

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. 509(1)(a) of the Act. Specifically, it is alleged that the Agent made representations that suggested he held certain insurance industry designations when he did not, in fact, hold the designations in good standing or at all. In so doing, it is alleged that he made false or misleading statements or representations as contemplated in s. 509 of the Act.

Facts and Evidence

This matter proceeded by way of a written Report to Council dated August 17, 2016 (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 September 26, 2016 and counsel for the Agent provided us with additional evidence and submissions by way of letter dated September 2016.

The Agent is the holder of certificates of authority to act in the capacity of a life and accident & sickness agent and his license history predates the AIC's introduction of its computerized licensing system in 1996. In the course of investigating a separate file, an AIC investigator came into possession of a February 14, 2014 letter that the Agent sent to a number of clients. The letter was printed on Kewcorp Financial Inc. letterhead ("Kewcorp"). Kewcorp is the Agent's insurance agency and he is its designated representative. The content of the letter is in relation to certain non-insurance investments. The Agent appears to have signed the letter and his typed name is set out in the following manner: "James Kew, CPCA, PFP".

The Report contained evidence that “CPCA” is the acronym for “Certified Professional Consultant on Aging.” Kewcorp’s website contained a reference to this designation and it provided a contact reference to locate a SPCA member. The Report indicated that the investigator spoke to a person affiliated with the organization that grants the CPCA designation (the Age Friendly Business Academy, hereinafter the “Academy”). She reportedly indicated that the Agent once held the designation but that his membership appeared to have lapsed in 2012. Another official (“JL”) subsequently emailed the investigator on April 11, 2016 and wrote, in part, as follows: “[The Agent] was an active member from August 9, 2003 until August 9, 2011. After that time [the Agent] did not renew his CPCA membership, therefore was no longer allowed to hold himself out as a CPCA in good standing whether in print, online or in any other fashion.”

The Report contained screen shots from the Academy’s website that outline the nature of the CPCA designation. Among other things, they contain the following:

The Age Friendly Business® Academy confers the Certified Professional Consultant on Aging (CPCA)® Designation.

To earn this designation, individuals must demonstrate a solid understanding of the health, social, and financial aspects of aging.

Individuals can demonstrate the requisite knowledge and competencies and become a CPCA in good-standing by meeting any one of the criteria listed below.

1. Enroll in one of the various CPCA training options, attain a 75% or higher mark on the (CPCA)® designation exam, successfully meet the legal and regulatory disclosure requirements, and agree to abide by the CPCA Code of Professional Responsibility. CPCAs must maintain their membership in good standing to continue to hold themselves out as Certified Professional Consultant on Aging (CPCAs). This includes an annual membership fee, updated disclosure declaration, continued commitment to the Code of Professional Responsibility, and ongoing continuing education.
2. Prove successful completion of a related or similar training course that covers the same topic areas. For instance, the Elder Planning Counselor designation course is recognized as meeting the equivalent education requirements. If a related training course does not cover specific modules included in the CPCA curriculum, interested professionals can take any number of the individual modules offered in the CPCA designation curriculum to supplement the training. The Applicant must achieve a 75% or higher mark on the supplemental modules completed. Once the applicant has proven proficiency in all the topic areas, and successfully met the legal and regulatory disclosure requirements, the applicant must agree to abide by the CPCA Code of Professional Responsibility, pay the annual membership fee and a one-time \$50 administration fee.

3. Professionals from Canada who earned the Certified Senior Advisors (CSA) designation and have let their membership lapse, can reinstate their membership as a CPCA. To reinstate membership as a CPCA, individuals must meet the legal and regulatory disclosure requirements, agree to abide by the CPCA Code of Professional Responsibility, pay the annual membership fee and a one-time \$50 administration fee.

The Academy emailed the AIC investigator again on April 27, 2016. In this email it indicated that the Agent had recently contacted the Academy and that he offered to retroactively pay the CPCA membership fees in order to reinstate his designation. The Academy official further wrote that the Agent's request was going to be referred to the Academy's Board of Standards for review. In a subsequent email, dated August 3, 2016, the Academy confirmed that it had denied his request to renew his CPCA membership.

The Report also contained information regarding the copyrighted PFP designation. This designation is granted by the Canadian Securities Institute ("CSI"). It stands for "Personal Financial Planner". An excerpt from the CSI website describes the PFP in this manner:

Personal Financial Planner (PFP[®]) designation a leading industry standard

Recognized by Canada's largest financial institutions, the PFP[®] designation is a leading industry standard that ensures those who earn it demonstrate the knowledge, skills and attributes necessary to evaluate and manage all aspects of a clients' unique financial situation. Earning the PFP[®] designation certifies the holder to be a comprehensive and holistic financial planner.

