

In the Matter of the
FINANCIAL INSTITUTIONS ACT, RSBC 1996, c.141
(the “Act”)

and the

INSURANCE COUNCIL OF BRITISH COLUMBIA
(“Council”)

and

EVERYTHING FINANCIAL CONSULTANTS INC.
(the “Agency”)

and

PETER JOSEPH CISHECKI
(the “Nominee”)

ORDER

Pursuant to section 237 of the Act, Council convened a hearing at the request of the Agency and the Nominee to dispute an intended decision of Council dated July 11, 2017.

The subject of the hearing was set out in an Amended Notice of Hearing dated September 7, 2018.

A Hearing Committee heard the matter on October 30, 2018 and presented a Report of the Hearing Committee to Council at its January 22, 2019 meeting.

Council considered the Report of the Hearing Committee and made the following order pursuant to sections 231, 236 and 241.1 of the Act:

1. A condition is imposed on the Agency’s and the Nominee’s life and accident and sickness insurance licences that requires the Nominee to successfully complete the Council Rules Course, on or before May 6, 2019;
2. The Nominee is fined \$5,000, to be paid on or before May 6, 2019;
3. The Agency is fined \$10,000, to be paid on or before May 6, 2019;
4. The Agency and the Nominee are jointly and severally liable to pay Council’s hearing costs of \$5,047.29, to be paid on or before May 6, 2019; and

Order

Everything Financial Consultants Inc. and Peter Joseph Cishecki
LIC-9135898C114245R02 / LIC-84037C69582R1 / COM-2016-00129

February 5, 2019

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5. A condition is imposed on the Agency's and the Nominee's life and accident and sickness insurance licences that failure to successfully complete the Council Rules Course or pay the above noted fines and hearing costs within the stipulated time frame will result in automatic suspension of Agency's and the Nominee's life and accident and sickness insurance licences and the Agency and Nominee will not be permitted to complete their 2019 annual filings until such time as the Council Rules Course is successfully completed and the fines and hearing costs are paid in full.

This order takes effect on the **5th day of February, 2019.**



Ken Kukkonen
Chairperson, Insurance Council of British Columbia

INSURANCE COUNCIL OF BRITISH COLUMBIA
(“Council”)

REPORT OF THE HEARING COMMITTEE

IN THE MATTER OF THE *FINANCIAL INSTITUTIONS ACT*
(R.S.B.C. 1996, c. 141)
(the “Act”)

AND

EVERYTHING FINANCIAL CONSULTANTS INC.
(the “Agency”)

AND

PETER JOSEPH CISHECKI
(the “Nominee”)

Date: October 30, 2018

Before: Karl Krokosinski Chair
Frank Mackleston Member
John Van Tassel Member

Location: Suite 300, 1040 West Georgia Street
Vancouver, British Columbia V6E 4H1

Present: David McKnight Counsel for Council
Stephanie Streat Counsel for Everything Financial
Consultants Inc. and Peter Joseph Cishecki
Peter Joseph Cishecki Nominee

BACKGROUND AND ISSUES

On July 11, 2017, Council made an intended decision, pursuant to sections 231 and 236 of the Act, against the Agency and the Nominee. The intended decision respected allegations that the Agency and Nominee breached Council Rule 7(11) by failing to ensure the Agency had errors and omissions (“E&O”) insurance and that, as a result, the Agency had operated in an unlicensed capacity.

On October 5, 2017, the Agency and Nominee requested a hearing before Council to dispute Council’s intended decision pursuant to section 237(3) of the Act. Council held a one-day hearing in this matter on October 30, 2018.

The issues in the hearing were:

1. Did the Agency and Nominee breach Council Rule 7(11) and fail to act in a competent manner and in accordance with the usual practice of the business of insurance:
 - a. by failing to ensure that the Agency had E&O insurance in place and by allowing the Agency to act in an unlicensed capacity for 23 months; and
 - b. in any other manner.
2. Are the Agency and Nominee able to carry on the business of insurance in a competent manner and in accordance with the usual practice, as required under Council Rule 7(8) and pursuant to section 231(1)(a) of the Act.
3. Should the Agency and Nominee be subject to any disciplinary or other action in the circumstances; and if so, whether Council should do one or more of the following in accordance with sections 231 and 236 of the Act:
 - a. Reprimand, suspend or cancel the Agency's and/or Nominee's life and accident and sickness insurance agent licences.
 - b. Impose conditions on the Agency's and/or Nominee's life and accident and sickness insurance agent licences.
 - c. Fine the Agency an amount not more than \$20,000.00.
 - d. Fine the Nominee an amount not more than \$10,000.00.
 - e. Require the Agency and/or Nominee to cease any specified activity related to the conduct of insurance business or to carry out any specified activity related to the conduct of insurance business.
 - f. Require the Agency and/or Nominee to pay the costs of this hearing.

