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 Moore
(the "Agent")

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

This case involved allegations pursuant to ss. 480(1)(a), 509(1)(a), and 481(2) of the Act. Specifically, it is alleged that the Agent engaged in churning activity by transferring individual variable insurance contracts ("IVIC") to individual variable annuity contracts ("IVAC"), and in the process, gave his client incomplete application forms to sign, which forms were only fully completed afterwards. In so doing, it is alleged that he acted in an untrustworthy manner contrary to s. 480(1)(a) of the Act. Additionally, it is alleged that the Agent made false or misleading statements as contemplated in s. 509(1)(a) of the Act by stating the reason he transferred the variable insurance contracts was to give his client enhanced guarantees when in fact the guarantees of the new variable annuity contracts were identical in all respects. Finally, it is alleged that the Agent failed or refused to provide information and documents to the Alberta Insurance Council Investigator, and thereby contravened s. 481(2) of the Act.

Facts and Evidence

This matter proceeded by way of written Report to Council (the "Report"). The Report and the exhibited evidence that was attached was provided to the Agent to allow him to adduce additional evidence and make submissions in response to the allegations. Counsel for the Agent provided additional evidence and submissions by way of a letter (with accompanying appendix) dated April 4, 2017.

The Agent has been licensed since at least January 3, 1996 for life and accident & sickness ("A&S") insurance. The Alberta Insurance Council ("AIC") received a termination notice dated November 1, 2016, from the Agent's sponsoring insurer Ivari, and suspended the Agent's certificates of authority for

life and A&S insurance on December 1, 2016. The Agent subsequently reinstated his certificates of authority on January 16, 2017 under the recommendation of BMO.

The matter initially came to the AIC's attention by way of an e-mail dated July 11, 2016, from a client (hereinafter "Client") expressing concerns that the Agent had transferred her Manufacturers Life Insurance Company ("Manulife") funds to Industrial Alliance Insurance and Financial Services Inc. ("IA"). The transfer cost in excess of $13,658.00, and the Client alleged that she was unaware the funds would be locked up in a new deferred service charge ("DSC") schedule.

The Client and the Agent first became acquainted in 2012 shortly after the death of the Client's husband. At that time, the Client (a retired teacher) was 71 years of age and her assets included stock investments that were established and managed by her late husband. After meeting, the Agent recommended that she utilize the stock investments previously managed by her husband to purchase Manulife policies.
The three Manulife policies that the Client purchased though the Agent in May of 2012 were "GIF Select Investment Plus Series" and the contracts provided for a 75% guarantee of the deposits allocated to the "InvestmentPlus Series" or, if greater, the market value. The commission summaries in relation to Manulife policies indicated that the Agent was paid first-year and trailer commissions of $16,700.58 and $10,093.54 ($26,794.12 in total) for policies 39451864 (the "Manulife RIF") and 39451830 (the "Manulife Non-Registered"). In regard to the Manulife Non-Registered policy, the Agent was paid a total commission paid of $19,149.32 which includes first year commissions of $11,896.91 and trailer commissions of $7,252.41.

File notes that the Agent provided to one of the insurers (during that insurer's investigation of a complaint that the Client initiated) indicated that the Client and the Agent had numerous contacts between 2012 and 2016. In April of 2016 the Agent visited the Client at her home. At that time, the Agent had the Client sign documents that resulted in the transfer of the Client's Manulife assets into new Industrial Alliance ("IA") investments. The Client signed the IA RIF application on April 7, 2016. However, the Agent did not sign the "Mandatory Life Insurance agent/Witness signature" section until April 20, 2016. The Client did not sign the "Investor Profile" section of the application until April 14, 2016. The fee option that the Agent selected on this application was a deferred service charge ("DSC").

Similarly, the Client signed the IA TFSA application on April 7, 2016 and the Agent signed the witness portion on April 20, 2016. While the Client signed the transfer form on April 7, 2016 the investor information section was not signed until April 14, 2016. The same fee structures appearing in the IA RIF were utilized in the IA TFSA.

In the case of the IA Non-registered investment, the Client signed the application form on April 7, 2016 but the Agent signed the "Mandatory Life Insurance agent/Witness signature" on April 26, 2016. Section 11 of this application indicated that the transfer was from the Manulife Non-Registered and indicates $100,000.00 allocated with a Front-End Load ("FEL") sales charge option with 0% sales charge and the balance allocated the same as the IA RIF and IA TFSA contracts described above, including the same fund Series and DSC option. Included with the IA Non-Registered application were copies of the Transfer Form signed by the Client and dated April 7, 2016 and the Investor Profile signed by the Client and dated April 14, 2016.

