

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 Bruce Ian Mawer  
(the "Former Agent")

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

This case involved an allegation pursuant to 480(1)(a) of the Act. Specifically, it is alleged that the Agent was the annuitant and servicing agent in relation to a leveraged individual variable insurance contract that was subject to a collateral assignment to AGF Trust Company ("AGF"). The Former Agent requested a transfer of the funds from Empire Life Insurance Company ("Empire") to Equitable Life ("Equitable"). In error, both Empire and AGF each sent a cheque to Equitable. The Former Agent subsequently completed two new applications with Equitable utilizing the funds from each of the cheques and then surrendered the contract not subject to the AGF assignment. After discovering the error, Empire requested that the Agent return the additional payment and the Agent did not comply with this request. In so doing, it is alleged that the Agent committed an offence pursuant to s. 480(1)(a) of the Act.

**Facts and Evidence**

This matter proceeded by way of a written Report to Council dated June 26, 2015 (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 signed the Report and submitted an addendum by way of a one page letter.

The Former Agent was licensed from September 21, 1999 until May 27, 2014 to act in the capacity of a life insurance and between May 2, 2006 and May 27, 2014 he held an accident and sickness ("A&S") certificate of authority. By email dated February 4, 2014 an Equitable official provided the AIC with documents in regard to the Agent's conduct. As a result, an AIC investigator opened an investigation file.

Amongst the attachments was a copy of a letter of complaint from Equitable dated February 4, 2014 wherein Equitable set out the relevant timeline of the transactions at issue. Among other things it stated that:

On Aug 13, 2013, [Equitable] received a \$33,816.23 cheque from Empire Life to be deposited into [the Former Agent's] non-registered no-load account. The deposit of the cheque did not happen until Sep 13, 2013. It turned out that Empire Life made an error of sending the leveraged loan fund directly to Equitable Life instead of going through [AGF]. When [the Former Agent] became aware that Equitable Life set up a policy that was not assigned to [AGF], he immediately put a request for full surrender on Sep 16, 2013.

Equitable Life processed the withdrawal request and transferred \$33,816.23 to his personal bank account. Empire Life realized the error and put a stop payment on the cheque after the fund was already transferred to [the Former Agent's] bank account. Equitable Life requested [the Former Agent] to return the money but has not heard back from him as of this date. Advisor for this policy is ["SC"] who we do not believe was assisting [the Former Agent] in any way.

The Report contains extensive documentation that corroborates the timeline and transactions set out above. Despite the fact that the funds came from a third party he signed application forms indicating otherwise.

Additionally, it was clear that the Former Agent knew that multiple cheques were generated because he gave specific instructions that the redeemed funds were to be handled differently than those coming from the fund that was encumbered by AGF's interest. These instructions were outlined in a handwritten request dated September 13, 2013 wherein the Former Agent indicated, "Re: Account #490017936 Please redeem this account in full and deposit into the bank account below."

On April 29, 2014, the Investigator wrote to the Former Agent via registered mail and requested information and documentation. As the Former Agent did not retrieve the registered letter, the investigator wrote to him again by way of email on May 22, 2014. Once again, the investigator requested information and documentation in relation to the matter and again follow-up with a repeated request by letter dated November 7, 2014.

On January 12, 2015, counsel for the Former Agent emailed the investigator to confirm he had been retained by the Former Agent and he also sought an extension to respond. Ultimately, the Former Agent responded through counsel on January 28, 2015. In essence, he submitted that he obtained the loan some time before and that in 2013 he required the funds and contacted the insurer to determine his balance. He submitted that he was confused and did not know that Equitable deposited two cheques and he thought that he had redeemed his only account. As to the application forms and question as to whether the funds were

being provided by a third party, the Former Agent submitted that he did not draft the applications and that he did not know whether the funds came from a third party and that if he had he would not have signed them with the incorrect answer.

The Former Agent subsequently retained different counsel and submitted an additional statement that candidly addressed the issues in this case and wrote, in part, as follows:

This statement is not an excuse for my behavior however I'm giving the context of what was going on in my life at this time.

At the time I redeemed this account I was going through severe financial difficulty. I had a business partner whom I owned multiple rental properties with as well as a tanning salon business. This individual had moved out of Edmonton without saying a word to me and I later found out that he had declared personal bankruptcy. As a result, I was not able to sustain the rental properties or the business. The bank foreclosed on my rental properties and I had to close the business.

I was told by a representative of Equitable Life that this account was redeemable and therefore took the opportunity. I would like to keep working as a life agent as this is my livelihood. Thank you.

In this letter, the Former Agent also outlined a variety of family issues that confronted him during the same period of time.

### **Decision of the Council**

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. However, the applicable standard of proof is the civil standard rather than the criminal standard of proof beyond a reasonable doubt.

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 falsely

attested to completing the applicable continuing education credits. 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 this case, two cheques were mistakenly issued rather than one. One sum of money was subject to the lender's interest and the other sum of equal value was not. It is clear that the Former Agent instructed that one of the amounts was to be cashed out and deposited to his bank. The other sum remained in the fund subject to the lender's interest. Therefore, we find that the evidence in the Report proves the objective element of the offence. As to the Former Agent's intent, he had to have known that he did not have an extra \$33,816.23 at his disposal given his precarious financial situation. However, even if he did not know about the second cheque, he was well aware of the fact that those funds were subject to the assignment and would have known that they should not have been released to him. This is the case notwithstanding the insurer's statement to the contrary. In either circumstance, the Former Agent

intentionally capitalized on an error and by liquidating the funds he acted in a dishonest or untrustworthy manner pursuant to s. 480(1)(a) of the Act. After doing so, the error was discovered and he was not able to reimburse the insurer.

As to the applicable sanction, we have the jurisdiction to levy civil penalties in an amount not exceeding \$5,000.00 per offence pursuant to ss. 480 of the Act and 13(1)(a) of the *Certificate Expiry, Penalties and Fees Regulation*, A.R. 125/2001. Normally, we also have the jurisdiction to suspend certificates of authority for a period of time or revoke them for one year. However, the Former Agent no longer holds a certificate of authority and a revocation or suspension is not applicable.

In determining the appropriate sanction, we have weighed (among other things) the seriousness of the offence and its underlying circumstances, the Former Agent's submissions about the personal and business challenges he faced and the critical part that honesty and trust plays in the professional conduct of insurance agents. In light of all of these factors, we order that a civil penalty in the amount of \$5,000.00 be levied against the Agent. In this case, we are not dealing with a situation where a layperson took advantage of a wrongful deposit in a bank account before the bank discovered the error. Rather, as a certificate holder, the Former Agent was a trained and licensed financial intermediary and the public is entitled to expect a level of conduct far exceeding that shown by the Former Agent.

In conclusion, the civil penalty must be paid within thirty (30) days of receiving this notice. In the event that the civil penalty is not paid within thirty (30) days interest will begin to accrue. Pursuant to s. 482 of the Act (copy enclosed), the Former 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: February 24, 2016

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Original Signed By

Kenneth Doll, Chair  
Life Insurance Council

Extract from the *Insurance Act*, Chapter 1-3

## 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