FST-06-028

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF THE FINANCIAL INSTITUTIONS ACT
R.S.B.C. 1996, C. 141 AS AMENDED

BETWEEN:

THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

APPELLANT

AND:

INSURANCE COUNCIL OF BRITISH COLUMBIA
and WILLIAM CRAIG BLACKWOOD

RESPONDENTS

APPEAL DECISION

BEFORE: DALE R. DOAN, LLB Presiding Member

APPEARANCES: Richard Fernyhough, for the Appellant
David McKnight, for the Respondent
William Craig Blackwood, Not Appearing

DATE OF LAST SUBMISSION: December 4, 2006

DATE OF DECISION: January 30, 2007

INTRODUCTION

This appeal (the "**Appeal**") began by the filing of a Notice of Appeal on behalf of the Appellant, Superintendent of Financial Institutions (the "**Appellant**" or "**Superintendent**"), on September 6, 2006. The Financial Services Tribunal (the "**FST**") is asked to review a decision of the Respondent, Insurance Council of British Columbia ("**Council**"), dated August 8, 2006 respecting a penalty imposed upon the Respondent, William Craig Blackwood (the "**Licensee**"), concerning breaches by the Licensee of section 231(1) of the *Financial Institutions Act*.

The decision of Council which is the subject matter of this Appeal involves four decisions of Council under the authority of sections 231, 236 and 241.1 of the *Financial Institutions Act* where Council ordered that:

1. The Licensee be reprimanded;
2. The Licensee be required to successfully complete an errors and omissions seminar offered through the Insurance Brokers Association of British Columbia, or an equivalent course as determined by Council, within one year from the date the Council's decision takes effect;
3. The Licensee pay the costs of Council's investigation in the matter assessed at $425.00; and
4. As a conditional decision, the Licensee be required to pay the above mentioned costs by November 8, 2006. If the Licensee did not pay the ordered costs by this date the Licensee's license be suspended as of November 9, 2006, without further action from Council.

The Notice of Appeal filed on behalf of the Appellant seeks the following two orders from the FST:

A. That the penalty imposed on the Licensee by Council be varied to include a period of suspension and/or a fine; and
B. Costs against Council pursuant to section 47 of the *Administrative Tribunals Act* as applicable to the FST Appeal pursuant to section 242.1(7) of the *Financial Institutions Act* be awarded.

The Notice of Appeal also sets out the two main grounds of Appeal, as follows:

I. Council's finding that the Licensee "did not intend to deceive the client" was unreasonable given its finding the Licensee unilaterally changed the coverage on the client's homeowner's insurance policy, without advising the client in order to reduce the cost of the policy to the amount the licensee quoted the client.
II. Council erred in exercising its discretion in unreasonably concluding that a reprimand, a requirement to successfully complete an errors and omissions seminar and a requirement to pay $425.00 in costs was appropriate discipline of the Licensee for unilaterally changing the coverage on his client's policy of insurance without

informing his client of the change and without obtaining his client's consent to the change, where such change decreased the insurance coverage his client believed he had obtained.

The facts surrounding the unilateral change in the coverage of a client's homeowner's insurance policy by the Licensee and the actions or inaction of the Licensee, as the case may be, are described below as are the respective positions of the Appellant and the Respondent, Council with respect to this Appeal. It should be noted that the Respondent Licensee has not filed submissions or other materials in this Appeal.

ISSUES ON APPEAL

In this Appeal the FST must determine whether the penalty imposed is reasonable in the circumstances of this case. The submissions of the Appellant set out six additional issues as follows:

1. Whether the Council could reasonably conclude that the complainant "requested the lowest possible premium and was not overly concerned with contents coverage but rather, required the insurance in order to obtain a mortgage on the home".
2. Whether the Council could reasonably conclude that the Licensee did not intend to deceive the complainant when he unilaterally changed the insurance coverage the complainant had contracted for and did not inform the complainant of his actions or that the complainant's insurance coverage had been decreased.
3. Whether the Council could reasonably conclude that the Licensee "was not acting in an incompetent manner."
4. Whether the Council erred in providing no reasons or insufficient reasons for imposing the penalty did it.
5. Whether the Council could reasonably conclude that the penalty imposed was an appropriate penalty under the circumstances.
6. Whether the Council erred in not adequately addressing the seriousness of the conduct in question as disclosed by the evidence contained in the Investigation Report submitted to Council and by the findings made in the intended decision of Council.

