

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 855473 Alberta Ltd. / Leeb Sherwin Financial Services
(the "Agency")

As represented by
Designated Representative Mark Leeb
(the "DR")

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

This case involved an allegation pursuant to s. 467(1)(c) of the Act. It is alleged that the Agency, through its DR, failed to disclose that the Agency engaged in a business other than insurance on applications for corporate certificates of authority that it submitted on February 14, 2008. In so doing, it is alleged that it contravened s. 467(1)(c) of the Act and, in so doing, breached a section of the Act as contemplated in s. 480(1)(b).

Facts and Evidence

This matter proceeded by way of a written Report to Council dated August 1, 2013 (the "Report"). The Report was forwarded to the DR for review and to allow the Agency to provide the Council with any further evidence or submissions. The DR did so by way of a two page letter dated August 29, 2013.

The Agency has been licensed as a life and accident & sickness ("A&S") insurance agency since February 15, 2006. To renew its certificates of authority for the 2008 and 2009 certificate terms, the DR submitted applications on February 14, 2008 and January 17, 2009 respectively. For each year, the DR submitted two application forms on behalf of the Agency. One form was for the life insurance certificate and another form applied for the A&S certificate. Each of the forms required the DR to disclose whether or not the Agency

was “Engaged in any business other than the insurance business?” In each instance the DR, on the Agency’s behalf, checked the box indicating “No”.

On December 18, 2012 the AIC received a letter dated December 14, 2012 from the Alberta Securities Commission (the “ASC”). The letter advised that the ASC received a complaint from DA and SG (collectively the “Complainants”) in regard to an investment that they made through the DR and the Agency. The specific investment that the Complainants made was in an entity known as New Life Capital Corp (“New Life”). The letter advised that the DR moved DA’s monies from segregated funds to New Life and that the Agency received commissions for the sales.

Accompanying the letter from the ASC were a number of attachments including:

- i) A copy of a letter signed by the Complainants dated December 6, 2012. The letter provided authorization to the ASC to forward their complaint to the AIC;
- ii) A copy of an e-mail from DA to the ASC dated October 8, 2012. The e-mail set out DA’s concerns in relation to the DR’s conduct;
- iii) A copy of an Ontario Securities Commission (“OSC”) Order dated May 17, 2012, pursuant to sections 127(1) and 127.1 of *The Securities Act*, R.S.O. 1990, c. S.5, as amended, in relation to New Life and other related respondents;
- iv) A copy of a Form 45-106F1 Report of Exempt Distribution (“Form 45”) filed with the ASC by New Life as the issuer of the security. The Form 45 was filed on June 25, 2008. Page two of the Form 45 disclosed that the Agency was compensated \$39,207.75 for distribution of the securities;
- v) A copy of an amended Form 45 filed with the ASC by New Life as the issuer of the security. The amended Form 45 was filed with the ASC on July 3, 2008. Page three of the amended Form 45 disclosed that the Agency was compensated \$62,278.25 for distribution of the securities;
- vi) A copy of pages 1, 2 and 29 of a 45 page Confidential Offering Memorandum (“OM”) filed by New Life Capital Investments Inc. with the ASC. This bore a date stamp of April 13, 2007. On page 1 under Selling Agent, the OM indicates the Company intends to retain selling agents in relation to the OM and refers to Item 7. Item 7 is titled “Compensation Paid to Sellers and Finders” and indicates, “The Company intends to enter into agreements with certain agencies (each, an ‘Agency’) to introduce potential investors

