

In the Matter of

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

and

THE INSURANCE COUNCIL OF BRITISH COLUMBIA ("Council")

and

BABAS TRAVEL LTD. (the "Agency")

ORDER

As Council made an intended decision on April 21, 2009, under sections 231, 236 and 241.1 of the Act; and

As Council, in accordance with section 237 of the Act, provided the Agency with written reasons and notice of the intended decision dated May 5, 2009; and

As the Agency 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 Agency is fined \$1,500.00; and
2. as a condition of this decision, the Agency is required to pay the above mentioned fine by **September 2, 2009**. If the Agency does not pay the ordered fine by this date, the Agency's licence is suspended as of **September 3, 2009**, without further action from Council.

This order takes effect on the 2nd day of June, 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

BABAS TRAVEL LTD.
(the “Agency”)

INTRODUCTION

Pursuant to section 232 of the *Financial Institutions Act* (the “Act”), Council conducted an investigation to determine whether there was compliance by the Agency with the requirements of the Act.

As part of Council’s investigation, on March 16, 2009, an Investigative Review Committee (the “Committee”) met with Mr. Rakesh Kumar Kalia, the Agency representative, to discuss allegations that the Agency acted contrary to Council Rules by failing to maintain errors and omissions (“E&O”) insurance as required; and by making a material misstatement to Council on the Agency’s licence application.

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 Mr. Kalia, an investigation report was provided to the Committee and the Agency for review. A discussion of this report took place at the meeting and Mr. Kalia 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 Mr. Kalia, the Committee made a recommendation to Council as to the manner in which this matter should be disposed. For the Committee to make a recommendation for disposition to Council, it has to have reached an agreement with the Agency as to the facts of the matter, any breaches of the applicable legislation, and an appropriate disciplinary action.

A report setting out the Committee’s findings and recommended disposition, along with the aforementioned investigation report, was presented to Council at its April 21, 2009 meeting. At the conclusion of its meeting, Council accepted the Committee’s recommended disposition and 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 Agency of the action it intends to take under sections 231, 236 and/or 241.1 of the Act before taking any such action. The Agency 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 Agency.

FACTS

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

General

1. Transworld Travel Ltd. ("Transworld") held a restricted travel insurance agent licence from June 17, 2005 to May 31, 2008;
2. Mr. Kalia acted as the manager of Transworld throughout the period it held a restricted travel insurance agent licence;
3. Mr. Kalia subsequently left Transworld and established the Agency. The Agency incorporated on February 27, 2008, and began operating in mid-April, 2008;
4. on April 21, 2008, Council received an application for a restricted travel insurance agent licence on behalf of the Agency;
5. on May 12, 2008, the Agency was granted a restricted travel insurance agent licence;

Material Misstatement and Failure to Maintain E&O Insurance

6. Item 9 on Council's Form 1 '*Application for First Insurance Licence or Re-Application*' requires applicants to indicate whether the following statements are true by checking a 'yes' or 'no' box:
 - (a) The Applicant is covered or will be covered prior to acting as a licensee under an E&O policy, which meets the requirements of Council Rule 7(11).
 - (b) The Applicant's E&O policy provides coverage to all licensees authorized to represent the Applicant.
7. Mr. Kalia completed the Agency's Form 1 Application and answered yes to the above cited statements regarding E&O coverage;

