

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 D. KEW

Appellant

- and -

LIFE INSURANCE COUNCIL

Respondent

AND BETWEEN:

KEWCORP FINANCIAL INC. and JAMES KEW FINANCIAL SERVICES

Appellant

- and -

LIFE INSURANCE COUNCIL

Respondent

Heard in Edmonton, Alberta on April 12, 2016

Before:

JULIE G. HOPKINS	-	Appeal Panel Chair
PATRICK SOULIERE	-	Appeal Panel Member
JEFFREY WILSON	-	Appeal Panel Member

REASONS FOR DECISION AND ORDER

1. These two appeals share the same factual underpinnings and were heard together. One is an appeal by James D. Kew of a decision of the Life Insurance Council dated January 19, 2016 and the other is an appeal by Kewcorp Financial Inc. operating as James Kew Financial Services (the "Agency") of a decision of the Life Insurance Council dated January 21, 2016 (together the

“Decisions”). The Life Insurance Council found that Mr. Kew and the Agency breached section 467(1)(c) of the *Insurance Act* in that they submitted applications for the renewal of certificates of authority that did not contain information required by the Minister. Specifically, it was found they failed to disclose that they were engaged in a business or occupation other than the insurance business in at least some applications submitted from January 9, 2006 through December 31, 2009.

Procedural History

2. Mr. Kew and the Agency commenced these appeals of the Decisions by way of a Notice of Appeal dated February 6, 2016.
3. The Superintendent of Insurance appointed this Panel of the Insurance Councils Appeal Board to hear the appeals on March 9, 2016.
4. On March 22, 2016, the Panel issued a Notice of Hearing scheduling the hearing of the appeals, with the agreement of the parties, for April 12, 2016.
5. Both parties were present at the hearing on April 12, 2016. Mr. Warren Martinson appeared as counsel for the Life Insurance Council. Mr. Kew appeared, on his own behalf and on behalf of the Agency, without counsel. He acknowledged that he was aware that he had the right to appear with counsel but that he chose to proceed unrepresented.
6. The parties confirmed they had no objection to the constitution of the Panel or its jurisdiction to hear the appeals.
7. The proceedings before the Life Insurance Council were in writing. The record before the Life Insurance Council and the Decisions was received in evidence by the Panel without any objection by the parties. At the hearing, the Life Insurance Council called as witnesses: Mr. Bernard Van Brabant, an investigator with the Alberta Insurance Council (“AIC”) and Mr. and Mrs. M who were former clients of Mr. Kew. Mr. Kew testified on his own behalf and on behalf of the Agency and submitted a number of documents as exhibits. At the end of the hearing the Panel reserved its decision.

Relevant Legislation

8. Section 467(1)(c) of the *Insurance Act* provides that an application for a certificate of authority must “contain the information, material and evidence required by the Minister”.¹ Mr. Kew and the Agency are alleged to have breached that section by failing to disclose in renewal applications for certificates of authority that they were engaged in a business other than the business of insurance.

Summary of Facts

9. The Agency has held certificates of authority to act as an agent for life insurance and accident and sickness insurance in Alberta since 2000. The AIC maintains licensing records going back to 1994. The AIC records show that Mr. Kew has held certificates of authority to act as an agent for life insurance and accident and sickness insurance in Alberta since 1994. Mr. Kew testified that he has held such certificates going back to 1979.

10. This matter came to the attention of the AIC as a by-product of a complaint made by a former client of Mr. Kew and the Agency, Mr. and Mrs. M, to the Mutual Fund Dealers Association concerning their purchase of real estate investment units offered by Investicare Seniors Housing Corporation (“Investicare”).

Renewal Applications

11. From 2006 to 2009, as part of the annual renewal of certificates of authority, Mr. Kew completed on-line application forms for himself and for the Agency. Both the Agency and Mr. Kew submitted two applications each year: one for life insurance and one for accident and sickness insurance. All applications for each year were completed on the same day. The application forms that were in issue before the Life Insurance Council, and that are the subject of these appeals, are the ones that were submitted: January 9, 2006; January 2, 2007; January 3, 2008, January 5, 2009 and December 31, 2009.