(the ‘Potential Investors’) to the Company, either directly or through their distribution network of agents (each, an ‘Agent’). The Company will pay compensation on the proceeds for all completed sales with Potential Investors resulting from the Agency’s network of Agents, that are directly or indirectly attributed to the efforts of the Agency as follows: Agency 0.5% of subscription proceeds (plus applicable GST), Agent 5% of subscription proceeds (plus applicable GST)”;

vii) A copy of an e-mail dated October 19, 2009 from the DR to DA. The e-mail contained an attachment which included a claim form for DA to complete in relation to submitting a proof of claim to the court appointed trustee, KPMG, prior to October 30, 2009. In the e-mail, the DR advised, “Please complete the following attached form, along with a lawyer we as advisors have hired to represent us a (sic) the voting to determine which offer to accept”;

viii) Copies of DA’s self-directed RRSP application, Investment Instructions for Securities of Private Issuers (“Investment Instructions”), and authorization to provide information, which were completed by DA and received by Canadian Western Trust (“CWT”). The documents were signed and dated by DA on March 4, 2008 and the authorization to provide information was made to the Agency. The Investment Instructions directed payment of DA’s self-directed RRSP held with CWT, to purchase securities issued by New Life and the DR signed as witness;

ix) Copies of DA’s Transfer Authorization for Registered Investments dated March 4, 2008, which authorized the transfer from the relinquishing institutions CI Funds and Mackenzie Financial, to the receiving institution, CWT; and

x) Copies of DA’s account statements with CWT. The statements refer to the Agency as the “Advisor”.

The Report indicated that on March 27, 2013, the investigator spoke with the DR and advised him of the complaint. In this telephone call, the investigator explained the mandate and jurisdiction of the AIC and that the AIC was reviewing alleged non-disclosure matters relating to whether the Agency was involved in occupations or businesses other than insurance. In discussing the matter, the DR advised the investigator that he became aware of New Life in 2007 through Pro-Seminars and that he was led to believe that insurance agents could “refer” investors to the exempt securities as they were not required to be registered or licensed with the securities regulator at that time. The DR further advised that he did not set up a

business and therefore did not see it as a business or occupation other than insurance that needed to be disclosed to the AIC. The DR also advised that he was only referring investors to New Life and not providing advice and he only received a referral fee which he believed did not need to be disclosed to the AIC.

On April 4, 2013, the Investigator wrote to the DR and requested information and documentation. The DR responded by way of fax, dated April 23, 2013. In this fax, the DR advised that in 2008 he explained various investment options to DA including “Life Settlements” and that DA requested information in relation to same. The DR wrote that DA made the decision to transfer his segregated fund investment to CWT and then to New Life and, as a result, was no longer a client of the Agency at the point of transfer. The DR further indicated that the “company” signed a confidentiality and non-disclosure document on October 15, 2007 with a copy attached. The DR wrote that the relationship with New Life ended in the fall of 2008 when New Life received a letter from the OSC that they were no longer authorized to operate pending a review. The DR advised that the Agency was paid a “referral fee” based on deposits to New Life.

The DR’s August 29, 2013 submission reads as follows:

Please find an addendum below regarding the investigation report to the Life Insurance Council on the agent, Mark Leeb and the agency 855473 Alberta Ltd. operating as Leeb Sherwin Financial Services. These entities will be referred to as agent (Mark Leeb) and agency (855473 Alberta ltd.) below.

1. I, Mark Leeb have been licensed since 1993 (20 plus years) for Life and A&S insurance. 855473 Alberta Ltd. has been licensed for life and A&S insurance since 2000 (13 plus years). The agent or the agency did not have any previous complaints filed with the Alberta Insurance Council or any other regulatory body. (Facts, Section 1, page 2)
2. Under fact 3 (iii) the document on page 21 indicates that New Life Capital was an investment in an industrial product. The agent or the agency did not receive this document. New Life Capital was life settlements.
3. Under fact 3(iv) the document indicates a commission and finder fees. New Life Capital provided a form 45 (pages 22 through 27) to the Ontario securities commission for an alleged dollar amount which was compiled by the President and chief executive officer, L. Jefferey Pogachar. Mr. Pogachar was charged with misappropriation of investors [sic] funds.
4. Under fact 3(vi) the agent or the Agency did not sign an agency agreement with New Life Capital. A confidentiality agreement was signed to facilitate paperwork.

5. The agent or the agency did not operate any other business. The referral fee was paid to the agency. It is a common practice for an insurance agent to collect a referral fee or a fee for service from clients who purchase a non life [sic] insurance product such as; a financial plan, estate plan, retirement plan, a buy-sell. As stated under point 4 on page 3, the insurance agent may refer investors to purchase exempt securities because they were not regulated by the ASC or any other regulatory body in 2007 or 2008.

