**INSURANCE COUNCILS APPEAL BOARD OF ALBERTA**

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

**And in the Matter of the *Insurance Councils Regulation*, Alta. Reg. 126/2001, as amended ("*Insurance Councils Regulation*")**

**BETWEEN:**

**JAMES KEW**

**Appellant**

**and**

**THE LIFE INSURANCE COUNCIL ("LIC")**

**Respondent**

Heard in Calgary, Alberta on August 24, 2017

Before:

**TRENA GRIMOLDBY – Appeal Panel Chair**
**JOHN BEAL – Appeal Panel Member**
**OSCAR BUERA – Appeal Panel Member**

**REASONS FOR DECISION AND ORDER**

1. This is an appeal of a decision of the LIC dated October 21, 2016 (the "Decision") wherein the LIC found Mr. Kew guilty of violating section 509(1)(a) of the *Insurance Act* (the "Act") for making misleading or false representations stating that he held certain designations, namely the PFP and CPCA certifications, when he did not in fact hold them.

**Procedural History**

2. This matter has somewhat of a lengthy procedural history.

3. Mr. Kew commenced his appeal of the Decision by way of a Notice of Appeal in the form of a letter to the Superintendent of Insurance hand delivered on November 17, 2016. Mr. Kew advised therein that he would be calling as many as ten witnesses and requested that videoconferencing facilities be available for the appeal.

4. On November 25, 2016, a Panel of the Insurance Councils Appeal Board (ICAB) was selected to hear the appeal.

5. On December 12, 2016, the Panel received a request from counsel for the LIC, Warren Martinson, for an adjournment *sine die* of the appeal hearing. Mr. Martinson advised that due to the issues raised in the Notice of Appeal and the fact that Mr. Kew anticipated calling up to ten witnesses, it would not be possible to schedule a hearing date within the 30-day period contemplated by section 19(1) of the *Insurance Councils Regulation* (the "Regulation"). Mr. Martinson also requested that a conference call be scheduled to discuss hearing procedures, document disclosure, exchange of witness will-say statements, and manner of evidence presentation at the appeal hearing. The Panel asked Mr. Kew for his response to Mr. Martinson's requests on December 15, 2016, and Mr. Kew responded on that date advising that he did not object to the adjournment request but that he did object to the scheduling of a conference call.

6. On December 16, 2016, the Panel adjourned the appeal hearing *sine die* to a date to be later specified by the Panel. The Panel asked the parties to provide their availability for a number of January 2017 dates and declined to schedule a conference call, advising instead it might revisit that suggestion in January 2017 depending on the circumstances.

7. In response to the Panel's request for the parties' January 2017 availability, Mr. Kew instead provided his February 2017 availability on December 19, 2017, stating that he was not available in January 2017. The Panel then on that date requested that the parties provide their availability for a number of February 2017 dates. The parties advised of their availability for the February 2017 dates on December 20 and 21, 2016, respectively. Counsel for the LIC, Robert Martz, advised he had been retained on behalf of the LIC in this matter on December 21, 2016. Mr. Martz suggested the parties exchange preliminary witness lists given the number of witnesses Mr. Kew had advised he intended to call, in furtherance of assisting hearing scheduling and ensuring witness availability. Mr. Martz also suggested that any requests for additional documents be made by either party at least four weeks in advance of a scheduled hearing date.

8. On December 22, 2017, Mr. Kew objected to Mr. Martz being retained as counsel by the LIC but did not address any of the suggestions put forward by Mr. Martz noted above. The Panel on January 13, 2017 requested responses three times from Mr. Kew to Mr. Martz's December 21, 2016 suggestions, due to various difficulties with Mr. Kew's email server. On January 16, 2017, Mr. Kew responded and declined to agree to both of Mr. Martz's suggestions.

9. On January 26, 2017, the Panel advised the parties it had decided to conduct a conference call to address some outstanding issues in furtherance of scheduling the appeal hearing. The Panel requested the parties' availability for same in late January – early February 2017. The Panel advised that the issues it would be canvasing in the call would include the number of witnesses to be called by each party, the number of days needed for the appeal hearing, available dates for the hearing, and deadlines for any additional document exchanges prior to the hearing.

10. On January 27, 2017, Mr. Martz provided his availability for the conference call and offered the use of a conference call number on January 30, 2017. Mr. Kew did not provide a response.

11. On January 30, 2017, the Panel advised the parties that the conference call would proceed on February 1 2017, and provided the conference call details. The Panel requested that the parties provide confirmation of their intent to participate in the call at their earliest convenience. Mr. Martz provided said confirmation on January 30, 2017. On February 1, 2017, Mr. Kew advised he would not be participating in the call.

12. On February 1, 2017, the Panel advised the parties that the conference call was cancelled but would be rescheduled and asked the parties to provide their availability for a rescheduled conference call in mid-February 2017. Mr. Martz provided his availability on February 1, and Mr. Kew provided his availability on February 3, 2017.

13. The Panel advised the parties on February 3, 2017 that the rescheduled conference call would proceed on February 15, 2017, and would address the same issues as were originally intended in the February 1, 2017 call.

