

INSURANCE COUNCILS APPEAL BOARD OF ALBERTA

In the Matter of the *Insurance Act*, R.S.A 2000, c. 1-3, as amended
and
In the Matter of the *Certificate Expiry, Penalties and Fees Regulation*, 125/2001, as
amended

BETWEEN:

BRIAN KOESTER

Appellant

- and -

GENERAL INSURANCE COUNCIL

Respondent

Heard in Edmonton, Alberta on May 23, 2019

Before:

Gwen Harris
Berk Bilgen
Chris Miller

Appeal Panel Chair
Appeal Panel Member
Appeal Panel Member

Attending:

Brian Koester
Matthew Pruski
Robert Martz
**H.Y.*

Appellant
Appellant - Counsel
Respondent - Counsel
Witness – via teleconference

DECISION AND ORDER

1. This is an appeal by Brian Koester (the Appellant) of the January 17, 2019 General Insurance Council (GIC) decision which found the Appellant guilty of failing to provide the information requested by the Minister. The GIC determined the Appellant had violated section 480(1)(b) of the *Insurance Act* and imposed the maximum penalty of \$1000.



** To protect the privacy of third parties their personal information has been removed from the record in accordance with section 40(4) of the Freedom of Information and Protection of Privacy Act*

Procedural History

2. The Alberta Insurance Council (AIC) mailed the GIC decision to the Appellant on January 23, 2019.
3. By letter received by the Superintendent of Insurance on February 22, 2019, the Appellant commenced the appeal of the January 17, 2019 decision of the GIC.
4. On April 5, 2019, the Superintendent of Insurance approved an extension of the statutory time limit for hearing the appeal.
5. On April 11, 2019, the Superintendent of Insurance finalized the selection of panel members from the Insurance Councils Appeal Board to hear the appeal.

Preliminary Matters

6. The Appellant attended the May 23, 2019 hearing with his Counsel, Mr. Pruski. Mr. Martz appeared as Counsel on behalf of the GIC.
7. The Appeal Panel chair reviewed the jurisdiction of the Appeal Panel and outlined the hearing procedure.
8. The parties confirmed they had no objection to the constitution of the Appeal Panel and raised no objection to the Appeal Panel's jurisdiction to hear and decide the appeal.
9. The GIC conducted its review of the Appellant's application on a documentary basis. Prior to the hearing, the Appeal Panel received and reviewed the following documents that constituted the record before the GIC and documents produced subsequent to the GIC hearing:
 - a. Investigation Report to the General Insurance Council, October 30, 2018
 - b. Alberta Insurance Council License History
 - c. Partial Printout of Appellant's online license application and application log
 - d. Letter from Alberta Insurance Council Director of Licensing to the Appellant, June 4, 2018
 - e. Decision of the General Insurance Council, July 30, 2008
 - f. Copy of payment receipt, June 5, 2018
 - g. Printout of e-mail messages between the Appellant and Alberta Insurance Council Investigator dated June 6, 2018 and June 21, 2018
 - h. Letter from Alberta Insurance Council Investigator to the Appellant, July 9, 2018

- i. Letter to Alberta Insurance Council from Appellant's Counsel (V. Kubinski) July 25, 2018 with medical certificates dated June 29, 2018 and July 24, 2018
- j. Letter from Appellant to Alberta Insurance Council, July 24, 2018
- k. Letter to Appellant's Counsel (V. Kubinski) from Alberta Insurance Council Investigator, August 3, 2018
- l. Letter to Alberta Insurance Council from Appellant's Counsel (V. Kubinski), August 20, 2018
- m. Printout of e-mail message to Appellant's Counsel (V. Kubinski), August 22, 2018
- n. Letter to Appellant's Counsel (V. Kubinski) from Alberta Insurance Council Investigator, August 22, 2018
- o. Letter to Alberta Insurance Council from Appellant's Counsel (P. Prowse), September 4, 2018
- p. Letter to Alberta Insurance Council from Appellant's Counsel (M. Pruski), October 3, 2018
- q. Affidavit of Brian Koester sworn October 3, 2018 with attachments
- r. Letter from Appellant's Counsel (M. Pruski) to Alberta Insurance Council, November 19, 2018
- s. Alberta Insurance Council letter dated January 23, 2019 transmitting the General Insurance Council decision to the Appellant.
- t. General Insurance Council decision January 17, 2019
- u. Canada Post record of delivery
- v. Letter dated February 21, 2019 from Appellant's Counsel (M. Pruski) to the Superintendent of Insurance
- w. Written submissions of the General Insurance Council, May 15, 2019
- x. Written submissions of the Appellant, May 16, 2019, including Appellant's Broadconnect Telecom Invoice for July 2017, Letter to Appellant's Counsel (P. Prowse) from Alberta Insurance Council Investigator dated September 12, 2018 and Investigation Report to the General Insurance Council dated September 12, 2018.

10. In the course of the hearing the following document was admitted:

- a. Printout of e-mail messages dated October 25, 2018 and October 26, 2018 between *H.Y. and various Alberta Insurance Council personnel.

