

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 Kenneth Moland
(the "Agent")

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

This case involves allegations pursuant to ss. 480(1)(a) of the Act, or, in the alternative, an alleged breach of s. 509(1)(a) of the Act, resulting in a subsequent violation of s. 480(1)(b) of the Act. Specifically, it is alleged that the agent knowingly or negligently failed to remit insurance premiums to the insurer while advising the client that the premiums were duly paid. Alternatively, it is alleged that the Agent made false or misleading statements to the insured pursuant to s. 509(1)(a) of the Act and has therefore violated s. 480(1)(b) of the Act. As a secondary matter, the case alleged that the Agent failed or refused to provide the information requested by the AIC by way of a formal Demand for Information (the "Demand") in contravention of s. 481(2) of the Act and subsequently breached s. 480(1)(b) of the Act.

Facts and Evidence

This matter proceeded by way of a written Report to Council dated October 22, 2020 (the "Report"). The Report was forwarded to the Agent for his review and to allow the Agent to provide the Council with further evidence or submissions by way of Addendum.

The Agent is the former holder of a certificate of authority authorizing him to act in the capacity of a general insurance agent. The Agent held varying levels of general insurance certificate during his time of practice, from general level 1 to level 3 designated representative, while acting as a general insurance agent during the period of February 11, 2006 to January 8, 2020. The Agent is not presently licensed.

The AIC investigation commenced in response to a complaint received on April 12, 2019 from the Agent's former client (the "Client"). The Client alleged that the Agent had failed to remit premiums to the insurer

despite advising the Client that the funds were duly transferred. On April 12, 2019, the Client specified;

My insurance policy has been cancelled for nonpayment despite the fact it was paid in full many months ago. I have attempted to contact my broker [the Agent] but there appears to be no-one there to take my call. I have attempted to contact their [redacted] office but their telephone number is no longer in service.

The Client provided policy details on April 15, 2019 in response to the AIC's request for further information. The Client provided two Notices of Cancellation which were received from the Insurer. The Notices provided as follows, in part;

Notice of Cancellation dated April 10, 2019 from the insurer, which provided;

[...] On behalf of the Insurers listed below and in accordance with the terms and conditions of this policy, we hereby give notice of cancellation for non-payment of premium. The following policy will be cancelled as of 12:01 a.m. on 25 April 2019 for non-payment

[...]
Broker Account: ***877
[...]
Policy Number: CGL ***726
[...]
Policy Period: 03 July 2018 to 03 July 2021
Premium: \$495 [...]
[...]
C,c,: [...] Attention: KEN MOLAND
[...]

[...]

Notice of Cancellation dated April 10, 2019 from the insurer, which provided;

[...]On behalf of the Insurers listed below and in accordance with the terms and conditions of this policy, we hereby give notice of cancellation for non-payment of premium. The following policy will be cancelled as of 12:01 a.m. on 25 April 2019 for non-payment

[...]
Broker Account: ***877
[...]
Policy Number: SFA ***726
[...]
Policy Period: 03 July 2018 to 03 July 0921
Premium: \$3,200 [...]
[...]
C,c,: [...] Attention: KEN MOLAND

On April 15, 2019 the Client provided cheque record ***617 identifying payment to the Agent's former brokerage (the "Brokerage") dated "29 June 2018". The cheque evidenced payment of \$4,320.00 to the Brokerage

On April 29, 2019 the Client advised;

[...] in addition to the cancelled policies I have sent to you already, there is a third policy cancelled – APC***726 for Property Policy (office and business contents). I have been offered coverage from [insurer][redacted] through our new broker [redacted] at the same price as originally offered but I am naturally reluctant to pay for the same thing twice. What course of action should we be taking? [...]