As a result of the transfer from the Manulife investments (that the Agent sold the Client in 2012) to the IA products that he sold her in 2016, the Agent was paid commissions in the amount of $28,767.85. The Agent's file notes confirm the progressive way portions of the applications were completed and supplemented over time after the Client signed them. These notes also outline some of the things that the Agent told the Client. For example, the notes include the following passage:

> [The Client] called Noel to review her investments and [the Agent] decided to go her (sic). When [the Agent] showed up, [the Client] didn't recognize him initially. [The Client] brought up her concerns about Canadian markets and wanted to diversify her investments more globally. [The Agent] reviewed the investments and recommeneded (sic) portfolio from IA. Also by transferring her investments to another company, it would increase her guarantee value as [the Client] has always concerned (sic) the estate value of her investments. [The Agent] discussed the fee schedule with IA and the DSC charge with Manulife. [The Client] agreed to the fees and thought a higher guarantee value would make sense. She asked if the DSC fees would be tax deductible as she was paying quite a bit of taxes on her investment growth. [The Agent] told her the fees wouldn't be deductible. Also, [the Client] wanted to add a life insurance to maximize her estate value. James recomened (sic) a level COI (cost of insurance) with IA at $100K.

In the course of investigating the complaint letter that the Client sent to the AIC, the Investigator wrote to the Agent by letter dated January 17, 2017, and requested information and documentation pursuant to the Demand for Information found in ss. 481(1) and (2) of the Act. In accordance with this Demand, the

Agent was required to respond by February 3, 2017. Canada Post tracking documents contained in the Report indicate that the Demand was successfully delivered on January 18, 2017 and they reference that the signatory for the mail was the Agent.

Discussion

In order to conclude that the Agent has committed an offence pursuant to s. 480(1)(a) of the Act as alleged in the first and second of the Report's allegations, it must be shown, on the basis of clear and cogent evidence, that it is more likely than not that the Agent committed the act as alleged. The elements of s. 480(1)(a) offences have been discussed 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 Agent also held a securities license and stated that he believed that the CE required to maintain his securities license was applicable to his insurance agent requirements. 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 his reasons for judgment, Mr. Justice Marceau reviewed the requisite test to find that an offence pursuant to s. 480(1)(a) of the Act has been made out and expressed it 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).
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> [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)

Regarding the evidence in these types of cases and the concept of "clear and cogent" evidence, Chairperson Hopkins dealt with this issue in *The Matter of the Appeal of Arney Falconer* (http://decisions.abcouncil.ab.ca/abic/icaba/en/111052/1/document.do) wherein she wrote:

> The Life Insurance Council stated in the Decision that there is a requirement "for 'clear and cogent evidence' because our findings can dramatically impact an insurance agent's ability to remain in the industry". However, the requirement for clear and cogent evidence does not mean that the evidence is to be scrutinized any differently than it should be in any other civil case. In all civil cases evidence must be sufficiently clear, convincing and cogent to satisfy the balance of probabilities. In *F.H.v. McDougall* 2008 SCC) (sic); [2008] 3 S.C.R. 41 the Supreme Court of Canada states:
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> > [45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.
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> > [46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

As to the third and fourth allegations made pursuant to ss. 509 and 481 of the Act, we note that these sections fall into a category of offences called strict liability offences. As such, the AIC only has the onus to prove that the Agent made a false or misleading statement and failed to respond to a properly made demand for information under the Act. Once this occurs, the onus shifts to the Agent to establish that he took all reasonable means to avoid committing the offence.

The first allegation in the Report alleges that the Agent acted in a dishonest or untrustworthy manner in regard to his 2016 IA sales to the Client because it amounted to a churning exercise. In response, Counsel for the Agent argued, among other things, that the Agent's conduct was appropriate given the Client's request to diversify her portfolio and that she understood the nature of the DSC charges that would be applicable to the transfer of the funds from Manulife to IA.

In our view, we are satisfied that the transaction that the Agent recommended and processed on behalf of the Client constitute inappropriate churning activity such that he committed an offence pursuant to s. 480(1)(a) of the Act. This conclusion is based upon the entirety of the evidence before us including the advanced age of the Client, the short-period that elapsed between the Agent selling the Client the Manulife investments and the purchase of the new IA instruments, the same guarantees that were applicable to each, the fee structure that the Agent elected to use and the commissions that were paid to the Agent.

