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 Robert Arnold
(the "Agent")

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

This case involved allegations pursuant to ss. 480(1)(a), 500, and 505(2) of the Act. Specifically, it is alleged that the Agent billed and collected fees in excess of the stated policy amounts from three clients without their knowledge or consent. In so doing, it is alleged that he made misrepresentations or acted in a dishonest or untrustworthy manner as contemplated by s. 480(1)(a) of the Act. Additionally, it is alleged that he contravened s. 500 of the Act when he prepared invoices for three clients indicating that the premium amounts were different from the amounts set out in the policies. Finally, it is alleged that he contravened s. 505(2) when he collected fees for providing services without first obtaining the clients' consent by way of signed written agreements as required.

Facts and Evidence

This matter proceeded by way of a written Report to Council dated December 7, 2012 (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 submitted additional material for our consideration. All told, the materials before us comprise almost 400 pages. In arriving at our conclusions we have carefully reviewed all of the evidence before us. However, given the breadth of the material we do not intend to outline every piece of evidence in these reasons.

The Agent is the holder of a valid certificate of authority authorizing him to act in the capacity of a general insurance agent. In this regard, he is the designated representative of Mitchell Insurance Brokers ("MIB"). His certificate of authority is sponsored by Aviva Insurance Company of Canada ("Aviva"). The Report

indicated that the Agent has been licensed since at least January 3, 1996 which is the date that the AIC's computerized license registry commenced.

On October 17, 2011, the AIC received a faxed letter and documentation from "BM". BM is an insurance agent formerly employed with MIB. In her letter, BM outlined a number of allegations regarding the Agent's billing practices and wrote that "[as] you can see from the information that I left you, he doesn't restrict himself to overcharging by $100…he writes out what he wants typed. I gave you an example with his handwriting. Once the letter is typed, he wants the letter, file and policy given back to him. He allegedly removes the part of the policy with the Insurance company charges, then hand delivers the invoice and the remainder of the policy…" BM added "[The Agent] claims he's the only game in town so he can extra bill whatever he wants and his clients have to take it and like it." BM included additional documents relating to client billing invoices that were prepared at the Agent's direction.

AIC investigators thereafter commenced making inquiries and collecting evidence. Ultimately, on March 28, 2012, an AIC investigator and the AIC Director of Compliance (both duly appointed Examiners under the Act) attended at the Agent's office. The purpose of this visit was to collect, under the authority of ss. 755, 758 and 759 of the Act, the 3 specific files that were in question in addition to copies of accounting records for the other clients as contained in the list provided by BM. The three specific files related to clients who will be referred to hereafter as "Client A", "Client B" and "Client C". A receipt for those files was provided to an employee of MIB and the files were removed from the Agent's office. Once these were copied they were returned to the Agent's office by courier on April 4, 2012.

On April 3, 2012, the AIC received a fax from the Agent regarding the files removed from his office. In his fax he stated "If you have not obtained permission from the individual policyholders you are in violation of the privacy act. Are you aware of this?...I will be contacting them all today over your alleged accusations…I will also expect you to photo copy these files and have these returned to my office no later than 2:30 PM today…" The AIC sent a response to the Agent on April 3, 2012, advising him to review the copies of the sections from the Act which were left in his office and set out the relevant statutory authority to enter the premises and remove the files for copying. The Agent sent a response by fax on April 3, 2012, and stated "I have been in contact with all three clients and they have not authorized you to remove or review these files. They have all made it very clear that these must be returned immediately to our office and that you have no authority to reproduce these documents. Who in fact did give you authorization to

review these confidential files? …I will contact all three of them again and ask if I should contact the police to have to obtain these files on there [sic] behalf."

On April 4, 2012, the AIC's Director of Compliance received a call from an officer of the Calgary Police Service ("CPS"). The officer advised that he had received a call from the Agent who was extremely irate and wanted the CPS to charge the AIC personnel with theft. The Director of Compliance discussed the AIC's jurisdiction with the officer who ultimately requested a copy of pertinent sections from the Act. These were provided to the CPS.

On April 4, 2012, the Agent forwarded a copy of the fax he had sent to the CPS regarding his complaint against the AIC. In that fax the Agent stated that "The AIC under false pretence [sic] demanded these files with out [sic] the permission, approval or authority of the policyholders." The Agent then added "The AIC are in possession of stolen property of which my clients have demanded to be returned to our office by today." Also attached to the Agent's fax was a fax addressed to the AIC investigator which stated:

> As you are aware I have been in touch with the three clients where the AIC removed their files from our office without their approval or authority…I am enclosing an update from [Client B] and they have instructed me that if his [sic] file is not returned by today that I contact the police on his behalf and file a complaint…If I were you I would seek an immediate legal opinion. As far as the insured is concerned you have stolen his file from our office without his permission. You obtained this information on the basis of a third party who was not authorized to file a complaint on their behalf. Correct? This is again abuse of power and a flagrant violation of your authority.