Since 2010, over 4300 Personal Financial Planner designations have been awarded to industry leading financial planning professionals. Accredited by the American National Standards Institute to ISO 17024, which acknowledges meeting global standards for certifications, CSI ensures PFP professionals meet the highest standards of competence and professionalism.

The PFP[®] designation is a comprehensive financial planning designation that is flexible and accessible. Course and certification exams can be written any time of year. There are tailored education paths for securities, mutual fund, insurance and banking professionals and students can achieve interim certificates while they work towards completing the PFP designation.

On April 8, 2016 the investigator emailed CSI to ascertain whether or not the Agent currently or in the past held a PFP designation. In an April 11, 2016 email reply, CSI indicated that it had no record of the Agent being a student.

The investigator wrote to the Agent by letter dated April 11, 2016. In this letter, the investigator asked, among other things, to provide documentation or evidence confirming that he was registered and authorized to use the CPCA and PFP designations. Counsel for the Agent responded by way of letter dated April 29, 2016. Among other things, counsel referenced the Agent's use of the CPCA designation and wrote that "...with respect to his use of the CPCA designation on a letter dated February 6, 2014, our client has advised that the use of the designation at that time was an oversight which has since been rectified by payment of the appropriate fees without the need for any qualification requirements."

As the Agent's counsel did not provide a response in regard to the Agent's use of the PFP designation, the investigator wrote a follow-up letter seeking that and other information on May 6, 2016. In response, counsel for the Agent wrote the following in a May 13, 2016 letter:

We report that [the Agent] has used the PFP designation as a self-defined term to represent the nature of his business operations. [The Agent] was unaware that PFP is a copyrighted designation and did not use the copyrighted term as such on his business correspondence. [The Agent] no longer uses the PFP acronym on his business documents.

...

[The Agent] states that his use of the CPCA designation on his letter dated February 6, 2014 was an oversight and is no longer present on any of his documents.

The Agent submitted his September 26, 2016 Addendum through counsel. While we have carefully reviewed the Agent's submissions and do not intend to refer to or list every one, they can be summarized as follows:

1. Clients that received the Agent's February 6, 2014 letter that contained the designations were familiar with the Agent in 2011 when his CPCA designation was active and that the designations inclusion once lapsed would not have misled anyone and it could have been reinstated as is indicated on the CPCA website;
2. The Agent indicates that he is a Personal Financial Planner and that he took personal financial planning courses of some kind in 1991 and again in 2007 but that "...he never sought to receive the actual certificate." He states that he believed he was entitled to use the designation having taken these courses. He further argues that he used the PFP reference as a description of the fact that he engaged in the activity of personal financial planning as opposed to its use as a designation and that he was not aware that he was referring to the copyrighted designation;

3. He states that he continued to receive CPCA fee notifications and that "...it was reasonable for [the Agent] to expect that since he was receiving offers to bring his fees up-to-date, that payment of such fees would put him a position to continue to retroactively use the CPCA designation and that the non-payment of fees did not prohibit [the Agent] from using the CPCA designation" and that the Academy did not inform the Agent that his designation would not be renewed by the Academy;
4. The Agent indicates that his website did not receive hits between January, 2010 and February, 2016 and that it was not active.

Discussion

Section 509 of the Act prohibits an agent from making any false or misleading statement or advertisement. In our view, this section is one of strict liability and in order to prove that the Agent committed an offence, the AIC must demonstrate that it more likely than not that the Agent made such a statement. If this is proven, the onus then shifts to the Agent to prove that he took all reasonable means to avoid committing the offence.

In this case, the evidence is clear that in his letter dated February 14, 2014 the Agent placed "PFP" and "CPCA" behind his name. It is equally clear, that both of these terms are industry designations that are conferred on applicants who meet and maintain the criteria established by the organizations that confer them. The PFP is a well-known industry designation administered by CSI and the material in the Report indicates that it is "[r]ecognized by Canada's largest financial institutions." In order to use this designation an applicant must pass an AFP Certification Examination and applicants cannot enroll to take this exam unless they have completed five other courses including Financial Planning I and II. The five courses must be taken from CSI or another approved provider and must be completed no more than five years prior to applying to write the AFP Certification Examination.

As noted above and in the materials, to obtain a CPCA designation an applicant must meet certain educational requirements and must agree to abide by the CPCA Code of Professional Responsibility. Applicants must also meet certain regulatory requirements and pay the yearly fees. It is true that individuals whose designation has lapsed can reapply for their designation without further educational qualification requirements if they pay their fees. However, they must still meet the legal and regulatory requirements and also agree to abide by the CPCA Code as referenced above.