12. Each application form asked “[s]ince the date of your last application have you been engaged in any business or occupation other than the insurance business?” [Emphasis added].

¹ It was not contentious that pursuant to section 791(1) of the *Insurance Act* and Ministerial Directive 05/01, the Ministerial Directive in force during the relevant period of time, the Minister’s powers under section 467(1)(c) of the *Insurance Act* had been delegated to the AIC.

The underlined words do not appear on the version of the forms put in evidence by the AIC investigator at the hearing but it was agreed by the AIC investigator that these words would have appeared on the online applications.

13. For the applications submitted in 2006, 2007 and 2008, the question concerning whether Mr. Kew and the Agency had been engaged in any other business or occupation was answered “no”. For the applications submitted in January and December 2009, the question was answered “yes”. With answering “yes”, Mr. Kew was prompted by the online application to provide “occupation details”. He responded “Financial Planning”.

14. The Panel concludes that, as a result of the renewal application forms submitted in January and December 2009, that both Mr. Kew and the Agency disclosed that from January 3, 2008 onward they were engaged in the business of financial planning. For the renewal application forms from January 9, 2006 until January 3, 2008, no business or occupation other than the insurance business was disclosed by Mr. Kew or the Agency.

15. The apparent reason for the change in response on the applications was that, as Mr. Kew testified, during 2008 his business changed. It had evolved from dealing with client’s insurance needs to operating as a financial planner on a fee for service basis.

Activities Related to Investicare

16. At the hearing, it appeared to be common ground that insurance agents frequently refer clients to, for example, a bank for a mortgage for which they are paid a fee by the bank. The Life Insurance Council concedes that an insurance agent receiving a fee for a referral is not considered by it to be engaged in a business that needs to be disclosed on a renewal application. However, it takes the position that Mr. Kew and the Agency, with their activities in relation to Investicare, were engaged in something beyond merely receiving fees for referrals.

17. Investicare was offering for subscription certain real estate investment units. In October 2005, the Agency entered into a “Referral Fee Agreement” with Investicare. Mr. Kew signed the agreement on behalf of the Agency.

18. As stated in the Referral Fee Agreement, the Agency agreed to introduce the offering to certain individuals and refer them to Investicare. The Agency covenanted that it would “comply

with all securities laws and regulations with respect to all activities undertaken in relation to the Offering” and that it would provide a copy of the Offering Memorandum to those people it introduced to the offering. Investicare agreed to pay a referral fee to the Agency equal to 8% of the aggregate subscription proceeds received from purchasers of the securities that were introduced to Investicare by the Agency.

19. Mr. Kew testified that he ceased referring clients to Investicare in August 2010. During the entire course of the Referral Fee Agreement, other than his wife and himself, he referred 20 of his clients to Investicare. There is no evidence as to when those referrals actually took place in the period from 2005 to 2010 except for the referral of Mr. and Mrs. M which occurred in 2008. That referral was the subject of a majority of the evidence at the hearing and is discussed immediately below. It occurred during the period of time when Mr. Kew and the Agency had disclosed in their renewal applications that they engaged in the business of financial planning.

20. Mr. and Mrs. M were insurance clients of Mr. Kew. Mrs. M is also a relative of Mr. Kew. Mrs. M testified that in 2008 she and her husband mentioned to Mr. Kew that they had an investment in an insurance product that was doing poorly and Mr. Kew suggested that Investicare “would be a much better thing to get into”. She testified he brought over books and papers and went over “demographics” and how the investment would work. She testified that notations on the promotional materials that were in evidence were Mr. Kew’s and that he made them when discussing the investment. Both Mr. and Mrs. M testified they had no contact with anyone at Investicare prior to making the investment. When they made the decision to invest, Mr. Kew presented the documents to them for signing. The documents were signed on July 15, 2008.

21. Mr. Kew testified that the documents signed by Mr. and Mrs. M were prepared by Investicare. One of those documents describes the Agency as “the company selling the securities”. That document was not signed by the Agency or Mr. Kew.