On April 4, 2012, the AIC sent a request to "MR", an official of Aviva that requested that Aviva provide a summary of all premiums charged to certain clients for the last 5 years, including renewal premiums and endorsements. Copies of the most recent policy renewals and invoices for each were also requested.

The AIC received a fax from the Agent dated April 10, 2012. In this fax the Agent confirmed that he had filed a complaint with the CPS on behalf of one of his clients, and in addition, the Agent attached a copy of a form of invoice that he wanted the AIC to approve. The Agent stated "I am sending you a copy of this years [sic] invoice for your approval. Our procedures on these three accounts all included a set up or consulting fee, which are documented in our invoices, as this is a sub brokered account at a reduced commission the set up fee or consulting fee off set this reduced commission. From my understanding this is

common practice in the brokerage business." The invoice that was attached to the fax included a line that made reference to there being consulting and set-up fees included in the premium amount.

On April 10, 2012, the AIC responded to the Agent's fax and indicated that:

> With respect to your request that we 'approve' the invoice which was attached to your fax, please be advised that the AIC does not approve the format of invoices…However, we wish to point out that, in accordance with section 500 of the [Act], you may not indicate on an invoice, or otherwise, that the premium to be paid for a policy is an amount that is different than the amount set out on the policy itself…Further, with respect to the additional fee which you have confirmed you are charging the client in issue, in accordance with section 505 of the [Act], you may not charge or collect such a fee unless the client in issue has agreed in writing to pay such additional fee before the service is provided.

On April 10, 2012, the Agent sent a second fax to the AIC, in response to the AIC's fax described in paragraph #13, which stated:

> …I was not aware of this ruling and have been charging a fee for services for many years when we are working with a reduced commission on a sub-brokered account. (emphasis added) We advise the insured on his new business, renewals or invoices that a fee has been added. They have the option NOT (emphasis in original) to take our offer. Is the signed check not evidence that that thee [sic] insured has accepted the terms and conditions of our invoice including the consulting fee or set up fee.

The Agent added:

> Our firm is buying their policies from a 'wholesaler' and have added the consulting fee or set up [sic] fee to the wholesaled price…We have not asked for a signed consent form for this fee…Several years ago I remember several of the 'major broker players' were charging a minimum policy amount no matter what the insurer issued the policy for. Was this ever questioned?...Items #500 and #505 do not make mentioned [sic] of a sub-brokered account. Should this not be included in #500 and #505 when there is a substantially reduced commission to the Broker? Should there not be a minimum and maximum commission a broker can charge? Can a Broker charge consulting fees if the insured is made aware of this prior to acting on the Insured's behalf?" (emphasis added)

On April 10, 2012, MR of Aviva sent an email to the AIC which confirmed that he had gathered the information requested. MR wrote "I have attached a summary of the transactions over the past five years for policies identified in your letter. I will have a courier deliver to your Calgary offices the hard copies of the most recent renewals and invoices for those same policies." The AIC then received a package from MR on April 12, 2012, with a letter that stated "Aviva fully supports your ongoing efforts in this investigation

and we have attached the information you've requested in your letter dated April 4, 2012." Attached to the letter were copies of the most recent policies for the clients on the list provided to MR by the AIC.

The Agent sent a fax to the AIC on April 11, 2012. The Agent confirmed that he re-read the information sent to him and he "…was not aware a fee could not be charged to off set a reduce [sic] commission rate." (emphasis added). The Agent also stated as follows:

1) "You can note [AIB] formerly CWW charge a fee."

2) "The ACT #500 or 505 does not make reference to a sub brokered account at a substantially reduced commission rate from the normal."

3) "When we buy a policy from a wholesaler are we not allowed to retail that policy at a standard commission i.e. set up fee or consulting fee."

4) "There is nothing in the ACT that states a Broker cannot charge a 'consulting fee' for services."

5) "Can a Broker who is acting as a consultant not charge a fee for services?"

6) "As you can see in our invoicing we quote prior to expiry or binding that a set up or consulting fee is included prior to the insured purchasing the insurance."

