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 Paul Moore
(the "Agent")

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

This case involved allegations pursuant to ss. 480(1)(a) of the Act. Specifically, it is alleged the Agent orchestrated a "churning" scheme whereby he repeatedly transferred funds within existing registered or non-registered IVIC contracts from a deferred sales charge option investment ("DSC") to an investment with an initial sales charge option ("ISC"). It is further alleged that he would wait approximately 90 days and then transfer the same client investments back to a DSC investment and that repeated commissions were generated for these transfers. In so doing, it is alleged that the Agent acted in an untrustworthy and dishonest manner pursuant to s. 480(1)(a) of the Act.

Facts and Evidence

This matter proceeded by way of a written Report to Council dated May 13, 2015 (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 submitted an addendum by way of a one page letter.

The Agent is a resident of British Columbia and has been licensed to act as a life and accident & sickness insurance agent in Alberta since April 1, 2008. On October 20, 2014, "SL" (an official of RBC Life, hereinafter referred to as "RBC") emailed an AIC investigator to alert the AIC to an internal RBC

investigation. Accompanying the email from SL were, among other things, a spreadsheet that detailed 59 Alberta and British Columbia accounts and the "Dealer Commission Paid Amount" which indicated commissions paid to the Agent for the applicable transactions. Of this spreadsheet, SL wrote that it:

> …outlines the transferring of 10% free units allowed annually to ICS and waiting to just outside the 90 day period to transfer them back into DSC resulting in the payment of additional commission and avoiding the short term trading period, as well the client loses the benefit of taking 10% free out of the DSC and not incurring redemption fees in the event of a withdrawal of funds. My conclusion in the review of his business is that he is churning in order to receive additional commission.

In response to a request from the investigator SL provided further documents with a letter dated November 15, 2014. These included copies of a "Statement of Value and Activity" (the "IVIC Statement") documents, an "RBC Guaranteed Investment Funds Trading Authorization" form (the "Trading Authorization Form") and the Switch Forms in relation to 19 IVIC client accounts with Alberta addresses and the fund switches in question.

The IVIC Statements contain information including the client name and address, as well as information in a section titled "Account Information" including the "Account Type" and "Account Number". They also contain information in a section titled "Your Account Details" which detail the "Trade Date", "Transaction Type", "Amount", and any applicable "Capital Gain/Loss" in non-registered accounts.

Each Trading Authorization Form bears the client and Agent signatures and is dated in the client signature section. In relation to one client (an Alberta numbered company), the Trading Authorization Form indicates, "I, …, the owner of investment contracts (the 'Contract(s)'), hereby authorize my Advisor ('you'), …, through this Trading Authorization (the 'Letter') to convey instructions, on my behalf, to [RBC] (the 'Company')."

The Trading Authorization Form also includes the following provision:

> Notwithstanding the generality of the foregoing, your authority hereunder shall be limited to conveying instructions, including but not limited to instructions communicated via electronic means, in respect of options offered under the Contract(s). These options are limited to Instructions relating to: … switching money from one investment election to another within the same Contract, or between Contracts with the same owner (I recognize that switching between Contracts may incur charges as per the terms of my Contracts)….

While there are slight versioning differences from client to client, the Trading Authorization Forms do not vary significantly.

The Switch Forms prove the sequence of fund transfers from DSC fund(s) to ISC fund(s) and after the 90 day period, back to DSC fund(s). The Switch Forms were not signed by the clients. Rather, the Agent signed and dated the Switch Forms on the basis of the Trading Authorization Forms noted above and he indicated to RBC that he had trading authority.

SL's email also contained copies of communications that passed between SL and the Agent. Included amongst these were a letter that the Agent wrote to SL dated July 25, 2014 which reads as follows:

> Thank you for your letter of July 23, 2014 asking for explanation of certain transactions for our clients.
>
> At Priority Wealth Management we utilize both Strategic and Tactical Asset Allocation strategies. Asset allocation is an important factor in determining returns for an investment portfolio. This is solidly based on the principle that different assets perform differently in different market and economic conditions. A fundamental justification for asset allocation is the notion that overall risk in terms of the variability of returns for a given level of expected return.
>
> This requires regular time and labour intensive monitoring on my part in order to properly rebalance the client's portfolios to stay in line with their investment objectives and to take advantage of market opportunities. On occasion, in non-registered accounts, this may result in immediate tax obligations to the client. However, this will also reset their adjusted cost base that will lessen their future tax obligations when they sell their entire position. The immediate tax obligation (if any, as many clients have carried forward capital losses) is a minor inconvenience to the client when weighed with the benefits of rebalancing their portfolio to offset market risk and increase portfolio performance. We feel this is to the client's long term advantage and is clearly explained to the client at the time of opening their account with a signed Trading Authorization Form 00518 (08/2012) as well as the Change (Deposits, Switch, Reset) Form 00521 (01/2014). To date I have never received any complaint [sic] from our clients in our asset allocation strategies.
>
> These strategies are developed in greater detail in the Wealth Management Techniques course and Financial Management Advisor diploma from the Canadian Securities Institute, which I completed in 2004.