FACTS

In its letter dated July 14, 2006, Council wrote to the Licensee advising of its intended decision with respect to the conduct of the Licensee in this matter. The facts outlined in this letter are in dispute to the extent at least of the findings of fact of Council. They provide a clear synopsis of the actions of the Licensee that resulted in Council's decision which is under review in this Appeal. The undisputed facts are as follows.

The Licensee has been licensed as a general insurance agent since March 19, 2001. On or about March 13, 2006 a client telephoned the Licensee requesting insurance coverage on a home that

he was purchasing. The Licensee stated that his client requested the lowest possible premium and was not overly concerned with contents coverage. Rather, the client required the insurance in order to obtain a mortgage on the home according to the Licensee.

The Licensee quoted $501.00 for comprehensive form coverage, which included coverage for personal property in the amount of $134,000.00. The client accepted this coverage and his homeowner's insurance policy became effective on March 15, 2006. On or about March 28, 2006, the insurer advised the Licensee that the premium calculations of $501.00 was incorrect because he had input the wrong territory and the premium actually amounted to $832.00. The following day, on March 29, 2006, the Licensee made a unilateral decision to instruct the insurer to amend the policy to a basic dwelling form in order to reduce the premiums to reflect the amount he had initially quoted to the client.

The principle difference between the comprehensive and basic dwelling coverage was the contents coverage, and the change to the policy had the effect of reducing the contents coverage from $134,000.00 to $20,000.00.

The Licensee did not advise the client of the changes to the homeowner's insurance policy. The client received the policy and noticed that coverage had been reduced without his knowledge or authorization. When the client contacted the Licensee about the changes made to his coverage, the Licensee offered to have the policy changed back to the comprehensive form for which the client had originally applied and the Licensee agreed to pay the $331.00 difference in premiums.

Council's intended decision indicated that Council found that the Licensee did not intend to deceive the client; rather, based on the early discussions between the Licensee and the client, Council found that the Licensee did not believe that the reduction in coverage to personal property would be problematic for the client since the client was mainly concerned with obtaining a mortgage on his home and paying low premiums. The client subsequently received an amended policy from the insurer reflecting the coverages that he had originally requested, including $133,700.00 in contents coverage. The Licensee's agency paid the $331.00 difference in premiums to the insurer. This took place after the client filed a complaint respecting the actions of the Licensee.

Council found the Licensee in breach of section 231(1)(a) of the *Financial Institutions Act* in that the Licensee failed to act in accordance with the usual practice of the business of insurance by failing to advise the client that the insurance he had requested could not be placed for the amount quoted and by instructing the insurer to reduce coverage without the client's knowledge or consent.

Council determined that the Licensee should have notified the client immediately upon learning of his error in calculating the premiums, thereby allowing the client himself to make the decision to reduce the coverage for which he had initially applied or pay an increased premium.

Council's intended decision also indicates that Council found that the Licensee was not acting in an incompetent manner. It took into consideration information that at the time of the transaction the Licensee had only been working at that agency for approximately two months and, as a

result, was not accustomed to calculating quotes manually nor was he familiar with the differing rated territories in the Surrey, British Columbia area.

Finally, after referring to two decisions for similar conduct that Council felt were appropriate for guidance in assessing the penalty in this case, it rendered the intended decision that eventually became the four part decision penalty set out above.

ANALYSIS

This Appeal deals with a Licensee that made a number of wrong decisions in the administration of this particular insurance application file. This Licensee was not found by Council to be nefarious or untrustworthy. Council appears to also have found that the Licensee was forthright in acknowledging his mistake and moved quickly to resolve it. Council accepted the Licensee explanation as an attempt to rationalize his behaviour and not as an attempt to abdicate responsibility for what he did. It does not appear that actual harm or economic loss to the client was experienced.

The undisputed facts also support findings that the Licensee was in breach of his statutory obligation to act in accordance with the usual practice of the business of insurance by his failing to advise the client that the insurance he had requested could not be placed for the amount quoted and by making a unilateral decision to instruct the insurer to reduce coverage without the client's knowledge or consent. This resulted in the Licensee not taking the correct and proper steps of notifying the client immediately upon learning of the error in calculating the premiums, not allowing the client to decide whether he wanted to reduce the coverage for which he had initially applied or to pay an increased premium, making a decision that has a material effect on the nature and quantum of insurance coverage afforded to the client, and dealing with the matter only after the client brought the apparent discrepancies to his attention in the context of a formal complaint procedure.

Armed with these two sets of somewhat competing considerations, Council considered two previous decisions relating to penalties in what it considered to be similar circumstances and rendered its decision.