14. The conference call proceeded on February 15, 2017, and the Panel advised the parties on February 17, 2017 of its decisions regarding the matters discussed on the call, as follows: the appeal hearing would be scheduled in Calgary for three days in length, there would be a three week deadline prior to the hearing for additional document production requests to be made by the parties to one another, and the Panel would check in with the parties two weeks out from the hearing date to see if all three days were still required or whether one or two days would instead be sufficient. The Panel provided dates in late March and early April 2017 and requested the parties provide their availability for same for the appeal hearing.

15. Mr. Martz provided his availability for the dates on February 21, 2017. Mr. Kew did not provide a response.

16. On February 24, 2017, the Panel advised the parties that it had experienced some difficulties in receiving responses from Mr. Kew in his appeal, and that this had resulted in several delays in addressing procedural matters and the scheduling of hearing dates. The Panel advised the parties the hearing was being scheduled for April 5 – 7, 2017.

17. On February 27, 2017, Mr. Kew stated he refused to accept the decision of the Panel that the hearing would be held in Calgary and raised matters pertaining to previous decisions of the Albert Insurance Council (the "AIC") that he had been involved in. On February 28, 2017, the Panel advised the parties that its decision on venue had been made, it had the discretion to make decisions on preliminary and procedural matters and control its own process on appeals, and that its decisions speak for themselves. The Panel reminded Mr. Kew of the numerous opportunities that had been provided for procedural matters to be addressed both in written submissions as well as during the conference call, and advised Mr. Kew that parties could request an adjournment of the hearing dates in accordance with the Regulation. The Panel also

advised Mr. Kew that it could only deal with the merits of this specific appeal, and that this appeal was not the platform upon which he could voice his views or concerns about previous decisions of the AIC, nor its policies or processes generally.

18. On March 22, 2017, the Panel conducted its check in with the parties in accordance with its decision of February 17, 2017. Mr. Martz advised the Panel on March 23, 2017 that the LIC intended to call one witness at the appeal hearing and that it did not expect that it would need three days for the hearing. The Panel that day also received correspondence from Kerry Croft, who indicated he was acting on behalf of Mr. Kew in regards to a not yet commenced Alberta Court of Queen's Bench ("QB") action that Mr. Kew intended to file against the AIC and who, although he did not confirm he had been retained to act for Mr. Kew in this appeal, requested that the appeal hearing be adjourned pending the outcome of the not yet commenced QB action. Mr. Croft sought confirmation of which parties he should include in his pleadings as well as who should be served with pleadings in the not yet commenced action. The Panel advised Mr. Croft that those inquiries should be made of the AIC directly, and that should his client wish to request an adjournment of the appeal hearing, he would need to do so in accordance with the *Regulation*. The Panel received no response from Mr. Kew to its check in requests.

19. On March 24, 2017, the Panel confirmed with the parties the hearing location, start time, responsibility for transcription services, and the three day duration of the hearing.

20. On March 27, 2017, the Panel received correspondence from Mr. Croft requesting an adjournment of the appeal hearing based on Mr. Kew's objection to the hearing venue, the QB action against the AIC, and Mr. Croft's lack of availability to attend the hearing. That same day, the Panel requested submissions from Mr. Martz in response, who advised that his client opposed the *sine die* adjournment request. He advised that he had not been served with anything in regards to a QB action against his client, and that as such, it could not form the basis of an adjournment request. Mr. Martz advised that if the issue was that Mr. Kew had retained new counsel, he offered to consent to a one month adjournment for Mr. Croft to get up to speed on the file.

21. That same day, the Panel asked Mr. Croft to provide any final submissions to the Panel on his adjournment request in light of Mr. Martz's response and offer. Mr. Croft responded on March 28, 2017 and advised he was awaiting client instructions and for the Courts to return his documents. He provided a further response on March 29, 2017 reiterating the basis for the adjournment request provided on March 27, 2017, and suggested Mr. Kew was entitled to have Mr. Croft attend at the appeal hearing as counsel and that Mr. Kew would suffer financial prejudice by having to retain counsel to appear at the hearing venue.

22. On April 3, 2017, the Panel advised the parties that it had considered the submissions on the adjournment request and had decided to adjourn the appeal hearing *sine die*, with the provision that the parties were to advise the Panel of their June and July 2017 availability for hearing dates by June 1, 2017.

23. The Panel also provided some guidance to the parties about some of the arguments made in Mr. Croft's March 29, 2017 submission. The Panel advised that it was not of the view that the QB action was relevant to the ICAB appeal hearing process requested by Mr. Kew, and that it should be dealt with separately in the appropriate forum. The Panel confirmed that the April 2017 hearing dates had been originally suggested by Mr. Kew himself, and expressed concern that Mr. Croft did not yet appear to have familiarized himself with the communications that had occurred in the appeal on that point. The Panel advised that it was not aware of, and had been provided with no authority in support of the proposition that there is an absolute right to counsel in administrative tribunal matters, nor of an absolute right to select specific counsel, nor of an absolute right of a party to select counsel located in another area when that party has been advised that their hearing will be proceeding in a different area. The Panel noted that Mr. Kew had on several occasions leading up to the decision on hearing venue refused to provide his preliminary witness list, or to confirm the attendance of any witnesses on his behalf at the hearing regardless of where they might reside. The Panel also noted that the *Regulation* does not contain a statutory requirement that would require it to hold a hearing where either the business activities of an appellant took place or where any activities in any given appeal allegedly took place.

