

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 Bobbi Lynn Tanner
(the "Agent")

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

This case involved allegations pursuant to s. 480(1)(a) or, alternatively, s. 509(1)(a) of the Act. Specifically, it is alleged that the Agent took and used client funds for personal purposes. In so doing, it is alleged that she is guilty of untrustworthiness or dishonesty in her dealings with her clients and her employer ("the Cooperators") and that this constitutes an offence pursuant to s. 480(1)(a) of the Act. In the alternative, it is alleged that the Agent used client and agency funds without consent and that this constitutes an offence pursuant to s. 509(1)(a) of the Act.

Facts and Evidence

This matter proceeded by way of an unsigned written Report to Council dated August 4, 2015 (the "Report"). The Report was forwarded to the Agent for her 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 the holder of a Level 1 general insurance agent certificate of authority that authorized her to act in the capacity of a general insurance agent. The Agent's first certificate of authority was issued on September 7, 2011 and it was recommended by the Cooperators. She held a certificate of authority until June 1, 2015 when Cooperators terminated her employment.

This matter arose out of a complaint letter submitted by the Cooperators' Assistant Secretary and Senior Counsel ("JH") dated June 5, 2015. In this letter, JH advised the AIC that the Cooperators conducted an audit and discovered the Agent had been personally using cash funds that clients submitted to the

Cooperators. After taking the funds, the Agent would subsequently repay them. The letter goes on to say that “[w]hen presented with these findings on June 1, 2015, [the Agent] apologized and admitted to having engaged in such actions. She also confirmed the date and all amounts taken which had since been repaid. As a result of these actions [the Agent] was terminated on June 1, 2015 from her employment.”

On June 10, 2015, an AIC investigator wrote to JH to request, among other things, a copy of the Cooperators’ investigation file. JH provided the information on July 7, 2015 and July 9, 2015. JH indicated that the Agent started using client funds for personal expenses in or about January, 2013. The audit proved that the Agent took varying sums of cash on 20 occasions. The amount taken and subsequently repaid totaled \$2,488.

On July 16, 2015 the investigator emailed the Agent and requested that she provide information relating to her termination from Cooperators. The Agent responded on the same day. In her email she wrote:

What I have done was this, sometimes when clients would pay with cash I would take a portion (instead of applying it to their account and I would then (always) pay what I had taken back at my next payday and it would be applied to the customers (sic) account at that time. There was never a time when I did not pay the money back ... I am no longer working in the insurance industry, nor do I ever have plans to again. I have obtained other employment and simply just wish to put this terrible mistake behind me. Because I have no intention of ever trying to get my insurance license again, I would assume you can just close the investigation and mark it accordingly.

Discussion

The first allegation in the Report alleges that the Agent acted in a dishonest or untrustworthy manner pursuant to s. 480(1)(a) of the Act in regard taking client funds in the form of cash to pay for personal expenses. The applicable legal test in determining whether the Agent is guilty of this offence was set out in *Roy v. Alberta (Insurance Councils Appeal Board)*, 2008 ABQB 572 (hereinafter “*Roy*”). In *Roy*, the Life Insurance Council found that an agent committed an offence pursuant to s. 480(1)(a) of the Act when he attested to completing his required continuing education when this was not, in fact, the case. The Insurance Councils Appeal Board also found the agent guilty of an offence and the agent appealed to the Court of Queen’s Bench. In reasons for judgment dismissing the appeal, Mr. Justice Marceau wrote as follows 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)

The evidence in the Report clearly proves that the Agent took funds that did not belong to her and put those funds to personal use. Given the Agent's admission, the objective and subjective elements of the applicable legal test under s. 480(1)(a) are met. This was intentional conduct and it is obviously dishonest and untrustworthy as contemplated pursuant to s. 480(1)(a) of the Act and we find her guilty of the offence as alleged in the Report.

Pursuant to s. 13(1)(a) of the *Certificate Expiry, Penalties and Fees Regulation*, we have the jurisdiction to levy civil penalties in an amount not exceeding \$5,000.00 in relation to our finding that the Agent acted in a dishonest or untrustworthy manner pursuant to s. 480(1)(a) of the Act. Were the Agent presently licensed we would also have the jurisdiction to suspend the Agent's certificate of authority to act as a general insurance agent for a period of up to 12 months or we could order that it be revoked for one year.

In our view a significant civil penalty is warranted in the circumstances. Pursuant to s. 504 of the Act, premium funds received by an agent or agency are deemed to be held in trust. The Agent breached her

trust obligations by taking funds that did not belong to her. The fact that she repaid the amounts is a mitigating factor in her favour when considering what sanction should be imposed. However, insurance agents simply cannot use client funds held in trust and the fact that she repaid the money does not excuse her conduct. In light of all of the evidence we order that a civil penalty in the amount of \$4,000.00 be levied against the Agent. As the Agent no longer holds a certificate of authority we cannot order the suspension or revocation of her certificate.

The civil penalty must be paid within thirty (30) days of receiving this notice. In the event that the penalty is not paid within thirty (30) days, interest will begin to accrue. 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 General Insurance Council. The motion was duly recorded in the minutes of that meeting.

Date: September 18, 2015

Original Signed By

Amanda Sawatzky, Member
General 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