**In the Matter of**

**The *FINANCIAL INSTITUTIONS ACT* (the "Act")**
**(RSBC 1996, c.141)**

**and**

**THE INSURANCE COUNCIL OF BRITISH COLUMBIA ("Council")**

**and**

**MEREDITH HOLLY PHENDLER (the "Licensee")**

# ORDER

As Council made an intended decision on March 17, 2009, under sections 231, 236 and 241.1 of the Act; and

As Council, in accordance with section 237 of the Act, provided the Licensee with written reasons and notice of the intended decision dated April 16, 2009; and

As the Licensee has not requested a hearing of Council's intended decision within the time provided to request a hearing;

Under authority of sections 231, 236 and 241.1 of the Act, Council orders that:

1. the Licensee's Level 1 General Insurance Salesperson's licence is cancelled for a minimum period of two years from date of this decision;

2. the Licensee pay the costs of Council's investigation into this matter assessed at $2,125.00; and,

3. as a condition of this decision, the Licensee is required to pay the investigation costs within 90 days from the date of this decision.

This order takes effect on the **12th day of May, 2009.**

Ken Hawley, BComm FLMI CFP CLU ChFC
Chairperson, Insurance Council of British Columbia

**INTENDED DECISION**

**of the**

**INSURANCE COUNCIL OF BRITISH COLUMBIA**
**("Council")**

**respecting**

**MEREDITH HOLLY PHENDLER**
**(the "Licensee")**

## INTRODUCTION

Pursuant to section 232 of the *Financial Institutions Act* (the "Act"), Council conducted an investigation into allegations the Licensee acted in a manner that brought into question her suitability under the Act by accessing an individual's personal and confidential information for purposes other than that relating to their insurance needs.

As part of Council's investigation, on February 16, 2009, an Investigative Review Committee (the "Committee") met with the Licensee to discuss the allegation that the Licensee committed a breach of privacy by requesting access to the ICBC data system for an improper purpose.

The Committee is comprised of one voting and two non-voting members of Council, all of whom have significant experience in the insurance business. Prior to the Committee's meeting with the Licensee, an investigation report had been distributed to the Committee and the Licensee for review. A discussion of this report took place at the meeting and the Licensee was provided an opportunity to clarify the information contained therein and make further submissions. Having reviewed the investigation materials and after discussing this matter with the Licensee, the Committee advised the Licensee that it would present its findings to Council, who would then consider the appropriate disposition and subsequently provide the Licensee with notice as to any decision in this regard.

A report setting out the Committee's findings and the aforementioned investigation report, was presented to Council at its March 17, 2009 meeting. At the conclusion of its meeting, Council determined that the matter should be disposed of in the manner set out below.

## INTENDED DECISION PROCESS

Pursuant to section 237 of the Act, Council must provide written notice to the Licensee of the action it intends to take under sections 231, 236 and/or 241.1 of the Act before taking any such action. The Licensee may then accept Council's decision or request a formal hearing. This intended decision operates as a written notice of the action Council intends to take against the Licensee.

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## FACTS

Based on the information contained in the investigation report, Council made the following findings of fact:

*Licensing History*

1. the Licensee was first licensed on September 20, 2004; she is currently licensed as a Level 1 General Insurance Salesperson;

2. the Licensee is presently employed at Rand & Fowler Insurance Services Ltd. (the "Agency");

3. the Licensee has not been disciplined by Council in the past;

*Breach of Privacy*

4. on July 16, 2008, the Licensee had been seated outside on Robson Street, in view of her parked vehicle, when she observed a female (the "Complainant") park in the space in front of the Licensee's vehicle;

5. the Licensee believed the Complainant had struck her vehicle and an argument between the two ensued;

6. at one point during the interaction, the Licensee called the Agency to obtain personal information about the Complainant and ownership of the Complainant's vehicle ("Acura MDX");

7. the Licensee informed the Complainant that she knew who owned the Acura MDX, and left a note on the woman's windshield that stated "Be careful in the future, watch yourself BITCH";

8. ICBC conducted a data access search and confirmed that information respecting the Acura MDX had been accessed approximately fifteen minutes after the reported time of the initial confrontation, by an individual at the Agency;

9. the 'Broker Query Screen' was accessed. The screen reflected details about the Acura MDX, insurance coverage on the vehicle, the identity of the vehicle's registered owner (Honda Canada Finance Inc.), and the name of the vehicle's principal operator;