In response the AIC served the Agent with the Demand on April 29, 2019 which was made pursuant to s. 481(2) of the Act and provided a deadline of response of May 14, 2019. The Demand requested the following in part;

[...] We have received a complaint from [redacted][Client] with respect to insurance policies # CGL***726, SFA***726 and APC***726 alleging that the Agency collected premiums and did not remit to the insurer, resulting in cancellation for non-payment[...] please provide the following information:

1. A detailed summary of your discussion and chronology of events relating to the above complaint;
2. A copy of the down payment receipt;
3. A copy of the premium finance agreement between the financing company and the client;
4. A copy of the cancellation letter sent to the client;
5. An explanation as to why premiums have not been remitted to [insurer][redacted] or the financing company; and
6. An explanation of where the funds are currently being held and what they are being used for.

In response to an inquiry privately made by the Client, the Client's new agency advised the Client and the AIC of the following on May 6, 2019;

[...] To follow up on our previous conversation after you had spoken with Mr. Ken Moland... [insurer] is adamant that the lack of payment from [former agency] [redacted] is **absolutely not** due to an accounting/admin/clerical error or delay. [former agency] simply did not forward the funds they collected from you on [insurer's] behalf, and have been avoiding contact. This collections problem has been ongoing for several months. [...]

[Emphasis provided in source document]

The Agent did not respond of the Demand deadline of May 14, 2019. Despite this, and in the interest of fairness, the AIC investigator served a further Demand on the Agent which provided an extended deadline of May 30, 2019 to provide the same information requested in the April 29, 2019 Demand. The Agent did not respond.

On June 3, 2019 the Client produced a bank statement which confirmed that the \$4,320.00 relating to cheque ***617 dated June 29, 2018 was withdrawn from his account on July 5, 2018.

The Insurer provided a final statement to the AIC investigator on June 28, 2019, as follows;

[...] As discussed on our call, [insurer][redacted] had issued 3 policies for Client [corporate account redacted] – SFA***726 and APC***726 with [former agency] for the period of July 3, 2018 to July 3, 2021. Although [insurer][redacted] threatened to cancel the policies for non-payment, [insurer][redacted] received confirmation that the insured paid the premiums to [former agency] and the cancellation notices were rescinded and the policies remained in force. Subsequently, all three policies were transferred to [new insurance agency].

In response to the entirety of the Report the Agent provided an addendum on November 4, 2020, which stated;

[...] I am in receipt of a package dated October 22, 2020, referring to a complaint from mid-2019 which I must admit I have never seen before. In any event, I have provided a signed copy of the page I am to sign from the Report to Council, and have the following which I wish to be placed before Council when they consider this matter:

- (1) This is the first I have heard of the complaint which apparently deals with a policy written in mid-2018. In 2018, as the AIC records will indicate, I had my own brokerage called [redacted][former agency]. This brokerage was sold in late 2018 and for all intents and purposes was shut down at that time, the files transferred to [redacted].
- (2) I have examined Exhibits F and H from the Report and can say that I received neither the email from [AIC Investigator] of April 29, 2020, nor the registered letter (or card indicating something needed to be picked up) of May 16, 2019. This is the reason for my non-response.
- (3) I should also point out that I was communicating with [AIC Investigator] on another complaint file at or around the same time – [redacted]. We, in fact, exchanged emails, letters and phone calls in May 2019 - July 2019 regarding that matter. I can advise she never indicated she was trying to contact me on another matter. She certainly had my number. AIC's own records indicate I was at [redacted] at the time of attempted contact. No one contacted me there.
- (4) With the passage of time, and the winding up of [former agency], I am without a memory of [Client] or this policy. Perhaps I could have been of assistance had I been contacted earlier. The files are all with [redacted] - they purchased them in 2018, and they terminated me in early 2020.
- (5) Members of the Council, it would be unfair for you to proceed on this matter and make a determination and mete out a possible punishment given the above. Instead, send the file back for further investigation. Have the investigator the relevant file from [redacted], share it with me, then allow me to answer the concerns raised before the matter returns to Council.

I trust you will not proceed without taking this step.

