

INSURANCE COUNCILS APPEAL BOARD OF ALBERTA

In the Matter of the *Insurance Act*, R.S.A 2000, c. 1-3, as amended ("*Insurance Act*")
And in the Matter of the *Certificate Expiry, Penalties and Fees Regulation*, Alta. Reg.
125/2001, as amended ("*Fees Regulation*")

BETWEEN:

DESLAURIER FINANCIAL SERVICES INC. / TRAVELINSURE.CA
(TRACY DESLAURIER-DESIGNATED REPRESENTATIVE)

Appellant

- and -

LIFE INSURANCE COUNCIL

Respondent

Heard in Edmonton, Alberta on October 12, 2018

Before:

GWEN HARRIS
DAVID BRITTAİN
DEAN HUNT

Appeal Panel Chair
Appeal Panel Member
Appeal Panel Member

DECISION AND ORDER

1. This is an appeal by DesLaurier Financial Services Inc. / TravelInsure.ca ("the Appellant") of the June 13, 2018 decision of the Life Insurance Council. The Life Insurance Council held that the Appellant failed to remit premiums over to the insurer pursuant to section 504 of the *Insurance Act*. The Life Insurance Council ordered the suspension of the Appellant's certificates of authority for a period of six months and levied a civil penalty of \$1000 pursuant to section 13(1)(b) of the *Fees Regulation*.

Procedural History

2. By letter dated July 24, 2018 to the Superintendent of Insurance, the Designated Representative of the Appellant commenced the appeal of the June 13, 2018 decision. On July 31, 2018, the Superintendent of Insurance finalized the selection of panel members from the Insurance Councils Appeal Board to hear the appeal. The Superintendent of Insurance subsequently granted the Chair's request for an extension of the statutory time limit for hearing the appeal.

Preliminary Matters

3. The Designated Representative of the Appellant attended the hearing on October 12, 2018. Mr. Martz appeared as counsel on behalf of the Life Insurance Council.
4. The parties confirmed they had no objection to the constitution of the hearing panel and raised no objection to the hearing panel's jurisdiction to hear and decide the appeal.
5. The Life Insurance Council conducted its review of the Appellant's alleged failure to remit premiums collected from clients for travel insurance policies to the insurer on a documentary basis. The panel received and reviewed the following documents prior to the hearing:
 - a. The record provided by the Life Insurance Council which included the materials before the Life Insurance Council, the June 13, 2018 decision of the Life Insurance Council and the June 22, 2018 letter from the Alberta Insurance Council and the July 24, 2018 email message from the Alberta Insurance Council to the Appellant transmitting the decision of the Life Insurance Council.
 - b. The July 24, 2018 letter from the Appellant to the Superintendent of Insurance.
 - c. The written submission of the Life Insurance Council dated October 8, 2018.

Issues to be Determined

6. **Did the Appellant collect premiums from clients and fail to remit those premiums to the insurer?**
7. **If so, is the six month suspension of the Appellant's certificates of authority and the civil penalty of \$1000 imposed by the Life Insurance Council appropriate?**

Relevant Legislation

8. The obligations of an insurance agent for dealing with premiums collected are set out in Part 4 (Market Conduct) of the *Insurance Act*. The provisions relevant to the present case state:

502(1) A payment to an agent, or an insurer or to an insurance agent who represents an insurer, whether in cash or by negotiable instrument and whether in whole or in part, of the amount of a premium

- (a) due in respect of a contract issued by the insurer, or
- (b) that will become due in respect of a contract not yet issued by the insurer,

is deemed a payment to the insurer, despite any condition or stipulation to the contrary.

503 An insurance agent is, for the purpose of receiving any premium for a contract of insurance, the agent of the insurer under the contract, despite any conditions or stipulations to the contrary.

504(1) An insurance agent who acts in negotiating, renewing or continuing a contract of insurance with an insurer 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.

9. Section 480 of the *Insurance Act* allows, in part:

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

- (b) has contravened any provision of this Act or the regulations ...

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.

(2) The amount of a penalty imposed under subsection (1) is governed by the regulations.

10. In a 2001 directive, the Minister's powers duties and functions as set out in the provision quoted above were delegated to the Life Insurance Council by the Minister of Finance.

11. Section 13 of the *Fees Regulation* authorizes the imposition of the financial penalty that is the subject of this appeal as follows:

13(1) For the purposes of section 480(2) of the Act, the amount of the penalty that may be imposed may not exceed the following:

...

(b) \$1000 for a matter referred to in section 480(1)(b), (c), (d) or (e) of the Act.