The Report also contained a fax that the Agent sent to Client A's principal indicating that another principal of Client A ("J") agreed to pay fees in addition to premium on a yearly basis and that a consent form was signed when the file was originally set-up. However, Client A's principal wrote an email to the AIC on May 8, 2012 stating the following:

I am writing you to respond to your following questions:

1) [The Agent] only told me that he was charging me amounts over and above the policy premium in a discussion I had with him on May 1, 2012 after the policy was in effect. I questioned him on what was going on as he wanted me to sign some form asking for my files to be returned from an ex employee.

2) [The Agent] did not tell me what amounts or percentage he charged me on my policies over and above the policy premium this year or in previous years. I had no idea I was being charged a policy premium until I questioned him on May 2, 2012.

3) [The Agent] informed me verbally well into my policy and I never gave my permission to the extra costs.

> 4) [The Agent] asked me to sign a letter stating that I was happy with my policy but I have refused to sign it as I wasn't sure at the time what was going on as an ex employee of [the Agent's] indicated that I was being over charged."

The Agent has not provided any evidence from J that substantiates his version of the events.

On May 10, 2012 the Agent sent a further fax to the AIC indicating that he was attempting to find documents that the clients signed giving permission to charge and collect the fees but said that his efforts were being impeded by the length of time some of the clients had been with his agency.

The Report also contained numerous copies of letters that were signed by the clients in issue. An undated letter signed by Client A's principal reads as follows:

> Bob, I have given no permission or authorization from [sic] taking documents from my business insurance file from [Client A's file] from you [sic] office. These documents have been taken illegally and I want all these documents and photocopied documents returned immediately.
>
> From my understating [sic] these document were stolen from a former employees [sic] of your firm.

Client B also signed a letter to "Whom it May Concern and Bob Arnold" dated April 23, 2012. This letter read as follows:

> I am well aware that Mitchell Insurance Brokers were charging me a consulting fee on my account to off set the reduced commission. The documents in my file were stolen by the AIC and I want any duplicated documents returned to Mitchell Insurance Brokers immediately.
>
> I also want the Calgary City Police to do a complete investigation into these false accusations made by the AIC against Mitchell Insurance Broker on my behalf. The AIC pursued this matter without my written authority to do so. From my understanding the AIC's actions are illegal. This is nothing more than abuse of power on behalf of Provincial Government funded organization of the AIC.

The Report also contained a number of other similar letters from Client B that spanned the period of time in which the investigation proceeded. To summarize them, he states that he was aware of being charged fees and that he knew this from the invoices prepared by the Agent and he also restates his concerns regarding his files being copied. The Report also has a letter that he signed on April 3, 2012 that expresses his satisfaction with MIB's billing and accounting practices.

However, it is interesting to note that in an email to the AIC dated October 18, 2012 Client B asked whether the AIC could provide him with a document setting out the "figures of what commissions you think I paid on top of the premium."

The Report also contains a June 1, 2012 fax cover sheet signed by Client C. It reads as follows:

> I want to no [sic] who gave you the authority to confiscate my personal and confidential insurance file from my Brokers [sic] office (Mitchell Insurance Brokers) without my written permission, consent or approval. In taking this file without my authority you have acted illegally and violated the Privacy Act.
>
> If you are in possession of a duplicated copy of my file I will expect this to be returned to my Broker immediately.

In the supplementary materials provided by the Agent there is also a December 14, 2012 email from Client C regarding a fax that the Agent obviously asked Client C to sign. In response, Client C wrote:

> I did receive you [sic] fax and while I clearly don't want to be involved in any of this, I am not prepared to sign the draft you asked me to sign. It is confrontational and doesn't need to be that aggressive. I would never send a note like that. I am happy to sign a note that states that I have not filed any complaint and do not want to be part of this action and would ask politely to be removed from any further activity related to the complaint.
>
> I don't have time to get into this as we are leaving on vacation tomorrow and I have a tone of things to do before we get away.

The Report also contains numerous invoices and draft invoices prepared for the clients, some of their policy documents, declaration pages and MIB accounting records. It also indicates that the AIC contacted various insurers so as to determine typical commissions paid to brokers. They range from 10% to 20% and, while hearsay evidence, they are commonly known industry standards of compensation for brokers.

Discussion

A. Preliminary Issues

Much of the correspondence in the Report relates to the AIC seizure of the clients' files. Indeed, following this, the Agent sent complaints to, among others, the Calgary Police Service, the Privacy Commissioner of Alberta, the Superintendent of Insurance, the Premier of Alberta, and the Law Society of Alberta.

As to this issue, it is helpful to refer to specific sections found in the Act.