24. On June 1, 2017, the Panel received correspondence from Mr. Croft who provided his client's availability for July, September, and October 2017 hearing dates and a preliminary witness list including counsel for the AIC Mr. Martinson, AIC Investigator Mr. Bernard Van Brabant, Mr. Kew, and unidentified persons from the organizations offering the Certified Professional Consultant on Aging (CPCA) designation course. Mr. Croft attempted to raise again his client's previous request that the hearing be adjourned pending the resolution of the QB action and that it be held in his client's preferred venue.

25. On June 2, 2017, Mr. Martz provided his availability for October hearing dates, submitted that the QB action should not impede the resolution of Mr. Kew's appeal, and that the Panel's decision on hearing venue had been made in its decision of February 17, 2017.

26. On June 26, 2017, the Panel advised the parties that the appeal would be heard October 4 – 6, 2017, and that the process set out in its February 17, 2017 decision was still in effect, with revised dates. Mr. Martz advised of a new scheduling conflict on those dates, and provided his availability for dates in July, August, September, and on alternate October dates. On June 27, the Panel canvassed the parties for their availability on selected September and October 2017 dates. Mr. Martz provided his availability for same. Mr. Croft provided his clients' October availability and indicated his client was no longer available in September as he had advised earlier in June 2017.

27. On June 28, 2017, due to the above noted scheduling difficulties, the Panel canvassed the parties for their availability for July and August hearing dates. Mr. Martz provided his availability for same while Mr. Croft provided no response on his client's availability for those dates.

28. On June 30, 2017, the Panel advised the parties that it had considered the parties' submissions on availability as detailed above and as a result, the appeal would be heard August 24 and 25, 2017, with the process set out in its February 17, 2017 decision being still in effect with revised dates.

29. On July 12, 2017, Mr. Croft advised the Panel that he and his client had decided not to attend the hearing requested by Mr. Kew. He further advised he would be submitting an Application to the Courts for an Order adjourning the appeal hearing until the Courts had fully resolved his concerns related to other AIC matters. Mr. Croft had failed to include Mr. Martz on this correspondence, so the Panel provided it to Mr. Martz as a party to the appeal.

30. On July 20, 2017, Mr. Croft again sought confirmation of which parties he should include in his pleadings and asked for suggestions from Mr. Martz and the Panel as to any other parties who should be named as respondents to his Application. The Panel advised it would not be a named respondent to the Application. That same day, the Panel advised the parties of the location of the scheduled hearing as well as the start time.

31. On August 8, 2017, Mr. Croft provided the Panel, Mr. Martz, and the Alberta government with his client's filed Application and Affidavit. Mr. Croft in his Application sought at QB via a Master in Chambers an adjournment of the scheduled appeal hearing and an Order directing that the appeal hearing proceed at his client's preferred venue. The Application was set to be heard on August 15, 2017.

32. On August 9, Lisa Friesenhan, counsel for the Alberta Government, advised Mr. Croft, Mr. Martz and the Panel that the relief he was seeking was outside of the jurisdiction of a Master in Chambers to hear. She requested that Mr. Croft withdraw his Application in Masters' Chambers and re-file it in QB Chambers and advised him the August 15, 2017 could be kept to hear it.

33. On August 10, the Panel conducted its check in with the parties in accordance with its decision of February 17, 2017. It asked the parties to advise whether two full days were required for the hearing and how many witnesses each party would be calling. On August 11, Mr. Martz advised that two full days would be sufficient and that he intended to call one witness at the hearing. The Panel received no response from Mr. Croft.

34. On August 15, 2017, Mr. Martz advised the Panel that Mr. Croft's Application had been dismissed in QB Chambers. The Panel received no advisement from Mr. Croft regarding the outcome of his Application.

35. On August 18, 2017, the Panel confirmed the scheduled hearing would still be proceeding, and advised Mr. Croft it was open to him to withdraw his client's appeal and request that the appeal hearing be cancelled any time before the start of the hearing on August 24, 2017. Mr. Croft responded that he was awaiting instructions from his client on how he wished to proceed on his appeal.

36. On August 21, 2017, Mr. Croft advised that Mr. Kew would not be attending his appeal hearing. He asked for confirmation that the Panel would review his client's Affidavit prepared in support of his recently dismissed QB Application, as evidence at the appeal hearing. Mr. Martz advised that his client did not consent to entering of the Affidavit as an exhibit at the appeal hearing without the attendance of Mr. Kew and the opportunity for cross-examination.

37. On August 22, 2017, Mr. Croft advised that his client now wished to attend his appeal hearing by way of telephone or video conference. Mr. Martz advised that either method could be accommodated. Mr. Croft responded that Mr. Kew would be able to attend via telephone conference from Mr. Croft's offices.

38. On August 23, 2017, Mr. Martz sought clarification on what role Mr. Kew would be playing at the appeal hearing. Mr. Croft advised that Mr. Kew would be making presentations to the Panel, answering questions of the Panel, and would be available for cross-examination by Mr. Martz. Mr. Martz submitted that no cross-examination had been conducted on the Affidavit, it was not a substitute for live testimony, it had been filed in another proceeding which had been dismissed by the Courts, and that Mr. Kew should have to attend his appeal hearing and give evidence. He further objected to Mr. Kew giving evidence via telephone conference given that this had been requested one day before the hearing, as it would prevent or hinder full cross-examination and the ability to put documents to Mr. Kew. Mr. Croft advised that documents could be put to Mr. Kew via email, and that his role at the appeal hearing would be to advise Mr. Kew as needed and confirm his identity for the purposes of sworn testimony. Mr. Croft also specifically requested that paragraphs 1, 2, 4, 5, 15-17, 23-28, and 32-37 of the Affidavit be admitted as evidence at the appeal hearing. In an effort to accommodate Mr. Croft's last minute request, Mr. Martz agreed to admit those paragraphs into evidence at the hearing, save paragraphs 16-17 and 37.

