company Account to pay our staff whether they work for [TGT] or [the Agency] this blurring becomes even more pronounced.

Suffice to say, this was a mistake (in hindsight) and we will take this experience to heart going forward and use this as a stern reminder to keep our two business entities distinct and separate.

Discussion

In order to prove the allegations in the Report, the AIC must adduce sufficient evidence to demonstrate that the Agency compensated an unlicensed individual (in this case the Former Agent) to act in the capacity of an insurance agent during a period in which she did not hold a valid and subsisting certificate of authority. Once this is done, the onus shifts to the Agency to demonstrate that it took all reasonable measures to avoid doing this. The offence that is alleged is known as a strict liability offence. This means that the AIC is not required to prove that the Agency intentionally committed the offence. Additionally, another issue in this case is whether or not the Former Agent was an employee of TGT because she could then act as an agent under TGT's restricted license. The Agency bears the onus of establishing that the Former Agent was an an employee of TGT rather than being self-employed or an independent contractor.

The evidence in the Report establishes that the Former Agent acted in the capacity of an insurance agent prior to holding her own individual certificate of authority. It is equally clear from the documents that the Agency compensated the Former Agent for acting in this manner. The DR candidly admits that the Agency was acting in the capacity of an MGA such that it compensated individuals acting on behalf of TGT or the Agency. The commission statements and policy lists are all produced under the Agency's name. Similarly, the T4A slips referring to the Former Agent were also issued under the Agency's name (albeit with the added reference to "Health"). In our view it is immaterial whether TGT later reimbursed the Agency as is suggested by the DR.

Given this, we move on to the question of whether the Former Agent was an employee of TGT such that she was entitled to act as an insurance agent under TGT's restricted certificate of authority.

Based on the nature of the documents as found in the Report, we are satisfied that the Former Agent was not an employee of TGT such that she could be compensated for agent activity under TGT's restricted certificate of authority.

Apart from the commission statements and other documents noted above, the redacted T4's and T4A's provided in the Report are instructive. As is common knowledge, these documents are mandated by the Canada Revenue Agency and are instrumental in completing yearly income tax returns. They report, among other things, employment income, and the amount that employers have deducted for taxes, Canada Pension Plan and Employment Insurance premiums on their employees' behalf. The T4 documents the Agency provided in relation to the Former Agent are significantly different than those of other people providing services to TGT. For example, the other people's redacted forms are T4's and the information that was redacted appears to be in the "employment income", "income tax deducted", "employment income", "EI insurable earnings" and "CPP/QPP" pensionable earnings" boxes. The employees' social insurance numbers are also redacted. Conversely, the Former Agent's T4A's set out "self-employed commissions" not employment earnings. They also show that there are no deductions for income taxes, CPP or EI premiums, no reference to EI and CPP insurable earnings and they do not contain the Former Agent's social insurance number. If the Former Agent had been a TGT employee, her employer would have been obligated to make all of the source deductions that were set out, but redacted, in the other T4's and she would have been issued a similar T4. Instead, she was issued a T4A that clearly said that she was self-employed. Therefore, on the basis of this and the other material in the Report, it is our view that the Former Agent was not an employee of TGT and that the Agency breached a section of the Act or regulations as alleged in the Report.

In terms of the applicable sanction, we have the ability to levy civil penalties in an amount not exceeding \$1,000.00 pursuant to ss. 480(1)(b) of the Act and 13(1)(b) of the *Certificate Expiry, Penalties and Fees Regulation* (A/R 125/2001). In this case, we have a number of related legal entities that appear to be administered in a rather haphazard manner when it comes to what entity is paying for what, which individuals are working for which and the employment status of those individuals. The DR accepts that lines were blurred as between the related entities. Notwithstanding this, the Agency does not have any previous infractions and the DR recognizes that changes have to be made in how these things are administratively handled. Given this, we do not believe that a civil penalty at the high end of the spectrum is appropriate.

Therefore, in the totality of the circumstances, we order that a civil penalty in the amount of \$300.00 be levied against the Agency. The civil penalty must be paid within thirty (30) days of receiving this notice. In the event that the civil penalty is not paid within thirty (30) days, the Agency's certificate of authority will be suspended.

Pursuant to s. 482 of the Act (copy enclosed), the Former 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: May 11, 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