Part 6 of the Act deals with enforcement and compliance. Section 755 indicates that an examiner under the Act may exercise the powers set out in ss. 758 and 759 in order "…to determine if there is compliance with this Act and regulations…" and "to examine any matter relating to a contract of insurance, including the settlement or adjustment of any claim made under a contract of insurance. (emphasis added)

The AIC staff members who visited the Agent's office are duly authorized examiners under the Act and they were investigating whether or not sections of the Act were being observed. As such, they were authorized to exercise the powers set out in s.759. Section 759 reads as follows:

759 (1) Subject to subsection (6), an examiner may, for the purposes referred to in section 755, enter at any reasonable time any premises or place of a regulated person, a subsidiary or holding body corporate of a regulated person or any other premises or place that the examiner believes on reasonable grounds contains records, documents or property of a regulated person or a subsidiary or holding body corporate of a regulated person.

(2) An examiner who enters any premises or place under this section may require the owner or manager of the premises or place and any other person in the premises or at the place

(a) to give the examiner all reasonable assistance and to make reasonable efforts to answer all the examiner's questions,

(b) to produce for inspection or examination all records or documents that are or may be relevant, and

(c) to produce any property of the regulated person or subsidiary or holding body corporate of the regulated person.

(3) An examiner may in the course of inspecting or examining records or documents under subsection (2)

(a) make copies of or take notes from them, or

(b) temporarily remove them.

(4) Where an examiner removes records or documents under subsection (3), the examiner

(a) must give a receipt for them to the person from whom they were taken,

(b) may make copies of, take photographs of or otherwise record them, and

(c) must, within a reasonable time, return them to the person to whom the receipt was given.

(5) A person who receives a request from an examiner under this section must comply with it.

(6) When the premises or place referred to in subsection (2) is a dwelling place, the examiner must not enter the dwelling place without the consent of the occupant of the dwelling place.

Given that MIB is a "regulated person" under the Act, the AIC personnel who were involved in investigating this matter were explicitly authorized to enter into places of business such as MIB and they were authorized to remove, copy and return the files in question. As such, we are of the view that the Agent's numerous complaints, allegations and assertions that AIC personnel acted illegally have no basis and will comment no further on them. Similarly, the AIC's jurisdiction to investigate matters and the Council's ability to adjudicate allegations of wrongdoing are not contingent on the existence of a formal complaint by any client such that a client can somehow "withdraw" a matter from our review.

B. Dishonest or Untrustworthy conduct pursuant to s. 480(1)(a)

As noted at the outset, this case relates to the Agent's actions in and around three specific clients. First, it is alleged that the Agent made misrepresentations or acted in an untrustworthy or dishonest manner by charging fees in excess of the actual premium amounts without the consent of the clients. It is further alleged that in some of the cases he included those excess fees in premiums that the clients were being charged. By way of introduction, we believe it helpful to describe the process by which the Agent obtained insurance for each of the clients and then reference what occurred in regard to each.

In regard to Client A, a corporate client that operated a Calgary bar/restaurant, the insurance transactions involved the Agent accessing policies through a third party agent who would, in turn, be in touch directly with the insurer. The Agent would request quotes from the third party on behalf of the client. The third party would then invoice the Agent for the policies and the Agent would be required to pay the invoiced amount to the third party. The third party forwarded premium dollars to the insurer. The third party invoices to the Agent set out the exact premium being charged by the insurer inclusive of the Agent's commission. The invoice precisely set out the Agent's commission and the third party's "agency policy fee". The Agent would then have to remit the premium amount and third party fee less his commission.

The documents indicated that the third party prepared a quote dealing with Client A's insurance dated September 2, 2009. This quote stated that the total premium for the policy was $18,250.00. Total cost to the client was to have been $18,500.00 inclusive of a $200.00 policy fee and $50.00 Equifax fee and the Agent's commission. The quote set out the Agent's commission as $2,738.00 (15% of the premium rounded up to the nearest dollar). The Agent faxed the quote back to the third party on September 9, 2009 with a handwritten and signed note: "Great…Please Proceed with Renewal".

BM indicated in her letter that the Agent required that separate invoicing documents be prepared to send to clients rather than the actual policy declarations that would clearly set out the premium. In this case, an MIB invoice was prepared that billed Client A the amount of $23,000.00. The body of the invoice then went on to explain the amount to Client A's principals and reads as follows:

> …your comprehensive business renewal for [Client A] will follow receipt of your payments. We are only authorized to activate policies on behalf of Lloyds of London once our firm has received payments. If you can have this available by September 30, 2009, we can arrange a courier to come by and pick this up. Please give us a call to confirm.
>
> Last year's annual premium was $27,000.00, and this year the premium has come in at $23,000.00 including consultation fee. Over the past two years, this is a savings of over $9,000.00. We have reviewed our other markets on your behalf and have been unable to obtain a lower quote because of high liquor beverage sales.

