

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 Sean Ronson Nethercott
(the "Former Agent")

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

This case involves an alleged violation of s. 480(1)(a) of the Act. The Council considered the alternative alleged violation of s. 509(1)(a) of the Act, which subsequently attracts a violation of s. 480(1)(b) of the Act. Specifically, it is alleged that the Former Agent provided false, misleading or fraudulent, statements that amounted to acts of deceit, dishonesty or untrustworthiness. Specifically, it is alleged that the Agent declared completion of a continuing education course on his renewal application that he did not complete. It is also alleged that the Former Agent reported himself as a course instructor which resulted in award of double course credits, when he, in fact, was not the course instructor. As such, it is alleged that the Former Agent has misrepresented information, and has acted in a fraudulent, deceitful, dishonest or untrustworthy manner as contemplated by s.480(1)(a) of the Act. Alternatively, it is alleged that the Former Agent made false or misleading statements in contravention of s. 509(1)(a) of the Act and has subsequently violated s. 480(1)(b) of the Act.

Facts and Evidence

This matter proceeded by way of a written Report to the Council dated January 30, 2020 (the "Report"). The Report was forwarded to the Former Agent to review and provide the Council with further evidence or submissions by way of Addendum. The Agent provided an addendum response which was considered by the Council in addition to the Report.

The Former Agent held certificates of authority which authorized him to act as a life insurance and accident and sickness ("A&S") insurance agent, and held both certificates during the year of 2007. The Former Agent held the life insurance certificate of authority again, intermittently, between the period of 2016 to September 24, 2019, and also held the A&S certificate between January 4, 2017 to September 24, 2019.

The AIC conducted an audit in June 2019 which verified that the Continuing Education (“CE”) credits claimed on licensees’ renewal applications were correct. AIC randomly selected agents who renewed their certificates of authority between the period of May 1st and June 30th, 2019. Auditees were asked to provide proof of CE credits for the past licensed period, being July 1st, 2018 to June 30th, 2019. The Former Agent was selected as an auditee.

A discrepancy was discovered with respect to a course claimed by the Former Agent and, on October 18, 2019 the Former Agent was provided a formal demand to respond (the “Demand”) pursuant to s. 481 of the Act. The Demand required the Former Agent to produce records relating to a specific CE credit claimed on his renewal application on or before November 18, 2019.

The Former Agent responded on October 21, 2019 and advised the Investigator that he had provided all relevant records to the AIC. The Investigator queried;

“it appears we do not have your CE certificate for course [redacted] which your reported on October 1, 2018. While you did provide us with the CE certificate for this course for September 23, 2016; you declared that you completed the course [redacted] again on October 1, 2018. **Accordingly, it is the October 1, 2018 certificate that we are looking for at this time. [...] Further, please confirm whether or not you are [a] certified instructor for this course”.**

[Emphasis added]

The act of instructing a course carries with it the award of double CE credits towards the relevant certificates of authority held by the course instructor. This means that if the Former Agent was a course instructor, he would receive twice the amount of CE credits within the licensing system. The Investigator sought to validate that course instructor status.

While awaiting a response from the Former Agent, the Investigator contacted the office of the Course Provider to obtain records relating to the course. The Investigator corresponded with A.N. [redacted], a Course Registrar, on November 12, 2019. A.N. responded to the Investigators questions as follows on November 13, 2019;

[...] could you please confirm:

- a. Whether or not Sean completed the “[redacted]” course on October 1, 2018;
- **NO, he successfully wrote the final exam ONCE on Sept. 1, 2016 as indicated above.**
- b. Whether or not Sean ever completed the “[redacted]” course after September 23, 2016;
- **NO he completed the final step on Sept. 1, 2016 as previously mentioned.**
- c. Whether or not Sean was an instructor for this course as of October 1, 2018; and,
- **NO Sean was not one of the [course provider redacted] or Faculty members.**
- d. Whether or not Sean was ever an instructor for this course at any time.
- **Sean was never at any time one of [course provider redacted]**

[Emphasis added in original correspondence]

In an addendum response dated February 4, 2020 the Former Agent responded;

[...]

1. I completed the [redacted course in question] in 2016, not 2018.
2. This course generated a number of "life" CE credits in 2016. To my knowledge there were no CE credits from this course for my General licence.
3. I was licenced for 23 days in the 2019/2020 year to which this report relates. An audit of my CE to that time was completed by the council in June 2019, which I was told was all clear before my licence renewed on July 1 2019, and the auditor had verified all of my courses to ensure I met the requirements to renew at that time.
4. I had declared that I had 15 hrs of CE completed in 2018/19 which included [...]
5. The [course] was very similar to the [redacted] course I had completed in 2018 through BCC (same institution as EPC) as well as [redacted] (Exhibit 1) which were also completed in that period and generated about 40 CE credits for Life.
6. During the audit in June 2019, the auditor had claimed that he would contact [insurer] for certification of the courses that I had completed, and had sent me an email that I had passed the audit
7. In October 2019, I was contacted by another AIC person who asked about the CE credits again. I told him that I was not licenced, had not been licenced for more than 90 days and was not interested in being licenced again. I referred him back to the auditor.

Therefore, as noted above, I had completed the adequate number of hours to meet the requirements to renew of 15 without the erroneous [redacted] course. I would have had 19.5 hours with the [...] carry forward courses for my renewal. As such I would have had 4.5 hours to carry forward without the [redacted] course (as was found by the audit in June). The report claims that a concern was identified in June, however, **it was more than 90 days later that I was contacted by the AIC about this concern.** During that time my licence was renewed, and no mention was made of the "concern"? This is obviously because I had more than enough CE credits to renew as was verified in the audit, which is why [Investigator] was directed back to the auditor. Furthermore, since I had not been licensed for months at the time, it is clear that this entire line of questioning was moot.

