

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 M Currey
(the "Agent")

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

This case involved allegations pursuant to ss. 480(1)(a) and 509(1)(a) of the Act and s. 5 of the *Replacement of Life Insurance Contracts Regulation* (the Regulation). Specifically, it is alleged in Count 1 that the Agent recommended replacement of life insurance policies to his clients ("MG" and "CG", collectively referred to as the "Clients") and misrepresented and/or made false or misleading statements about the cost of insurance and that this constitutes an offence pursuant to s. 480(1)(a) and/or s. 509(1)(a) of the Act. In Count 2, it is alleged that the Agent failed to provide a copy of the written explanation of the advantages and disadvantages of replacing the existing policy with the new policy prior to completing the application contrary to s. 5 of the Regulation.

Facts and Evidence

This matter proceeded by way of a written Report to Council dated March 5, 2013 (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 submitted an addendum for review. Many of the facts set out in the Report are not in dispute. Therefore, we have adopted portions of the Report in these reasons. Additionally, the Report and additional material is approximately 200 pages in length. While we have carefully reviewed the Report and exhibits in their entirety we do not intend on recounting every piece of evidence or submission.

The Agent has been licensed since February 12, 2004 for Life and Accident and Sickness ("A&S") insurance. On September 8, 2011, the AIC received a letter dated August 29, 2011, with accompanying documents from the Clients. In the letter, the Clients raised a number of issues regarding the Agent and his

dealings with them that included concerns related to their surrender of an Empire Life Insurance Company (“Empire Life”) policy. The Clients advised, “It has recently come to our attention that directly through [the Agent’s] handling of the investment values and monies which we had accumulated in these policies over the course of a number of years, that we may now have seen the utter depletion and squandering of same. All directly attributable to [the Agent’s] handling of these policies and our monies.” The attachments that the Clients provided included information in relation to two Empire Life policies and the Rogers Oil & Gas Inc. investment.

On September 26, 2011, the investigator spoke with CG and her brother, who was assisting the Clients with their concerns. The investigator explained the mandate of the AIC and advised that the AIC does not have any authority to assist them in recovering any alleged losses as a result of the Agent’s actions. During the discussion concerns were raised about the alleged replacement of life insurance policies and the investigator verbally requested additional information and documentation. CG advised that her husband would forward additional information.

On January 5, 2012, the investigator spoke with the Agent and advised him of the complaint received from the Clients. The investigator advised that he would write the Agent to request information and documentation and did so on January 6, 2012.

Ultimately, after several extensions, the Agent (through counsel) responded to the investigator’s questions. In this response, the Agent indicated that “[i]n May of 2010, [CG] contacted [the Agent] and confirmed that she was unhappy over the amount of the minimum annual premium which was required pursuant to the Empire Life Insurance Contract and asked whether it was possible to either lower the amount of the annual premium, or in the alternative, if the anniversary date could somehow be changed because she stated that it was inconvenient to come up with the \$15,735 payment during the time of year when the anniversary payment was due.” The Agent further advised that he then completed a review of the Empire Life policy to determine how the policy was being used and whether the Clients’ goals were being maximized. Additionally, the Agent indicated he was concerned that the Clients had not continued “over-funding” the policy and looked into alternative options for the Clients in relation to their financial situation. The Agent further advised, “[The Agent] revisited [the Clients’] needs analysis and performed a comparative ‘Insurance Charges Cost Breakdown’ calculation [Tab G1] and it became clear to [the Agent] that a change in policy coverage would be beneficial for [the Clients].” Further, “After numerous other life insurance

options with various other insurance carriers were reviewed and considered, [the Clients] confirmed that they wanted to change their universal life insurance policy from Empire Life to BMO and [the Agent] arranged for the transaction to be completed. The key consideration for [the Clients] was their understanding that the Empire Life policy did not adequately meet their short, mid, and long term goals anymore and that the investment return potential provided through the BMO policy far outperformed the returns which were available under the Empire policy.”

Amongst the documents received from the Agent was a copy of the Empire Life application he completed on the Clients dated April 5, 2006, and an unsigned point of sale illustration with a preparation date of April 5, 2006. The application indicated a “Level Sum Insured” death benefit option and a “Level” COI option. The unsigned April 5, 2006 point of sale illustration contained a planned premium schedule of \$30,000.00 annually from the single equivalent age (“SEA”) of 57 to 76. The unsigned point of sale illustration also contained a column setting out the “Total Insurance Charges”, based on the details contained in the illustration. The Insurance Charges totaled \$87,360.00 from age 57 to 66. In the “Explanation of Ledger Columns” section it defined “Total Insurance Charges” as “The sum of all insurance charges including riders, additional benefits, premium loads and the monthly policy fee.” It further defined “Joint Insurance Charges” as “The total charges related to joint coverage only.”