In this transaction, Client A paid $23,000.00 for a policy that was issued (inclusive of the commission of $2,738.00) for $18,500.00. Therefore, not only did Client A pay the 15% commission it paid an additional $4,500.00.

The following year, MIB again processed Client A's renewal. This time, the third party invoice relating to Client A's commercial property policy was dated September 3, 2010. The premium set out in the invoice was $15,548.00. The Agent's commission on the transaction was 15% of $15,548 ($2,332.20) and the third party's policy fee was $200.00. Therefore, the invoiced amount to the Agent was $13,215.80 (premium plus third party fee less the Agent's commission).

Once again, as indicated by BM, the Agent directed that a separate invoicing document be prepared for the client. In this case, the Report contained a draft document with handwritten changes made by the Agent. The draft is simply a restatement of the September, 2009 amounts and the Agent crossed out certain numbers and wrote in others. The document that was sent to Client A was dated September 30, 2010 and used the numbers that were written in by the Agent on the draft. It requested that Client A pay $18,750.00 for the policy. As before, the invoice contains a message to Client A's principals and reads as follows:

> …your Business Comprehensive Insurance renewal for [Client A] will follow receipt of your payments. We are only authorized to activate policies on behalf of Lloyds of London once our firm has received payments. If you can have this available by September 30, 2010, we can arrange a courier to come by and pick this up. Please give us a call to confirm.

> Last year's annual premium was $23,000.00, and this year the premium has come in at $18,750.00 including consultation fee. Over the past two years, this is a saving of over $13,000.00. We have reviewed other markets on your behalf and have been unable to obtain a lower quote because of high alcoholic beverage sales as well as two Statements of Claim that are still open.

Therefore, in this transaction Client A paid $18,750.00 for the policy and $13,415.00 was remitted to the third party. Given this, Client A not only paid the agency a commission of $2,332.00 but also an additional $5,335.00. However, this was obscured given the fact that Client A was never provided with a copy of the declaration page setting out the premium and was only told that the amount was premium including fees. These fees were not set out nor was there any indication as to how they were calculated. The client's file in the agency contained copies of the actual policy documents that set out the premiums. These were also found in the Report.

In 2011 MIB again processed a quote and renewal on behalf of Client A. This time, the premium was $14,639.00 inclusive of the Agent's commission. The commission payable to the Agent and MIB was 15% or $2,195.00. Including the $200.00 fee MIB was asked to remit $12,643.15 so as to place the policy. The invoicing document that was sent to Client A over the Agent's name required payment of $17,850.00. That represents an additional charge of approximately $5,200.00.

As noted above, one of Client A's principals wrote to the AIC on May 8, 2012 and indicated that the Agent did not tell him that Client A was paying amounts over and above the actual premium of the policy (that already included commission) and that he never gave the Agent permission to charge such fees. The Agent wrote to this principal on May 12, 2012 seeming to suggest that he discussed this with another principal of Client A. However, unlike letters that the Agent supplied from other clients, no such confirmation was provided to substantiate these alleged conversations. The Agent repeats these assertions in the additional information he provided but there is nothing from the client to corroborate this. Rather, the only evidence from Client A is that these particular fees were never disclosed or agreed to by Client A. The Report indicates that the Client paid more than $14,000.00 above the policy premiums that included the broker's commission.

Client B is also a corporate entity that placed insurance through the Agent and MIB. The policy in question for this client is a commercial policy covering commercial property and liability for guiding and outfitting.

This policy is underwritten by The Sovereign General Insurance Company ("Sovereign") and the commission set by the insurer is 10%. Once again, this policy was acquired through a third party broker. The third party confirmed to the AIC that 10% has "more or less" been the standard commission rate for this type of policy but that it had recently been increased to 15%.

The earliest record in the file for this client was the 2008-2009 renewal. The renewal was issued by the insurer for a premium of $12,522.00. The Agent issued an invoice for this renewal dated May 1, 2008 that, in part, states: "Enclosed your guiding liability binder for rafting and related activities. Sorry for the delay. We have maintained the same premiums as last year. This is a bargain." This invoice charged Client B 15,060.00 for the policy. The file contained both the insured's copy of the policy and the broker's copy of the policy and there is no indication that the policy was ever sent to the client.

The insurer issued a renewal for 2009-2010 with a premium of 15,522.00. The April 20, 2009 invoice that was issued to the insured charged $16,000.00 and made reference to a "consultation fee" being included in the amount. As before, the file contained both the insured's and broker's copies of the policy.