SL also provided the investigator with portions of the applicable RBC "Information Folder and Contract (Including Fund Facts)" (the "Information Folder"). Among other things, the Report noted a number of

provisions related to fund transfers. Section 4 contains provisions related to "Switches" including "General Information" in section 4.1 which indicates:

> Upon request and subject to our Administrative Rules, you may switch monies between Funds within your Contract on a scheduled or unscheduled basis. Please see Section 8.2 for additional information concerning the Unit Values and Valuation Dates that apply to a switch. No sales charges apply to the Units purchased or redeemed as part of the switch. If the Units redeemed were subject to a sales charge, the Units purchased will be subject to the same sales charge as if they continue to be the Units redeemed.
> …
> Switches between Series or between different Sales Charge options is a surrender of units of a Fund in one Series or Sales Charge option to acquire units of the same or another Fund in a different Series or Sales Charge Option. Any applicable fees may apply and we may not carry over your original Deposit Date which will impact your death and maturity benefit guarantees

Section 5 contains provisions related to "Withdrawals" including "Low sales charge and deferred sales charge Units". Specifically, section 5.3.2 notes that "[t]here are sales charges for redeeming Units you previously purchased using the low sales charge or deferred sales charge options. If you redeem those Units after the sales charge scale has expired, there are no further sales charges. If you redeem any Units within 90 days after purchasing them, a short-term trading fee may apply." This section goes on to note that "[e]ach year you may redeem low sales charge and deferred sales charge Units without paying any sales charges up to your annual sales charge-free limit."

Section 11 sets out certain "Tax Information". "Taxation of Non-Registered Contracts" is governed by section 11.2 which reads as follows:

> If you withdraw from, or switch Units of, a Fund (including, to pay for deferred or low load sales charges or other fees and charges, or on the surrender of your Contract on maturity or the death of the Annuitant), you may realize a capital gain (or capital loss) to the extent the proceeds of disposition you receive exceed (or are exceeded by) the adjusted cost base of the Units being withdrawn or switched.

The investigator wrote to the Agent to request further information on January 7, 2015. In response dated January 19, 2015, the Agent parenthetically referenced the investigator's individual questions and wrote:

> Thank you for your letter of January 7, 2015 asking for explanation of certain transactions for our clients.
>
> Here are my answers to your requests:

1) I met most of my Alberta clients when I lived in Alberta in 2005 – 2007. I served on a volunteer hospital visitation group at the Queen Elizabeth II Hospital in Grande Prairie, Alberta. I also volunteered at the GP Aquatic Centre and worked for the Royal Bank as an Investment Retirement Planner. All of the clients that were mentioned in your letter I have gotten to know personally because I set up the Group Retirement Plan for [KC] in Grande Prairie. They are all employees and participants in that plan. I have put on many seminars over the years for them, met them in their homes, and have spoken to them over the telephone countless times. I travel to Grande Prairie to meet them about 4 times a year on average. The only clients that are not part of the Group Retirement Plan are [TY and LY] who are personal friends of mine for many years. I was the original insurance agent for every client mentioned.

2. 3) At Priority Wealth Management we utilize both Strategic and Tactical Asset Allocation strategies. Asset allocation is an important factor in determining returns for an investment portfolio. This is solidly based on the principle that different asset classes offer returns that are no perfectly correlated, hence diversification reduces the overly risk in terms of the variability of returns for a given level of expected return.

This requires regular time and labour intensive monitoring on my part in order to properly rebalance the client's portfolios to stay in line with their investment objectives and to take advantage of market opportunities. On occasion, in non-registered accounts, this may result in immediate tax obligation (if any, as many clients have carried forward capital losses) is a minor inconvenience to the client when weighed with the benefits of rebalancing their portfolio to offset market risk and increase portfolio performance. We feel this is to the client's long term advantage and is clearly explained to the client at the time of opening their account with a signed Trading Authorization Form 00518 (08/2012) as well as the Change (Deposits, Switch, Reset) Form 00521 (01/2014). To date I have never received any complaint [sic] from our clients in our asset allocation strategies. These strategies are developed in greater detail in the Wealth Management Techniques course and Financial Management Advisor diploma from the Canadian Securities Institute, which I completed in 2004. I let my clients know from the beginning of our relationship that we typical [sic] rebalance the portfolio 4 times a year if market conditions warrant it, and if there will be no change to the client. We also explain that we do so under the authorization conferred under the Trading Authorization form. That eliminates the need to have them sign paperwork which can prove problematic when they are away from home working on oil rigs. They are also aware that they receive trade confirmations mailed to their homes that explain the transaction. On the rare occasion that there should be a deferred sales charge incurred, we would explain that to the client prior to conducting any trade. Since most of my Alberta clients are part of the same group plan, I would typically do the same transactions at the same time, since most of the clients will share similar time horizons, investment objectives, and similar account balances.