As to whether the Agent made a false or misleading statement, representation or advertisement in relation to his use of PFP, CSI indicated that the Agent was never a student and the Agent admits that he did not obtain the PFP designation. Rather, he states that his use of “PFP” was a self-defined term based on the fact that he took two financial planning courses and that he engages in financial planning of a personal nature with his clients. The Academy stated that the Agent’s membership lapsed and that he was not entitled to use the CPCA designation after 2010. The Agent admits this and states that his use of the designation was an oversight.

In our view, the only reasonable interpretation of the Agent’s references to PFP and CPCA in his letter of February 14, 2014 is that he held those designations at the time and this is clearly a false statement or representation. As a result, the onus shifts to the Agent to prove that he took all reasonable means to avoid making the false statement or representation.

As to his PFP reference, the Agent argues that he performed personal financial planner services to his clients and took two courses personal financial planning courses. Specifically, in his Addendum he stated that he “...had reason to believe, by virtue of successfully completing the aforementioned course, that he was entitled to use the Personal Financial Planner term as he had done prior to registration of PFP” and that “[i]t is reasonable that [the Agent] would not have known that abbreviating Personal Financial Planning would ultimately be seen as infringing on intellectual property territory claimed by a Personal Financial Planner designation.”

We believe that the Agent did not exercise due diligence to avoid making the false or misleading statement in regard to his reference to PFP. On the contrary, the Agent took no steps to determine whether or not he was entitled to use PFP behind his name because the Agent simply assumed that he could. The issue is not whether it was reasonable for the Agent to falsely assume he could use PFP behind his name. Rather, the issue is whether he took any reasonable steps to validate his false assumptions. For example, there is no indication that he visited CSI’s website or sought out information as what he was entitled to reference. Therefore, we find that he committed an offence pursuant to s. 509(1)(a) in this regard.

As to his reference to holding a CPCA, there is no indication that the Agent took any positive steps to determine his right to utilize the designation after it expired. Additionally, he references the fact that the

Academy continued to invoice him and that it was reasonable for him to conclude that all he needed to do was pay the fees to use the designation. Once again, the Agent simply made an assumption in this regard and this turned out to be false given the fact that the Academy took the position that its Standards Board had to review his application to reinstate and his application was ultimately declined. He also states that he based his assumption on the fact that the Academy's website explicitly references the fact that a lapsed membership can be reinstated. However, the same passage of the website also states that the Agent would have to meet the legal and regulatory requirements and this suggests some degree of review or discretion is exercised in granting the designation to a reinstatement applicant. Therefore, we again find that the Agent did not exercise due diligence and we similarly find that he committed an offence pursuant to s. 509(1)(a) of the Act.

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. We also have the ability to suspend an agent's certificate of authority for a period of time or revoke it for one year. The imposition of a suspension or revocation would be unusual and inappropriate in this case given factors such as the length of time that the Agent has held a certificate and the fact that this is his first offence.

That being said, we do believe that a civil penalty is appropriate. The Agent has held a certificate of authority for an extremely long period of time. While this is his first offence under the Act, he either knew or ought to have known that he was not entitled to use the PFP and CPCA designations when he did. If the purpose of using PFP was to describe his practice, it is doubtful that the general public would have any indication that this was simply a self-defined acronym that was unassociated with the designation. When letters are found behind a person's name, it is reasonable to conclude that they represent things like university degrees, honours or designations. Had someone tried to research what a PFP or a CPCA was they could have presumably found the same websites that are referenced in the Report and would most likely draw the conclusion that the person holds those designations. They could not, however, determine the meaning of these terms if they were simply "self-defined" by the Agent.

The Agent submits that the letter went to clients that previously knew him when he held a valid CPCA and that this means that they would not have been misled when he wrongfully used the designation in 2014. He further submits that his website was not active and did not get any hits. It is true that there is

no evidence to suggest that specific individuals were misled or that he gained an advantage by utilizing the designations when not entitled to do so. However, the use of a designation is an explicit statement of qualification and they are usually referenced to give a reader the assurance and comfort that the designation holder has a specific level of expertise and has an ongoing commitment to the professionalism that underpins the designation. This is obviously the case, and of particular interest to the public members of the Council, when untrained consumers are considering whether to place their financial health in someone else's hands. Therefore, based on all of the evidence and submissions, we order that a civil penalty of \$750.00 be levied against the Agent.

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 Agent's certificate of authority will be automatically suspended pursuant to s. 480(4) of the Act. 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: October 21, 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