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 Jason Burke
(the "Agent")

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

This case involved allegations made pursuant to s. 480(1)(a) and alternatively, s. 509(1)(a) of the Act. Specifically, it is alleged that the Agent misled a vehicle dealership (the "Dealership") by providing counterfeit documents under letterhead of an insurance company, with the intention of improperly collecting his retainer deposit. Additionally, it is alleged that the Agent executed a scheme involving a falsified report claiming that his vehicle(s) had been stolen. In so doing, it is alleged that the Agent is guilty of misrepresentation, fraud, deceit, untrustworthiness, or dishonesty as set out in s. 480(1)(a) of the Act. In the alternative, it is alleged that the Agent made a false or misleading statement contemplated by s. 509(1)(a) of the Act.

Facts and Evidence

This matter proceeded by way of a written Report to Council dated May 31, 2018 (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 provide further materials.

The Report contained the Agent's license history. The license history confirms that the Agent is the holder of life and accident & sickness ("A&S") certificates of authority, and has held these licenses from May 25, 2017.

The AIC investigation stemmed from an email received form the Insurance Bureau of Canada (the "IBC") dated January 9, 2018. The email enclosed an Investigative Report pertaining to the alleged conduct and fraudulent activities of the Agent, which occurred in the Province of Alberta (the "Investigative Report"). The report purported that the Agent had engaged in a scheme to exploit the high-return, illegal export of a Mercedes Benz vehicle to China.

Specifically, the Investigative Report stated:

> 6. In response to the fraudulent practice of shipping brand new vehicles overseas Mercedes Canada has introduced several protective measures via a "Non-Export Agreement" to dissuade people from buying with the sole purpose of shipping. Sizable retainers as well as a list of requirements that the accumulated mileage are some of the steps that are now required to buy any new Mercedes vehicle. As a leader in the automotive industry and in an effort to prevent money laundering Mercedes also requires that during cash purchases the customer produce documentation to show that the money presented to buy the vehicle had been lawfully obtained.
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> 7. On November 06, 2017, I reached out to [redacted] and discussed the Burke purchase of the 2017 [Mercedes] GLS 450. In addition to learning the above information I was also sent the below documents that related to the purchases of the new vehicle.
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> a. Great West Life & Annuity Insurance Company Beneficiary Letter;
> b. Photo Identification – Copy of Burke's Alberta Class 1 Driver's License;
> c. Wawanesa Proof of Loss;
> d. RCMP Declaration of Loss of Motor Vehicle from RCMP file 2017-1449721;
> e. Photocopy of Burke's American Income Life Insurance business card;
> f. Copy of four page non export agreement signed by Burke and Purdy;
> g. Toronto Dominion Bank Draft for $116,000.00 payable to Country Hills Mercedes Benz;
> h. Bill of sale for the GLS450.
>
> […]
> 10. Since the transaction between Burke and Mercedes was a cash purchase Burke was also required to produce proof that he possessed the funds necessary to complete the sale, which was in excess of $100,000.00, as well as documentation that detailed how he had lawfully received the funds. On August 25, 2017, and in addition to the bank statements, Burke produced a Beneficiary letter on the stationary of the "Great West Life and Annuity Insurance Company"[…]

A copy of the letter under the Great-West Life letterhead was enclosed in the Investigative Report. The content of the letter was as follows:

> […]
> Dear Beneficiary;
> Please accept our condolences on your recent loss. We understand this is a difficult time, and we hope we can alleviate any concerns you may have regarding your claim.
> Tanner Nilsson stated you as his beneficiary on his life insurance policy in the amount of $232,200.00 will be paid out in full on June 2nd, 2017.
> […]
> Sincerely,
> [signed]
> Francis Lyse
> Life Claims Coordinator

The Investigative Report questioned the legitimacy of the letter and, through inquiries placed to Great West Life, the investigator determined that the letter was forged:

> 11. […] to determine the authenticity of the Great West Beneficiary letter, on December 04, 2017 the writer, had conversations with Glen Smyth who is the Senior Investigator with the

> Special Investigations Unit of Great West Life about the letter. After our phone conversations Smyth via email confirmed the following about the Great West letter […]
>
> […]
> "The letter you enquired about is a fabricated letter for the following reasons:
> 1. "Tanner Nilsson" did not and does not have a life insurance policy with Great-West Life.
> 2. "Francis Lyse, Life Claims Coordinator" is a fictitious employee. Francis Lyse is not and has not been an employee with Great-West Life.
> 3. The letterhead is not the letterhead currently used by Great-West Life.
> 4. The postal code for [redacted] is incorrect. That postal code is for our other building at [redacted].

The Investigative Report also reviewed the Agent's Wawanesa Insurance Proof of Loss (the "Proof of Loss") which had indicated that his property, namely the Agent's Mercedes and another vehicle, a BMW X5, had been stolen. When the Agent called the Dealership and alerted them to this theft, the Dealership directed him to the Police. The Investigative Report sets out the events:

> 13. […] As mentioned above and to ensure that the new vehicle would not be shipped overseas and resold[,] [sic]Mercedes required that a retainer be held by them until the customer could show compliance to the terms of the 6 month agreement.
>
> 14. On September 15, 2017 Burke called the dealership, well inside the 6 month period, and demanded that he receive his retainer back as he could no longer comply with the terms of the agreement. The reason that Burke stated for not being able to comply was that while he was on vacation two of his vehicles were stolen one being the recently purchased Mercedes the second being his BMW X5. On October 25, 2017, and in an effort to support his claim that his two vehicles were stolen Burke provided [redacted] with two documents. The first was a "Wawanesa Insurance Proof of Loss" showing that in addition to a large amount of personal property both his 2017 Mercedes GLS450 that was purchased from [redacted] and his 2017 BMW X5 with VIN [redacted] had been stolen.
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> 15. When Burke dropped off these documents at the Mercedes Dealership he actually drove to the dealership in the BMW X5 that he was alleging had been stolen. Surreptitiously Mercedes Sales Representative [redacted] confirmed the VIN of the BMW X5 via the dash mounted VIN plate that is viewable from the outside of the vehicle as being [redacted].