8. by letter dated August 28, 2008, Mr. Kalia was asked to provide documentation to confirm that the Agency had the required E&O insurance pursuant to Council Rule 7(11);
9. Council subsequently received an E&O Declaration Page for the Agency with a policy period of September 12, 2008 to September 12, 2009, but confirmation of E&O coverage for the period of May 12, 2008 to September 12, 2008, remained outstanding;
10. Council followed up with Mr. Kalia to specifically address the absence of proof of E&O with respect to the period of May 12, 2008 – September 12, 2008;
11. Mr. Kalia initially submitted that he had requested E&O coverage from Bay City Insurance Services Ltd. (“Bay City”), his general insurance agent, in May 2007, at the same time that he procured a commercial business insurance policy for Transworld. Upon renewal of the commercial business insurance policy on May 14, 2008, it was amended such that the named insured was changed from Transworld to Babas;
12. according to Mr. Kalia’s first written submission to Council, he had requested E&O coverage for the Agency at this time, and upon receipt of the policy, he had assumed that the E&O coverage had also been placed, and failed to read it over carefully;
13. Mr. Kalia initially suggested to Council that the gap in coverage was due to the oversight of Bay City;
14. by letter dated December 10, 2008, Bay City advised Council that Mr. Kalia had not requested E&O coverage in May 2008, contrary to Mr. Kalia’s suggestion;
15. Mr. Sarban Singh Sidhu, a representative of Bay City, advised Council that in May 2007, Mr. Kalia had been in contact with Bay City to arrange business interruption insurance and general commercial liability insurance on behalf of Transworld;
16. according to Mr. Sidhu, Mr. Kalia did not provide the necessary information to obtain a quote for E&O insurance, on behalf of the Agency, at that time;
17. when presented with Mr. Sidhu’s submissions, Mr. Kalia responded with a letter to Council dated December 16, 2008, in which he advised there had been a misunderstanding between himself and Bay City;
18. when asked by the Committee why Mr. Kalia stated on the Agency’s licence application that E&O coverage was in place when it was not, Mr. Kalia said that he thought it would have been in place by the time the licence was effective;

19. Mr. Kalia told the Committee that he had been very busy setting up his new business and simply failed to follow up with Bay City. In his mind, Mr. Kalia submitted, he had already obtained all necessary insurance;
20. Mr. Kalia only contacted Bay City to ask about the status of the Agency's E&O policy when prompted by an inquiry from Council. It was at this point that Mr. Sidhu informed Mr. Kalia that he had not formally requested one.
21. Mr. Kalia then proceeded to obtain E&O coverage, effective September 12, 2008;
22. Mr. Kalia advised the Committee that the Agency now had E&O coverage in accordance with the specific requirements of Council Rule 7(11). He further affirmed that he has the appropriate renewal system in place to ensure all necessary steps are taken to renew the policy in time;
23. Mr. Kalia stated that he did not sell any insurance between the date on which he received Council's August 28, 2008 letter, and the date he obtained E&O coverage.

ISSUES

1. Did the Agency fail to meet the requirements set out under Council Rule 7(11)?
2. Did Kalia make a material misstatement to Council on the Form 1, 'Corporate Application for First Insurance Licence or Re-Application' or in reply to an inquiry addressed under this Act to the licensee?
3. Is disciplinary or other action required in the circumstances?

LEGISLATION

Rule 7(11) of the Council Rules:

Effective January 1, 2006, unless otherwise determined by Council a licensee:

- (a) must maintain or be covered by E&O insurance, which extends to all activities as a licensed insurance agent, salesperson or adjuster, with:
 - (i) a minimum limit of \$1,000,000.00 per claim; and
 - (ii) a minimum aggregate limit of \$2,000,000.00;
- (b) who is a direct employee of an insurer is exempt from subsection (a) where:
 - (i) the licensee only sells the products of that insurer; and
 - (ii) the licensee provides certification from the insurer that:
 - (A) the licensee is an employee of the insurer;
 - (B) the company accepts responsibility for the licensee's activities as a licensee; and
 - (C) the company will respond to E&O claims against the licensee on the same basis as set out in subsection (a);
- (c) that is no longer insured as required under subsection (a) or (b) must:
 - (i) notify Council within 5 business days; and
 - (ii) immediately stop conducting any insurance activities;
- (d) will have the licence automatically suspended without Council taking any action, where the licensee remains uninsured for a period exceeding 30 calendar days; and
- (e) will have the licence suspended under subsection (d) automatically 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;otherwise the licence is terminated.

Section 231 of the Act provides Council with the authority to discipline licensees or former licensees in the following circumstances:

- (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.

ANALYSIS

Council found that the foregoing facts constituted a breach of Council Rule 7(11) in that the Agency failed to obtain E&O coverage as required for the period between May 12, 2008 and September 12, 2008. The Committee also found that Mr. Kalia made a material misstatement to Council on the Agency's Form 1, '*Corporate Application for First Insurance Licence or Re-Application*'.

Council accepted Mr. Kalia's submissions that he had been busy tending to the numerous tasks involved in setting up the Agency's business. However, Council concluded that Mr. Kalia had a responsibility to ensure compliance with Council's E&O requirements. Further, Council was of the view that this was an obligation Mr. Kalia ought to have been accustomed to given his history as manager of Transworld.