22. Mr. Kew drafted a letter, signed by Mr. and Mrs. M on Kewcorp Financial Inc. letterhead, instructing the cancellation of Mr. and Mrs. M’s insurance policy related to the underperforming investment and giving directions as to the how the funds should be disbursed. The last sentence

of the letter reads “[i]f you have any questions regarding the above transaction please contact our Financial Planner Jim Kew...”.

23. Mr. Kew testified that typically with the referrals he made to Investicare, Investicare would host a dinner seminar. Mr. Kew’s clients would attend the seminar and then they would decide whether to invest from there. He did not recall if Mr. and Mrs. M. attended such a dinner. However, from Mr. and Mrs. M.’s evidence, it is clear they did not.

24. With Mr. Kew’s other referrals, as with Mr. and Mrs. M, Investicare would have prepared the documents to be signed. Mr. Kew would have gone through the documents with those clients as he did with Mr. and Mrs. M for signing. In most cases he may also have gone through the investment with them and make notations on promotional material as he did with Mr. and Mrs. M.

25. Mr. Kew testified that none of the other referrals involved the cancellation of an insurance policy to fund the investment as it did in the case of Mr. and Mrs. M.

Decisions of the Life Insurance Council

26. The Life Insurance Council, based on the record before it, concluded that Mr. Kew and the Agency were engaged in a business or occupation other than insurance. It appears it concluded Mr. Kew and the Agency were engaged in the business of providing financial advice. Importantly, with the exception of the Referral Fee Agreement, all of the evidence that the Life Insurance Council referred to in the Decisions to support its conclusion was from mid-2008 or later and related mostly to the investment by Mr. and Mrs. M in Investicare.

27. It does not appear that the Life Insurance Council was informed that the relevant application forms would have read “since the time of your last application have you engaged in any business or occupation other than the insurance business” [emphasis added]. The form of the applications that was in evidence before them does not show the underlined words above. As a result, it does not appear that the Life Insurance Council was aware that Mr. Kew and the Agency had disclosed on their renewal applications they were in the business of financial planning from January 3, 2008 onward including the time that Mr. and Mrs. M made their investment in the Investicare units.

28. In any event, the offence at issue is not the act of being engaged in another business, but failing to disclose that fact on an application form. Although Mr. Kew and the Agency were found to have contravened section 467(1)(a) of the *Insurance Act*, neither of the Decisions specifically identify which renewal applications should have contained the disclosure of being engaged in another business. It is true that the Decision concerning Mr. Kew concludes that there was a contravention of section 467(1)(c) on six occasions, but it does not identify when they occurred. There were 10 forms in issue in each proceeding.²

Issues to be Decided

29. The issues to be decided on these appeals are (1) the appropriate standard of review and (2) whether the Life Insurance Council made a reviewable error in finding Mr. Kew and the Agency in breach of section 467(1)(c) of the *Insurance Act*.

Discussion

Standard of Review

30. Although this is considered a *de novo* appeal,³ a standard of review analysis must be done by this Panel to determine what deference, if any, is to be given to the Decisions.⁴

31. Where new evidence 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. The Panel finds that is the case here. Unlike the Life Insurance Council, the Panel heard the testimony of the AIC Investigator, Mr. and Mrs. M and Mr. Kew. It also does not appear that the Life Insurance Council had the benefit of the evidence, before the Panel by admission, that the application forms in evidence did not include the full wording of the question being asked. Nor were they informed how the question on the application form would have actually read.

² Renewal applications for certificates of authority for each of life insurance and accident and sickness insurance on January 9, 2006; January 2, 2007; January 3 2008; January 3, 2009 and December 31, 2009.

³ *Gilbert v Alberta Insurance Council*, 2009 ABQB 673 at para. 28.

⁴ *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.

32. As stated by the Court of Appeal, in such circumstances “it is artificial to speak of any standard of review”.⁵ In the result, the Panel will consider this appeal as a tribunal of first instance.

Has there been a breach of section 467(1)(c) of the Insurance Act?