4) As far as moving ISC funds into DSC funds, this is how I was shown at any bank or Insurance company I have worked with in the past. In 2007 I specifically asked the RBC Insurance management about this and was told that as long as the trade is in the best interest of the client that it is not inappropriate to do this. I was never advised of any change in this.

> I hope this answers any questions you may have. I care about all of my clients and wish to conduct myself professionally. Please feel free to contact me at any time.

As noted at the outset of this Decision, the Agent provided the Council with additional submissions by way of a one page letter which reads as follows:

> As we had discussed on [sic] our telephone conversation of May 13, 2015 I had previously spoken with RBC Insurance on at least two different occasions in the past in regards to the fund switches. I was told in 2007 by [TC], RBC Insurance and also in April of 2014 by [NS], RBC Insurance that it was not inappropriate to move ISC Funds back into DSC Funds as I had been doing. Perhaps a follow up call with either of them would provide more clarity on this.
>
> When I received a letter from [SL] on July 23, 2014, I was asked about my rationale behind these trades, which I politely explained to her in my letter of July 25, 2014 (Exhibit D). It was not until November 4, 2014 that I received a letter asking me not to rebalance portfolios for clients in this manner. I immediately complied with those instructions from that point on and have continued to do so.
>
> Again, it was never my intention to do anything that was inappropriate and can assure you I will not move ISC to DSC funds again in the future.

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 were outlined 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 Insurance Councils Appeal Board dismissed the appeal and also found the agent guilty of the offence. The agent subsequently appealed to the Court of Queen's Bench. In his reasons for judgment dismissing the agent's appeal, Mr. Justice Marceau reviewed the requisite test and wrote 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 applying this test to the case before us, the Agent repeatedly and systematically engaged in an exercise of moving client investments from funds with DSC's to those with ISC's that resulted in new commission payments to the Agent. Following this, the Agent would transfer the same money back to funds with DCS's once 90 days had passed. After reviewing the evidence before us in detail we can discern no legitimate rationale for the Agent's repeated actions. Rather, it is our conclusion that the Agent misused his trading authority to generate multiple new commissions on existing investments so as to benefit himself.

We base this conclusion on a variety of factors including, among other things, the number of clients involved, the precise timing of the transfers and the repeated pattern of moving funds from one service charge option to another and then back again. The lack of any individual needs analysis that underpinned the transfers also called their legitimacy into question. While not binding on us, another factor that we took into consideration was RBC's investigation and its ultimate conclusion that the Agent repeatedly churned files in a manner that was not in his clients' best interests. Therefore, we find that the Agent acted in a dishonest and untrustworthy manner in relation to the 19 Alberta clients and find him guilty of 19 offences pursuant to s. 480(1)(a) of the Act.

As to the appropriate sanction for this conduct, we typically have the ability to levy civil penalties in an amount up to $5,000.00 for offences pursuant to s. 480(1)(a) and 13(1)(a) of the *Certificate Expiry, Penalties and Fees Regulation*, A.R. 125/2001. We also have the ability to order that certificates of authority be revoked for one year or suspended for a period of time. Based on the facts in this case, we believe that a significant civil penalty is warranted. The Agent designed and implemented an ongoing scheme to misuse the broad trading authority his clients granted so as to benefit himself. As noted by RBC, the Agent's clients were entitled to make transfers of up to 10% out of their DSC funds without incurring fees. However, this benefit was spent as a result of the Agent's unnecessary transfers and, therefore, would not have been available where a transfer was actually warranted.

Additionally, we are troubled by the Agent's responses. In his letters, the Agent repeatedly tries to argue that the transfers he undertook were legitimate "rebalancing" efforts that were undertaken for his clients' benefit. He indicates that his actions were the result of bad training and that he will not make transfers between ISC and DSC funds. This Council does not take issue with transfers that agents make on their clients' behalf where they are competently made and undertaken in the clients' best interest. However, the evidence before us proves that the Agent was motivated by and acted in his own interests rather than those of his clients.

Given all of these factors, we believe that significant civil penalties are appropriate. Therefore, we order that a civil penalty of $2,500.00 be levied against the Agent on each of the 19 counts (total $47,500.00). We also have the ability to revoke the Agent's certificates of authority for one year or suspend them for a period of time. Given the circumstances, including the number of clients involved, his misuse of trading authority granted to him by his clients, the overarching need to protect the public and deter future such conduct from the Agent, we are of the view that revocation of the Agent's certificates of authority is the appropriate penalty on each of the 19 offences (concurrent) as well.

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 rate of 12% per annum in accordance with s. 13(2) of the *Certificate Expiry, Penalties and Fees Regulation*. The revocations will commence on the eighth (8) day after the mailing of this decision. 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: July 22, 2015

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
Alberta Finance
402 Terrace Building
9515-107 Street
Edmonton, Alberta T5K 2C3