The Agent also provided a copy of an Empire Life “Residual Notice”, “Policy Delivery Receipt” and a signed point of sale illustration with a preparation date of May 9, 2006, which contained the signature of one of the clients [MG] also dated May 9, 2006. The Residual Notice contained delivery requirements and confirmed the Empire Life policy issue date of May 4, 2006. The signed Policy Delivery Receipt confirmed delivery of the policy on May 9, 2006. The signed point of sale illustration contained a planned premium schedule of \$30,000.00 annually from the SEA of 56 to 75 and a column setting out the “Total Insurance Charges” that was based on the details contained in the illustration. The Insurance Charges totaled \$155,940.00 from age 56 to 75.

The Agent provided a copy of an Empire Life policy statement dated May 3, 2010 which confirmed policy values including the monthly COI, changes to the investment options between May 4, 2009 and May 3, 2010 and details related to the Loan Account confirming a policy loan transaction between May 4, 2009 and May 3, 2010.

The Agent further provided a copy of the "Request for Surrender" form for the Empire Life policy signed and dated by the Clients on February 17, 2011 and a copy of an Empire Life "Trilogy Current Statement" dated February 19, 2011, which indicated a "Modal Premium" of \$16,756.08, a "Policy Accumulated Value" of \$21,174.88, a "Policy Surrender Value" of \$6,395.85, and a "Loan Amount" of \$14,691.18.

The material the Agent provided also included a copy of four separate documents titled "Insurance Charges Cost Breakdown (Nov 2010)" ("ICCB"). The ICCB documents contain varying values in the Funding column, the untitled column, and in the Net column. The values in the BMO Charges and Empire Charges columns with a total of \$267,341.76 for the BMO Charges and a total of \$654,783.12 for the Empire Charges are consistent in all four documents.

The Agent provided a copy of the BMO application signed and dated by the Clients on November 24, 2010. The application disclosed the existing Empire Life coverage and that replacement was intended.

The Agent provided a copy of the LIRD form signed and dated by the Clients on November 24, 2010. Included with the LIRD was a copy of an ICCB with the funding at \$50,000.00 from age 56 to 60 and \$100,000.00 from age 61 to 65. The ICCB indicates a total of \$267,341.76 for the BMO Charges and \$654,783.12 for the Empire Charges and is initialed by MG.

The Agent provided a copy of the signed point of sale illustration for the BMO policy with a preparation date of November 23, 2010, and which was signed by the Clients on November 24, 2010. On page 7 of 28, the illustration contains a planned premium schedule of \$50,000.00 annually for the first five years which matches the Funding column of the ICCB attached to the LIRD. On page 20 of 28, the illustration contains a Total Charges to Fund Value Ratio comparison. The Total Charges on this page match the BMO Charges on the ICCB for the first 11 years and then differ from years 12 to 33. On page 27 of 28 of the illustration, COI is defined as "This is the total annual amount withdrawn from the Fund Value of the policy to pay for insurance charges (including additional charges due to increases in coverage that result from the tax-exempt test) but excludes the cost of any riders and benefits." "Administration Fee" is defined as "this is the annualized fee deducted from the Fund Value." Also included was a two page "Supplementary Questionnaire" with instructions to the Investment Allocation and a four page illustration for the "BMO Insurance Insured Retirement Plan."

On November 16, 2012, the Investigator received an e-mail with attachments from the Agent. In the attachments, the Agent provided copies of three ICCB documents, pages 20 of 28 and 21 of 28 of the signed BMO point of sale illustration, an Empire Life "Trilogy Current Statement" dated November 30, 2010, and the entire 28 pages of the signed BMO point of sale illustration (copy not included). On the first ICCB (see pp. 154), the document is identical to the ICCB which accompanied the LIRD and contained the initials of MG. The first ICCB also contained handwritten notes indicating "Expected Funding" related to years 1 to 10 in the Funding column and then "Riders reduce" pointing to year 11 in the Funding column. Pointing to the BMO Charges column, the Agent indicated, "Pg 20 of signed illustration w Riders". Pointing to the Empire Charges column, the Agent indicated, "From Empire Life Statement". Above the untitled columns the Agent indicated, "BMO net Funding" and "Empire net Funding" respectively. On the second ICCB the total of the BMO Charges is \$298,087.86 which was an increase from the first ICCB. The amounts throughout the BMO Charges column on the second ICCB are identical to the "Total Charges" values from pages 20 of 28 and 21 of 28 of the signed BMO point of sale illustration. The difference in the total BMO Charges between the first and second ICCB is explained by the Agent on the second ICCB as "When the riders can be changed and it can be less expensive." The Agent also indicated a savings of 45% or \$356,696 in favour of the BMO policy in comparing the total charges of the two policies. The third ICCB is the same as the second ICCB without any notes by the Agent. The Agent also included pages 20 of 28 and 21 of 28 of the BMO point of sale illustration (see pp. 157-158), which contains the "Total Charges" and the Agent also attached a copy of an Empire Life "Trilogy Current Statement" dated November 30, 2010, which indicated a "Modal Premium" of \$16,756.08, which is the same as the "Trilogy Current Statement" dated February 19, 2011 previously provided by the Agent. This dollar value corresponds to the dollar value the Agent indicated on all ICCB's he provided in relation to the Empire Charges.