The Hearing Committee was constituted pursuant to section 223 of the Act. This is a report of the Hearing Committee as required by section 223(4) of the Act.

EVIDENCE

The Hearing Committee reviewed and considered the following evidence:

- | | |
|------------|---|
| Exhibit 1: | Agreed Statement of Facts |
| Exhibit 2: | Council's Book of Documents |
| Exhibit 3: | Email Chain at TAB 1 of the Defendant's Book of Documents |
| Exhibit 4: | Copy of Axis Errors and Omissions Insurance at TAB 2 of the Defendant's Book of Documents |

Exhibit 5: Letter from Peter Cishecki to Insurance Council of BC at TAB 3 of Defendant's Book of Documents
Sworn Testimony of Peter Cishecki at the October 30, 2018 hearing.

FACTS

At the hearing, the parties entered into and tendered an agreed statement of facts ("Agreed Statement") containing the majority of the facts relevant to the issues in this matter.

Background

The Agency was originally licensed as a life and accident and sickness insurance agent ("Life Agent") in British Columbia between 1998 and 2003. The Agency was relicensed in 2012 and has maintained an active licence since then. The Nominee obtained a Life Agent licence in 1991 and has been the Agency's Nominee since May 2012.

Circumstances Leading to the Lapse of E&O Insurance

The Agency had an E&O policy in place in 2012 and 2013. In December, 2013, the E&O provider for the Agency sent an email to the Agency advising that it needed to renew its E&O insurance for 2014. The application provided by the E&O provider included a section to select "corporate entity" E&O insurance. The Agency did not select that section and submitted the renewal to the provider without indicating that it sought to renew the corporate E&O insurance.

The Nominee employed an assistant (the "Assistant") beginning in the fall of 2013. The Assistant took over "all responsibilities" relating to running the Agency office in January 2014. The Nominee delegated responsibility for renewing all E&O policies for the 2014 and 2015 periods to the Assistant. The Nominee also provided the Assistant with a corporate credit card to pay the premiums on the policies. The Assistant did submit renewals for the E&O policies of each individual agent. However, when submitting the insurance renewals the Assistant did not select the corporate entity rider to renew the Agency's corporate E&O insurance for 2014. This occurred again for the 2015 policy.

The Nominee did not review the credit card statements or the insurance policies himself and so was unaware that the Agency's E&O insurance had not been renewed.

The E&O provider did not notify the Agency that its corporate E&O insurance had lapsed.

The Agency conducted seventy insurance transactions during the period it was without E&O insurance.

Investigation of Lapse of E&O Insurance

In January 2016, Council conducted an inspection of the Agency, wherein Council determined that the Agency had not had E&O insurance since January 2, 2014.

The E&O provider advised Council that the Agency's corporate E&O insurance lapsed in January 2014 when the corporate entity rider was not selected. All other agents' E&O policies were renewed as required. The difference in the Agency's annual premium was approximately \$400.00.

Response to Lapse of E&O Insurance

In January 2016, Connel Lewis of Council audited the Agency. Two weeks after the audit, Mr. Lewis requested the Assistant provide a copy of the Agency's corporate E&O coverage. This was the first time the Assistant had heard of corporate E&O coverage. Following this phone call, the Assistant reviewed the Agency's 2012 and 2013 insurance documents and discovered that the Agency had E&O coverage through a corporate entity rider but did not find this coverage in place for 2014 and 2015. The Assistant, on instruction from the Nominee, then immediately contacted the E&O provider, both to renew the corporate E&O insurance and to obtain "past acts coverage" for the period during which the Agency's E&O policy had lapsed. The "past acts" coverage effectively insured all acts during the period of under insurance.