10. ICBC contacted Brad Jefferson ("Jefferson"), the owner of the Agency, to ask if he could confirm which employee was associated with the user ID connected to the search. Jefferson identified Mark Banath ("Banath") as the employee with the user ID in question. Banath did not dispute this;

11. Banath submitted that it was not unusual to take phone calls from a fellow co-worker on the road and respond to requests for information. When this occurs, Banath would use the 'Broker Query Screen' to obtain the information sought. In order to access this data, the user must enter a plate *or* registration number *and* the first three letters of the registered owner's name. In this instance, the registered owner was the leasing company. Thus the plate number on the Acura MDX and the first three letters "HON" for Honda Financing were entered by Banath, to access the Broker Query Screen.

*Complainant's Submissions*

12. On July 17, 2008, the Complainant contacted ICBC to report an alleged breach of her privacy by an individual she believed to be employed by ICBC;

13. the Complainant reported that the Licensee came close to her Acura MDX and "started screaming" and accused her of hitting the Licensee's car. The Complainant told the Licensee she had a built-in camera in her Acura MDX and conceded that she did get close to the Licensee's car, but did not actually make any contact;

14. the Complainant reported that the Licensee continued to yell at her and remarked that she worked for ICBC and could report the incident. The Complainant left the scene to go to her doctor's office and returned approximately five minutes later to retrieve something from her vehicle;

15. according to the Complainant, the Licensee approached her this time and said "so this is your husband's car?" and asked the Complainant about the identity of the person listed as the principal operator. The Complainant's recollection is that the Licensee referred to the principal operator by name;

16. in a subsequent interview, the Complainant re-iterated that the Licensee had specifically referred to the registered principal operator of the Acura MDX by his first name when addressing her. She specifically remembers that she stopped herself from replying to the Licensee's question as to whether the person named was her husband because she did not want to give the Licensee any additional personal information;

17. instead, the Complainant submitted that she responded by telling the Licensee to "get a life" and went back to her doctor's office;

18. when she returned to her vehicle, the Complainant found the note referred to above, that the Licensee had left on her vehicle;

*Licensee's Submissions*

19. the Licensee presented her recollection of the incident to the Committee as follows: she was on a break from her road running duties, seated outside on Robson Street when she noticed the Complainant attempt to park in the space in front of where her own vehicle was parked; the Complainant's Acura MDX hit the Licensee's vehicle; the Licensee approached the woman and told her she had hit her vehicle; and a heated argument ensued;

20. the Licensee described the Complainant's conduct as aggressive;

21. after the Complainant left the scene, the Licensee called the general number for the Agency and spoke to Banath. She asked him to "do a screen 2" for her and presented it as a routine request. The Licensee was able to guess the correct name code for the registered owner of the Acura MDX through her personal knowledge of Acura vehicles and registration;

22. when the Complainant returned to the scene approximately five minutes later, the Licensee approached her and said "that MDX does not belong to you." The Licensee submitted that she referred to Honda Canada as the owner, and did not use any personal names;

23. the Licensee acknowledged that she wrote the note, as alleged by the Complainant, after the Complainant went back inside a second time;

24. the Licensee has admitted to "a breach of this woman's right to privacy." She attributed her actions to being caught in the heat of the moment and denied any intention to use the personal information for her gain or for any other reason.

*Jefferson's Submissions*

25. Jefferson reviewed the conduct of Banath and the Licensee at the time ICBC informed him of the incident. He is satisfied that Banath did not do anything wrong, as he considered Banath's actions to be an appropriate response to a routine phone call from a road agent;

26. with respect to the Licensee, Jefferson was satisfied that she had shown remorse for her actions and would not likely do it again in the future. He is not otherwise concerned with her suitability as an employee of the Agency;

27. Through email, Jefferson had previously reminded employees of the need to follow the new rules set out in the *Freedom of Information and Protection of Privacy Act* ("FOIPPA") and he also enclosed '*Privacy Please*', an ICBC document, as a reference.

## ISSUES

Council identified the following issues:

a) Does the evidence show that the Licensee failed to act in a trustworthy manner and that she failed to carry on the business of insurance in good faith and in accordance with the usual practice of the business of insurance in this matter?

b) Is disciplinary or other action warranted in the circumstances?

