ALBERTA INSURANCE COUNCIL
(the "AIC")

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

And

In the Matter of James R. McPherson
(the "Agent")

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

This case involves alleged violations pursuant to s. 455(2) of the Act. Specifically, it is alleged that the Agent acted as an insurance agent for a business without holding valid and subsisting insurance agent certificates of authority to act as an insurance agent on behalf of the business, and subsequently violated s. 480(1)(b) of the Act.

It is also alleged that the Agent contravened s. 489 of the Act by advertising insurance agent services on behalf of a business without holding valid and subsisting insurance agent certificates of authority to represent the business as an insurance agent, and subsequently violated s. 480(1)(b) of the Act.

Facts and Evidence

This matter proceeded by way of a written Report to Council dated November 14, 2023 (the "Report"). The Report was forwarded to the Agency for review, and to allow the Agency an opportunity to provide the Council with any further evidence or submissions by way of Addendum.

The Agent held Agent Life and Accident and Sickness (A&S) certificates of authority from February 13, 1996 to February 15, 2002. The Agent has held a Life – Designated Representative certificate of authority, periodically, since February 6, 1996. The Agent has held an A&S – Designated Representative certificate of authority, periodically, since April 5, 2002.

This matter arose during the AIC's 2023 Errors and Omissions audit when the Agent informed the AIC that he had been conducting insurance agent business under [M.B.I.] [redacted] (hereinafter the "Business"), when his

certificates of authority authorized the Agent to conduct insurance agent business under [H.I.V.L.] [redacted] (hereinafter the "Agency").

On May 17, 2023, the AIC investigator located the website belonging to the Business, which lists the Agent as an "agent" of the Business.

On July 12, 2023, [C.L.A.C.] [redacted] (hereinafter the "Insurer"), provided the AIC investigator with the following information:

> […]
> Further to your letter dated June 30, 2023, our contracting department has provided us with the following information:
>
> - [The Business] has an Affiliated Producer Group Agreement with [the Insurer], effective March 1, 2004. The selling advisor associated with [the Business] is James McPherson.
>   - […]
>
> - James McPherson also has a producer contract with [the Insurer] under the name, [the Agency], effective March 1, 2004.
>   - […]

On October 13, 2023, the Agent provided the AIC investigator with the following information:

> […]
> Further to your email of October 5, 2003 [sic], and subsequent follow up conversation and email of October 12, 2023, I will endeavour to respond to your inquiries.
>
> 1. Please describe how McPherson got to carry on business on behalf of the [Business]. If there is an employment contract or independent contractor agreement, please provide me with a copy.
>
> I started my career on June 2, 1969 as an Agent […]. I incorporated my Holding Company, [the Agency] on March 13, 1981 […], for the purpose of transacting Life and Health Insurance business. This Company has been Licenced [sic] with AIC with me as the Designated Representative since It's [sic] inception. I have always been the only agent conducting Insurance business through this holding company. [The Agency] holds contracts with 4 or 5 Life Insurance Companies.
> [The Business] was founded on October 17, 1997 with myself and a former partner […].
> I have always assumed (wrongly as it turns out) that my personal Company ([the Agency]) was the instrument for my Life & health Business, and that [the Business] was a vehicle for a collaboration of Independent, stand-alone Agents. Consequently there is no Employment Contract or Independent Contractor Agreements through [the Business].
>
> 2. Describe the activities he carried out.
>
> I was and am a Licensed Certificate holder of Life & Health Insurance. We thought that any and all licensed Agents associated with [the Business] are or were Independent Contractors responsible for their own Certifications, Continuing Education requirements, and E&O Insurance. I clearly recall years ago being advised I could not be the Designated Representative of [the Business] because I was already the DR for another Company (Agency). The same held true for my Partner […], so we had an associate, [M.M.] [redacted] (hereinafter the Business DR") become the DR. Since I (we) have learned this is offside with current Legislation or Regulations, […] I have become the DR, along with appropriate E&O coverage. As soon as I learned that I was not licensed under [the Business] I rectified the concern immediately, and become the licensed DR with new E&O coverage.

3. Describe when he started carrying on business on behalf of the [Business] and when it ended.

As indicated in point 2. I established [the Business], as a Founding Shareholder on Oct 17, 19997, and continue in that capacity to this day, albeit with changes to make me the Designated Representative […].

4. Describe from the [Business'] perspective how he came to work for the [Business] without corresponding certificate of authority.

This was an oversight and an error on my part. As mentioned, I was labouring under the previously stated circumstance whereby I could not be the DR of two separate Companies. I believed I could only be the DR of my personal company, [the Agency], which I have been for many years. This is why we asked [the Business DR] to be the DR of [the Business]. [The Agency] hold contracts with Insurance Companies and receives commission from then with renewal commissions from Group Insurance business flowing to [the Agency] through [the Business]. This has been changed now that I am the DR of [the Business].

