

ALBERTA INSURANCE COUNCIL
(the "AIC")

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

And

In the Matter of James W Kennedy
(the "Agent")

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

This case involved allegations pursuant to ss. 480(1)(a) and 481(2) of the Act. Specifically, it is alleged in Count 1 that the Agent misappropriated an insurance client's (the "Client") dividend cheque in relation to a life insurance policy by signing the Client's signature on the dividend cheque and depositing the cheque into his personal bank account. Alternatively, it is alleged that another person signed the dividend cheque (which was then deposited into his personal bank account). Following which, it is alleged that the Agent failed to advise the Client that her cheque had been deposited into his personal bank account rather than returned to London Life. In so doing, it is alleged that he acted in an untrustworthy and dishonest manner in his market conduct activities as an insurance agent and that this constitutes an offence pursuant to s. 480(1)(a) of the Act. In Count 2, it is alleged that the Agent failed or refused to provide information and documentation requested by an AIC investigator within the time specified in the demand for information (the "Demand"). In so doing, it is alleged that he contravened s. 481 of the Act and thereby committed an offence as contemplated in s. 480(1)(b) of the Act.

Facts and Evidence

This matter proceeded by way of a written Report to Council dated September 26, 2014 (the "Report"). The Report was forwarded to the Agent for his review and to allow the Agent to provide the Council with any further evidence or submissions by way of Addendum. The Agent did not adduce any further evidence.

The Agent was licensed from at least February 19, 1997 to March 6, 2014, for accident and sickness ("A&S") insurance and life insurance. By letter dated March 5, 2014, the Agent's recommending insurer ("London Life") notified the AIC that they had dismissed the Agent for cause.

London Life subsequently provided the AIC with an “Investigative Report” dated April 15, 2014. It was prepared by London Life investigator (“BB”). In providing the Investigative Report to the AIC, BB wrote a cover letter that summarized his findings with regard to the Agent’s conduct. In the cover letter, BB (in part) wrote:

While associated with London Life, [the Agent] took possession of a client’s life insurance policy dividend cheque in August of 2004. The client understood that [the Agent] was going to return this cheque in the amount of \$1,860.20 to London Life. The client was told by [the Agent] that the cheque would not be cashed and the funds would be returned to the client’s life insurance policy. Instead the client’s signature was forged on the back of the cheque and it was deposited into [the Agent’s] personal bank account. [The Agent] did mail a bank draft to the client for \$1,800.00 in December of 2010 but did not provide the client with an explanation of why he sent the draft.

A copy of this report has been sent to the Calgary Police Service to assist with their criminal investigation.

We believe that [the Agent’s] actions were contrary to the Criminal Code of Canada.

It is the policy of London Life to report such matters to the appropriate authorities and to assist in any regulatory action. Accordingly, we would be willing to provide assistance, evidentiary documentation and insurance expertise to your section in the resolution of this file.

Included with BB’s cover letter were a number of documents. First, BB provided the investigator with a copy of the Investigative Report. The Report before us made reference to a number of passages. BB wrote that he confronted the Agent about the bank draft that he sent the Client and asked him why he sent this draft. In response, the Agent did not directly answer BB’s question. He asserted that someone else cashed the Client’s dividend cheque but that the Agent did not want to provide any information about the identity of this person. BB later asked the same question and the Agent once again claimed that someone else had forged the Client’s signature and deposited her cheque:

[BB] pointed out that the coding on the back of the cheque indicated the cheque was deposited into his Royal Bank of Canada account and he agreed that’s what happened.

However he stated that his wife also had access to the account and she had deposited the forged cheque. She did not have her own bank account but had a bank card for his account. [The Agent] explained that his wife was having health and money problems at that time.

[The Agent] could not explain how he had taken possession of the dividend cheque in August 2004, held onto it until November 2004 and then it ended up in his personal bank account. He said that as soon as he found out about the cheque going into his account in December 2004 he sent a bank draft to [SM] for \$1,860.20.