Further since the AIC has spent a great deal of time auditing my CE credits from 2016 through to 2019, it is clear that I had carry forward credits in each year of the maximum allowable, and had met the requirements. Therefore there is no motive or cause for misrepresentation, since I had completed the requirements in each year. In fact there were a number of courses completed during that period that I did not report as I had already completed both the required CE for that year, but also the carry forward for each year up to that point. In Exhibit B of the AIC submission this is clearly shown that the [redacted] course was unnecessary to renew, since the [separately claimed] course generated 12 hours.

[...] I have no interest in returning to the Insurance industry, and am not interested in contesting this beyond the erroneous finding that there was some sort of intentional deceit that would have allowed a renewal under false pretenses. As noted above, I had far more CE hours than necessary in each year for my licences, and did not have to "make up" false CE credits to meet these requirements.

[Emphasis added in original]

The Former Agent added further comments by way of email correspondence on February 4, 2020;

As per the attached response, Obviously the "misrepresentation" was in error, as I had lots of CE for both life and General for that year in addition to the 7.5 hours of carryforward I took the [redacted unrelated course] brokers training, [Insurer] cyber breach insurance course, and various other courses at [insurer] in 2018. Fpr [sic] Life I took Capstone as well as several other courses which are attached so as per the audit findings I would not only have 15 hours for that year, but carryforward for 2020- 21. My response to the council is attached along with course documents for courses completed but not needed for CE for that period along with the findings of the audit.

Also as discussed I am not licensed and do not wish to be so regardless of the findings of the council. I will not be contesting them.

Discussion

The Report alleges that the Former Agent acted in a fraudulent, deceitful, dishonest or untrustworthy manner, or misrepresented information, pursuant to s. 480(1)(a) of the Act. The applicable test to determine whether the Former 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 the agent committed a violation of s. 480(1)(a) of the Act when he attested to completing CE when he did not complete the declared CE. The agent advanced the matter on appeal before the Insurance Councils Appeal Board. The Insurance Councils Appeal Board also found the agent guilty of violating s. 480(1)(a) the Act. The agent subsequently appealed the decision of the Insurance Councils Appeal Board to the Court of Queen’s Bench of Alberta.

In his 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)

Discussion

In order to conclude that the Former Agent committed a violation of s. 480(1)(a) of the Act, the Report before the Council must prove, on the basis of clear and cogent evidence, that it is more likely than not that the Former Agent committed the acts as alleged. Section 480(1)(a) of the Act provides;

Sanctions affecting certificates

480(1) If the Minister is satisfied that the holder or a former holder of a certificate of authority

(a) has been guilty of misrepresentation, fraud, deceit,

untrustworthiness or dishonesty,
[...]
the Minister may revoke, suspend or refuse to renew or reinstate
one or more of the certificates of authority held by the holder,
impose terms and conditions provided for in the regulations on one
or more of the certificates of authority held by the holder and
impose a penalty on the holder or former holder

The Council considered the Former Agent's version of events. The Council found that the records produced by the Former Agent satisfied the CE requirements to renew his certificate of authority, in excess, for the audited year. However, the Former Agent provided no meaningful explanation as to why he declared completion of a course in 2018 when he, in fact, completed the course in 2016. Further, the Former Agent declared himself a course instructor of this course when he was, in fact, not a course provider. Both of these facts were supported by the Course Registrar records and the Former Agent's statements. As such, the Council turned to the mental element and considered; were the statements of the Former Agent's dishonest, untrustworthy, or deceitful as contemplated by s. 480 of the Act?

The Council turned to the records of the Course Registrar which indicated that the Former Agent was not at the time, nor has he ever been, a course instructor of the course. The benefit of claiming double credits is reserved for those accredited to teach the course. When an agent completes a renewal application the agent must complete declarations which acknowledge that the information claimed is correct and could be subject to audit. The Former Agent declared the renewal applications were accurate. Further, the Council found an agent could be motivated to declare excess credits to carry forward surplus hours to the following licensed period. The Council was therefore satisfied that the Report showed clear and cogent evidence that the Former Agent made the misstatements deliberately.

The Council finds that the evidence satisfies the objective and subjective elements to demonstrate a s. 480(1)(a) violation. As such, the Council finds the Former Agent has contravened s. 480(1)(a) of the Act on two counts. The first being when the Former Agent declared he had completed the course during the 2018 period when he had not, and the second being that the Former Agent declared himself a course instructor when he was not. In light of the above, the Council did not consider the alternative alleged offence under s. 509 of the Act.

Pursuant to s. 13(1)(a) of the *Certificate Expiry, Penalties and Fees Regulation*, the Council has the jurisdiction to levy a civil penalty in an amount not exceeding \$5,000.00 in relation to each demonstrated violation of s. 480(1)(a). The Council acknowledges that the Former Agent has appeared before this Council before on matters of conduct. Therefore, the Council agrees that a significant civil penalty is warranted in the circumstances. The

Council orders a civil penalty in the amount of \$5,000.00 for each of the two demonstrated contravention of s. 480(1)(a), resulting in a total civil penalty of \$10,000.00.

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 (excerpt 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: May 15, 2020

[Original signed by]

Michael Bibby, 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