39. The appeal hearing was held on August 24, 2017. Mr. Martz, Mr. Martinson, and AIC Investigator Roy Dias, appeared on behalf of the AIC. Mr. Croft and Mr. Kew attended via telephone conference on behalf of Mr. Kew. While the hearing was scheduled for an 8:30 a.m. start time, Mr. Croft and Mr. Kew did not arrive until approximately 8:45 a.m.

40. At the outset of the hearing, The Panel asked the parties for further submissions on paragraphs 16, 17, and 37 of the Affidavit[1]. After hearing further submissions, the Panel decided not to admit those paragraphs into evidence[2]. The Panel further advised the parties that it would ultimately assign the appropriate weight to be given to the Affidavit evidence[3].

41. The parties agreed that the Panel effectively sat as a Panel of first instance in a hearing *de novo*[4].

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[1] Hearing transcript ("Transcript"), pages 8 – 11.
[2] Transcript, page 12, lines 3-8.
[3] Transcript, page 13, lines 14-20.
[4] Transcript, page 14, lines 24-26; Written Submissions of the LIC dated September 22, 2017 "(LIC Submissions"), page 4, paragraph 17.

42. The parties also agreed to the marking of Exhibits in the hearing as follows:

- Exhibit A – Letter appointing the appeal Panel
- Exhibit B – Decision of the General Insurance Council ("GIC")
- Exhibit C – LIC submission to the appeal Panel
- Exhibit D – Notice of Appeal of the LIC decision
- Exhibit E – Notice of hearing location
- Exhibit F – Notice of hearing date
- Exhibit G – Paragraphs 1, 2, 4, 5, 15, 23 – 28, 32-36 of the Affidavit of James Kew sworn on August 2, 2017.

43. At the close of evidence at the hearing, the Panel and the parties scheduled written closing submissions to be provided to the Panel. Mr. Kew was to provide his submissions to the Panel by September 12, 2017, and Mr. Martz was to provide his by September 22, 2017.

**Relevant Law**

44. Section 509(1) of the *Insurance Act* provides as follows:

Unfair practices

509(1) No insurer, insurance agent or adjuster may

(a) make a false or misleading statement, representation or advertisement,

(b) engage in a tied selling practice prohibited by the regulations,

(c) engage in any unfair, coercive or deceptive act or practice, or

(d) make any statement or representation or commit any practice or act that is prohibited by the regulations.

**Issues to be decided**

45. The issues to be decided on this appeal are:

1. The appropriate standard of review of the LIC decision;
2. Whether or not the LIC erred in law when it found that Mr. Kew committed an offence pursuant to section 509(1)(a) of the Act;
3. Whether or not there was procedural unfairness in the LIC proceedings or the proceeding herein;

4. Whether or not Mr. Kew committed the offence as alleged in the AIC Investigation Report to Council and as found by the LIC in its Decision; and
5. The appropriate sanction if Mr. Kew is found to have committed the offence.

**Summary of Facts**

46. Mr. Kew is the principal of Kewcorp Financial Inc. ("Kewcorp") and the holder of certificates of authority which allow him to act in the capacity of a life and sickness agent. His license history predates the AIC's introduction of its computerized licensing system which was implemented in 1996.

**AIC Investigation and Report to Council**

47. During a separate AIC investigation against Mr. Kew being conducted in early 2016, the AIC received a letter dated February 6, 2014 sent by Mr. Kew to a group of his clients. The letter was printed on Kewcorp letterhead, was signed by Mr. Kew, and included the designations CPCA (Certified Professional Consultant on Aging) and PFP (Personal Financial Planner) beside his name.[5]

48. The AIC Investigator discovered in April 2016 that Mr. Kew's CPCA status had been inactive since 2012, and further learned that Mr. Kew was no longer a member of the Age Friendly Business Group of Companies ("AFB") and that he was no longer allowed to hold himself out using the CPCA designation.[6]

49. The AIC Investigator also learned from AFB in April 2016 that Mr. Kew had contacted AFB and offered to retroactively pay fees to reinstate his CPCA membership and designation. The AFB advised Mr. Kew that this request would be provided to their Board of Standards for review. The AIC Investigator followed up with AFB in August 2016 on the review and was advised by the AFB that Mr. Kew's request for reinstatement had been denied.[7]

50. The AIC Investigator learned in April 2016 in relation to the PFP designation that Mr. Kew had not completed the required course work with the Canadian Securities Institute to have earned the PFP certification, nor did they have any record of a student named James Kew.[8]

51. The AIC Investigator received correspondence from Mr. Croft in April 2016 advising he had been retained by Mr. Kew to represent him on the above noted matters. In May 2016 in response to information requests from the AIC Investigator, Mr. Croft advised that Mr. Kew's use of the CPCA designation had been an "oversight", that the issue had been resolved by the payment of fees, and that the designation was no longer present on any of Mr. Kew's documents. He further advised that Mr. Kew had been using the PFP designation as a "self-defined term to represent