5. Describe the producer contract.

We have a wide range of procedures in place, including signed forms by clients acknowledging that we hold confidential information and our commitment to honour their confidentially, client signed documents indicating the companies we hold contracts with, and that we will be paid a commission through them for our services, signed Privacy letters, etc. […]

7. Describe why it took so long for this matter to be uncovered. i.e., why didn't the Designated Representative not catch this at renewal?

Well, simply stated, this was an oversight and error on my part. I laboured under the assumption that I could not be a DR for two Companies (Agencies), [the Agency] and [the Business]. This is why we set our Associate, [the Business DR] as the DR for [the Business]. Once this oversight came to light, I immediately took corrective action. I apologize for this grievous oversight […]

On October 18, 2023, the Agent provided the AIC investigator with the following information:

[…]
In response to your inquiry, I can confirm that I always have a prospective client sign the […] form entitled "Advisor information for clients concerning – James R. McPherson, CFP, CLU, ChFC, [the Agency], [the Business]".
More specifically, yes, I can confirm it is my consistent practice to comply with Sec 491 of the Insurance Act the following by having a client sign this form that discloses to the client:

(a) The name of the business the individual is representing, and
(b) That the disclosure under clause (a) is made for the purposes of complying with this section.
[…]

On November 23, 2023, the Agent provided the AIC investigator with the following additional information:

[…], I will now address the current charges against me to the duly elected panel of my Peers, the Life Council.

Most of my defence has already been submitted to the Investigating Officer as articulated in my response […], and included in [..] letter to me of November 15, 2023, which is the material part of the information before you.

[…], the recommendation before you is a sanction of $1000 for each breach for a total of $6000.

Am I correct to assume this is the sanction for an oversight? This was actually not even an oversight.

> The only reason I would have asked a Junior Associate to apply and become the Designated Representative of [the Business], back in 2000, was because I was advised by AIC that I could not be the DR of two companies (agencies). There is no other possible explanation for this. I clearly remember the discussion, and thought it was weird. Why would I ask a Junior member of our Firm to be the Designated Representative of our Firm? [The Business DR] was not, and is not a Partner in [the Business]. [The Business DR] is an independent Life & A&S Advisor who shares out rent and other expenses, and is a friend and collaborator in business. My Partner, [C.R.] [redacted] (hereinafter the "Partner"), was in the same position as me. [The Partner] was already the DR to [the Partner's] own personal holding company, and simply agreed, with my counsel, that [the Partner] could not be a DR in two Companies. [The Business] is a small operation of independent advisors who take pride in good advice and exemplary service to our clients. [The Business DR] has no role, nor ever has, in the financial operation of [the Business], other than as an independent adviser and friend. [The Partner] and I only share business through [the Business] on Group Insurance Business. Our Life and A&S business is independently owned and serviced.
>
> Ladies & Gentlemen of the AIC Life Counsel, I wish to try and express to you how difficult it is for me to divine that I would be in such a situation at this stage of my career. I have endeavoured to the best of my ability to contribute to our Industry and our Community. Simply stated, I'm crushed. […]

Discussion

The Council contemplated s. 455(2) of the Act, which provides that *"No individual may act as an insurance agent for a business unless the individual holds a valid and subsisting insurance agent's certificate of authority specifying that the individual is authorized to represent that business."* (emphasis added). This offence is strict liability in nature. Under a strict liability offence, the AIC has the onus to prove that the Agent failed to have a valid and subsisting insurance agent certificate of authority to represent the business. Once this occurs, the onus then shifts to the Agent to establish a due diligence defence. The Agent must prove that all reasonable measures were taken to avoid making the offence. There is no requirement on the AIC to prove the Agent's intent.

In consideration of the evidence before it, the Council is satisfied that the Agent was acting as an insurance agent for the Business without holding a valid and subsisting certificate of authority to do so. The Council considered the email from the Insurer, which stated the following: *"[The Business] has an Affiliate Producer Group Agreement with [the Insurer, effective March 1, 2004. The selling advisor associated with [the Business] is James McPherson."*

The Council also considered the October 13, 2023 email from the Agent which stated: *"This was an oversight and an error on my part. As I mentioned, I was labouring under the previously stated circumstance whereby I could not be the DR of two separate companies."* Although the Council acknowledges that the Agent was *"labouring under the previously stated circumstance"*, the Council cannot overlook the fact that the Agent has been acting under this assumption since at least 2004, without appearing to have done his due diligence in determining whether the assumption was correct or not. Therefore, the Agent has not met the burden of proof to establish a due diligence offence. As such, the

Council finds the Agent guilty on three (3) counts of violating s. 455(2) of the Act for the years of 2021, 2022, and 2023, and has subsequently violated s. 480(1)(b) of the Act.