Discussion

The Council is cognizant that findings under s. 480(1)(a) *Insurance Act* can have long-lasting effects on insurance agents and former agents, such as the Agent in this case. Such findings can impact an agent's ability to practice within the insurance industry. Here, and in all alleged breaches of s. 480(1)(a), the Council must apply stringent tests to weigh the evidence produced. That being, in order to conclude that the Agent violated s. 480(1)(a) of the Act the Council must prove on the basis of clear and cogent evidence that it is more likely than not that the Agent committed the act(s) as alleged.

The intent and requirement of clear and cogent evidence is reflected in the Decision of the Court of Queen's Bench of Alberta in *Roy v. Alberta (Insurance Councils Appeal Board)*, 2008 ABQB 572 (hereinafter referred to as "Roy"). In *Roy*, the Life Insurance Council found that an insurance agent had

violated s. 480(1)(a) of the Act by falsely declaring the completion of continuing education credits (“CE”) when he did not, in fact, complete the required CE. In *Roy*, the agent concurrently held a securities license and believed that the CE to maintain his securities license was applicable to his insurance agent certificates of authority. The agent appealed the decision of the Life Insurance Council to the *Insurance Councils Appeal Board* of Alberta.

In their findings, the *Insurance Councils Appeal Board* upheld the conviction of untrustworthiness, as contemplated by s.480(1)(a) of the Act. The Agent subsequently appealed the decision to the Court of Queen’s Bench of Alberta on a matter of judicial review.

In his reasons for judgement, Mr. Justice Marceau reviewed the requisite test to find that a violation of s.480(1)(a) of the Act has been made, and expressed that reasoning at paragraphs 24 to 27, as follows:

[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”.**

[27] Clearly the false answer was one which the Alberta Life Insurance Council could not trust as a basis for renewing the Applicant’s Life Insurance Certificate of Authority. That satisfies the objective element. Just as clearly the finding that "the best that can be said of the Appellant’s approach to the required statements is that he did not know if he had the required credits or not and likely gave the form little or no thought" is a **finding of wilful[sic] blindness, of recklessness, and that is sufficient to prove intent in this context.** The Board was aware that recklessness could satisfy the intent requirement and made no error on that score. Having read the transcript of the hearing, I find that it was not unreasonable for the Appeal Board to conclude that the evidence of the Applicant about vaguely thinking that among all the courses he took he believed there would be enough crossover from courses taken for his securities licence to the life

insurance requirements **fell far short of the due diligence expected of someone entrusted with fiduciary and good faith obligations.**
[Emphasis added]

The Agent also has a positive statutory obligation to remit premium payments to the insurer, as contemplated by s. 504 of the Act, which reads;

Agent trustee of premiums

504(1) An insurance agent who acts in negotiating, renewing or continuing a contract of insurance with an insurer and who receives a payment from the insured for a premium for the contract is deemed to hold the premium in trust for the insurer.

(2) If the insurance agent fails to pay the premium, less the agent's commission and any deductions to which, by the written consent of the insurer, the agent is entitled, over to the insurer within 30 days after the agent receives a written demand for payment of the premium, the agent's failure is proof, in the absence of evidence to the contrary, that the agent has used or applied the premium for a purpose other than paying it over to the insurer.

As such, the Agent is placed in a fiduciary relationship whereby the client relies on the agent's expertise, competency and integrity to remit the insurance premiums to the insurer. Loss, error, or lapse of such coverage caused by misappropriation funds exposes a client to serious risk. Had the Client not received the notices from the Insurer that two of the three policies were in jeopardy of being cancelled due to non-payment of premiums, the Client would not have discovered that the third policy was also at risk of being cancelled due to non-payment. The Client made all payments in accordance with the Agent's instructions and remitted the premium funds to the former agency. Due to the Agent's willful or negligent mismanagement all three policies were at risk of cancellation for non-payment. The Client could have unknowingly operated without insurance. In the Client's own words, the Client lost trust in the insurance industry as a result of the Agent's conduct.