The Investigative Report also referenced a number of other documents including: correspondence from the Client to London Life in which she outlined her concerns, copies of both sides of the cheque that bore her forged signature and the banking details for the Royal Bank account in which it was deposited on November 17, 2004, samples of the Client's signature, and confirmation that the banking information found on the Client's cheque matched the Agent's account data on file with London Life.

The Investigative Report also contained email correspondence between the Agent and the Client dated November 15, 2010. In this correspondence, the Client asked the Agent for an explanation as to what happened to the cheque, the date it was cashed, and by whom. The Agent's e-mail response dated November 22, 2010, advised, "Hi,,(sic) (SM),,(sic) I still haven't here (sic) from Guy I will give him one more day. Got your message will look into it, and call you tomorrow. Hope all is well."

On May 27, 2014, the investigator left a voice message with the Agent on his cell phone number. The investigator advised the Agent that he wished to speak to him about the information that London Life provided to the AIC. Later that same day, the investigator and Agent spoke. During this conversation the investigator told the Agent of London Life's complaint and indicated that he would send the Agent a written request to provide certain documents and information. At this time, the investigator confirmed the Agent's mailing address and referred him to the AIC website for information on the AIC compliance process. The Agent acknowledged this and said that he would review the investigator's letter.

Following this telephone conversation, the investigator wrote to the Agent and requested information and documentation through a formal Demand for Information made under the Act. The demanded information was due on or before June 18, 2014.

As the Agent did not respond to the Demand for Information, the Investigator telephoned the Agent on June 26, 2014 and asked that the Agent return the call to confirm the status of the Agent's response to the Demand for Information. As of the drafting of the Report, the Agent had not returned the investigator's call or responded to the Demand for Information.

Discussion

In order to conclude that the Agent has committed an offence pursuant to s. 480(1)(a) of the Act, the Report must prove, on the basis of clear and cogent evidence, that it is more likely than not that the

Agent committed the act as alleged. The requirement of clear and cogent evidence reflects the fact that our findings can dramatically impact an insurance agent's ability to remain in the industry.

Additionally, the elements of s. 480(1)(a) offences were outlined by the Alberta Court of Queen's Bench in *Roy v. Alberta (Insurance Councils Appeal Board)*, 2008 ABQB 572 (hereinafter "*Roy*"). In *Roy*, the Council found that an Agent committed an offence pursuant to s. 480(1)(a) of the Act when he attested to completing the applicable CE when he did not, in fact, have the required CE. The Insurance Councils Appeal Board dismissed the appeal and also found the agent guilty of the offence. The agent subsequently appealed to the Court of Queen's Bench. In his reasons for judgment dismissing the agent's appeal, Mr. Justice Marceau reviewed the requisite test and wrote at paragraphs 24 to 26:

[24] The Long case, albeit a charge under the Criminal Code of Canada where the onus of proof is beyond a reasonable doubt (not on a preponderance of evidence as in this case), correctly sets out the two step approach, namely the court or tribunal must first decide whether objectively one or more of the disjunctive elements have been proven. If so, the tribunal should then consider whether the mental element required has been proved. While the Appeal Board said it was applying the Long decision, it did not make a finding as to whether step 1 had been proved with respect to each of the disjunctive elements. Rather it immediately went into a step 2 analysis and found that the mental element required for untrustworthiness might be less than the mental element required for fraud (as a given example).

[25] I am of the view that statement was in error if it was made to convey a sliding scale of mens rea or intent depending on which of the constituent elements was being considered. In my view, the difference between the disjunctive elements may be found in an objective analysis of the definition of each and certainly, as demonstrated by the Long case, what constitutes fraud objectively may be somewhat different from untrustworthiness. However once the objective test has been met, one must turn to the mental element. Here to decide the mental element the Appeal Board was entitled, as it did, to find the mental element was satisfied by the recklessness of the Applicant.

