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 Russell Gordon Campbell
(the "Agent")

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

This case involved allegations pursuant to ss. 480(1)(a) and 505 of the Act. Specifically, it is alleged that the Agent accepted insurance premiums from clients to place coverage through insurance companies but that he deposited them into a personal account and used them for his own expenses. In doing so, it is alleged that he acted in a dishonest or untrustworthy manner pursuant to s. 480(1)(a) of the Act. Alternatively, it is alleged that the Agent collected additional fees from clients who were acquiring insurance without first obtaining the required written and signed agreement as referenced in s. 505 of the Act. As a result, it is alleged that he contravened a section of the Act or regulations as contemplated in s. 480(1)(b) of the Act.

Facts and Evidence

This matter proceeded by way of a written Report to Council dated January 16, 2015 (the "Report"). The Report was forwarded to the Agent for his review and to allow him the opportunity to provide the Council with additional evidence or submissions in response to the allegations. The Agent signed the Report on January 29, 2015 and submitted an addendum for the Council's consideration.

The Agent is a holder of an insurance agent certificate of authority authorizing him to act in the capacity of a general insurance agent. Except for short periods of time he has been licensed continuously since at least 1998. On June 6, 2014 the AIC received fax from "DW". DW is the designated representative of the agency for which the Agent worked at the time (the "Agency"). While holding one general agency license,

the Agency operates through various locations and they are, to a certain extent, run independently from the others. The Agent operated one of these locations. In her letter, DW alleged that the Agent collected premiums and deposited them into a personal account and that they were then used for personal purposes. DW also suggested that the Agent did not properly remit the premiums to the Agency. Finally, DW alleged that the Agent collected additional service fees from clients without first obtaining a signed written agreement from the clients before charging the fees.

An AIC investigator wrote to the Agent on June 13, 2014. In this letter the investigator requested that the Agent provide the AIC with an explanation as to why the Agent deposited client funds into his personal bank account and why he subsequently used those funds for personal expenses. The AIC also requested that the Agent provide the AIC with the reason the Agent collected additional agency fees from clients in the absence of a written and signed agreement.

On June 19, 2014 DW sent the investigator an email that included 50 pages of attachments. Amongst the documents was a string of emails passing between DW and the Agent in which they discuss the question of outstanding premiums the Agent owed to the Agency. In one email the Agent apologized to DW and confirmed that he would close his personal bank account.

By fax to the AIC sent June 30, 2014, the Agent explained that he used the account in question to deposit premiums collected from clients on agency-billed policies. He wrote, among other things, that "[t]hroughout the time that I had this account, for the most part, any time that I did not submit the total amount of the Agency Bill funds collected, I had sufficient commissions in my commission bank at my head office to cover the funds collected and used as operating expenses." The Agent further explained that when he "did not submit the total amount of the Agency Bill funds collected" he had "sufficient commissions in commission bank (sic) at head office to cover the funds collected…." The Agent advised that the difference between the client funds and commission earned "(held back and payable to my brokerage)" totals an outstanding amount of $5000 owed to the Agency. The Agent confirmed that he would pay the Agency the outstanding balance. The Agent also explained that "I have been using a word document to invoice some my Agency Bill clients" he sent an invoice to those clients that stated "This invoice may include nonrefundable additional fees, as outlined above." The Agent admitted that for a "few clients that did not have an invoice sent to them, nor did I have a fee form signed. I have attached a list of these clients and the fees charged."

On July 3, 2014 the Agent emailed the AIC investigator and provided a number of documents to substantiate his explanation of the circumstances. Among these documents was one entitled "2014_060 AIC Agency Fee Info list". It was a list of 18 clients from which he charged and collected additional fees that totaled $4,747.78.

The Agent's January 29, 2014 addendum addressed the movement of money to and from the bank account in question and his dispute with DW over the accounting of premiums collected versus submitted and the resulting commission owed. As to the question of collecting fees without the required written and signed agreement he suggested that the number of these should total 16 rather than the 37 as alleged in the Report.

Discussion

The first allegation in the Report alleges that the Agent acted in a dishonest or untrustworthy manner pursuant to s. 480(1)(a) of the Act in regard to the collection and depositing of premiums, their ultimate use and subsequent remittances to his head office. The applicable legal test in determining whether the Agent is guilty of this offence was set out 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 when this was not, in fact, the case. The Insurance Councils Appeal Board also found the Agent guilty of an offence and the Agent appealed to the Court of Queen's Bench. In reasons for judgment dismissing the appeal, Mr. Justice Marceau wrote 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)

The evidence in the Report clearly proves that the Agent collected premiums from clients and that these funds were then deposited into a personal bank account and that he used portions of these funds for other purposes. In a May 15, 2014 email to DW, the Agent admitted to his deception and the fact that he had failed to forward almost $40,000.00 to the Agency. As such, the Report proves that the Agent misappropriated the funds thereby satisfying the objective element of the offence.

As to the Agent's intent, in a September 3, 2014 letter to the investigator the Agent indicated that he was in a very precarious financial situation personally. He could not make his mortgage payments and he had reached the borrowing limits on his credit cards and he could not obtain other credit. It was this state of affairs that led him to misappropriate premiums to make ends meet in the apparent hope that future commissions would offset these amounts. The Agency has strict guidelines requiring premiums to be forwarded to the agency on a monthly basis. Further, the Act states that insurance premiums accepted by an insurance agent are deemed to be held in trust. The Agent's intentional actions in and around these funds was in clear breach of the Agency's policies and incompatible with the concept of being a trustee. Therefore, it is our conclusion that the Agent acted in a dishonest and untrustworthy manner such that he committed an offence pursuant to s. 480(1)(a) of the Act.