The Council agrees that the Agent's wrongful use of premiums is deliberate and demonstrates deceitful or untrustworthy conduct as contemplated by s. 480(1)(a) of the Act. The Council finds that the Agent was, at the very least, willfully reckless or negligent in failing to remit the Client's the premiums to the Insurer. Moreover, the Act is clear that premium funds are to be held in trust until remitted to the Insurer. As the Insurer has attested, the Client's premiums funds were never located. The Council is satisfied that in absence of evidence to the contrary, the Agent has used or applied the premiums for a purpose other than delivering the funds to the insurer, and the Council believes this demonstrates fraud, dishonesty, untrustworthy and deceitful conduct. Regardless of how the Agent's conduct is categorized the Council is of the view that the requisite tests have been satisfied, the objective and subjective elements have been

proven, and that the Agent has violated s. 480(1)(a) of the Act.

The Council agrees that a substantial civil penalty is warranted under the circumstances as honesty and transparency are the hallmarks of a trustworthy agent. Given the seriousness of the offence the Council orders that a civil penalty in the amount of \$5,000.00 be levied against the Agent pursuant to s. 480(1)(b) and 13(1)(b) of the *Certificate Expiry, Penalties and Fees Regulation*, A.R. 125/2001. Had the Agent been licensed at the time of this Decision the Council would have exercised its authority to revoke the Agent's certificate of authority for the maximum period of one year. Given that the Agent is not presently licensed, the Council cannot action such a revocation.

In turning to the second matter with respect to the Agent's failure to respond, the AIC operates under delegated authority granted by the Minister of Treasury Board and Finance which permits the AIC to investigate complaints against holders, and former holders, such as this case, of insurance agent certificates of authority.

The delegated authority provides that;

“s. 481(1) [t]he Minister may direct the holder or former holder of a certificate of authority to provide to the Minister within a reasonable period of time specified in the direction any information specified by the Minister relating to the matters in s. 480(1).”

Subsection 2 states that “... *A person served with a direction ... who has the information **must** provide the information in accordance with the direction.*” [Emphasis added]

The offence of failing to respond to a Demand is one of strict liability. As such, the AIC must only prove that the Demand was properly constructed and served upon the Agent, proper in the sense that the AIC met all of the requirements under the Act, and that the Agent did not comply. Once the Council has proven that the Demand was properly delivered the responsibility then shifts to the Agent to demonstrate that due diligence was exercised to satisfy the statutory requirement to respond. To substantiate this due diligence defence, the Agent must prove that he took all reasonable steps to avoid making the offence. In light of the evidence the Council is satisfied that the AIC's Demand meets all requirements of the Act.

Given that the Agent failed to respond within the timescales provided, the Agent has not met the burden of establishing a due diligence defence and accordingly, the Council finds him guilty of violating s. 481(2) of the Act, and subsequently finds him guilty of violating s. 480(1)(b) of the Act.

In terms of the applicable sanction, the public relies on the AIC to investigate complaints, and the Act requires that licensees provide information when called upon to do so. Therefore, the public is not well-served when certificate holders fail to comply with demands like those made in this case. Pursuant to s. 13(1)(b) of the *Certificate Expiry, Penalties and Fees Regulation*, A.R. 125/2001, the Council has the ability to assess a civil penalty up to a maximum of \$1,000.00. In this case, the Agent has not responded in any meaningful way to the repeated requests of the AIC, and the Council is of the opinion that a significant civil penalty must be assessed to send a strong message to the Agent. Therefore, the Council orders that a civil penalty of \$1,000.00 be levied against the Agent.

The civil penalties must be paid within thirty (30) days of receiving this notice. In the event that the penalties are not paid within thirty (30) days, interest will begin to accrue at the applicable prescribed rate. 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: January 12, 2021

[Original signed by]
Amanda Sawatzky, Chairperson
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