## LEGISLATION

**Rule 3 of the Council Rules**
**Licence Applications**

**Applicants to Satisfy Council**

(2) If an applicant satisfies Council that the applicant:

(a) has met all of the requirements set out in the Act and Council Rules;

(b) is trustworthy, competent and financially reliable;

(c) 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;

(d) has not in any jurisdiction:

(i) been refused, or had suspended or cancelled, an insurance licence or registration;

(ii) been convicted of an offence; or

(iii) been refused or had suspended or cancelled a licence or registration in any other financial services sector or professional field;

for a reason that reveals the applicant unfit to be an insurance agent, salesperson or adjuster;

and

(e) does not hold other business interests or activities which would be in conflict to the duties and responsibilities of a licensee, or give rise to the reasonable possibility of undue influence.

then the Council may consent to issuing a licence.

**Section 231 of the Act**
**Part 7 – Administration of the Regulation of Financial Institutions**
**Division 2 – Insurance Council of British Columbia**

**Council may suspend, cancel or restrict licences and impose fines**

(1) If, after due investigation, the council determines that the licensee or former licensee or any officer, director, employee, controlling shareholder, partner or nominee of the licensee or former licensee

(a) 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,

(b) has breached or is in breach of a term, condition or restriction of the licence of the licensee,

(c) has made a material misstatement in the application for the licence of the licensee or in reply to an inquiry addressed under this Act to the licensee,

(d) has refused or neglected to make a prompt reply to an inquiry addressed to the licensee under this Act,

(e) has contravened section 79, 94 or 177, or

(e.1) has contravened a prescribed provision of the regulations,

then the council by order may do one or more of the following:

(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.

(2) A person whose licence is suspended or cancelled under this section must surrender the licence to the council immediately.

(3) If the council makes an order under subsection (1)(g) to suspend or cancel the licence of an insurance agent, or insurance adjuster, then the licences of any insurance salesperson employed by the insurance agent, and of any employees of the insurance adjuster are suspended without the necessity of the council taking any action.

(3.1) On application of the person whose licence is suspended under subsection (1)(g), the council may reinstate the licence if the deficiency that resulted in the suspension is remedied.

(4) If an insurance agent's licence or an insurance adjuster's licence is reinstated, the licences of any insurance salespersons or employees of the insurance adjuster who

(a) were employed by that agent or adjuster at the time of the suspension, and

(b) remain employees of that agent or adjuster at the time of reinstatement,

are also reinstated without the necessity of the council taking any action.

**Section 236 of the Act**
**Part 7 – Administration of the Regulation of Financial Institutions**
**Division 3 – Hearings and Appeals**

**Power to impose conditions**

(1) The commission, superintendent or council, depending on which of them has the power to make the order, give the consent or issue the business authorization, permit or licence may
  (a) impose conditions that the person considers necessary or desirable in respect of
    (i) an order referred to in section 235 (1),
    (ii) a consent referred to in section 235 (2),
    (iii) a business authorization,
    (iv) a permit issued under section 187 (1), or
    (v) a licence issued under Division 2 of Part 6, and
  (b) remove or vary the conditions by own motion or on the application of a person affected by the order or consent, or of the holder of the business authorization, permit or licence.

(2) A condition imposed under subsection (1) is conclusively deemed to be part of the order, consent, business authorization, permit or licence in respect of which it is imposed, whether contained in or attached to it or contained in a separate document.

(3) Except
  (a) on the written application or with the written permission of the holder, or
  (b) in the circumstances described in section 164, 231 or 249(1), a power of the commission, superintendent or council under this Act to impose or vary conditions in respect of
  (c) a business authorization is exercisable only on or before its issue date, or
  (d) a permit under section 187 (1) or a licence under Division 2 of Part 6 is exercisable only on or before its issue date with effect on and after that date.

**Section 241.1 of the Act**
**Part 7 – Administration of the Regulation of Financial Institutions**
**Division 2 – Insurance Council of British Columbia**

**Assessment of Costs**

(1) If an order results from an investigation or hearing, the commission, the superintendent or the council may by order require the financial institution, licensee, former licensee or other person subject to the order to pay the costs, or part of the costs, or either or both of the following in accordance with the regulations:
  (a) an investigation;
  (b) a hearing.

(2) Costs assessed under subsection (1)
  (a) must no exceed the actual costs incurred by the commission, superintendent or council for the investigation and hearing, and
  (b) may include the costs of remuneration for employees, officers or agents of the commission, superintendent or council who are engaged in the investigation or hearing.