In the following year, Sovereign issued a renewal for 2010-2011 and the associated premium was $15,500.00. The invoice issued to Client B's principal by MIB staff, dated April 23, 2010 reads, in part, as follows:

> …we have not yet received your Guiding Liability for Rafting Insurance renewal in our office, but will forward it upon receipt from [the third party broker] and once your payment for same has been received. Please read over the documents carefully and if you should have any questions, feel free to call [the Agent] and he would be glad to review it with you. The annual premium is $15,500.00 including set up fee, to which we have applied a credit on account of $1,844.00, resulting in the above amount. Your overall premium is down this year. If this policy is not required, please contact our office immediately.

The accompanying accounting record has a handwritten notation regarding the use of the credit to pay for this policy: "use as set up fee for May/10 renewal as per Bob". Again, the file contained the insured's copy of the policy.

In the following year, Sovereign issued a policy renewing Client B's coverage for the 2011-2012 term on March 16, 2011. The premium was $9,940.00. MIB again issued an invoice for this renewal and the cost associated with this is $12,500.00. The memo also contains a reference to the fact that "[y]our overall

premium is down this year for an approximate saving of $6,000.00. Upon receipt of payment which includes set up fee we will be forwarding your policy and ask that you please read over your document and if you should have any questions, do not hesitate to call [the Agent] at our office. The Report also made note of the fact that the broker's copy of the policy contains a handwritten reference on the first page of the policy that $2,560.00 is the "set up fee".

In relation to Client C, the Agent insured certain pieces of property through policies underwritten by AXA Insurance (Canada) ("AXA"). Once again, this was a policy where the broker's commission of 20% was included in the premium such that a client would pay the premium amount to the broker and the broker would retain the commission and send the remainder to the insurer.

The earliest record in the file for this client was the 2008-2009 renewal. The renewal was issued by the insurer for $2,453.00 in premium. The Report noted that the file did not contain an invoice to Client C but that accounting records proved that he paid $1,000.00 more than the premium.

On March 10, 2009, an endorsement was done to add coverage to Client C's policy as he acquired further property, and in accordance with an email from the insurer, the additional premium was to be $498.00. However, by memo dated March 10, 2009 the Agent stated that $1,150.00 was due and Client C paid this amount.

On May 21, 2009, Client C sought to add coverage for another piece of property to the policy. AXA endorsement documents indicated that the premium for adding this extra property was $31.00. On May 28, 2009 an invoice was produced that charged the client $195.00. The invoice was signed by the Agent.

Client C sought to obtain coverage for additional property effective December 22, 2009. The insurer sent out a memo confirming the additional premium would be $940.00. The invoice dated January 31, 2010 charged Client C $1,000.00 instead of $940.00 and invited the client to contact the Agent in the event that he had any questions.

In July, 2010 Client C sought to obtain another endorsement for additional property through the Agent. In response, the AXA underwriter sent an email to the Agent confirming that the premium for this change would be waived. However, another invoice dated August 14, 2010 was sent to the client asking that he pay

$250.00. In referencing the change resulting from the addition of new property to the policy, the Agent told Client C that "[t]he change has produced an additional premium including fees as per the above, which we have applied to your account. Documentation will follow in due course. If you should have any questions do not hesitate to call [the Agent] to discuss it with you."

On November 12, 2010, Client C added more property and, once again, AXA waived any additional premium for this addition. Despite this, the Agency sent Client C an invoice of $450.00 because "[t]he amendment has produced an additional premium including fees…."

Effective April 8, 2011, another endorsement to the policy was processed. While the additional premium was to be $402.00 the Agent sent Client C an invoice for $850.00. His memo to the client indicates that the amendment produced an additional premium including fee.

On September 26, 2011, the Agent sent an invoice to Client C for an additional $702.00 as a result of adding more property to the policy's schedule of coverage. The Report notes that a copy of the endorsement documents could not be located in the file. However, there was a copy of an email from the Agent to the insurer which stated "Hi I got endorsement was there not an additional premium?" Therefore, it appears that there was no charge for this amendment to the policy.

Two more endorsements and invoices were prepared for Client C effective December 20, 2011 and February 23, 2012. The premiums generated by these changes were for $413.00 and $651.00. However, Client C was invoiced $485.00 and $750.00. The latter of these invoices indicated that the amendment produced an additional premium. All told, Client C paid more than $5,000.00 over the amount that was invoiced by the insurer; amounts that already included the Agent's compensation in the form of commissions.

