ALBERTA INSURANCE COUNCIL
(the "AIC")

In the Matter of the *Insurance Act*, R.S.A. 2000 Chapter I-3
(the "Act")

And

NIB Insurance Group Ltd.
(the "Agency")

And

As represented by
Kenneth Moland, Designated Representative
(the "DR")

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

This case involves an alleged violation of s. 480(1)(a) of the Act, or, alternatively a violation of s. 509(1)(a) and subsequently s. 480(1)(b) of the Act. Specifically, it is alleged that the Agency collected a premium amount from a client but failed to remit the premium amount to the Managing General Agency (the "MGA"). In so doing, it is alleged that the Agency acted in a deceitful, fraudulent or untrustworthy manner as contemplated by s. 480(1)(a) of the Act. In the alternative that the Agency made false or misleading statements as contemplated by s. 509(1)(a) of the Act, and subsequently violated s. 480(1)(b) of the Act.

It is also alleged that the Agency contravened s. 452(2) of the Act by acting without a valid certificate of insurance, and subsequently violated s. 480(1)(b) of the Act.

Facts and Evidence

This matter proceeded by way of a written Report to Council dated January 15, 2020 [sic] (the "Report"). The Report was forwarded to the DR for review and to allow the Agency to provide the Council with any further evidence or submissions by way of Addendum.

The Agency was the former holder of a General Insurance certificate of authority but is presently inactive. The DR is the former holder of a General Insurance certificate of authority held at various levels between the period February 11,

1996 and January 8, 2020. The individual acted as the DR for the Agency for the entirety of the Agency's existence before the DR's certificates of authority were terminated on October 15, 2018.

On January 8, 2020, the AIC received a termination for cause letter from H.I.I. [redacted] (hereinafter "H.I.I."). The letter stated:

> […] It has come to our attention that in December of 2018, prior to being under contract with H.I.I. Kenneth Moland while unlicensed, wrote a policy for U.P.C. [redacted] (hereinafter "Client"). Mr. Moland also collected funds from the insured and failed to remit payment to the MGA.
>
> Due to this clear violation of the standards of an Insurance advisor in Alberta we have been forced to initiate the termination of Mr. Moland's contract with H.I.I effective January 7 2020. […]

On February 5, 2020, H.I.I. responded to the AIC's request for information by email. The email provided the following information:

> […] For evidence regarding the collection and mismanagement of trust funds I have enclosed two email attachments;
> - The first is an email sent to us from the MGA where the Insured, Client, had provided them proof of a cheque made out to NIB Insurance that was couriered to Ken Moland.
> - The second is an email string from the MGA to Ken Moland showing their number of requests for payment on the 2018-2019 policy term for the Client.
>
> At the beginning of this string Ken admits that the insured paid the premium to NIB, and that funds where deposited and recorded in their ledger, but despite expressing intention to pay these funds they were never sent to the MGA.
>
> Regarding evidence that he issued this policy while unlicensed;
> - Based on his achieved license history as shown on the Alberta Insurance Council website his General Insurance – Level 3 license expired on Oct 15, 2018.
> - The policy in question was written effective Dec 1, 2018 by Ken Moland, under NIB Insurance Inc […]

Within the information from H.I.I., was an email from the MGA containing a fax from the Client, which was dated October 18, 2019. This fax stated:

> Attached is the cheque copy we received from the bank. I am confused though as the amount we paid is more than what was on the invoice. Please rectify. We received no invoice from NIB, just a call todays [sic] before it was due and a courier was sent on November 30th to get the cheque. We were not pleased. […]

A copy of an email chain between the DR and the MGA was provided by H.I.I. The MGA requested payment of the 2018-2019 policy term on multiple occasions.

