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 Kenneth Moland as
Designated Representative ("DR") of NIB Insurance Group
(the "Agency")

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

This case involved allegations pursuant to s. 480(1)(a) and s. 509(1)(a) and (c) of the Act. Specifically, it is alleged that DR collected insurance premiums from the Agency's clients but did not pay those premiums to I3 Underwriting Managers Inc. ("I3"). In so doing, it is alleged that he is guilty of untrustworthiness or dishonesty in his dealings with his clients and the Agency and that this constitutes an offence pursuant to s. 480(1)(a) of the Act. It is alleged that he also made false and misleading statements to the AIC investigator in the course of investigating this matter such that he committed an offence pursuant to s. 509(1)(a) and (c) of the Act.

Facts and Evidence

This matter proceeded by way of an unsigned written Report to Council dated February 2, 2017 (the "Report"). The Report was forwarded to the DR for his review and to allow him to provide the Council with any further evidence or submissions by way of Addendum. He did not adduce any further evidence.

The DR has held certificates of authority that authorized him to act in the capacity of a general insurance agents since at least 1996 (the year in which the AIC's electronic records commence). This matter arose out of a complaint letter submitted by I3's corporate counsel ("AC"). I3 is a managing general agent for Lloyd's of London ("Lloyds") and collects premiums on behalf of Lloyds. In his May 17, 2016 letter, AC advised that the Agency failed to remit premiums to I3 in an amount totaling $23,854.50. Some of outstanding amount dated as far back as November, 2014.

By letter dated May 25, 2016, AC provided the investigator with further documents and information including various system-generated overdue invoice reminders sent to the Agency and correspondence between I3's Chief Executive Officer ("JS") and the DR. The account statements span the period from November, 2014 - April, 2016. I3 also pointed out that the Agency's amount owing due to unpaid premiums had increased to $26,355.80 from $23,854.50.

The investigator wrote to the DR on May 31, 2016 and requested that the DR provide certain information regarding I3's allegations. As the DR did not respond, the investigator sought the information from the DR again by way of issuing a formal Demand for Information pursuant to s. 481 of the Act.

The DR responded by email on July 15, 2016. In this email the DR stated that there were a number of "accounting issues" that were being sorted out between I3 and the Agency's controller and that he would provide further information to the AIC once these issues were resolved. However, it is particularly noteworthy to mention that the DR made the following statement in his email: "There appear to be a number of accounting issues, most of which I was unaware of are currently being sorted out between I3 and my controller [emphasis added]."

On June 29, 2016, the investigator wrote to I3 to inquire if they had made a demand for payment to the DR as contemplated by s. 504 of the Act. AC responded and advised they had done so through various measures and he provided the investigator with relevant copies of invoices and emails that were exchanged between April 11, 2016, to May 12, 2016.

To his credit, the DR's July 15 email was able to substantiate several payments that were remitted to I3 but not accounted for in I3's initial statement of the overdue amount. Ultimately, in an August 19, 2016 email, AC revised the amount of outstanding premiums owing by the Agency and indicated that the total was $16,232.30.

Not satisfied, on September 19, 2016 the DR alleged that I3 had still not given credit for payments that the Agency made. Once again, AC confirmed the outstanding amounts and that the $16,232.30 figure remained. This investigator called the DR and emailed him on December 2, 2016 to discuss the discrepancy between what the DR said was paid to I3 and the amounts that I3 say was actually received.

The DR said that he would call the investigator, however, he did not do so and he did not respond to the Report.

Discussion

The first allegation in the Report alleges that the DR acted in a dishonest or untrustworthy manner pursuant to s. 480(1)(a) of the Act in regard taking client funds to pay for policy premiums, but then failed to remit those policy premiums to I3 as the underwriting manager. The applicable legal test in determining whether the DR 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)

Additionally, in considering these allegations the *Roy* test must be read in conjunction with s. 504 of the Act which reads as follows:

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

In our view, the effect of this provision is that the AIC need only prove that the DR and Agency collected premiums and then failed to remit them within thirty days after demanded. Once these objective elements are proven, s. 504 deems that the premiums the Agent held in trust were used for a purpose other than remitting them to the insurer. Therefore, in the absence of evidence to the contrary, the DR is deemed to have the intention of wrongfully converting the premiums.

The evidence in the Report clearly proves that the DR took the policy premiums but failed to remit them to the underwriting manager. The DR does not deny that policy premiums were owing to I3, but the tenor of his position was that there was an accounting dispute between NIB and I3 and he attempted to minimize the significance and amount of the funds owing. He characterized many of the shortages as something he was "unaware of" and insisted that his controller and I3 were sorting things out. These statements were not true. Even in the absence of the deeming provision found in s. 504 of the Act, we would have been satisfied that the DR's conduct was intentional.

We are not insensitive to the fact that from time to time accounting issues do arise between agencies and insurers and they can occur for a variety of reasons. However, the amounts at issue here and the time over which the premiums were not remitted is troubling. So too are the repeated excuses that the DR made to I3 throughout I3's attempts to secure the premiums from the DR. As noted above, the amounts due are deemed to be held in trust for the insurer and the obligations of a trustee are fiduciary in nature and the DR and NIB were obligated to act in the utmost good faith and for the benefit of the beneficiary.

Given the DR'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.

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 DR acted in a dishonest or untrustworthy manner pursuant to s. 480(1)(a) of the Act. Because the DR is presently licensed, we also have the jurisdiction to suspend his certificates of authority for a period of up to 12 months, or we could order that they be revoked for one year.

In our view a significant civil penalty is warranted in the circumstances. The DR breached his trust obligations by taking funds and failing to pass them on to I3. In light of all of the evidence we order that a civil penalty in the amount of $5,000.00 be levied against the DR. We also order that the DR's certificates of authority be revoked effective two (2) weeks from the date of issuing this decision.

As to the second count against the DR for violating s. 509(1) of the Act, we find that by virtue of providing incorrect information, he misled the investigator. It is patently clear that he also made false and misleading statements to I3 at a time when he had an opportunity to come clean and resolve this matter appropriately. Offences under this section of the Act are strict liability in nature. Given this, the AIC only needs to prove that the statements that the DR made were false or misleading and it need not provide proof that the conduct was intentional. At that point, the onus shifts to the DR to demonstrate that he acted with due diligence to avoid the offences. In order for him to successfully avail himself of that defence, he must show that he took all reasonable means to avoid the offence. As such, we find him

guilty of breaching s. 509 of the Act. For this conduct we order that a civil penalty of $1,000.00 be levied against the DR.

To summarize, we have found the DR guilty of two offences pursuant to the Act. We have also ordered that the DR pay civil penalties totaling $6,000.00 and that his certificate of authority be revoked. The civil penalties must be paid within thirty (30) days of mailing this notice. In the event that the penalties are not paid within thirty (30) days, interest will begin to accrue. Pursuant to s. 482 of the Act (copy enclosed), the DR 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