The standard of review by the FST has been referred to in this Appeal. I am of the unequivocal view that the standard of review of the FST, given its statutory review powers set out in section 242.2(ii) of the *Financial Institutions Act* and which has been the subject matter of numerous appeal decisions of the FST is the pragmatic and functional approach also taking into consideration the reasonableness of the decision under appeal. A good summary of the standard of review of the FST is set out in the *Financial Institutions Commission* v. *Insurance Council of British Columbia and Branislav Novko* (FST-05-008, August 22, 2005, at page 4) and in the *Superintendent of Real Estate* v. *Real Estate Council of British Columbia and Kenneth Scott Spong* (FST-05-007, January 13, 2006, at page 15). These two decisions establish that the pragmatic and functional approach meets the criteria of the statutory appeal jurisdiction of the FST, and that this approach combined with the application of reasonableness to the decision under Appeal satisfies the criteria set out in section 242.2(ii) of the *Financial Institutions Act* which enables the FST in an appeal to:

> "...confirm, reverse or vary a decision under appeal, or may send the matter back for reconsideration, with or without directions, to the person or body whose decision is under appeal."

The FST will not hesitate to vary or reverse a decision under appeal if the determination of the tribunal below is found to be unreasonable in a material respect. Indeed, this is consistent with the standard of reasonableness determined to be appropriate for FST appeals in both the *Novko* appeal, referred to above, and *Financial Institutions Commission* v. *Insurance Council of British Columbia and Maria Pavicic* (FST 05-009, November 11, 2005, at page 8). To paraphrase the standard as described in the *Novko* appeal, the FST must determine whether the tribunal below could reasonably have reached a decision as to penalty that it had made after considering all of the evidence, the documentation, the assessments regarding credibility, and its findings of facts, all based upon clear and cogent evidence presented to it. Should the FST determine that the tribunal could not reasonably have reached its decision on penalty after applying that standard, then it is open to the FST to reverse or vary the decision or to send the matter back to the tribunal for reconsideration with or without directions. In effect, the standard of reasonableness emerges from that test especially with respect to determinations on penalty.

Even given the standard as so described, the FST will afford a significant deference to the tribunal that hears and determines the matter in the first instance. This is due to the fact that the review by the tribunal falls within the scope of its statutory authority and area of expertise. In addition, the tribunal has the benefit of reviewing the evidence firsthand and making determinations as to relevance, materiality and credibility as the case may be. In cases where the level of expertise of the tribunal is high, the level of deference afforded to the determinations of the tribunal should be significant.

In this Appeal, the Appellant correctly in my view submits that the primary purpose of the *Financial Institutions Act* regulating professions is the protection of the public. The *Novko* decision (referred to above) and the *Regulation of Professions in Canada* (James T. Casey – Toronto; Carsware, 2003 at page 14-5) support the principle that in the protection of the public interest, legislation such as the *Financial Institutions Act* allows certain factors to be taken into consideration. These factors include specific deterrence of the licensee from engaging in further misconduct, general deterrence of licensee's, rehabilitation of the licensee, punishment of the licensee, the denunciation by society of the conduct, the need to maintain the public's confidence in the integrity of the profession's ability to properly supervise the conduct of its members, and the avoidance of imposing penalties which are disparate with penalties imposed in other cases.

Having reviewed the Record in this Appeal and having considered in particular the Investigation Report Re: William Craig Blackwood, submitted to the General Investigative Review Committee by the Insurance Council of British Columbia's investigator, Karen Mok dated May 9, 2006 (the "**Investigative Report**") and having carefully reviewed the intended decision of Council which relied upon the Investigative Report and its Committee's report following a meeting with the Licensee, I am satisfied that the protective principles involving the public interest described above were not adequately applied by Council in this matter.

Further, having reviewed the comparative authorities considered by Council in determining the penalty to be imposed upon the Licensee, I am also satisfied that the situations faced in those cases are sufficiently distinguishable from the circumstances surrounding the Licensee's actions that a variation in the penalty imposed in this case is warranted.

I believe that these findings on behalf of the FST are required for a number of reasons the most significant of which involve what I believe to be unreasonable determinations by Council in this matter and the misapplication of the principles imposed upon Council in determining the appropriate penalty in circumstances such as those faced in this matter. I will review here the most important errors.