[DA] signed the form to allow the agency access to information with Canadian Western Trust because he was out of the country working on an oil rig.

I did not sign the Designated Representative's statement as I disagree regarding the facts on the report to the life insurance council. I respectfully request to be present when the committee reviews the documents involving the agent and the agency. The concern regarding the issue of the licence [sic] renewal form occurred 6 ½ years ago.

Discussion

Section 467 of the Act requires agents to provide the AIC with the information that is required to determine whether or not an agent can receive or hold a certificate of authority. In regard to other occupations the applicable Regulation under s. 5(1) states:

- (f) the individual must not be in a position to use coercion or undue influence in order to control, direct or secure insurance business;
- (g) the individual must not be engaged in another occupation or business that would place the individual in a conflict of interest position when acting as an insurance agent.

Given these prohibitions, the AIC requires all agents and agencies to inform it of all other business activities so that it can undertake reviews where appropriate.

In this case, it is clear that the DR did not disclose any other businesses in which the Agency was involved. He states that the reason for this is that he did not consider his activities in and around New Life as being another occupation or business. Therefore, the only real issue in this matter is whether or not the Agency's other activities were simply referrals or whether the activities constituted another business that required disclosure.

In our view, the determination of this question requires the Council to look at all of the circumstances in their entirety and that no one factor is necessarily conclusive in this case. First, the facts as set out in the Complainants' letter indicated that the DR took an active role in soliciting their investment into New Life. DA's uncontradicted evidence is that the DR discussed the nature of the investment with him and

assured DA that his investment was secure and even mentioned that investments in New Life were seeing an 8% return. This very much appears to be promotional activity rather than a referral. Additionally, the DR and the Agency took an active role in facilitating the transfer of DA's funds into New Life. This accorded with the fact that the DR and the Agency acted as the Complainant's financial planner in the past. The DR also appears as the witness to at least one of the documents signed by DA. All of these things suggest that the Agency and the DR were not simply acting in a disinterested referral capacity. Additionally, the Agency was compensated more than \$62,000.00 in relation to its role in soliciting the sale of New Life investments. Finally, the DR sent legal documents to DA to sign stating: "[p]lease complete the following attached form, along with a lawyer that we as advisors have hired to represent us a (sic) the voting to determine which offer to accept." Given all of these factors, we are of the view that the Agency was clearly engaged in business activities other than the sale of insurance and that these should have been disclosed by the Agency, through its DR, on the application forms at issue. As such, we find that the Agency breached a section of the Act as contemplated in s. 480(1)(b).

As to the applicable sanction, we have the ability to levy civil penalties in an amount not exceeding \$1,000.00 pursuant to s. 480(1)(b) of the Act and s. 13(1)(b) of the *Certificate Expiry, Penalties and Fees Regulation*, A.R. 125/2001. We also have the authority to suspend or revoke the Agency's certificate of authority. Due to the fact that more than three years has elapsed since the time of the Agency's non-disclosure, s. 480(9) bars us from imposing any civil penalty. However, this limitation does not apply to the imposition of a suspension or outright certificate revocation. Given the seriousness with which we view the DR's actions in this case, we order that the Agency's life and A&S certificates of authority be suspended for three (3) months. We order that the suspension commence on the eighth day after the mailing of this decision.

Pursuant to s. 482 of the Act (copy 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.

Date: December 5, 2013

Original Signed By

Ken Doll, Chair
Life Insurance Council

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

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

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

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

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

- a) a copy of the written notice of the decision being appealed;
- b) a description of the relief requested by the appellant;
- c) the signature of the appellant or the appellant's lawyer;
- d) an address for service in Alberta for the appellant;
- e) an appeal fee of \$200 payable to the Provincial Treasurer.

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

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

Address for Superintendent of Insurance:

Superintendent of Insurance
Alberta Finance
402 Terrace Building
9515-107 Street
Edmonton, Alberta T5K 2C3