Issue to be Determined

11. Did the Appellant commit an offence under section 480(1)(b) of the *Insurance Act*?

12. If so, is the penalty of \$1000 as imposed by the General Insurance Council appropriate?

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Relevant Legislation

13. Section 467 of the *Insurance Act* lists the information an applicant must provide with an application for a certificate of authority. Specific to this case:

467(1) An application for a certificate of authority must

(c) contain the information, material and evidence required by the Minister,

14. The grounds for imposing sanctions on the holder of a certificate of authority are set out in section 480(1) of the *Insurance Act*. Specific to this case:

480(1) If the Minister is satisfied that the holder or a former holder of a certificate of authority

(b) has contravened any provision of this Act or the regulations or similar legislation in another jurisdiction or legislation that is a predecessor of this Act or the regulations,

the Minister may revoke, suspend or refuse to renew or reinstate one or more of the certificates of authority held by the holder, impose terms and conditions provided for in the regulations on one or more of the certificates of authority held by the holder and impose a penalty on the holder or former holder.

15. Section 13 of the *Certificate Expiry, Penalties and Fees Regulation* prescribes the financial penalties that may be imposed for violations of section 480 of the *Insurance Act*.

13(1) For the purposes of section 480(2) of the Act, the amount of the penalty that may be imposed may not exceed the following:

- (a) \$5000 for a matter referred to in sections 480(1)(a) of the Act;
(b) \$1000 for a matter referred to in section 480(1)(b), (c), (d) or (e) of the Act,

16. In a 2001 directive, the Minister of Finance delegated the Minister's powers, duties and functions as set out in the provision quoted above to the GIC.

Undisputed Facts

17. The Appellant held a general insurance agent's certificate of authority from June 9, 1997 to January 9, 2006.
18. The Appellant relinquished his certificate of authority on January 9, 2006.
19. On July 30, 2008, the GIC convicted the Appellant of offences related to his conduct in 2005 and levied civil penalties totaling \$3500.

20. The Appellant has held a general insurance agent's certificate of authority from July 4, 2017 to the present.
21. The Appellant did not identify his prior certificate of authority or 2008 conviction on his 2017 application for a general insurance agent's certificate of authority.
22. On June 5, 2018, the Appellant paid the civil penalty of \$3500 plus accrued interest of \$4025.

Witness

23. Counsel for the GIC called the *H.Y. who testified:
 - a. He reviewed the telephone records for calls to the Edmonton Office from the four telephone numbers provided to him.
 - b. He found there were no calls between January 1 and December 31, 2017 from three of the telephone numbers. There was a call to the Edmonton Office from one of the four telephone numbers on October 2, 2017. That call appeared to be unanswered.
 - c. He does not know if he was provided with all of the Appellant's telephone numbers.
24. On cross-examination, *H.Y. provided the following information:
 - a. On October 26, 2018 when he reviewed the telephone records, all of the 2017 records were available to him and searchable.
 - b. He is no longer able to check for calls made from other telephone numbers in 2017.
 - c. He might be able to have the information restored to look for other telephone numbers.
 - d. The telephone number recorded on the system may be a general number rather than the specific number used by a caller.

Submissions

25. In written submissions and opening and closing remarks, Counsel for the GIC reviewed the information considered by the GIC. He submitted:
 - a. The Appellant failed to disclose that he had previously held a license in Alberta and that he had been convicted of an offence within the last 10 years.

- b. The GIC does not oppose the Appellant's appeal of the finding of his failure to disclose the prior license as he only had to disclose a license held within the previous 10 years.
- c. The Appellant's failure to disclose his prior 2008 conviction is a violation of section 480(1)(b) of the *Insurance Act*.
- d. Offences under section 480(1)(b) are public welfare offences that attract strict liability. In order to avoid liability, the Appellant must show he took all reasonable care to avoid the offence.
- e. The Appellant was not duly diligent in failing to advise the AIC in his 2017 application of his 2008 conviction.
- f. It is difficult to accept the Appellant was unaware of the date of his conviction as he had signed the investigator's preliminary report on April 3, 2008. As such, he must have known he had been convicted of an offence within ten years of submitting his application in 2017.
- g. Although the Appellant claims to have contacted the AIC to inquire whether there were outstanding convictions, the records do not show calls from any of the telephone numbers included on his file.
- h. As the GIC does not oppose the Appellant's appeal of the finding on failure to disclose his prior license, the civil penalty for failure to disclose the 2008 conviction should be \$500.

26. Counsel for the Appellant elected not to call evidence. He argued the record shows the Appellant was diligent in trying to confirm the date of the prior conviction. He submitted:

- a. The Appellant was never served with the 2008 decision of the GIC. His first notice of the conviction and the civil penalty assessed was in the June 4, 2018 letter from the AIC Director of Licensing.
- b. On June 5, 2018, the Appellant paid the assessed civil penalty and interest in full and advised the AIC of his error on the application form.
- c. As the Appellant had relinquished his license in 2006 and did not recall the date on which he signed the investigator's report, he believed the conviction was more than 10 years old.
- d. The Appellant's telephone records from July 2017 show the calls he made to the AIC in which he was told there were no convictions or penalties relating to him.
- e. The September 12, 2018 Investigator's Report that was not provided to the GIC reveals a data entry error that resulted in the creation of two licensing records for the Appellant on the AIC's Licensing Management System. The report confirms that due to the discrepancies, an unpaid civil penalty that was levied against the Appellant in 2008 under his prior license was not transferred to the license issued in 2017.