The requests for payment were as follows:

Date	Email from MGA	Date	Response from DR
		Oct. 18, 2019	[…] I have finally have [sic] a moment to send you the email I

			promised you during our conversation earlier this week. To summarize our conversation: 1. **Confirmed that the insured has paid the premium to NIB.** 2. I have met with my old book keeper [sic] and he is looking into this as it is showing as paid in the general ledger. 3. **The goal is to have this resolved prior to the end of October** […]
Oct. 31, 2019	Please advise status update on payment of the 2018 to 2019 term. Please advise status on Broker Agreement.		No response.
Nov. 5, 2019	Please advise status update on payment of the 2018 to 2019 term. Please advise status on Broker Agreement.		No response.
Nov. 13, 2019	Can you please advise.	Nov. 13, 2019	**Payment has been scheduled and may have already been sent** […]
Nov. 18, 2019	Check [sic] with our accounting department **we have not received as yet please reach out and advise** […]		No response
Nov. 26, 2019	As per my voice mail **please advise when we will received [sic] payment, you had said end of October we are now at the end of November.**	Nov. 29, 2019	[…] Again with respect to the payment of the premium, as advised the NIB records show this as being paid, however I have not been able to find a bank transaction to support the payment, therefore I have assumed it was not paid. […]
Dec. 2, 2019	Please see below from underwriter We can agree to bind 2019-2020 renewal coverage subject to final 30 days pending receipt of payment for 2018-2019 and 2019 to 2020. [sic] renewal premium.	Dec. 2, 2019	The condition provided is agreeable. Can you confirm the renewal premium so I can advise the insured and collect the 2019-2020 premium. […]
Dec. 19, 2019	We have not received payment or broker agreement please advise status.		No response
Dec. 27, 2019	Can you respond.		No response
Jan. 6, 2020	As per my voice mail to you today we need an immediate response.		No response

On January 7, 2020, it appears that the MGA contacted H.I.I. to try and settle the account for the Client:

> Thank you for speaking with us today, please find attached broker agreement please complete and return so we can activate you in our accounting system. […]

The effective date of the policy in question was December 1, 2018.

On February 7, 2020, the AIC sent the DR two demands for information. The first demand for information requested the following:

> […] The AIC is currently reviewing an allegation that, while unlicensed, you wrote a policy for the Client and subsequently collected funds from the insured but failed to remit payment to the MGA.
>
> Accordingly, we require that you provide us with the following:
>
> 1. An explanation as to why the insured's payment was never remitted to the MGA despite you receiving the cheque from the insured via courier and despite you confirming, in an email to the MGA on October 18, 2019, that the insured paid the premium to NIB and that funds were deposited and recorded in NIB's ledger.
>
> 2. Any additional information/documentation which may assist in understanding the material facts surrounding the matter in question. […]

The second demand for information related to the allegation of unlicensed activity.

On April 9, 2020, the DR responded to the AIC. The DR provided the following information:

> […] To answer your questions to the best of my ability regarding the Client and the MGA:
>
> 1. The Client was a recurring client of NIB Insurance.
> 2. NIB sold its book of business to H.I.I., and I came to be employed at H.I.I. in late 2018.
> 3. There were transitional issues, but all renewals would have to be processed either for NIB or H.I.I. – to keep the business going and service the clientele.
> 4. H.I.I never dealt with the necessary paperwork between itself and the MGA (and a number of my other insurers), therefore there was a difficulty having them process the renewal, even though, effectively, this was now an H.I.I client.
> 5. the client forwarded payment to NIB and my accounting deposited it in NIB.
> 6. the policy was always in place.
> 7. once I realized what happened – once it was brought to my attention in 2019, H.I.I, through me but with H.I.I.'s agreement, agreed to pay the missing payment at the time of the following years' renewal – effectively the premium X 2. H.I.I. was then going to deduct that money off of what they still owed NIB in the NIB/H.I.I. transaction.
> 8. I was then terminated from H.I.I. in early January 2020 and cannot tell the tale beyond that time. I am also without any of the documentation to assist.
> 9. Under the various agreements involving myself, my company, and H.I.I., all signed in 2018, H.I.I. was required to inform AIC that I would be operating under their umbrella. I do not recall now why they only so informed AIC in mid-December, 2018, and I cannot confirm or deny that date. I can only advise that I recall finding out one day that they had not so informed AIC, even though I had already started working at H.I.I., and H.I.I. indicating that the letter would then be sent same day/next day. […]