The Assistant said in an email to Council that she was confused by the insurance certificate issued to the Nominee because "on all of Peter's Individual Certificates it lists the insured individual as Peter Cishecki and the Personal Corporation and Firm Name as Everything Financial Consultants Inc. This can be confusing as it implies the coverage is for both." The insurance certificate for the Nominee's personal insurance states that the insured individual is "Peter Joseph Cishecki". It also lists the "Firm Name" as "Everything Financial Consultants Inc.". Below the firm name are the words "Vicarious liability only". At the top of the certificate are the words: "TYPE OF INSURANCE: Financial Advisor Professional Liability Insurance."

The Nominee also contacted the E&O provider to determine what had happened following the lapse in insurance. The E&O provider advised the Nominee that since his Agency's issue came to light, the E&O provider examined its policies and discovered that there were other companies in the same situation as the Agency.

As a result of the E&O insurance lapse, the Agency has improved its procedures to include more E&O insurance renewal procedures. The Nominee also represents that he has since become more diligent in the operation of the Agency.

ANALYSIS

Legal Framework

Section 225.1 of the Act enables Council to make rules for the purposes of licensing and regulating the conduct of insurance agents, insurance salespersons, insurance adjusters and employed insurance adjusters.

Section 231(1)(a) of the Act authorizes Council to impose penalties on a licensee or nominee of a licensee if Council determines that the licensee and/or nominee "no longer meets a licensing requirement established by a rule made by the council or did not meet that requirement at the time

the licence was issued, or at a later time". The possible penalties are set out at section 231(1)(f) to (k) of the Act:

- (f) reprimand the licensee or former licensee;
- (g) suspend or cancel the licence of the licensee;
- (h) attach conditions to the licence of the licensee or amend any conditions attached to the licence;
- (i) in appropriate circumstances, amend the licence of the licensee by deleting the name of a nominee;
- (j) require the licensee or former licensee to cease any specified activity related to the conduct of insurance business or to carry out any specified activity related to the conduct of insurance business;
- (k) in respect of conduct described in paragraph (a), (b), (c), (d), (e) or (e.1), fine the licensee or former licensee an amount:
 - (i) not more than \$20 000 in the case of a corporation, or
 - (ii) not more than \$10 000 in the case of an individual.

Council Rule 7(8) states that a licensee must comply with Council's Code of Conduct, as amended from time to time.

Council Rule 7(11)(a) states that an agency must maintain or be covered by E&O insurance of \$1,000,000.00 per claim and a minimum aggregate limit of \$2,000,000.00.

Council Rule 7(11)(d) states a licensee's licence is automatically suspended without Council taking any action, where the licensee remains uninsured for a period exceeding 30 calendar days. Council Rule 7(11)(e) states an agency whose licence is suspended under subsection (d) will automatically be reinstated where: (i) the licensee obtains the required E&O insurance within 30 calendar days from the date of the suspension; and (ii) the licensee delivers to Council the required verification.

Council Rule 3(2)(c) states that Council may grant a licence if the applicant intends to publicly carry on business as an insurance agent, salesperson or adjuster in good faith and in accordance with the usual practice of the business of insurance.

Council's *Policy & Guidelines, January 2014, Section 4 Suitability Policies* states that the Code defines trustworthiness, good faith, competence, financial reliability, and the usual practice of the business of insurance. The purpose of the suitability policies is to assist Council in assessing the suitability of a person where Council learns of a possible suitability concern. The Code serves as the benchmark upon which applicants and licensees are measured.

Under the suitability policies, Council considers the nature of a matter to determine if it is relevant to a person's trustworthiness, competence, or intention to carry on the business of insurance in good faith and the person's overall fitness to be an insurance licensee.

Council's Arguments

Council seeks the following findings against the Nominee and the Agency:

1. The Agency and Nominee breached Council Rule 7(11);
2. The Nominee's and Agency's actions bring into question their competency and the ability to carry on the business of insurance in good faith.