[26] While the language used by the Appeal Board may be characterized as unfortunate, on this review on the motion of the Applicant I need not decide whether the Appeal Board reasonably could acquit the Applicant on four of the disjunctive elements. Rather, the only matter I must decide is whether the Appeal Board acting reasonably could conclude, as they did, that the Applicant's false answer together with his recklessness justified a finding of "untrustworthiness". (emphasis added)

In applying this test to the case before us, it is clear that the cheque in the Client's name was deposited in to the Agent's personal bank account. It is equally clear to us that the Client's signature was forged. The Agent admitted this when he indicated that he did not forge the signature but knew the identity of

the person who did. We also find as a fact that the Agent actively misled the Client and hid from her the fact that her cheque was deposited into his bank account on the basis of a forged signature.

Given these objective facts we now turn to the evidence as to the Agent's intent. In our view, the Agent lied to the Client so as to hide the fact that either he or someone else known to him had forged the Client's signature and then deposited the cheque into his personal bank account. Obviously, forging a signature on a client cheque and misappropriating the funds has serious ramifications that must have been known to the Agent. In light of these ramifications the Agent had to make a choice: he could alert the Client to the true facts or he could mislead the Client as to the true circumstances and thereby act in a dishonest and untrustworthy manner. Despite a long history in the industry the Agent chose to mislead his client and thereby, in our view, committed an offence pursuant to s. 480(1)(a) of the Act.

As to the appropriate sanction for this conduct, we typically have the ability to levy civil penalties in an amount up to \$5,000.00 for offences pursuant to s. 480(1)(a) and 13(1)(a) of the *Certificate Expiry, Penalties and Fees Regulation*, A.R. 125/2001. We also have the ability to order that certificates of authority be revoked for one year or suspended for a period of time. Based on the facts in this case, we believe that a significant civil penalty is warranted. The Agent either forged the cheque and deposited it into his bank account or chose to protect the interest of the person who did so over the interests of his client. Given this, we levy a civil penalty of \$5,000.00. As the Agent no longer has a certificate of authority, the option of suspending or revoking a certificate is a remedy that is not available.

In regard to Count 2, the AIC operates under a delegation from the Minister of Treasury Board and Finance. Through this delegation, the AIC has authority to investigate complaints against holders and former holders of insurance agent certificates of authority. Pursuant to the Minister of Finance Directive No. 05/01, the Minister also delegated his powers under s. 481 to the AIC. Section 481 states that "[t]he Minister may direct the holder or former holder of a certificate of authority to provide to the Minister within a reasonable period of time specified by the Minister relating to the matters in section 480(1)." Subsection 2 states that the "...person served with the direction who has the information must provide the information in accordance with the direction."

The evidence is clear that the AIC investigator was investigating a complaint that fell within the ambit of s. 480(1) of the Act. In furtherance of this investigation, the investigator sent the Demand to the

Agent and it was successfully delivered. The Agent spoke to the investigator and confirmed his contact information. However, he did not respond to the Demand for Information as required by the Act. As such, we are of the view that he breached s. 481 and contravened a section of the Act as contemplated in s. 480(1)(b).

In terms of the applicable sanction, the public relies on the AIC to investigate complaints and the Act requires that holders and even former holders such as the Agent provide information when called upon to do so. Therefore, the public is not well-served in the event that agents simply ignore Demands like those made in this case. Given the facts in their entirety, we order that a civil penalty in the amount of \$1000.00 be levied against the Agent pursuant to s. 13(1)(b) of the *Certificate Expiry, Penalties and Fees Regulation*, A.R. 125/2001.

To summarize, we have found the Agent guilty of both offences alleged in the Report. In relation to these findings, we levied two civil penalties (\$5,000.00 and \$1,000.00) totaling \$6,000.00 pursuant to ss. 480(1)(a) of the Act and 13(1)(a) and (b) of the *Certificate Expiry, Penalties and Fees Regulation*, A.R. 125/2001. The civil penalties must be paid within thirty (30) days of receiving this notice. In the event that the penalties are not paid within thirty (30) days, interest will begin to accrue at the rate of 12% per annum in accordance with s. 13(2) of the *Certificate Expiry, Penalties and Fees Regulation*. Pursuant to s. 482 of the Act (copy enclosed), the Agent 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 22, 2014

Original signed by

Kenneth 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