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[5] Written Submissions of LIC dated September 21, 2017 ("LIC Submissions"), Tab A, page 2, paragraph 2.
[6] LIC Submissions, *supra*, Tab A, page 2, paragraphs 3 and 6.
[7] LIC Submissions, *supra*, Tab A, page 2, paragraphs 9, 13 and 14.
[8] LIC Submissions, *supra*, Tab A, page 2, paragraphs 4 and 5.

the nature of his business operations", that Mr. Kew "was unaware that PFP is a copyrighted designation", and that the designation was no longer present on any of Mr. Kew's documents.[9]

52. In light of the foregoing facts, the AIC Investigator noted relative to the CPCA designation that the April 2016 advisement from Mr. Croft had been contradicted by the AFB in August 2016 who advise that Mr. Kew's reinstatement request had been denied. The AIC Investigator also noted relative to the PFP designation that Mr. Kew's explanation that he was simply using a self-defined term and that he was unaware he was using a copyrighted designation was implausible. The AIC Investigator further noted that the use of the PFP designation was misleading as it implied to clients that Mr. Kew had met a certain proficiency in relation to financial planning when that was not in fact the case.[10]

53. As a result, on August 17, 2016, the AIC Investigator issued his Report to Council including the foregoing information and recommended that Mr. Kew's conduct violated section 509(1)(a) of the Act and that a civil penalty pursuant to section 480 of the Act be imposed.

**LIC Decision**

54. Following the AIC Investigation, the LIC received the Report to Council as well as additional submissions from Mr. Kew on September 26, 2016.[11]

55. The LIC considered the matter as well as the evidence before it and issued its decision on October 21, 2016. The LIC's findings in the matter were as follows:

> "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 materials 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

[9] LIC Submissions, *supra*, Tab A, page 3, paragraphs 10 and 12.
[10] LIC Submissions, *supra*, Tab A, page 4.
[11] LIC Submissions, supra, Tab B, pages 4 and 5.

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.

...

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.

...

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 [AFB] 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 [AFB] took the position that its Standards Board had to review his application to reinstate and his application was ultimately declined. He also states he based his assumption on the fact that the [AFB'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 suggest 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 to 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 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 CPCA was they could presumably have 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 those terms if they were simply "self-defined" by the Agent.

...

... 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."[12]

56. The LIC ordered that the penalty was to be paid within 30 days of receiving the LIC Decision., and that if it was not paid by that time, Mr. Kew's certificate of authority would be automatically suspended pursuant to s. 480(4) of the Act. The LIC also advised that Mr. Kew had 30 days in which to appeal its Decision by filing a Notice of Appeal with the Office of the Superintendent of Insurance.

[12] LIC Submissions, *supra*, Tab B, pages 5-8.

**Notice of Appeal**

57. On November 17, 2016, Mr. Kew submitted a Notice of Appeal of the LIC Decision. In addition to that, the Panel canvassed Mr. Kew at the appeal hearing held on August 24, 2017 for further clarity on his grounds of appeal. The Panel considers the grounds of appeal to be those contained in his Notice as well as those provided in his advisements provided at the appeal hearing, as noted above herein at paragraph 45, at points two, three and four.

**Appeal Hearing – Evidence and Argument**

58. As noted above at paragraph 39, the appeal hearing was held on August 24, 2017. Both the AIC and Mr. Kew provided evidence and argument at the hearing.

59. Mr. Kew made submissions on his own behalf, despite the presence of his counsel Mr. Croft. He shared an anecdote about an instance where he had been caught speeding by an RCMP officer who stopped him, admonished him, and then let him go. He submitted that this incident was relevant to his appeal in that the concept of strict liability in matters such as the one before the Panel should, essentially, not be so strict.[13] He implied that the AIC was abusing its power[14] in this matter. He admitted that he had sent the letter of February 2014 which was signed "James Kew, CPCA, PFP"[15], but stated he had used an old template in error.[16] With regard to the PFP designation, Mr. Kew submitted that it was unreasonable to assume that he would know that someone had trademarked the acronym PFP, and that "he can't know everything".[17] He submitted that he had "great reason to be very upset and to distrust everything" that the AIC was involved in, and that he was considering filing a complaint with the RCMP against the AIC on corruption charges.[18] He admitted that he did not hold the PFP designation from CSI[19], that he wasn't aware that somebody had trademarked it, and argued "[h]ow could I possibly be aware of that, and why would I care, frankly".[20] He admitted his CPCA designation had lapsed and accused the AIC Investigator of "tainting" the decision of the AFB to deny his reinstatement request.[21]

60. Mr. Kew also submitted he had refused to attend at the hearing venue but had decided at the last minute to attend via teleconference under the advisement of Mr. Croft.[22] He stated that he didn't know if the appeal hearing was proceeding until the morning of August 24, 2017, but then later admitted that he and Mr. Croft had been aware of the hearing date for a while.[23] He

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[13] Transcript, *supra*, page 27, lines 3 – 26; page 35, lines 15-16.
[14] Transcript, *supra*, page 27, lines 22-23.
[15] Transcript, *supra*, page 36, lines 5-6.
[16] Transcript, *supra*, page 29, lines 1-2 and 11-12.
[17] Transcript, *supra*, page 30, lines 21-23.
[18] Transcript, *supra*, page 34, lines 8-11 and 25-26.
[19] Transcript, *supra*, page 41, lines 10-12
[20] Transcript, *supra*, page 41, lines 21- 23.
[21] Transcript, *supra*, page 42, lines 23-24 and 26; page 43, line 1.
[22] Transcript, *supra*, page 55, lines 20-21; page 61, lines 1-4.
[23] Transcript, *supra*, page57, lines 8-17; page 60, line 20.

claimed that he had been prevented from calling or issuing "subpoenas" to witnesses in support of his position,[24] but provided no evidence to support this assertion.