Council seeks the following penalties against the Nominee and the Agency:

1. Impose a condition on the Agency's and Nominee's life and accident and sickness insurance licences that requires the Nominee to successfully complete the Council Rules course within 90 days of Council's order;
2. Fine the Nominee \$5,000.00 to be paid within 30 days of Council's decision being issued;
3. Fine the Nominee \$10,000.00 to be paid within 30 days of Council's decision being issued;
4. Order that the Agency and Nominee be jointly and severally liable to pay Council's costs associated with the hearing to be determined.

Council submitted as follows:

- The fact that the Agency and the Nominee did not have systems in place to ensure the error did not occur, and the fact that the Agency did business for almost two years and went through two additional renewal periods without determining that the E&O insurance had lapsed speaks to the Nominee's competence to effectively and adequately manage the Agency's operations.
- By not having E&O insurance in place, the Agency's Life Agent licence was terminated on or about March 4, 2014 in accordance with Council Rule 7(11), which means the Agency engaged in insurance activities while unlicensed for almost two years.
- Had Council's inspection of the Agency not occurred in 2016, the Agency may well still be operating without E&O insurance.
- The Nominee provided evidence that he assigned the renewal of the Agency's E&O insurance to the Assistant who was a new employee but did not take any steps or any sufficient steps to ensure the new employee was trained or supervised to ensure the E&O

was handled properly. All of this, submits Council, point to a lack of an appropriate system of safeguards.

- Council criticizes the Nominee for blaming the E&O provider for not bringing it to the Agency's attention as this deflects responsibility for taking steps to ensure that all insurance was handled properly. Council submitted that it is a glaring error on the part of the Nominee and the Agency that the difference in premiums was not noticed as missing for two years. The Nominee did not review the corporate credit card statements and therefore was not aware that the insurance had not been renewed.
- The fact the Nominee made annual filings in 2014 and 2015 to Council in which it confirmed that it was in compliance with all of Council's Rules indicates a failure in competency and diligence.
- Last, Council argues that had a claim been made while the Agency was uninsured, it is not certain that the E&O provider would have honored a claim while the Agency was uninsured, despite the fact that the E&O provider eventually offered past acts coverage.

The Council relies on several precedent decisions of Council to support the penalties it seeks as follows:

- *In the Matter of Global Warranty (West Coast) Corporation and Andrew Mark Hall*, June 20, 2017: The agency held a general insurance licence in BC. The agency was without insurance in Saskatchewan and BC for a 138 day period and failed to cease insurance activity during this time. The nominee explained that the agency's head office, which is located in Ontario, is responsible for maintaining the agency's E&O insurance. The nominee stated the agency's head office failed to renew its E&O insurance and did not inform the nominee that it had expired. The nominee confirmed he did not take any steps to ensure the agency operated in B.C. in compliance with Council's Rules including not being aware when the agency's E&O insurance expired or following up with the head office to ensure the agency had E&O coverage in B.C. Council fined the agency \$6,000.00 and the nominee \$1,000.00. Council also ordered that the nominee complete the Council Rules course.
- *In the Matter of Prosperity Protection Corp*, February 15, 2017: The agency held a life and accident and sickness insurance licence in BC. The agency failed to maintain valid E&O insurance in BC for 39 days. Council found the agency breached Council Rule 7(3)(a)(i) by failing to notify it within five days of disciplinary action by the ICS and breached Rule 7(11) by failing to notify Council when it ceased to have E&O insurance. As a result, Council imposed a condition on the agency's licence that required the nominee to successfully complete the Council Rules course within 90 days of Council's order and fined the agency \$1,000.00.

- *In the Matter of Johnson Fu Insurance Agency Inc.*, June 24, 2014: The agency operated 7 months without E&O insurance. The nominee was unaware that there was inadequate insurance coverage and failed to inform Council of the same. Notwithstanding that Council determined the breach was unintentional, Council determined that the failure to carry adequate insurance coverage represents a substantial risk to the public and fined the agency \$2,800.00.

Nominee's and Agency's Arguments

The Nominee and Agency submitted that a citation is just and fit in the circumstances and that Council should impose no other penalty.

