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 Gerry Kosior
(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. Specifically, it is alleged that the Agent proposed that a client (DB) transfer an existing variable life insurance policy designated as a locked in retirement account ("LIRA") to a new variable life insurance policy designated as a life income fund account ("LIF"). Specifically, it is alleged that the Agent advised DB that he would be eligible for a pension income tax credit to offset the taxable income he would receive from the LIF account payments when, in fact, DB was ineligible to qualify for the pension income tax credit. As a result, it is alleged that the Agent made a misrepresentation and therefore contravened section 480(1)(a). In addition or in the alternative, it is alleged that the Agent made a false or misleading statement contrary to section 509(1)(a) of the Act.

Facts and Evidence

This matter proceeded by way of a written Report to Council dated June 3, 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 signed the Report on June 20, 2013 and submitted an Addendum by way of a letter.

The Agent has been licensed since at least January 26, 1996 (the date upon which the AIC started keeping electronic licensing records) for Life and Accident and Sickness ("A&S") insurance. On July 31, 2012, the AIC received a letter and accompanying documents from DB. In his letter, DB set out the concerns he had about the Agent and the insurer on whose behalf the Agent worked ("Manulife"). DB advised that his complaint related to changes that the Agent made to his Manulife LIRA in 2008 and to Deferred Sales

Charges ("DSC") payable on the new Manulife LIF contract that the Agent sold to him. Specifically, DB advised that "[the Agent] proposed that we could withdraw some money from our LIRA which could be invested into an RRSP. We understood that would 'free up' some money so we could increase our retirement savings." DB further wrote that "[w]e didn't fully understand the income tax consequences of taking money out of the LIRA and putting it back into an RRSP but we went along with [the Agent's] recommendation." Additionally, DB wrote that "[a]t no point did [the Agent] give us any outline of his advice in writing, nor did he tell us that there would be taxes payable on the $1,800/year withdrawn from the LIRA. Further he never explained that us (sic) there would be new back-end charges for doing this change. We would have refused if things had been explained properly to us."

Amongst the attachments that DB submitted was a copy of an October 25, 2011 complaint letter submitted to Manulife. Further, he provided the AIC with a letter from "CG" of Manulife to DB dated June 11, 2012 with an attached "Release and Assignment of Action". CG advised [DB] that:

> [the Agent] states that he discussed a number of investment options with you such as leveraging to invest, TFSA, etc and that the transfer of the LIRA to a LIF policy was part of a larger financial strategy you had decided to complete with him. After the transfer of the LIRA to LIF, you were to return for a follow up visit the next month to implement a PAC to contribute monthly to an RRSP with the new income flow from the LIF. In addition, there was new LIF legislation being introduced at that time which was expected to allow you to claim a pension tax credit for the LIF income. Unfortunately this legislative change did not materialize.

On August 22, 2012, an AIC investigator wrote to CG and requested information and documentation. CG responded by way of letter and accompanying documents on September 17, 2012. Amongst the documents she provided were communications between CG and the Agent that included a April 20, 2012 email that read as follows:

> When I met with [DB] regarding his LIRA account, new legislation regarding LIF's was being introduced. I reviewed [DB's] personal situation regarding current personal income and tax deductions against it as he was earning [amount] per year. It was my interpretation after talking to a local person at Revenue Canada that an annuity (GIF) would qualify for the $2,000.00 annual income pension deduction prior to age 65. Thus the $2000/yr. payout based on an account of approximately $40,000 and a conservative ROR of 5%, the principle would remain intact and no tax would be paid on the $2000. If the payout was based on a $20,000 investment and the other $20,000 rolled into an individual RRSP then the $20,000 LIF with a $2000 per year withdrawal would require a 10% ROR to keep capital intact. This type of payout could not be guaranteed nor [sic] sustainable. The

$2000/yr. income that [DB] was receiving had some flexibility in the payout amount and could be reduced to an annual minimum of $800 per yr.

This was the first part of an overall financial plan that was going to be implemented for [DB]. [DB] was supposed to contact me to set up a monthly PAC for the RRSP in July 2008. [DB] never contacted me. Other plans to be looked at and possibly implemented were a leveraged loan to reduce [DB's] taxable income, TFSA and a non-registered investment. We discussed that the fee schedule would a [sic] DSC fee similar to the previous account. Under the intended strategy the client would have avoided a reduction of the funds that would result from a front end fee and if the client would have maintained the contract there would have been no negative consequence to the client given the 20% free withdrawal level. That is why the DSC fee was selected. Had we continued to work with this client there would have been no negative impact and we would have sought to resolved [sic] the error regarding our interpretation of the pension income deduction.