In terms of the applicable sanction, the Council has the discretion to levy a civil penalty in an amount up to $1,000.00, per demonstrated offence, pursuant to s. 36.1(1)(b) of the *Insurance Agents and Adjusters Regulation*, A.R. 122/2001. In consideration of the length of time the violation occurred and the length of time the Agent has held certificates of authority, the Council orders that a civil penalty in the amount of $1,000.00, per demonstrated offence, for a total civil penalty of $3,000.00, be levied against the Agent.

In turning to the second matter, the Council contemplated s. 489 of the Act, which provides that, *"No […] individual who is required to hold an insurance agent's […] certificate of authority before acting as an insurance agent […] may indicate in an advertisement that the […] individual is an insurance agent […] or offers in an advertisement to provide the services of an insurance agent […] unless the […] individual holds the appropriate valid and subsisting certificate of authority."* (emphasis added) This offence is strict liability in nature. Under a strict liability offence, the AIC has the onus to prove that the Agent advertised insurance agent services on behalf of a business without holding a valid and subsisting insurance agent certificate of authority to do so. Once that occurs, the onus then shifts to the Agent to establish a due diligence offence. The Agent must prove that all reasonable means were taken to avoid making the offence. There is not requirement on the AIC to prove the Agent's intent.

In consideration of the evidence before it, the Council is satisfied that the Agent advertised insurance agent services on behalf of the Business without holding a valid and subsisting insurance agent's certificate of authority to do so. The Council considered the screen shot of the Business' website from May 17, 2023, which advertised the Agent as a representative of the Business. In addition, the Council considered the Agent's October 18, 2023 email to the AIC, which stated,

> *[…] I can confirm that I always have a prospective client sign the Attached form entitled "Advisor information for clients concerning – James R. McPherson, CFP, CLU, ChFC, [the Agency], [the Business]."*

Based on the evidence, the Agent has not met the burden of proof to establish a due diligence defence. As such, the Council finds the Agent guilty on three (3) counts of violating s. 489 of the Act, for the years of 2021, 2022, and 2023, and has subsequently violated s. 480(1)(b) of the Act.

In terms of the applicable sanction, the Council has the discretion to levy a civil penalty in an amount up to $1,000.00, per demonstrated offence, pursuant to s. 36.1(1)(b) of the *Insurance Agents and Adjusters*

Regulation, A.R. 122/2001. In consideration of he period of time over which the violation occurred, the Council orders that a civil penalty in the amount of $1,000.00, per demonstrated offence, for a total civil penalty of $3,000.00, be levied against the Agent.

The civil penalty of $6,000.00 must be paid within thirty (30) days of the mailing of the Decision. In the event that the civil penalty is not paid within thirty (30) days, interest will begin to accrue at the prescribed rate. Pursuant to s. 482 of the Act (excerpt enclosed), the Agency has thirty (30) days in which to appeal this decision by filing a Notice of Appeal with the Office of the Superintendent of Insurance.

This Decision was made by way of a motion made and carried at a properly conducted meeting of the Life Insurance Council. The motion was duly recorded in the minutes of that meeting.

Dated: January 31, 2024

[Original Signed By]
Usman Mahmood, Vice-Chair
Life Insurance Council

Extract from the *Insurance Act*, Chapter I-3

Appeal

482 A decision of the Minister under this Part to refuse to issue, renew or reinstate a certificate of authority, to impose terms and conditions on a certificate of authority, to revoke or suspend a certificate of authority or to impose a penalty on the holder or former holder of a certificate of authority may be appealed in accordance with the regulations.

Extract from the *Insurance Councils Regulation*, Alberta Regulation 126/2001

Notice of appeal

16(1) A person who is adversely affected by a decision of a council may appeal the decision by submitting a notice of appeal to the Superintendent within 30 days after the council has mailed the written notice of the decision to the person.

(2) The notice of appeal must contain the following:

a) a copy of the written notice of the decision being appealed;

b) a description of the relief requested by the appellant;

c) the signature of the appellant or the appellant's lawyer;

d) an address for service in Alberta for the appellant;

e) an appeal fee of $200 payable to the Provincial Treasurer.

(3) The Superintendent must notify the Minister and provide a copy of the notice of appeal to the council whose decision is being appealed when a notice of appeal has been submitted.

(4) If the appeal involves a suspension or revocation of a certificate of authority or a levy of a penalty, the council's decision is suspended until after the disposition of the appeal by a panel of the Appeal Board.

Contact Information and Useful Links for Appeal:

Email: tbf.insurance@gov.ab.ca
Phone: 780-643-2237
Fax: 780-420-0752
Toll-free in Alberta: Dial 310-0000, then the number
Mailing Address: 402 Terrace Building, 9515 – 107 Street Edmonton, AB T5K 2C3
Link: Bulletins, notices, enforcement activities | Alberta.ca – *Interpretation Bulletin 02-2021 – Submitting Notices of Appeal of Insurance Council Decisions*