Submissions

12. In written and oral submissions, Counsel for the Life Insurance Council submitted:

- a. On July 14, 2017, the insurer demanded the Appellant pay unremitted premiums of \$45,856.54.
- b. While the Appellant disputes the amount of premiums due, its failure to pay premiums owing to the insurer is undisputed as acknowledged by the Designated Representative of the Appellant in December 15, 2017 and January 8, 2018 emails sent to the Alberta Insurance Council and in the March 9, 2018 letter to the Alberta Insurance Council.
- c. The *Insurance Act* provides that an agent holds premiums in trust for the insurer and is to pay the premiums to the insurer within 30 days of a demand.
- d. In failing to remit the premiums within the prescribed period, the Appellant violated sections 504(1) and (2) of the *Insurance Act*.
- e. The Appellant took no steps to remediate the problem.
- f. The penalties imposed reflect the seriousness of breaching the statutory requirement to remit the premiums collected to the insurer.

13. The Designated Representative of the Appellant argued that the penalties imposed are too severe given the legitimate business reasons for not remitting the premiums to the insurer. In support of this position, he submitted:

- a. The administration of the insurance products for which premiums were not remitted turned out to be much more complicated than he had anticipated. As a result, he had to invest **Confidential** for back office support. **IB i**
- b. **Confidential Business Information**

- c. The insurer did not enforce payment of the premiums.
- d. The insurer indicated it was willing to wait for payment of the premiums Confidential Business Information September 2017. Confidential Business Information
- e. The insurer made a complaint to the Alberta Insurance Council when the sale fell through and commenced legal action.
- f. The civil penalty of \$1000 is too severe given recent cases before the Life Insurance Council in which penalties were reduced to \$500 because the appellants complied with demands. He also complied but did not receive a reduction.
- g. As this is the first complaint against him in 27 years in the industry, the suspension of the certificates of authority is unprecedented.
- h. The reasoning applied by the General Insurance Council in its July 20, 2018 decision (Whitecourt Insurance Agency) should apply to this case. In that case, the Council stated: "The imposition of a suspension or revocation would be unusual for this first and singular offense".
- i. The failure to remit the premiums to the insurer did not affect the consumer.
- j. As a consequence of the Life Insurance Council decision, he has suffered significant financial setback and his business activities have been jeopardized due to the suspension on October 1, 2018 by his Managed General Agency and the cancellation of representation by his sponsoring agency.
- k. He was unable to take steps to remediate the situation because of the legal action taken by the insurer.

14. In response to questions, the Designated Representative of the Appellant provided the following information:

- a. Through 2015 and to the end of 2016 when the deal with the foreign government fell through, the Appellant was current with remitting premiums to the insurer. Approximately \$75,000 in premiums was remitted to the insurer.
- b. Premium remittances to the insurer were never current after the end of 2016 but the insurer was willing to wait to be paid Confidential Business Confidential Business Information September 2017.
- c. The certificates of authority have now been suspended for two months. To be consistent with the prior ruling of the General Insurance Council on a first offense, there should be no suspension of the certificates. To be consistent with rulings where the party complied with the Insurance Council requests, the financial penalty would be \$500. Given the cost he has incurred to date as a result of the loss of his license, the fine and suspension period should be zero.

- d. The Appellant owes remittances to the insurer for premiums collected from December 2016 through May 2017 for about 50 policies.
- e. The amount claimed by the insurer is inaccurate because it does not take into account early returns that reduced the cost of the policies.

Discussion

Remittance of premiums to insurer

- 15. The Appellant held a life insurance agent's certificate of authority and an accident and sickness insurance agent's certificate of authority from May 3, 2012.
- 16. The record shows the Appellant executed an agreement with the insurer on November 19, 2015. In brief, the insurer appointed the Appellant as an agent to market and distribute travel medical and related insurance products underwritten by the insurer. The agreement made provision for the remission of premiums and specified that the premiums (less commissions) were the property of the insurer and were to be maintained in a specifically designated trust bank account.
- 17. The record also shows the insurer terminated the agreement on May 19, 2017 due to the Appellant's failure to remit premiums. The insurer advised the Appellant that it was not prepared to consider alternative arrangements until the account was current. The Designated Representative of the Appellant advised the panel that the insurer extended the agreement to May 31, 2017.
- 18. On July 14, 2017, the insurer issued a written demand for payment of \$45,856.54 for outstanding premiums. On October 3, 2017, the insurer lodged a complaint with the Alberta Insurance Council in respect of the Appellant's failure to remit premiums.
- 19. It is undisputed that the Appellant did not comply with the July 14, 2017 demand to remit premiums within the time stipulated in section 504(2) of the *Insurance Act*. The Designated Representative of the Appellant acknowledges that the premiums remain outstanding.
- 20. The *Insurance Act* clearly stipulates that a premium received by an insurance agent for a contract of insurance constitutes a payment to the insurer that the agent holds in trust for the insurer. Further, the *Insurance Act* directs that a failure to pay the premium held in trust over to the insurer within 30

days of a written demand is proof that the agent used the premium for a purpose other than to pay it to the insurer unless there is evidence to the contrary.