Council concluded that Mr. Kalia had made a material misstatement by indicating that E&O coverage was in place on the Agency's application. The application was received by Council on April 21, 2008. By letter dated August 28, 2008, Council requested proof of the Agency's purported E&O coverage. It was only after Mr. Kalia received this letter that he obtained the necessary coverage. The Committee did not accept that Mr. Kalia lacked the knowledge and experience to appreciate that the Agency's application constituted more than a mere name change from Transworld. Rather, this was a new corporate entity. Accordingly, all insurance policies relating to Transworld had no bearing on the coverage available to the Agency. The Committee was of the view that Mr. Kalia ought to have appreciated this and taken all reasonable steps to confirm coverage was in place.

Council regarded Mr. Kalia's initial instinct to blame Bay City unfavourably. Despite this attempt at shirking responsibility, Mr. Kalia was for the most part co-operative with Council's investigation. He responded to all inquiries and acted quickly to obtain E&O coverage and rectify the situation upon receiving notice from Council.

In deciding the appropriate disciplinary measure warranted in the circumstances, Council considered previous decisions involving a licensee's failure to obtain required E&O insurance. In the *Pacific National Travels Inc.* case, Council found that the agency acted in breach of its rule requiring E&O insurance. Council noted that the agency was forthright in this matter and did not believe it was the agency's intention to engage in insurance business without having E&O insurance. Significantly, Council considered the fact that the agency had been forthright in its application by disclosing it did not have E&O insurance and acted promptly to obtain it once advised it was required. The agency was fined \$1,000.00.

In *Access China Tours Inc.*, the agency submitted a renewal application for its licence and failed to answer the question confirming it had E&O insurance. Upon learning that it did not have E&O insurance, the agency ceased operations in accordance with Council Rules until such time that it obtained the required E&O. Council accepted the agency owner's explanation that he was not aware of the requirement. Council concluded the agency was still suitable to hold a licence, but concluded the agency, while not intentionally acting contrary to Council Rules, had a duty to know its requirements under Council Rules and operate in accordance with them. Council fined the agency \$1,000.00 based on the breach.

Council found that the present case merited a higher fine than the previous cases discussed, in order to address the material misstatement made by Mr. Kalia. The Agency lacked E&O insurance for a four month period. Had it been acting in compliance with Council Rules, the Agency would have been paying for an E&O policy throughout the five month period. Council determined that a fine in the amount of \$1,000.00 was insufficient as a deterrence against a breach of this nature. Council concluded that \$1,500.00 represented a more appropriate fine. The increased amount not only addresses the need for specific deterrence, it also serves as a punitive measure against the material misstatement made by Mr. Kalia on behalf of the Agency. In contrast to the precedent cases discussed by the Committee, Mr. Kalia knowingly misrepresented the status of the Agency's E&O coverage. He had the knowledge and experience to understand the necessity for such a policy and failed to take sufficient steps to fulfil his responsibility.

INTENDED DECISION

Pursuant to section 231 and 236 of the Act, Council intends to order the following:

1. the Agency be fined \$1,500.00; and
2. as a condition of this decision, the Agency is required to pay the investigation costs within 90 days of the intended decision becoming final. Failure to pay the outstanding fine within that time frame will result in the automatic suspension of the Agency's licence until all amounts are paid to Council.

The intended decision will take effect on **June 2, 2009**, subject to the Agency's right to request a hearing before Council pursuant to section 237 of the Act.

RIGHT TO A HEARING

If the Agency wishes to dispute Council's findings or its intended decision, it may present its case at a hearing before Council where it may be represented by legal counsel. Pursuant to section 237(3) of the Act, to require Council to hold a hearing, the Agency must give notice to Council by delivering to its office written notice of this intention by **June 1, 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.

If the Agency does not request a hearing by **June 1, 2009**, the intended decision of Council will take effect.

Even if this decision is accepted by the Agency, 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, BC
V3T 5X3
Phone 604-953-5300

Dated in Vancouver, British Columbia on the **5th day of May, 2009**.

For the Insurance Council of British Columbia



Gerald D. Matier
Executive Director

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