61. Mr. Martz submitted that he intended to lead evidence on behalf of the AIC, through AIC Investigator Roy Dias. Mr. Kew objected to Mr. Dias being presented as a witness on behalf of the AIC.[25] The Panel heard from both parties and then overruled Mr. Kew's objection.[26] The Panel advised the parties that Mr. Martz had previously advised he would be bringing one witness to the hearing, and that the Regulation did not contain any requirement that the names of witnesses be provided in advance.[27] The Panel further advised the parties that the AIC was entitled to present evidence in an appeal to which they are a party, and that Mr. Kew would have the opportunity to ask questions of Mr. Dias as well.[28]

62. Mr. Dias confirmed he was attending at the appeal hearing for the purposes of giving evidence on behalf of the AIC, that the Report to Council was prepared by an AIC Investigator, and that the AIC Investigator who had prepared the Report to Council was no longer with the AIC.[29]

63. As noted above at paragraph 43, at the close of evidence at the hearing, the Panel and the parties scheduled written closing submissions to be provided to the Panel. Mr. Kew was to provide his submissions to the Panel by September 12, 2017, and Mr. Martz was to provide his by September 22, 2017. Both parties did so in accordance with this schedule.

64. In his written submissions dated September 10, 2017, Mr. Kew argued, among other things, that:

    - His rights under section 1(b) of the *Alberta Bill of Rights* had been impugned due to the location of the hearing[30];
    - The AIC had acted in bad faith in this matter[31];
    - The evidence of Mr. Dias was not relevant[32]; and
    - "Strict liability is not strict liability in the strict sense"[33]

65. In his written submissions dated September 21, 2017, Mr. Martz submitted, that section 509 of the Act is a public welfare offence that attracts strict liability. He cited *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 at paragraph 29 where the Supreme Court of Canada characterized public

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[24] Transcript, *supra*, page 56, lines 4-7; page 59, lines 8-13; page 60, lines 14-20.
[25] Transcript, *supra*, page 66, lines 7-12.
[26] Transcript, *supra*, page 68, lines 3-4.
[27] Transcript, *supra*, page 68, lines 6-13.
[28] Transcript, *supra*, page 68, lines 14-18.
[29] Transcript, *supra*, page 72, lines 10-11; page 78, lines 20-23; page 81, lines 19-22.
[30] Written Submissions of Mr. Kew dated September 10, 2017 ("Kew Submissions"), page 2.
[31] Kew Submissions, *supra*, page 5.
[32] Kew Submissions, *supra*, page 7.
[33] Kew Submissions, *supra*, page 8.

welfare offences as those that involve the protection of public and social interests, and submitted that section 509 of the Act prohibits agent, adjuster and insurer conduct that is against the public interest.[34]

66. Mr. Martz further submitted that, being a strict liability offence, section 509 does not require proof of intent or *mens rea*. He submitted that in order to find that Mr. Kew contravened the section, the LIC must first prove on a balance of probabilities that the statements were made and that they were false or misleading. If this was shown by the LIC, the onus then shifts to Mr. Kew to show that he was duly diligent in making the statements and that he took all reasonable measures to avoid making false or misleading statements.[35]

67. Mr. Martz submitted that Mr. Kew made false and misleading statements in the February 2014 letter to clients and on the Kewcorp website in April 2016 regarding the CPCA and PFP designations.[36] Mr. Martz then submitted that the statements were false and/or misleading, as there was no dispute that Mr. Kew was not entitled to use either the CPCA or the PFP designations, and that representing that he held these designations in his letterhead and on his website was false and/or misleading. He submitted that a member of the public reading Mr. Kew's letters or website could be lead to believe that he had met the requirements to hold the designations when he had in fact not.[37] He submitted that as Mr. Kew had made the statements and lacked the authority to do so, the first element of the strict liability offence had been made out.[38]

68. Turning to the due diligence defence, Mr. Martz submitted that an individual must show that they took all reasonable steps in the circumstances to prevent the incident which forms the basis of the charge. He submitted that passivity is not a defence and that Mr. Kew's own evidence showed he had not taken active steps to ensure he was entitled to use the designations.[39]

69. Mr. Martz submitted that Mr. Kew had made no effort to confirm whether he could use either the CPCA or PFP designations. He submitted that Mr. Kew knew what the CPCA designation stood for, had let it lapse, had incorrectly assumed he could be reinstated upon payment of fees, and was refused his request for reinstatement by the AFB. As such, he submitted that Mr. Kew was not duly diligent in regard to this designation. With regard to the PFP designation, Mr. Martz pointed to Mr. Kew's admission that he had taken no steps to determine whether or not he could use it, he had just assumed that he could, and he took no steps to confirm his assumption.[40]

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[34] LIC Submissions, *supra*, page 4, paragraphs 18 and 19.
[35] LIC Submissions, *supra*, page 5, paragraphs 20 and 22; page 7, paragraph 34.
[36] LIC Submissions, *supra*, page 5, paragraphs 23 and 24.
[37] LIC Submissions, *supra*, page 6, paragraphs 26 and 28.
[38] LIC Submissions, *supra*, page 7, paragraph 33.
[39] LIC Submissions, *supra*, page 7, paragraphs 34 – 36.
[40] LIC Submissions, *supra*, page 8, paragraphs 37 - 41.