- f. The Appellant's 2017 application would have been subject to eight levels of review but the error in his application was not found for a year because of the data entry error.
- g. The Appellant was diligent in trying to confirm the date of conviction and it was reasonable for him to rely on the information provided to him.

Discussion and Reasons

27. This appeal focuses on the issue of whether or not in responding in the negative to the question on his July 4, 2017 application "in the last ten years have you: d) been convicted of an offence under the Insurance Act or any other enactment?" the Appellant contravened section 467(1)(c) of the *Insurance Act*.
28. The failure to comply with the requirement to provide accurate information required by the Minister is categorized as a regulatory or public welfare offence that attracts strict liability. In the present case, this means that once the failure to comply with the requirement is established, liability can be avoided only if the Appellant can establish on a balance of probabilities that he was diligent in taking all reasonable steps to prevent the failure to provide accurate information.
29. In this case, it is undisputed that in responding in the negative to the question on conviction for an offense, the Appellant failed to disclose the conviction as determined by the GIC in its July 30, 2008 decision which was within the ten-year period noted on the application form.
30. It is the position of the Appellant that he was duly diligent in his efforts to provide accurate information. In support of this position, Counsel referenced the Appellant's sworn affidavit, documentation of a data entry error on the AIC's Licensing Management system and the Appellant's telephone records from July 2017.
31. The AIC does not claim and there is no evidence on the record that the Appellant was served or otherwise notified of the 2008 GIC decision. As such, the Appeal Panel accepts the Appellant's assertion that the June 4, 2018 letter from the AIC Director of Licensing was the first notice he had of his conviction by the GIC and the date of that conviction.
32. Further, the Appeal Panel accepts that it was not unreasonable for the Appellant to believe in July 2017 that his prior conviction was outside the 10-year period given he had not been notified of the 2008 GIC decision and that he had relinquished his license in January 2006.

33. The Appeal Panel acknowledges the information provided by ^{*H.Y.} as to the lack of a record of calls made to the AIC in 2017 from the Appellant's telephone numbers. However, the Appeal Panel prefers to rely upon the record of calls made to the AIC office in July 2017 as shown on the Appellant's telephone bill because the AIC review was limited to only those telephone numbers on file.
34. The Appeal Panel accepts the Appellant's account as set out in his sworn affidavit that he made calls to the AIC to find out about convictions on the AIC system and was advised that there were no convictions or penalties. The Appellant's claim is supported by the telephone bill which shows three calls made to the AIC office on July 4, 2017. While the existence of a call placed does not prove the information provided to the Appellant, the Appeal Panel finds it reasonable to accept that the Appellant was told there were no penalties or convictions given the data error documented on the September 2018 investigator's report that indicated the penalties were not transferred to the Appellant's current file.
35. The Appeal Panel is satisfied that in seeking confirmation from the AIC about conviction and penalties and relying upon the information provided, the Appellant took reasonable steps to ensure the accuracy of the information he provided on his July 2017 application. As such, the Appeal Panel finds the Appellant was duly diligent in his efforts to avoid providing the inaccurate information which was based on his mistaken understanding that the conviction predated the 10-year requirement of the question on his application.

Conclusion

36. For the foregoing reasons, the Appeal Panel concludes the Appellant did not commit an offence pursuant to section 480(1)(b) of the *Insurance Act*.

Appeal Fee

37. Section 24 of the *Insurance Councils Regulation* provides that, in determining an appeal, a panel shall also determine the disposal of the appeal fee paid by the Appellant to commence the appeal to one or both of the parties taking into consideration both the results of the appeal and the conduct of the parties. Given the result of the appeal, the Appeal Panel is of the view that the appeal fee paid should be awarded to the Appellant. The conduct of the parties provides no reason to do otherwise.

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Order

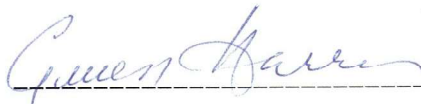
38. For the reasons set out above, it is ordered that:

- a. The January 17, 2019 Decision of the General Insurance Council is reversed.
- b. The appeal fee is awarded to the Appellant.

DATED at Edmonton, Alberta this 3rd day of July, 2019.

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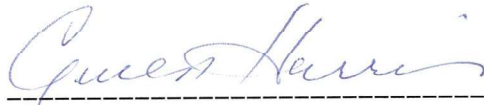
Per:



Gwen Harris – Appeal Panel Chair

Authorized to sign for:

Per:



Berk Bilgen – Appeal Panel Member

Per:



Chris Miller – Appeal Panel Member