On January 31, 2021 the DR responded to the entirety of the Report to Council with the following:

> […] One has to appreciate the time frame in which this renewal for the Client occurs [sic].
>
> At the time, NIB has sold its book of business to H.I.I. I was to have started working there in the fall of 2018, NIB having folded up. Therefore, this insured, and many others, were now to be serviced by H.I.I. Three problems arose:

(1) delays in finalizing the sale of the book of business;

(2) delays (unknown to me) in H.I.I advising AIC of me now working there and issuing a letter to AIC, leading to a licence [sic] being issued for me; and

(3) delays, which in fact lasted well into 2019, for H.I.I. to work out a brokerage contract with the MGA who underwrote the Client (note: the insured needed to stay with the same insurer for the other U.C.C. [redacted]).

And so, when the renewal came up, the insured sent the premium cheque to NIB, despite the sale and transition etc. I was to be licenced [sic] through H.I.I. before my licencing [sic] expired at NIB. It didn't happen.

H.I.I. became responsible for the transferred files, including renewals. Ultimately they were to pay the MGA – renewals times two. The renewal premium – already absorbed in NIB – was to be deducted in monies [sic] yet to be paid to NIB from the sale to H.I.I. It literally took that long for H.I.I. to complete their contract with the MGA. Most importantly, the insured's coverage never lapsed. […]

Discussion

Although not otherwise contemplated by the Report of the AIC, ss. 504(1) and (2) of the Act relate to the control of premium amounts paid to insurance intermediaries;

Agent trustee of premiums

504(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.

From the wording of these sections is clear that each single premium payment an agent receives is explicitly held in trust for the insurer. To that extent, if an insurance intermediary refuses or neglects to remit premium funds to an insurer it is presumed that the agent has used the funds for an improper purpose. The Agency agrees that it received premiums funds on behalf and purports *"Again with respect to the payment of the premium, as advised the NIB records show this as being paid, however I have not been able to find a bank transaction to support the payment, therefore I have assumed it was not paid."*

The Council remains cognizant that findings under s. 480(1)(a) of the *Insurance Act* can have long-lasting effects on professionals in the insurance and financial industries. The Council therefore applies stringent tests to weigh the evidenced produced. In order to conclude that the Agent committed a violation 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(s) as alleged.

The elements of a violation of s.480(1)(a) of the Act in the decision of the Court of Queen's Bench of Alberta, *Roy v. Alberta* (*Insurance Councils Appeal Board*), 2008 ABQB 572 (hereinafter referred to as "*Roy*"). In *Roy*, the Life Insurance Council found that an agent violated s. 480(1)(a) of the Act. The agent falsely attested to completing the required continuing education ("CE") necessary to maintain his insurance certificates when he did not, in fact, have the required CE. The agent concurrently held a securities license and believed that the CE required to maintain his securities license was applicable to his insurance certificates of authority.

The agent appealed the decision of the Life Insurance Council to the *Insurance Councils Appeal Board* of Alberta. In their findings, the *Insurance Councils Appeal Board* set aside the findings with respect to "misrepresentation, fraud, deceit and dishonesty" as contemplated by s. 480(1)(a) of the Act, but upheld the conviction of "untrustworthiness", a disjunctive element of a s.480(1)(a) offence. The agent appealed the Decision to the Court of Queen's Bench of Alberta on a matter of judicial review.