70. With regard to the other defences advanced by Mr. Kew in his September 10, 2017 submission, Mr. Martz argued that these issues had already been dealt with or were irrelevant to these proceedings. He submitted that the complaints of Mr. Kew relative to the hearing location had already been dealt with in the unsuccessful QB application made by Mr. Kew mentioned above at paragraph 34 herein. As the QB Application had been dismissed, he submitted the matter was *res judicata* and not relevant to a decision on the merits in this proceeding.[41]

71. With regard to the evidence of Mr. Dias, Mr. Martz argued that despite being hearsay, the Report to Council was reliable and provided all the emails and correspondence upon which it based its conclusions such that the Panel was able to evaluate their reliability.[42]

72. Mr. Martz also argued that the LIC in its Decision had specifically declined to impose a suspension or other similar penalty, imposing instead a small fine. He argued that it was through this choice of penalty that the LIC had acknowledged and appropriately recognized the nature of the offence in this case. As such, he submitted that Mr. Kew be found to have committed the offence, that his appeal be dismissed, that the penalty set out in the LIC Decision be ordered, and that the appeal fee be remitted to the AIC.[43]

**Discussion**

**Issues**

73. The issues to be decided on this appeal are:

    1. The appropriate standard of review of the LIC decision;
    2. Whether or not the LIC erred in law when it found that Mr. Kew committed an offence pursuant to section 509(1)(a) of the Act;
    3. Whether or not there was procedural unfairness in the LIC proceeding or the proceedings herein;
    4. Whether or not Mr. Kew committed the offence as alleged in the AIC Investigation Report to Council and as found by the LIC in its Decision; and
    5. The appropriate sanction if Mr. Kew is found to have committed the offence.

**Standard of Review**

74. The question of the standard of review exercised by appeal panels was canvassed in a July 2015 decision of Chairperson Hopkins of the ICAB (In the Matter of the Appeal of Arnold Falconer), wherein she wrote the following at paragraphs 50 and 52:

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[41] LIC Submissions, *supra*, page 9, paragraphs 45 and 47.
[42] LIC Submissions, *supra*, page 10, paragraph 48.
[43] LIC Submissions, *supra*, page 10, paragraph 51; page 11, paragraph 53.

> Although this is considered a *de novo*[44] appeal, a standard of review analysis must be done by this Panel to determine what deference, if any, is to be given to the Decision.[45]
>
> ...
>
> Where new evidence or a new issue is raised on appeal with the result that the issue before the appeal panel is new or different than what was considered by the body whose decision is being reviewed, there is no decision on point. As stated by the Court of Appeal, in such circumstances "it is artificial to speak of any standard of review".[46] Rather, the appeal panel considers the issue as a tribunal of first instance. That is the case here where the new evidence is material to both the alleged offence and the appropriate sanction if any. In the result, although mindful of the Decision, the Panel will consider this appeal as a tribunal of first instance.

75. The LIC submitted that given the nature of the new evidence before it, the Panel should hear this matter as a tribunal of first instance in a *de novo* hearing. Mr. Kew at the appeal hearing agreed.

76. As such, the Panel finds that the appropriate standard of review of the LIC's Decision is that articulated by Chairperson Hopkins noted above at paragraph 52 herein. At the outset of the hearing of this appeal, the parties agreed that the hearing should proceed as a hearing *de novo*, in accordance with past practice of the ICAB. The Panel considers the July 2015 decision of Chairperson Hopkins and the standard of review articulated therein, whereby the Panel there considered the appeal as a tribunal of first instance but were mindful of the decision before it being appealed, to be instructive. Accordingly, this Panel finds that it is hearing the appeal herein as a tribunal of first instance while also being mindful of the LIC Decision. The Panel also finds that Mr. Kew has not been denied the opportunity to lead evidence to contradict or address findings in the LIC Decision.

**Whether or not the LIC erred in law when it found that Mr. Kew committed an offence pursuant to section 509(1)(a) of the Act**

77. The LIC found that, based on the evidence before them, Mr. Kew had committed an offence pursuant to section 509(1) of the Act where he made false or misleading statements in contravention of that section, and that Mr. Kew had not established any due diligence defence in showing that he took all reasonable steps to avoid committing the offence.

78. Having carefully considered all of the foregoing, the Panel was unable to find any error of law in the LIC Decision.

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[44] *Gilbert* v. *Alberta Insurance Council*, 2009 ABQB 673 at para. 28

[45] *Imperial Oil Resources Ltd.* v. *826167 Alberta Inc.*, 2007 ABCA 131 at paras. 8 – 18, *Newton* v. *Criminal Trial Lawyers Association*, 2010 ABCA 399 para. 52.

[46] *Kikino Metis Settlement* v. *Metis Settlements Appeal Tribunal*, 2013 ABCA 151 at para. 13.

**Whether or not there was procedural unfairness in the LIC proceeding or the proceedings herein**

79. Mr. Kew has made a number of complaints throughout this proceeding relative to the hearing location, the provision of witness lists by parties, and his ability to call witnesses in his appeal.

