

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 Marshall Sawchuk  
(the "Agent")

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

This case involved allegations pursuant to s. 480(1)(a) or, alternatively, s. 465(1) of the Act. Specifically, it is alleged that the Agent acted in an untrustworthy and dishonest by making a false declaration regarding his errors and omissions ("E&O") coverage on his 2016/2017 certificate renewal application. It is alleged that this was uncovered when the AIC conducted a random audit and discovered that the Agent entered the particular of his personal auto policy issued by Wawanesa Mutual Insurance Company (hereinafter "Wawanesa"). In making the representation that E&O coverage was in place when it was not, it is alleged that he is guilty of untrustworthiness or dishonesty and that this constitutes an offence pursuant to s. 480(1)(a) of the Act. In the alternative, it is alleged that the Agent failed to have E&O coverage in place, such that he breached s. 465(1) of the Act.

**Facts and Evidence**

This matter proceeded by way of an unsigned written Report to Council dated January 30, 2017, (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 did not adduce any further evidence.

The Agent was the holder of a certificate of authority that permitted him to act in the capacity of a hail insurance agent. He first held a certificate of authority on June 20, 2008. Insurance agents and adjusters must renew their certificates of authority yearly between May 1 and June 30. Renewals are submitted through an online application form wherein agents and adjusters are required to enter, among other things, their E&O policy or certificate number, the name of the insurer that issued the E&O policy and the policy's

effective and expiry dates. Once the entire renewal application is complete, agents must "...confirm that the information is true and correct and that the E&O coverage described is valid in force insurance." The Report evidences the fact that the Agent entered his Wawanesa policy and that it was clearly not an E&O policy. He also made the explicit declaration to the contrary.

As part of a random audit, on August 9, 2016 the AIC emailed "KT" (a Wawanesa official) to confirm whether or not the policy that the Agent reported in his renewal was an E&O policy. KT responded on August 12, 2016 and informed that the policy in question was not an E&O policy given that Wawanesa did not offer E&O policies.

Having obtained this information, the AIC investigator emailed the Agent on October 12, 2016 and asked that the Agent provide clarification on this matter. As the Agent did not respond, the investigator made a formal Demand for additional information on November 1, 2016. The Agent finally responded on November 16, 2016 and wrote:

I was going to get E&O from Monarch Insurance till I was told it was going to cost me 800 to 1,000 dollars. Selling hail insurance on crops is a very short term job which runs from June 15<sup>th</sup> to July 31<sup>st</sup> each year and then ends. Because my sales very [sic] per year, sometimes my sales are \$4,000 to \$5,000 a season plus I travel and have to pay my own expenses my profit on this is very low so I cannot justify this cost. It seems unfair to pay for a whole year because of the situation.

### **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 misrepresenting that he had E&O insurance coverage. 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).

[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)

The evidence in the Report clearly proves that the Agent was aware that he did not have E&O coverage when he submitted his renewal application in June, 2016 because he actively sought out coverage but declined to obtain it as he did not want to incur the cost. Given the Agent's admission, the objective and subjective elements of the applicable legal test under s. 480(1)(a) are met. This was intentional conduct and it is obviously dishonest and untrustworthy as contemplated pursuant to s. 480(1)(a) of the Act and we find him guilty of the offence as alleged in the Report. In light of this finding, there is no need to consider the alternative allegation against the Agent (that he failed to have E&O coverage in place, in violation of s. 465(1) of the Act).

In terms of the appropriate sanctions, pursuant to s. 13(1)(a) 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. Were the Agent presently licensed we would 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.

In our view, a penalty is warranted in the circumstances. We note that the Agent's deception on his renewal application was more than inadvertent – it was deliberate. It was also untrustworthy conduct that enabled him to renew his certificate when he would not have otherwise been entitled to act as an insurance agent.

We also note, however, that the Agent is engaged in relatively small business operations and does not write a significant number of policies. In that respect, we are mindful of striking the right proportional balance between the penalty and the conduct and potential harm to consumers. In light of all of the evidence we order that a civil penalty in the amount of \$1,000.00 be levied against the Agent. As the Agent does not currently hold a valid certificate of authority, sanctions such as the suspension or revocation of his certificate are not applicable.

The civil penalty must be paid within thirty (30) days of receiving this notice. In the event that the penalty is 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 a motion made and carried at a properly conducted meeting of the General Insurance Council. The motion was duly recorded in the minutes of that meeting.

Date: March 9, 2017

LORRIE KING  
Lorrie King, Member  
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