21. The failure to comply with the demand as set out in section 504(2) is categorized as a regulatory offence that attracts strict liability. In the present case, this means that once the failure to comply with the insurer's written demand for payment is established, liability is avoided only if the Appellant can establish on a balance of probabilities that it did not use or apply the premium payments for a purpose other than the purpose for which they were held in trust. Simply put, in order to avoid liability it must be shown that the Appellant was not in breach of its trust obligations.
22. The Designated Representative of the Appellant maintains that the complexities encountered in administering the type of insurance product he was selling and the significant and unexpected costs associated with the administration were legitimate business reasons for not remitting the premiums to the insurer.
23. The Panel is not satisfied that these explanations constitute evidence that the Appellant did not use the premium payments for a purpose other than for paying them over to the insurer. Rather, the Panel is of the view that the business difficulties described indicate that the Appellant used the premiums to support the increased cost of operating the business. This view is further supported in the December 15, 2017 email message from the Designated Representative of the Appellant to the Alberta Insurance Council investigator in which he stated:

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operational cash flow was used elsewhere." (emphasis added)

24. The Panel acknowledges the Designated Representative's submissions that the insurer was willing to wait for payment Confidential Business Information and that he was unable to remediate the problem because of the outstanding matter of arbitration and the commencement of legal action by the insurer. However, neither of these explanations serves as evidence the premium payments were not used for or applied to a purpose other than for the purpose for which they were held in trust.
25. The Panel acknowledges the Appellant's business difficulties. However, such difficulties cannot be used to absolve the Appellant of the duties of a trustee of the premiums due to the insurer.

26. In light of the fact that no evidence was advanced to show that the Appellant was holding in trust the premiums due the insurer and on the Appellant's own evidence of the extraordinarily high cost of administering the insurance products and of funds not being available because operational cash flow was used elsewhere, the Panel finds that the Appellant failed in his statutory obligation to hold the premiums in trust for the insurer having used the premiums for a purpose other than for paying them over to the insurer.
27. On the first issue, the Panel finds the Appellant collected insurance premiums from clients and failed to remit those premiums to the insurer in contravention of section 504(2) of the *Insurance Act*.

Penalty

28. As noted earlier in this decision, section 408(1) of the *Insurance Act* allows for suspension of certificates of authority where the holder of the certificates contravenes any provision of the Act.
29. In this case, the Life Insurance Council suspended the Appellant's certificates of authority for six months.
30. The Designated Representative of the Appellant argues that given this was the first complaint against him in twenty-seven years in the industry, the suspension is unprecedented. He cited a July 20, 2018 decision of the General Insurance Council as an indication that first complaints do not warrant suspension of the certificates of authority.
31. The case cited by the Designated Representative of the Appellant (Whitecourt Insurance Ltd.) involved a complaint from an insurance client about a statement made by the agency in contravention of section 509(1)(a) of the *Insurance Act*. The General Insurance Council determined that while the statement made to the client had an exclusive internal meaning to the Agency, beyond and outside of what was communicated to the client, the only reasonable interpretation of the Agency's references to "No increase in premiums" by a member of the public was that a "cap" was imposed on the premiums paid over a four-year period. The Council determined the Agency's letter lacked clarity and the Agency did not exercise due diligence in communicating the policy renewal specifics and capping policies to the client. The Council found the Agency had made a misleading statement and imposed a civil penalty of \$500. Council declined to impose the permitted certificate suspension reasoning that it would be unusual for this first and singular offense.

