

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 The Travel Agent Next Door Inc.
(the "Restricted Agent")

As represented by Designated Individual Nancy Aube
(the "DI")

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

This case involved an allegation pursuant to s. 499(1) of the Act. Specifically, it is alleged that the Restricted Agent compensated individuals for acting as insurance agents who were not authorized to sell insurance under the Act. In so doing, it is alleged that the Restricted Agent breached a section of the Act as contemplated by s. 480(1)(b) of the Act.

Facts and Evidence

This matter proceeded by way of a written Report to Council dated March 16, 2016 (the "Report"). The Report was forwarded to the Restricted Agent for review and to allow it to provide the Council with any further evidence or submissions by way of Addendum. The Restricted Agent provided the Council with additional evidence and submissions through legal counsel by letter dated April 29, 2016. In response, the AIC submitted a rebuttal dated May 6, 2016 and the Restricted Agent provided a surrebuttal.

The Restricted Agent is a travel agency that has been licensed as an insurance agent since June 19, 2014. Pursuant to s. 454 of the Act, its employees are authorized to sell travel insurance. On April 7, 2015 "DW" sent an email inquiry to the AIC's Director of Licensing ("SB"). DW indicated that he was the owner of a travel agency and that while he utilized independent contractors ("IC") to act as travel agents it was his understanding that these individuals were not entitled to sell travel insurance under his

agency's restricted certificate because they were not employees. He asked SB to confirm whether or not his understanding was correct.

SB responded to DW's email on April 8, 2016 and confirmed that "[o]nly employees of a travel agency that holds a restricted certificate may sell travel insurance under the travel agency's restricted certificate" and that "[i]ndependent contractors are not authorized to sell travel insurance under the travel agency's restricted certificate." In subsequent emails DW alleged that the Restricted Agent used IC's to sell travel insurance under its restricted certificate of authority. As a result, the AIC opened an investigation file and assigned one of its investigators to gather further information.

By email dated April 28, 2016 the AIC investigator sent an email and attached letter to the DI. The investigator asked the DI to provide, among other things, further information as to the Restricted Agent's sales practices, the identity of the insurers for which it sold insurance and the employment status of the individuals who sold insurance under its restricted certificate of authority.

The Report indicated that "FF" telephoned the Agent on April 30, 2015. The investigator stated that FF admitted that the Restricted Agent used IC's to sell travel insurance on behalf of the Restricted Agent. During the call FF was said to have questioned the investigator about the definition of "employee" and the investigator states that he advised FF that he was not aware of a definition of "employee" in the Act or Regulations and that FF should include any questions or concerns in his response to the investigator's April 28, 2016 letter.

FF's sent his written response by email on May 19, 2016. FF wrote, among other things, that as of May 1, 2015 it utilized 22 individuals to sell travel insurance and that they were commissioned agents who were paid twice per month and issued T4A's at the end of a calendar year. He further indicated that they sold travel insurance on behalf of Manulife.

As to the individuals' employment status, FF wrote that he had researched the definition of employee and that, in his view, an employee was "a person who works for another person or for a company for wages or a salary..." and that the individuals who sold travel insurance on behalf of the Restricted Agent met this definition. As such, he argued that they were entitled to act as agents under the restricted certificate of authority. Finally, he provided the investigator with a list of other travel agent entities and

he suggested that some of these used IC's to sell insurance under their restricted certificates of authority. Included with FF's response was a sample agreement with attached appendices between the Restricted Agent and the "Travel Consultant".

The investigator wrote to a Manulife official ("JB") on August 5, 2015. In this letter he requested that JB confirm the number of travel insurance sales that the Restricted Agent made on Manulife's behalf, the compensation that was paid in that regard and a that he provide a copy of the contract between Manulife and the Restricted Agent. A different Manulife official ("LD") replied by email on August 19, 2015. She also enclosed a number of attachments to the email including the following:

1. A letter from LD dated August 19, 2015, which provided information in relation to the travel insurance sales by the Restricted Agent. LD advised that 198 policies were sold and \$16,664.11 in commissions were paid to the Restricted Agent. LD further advised it is Manulife's understanding that the "Travel Consultants" are compensated directly by the Restricted Agent; and
2. A copy of the "Product and Services Agreement" with attached Schedules with an effective date of March 6, 2014, between Manulife and the Restricted Agent.

In response to another request for information, FF emailed the AIC again on February 4, 2016 and March 3, 2016. In this emails he provided the investigator with further documents that included excerpts of written agreements between the Restricted Agent and the individuals or entities in issue, accounting records that outlined, among other things, the commissions paid and files upon which the individuals worked and copies of T4A's.