The Nominee and Agency submitted as follows:

- The lapse of E&O insurance for the Agency was inadvertent and unintentional. With the exception of the current inquiry the Nominee has ensured that the appropriate insurance was in place at any given time;
- The Nominee instructed the Assistant to renew the policy and intended and believed the policy was renewed;
- The Nominee quickly remedied the lapse of E&O coverage by taking immediate steps to secure the coverage after he learned it was not in place. A new policy was in place within a couple days, including coverage for "past acts".
- The Nominee had a reasonable belief that coverage was in place. Where a broker is engaged to assist with the acquisition of appropriate insurance coverage, it is commonly expected by the insured that the broker will assist in the insurance acquisition process, and will use its specialized knowledge to help the insured make appropriate decisions regarding coverage.
- The Supreme Court of Canada has found that brokers have a duty to properly inform insureds about coverages available (*Fletcher v. Manitoba Public Insurance Co.*, 1990 CanLII 59 (SCC)).
- It was reasonable for the Nominee to believe that upon instructing the Assistant to renew the coverages, that the appropriate insurance would be renewed. The Assistant's failure was a failure to check a box on an insurance renewal form. The lapse was not at any time brought to the attention of the Nominee by his broker and that the insurance renewed was markedly different from what had been sought and delivered in the past.
- The broker admitted to failing in their practices. Had the discrepancy in the purchase of the intended E&O insurance been brought to the Nominee's attention at any point in the lapse,

it would have been remedied immediately, as is shown by how the Nominee swiftly addressed the under insurance once it became aware of same.

- The Nominee has at all material times taken an active role in taking steps to ensure that the administrative practices and procedures of the Agency are appropriately pursued. Since 1996, the Nominee has sought and obtained the coverage necessary to the Agency.
- At all material times the Agency had policies and procedures in place related to the operation of the Agency. The Assistant had only recently assumed the position of executive assistant at the time the insurance came up for renewal, so she had not been personally aware of any necessity to obtain a separate E&O rider for the Agency.
- The Nominee has taken steps to prevent similar incidents from occurring in the future.

With respect to the precedent decisions, the Nominee and Agency submit:

- *In the Matter of Global Warranty (West Coast) Corporation and Andrew Mark Hall*, June 20, 2017: This case is distinguishable on the basis that the agency made no inquiry into whether coverage had been obtained or not whereas in this case the Agency did attempt to obtain the E&O insurance and thought that it had been so obtained. An inadvertent error led to the failure to secure the renewal of a separate rider, and this error went undiscovered due to subsequent renewals under the same terms.
- *In the Matter of Prosperity Protection Corp*, February 15, 2017: This case is distinguishable as, unlike the current matter, Prosperity acted with ambivalence when it learned E&O insurance was not in place.
- *In the Matter of Mark Wagner*, September 6, 2018: Council found that the licensee had 25 improperly completed insurance forms in the client files, including signed bank forms, altered forms, incomplete forms, forms witnessed prior to client execution, and forms with date discrepancies. No client harm was identified in the improperly filled out documents. Council ordered remedial education, a period of supervision, and a fine of \$2,500.00.
- *In the Matter of Hugo Donais*, September 6, 2018: Council found that the licensee had improperly completed various insurance forms, including ones with blanks, missing signatures, white out, crossed out information, or that had been partially or pre-completed. The licensee advised that there was no malicious intent, and that some of the errors would have been administrative employee errors. There was no harm found to have been caused to clients. The Council ordered education to address the repeated errors and a fine of \$1,000.00.
- *In the Matter of Annie Chu*, May 2, 2018: Council found that the licensee failed to meet her continuing education requirements over 2 years, and showed a disregard for Council

Rules. Fines of \$3,000.00 were levied, and a number of restrictions imposed upon the licensee until she took steps to rectify the default.

- *In the Matter of Patricia Brienon*, August 29, 2017: a licensee obtained an endorsement on her automobile insurance policy to allow her son to drive the family car one weekend. The car was in an accident, and she thereafter realized that she had mistakenly caused the Endorsement to be registered for the wrong day, and that the coverage was not in place at the time of the accident. She called her Agency and instructed an employee to change/falsify the date of the Endorsement. She thereafter contacted her supervisor to report the incident, having realized that she did not handle the matter appropriately. Council issued a reprimand due to the licensee's prompt response to remedy her mistakes.

Hearing Committee's Analysis

The parties do not dispute that the Agency did not have the required E&O policy in place in 2014 and 2015. This is a clear breach of Council Rule 7(11)(a).