On December 12, 2012, the Investigator received a letter dated November 19, 2012 with attached documents from the Agent's counsel wherein he advised that the Agent did not provide a written explanation to the advantages and disadvantages of replacing the existing policy, but rather he used numerous versions of the ICCB's to explain same, including a copy of an ICCB that was initialed by the Clients. The Agent's counsel further advised that the BMO columns in the ICCB's took assumed anticipated future reductions and changes to the riders and provided an "estimate" of the total charges over a 48 year period. He further advised that the column entitled Empire Charges was obtained from the documents submitted previously.

On December 21, 2012, the Investigator received a letter dated December 20, 2012 with attachments from Empire Life including a copy of the Empire Life policy. The policy contained "Policy Summary" pages which included "Policy Information", "Insurance Coverage(s)", and "Cost of Insurance Table" details. The policy also contained "Definitions" including definitions of COI and "Monthly Charge", a section titled "Premiums and Investing" and under "Monthly Processing", provisions related to "Monthly Charge" and COI. In the Policy Summary pages, the Death Benefit Option was "Level Sum Insured" and the COI Rate Structure was "Level". Under the Monthly Charge provision, the Monthly Charge is equal to the sum set out in 1 through 4 which includes the administration fee, total COI, total of Additional Benefit costs and total of extra charges for rated Insurance Coverages and/or Additional Benefits. The policy also contained a formula to calculate COI reductions with various tax-exempt account values.

In addition, the policy provisions provided "Example of [COI]". Under Level Sum Insured it states: "The [COI] and the Net Amount at Risk will increase or decrease depending on the Tax-Exempt Account Value while the Death Benefit will remain level as shown in the following table..." The example shows that as the Tax-Exempt Account Value increases and the Net Amount at Risk decreases, the COI also decreases.

On January 7, 2013, the Investigator received an e-mail with attachments from BMO. The attachments included a letter from BMO to the Clients dated December 29, 2010, confirming the issuance of their policy and confirmation of the investment allocation of their deposits. The attachments also included a copy of the policy which included Policy Information pages and tables confirming the guaranteed COI. Also included was a copy of the Clients' letter to BMO dated November 3, 2011, which requested the surrender of the BMO policy.

The Report also contained a letter from the Clients to the investigator dated January 7, 2013. The Clients reiterated the concerns raised in their letter dated August 29, 2011 and confirmed they replaced the BMO policy sold by the Agent. The Clients further advised, "As soon as [the Agent] received his approval and authorization to act as a representative of [BMO], (which authorization we have heard has since been suspended) he commenced lobbying with us and urging us to abandon our Empire Life policy, and convert as quickly as possible to BMO Life. Both I and my wife, [CG] were reluctant to do this because we were perfectly content with the (sic) the existing coverage under Empire Life." The Clients further advised, "You refer to the LIRD [LIRD] in your letter. We recall signing such a form with [the Agent], but the total duration of his dealing with said form was about thirty (30) seconds. No written explanation whatsoever."

The Clients further advised, “You refer in you (sic) letter to a document entitled [ICCB]. If this was viewed by us, it was with no explanation from [the Agent]. Clearly, the cost of such policy to us was a significant net increase from our former policy(s) with Empire Life.” The Clients further advised, “The policy contributions are onerous, and premium payments were over \$2000.00 per month (much higher than Empire’s). We now believe, upon studying this matter, that [the Agent] purposely placed us in insurance coverage that was far in excess of what we needed, or wanted. He offered virtually no proper explanation of said coverage, or any rational justification for same.”