In order to conclude that the Agent has committed offences 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 acts as alleged. The requirement of clear and cogent evidence reflects the fact that our findings can dramatically impact an insurance agent's ability to remain in the industry.

Additionally, the elements of s. 480(1)(a) offences have been discussed by the Alberta Court of Queen's

Bench in *Roy* v. *Alberta (Insurance Councils Appeal Board)*, 2008 ABQB 572 (hereinafter "*Roy*"). In *Roy*, the Council found that an agent committed an offence pursuant to s. 480(1)(a) of the Act when he attested to completing the applicable CE when he did not, in fact, have the required CE. The agent also held a securities license and stated that he believed that the CE he required to maintain his securities license was applicable to his insurance agent requirements. Like the Council before, 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 his reasons for judgment, Mr. Justice Marceau reviewed the requisite test to find that an offence pursuant to s. 480(1)(a) of the Act has been made out and expressed it 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)

In applying this test to the case before us, a number of things are clear. First, in each of the cases, the policies that were issued by the insurers on behalf of the clients included the commission that was due and owing to the Agent and MIB. In many cases that amounted to 15% of the premium. Despite this,

the Agent (either personally or through instructions to subordinates) sent out invoices that charged substantially more than what was charged in premium by the insurer. In some cases the invoices make reference to fees. In others, the charges given to the clients are couched in terms of premiums and consultation fees or premiums and set-up charges. Regardless of the various euphemisms that were used to describe the same thing, we are of the view that the statements that the Agent made, or directed to be made, were designed to hide the extent of the amounts that he was arbitrarily adding to the premium so as to earn more than the commissioned amounts. In at least one case, that of Client C, the Agent charged amounts where no additional premium was due at all.

In response, the Agent urges us to consider the fact that the clients (at some time or other) sent correspondence suggesting they agreed to fees. There are a number of difficulties with this. First, in the case of Client A, the principal that has given evidence indicated that he did not know or agree to the amounts that were charged. Even though the Agent provided a number of letters from Client B indicating that he consented to charges he, in turn, appears not to have known what those charges totaled. It is difficult to argue that a client agreed to fees when there is no indication that the amounts (or even a formula to allow the client to determine the fees) were ever disclosed to the client. It is also interesting to note that Client C refused to sign one of the letters that the Agent provided to him on the grounds that it was too aggressive and that he did not want to become involved. Client C was the individual that was asked to pay increased amounts that represented premiums and fees when there was no extra premium at all.

Second, every client realizes that insurance agents are compensated for the services they provide. No one works for free. To that extent, it is not surprising that clients would write letters indicating that they knew that the Agent was charging something for his time and effort. However, what was occurring here was far beyond what any client could or should reasonably expect. In these cases, the Agent was compensated the typical broker's commission and that was included in the premium. Despite this, the Agent continually tacked-on arbitrary amounts above and beyond this obviously in the hope that the clients would simply accept the total amount as just the cost of doing business with little thought as to what was premium and what was fees.

Third, he never informed any of the clients what fees he was charging. The fact that they neglected to protect themselves further by not requesting the policy documents that would bring the Agent's tactics to light does not absolve the Agent of his wrongdoing.

The Agent also says that he had signed agreements but that he could not locate them. This excuse does not hold water. When the AIC investigators asked about whether or not his clients had signed agreements to pay the fees, the Agent responded that he did not have them because he did not know that they were required. He also said that a client's signed cheque was the agreement required by the Act.

In light of all of the evidence we are satisfied that there is sufficient clear and cogent evidence to prove that the requisite elements of the offences have been made out and that the Agent made misrepresentations and acted in a dishonest and untrustworthy manner as contemplated in s. 480(1)(a) of the Act as alleged in Counts 1, 2 and 3 of the Report.

In terms of the applicable sanctions, we have the ability to levy a civil penalty in an amount not exceeding $5,000.00 for each of these contraventions pursuant to s. 13(1)(a) of the *Certificate Expiry, Penalties and Fees Regulation*, A.R. 125/2001. We also have the ability to suspend the Agent's certificate of authority for a period of time or revoke it for one year.

In the cases before us now, the Agent's practices in misleading his clients were systematic and long-running and involved relatively large amounts considering the premiums that were actually being charged by the insurers. Further, the Agent's conduct throughout the course of this investigation has been deplorable and inexcusable. We are of the view that his actions readily demonstrate that the Agent cannot be properly regulated as an insurance agent.