Council submits that as a result of the E&O policy lapse, the Agency was unlicensed for 2014 and 2015. The Agreed Statement states at paragraph 2 that "The Agency was relicensed in 2012 and has maintained an active license (sic) since then." This fact is repeated and relied on in Council's written submissions at paragraphs 2 and 10. While this appears to contradict Council's submission, in our view this is merely an unfortunate lapse in the drafting of the Agreed Statement. Council Rule 7(11)(d), by operation of law, automatically suspends the licence of the Agency when the Agency has failed to maintain E&O insurance for longer than 30 days. This outcome arises by operation of law and cannot be modified by an Agreed Statement. As such, we accept that the Agency was unlicensed for 2014 and 2015.

The Nominee delegated the renewal of corporate E&O insurance to the Assistant. The Nominee explicitly did not review either the policies or the credit card statements paying for the premiums. The Assistant was unaware of the existence and importance of corporate E&O insurance until Council informed her of this fact in January 2016, two years after the Nominee had delegated responsibilities to her. These facts indicate that the Nominee failed to properly train and supervise the Assistant with respect to the Agency's obligation to hold E&O insurance. Moreover, the Nominee failed personally to take responsibility for reviewing that the relevant insurance policies were in place and had been renewed.

The Assistant told Council in an email sent prior to the hearing that she was confused by the insurance certificate issued to the Nominee. In our view that is not an excuse for failing to renew the corporate policy. The certificate clearly indicates who the insured is and the type of insurance. The statement below the firm name indicates that the policy is limited to "vicarious liability only". Moreover, the Assistant already admitted in email correspondence to Council that she did not know what corporate E&O insurance was until 2016 when Council told her about it. This is not consistent with proper supervision of the Assistant by the Nominee.

The lapse in the corporate E&O policy resulted in a reduction in the insurance premium of \$400.00. The Nominee failed to observe this reduction because the Nominee was not reviewing the credit card statements or the insurance policies.

A relatively straightforward review of the policy documents would have revealed that the Agency did not have E&O insurance. If the Assistant had been properly trained or advised, she would have been aware of the existence and importance of corporate E&O policies and likely would have made the appropriate inquiries. The Nominee and the Agency did not have adequate systems or policies in place to ensure proper insurance coverage during the time they were uninsured.

The Nominee admits that he did not read the policies at the time of the renewal. Moreover, in answer to questions by the Chair of the Hearing Committee, the Nominee did not appear to have a detailed grasp of the terms and content of the E&O policies. While the Nominee submits in his written submissions that he had policies and procedures in place related to the operation of the Agency, he did not explain what they were and, in any event, that assertion is contradicted by the fact that the Assistant had no awareness of the requirement to hold corporate E&O insurance and there was virtually no evidence that the Nominee or anyone else at the office had ever informed her of this fact as part of training or onboarding explaining the Agency's policies and procedures. The only evidence relating to training arose during questioning of the Nominee by the Chair of the Hearing Committee. The Nominee stated that there was training of the Assistant but did not explain what it was, when it was, or any other details. As such, this comment has little probative value and is not sufficient to prove that proper training was in place. Moreover, the Assistant remained unaware of the requirement to hold E&O insurance for two years following the initial lapse and there is no evidence she received any training or was exposed to any policies or procedures relating to the requirement for corporate E&O insurance during that period.

All of the above factors go to the competence of the Nominee. As such, we find the Nominee failed to properly supervise his staff and failed to have policies and procedures in place to ensure the required insurance coverage was in place for the Agency. We find that this lapse in care by the Nominee was not intentional. However, it does amount to a degree of carelessness that is not consistent with the Code and Council's Rules.

In his written submissions, the Nominee places blame on the E&O provider for failing to inform the Agency of the lapse in insurance. He says that "it was not unreasonable for the Nominee to believe that adequate coverage was in place at all material times." We disagree. It may be that the E&O provider should have informed the Agency of the lapse, but this does not eliminate the independent responsibility of the Nominee to ensure that the Agency was compliant with Council Rules. The Agency submitted forms each year to Council in which it indicated it was compliant with Council Rules and obviously did so without ensuring that it was in fact compliant. Moreover, in answering questions posed by the hearing committee, the Nominee acknowledged that it was his responsibility as president of the Agency to ensure that "everything was in place". We take that statement to mean that the Nominee acknowledges he was responsible to ensure the Agency was covered by E&O insurance.