In summary, there was an error based on the information received from the CCRA but due to lack of further communication by [DB], the above noted future implementations never took place and the next notification was a transfer out of the whole portfolio without any further consultation on December 2, 2010 at the request of the owner to another advisor. The overall principle was to guarantee the income level in a sustainable contract, take advantage of the Pension Deduction, had it been available, and systematically move funds to a TSFA [sic] environment.
Unfortunately, we did not have the opportunity to manage the deployment of the full strategy and remediate the misinterpretation of the pension deduction status.

In a letter that the Agent wrote to the investigator on January 28, 2013, the Agent recounted the manner in which his relationship with DB commenced and the process he undertook to advise DB. In paragraphs 10 – 11 he also wrote the following:

10. I believe I was not aware this strategy would not work until the following tax year when my spouse received a receipt for $2000 LIF income. This is when I realized the strategy was not accurate and one had to be age 65 to qualify for this deduction. Since this option is irrevocable, the only partial remediation was to reduce the amount received in pension income to the LIF minimum to reduce the tax payable on this income. This information unfortunately did not trigger the fact that there was a problem with [DB's] account nor was I contacted by [DB] that he had received a tax receipt for the income. If I was contacted, we could have reduced the payment to the minimum of approximately $700-$800 per year, thus reducing the tax burden. With $117,000 RRSP contribution room limit, there was plenty of room to do this.
    At worst, [DB] could have contributed $2000 to a spousal RRSP. This would have offset the $2000 of income that he received, thus tax neutral. [DB] would receive 36% reduction off taxes and when he was ready to take the income it would probably be taxed at 25% based on [TB's] present annual income of [amount].

11. In December of 2010 we received notice of a Transfer Advisor Notification fax that [DB] had changed advisors. Once it was brought to my attention that the pension income strategy would not work, I offered to refund any DSC charges incurred if [DB] wanted to transfer the product to another account or company as some restitution for the error I had made. This offer was declined by [DB].

In his Addendum the Agent again restates the salient facts and the advice he gave. He also referenced (among other things) the length of time he has been in the industry, the professional designations he holds, the cooperation that he exhibited throughout the investigation and the innocent nature of the mistaken advice that he gave. He also submitted that the recommended 1 – 3 month suspension would not be appropriate.

Discussion

As to the first allegation, 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. In other words, the applicable standard of proof is the civil burden rather than the heightened standard found in the context of criminal cases. However, the requirement that any adverse finding against the Agent be based on clear and cogent evidence reflects the fact that our decisions can dramatically impact an insurance agent's ability to remain in the industry.

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 Life Insurance Council found that an Agent committed an offence pursuant to s. 480(1)(a) of the Act when he attested to completing his required continuing education ("CE") hours when this was not, in fact, true. 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 likewise found the Agent guilty of an offence and the Agent thereafter 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)

In reviewing the evidence in the report we are prepared to give the Agent the benefit of the doubt as it pertains to the allegation made under s. 480(1)(a) of the Act and find him not guilty of this more serious offence. It is clear that the Agent made a false statement in regard to the legislation and tax consequences that were triggered by his advice to DB. However, we do not believe that the Agent's intent rises to the level of a 480(1)(a) offence and the tests set out above.

However, s. 509 of the Act prohibits agents from making any "false or misleading statements, misrepresentations or advertisements." The Agent candidly admits that he misinterpreted the legislation at issue and that the advice that he gave was not correct. Given this, we are satisfied that he committed the lesser offence as alleged in the Report and made a false or misleading statement as contemplated in s. 509 of the Act.

In terms of the sanctions available to us, pursuant to s. 480 of the Act and s. 13(1)(b) of the Certificate Expiry, Penalties and Fees Regulation, A.R. 125/2001, we normally have the jurisdiction to levy a civil penalty in an amount not exceeding $1,000.00. However, the three year limitation period on levying

civil penalties (as found in s. 480(9) of the Act) has passed. As such, we make no order as to the levying of a civil penalty.

We also have the authority to revoke the Agent's certificate of authority for one year or suspend it for up to a year. In this case, the Agent cooperated throughout the investigation and candidly admitted his error. Further, he is a long-standing agent that does not have any previous disciplinary offences. Given this, we do not believe that a revocation or lengthy suspension would be appropriate in the circumstances. However, the client in this case was put at risk and was adversely affected by the Agent's conduct. As such, we order that the Agent's certificates of authority by suspended for a period of one month.

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 Life Insurance Council. The motion was duly recorded in the minutes of that meeting.

Date: September 23, 2013

Original signed by:
Ken 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
402 Terrace Building
9515-107 Street
Edmonton, Alberta T5K 2C3