In the submission that it made through counsel, the Restricted Agent highlighted a number of facts including the dates upon which the AIC issued its certificate of authority and the fact that the individuals selling insurance on its behalf were restricted to selling Manulife policies. It also contended that Manulife was aware of the manner in which it intended to sell insurance and that consumers were more likely to purchase insurance when the travel arrangements were being made versus after the fact and that:

[The Restricted Agent's] travel agents are "independent travel agents" only to the extent that, upon termination of their relationship with [the Restricted Agent], they may take with them the list of clients that they introduced to [the Restricted Agent]. Following the termination of the travel agent's relationship with [the Restricted Agent], the only travel clients a travel agent is not entitled to solicit are those introduced through [the Restricted Agent's] Lead Generation Program.

The Restricted Agent further suggested that the AIC investigator advised FF that he should continue to conduct “business as usual” pending the investigation. In rebuttal submissions the AIC denied this contention. Instead, the investigator submitted that he was in no position to inform the Restricted Agent to stop selling travel insurance because it held a valid and subsisting certificate of authority and that it would be permissible for the travel agents to refer clients to employees of the Restricted Agent in order to handle their insurance needs. He also indicated that FF believed that their current business structure was in compliance with the Act and regulations. In further response to the AIC’s rebuttal, counsel suggested, among other things, that the investigator should have recommended that FF seek legal advice. He also suggested that the Restricted Agent cannot be found guilty of the allegations in the Report in the absence of previous Council cases that interpreted what “employee” means in the context of restricted agent licensing and conduct because the law was not “...certain and ascertainable.”

Discussion

It is alleged that the Restricted Agent compensated people for acting as insurance agents that were not entitled to act in this capacity under the Restricted Agent’s certificate of authority. These provisions are strict liability offences in nature. Therefore, in order to prove the allegations in the Report, the AIC must adduce sufficient evidence to demonstrate that it is more likely than not that the the Restricted Agent compensated individuals to act in the capacity of insurance agents when they were not authorized to do so. Once this is proven, the onus shifts to the Restricted Agent to demonstrate that it took all reasonable measures to avoid doing this. This means that the AIC is not required to prove that the Restricted Agent intentionally committed the offence.

The evidence in the Report clearly establishes that the individuals in question acted in the capacity of insurance agents as defined in s. 1(bb) of the Act. It is equally clear that the Restricted Agent is only entitled to act as an insurance agent through its employees rather than IC’s. As such, the real issue before us is whether the individuals in question are employees that were acting under the Restricted Agent’s certificate of authority. The Restricted Agent’s surrebuttal also raised issues as to whether the definition of the term employee is ascertainable and whether the investigator should have advised the Restricted Agent to seek legal advice.

In response to the latter, we do not believe that the investigator was required to advise FF to seek legal advice on the definition of employee. The role of the investigator was to collect relevant evidence in

relation to the conduct and business practices of the Restricted Agent. The Restricted Agent and FF were of the view that their business structure complied with the provisions of the Act. They still do and they are obviously entitled to take that position. However, the decision as to whether they would change their structure or continue on in the same manner (or whether to seek legal advice) was theirs to make and the responsibility for that decision must ultimately rest with them.

Similarly, we reject the Restricted Agent's submission that the definition of employee is not sufficiently ascertainable. Statutes and regulations (like insurance policies) are replete with words and phrases that can bear numerous meanings. The word "employee" happens to be one of them. However, the Restricted Agent's counsel himself noted that there is a rich jurisprudential history that interprets the concept and status of "employment" and "employee" and his submissions refer to many of these. The fact that this Council has not been called upon to interpret these terms in an expansive manner is, in our view, irrelevant to whether the Restricted Agent has committed an offence. Given this, we move on to the question of whether the individuals in issue are employees of the Restricted Agent such that the Restricted Agent was entitled to utilize them so sell insurance under its restricted certificate of authority.

Having reviewed the Restricted Agent's submissions, we agree that no one piece of evidence conclusively determines the status of the individuals in question. Rather, we must look at all of the factors in play and the context of the Act to reach a conclusion as to whether they are employees. As indicated by counsel for the Restricted Agent in his brief these factors include, among others, the following:

- Whether the individuals own the "tools of the trade" (para. 2.23);
- "Whose business is it any way?" (para. 2.28) or "...whether the worker is an 'entrepreneur,' running his/her own business..." (para. 2.10);
- The contracts between the parties;
- The T4A's;
- The working environment and extent of control or direction that is exercised by the Restricted Agent over the individuals (paras. 2.4 and 2.12);
- Who bears the risks and rewards of the business?; and
- The context of the Act and regulatory scheme.