80. As discussed throughout this proceeding, and above at paragraph 70 herein, these issues have been dealt with earlier in this proceeding or in other forums.

81. The Panel was unable to find any procedural unfairness on the part of the LIC towards Mr. Kew in the proceeding leading up to and including its Decision of October 21, 2016.

82. The Panel notes that the complaints of Mr. Kew relative to the hearing location in this proceeding were dealt with by the Panel in its April 3, 2017 decision as outlined at paragraph 23 herein, and in the QB Application made by Mr. Kew mentioned above at paragraph 34 herein prior to the appeal hearing. Mr. Kew's application was dismissed, and as such, the matter is *res judicata*.

83. Further, with regard to Mr. Kew's late-raised claims in his September 10, 2017 submission that his rights under section 1(b) of the *Alberta Bill of Rights* were impugned in this proceeding due to the location of the hearing, the Panel has considered this allegation and finds it to be without merit. While Mr. Kew tendered no evidence in support of this allegation, based on all of the foregoing, Mr. Kew was treated fairly in accordance with the principles of the *Alberta Bill of Rights* at all times during this proceeding and as such, the Panel finds no issue with regard to this allegation.

84. With regard to the provision of witness lists by the parties in this proceeding, section 21 of the Regulation provides that a written submission provided in advance of a hearing must be provided at least seven days in advance of the hearing date and must contain, among other things and in accordance with section 21(2)(b), a list of any witnesses to be called by the party. The Panel notes, as it did at the appeal hearing, that the Regulation does not stipulate that witness names are to be provided. Mr. Martz on behalf of the AIC provided his witness list of one witness in advance of the hearing on August 11, 2017 in accordance with the Regulation. As such, the Panel finds no issue with regard to this point.

85. With regard to Mr. Kew's claims that he was unable to call witnesses at this appeal hearing, the Panel notes that no evidence was provided by Mr. Kew in support of this assertion. It was open to Mr. Croft and Mr. Kew at any time in the approximately nine months leading up to the hearing to canvass and/or call any witnesses they wished for the purposes of the appeal hearing, and have them attend either in person or via teleconference or videoconference, including arranging with Mr. Martz to accommodate that attendance in whatever form. The Panel was unable to find anything limiting this ability, including cost considerations, as no evidence in that regard was provided to the Panel by Mr. Kew. As such, the Panel finds no issue with regard to this point.

86. Given all of the foregoing, the Panel was unable to find any procedural unfairness in the LIC proceeding towards Mr. Kew, nor in this proceeding towards Mr. Kew.

**Whether or not Mr. Kew committed the offence as alleged in the AIC Investigation Report to Council and as found by the LIC in its Decision**

87. After having carefully considered all of the foregoing, the Panel finds that Mr. Kew made false and misleading statements in the February 2014 letter to clients and on the Kewcorp website in April 2016 regarding the CPCA and PFP designations. The Panel finds that the statements were false and/or misleading, as there is no dispute based on the evidence herein that Mr. Kew was not entitled to use either the CPCA or the PFP designations, and that representing that he held these designations in his letterhead and on his website was false and/or misleading. The Panel finds that a member of the public reading Mr. Kew's letters or website could be led to believe that he had met the requirements to hold the designations when he had in fact not.

88. The Panel finds that Mr. Kew made no effort to confirm whether he could use either the CPCA or PFP designations. The Panel finds that Mr. Kew knew what the CPCA designation stood for, had let it lapse, had incorrectly assumed he could be reinstated upon mere payment of fees, and was ultimately refused his request for reinstatement by the AFB. As such, Mr. Kew was not duly diligent in regard to this designation. With regard to the PFP designation, Mr. Kew admitted that he had taken no steps to determine whether or not he could use it, he had just assumed that he could, and he took no steps to confirm his assumption. As such, Mr. Kew was not duly diligent in regard to this designation as well.

89. As such, the Panel finds that Mr. Kew committed an offence pursuant to section 509(1)(a) with regard to the false or misleading statements he made regarding the CPCA and PFP designations. The Panel also finds that Mr. Kew did not exercise due diligence in taking all reasonable steps to avoid committing the offence.

**Appropriate Sanction and Appeal Fee**

90. This Panel finds that the appropriate sanction in this matter is the one imposed by the LIC in its Decision as noted above, and orders that a civil penalty of $750.00 be levied against Mr. Kew.

91. The Panel further directs that Mr. Kew cease using the CPCA and PFP designations until such time as he is fully qualified and entitled to do so, and orders that the Appeal Fee in this matter be paid to the LIC forthwith.

**Order**

92. For the above reasons, it is ordered that:

    (a) The appeal is dismissed; and

    (b) The appeal fee is to be paid to the Life Insurance Council forthwith.

DATED at Calgary, Alberta, this 19 day of January, 2018.

INSURANCE COUNCILS APPEAL BOARD OF ALBERTA

Per: _____.
Trena Grimoldby - Appeal Panel Chair

for Per: _____.
John Beal - Appeal Panel Member

for Per: _____.
Oscar Buera - Appeal Panel Member

Appearances:

| | |
|---|---|
| Mr. R. Martz/Mr. W. Martinson | on behalf of the Life Insurance Council |
| Mr. J. Kew/Mr. K Croft | on behalf of the Appellant |