32. The Designated Representative of the Appellant argued that the reasoning of the General Insurance Council in the July 20, 2018 decision in regards to suspension of certificates should be applied in this case. The Panel disagrees. Unlike the present case, the case cited did not involve the breach of a trust obligation, multiple clients or a significant amount of funds owed over a lengthy period of time.
33. The trust relationship established in section 504 of the *Insurance Act* demands that an insurance agent fulfill the fiduciary duties of good faith, trust and candor, acting always in the best interests of the insurer. These duties are fundamental to the proper functioning of the insurance industry.
34. In this case, the Appellant failed in its trusteeship duty to remit a significant amount of premiums collected over an extended period. In failing to remit the premiums, the Appellant created an obligation for the insurer for numerous policies for which it did not receive premiums. As well, the Appellant's failure to remit the premiums affected a number of clients who encountered difficulty in pursuing claims once the Appellant's contract with the insurer was terminated because of the failure to remit.
35. In these circumstances, the Panel finds that the Appellant's failure to remit the premiums collected to the insurer is a serious breach of the statutory trust obligation that warrants the suspension of certificates of authority as ordered by the Life Insurance Council.
36. The *Fees Regulation* allows for a penalty of no more than \$1000 for a breach of the provision that is the subject of this appeal. The Life Insurance Council imposed the maximum penalty of \$1000 on the Appellant in this case.
37. The Designated Representative of the Appellant cited recent decisions of the Life Insurance Council in which the civil penalty was reduced in recognition of compliance with demands for information. He maintained that as he also had complied, the same approach should be applied in this case.
38. The decisions cited by the Designated Representative of the Appellant (Dancel April 16, 2018 and Starkman April 16, 2018) involved the failure to respond to a demand to provide proof of continuing education credits. In both decisions the civil penalty was reduced from the maximum allowable because although the information demanded was not provided within the statutory time frame, it was provided following receipt of the investigator's report. Upon appeal to the Insurance Council Appeal Board, the decisions of the Life Insurance were confirmed (Dancel July 12, 2018, Starkman July 24, 2018).

39. Counsel for the Life Insurance Council referenced General Insurance Council decision (Kenneth Moland March 9, 2017) and Life Insurance Council decision (John Ellstone July 12, 2017) as examples of situations in which the maximum civil penalty was imposed due to the seriousness of the offence. The Moland decision involved the failure to remit a significant quantum of premiums over an extended period of time and providing misleading information to an investigator. The Ellstone decision involved a total failure to respond to a demand for proof of continuing education credits.
40. The decisions cited are consistent in applying the maximum penalty in situations where the breach of the statutory requirement was viewed as significant because it involved breach of trust involving significant funds over an extended period, misleading an investigator or total disregard for a demand for information. In the cases where the agents complied with the demand for information after receiving the investigator's report their remediation of the situations was recognized with a reduction in the civil penalty levied.
41. In this case, the Panel finds that the maximum civil penalty is warranted because the Appellant's failure to remit a significant amount of premiums to the insurer over an extended period of time in contravention of section 504(2) of the *Insurance Act* is a serious breach of trust and the evidence does not show the Appellant took satisfactory steps to remediate the situation of the outstanding obligation to the insurer.
42. Finally, the Panel acknowledges the argument of the Designated Representative of the Appellant that the Insurance Council failed to fulfill its duty by not providing him with the decision of the Life Insurance Council in a timely manner and not advising him of the suspension of his license. The Panel is satisfied that because the Insurance Council provided notice to the Appellant on July 24, 2018 via email he was able to appeal the decision within the statutory time limit. The hearing of the appeal is sufficient to cure such procedural lapses.

Conclusion

43. In the final result the Panel concludes the Appellant breached his trust obligation in failing to remit premiums collected from clients to the insurer in accordance with Section 504(2) of the *Insurance Act* and that the six-month suspension of the certificates of authority and civil penalty of \$1000 imposed by the Life Insurance Council are appropriate in the circumstances.

Appeal Fee

44. Section 24 of the *Insurance Councils Regulation* provides that, in determining an appeal, a panel shall also determine the disposal of the appeal fee paid by

the Appellant to commence the appeal to one or both of the parties taking into consideration both the results of the appeal and the conduct of the parties. Given the result of the appeal, the Panel is of the view that the appeal fee paid by the Appellant should be awarded to the Life Insurance Council. The conduct of the parties provides no reason to do otherwise.

Order

45. For the reasons set out above, it is ordered that:

- a. The June 13, 2018 Decision of the Life Insurance Council is confirmed.
- b. The appeal fee is awarded to the Life Insurance Council.

DATED at Edmonton, Alberta this 2nd day of November 2018.

INSURANCE COUNCILS APPEAL BOARD OF ALBERTA

Per: 
Gwen Harris – Panel Chair

Authorized to sign for:

Per: 
David Brittain – Panel Member

Per: 
Dean Hunt – Panel Member