First, Council relied upon the Investigative Report. The Committee that met with the Licensee apparently did as well. A review of the Investigative Report and the series of documents attached thereto as evidence establishes that substantially all of the material facts accepted by Council came from the statements made by the Licensee himself. Further, virtually no corroborative evidence exists. Third party evidence is limited to two items, a brief memorandum where the investigator describes a telephone conversation with the complainant insured who simply complained about the activity of the Licensee in unilaterally reducing the coverage on his personal property and advising that he had no knowledge nor did he consent to the reduction in the contents coverage, as well as a brief memorandum of the investigator outlining a conversation with the insurance company establishing that the complainant insured ultimately received the homeowner's insurance coverage with the contents coverage that he initially requested. The balance of the facts are those of the complainant alone, all provided in the context of an investigation over the complainant by Council. Even the memorandum prepared by the Licensee to Baycity Insurance Services Ltd. where he admitted the wrong doing and stated that he did not intend to deceive the insured but was trying to correct a mistake that he made, was prepared eight days after the investigator spoke to the complainant insured. The matter had progressed to a formal complaint level prior to that memorandum. Although it may be reasonable to determine that the Licensee is making an honest statement respecting the errors that he committed in this matter, it is also reasonable to determine that certain or all of the statements are self serving.

As a result, it is my view that findings by Council that:

(a) The complainant required the lowest possible premium and was not overly concerned with the contents coverage but rather required the insurance in order to obtain a mortgage on the home, and

(b) The Licensee did not intend to deceive the complainant,

both are unreasonable findings of fact in the circumstances. They are uncorroborated, made at a time when an investigation was underway over the conduct of the Licensee and do not stand up to scrutiny when one considers the fact that the actions of the complainant contradict the statement of the Licensee in any event. In this case, the complainant filed a formal complaint respecting the improper acts of the Licensee. In addition to the foregoing, the Licensee's actions contradicted his own statements given the fact that if the complainant was not overly concerned

regarding the contents coverage and only wanted the lowest possible premium, Licensee would have had no reason to hesitate in contacting the complainant for the appropriate consent to the reduction in the coverage, or the Licensee could have offered the lower cost basic dwelling policy in the first place.

Second, the explanatory memorandum of the Licensee emerged over one week following the formal complaint process of the complainant insured and the interview with the investigator. This supports the finding that the Licensee did not intend to inform the complainant of the policy and coverage changes that were unilaterally authorized by the Licensee. The Licensee states that he "should have contacted the complainant". There is no evidence that the Licensee made any attempt to contact the complainant. The matter was finally solved by way of the Licensee actually arranging for payment of the additional coverage so that the complainant received the insurance which he intended to receive in the first place.

Third, it is my view that there is insufficient evidence one way or the other to determine whether the Licensee acted in an incompetent manner. The Licensee apparently did not know that certain areas bore higher risk rated premiums due to his short work experience at that particular agency. This is not a clear indication of incompetence. His actions on this particular file indicate that he made two significant errors that are contrary to the accepted procedures of insurance licensees, namely unilaterally authorizing a material reduction in insurance coverage, and not informing the insured or seeking the consent of the insured to the same. These would be indications of incompetent activity. But without further evidence, a finding one way or the other is, in my view, unreasonable. Yet Council determined as a matter of fact that the Licensee was not incompetent.

Fourth, Council did not consider whether the activities of the Licensee in this matter were contrary to the Code of Conduct requirements set out in the Insurance Council of British Columbia's Code of Conduct. In the *Novko* decision (described earlier) the FST determined that one of the primary duties of the Insurance Council of British Columbia is to regulate the insurance profession. In that decision, the FST stated that this by necessity involves the careful administration of the Code of Conduct imposed upon all insurance licensees as well as the careful consideration of the application of the legislation and its regulations. The integrity of the insurance profession and the protection of the public requires this careful administration by the Council. It is my view that this statement applies in this case as well. The Code of Conduct outlines specific requirements of "trustworthiness and acting in good faith". Under the Guidelines for Trustworthiness, found in the Code of Conduct, conduct which would reflect adversely on a licensee includes:

> (c) intentionally misleading clients... by withholding material information; and
>
> (e) conduct in the nature of theft or fraud.

The Licensee admits the mistake that he made in not making the complainant aware of the change to the policy before it was issued. However his statement that he did not intend to deceive the complainant is suspect at least. Regardless, the Guideline refers to "intentionally misleading clients... by withholding material information." The conduct of the Licensee establishes a breach of that Guideline. I will not comment on the criterion necessary to establish

conduct of the nature of theft or fraud in this matter as the Guideline for trustworthiness was breached in any event. What I do note is that Council did not provide reasons as to whether or not the Licensee's conduct amounted to a lack of good faith under the Code of Conduct and the appropriate Guideline.