As to the allegation that he grossly misstated the Empire Life insurance charges in the ICCB’s, the Agent wrote in his Addendum as follows:

I created the excel sheet by using the export tool from the BMO software. The insurance charges came directly off their policy statement, as they were not following their planned illustration. The cash values used did not include any interest, and there was no grossing up numbers for financial gain. The spreadsheet was only one of the many items that the clients reviewed, to help illustrate the differences in the policies, level COI vs. the proposed ART JLTD in the BMO policy (including the life, rider, and CI charges).

We reviewed many different versions of this spreadsheet, in combination with their Empire statements, initial Empire illustrations, the proposed BMO options, and investment options. The clients signed and or initialed the sheets used to show that we did an extensive review all (sic) options available to them. They were given paper copies of spreadsheets, and proposed BMO illustrations.

Discussion

As to the allegations under Count 1, 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 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 he required to maintain his securities license was applicable to his insurance agent requirements. The Insurance Councils Appeal Board 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).

[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)

In this case, the Agent sold the Clients an Empire policy in 2006. Thereafter, in 2010, the Agent replaced the Clients' Empire Life policy with the BMO policy in question. In this regard, he prepared and presented the ICCB documents that purported to compare the cost of insurance between the two policies. When the Agent detailed the insurance charges of the Empire Life Policy he completely disregarded the deposits that were being made in his chart and the fact that those deposits would reduce the insurance charges over time. Rather, they are purported to stay level until age 95. Given the deposits that were outlined in the ICCB's and the change that these would produce in the Tax-Exempt Account Value and the Net Amount at Risk, the insurance charges that the Agent outlined were simply false. As such, the first element of the test enunciated above has been met.

As to the Agent's intent, it is interesting to note that the Agent utilized a number of assumptions that resulted in the BMO policy having a much lower cost of insurance. In other words, he used every opportunity to minimize the cost of insurance in the BMO policy while, at the same time, falsely overstated the cost of insurance of the Empire Life policy. This was clearly intentional and simply could not be the result of some sort of accident. Given this we are satisfied that the Report provides sufficient clear and cogent evidence to prove that the Agent made a misrepresentation or acted in an untrustworthy manner as contemplated in s. 480(1)(a) of the Act.

As to the applicable sanctions, we have the ability to levy civil penalties in an amount not exceeding \$5,000.00 pursuant to s. 13(1)(a) of the *Certificate Expiry, Penalties and Fees Regulation*, A.R. 125/2001. We also have the ability to suspend or revoke the Agent's certificate of authority to act as an insurance agent. Given all of the facts, we are of the view that a substantial civil penalty is warranted. The Agent is not a newly licensed advisor and has a number of years of experience. Additionally, he sold the policy that was replaced and clearly would have known how to properly complete the comparison. As such, we order that a civil penalty in the amount of \$3,000.00 be levied against the Agent. We further order that his certificate of authority be suspended for a period of 30 days.

As to the second allegation, it is not in dispute that a replacement of the existing policy was intended. As such, pursuant to s. 5 of the Regulation, the Agent was required to complete a replacement declaration for the client prior to taking the application. The Replacement Declaration indicates that he provided the Client with a written explanation of the advantages and disadvantages of the new policy in comparison to the existing policy. While he may have given them a myriad of information documents regarding the new policy and perhaps reviewed elements of the existing policy, the only documents that really compare the two are the ICCB's and given their inaccuracy it cannot be said that he provided the Clients with the written explanation that is referenced in the Declaration. As such, we find that the Agent breached s. 5 of the Regulation as alleged.

As to the applicable sanctions, we have the ability to levy civil penalties in an amount not exceeding \$1,000.00 pursuant to s. 13(1)(b) of the *Certificate Expiry, Penalties and Fees Regulation*, A.R. 125/2001. We also have the ability to suspend or revoke the Agent's certificate of authority to act as an insurance agent. Given all of the facts, we order that a civil penalty in the amount of \$300.00 be levied against the Agent. We do not feel that a license suspension or revocation would be appropriate here.

Therefore, we have found the Agent guilty of an offence under s. 480(1)(a) of the Act and levied a penalty of \$3,000.00 with a suspension of 30 days under Count 1. In Count 2, the Agent was found to be in contravention of s. 5 of the Regulation, and we levied a penalty of \$300.00. Total penalties are \$3,300.00 and a 30 day suspension of the certificates of authority. The civil penalties must be paid within 30 days of receiving this notice. In the event that the penalties are not paid within 30 days, interest will begin to accrue and the certificates of authority cannot be reinstated until they are paid. The suspension will commence on the 8th day after the mailing of this decision. Pursuant to s. 482 of the Act (copy enclosed), the Agent has 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: July 23, 2013

Original signed by
Phyllis Kobasiuk, Vice-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