Additionally, this is not the first time that the Agent has been found guilty of conduct prohibited by s. 480(1)(a) of the Act. In 2011, this Council found that the Agent acted in a dishonest manner when, in the course of collecting an outstanding debt from a client, he assumed a fictitious alter-ego and posed as a collections agent in text messages that he sent to the client. In regard to this conduct the Council levied a civil penalty in the amount of $1,000.00.

We are of the view that the strongest possible sanction be levied against the Agent so as to deter his conduct and any other agent that may be tempted to treat clients in a similar matter. In light of all the circumstances before us, we order that three civil penalties of $5,000.00 each be levied against the Agent. We also order that his certificate of authority to act in the capacity of a general insurance agent be revoked in regard to each of the findings. The three revocations are to be served concurrently.

C. Indicating premiums other than those set out in the policies (s. 500) and additional fees (s. 505)

Section 500 of the Act states:

> No insurer, no officer, employee or agent of an insurer and no insurance agent may indicate that the premium to be paid for a policy is an amount that is different than the amount of the premium set out in the policy.

As noted above, the Agent systematically sent out (or caused to have sent out) invoices that told clients that they were being charged premiums that included fees to compensate the Agent.

In each of the cases, the insurer issued policies that expressed the premiums inclusive of the Agent's compensation. However, the Agent issued invoices with a completely different amount of premium and compensation totaled. In our view, only an insurer is entitled to set the premium of a policy. It is the insurer, after all, that is responsible for remitting premium taxes to the Government of Alberta on the premiums that they charge. In these cases, the Agent was making up new premium amounts inclusive of fees and it is our conclusion that the Agent contravened s. 500 of the Act in regard to each of the three clients. In so doing we find that he breached a section of the Act as contemplated in s. 480(1)(b).

Pursuant to s. 13(1)(b) of the *Certificate Expiry, Penalties and Fees Regulation*, A.R. 125/2001 we have the ability to levy civil penalties in an amount not exceeding $1,000.00 for each of these offences. We also have the ability to suspend the Agent's certificate of authority or revoke it for one year. For similar reasons and considerations set out in our comments regarding the first set of offences, we order that three civil penalties of $1,000.00 be levied against the Agent. We further order that the Agent's certificate of authority be suspended for a period of six months in relation to each of the three findings and that these three suspensions be served concurrently with the revocations ordered above.

Finally, s. 505 of the Act prohibits agents from charging and collecting a fee without first having the client agree in writing to pay the fee. Section 505(1) and (2) read as follows:

> (1) In this section, "fee" does not include the premium payable under a contract of insurance.
>
> (2) No insurance agent may charge or collect a fee for providing a service to a person who is or is in the process of acquiring insurance through the agent unless the person has agreed in writing before the service is provided to pay the fee.

This section requires agents to provide proper disclosure and obtain a client's consent before charging fees for their services. In this regard it is important to note that the only fees that require this heightened disclosure and consent are ones that are not included in the premiums that are set by the insurer.

It is our view that the Agent contravened this section in regard to each of the three clients. He has been unable to substantiate that any written agreements were signed by the clients prior to his providing the services. As noted above, he first said that he did not even know that this requirement existed. Then he attempted to argue that a signed cheque can be such an agreement. In order to comply with this section an agent needs to have a separate written agreement signed by the client **before** he provides the service. We are also of the view that the agreement must specify the fee that is to be charged. The Agent did not do this in any of the cases.

Pursuant to s. 13(1)(b) of the *Certificate Expiry, Penalties and Fees Regulation*, A.R. 125/2001 we have the ability to levy civil penalties in an amount not exceeding $1,000.00 for each of these offences. We also have the ability to suspend the Agent's certificate of authority or revoke it for one year. For similar reasons and considerations set out in our comments regarding the first and second sets of offences, we order that three civil penalties of $1,000.00 be levied against the Agent. Once again, we order that the Agent's certificate of authority be suspended for six months in relation to each of these three findings and that these suspensions should be served concurrently with the revocations and other suspensions ordered above.

Conclusion

To summarize, we have found the Agent guilty of three offences pursuant to s. 480(1)(a) and have ordered that three civil penalties totaling $15,000.00 be levied. We also found the Agent guilty of

contravening s. 500 three times and s. 502(2) three times. We levied six penalties totaling $6,000.00. All told, we therefore levy a grand total of $21,000.00 in civil penalties. Finally, we ordered three revocations and six suspensions of six months each. The civil penalties must be paid within thirty (30) days of receiving this notice. In the event that they are not paid within thirty (30) days, interest will begin to accrue. The revocations and suspensions noted above are to be served concurrently and will commence on the eighth day after the mailing of this decision. 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.

May 16, 2013

Original signed by Jim Harris
Chair
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