(3) If a person fails to pay costs as ordered by the date specified in the order or by the date specified in the order made on appeal, if any, whichever is later, the commission, superintendent or council, as the case may be, may file with the court a certified copy of the order assessing the costs and, on being filed, the order has the same force and effect and all proceedings may be taken on the order as if it were a judgment of the court.

## ANALYSIS

Council found the above mentioned facts constituted a breach of section 231(1)(a) of the Act in that the Licensee did not act in a trustworthy manner and in accordance with the usual practice of the business of insurance, as required under Council Rule 3(2). In particular, Council concluded that on July 16, 2008, the Licensee committed a breach of privacy when she requested access to the ICBC data system for a purpose other than *bona fide* ICBC business. In reaching this conclusion, Council considered the actions of the Licensee and her submissions, as well as the submissions of the Complainant, Banath, ICBC, and Jefferson, as compiled by Council staff in its investigative report.

In concluding that a privacy breach had occurred, Council considered the motive for the breach. In this respect, the Licensee has acknowledged that she committed a breach of privacy, however, she contended that she had a real concern about the Complainant leaving the scene of an accident without exchanging information. Council did not accept that the Licensee had a genuine concern that the Complainant was attempting a 'hit and run' as the circumstances did not reflect a state of urgency. In particular, the Licensee had not observed any actual damage on her vehicle at any point during the interaction or any time afterwards; the Complainant had left the area on foot to attend a nearby office; after the Complainant left on foot the first time, the Licensee confronted her with the information she had obtained when the Complainant returned; and, after the Complainant left the area on foot a second time, the Licensee wrote a threatening note and placed it on the Complainant's Acura MDX.

Council found that the Licensee and the Complainant's submissions were in direct conflict on several material points. The Licensee maintains that she never represented herself as an ICBC agent. She also submitted that she did not mention any personal names with respect to the ownership or operator of the Complainant's vehicle. However, the Complainant consistently submitted otherwise. In her initial interview with ICBC, she stated that the Licensee had said she was an employee of ICBC, and referred to the principal operator by his first name. Approximately six months later, when interviewed by Council staff, the Complainant's recollection of the incident had not changed. Her memory was supported by specific details. For example, she specifically recalls that she didn't engage with the Licensee when asked about the principal operator so as not to offer her any further personal information.

Council accepted the Complainant's submission with regards to the above mentioned details in dispute. They reasoned that the Complainant had no way of knowing what information appeared on the 'Broker Query Screen'. Had the Licensee not stated the name of the principal operator, it would be impossible for the Complainant to know with certainty that the Licensee had access to this information. In light of the consistency of the Complainant's statement and the surrounding evidence, Council did not have sufficient reason to disbelieve the Complainant. Rather, in the face of this determination and its finding that the Licensee's contention about the concern of a potential hit and run was not genuine, Council felt this reflected on the Licensee's credibility and trustworthiness.

Council also determined that the Licensee had acted in haste and without regard for the consequences of her actions. The Licensee characterized her actions similarly: she attributed her misconduct to being caught up in the heat of the moment and she admitted that she had lost her temper. However, while the Licensee was insistent that she did not intend to use the information, and had no interest in learning who the woman was, Council found that the Licensee had instinctively opted to call the Agency and abuse her ability to access confidential information, to intimidate the Complainant and assert control over the situation. The Licensee did so because she knew how to manipulate the internal security measures of the ICBC data system by providing the first three letters of the leasing company name to access the Broker Query Screen. This finding, along with the determinations that the Licensee's evidence was not always credible, and considering the actions involved a breach of confidentiality, led Council to conclude that the Licensee had not acted in a trustworthy manner or in accordance with the usual practice of the business of insurance, contrary to Council Rule 3(2).

In determining an appropriate penalty, Council reflected on the principle of trustworthiness, which is a fundamental element of each of the professional requirements defined in Council's Code of Conduct. Licensees must adhere to a strict standard of personal integrity, reliability and honesty. Acts of dishonesty outside a licensee's professional life may reflect on his or her trustworthiness to hold an insurance licence. Council also expressly identified that the use of confidential information provided by an insurer for a purpose other than intended, qualifies as misconduct contrary to the principle of trustworthiness as set out in Council's Code of Conduct. And, in particular, it is a cornerstone of the insurance industry that when members of the public provide private information to licensees and insurers, they do so with confidence that it will be protected.

Ultimately, Council treats breaches of privacy very seriously and it has adopted disciplinary measures of commensurate gravity when it finds that a licensee has violated the privacy rights of a member of the public.