In his reasons for judgement, Mr. Justice Marceau reviewed the requisite test to find that a violation of s.480(1)(a) of the Act has been made, and expressed that reasoning at paragraphs 24 to 27 as follows:

> [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). [Emphasis added]
>
> [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.** [Emphasis added]
>
> [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]
>
> [27] Clearly the false answer was one which the Alberta Life Insurance Council could not trust as a basis for renewing the Applicant's Life Insurance Certificate of Authority. That satisfies the objective element. Just as clearly the finding that "the best that can be said of the Appellant's approach to the required statements is that he did not know if he had

> the required credits or not and likely gave the form little or no thought" is a finding of wilful[sic] blindness, of recklessness, and that is sufficient to prove intent in this context. The Board was aware that recklessness could satisfy the intent requirement and made no error on that score. Having read the transcript of the hearing, I find that it was not unreasonable for the Appeal Board to conclude that the evidence of the Applicant about vaguely thinking that among all the courses he took he believed there would be enough crossover from courses taken for his securities licence to the life insurance requirements **fell far short of the due diligence expected of someone entrusted with fiduciary and good faith obligations.**
> [Emphasis added]

The Council weighed the effects of the DR's alleged actions, the evidence presented, and accounts of all parties when reaching its' conclusion. Insurance intermediaries are held to a high standard of due diligence when managing insurance products and client premiums. The relationship between an insurance intermediary is such that the client relies on the Agency's expertise, competency and integrity to affect the discussed coverage.

The Council noted that several demands for payment were made by the MGA, with many of the demands going without a response. The Client provided a copy of the cheque to the MGA as proof that payment of the insurance premiums was made to the Agency. However, the Agency never remitted these funds. As such, the Council finds that it is more likely than not that the misappropriation of the insurance premium was done knowingly, and with intention.

The Council found that the Agency's conduct was negligent, reckless, deceitful, intentional, dishonest, untrustworthy, and fraudulent and moreover constituted misrepresentation (particularly as to the whereabouts of the insurance premiums, which still have not been located). In light of all the information before it, the Council is satisfied that there is sufficient, clear and cogent evidence to prove that the requisite elements of a s. 480(1)(a) violation are met, and that the Agency's conduct was a violation of s. 480(1)(a) of the Insurance Act.

The Council agrees that a substantial civil penalty is warranted under the circumstances as honesty and transparency are the hallmarks of a trustworthy agent. Given the seriousness of the offence the Council orders that a civil penalty in the amount of $5,000.00 be levied against the Agency pursuant to s. 480(1)(b) and 13(1)(b) of the *Certificate Expiry, Penalties and Fees Regulation,* A.R. 125/2001.

In turning to the second matter, in order to prove the allegation in the Report, the AIC must adduce sufficient evidence to demonstrate that the Agency acted in the capacity of an insurance agent, as defined in the Act, during a period in which it did not hold a valid and subsisting certificate of authority. Once this has been done, the onus sifts to the Agency to demonstrate that all reasonable measures were taken to avoid acting as an insurance agent absent a certificate of authority. There is no requirement that the Council prove that the Agency acted intentionally.

From the evidence in the Report, it is clear that the Agency's certificate of authority expired on October 15, 2018. It is also clear that the Agency sold the Client the policy on October 26, 2018 (effective date December 1, 2018) during a time that the Agency did not hold a valid certificate of authority. Therefore, we find that the Agency breached s. 452(2) of the Act and that it contravened a section of the Act as contemplated in s. 480(1)(b).

In terms of the applicable sanction, we can levy civil penalties in an amount up to $1,000.00 pursuant to ss. 480(1)(b) of the Act and 13(1)(b) of the *Certificate Expiry, Penalties and Fees Regulation*, A.R. 125/2001. In light of all the information before it, the Council orders that a civil penalty in the amount of $1,000.00 be levied against the Agency pursuant to s. 480(1)(b) and 13(1)(b) of the *Certificate Expiry, Penalties and Fees Regulation*.

The 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 applicable prescribed rate. Pursuant to s. 482 of the Act (excerpt enclosed), the Agency 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: April 8, 2021

[ORIGINAL SIGNED BY]

Chairperson Janice Sabourin,
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
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