The Investigative Report also set out that the investigator addressed a Senior Claims Investigator at Wawanesa Insurance regarding the Proof of Loss statement provided by the Agent. The Senior Claims Investigator stated that "[…]we have no policies in that name and date of birth".

The Agent produced a "Declaration of Loss of Motor Vehicle" (the "Declaration of Loss") which was signed by an RCMP officer and dated October 25, 2017. It was noted by the Council that the Agent presented the Dealership with the Proof of Loss dated September 14, 2017, however the RCMP Declaration of Loss was filed October 25, 2017, six weeks after the apparent loss. Additionally, the Declaration of Loss only listed the Mercedes GLS 450 and not the BMW X5 (contrary to the Statement of Loss). As many members of the

Council have industry experience, the Council noted that an insurance company is not likely to issue a Proof of Loss without a supporting Police Report.

In an email dated February 22, 2018 the Agent provided the AIC with a brief explanation of the events relating to the motor vehicle claim:

> The vehicle was not stolen there were no claims made to the insurance company what so ever just preliminary inquiries until I found that the vehicle was not stolen, there was just a miscommunication between myself and another party which led to me thinking for a couple [of] [sic] days my vehicle had been stolen which in fact it had not been.

Additionally, on May 4, 2018 the Agent responded to the AIC's inquiries relating to the Great West Life Insurance letter dated May 22, 2017 and the Proof of Loss dated September 14, 2017:

> There is no proof of loss letter that I provided that had any signatures what so ever on it. The letter from great west life was not mine it was my wives [sic] regarding the life insurance money from her brother's death. I'm not sure where she got it and we don't speak anymore. […]Thanks in much to untrue allegations by [redacted] at the dealership in question to my wife at the time, police, my employer among others I'm sure just to name a few.

The Agent provided a further explanation relating to the Proof of Loss in an email dated May 7, 2018:

> So when I went in I had brought it with me and other documents as I wasn't sure what had happened fully yet, it was preliminary what I printed off the internet. Once everything was confirmed I was going to get it signed by the commission of oath [sic] which makes it a document because as it sat at that point it was just a piece of paper with writing on it, it had no validity until it was signed by the commissioner.

On May 8, 2018, in response to the AIC's question "Where and when did you discover that your car was not stolen? Whom did you notify once you made this discovery?" the Agent responded:

> I notified the police the day after I filed the report to have it corrected once a guy I k ow [sic] from a previous job came by and said he needed the keys as he sold the suv which I never agreed to at the time but he made the deal so it is what it is.

And in final emails dated May 8, 2018 the Agent added "It was never stolen therefore never found he just sold it and let me know when I was back from vacation." When the AIC posed further questions to the Agent he responded:

> No there was nothing that was ever stolen and the bmw I got back because he didn't have a buyer for that like he did the other [.. and] It was all just a big miscommunication on a one off hypothetical conversation I had with this guy months previously that's all[.]

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 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 applicable continuing education courses when he, in fact, did not. 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.
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> [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.

Based on the evidence, particularly the communications with the insurance companies that explicitly state that no records of the documents produced by the Agent exist, that the signees of the documents were not true employees, and that the clients named by the Agent were not clients of the company, the Council feels that test of clear and cogent evidence has been met. The Agent purports that the events leading up to the Proof of Loss submission resulted from a misunderstanding. However, this explanation is problematic given the amount of inconsistencies uncovered, the span of the events, the actions of the Agent, and the documents produced. Given the evidence, the Council concludes that the objective and subjective elements of the applicable legal test under s. 480(1)(a) have been met. The Council believes the conduct was intentional, and the conduct is incontestably dishonest and untrustworthy as contemplated by s. 480(1)(a) of the Act. Accordingly, the Council finds the Agent guilty of the offence as alleged in the Report. As a result of this finding of guilt under s. 480(1)(a) of the Act, it is unnecessary for the Council to consider the alternative offence under s. 509(1)(a) as proposed by the Report.

Pursuant to s. 13(1)(a) of the *Certificate Expiry, Penalties and Fees Regulation*, the Council has the jurisdiction to levy civil penalties in an amount not exceeding $5,000.00 in relation to the findings that the

Agent acted in a dishonest or untrustworthy manner. The Council therefore orders that a civil penalty of $5,000.00 be levied against the Agent.

Under the offence of 480(1)(a) the Council has the jurisdiction to suspend the Agent's certificates of authority to act as a life and A&S insurance agent for the period of up to 12 months, and has the authority to revoke the certificates of authority for the period of up to one year. Given the unethical practices of the Agent, and his use of industry knowledge for personal gain (a severe offence in the eyes of the Council) the Council orders that the Agent's certificate of authority be revoked for the period of one year.

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: August 14, 2018

[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
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402 Terrace Building
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