While again emphasizing that no one factor is determinative, we note the following:

1. The T4A's that the Restricted Agent issued to the individuals categorize the income they earn as "Self-employed commissions" and the Restricted Agent makes no source deductions for employment insurance, Canada Pension Plan or income taxes;

2. The individuals are required to pay the Restricted Agent an annual fee of up to \$499.00 and monthly fees of \$69.00 as a condition of the agreement;
3. The Restricted Agent may sell the individuals “additional optional services and travel marketing resources on a fee-for-service basis”;
4. The individuals “...retain all rights with respect to any client to whom [the individuals] introduces to [the Restricted Agent]” and have “a propriety interest the (sic) [individual’s] own clients and those clients introduced to [the Restricted Agent] as a result of the [individual’s] own efforts.”;
5. The individuals must provide their own computer equipment and maintain their own virus protection software;
6. The individuals are responsible for obtaining all necessary licenses and permits;
7. The individuals are paid solely on the basis of commission and there are no references in the agreements to the payment of holiday pay or required working hours;
8. The individuals are responsible for paying costs associated with certain online travel booking systems, a 3.5% merchant fee on all amounts (excluding service fees) that are processed through the Restricted Agent’s merchant account, courier expenses, service fees resulting from direct deposits, and any credit card or other fees;
9. The agreements contemplate that the individuals maintain their own financial records and grant the Restricted Agent “...the right to have a certified accountant conduct an audit of the [the individual’s] financial records; and
10. The individuals are responsible for reconciling or paying any credit card charge-backs.

Based on all of these factors and the evidence and submissions in their entirety, it is our conclusion that the individuals are not employees of the Restricted Agent. Rather, they own their own businesses and pay the Restricted Agent for the right to access markets and associated marketing materials and resources. It is the individuals that bear the risks and enjoy the rewards of their efforts. They are responsible for paying most of the other costs of doing business. These type of business structure are not uncommon in the insurance world and are sometimes known as managing general agencies (“MGA’s”) or third party administrators (“TPA’s”). In these cases, the insurance agent uses the MGA to access certain markets that might not otherwise be open to them. The agent might also benefit from marketing resources and other administrative services. In return, the Agent often pays a percentage of

their commission or other fees for the services and access that the MGA provides. However, the agents do not become employees of the MGA and the agents are in business for themselves. The same can be said of the travel consultants in this case. As such, we find that they were not acting under the authority of the Restricted Agent's certificate of authority and that the Restricted Agent, therefore, compensated unlicensed insurance agents. We also conclude that the Restricted Agent did not take every reasonable means to avoid committing the offence such that it can avail itself of the due diligence defence in a strict liability matter. As such, we find that the Restricted Agent breached s. 499 of the Act as alleged.

As to the number of offences, the Restricted Agent argued, at paragraph 2.35 of its submission, that if it was found guilty, this finding should only be in relation to the eight IC's that acted as insurance agents when FF "...first became aware that there was a potential non-compliance issue... ." We do not agree. As we noted above, the investigator's role in this matter was limited to collecting relevant evidence and placing it before this Council if he felt that there was sufficient evidence to suggest that the Restricted Agent had breached a section of the Act or regulations. Having learned that there was a potential compliance problem with its practices, the Restricted Agent chose to expand the number of IC's that it utilized and did not avail itself of legal counsel.

Ultimately, we could have found that the Restricted Agent committed an individual offence for each of the policies that the IC's sold and we could have then imposed individual civil penalties of up to \$1,000.00 for each of the offences pursuant to s. 480(1)(b) of the Act and s. 13(1)(b) of the *Certificate Expiry, Penalties and Fees Regulation* (A/R 125/2001). However, this approach would be unduly punitive given the facts in this case and we instead find the Restricted Agent guilty of one offence in relation to each of the 19 IC's for which T4A's and agreements were detailed and we order that a civil penalty of \$300.00 be levied in regard to each. Therefore, we order that the Restricted Agent pay a total of \$5,700.00 in civil penalties. We are also of the view that a license suspension or revocation is not warranted in the circumstances.

The civil penalties 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 Restricted Agent's certificate of authority will be suspended in accordance with s. 480(4) of the Act. Pursuant to s. 482 of the Act (copy enclosed), the Restricted 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: August 15, 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