As to the second allegation that the Agent committed an offence pursuant to s. 480(1)(a) in regard to the staggered manner that the applications were completed and signed by the Client and the Agent, Counsel for the Agent argued that the Agent witnessed the Client's signature and that the delay in completing the applications stemmed from the fact that the Client wanted to make contact with her daughter prior to submitting the applications.

Once again, we conclude that the Agent acted in a dishonest and untrustworthy manner in regard to having the Client sign incomplete application forms that were then amended after the fact. When an agent submits a signed application to an insurer he or she is representing to an insurer that the client signed the document when it was complete and that by signing the document at that time the client had reviewed all that had been completed and agreed to on that form. In this case, the Agent had the Client sign documents that were not completed. The fact that the Client may have wanted to make contact with her daughter does not change the fact that the Agent submitted the application forms after making numerous amendments to them. The fact that he witnessed the signature is not the point. The issue is that he submitted an application that suggested it was completed at the time that Client signed the document and that was not true. Given this we find him guilty of this allegation.

In regard to the third allegation relating to the guarantees that the IA policies offered as compared to the those found in the Manulife investments, the notes of the Agent's conversation with the Client clearly state that he told the Client that the guarantees in the IA policies were greater than those offered in her Manulife policies. In response, the Agent's submission states, among other things:

> The Agent never advised that the guarantee percentage would be higher. Rather the Agent Explained that [the Client] would be putting in significantly more money into the IA accounts that she had in 2012 with Manulife (due to her investment growth) and as such, the (sic) she would receive the same guarantee (75%) on an increased net deposit.

The difficulty with the Agent's approach is that it clearly contradicts the notes of the conversation that say that the guarantees are greater. It would hardly be noteworthy to say that the value of the Client's estate would be higher if the Client invested more money in the IA investments than the Manulife investments. The reading that the Agent retrospectively urges us to adopt is unreasonable given the content of the notes. As such, we find that the Agent made a false or misleading statement pursuant to s. 509 of the Act. The evidence before us does not adequately establish that he acted with due diligence such that he can avail himself of a defence to this strict liability matter.

In relation to the final allegation and the investigator's January Demand, the AIC investigation was in regard to allegations that the Agent contravened sections of the Act and regulations. The Demand that the investigator issued provided the Agent with adequate time to respond and it was delivered. The Agent admits that he did not respond but suggests that his delay resulted from the fact that he chose to not respond as he was awaiting contact from his errors & omissions insurance carrier and an intervening illness.

The Agent's excuses for not responding do not constitute taking all reasonable measures to avoid committing the offence such that he can take advantage of a due diligence defence. Having received the Demand, he was obligated to reply within the reasonable period set out or seek an extension. He could have replied or engaged legal counsel to reply on his behalf. The fact that he was taken by surprise because he thought that the insurers had dealt with the Client's complaints does not excuse his non-response.

As to the appropriate sanctions for this conduct, we can levy civil penalties on the first two offences in an amount up to $5,000.00 and $1,000.00 for the third and fourth offences pursuant to ss. 480(1)(a) and (b) and 13(1)(a) and (b) of the *Certificate Expiry, Penalties and Fees Regulation*, A.R. 125/2001. We also have the jurisdiction to order that her certificate of authority be revoked for one year or suspended for a period of time. Given the evidence in its entirety including the Agent's long licensing history and the fact that this is his first disciplinary offence, we order that civil penalties of $2,500.00 be issued in regard to each of Counts 1 and 2. In regard to Court 3 we are of the view that a civil penalty in the amount of $750.00 is appropriate. As to Count 4 and our finding that the Agent failed to respond to the Demand, the circumstances of this case are somewhat unique and we decline to issue a civil penalty. We also considered whether or not license suspensions or a revocation is needed in these circumstances. Once again, given the Agent's licensing history and the nature of these offences, we believe that the civil penalties will offer sufficient public protection and specific deterrence to the Agent. In the event that the Agent is found guilty of additional offences in the future, these additional sanctions may become necessary.

The civil penalties totaling $5,750.00 must be paid within thirty (30) days of the mailing of this decision. If the civil penalties are not paid within thirty (30) days, the Agent's certificate of authority will be automatically suspended and 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.

Dated: August 11, 2017

Kenneth Doll
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
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Edmonton, Alberta T5K 2C3