In regard to the collection of fees, the Act prohibits the charging or collection of additional fees if the client has not signed a written agreement agreeing to those fees. The agreement must also be signed prior to an agent performing the services that give rise to the purported fees. In this case, the Agent sent out invoices charging service fees to a number of clients. Almost all of the invoices state that "…payment is due upon invoicing" and that by signing the invoice the client agrees to pay the fees. Many of the invoices at issue are not signed. However, even if signed it cannot be said that the clients

signed them prior to the services being rendered as they are not getting the invoices prior to the services and, in any event, the invoices themselves say that the amounts are due and owing on the invoice date. Further, the Act prohibits the mere act of charging the fees without having the signed written agreements in place. As such, an offence is committed even if the client later signs an agreement and consents to the fee.

In this case, the evidence clearly proves that the Agent charged and collected fees without first obtaining the signed written agreement as required by the Act. While it is not necessary to comment on the Agent's motives, it is most likely that he charged these fees because of his financial situation as described above. The evidence suggests that he may have done this on at least 50 occasions. However, the Report's focus and investigator's recommendation was only in regard to 37 of these. This may be related to a number of factors including the timing of some of the invoices and the dates of the coverage put in place, the amounts charged or what might appear as the clients' subsequent agreement to pay the fees. Additionally, a number of the occurrences took place outside the three year limitation period that the Act establishes in relation to the levying of a civil penalty. While the expiry of this limitation period does not prevent us from finding an agent guilty of a given offence, we are prepared to conclude this matter on something closer to the investigator's recommendation rather than what may have been the total number of individual fees that were charged. As such, we find the Agent guilty of 34 counts of charging or collecting a fee without the required written and signed agreement in contravention of s. 505 of the Act.

Sanctions

Pursuant to s. 13(1)(a) and (b) of the *Certificate Expiry, Penalties and Fees Regulation*, we have the jurisdiction to levy civil penalties in an amount not exceeding $5,000.00 in relation to our finding that the Agent acted in a dishonest or untrustworthy manner pursuant to s. 480(1)(a) of the Act and up to $1,000.00 for each of the 34 offences subsequent offences. We also have the jurisdiction to suspend the Agent's certificate of authority to act as a general insurance agent for a period of up to 12 months or we could order that it be revoked for one year; following which the Agent would have to reapply for a certificate.

To determine the appropriate sanctions to impose, we have weighed a number of mitigating and aggravating circumstances in light of the evidence and our findings. These are the Agent's first

disciplinary offences and they have occurred after a long history of acting as an insurance agent without obvious incident. Upon being confronted by the Agency, the Agent largely admitted his wrongdoing and appeared to cooperate with his employer so as to minimize any risk to consumers. He has cooperated throughout the course of the AIC's investigation and he has provided information and responses when called upon to do so. While not providing a justification or excuse, the Agent's financial and personal situation obviously contributed to the grave errors of judgment he made when took and used these funds.

On the other hand, there are a number of significant aggravating circumstances for us to consider. First, the Agent's misappropriation of funds took place over a period of time. His actions were not an isolated occurrence or the result of a momentary lapse of judgment. Second, the Agent's scheme took planning and was obviously deliberate. By using a personal bank account the Agent was essentially operating two sets of books. The Agency's records showed outstanding accounts receivable for clients when, in fact, the Agent collected and used the funds for his own expenses. Third, the charging and collection of premiums without having signed written agreements was part of the Agent's deception to the Agency. The process that he used enabled him to collect additional "off-book" revenue without the Agency's knowledge or oversight. Further, while the Agent's long history in the industry is a credit to him in some respects, it also leads us to conclude that he knew what he was doing and he should have known better. We are not dealing with a neophyte in the insurance industry and rather than dealing with his financial difficulties in a forthright manner he chose to take funds that were entrusted to him by his clients and agency. He also took advantage of clients by charging and collecting fees that they were not obligated to pay without getting notice of the fees in advance and having the opportunity to consider them as part of the written agreement required by the Act.

The Agent's conduct is akin to a lawyer wrongfully taking trust monies from his or her firm. It does not matter that he thought a large commission was imminent or that he intended on paying the money back at some later date. His actions run counter to all that is expected of an insurance agent and they are incompatible with holding a license. Therefore, as to our finding that the Agent acted in a dishonest and untrustworthy manner we order that the Agent's certificate of authority be revoked. In the absence of an appeal, this revocation shall take effect on the 8th day after mailing this decision. We also order that a civil penalty in the amount of $5,000.00 be levied against the Agent.

As to our finding that the Agent committed 34 offences in regard to collecting or charging fees without the requisite agreement, we levy a civil penalty of $100.00 for each offence ($3,400.00). As such, we levy civil penalties totaling $8,400.00.

The civil penalties must be paid within thirty (30) days of receiving this notice. In the event that the civil penalties are not paid within thirty (30) days interest will begin to accrue. 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 motions made, carried and minuted at properly conducted meetings of the General Insurance Council.

Date: May 1, 2015

Original Signed By

Louise Clare, Chair
On behalf of the 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