33. To reiterate, section 467(1)(c) of the *Insurance Act* provides that applications submitted to obtain certificates of authority must contain the information, material and evidence required by the Minister. The offence, then, is to submit an application that fails to disclose the information required therein. The renewal application forms in issue required the following information: “[s]ince the date of your last application have you been engaged in any business or occupation other than the insurance business?” Therefore, to demonstrate an offence under section 467(1)(c) in relation to this question, it must be proven that in the case of any particular renewal application where the applicant answered “no”, that the applicant was engaged in another business during the specific period of time between the date of the renewal application date and the date of the previous application. If the applicant answered “yes”, it must be proven that the applicant was engaged in another business during the same period of time that was different than the one disclosed.

34. As stated above, the Panel has concluded that Mr. Kew and the Agency disclosed in renewal applications forms submitted January 5, 2009 and December 31, 2009 that from January 3, 2008 onward they were engaged in the business of financial planning. The activities of Mr. Kew and the Agency at issue in this case from January 3, 2008 onward fall within the description of financial planning. As a result, the Panel finds there has been no breach of section 467(1)(c) of the *Insurance Act* in relation to the renewal application forms submitted January 5, 2009 and December 31, 2009.

35. As to the remaining renewal applications (those dated January 9, 2006, January 2, 2007 and January 3, 2008), no disclosure of Mr. Kew or the Agency being engaged in another business was made. The relevant activities of Mr. Kew and the Agency for the purposes of those applications are those before January 3, 2008. The evidence in that regard is that the Agency entered into the Referral Fee Agreement in October 2005 and that 20 referrals took place.

⁵ *Kikino Metis Settlement v. Metis Settlements Appeal Tribunal*, 2013 ABCA 151 at para. 13.

Although Mr. Kew gave evidence as to his typical practice when referring clients to Investicare under the Referral Fee Agreement, there is no evidence as to when, or even if, any of those referrals occurred between October 2005 and January 2008.

36. The Panel does not accept that the mere act of entering into the Referral Fee Agreement is alone sufficient to amount to being “engaged” in a business. The word “engaged” indicates some greater level of activity or effort. Exactly what that level of activity is required need not be determined here. In any event, the Life Insurance Council has taken the position that an insurance agent that is paid for referrals is not engaged in a business that needs to be disclosed in a renewal application. On its face, the Referral Fee Agreement appears to amount to nothing more than that type of arrangement.

37. Turning to the evidence of the 20 “referrals”, even assuming that they could amount to being engaged in a business, which is something we specifically do not decide, it has not been proven when or if any of those referrals actually occurred during the relevant period of time. It must be remembered that the offences here are in relation to specific renewal applications. The Panel is not prepared to assume that some of the 20 referrals must have taken place in the licensing period prior to any particular application in issue and so should have been disclosed in that specific application. We cannot conclude that it was more likely than not that, for example, some of the 20 referrals must have taken place before January 2006 and so should have been disclosed on the renewal applications filed January 9, 2006. Based on the evidence before us, we cannot conclude that any of the specific applications remaining in issue failed to contain information that was required to be disclosed and so did not comply with 467(1)(c) of the *Insurance Act*.

38. In the result, the Panel finds no breach of section 467(1)(c) has been proven in relation to the renewal applications filed January 9, 2006, January 2, 2007 and January 3, 2008.

Appeal Fee

39. 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 appeals, the Panel is of the view that the appeal

fees paid by Mr. Kew and the Agency should be remitted to them forthwith. The conduct of the parties provides no reason to order otherwise.

Order

- (a) The appeals are allowed and the Decisions of the Life Insurance Council are reversed;
- (b) The appeal fees paid by Mr. Kew and the Agency are to be remitted to them forthwith.

DATED at Calgary, Alberta, this 4th day of May, 2016.

INSURANCE COUNCILS APPEAL BOARD OF ALBERTA

Per: _____
Julie G Hopkins – Panel Chair

Authorized to sign for:

Per: _____
Patrick Souliere – Panel Member

Authorized to sign for:

Per: _____
Jeffrey Wilson – Panel Member

Appearances:

Mr. W. Martinson	on behalf of the Life Insurance Council
James D. Kew	on his own behalf and on behalf of Kewcorp Financial Inc. operating as James Kew Financial Services