In considering the appropriate parameters for discipline, Council reviewed the following cases involving analogous breaches of the Act. In *Henneberry*, the agent improperly accessed the ICBC computer system to obtain personal and confidential information about the registered owner of a vehicle and conveyed this information to a third party who used it to threaten the vehicle owner during a road rage incident. Council noted that the agent had been fully aware that disclosure of the information to a third party was contrary to ICBC guidelines as well as the Agency's own procedures, yet chose to disregard these rules. In this case, providing the information to the third party could have led to serious ramifications for the driver of the vehicle. Council noted that the potential risk to the public in accessing the personal information was manifested when a member of the public was victimized. The agent did not admit to his misconduct until he was certain he would be found out. Once he admitted to the misconduct, the agent was not forthcoming with additional information throughout the investigative process. The agent had also misused his position as an insurance salesperson for personal benefit and for the benefit of his friends and acquaintances by improperly rating territory codes. Pursuant to an order from Council, the agent was deemed not suitable to hold a licence for a minimum of two years and assessed the costs of the investigation.

In *Cheema*, the agent had accessed the ICBC database to obtain information on a vehicle, with the intention of sharing the information with an acquaintance known to be involved in criminal activity. The acquaintance had recently been released from prison for a weapons offence and had been convicted in the past for other criminal offences. Ultimately, in *Cheema*, the agent did not disclose the information. He noticed the vehicle was registered to ICBC and advised his friend that he could not access the information he had requested. Council nonetheless found that, on a balance of probabilities, had the vehicle in question not been registered to ICBC, the agent would have carried out the plate inquiry as intended and conveyed that information to his friend. The agent also admitted that he had been asked to conduct similar searches on numerous previous occasions. Similar to *Henneberry*, the agent did not advise anyone of what he had done until ICBC conducted its investigation. Council imposed an order cancelling the agent's licence, with reinstatement not to be considered for a minimum of two years, from the date of cancellation.

Taking all of the above into consideration, Council found it would be appropriate to cancel the Licensee's licence with reinstatement not to be considered for two years from the date of cancellation. In addition, Council intends to assess the costs of Council's investigation against the Licensee pursuant to section 241.1 of the Act. Council concluded that such a cancellation would serve as an adequate general and specific deterrent. Council is of the view that the sanctions it intends to impose on the Licensee satisfactorily communicate to the insurance industry that such conduct will not be tolerated. Council was also hopeful that the penalty would act as a measure of rehabilitation for the Licensee.

## INTENDED DECISION

Pursuant to section 231, 236 and 241.1 of the Act, Council made the following intended decision:

1. the Licensee's Level 1 General Insurance Salesperson's licence be cancelled for a minimum period of two years from the date Council's intended decision becomes final;

2. the Licensee pay the costs of Council's investigation into this matter assessed at $2,125.00; and,

3. as a condition of this decision, the Licensee is required to pay the investigation costs within 90 days of the intended decision becoming final.

The intended decision will take effect on **May 12, 2009**, subject to the Licensee's right to request a hearing before Council, pursuant to section 237 of the Act.

## RIGHT TO A HEARING

If the Licensee wishes to dispute Council's findings or its intended decision, she may present her case at a hearing before Council where she may be represented by legal counsel. Pursuant to section 237(3) of the Act, to require Council to hold a hearing, the Licensee must give notice to Council by delivering to its office written notice of this intention by **May 11, 2009**. A hearing will then be scheduled for a date within a reasonable period of time from receipt of the notice. Please direct written notice to the attention of the Executive Director, Mr. Gerald Matier.

If the Licensee does not request a hearing by **May 11, 2009**, the intended decision of Council will take effect.

Even if this decision is accepted by the Licensee, pursuant to section 242(3) of the Act, the Financial Institutions Commission still has a right to appeal this decision of Council to the Financial Services Tribunal ("FST"). The Financial Institutions Commission has 30 days to file a Notice of Appeal, once Council's decision takes effect. For more information respecting appeals to the FST, please visit their website at www.fic.gov.bc.ca/fst/ or contact them directly at:

Suite 1200 - 13450 102nd Avenue
Surrey, B.C.
V3T 5X3
Phone: 604-953-5300

Dated in Vancouver, British Columbia on the 16th day of April, 2009.

For the Insurance Council of British Columbia

per:
Gerald D. Matier
Executive Director

GM/tlh