Finally, Council did not provide reasons or any analysis with respect to its decision on penalty other than referring to its previous decisions in the *Insurance Council of British Columbia and Carl Eugene Rea* (July 29, 2002) and *Insurance Council of British Columbia and Geanette Ann Andreasen* (May 13, 2004). There is a lack of any substantive analysis respecting how Licensee's conduct compares with the conduct of the licensee's in the said two decisions, the reasoning behind the type of penalty imposed, or any other analysis that would assist in determining the appropriateness of the penalty determined by Council. This, in my view, is unreasonable in the circumstances and is contrary to the reasons set forth in the FST decision of *Superintendent of Real Estate* v. *Real Estate Council of British Columbia and Kenneth Scott Spong* (FST-05-007, January 13, 2006, at pages 12-14). In the *Spong* appeal decision, the FST determined that the submissions of the Superintendent of Real Estate, in that case, were correct that there was no "tenable explanation", let alone a "line of analysis...that could reasonably lead [Hearing Committee] from the evidence to the conclusion it reached." In the *Spong* decision, the FST allowed the appeal on the basis that the Hearing Committee in that case breached its duty of fairness by failing to provide any explanation on the face of its decision for the penalty imposed by the lower tribunal. In this Appeal, I am of the view that Council has not reasonably supported its decision on penalty. No analysis exists. In addition, Council's duty to consider criteria such as deterrence with respect to the Licensee committing further acts of this nature, general deterrence to insurance licensees generally, maintaining the public's confidence in the integrity of Council's ability to properly administer the rules regarding the conduct of its members, have not been met.

These four material deficiencies lead me to the conclusion that Council could not reasonably have reached its decision on penalty. It may be perfectly reasonable to accept as a proposition that the Licensee in this case made a single series of errors of judgment, a mistake that is unprecedented in his career and that he was on his way to correct the matter and accept full responsibility regardless of the complaint and possibly without knowledge of the same when the formal complaint procedure descended upon him. However, from the Record, this assertion can not be established. Similarly, this could be one in a series of many fundamental breaches of the Code of Conduct imposed upon insurance licensees generally. Again, this is unknown to Council and to the FST. Based upon the known facts in this Appeal, I would have expected Council to seriously consider factors such as rehabilitation of the Licensee and deterrence of licensees generally. Timing pressures and unreasonable demands of customers may be expected to lead licensee's to make many decisions in the course of their work week. It is up to Council to establish clear parameters as to what is acceptable and what is not acceptable on the part of licensees when dealing with these sorts of pressures and situations. The Code of Conduct and the Guidelines, especially the Guideline respecting trustworthiness are fundamental requirements on insurance licensees, mandates a higher standard of conduct on licensees in this industry. A reprimand in the case of a licensee that knowingly misled a client and who in the first instance unilaterally authorized a material and potentially very dangerous reduction in insurance coverage appears to be an unreasonable result. Without further information and without the benefit of

considered analysis by Council, who is the expert body relating to the regulation of its insurance industry in this province, I am not able to so determine. What concerns me further is the affect Council's decision may have upon the public's view of Council's ability to regulate the conduct of its licensees. The acceptance of the Licensee's own statements as facts in determining the appropriate penalty and the actual penalty determined appropriate by Council given such a clear case of a breach of the Code of Conduct sends what I believe to be an improper message regarding the regulatory procedures of Council.

It is my view that this matter requires further consideration and action on the part of Council. I recognize that in situations where Council chooses to use the "intended decision" process, it is possible for the decision to be settled or finalized without the benefit of a formal hearing before Council and without the benefit of further investigative reports or specific matters or witnesses being researched and presented to Council. This, however, is a consequence of Council choosing to use the "intended decision" procedure and this case and, in my view illustrates the weakness of that procedure. In order for Council to thoroughly consider the principles which it has an obligation to review and consider in relation to the Code of Conduct and also to consider the applicability of previous decisions or penalties imposed, it would be expected to require a hearing, submissions or other forms of relevant evidence or research that would enable Council to properly fulfill its duties.

DECISION

For the above noted reasons I direct that this matter be sent back to Council for reconsideration with the direction from the FST that Council conduct a hearing or otherwise obtain those investigative or research reports it determines appropriate having regard to due process and the right of the Licensee to make submissions or responses to the same, all in order for Council to put itself into a position to analyze the material, evidence and relevant facts involved in this matter in conjunction with the legislation, Code of Conduct and Guidelines affecting insurance licensees in the Province of British Columbia, previous relevant decisions respecting penalty in the insurance and similar industries, and decisions of the FST that may be applicable or useful in the analysis, and thereafter to render its decision regarding the appropriate disposition of this matter and penalty if any.

There will be no costs awarded in this Appeal.

Respectfully submitted this 30th day of January, 2007

Dale R. Doan LLB
Member Financial Services Tribunal