The Nominee did take swift action when the lapse in policy was discovered. We consider this to be a mitigating factor. Moreover, the Nominee claims that he has improved the Agency's policies and procedures going forward. We have no reason to doubt this statement.

In conclusion, we find that the Nominee and the Agency failed to act in a competent manner and in accordance with the usual practice. The Agency breached Council Rule 7(11)(a). The Nominee and the Agency breached section 231(1)(a) of the Act.

With respect to penalty, we must consider aggravating and mitigating circumstances. Additionally, though we are not bound by precedent decisions of Council, we should be guided by them as a matter of procedural fairness. This ensures that the penalties we recommend are consistent with those that have been issued in the past for similar conduct.

We have reviewed the decisions relied on by both Council and the Nominee and Agency. In our view, the period during which the Agency's E&O insurance lapsed is significantly greater than those in *In the Matter of Global Warranty (West Coast) Corporation and Andrew Mark Hall*, *In the Matter of Prosperity Protection Corp.*, and *In the Matter of Johnson Fu Insurance Agency Inc.* In *Global Warranty*, the E&O insurance had lapsed for 138 days and Council fined the agency \$6,000.00 and the nominee \$1,000.00. In this instance, the Agency's insurance lapsed for approximately five times longer than the period in *Global Warranty*. This demonstrates a greater lapse of care and a greater risk to the public.

We do not agree with the Agency and the Nominee that the facts of *Global Warranty* represent a less egregious situation than this case. There is no meaningful distinction between a Nominee assuming that E&O insurance is in place (as in this case) and failing to make inquiries into whether E&O insurance was in place (as in *Global Warranty*). The Nominee did not make such inquiries in this case, which is why the E&O insurance lapsed for two years. It may be that the reason he did not make inquiries was because he assumed the E&O policy was in place, but the fact remains that sufficient inquiries were not made. This is true even if the Nominee relied on the E&O provider to inform him of the existence of a corporate E&O policy. The Nominee and the Agency had an independent obligation to have proper systems, policies, and training in place, which they did not. The Agency and Nominee assert that their swift action in responding to the information that the E&O policy had lapsed distinguishes their case from that in *Prosperity Protection Corp.* While we agree that the swift action is a mitigating factor in this case, the demonstrated lack of systems, policies and training, the concomitant lack of care, and the length of the lapse in coverage are aggravating factors that elevate the suitable penalty above that issued in *Prosperity Protection Corp.*

The remaining cases relied on by the Agency and the Nominee are not relevant to this matter as they deal with administrative failures and a failure to obtain sufficient continuing education credits. They do not address the lapse of a corporate E&O policy. Corporate E&O policies serve a fundamental function in protecting the public.

As such, with respect to penalty, the aggravating factors in this case outweigh the mitigating factors. The existence of some mitigating factors, as set out above, justify reducing the penalty to

below the maximum permitted by the Act, but the significant number of aggravating factors, particularly the length of time of the lapse, justify a higher penalty than those imposed in the precedent decisions relied on by Council.

RECOMMENDATION OF THE HEARING COMMITTEE

E&O insurance is the back stop and ultimate protection for consumers and is paramount to the public interest. Council has no authority to order restitution, even assuming that an agency has the resources and assets to respond to an E&O claim. Without E&O insurance there is a substantial risk to the public.

As such, we recommend that Council impose the following penalties:

1. Impose a condition on the Agency's and Nominee's life and accident and sickness insurance licences that requires the Nominee to successfully complete the Council Rules course within 90 days of Council's order;
2. Fine the Nominee \$5,000.00 to be paid within 30 days of Council's decision being issued;
3. Fine the Agency \$10,000.00 to be paid within 30 days of Council's decision being issued;
and
4. Order that the Agency and Nominee be jointly and severally liable to pay Council's investigation and hearing costs, to be determined in accordance with Council's Investigation and Hearing Costs Policy.

Dated in Vancouver, British Columbia, on January 3rd, 2019.



Karl Krokosinski, Chair of the Hearing Committee
Insurance Council of British Columbia