**FST 06-026**

# FINANCIAL SERVICES TRIBUNAL

**IN THE MATTER OF THE *FINANCIAL INSTITUTIONS ACT*, R.S.B.C. 1996, c. 141 (the "Act")**

**BETWEEN:**

SUPERINTENDENT OF FINANCIAL INSTITUTIONS
(the "Superintendent")

**APPELLANT**

**AND:**

INSURANCE COUNCIL OF BRITISH COLUMBIA (the "Council"),
SPECIAL RISK INSURANCE BROKERS LTD. (the "Agency"),
and
RAYMOND EDWARD WILLIE (the "Licensee")

**RESPONDENTS**

| | |
|---|---|
| **BEFORE:** | JOHN B. HALL, Presiding Member |
| **APPEARANCES:** | SANDRA WILKINSON, for the Superintendent<br>DAVID T. McKNIGHT, for the Council<br>LAURI ANN FENLON, for the Agency and Licensee |
| **DATE OF FINAL SUBMISSION:** | January 9, 2007 |
| **DATE OF DECISION:** | April 23, 2007 |

## INTRODUCTION

The Superintendent has appealed an order of the Council dated June 24, 2006 which imposed penalties on the Licensee and the Agency. The order followed an intended decision made by the Council on May 16, 2006. Neither the Licensee nor the Agency requested a hearing within the time provided to them by the Council, and they did not oppose the penalties in the intended decision which became the terms of the order.

The Licensee has worked in the insurance industry in various capacities for about 32 years, and has been licensed with the Council since July 24, 1985. His son, Thomas Willie, has a level 3 general insurance license and works with the Agency. They were the Agency's only directors and officers at the time material to this appeal.

The intended decision was preceded by the report of an Investigative Review Committee which inquired into two allegations of misconduct against the Licensee and the Agency; namely, that:

(i) the Licensee and the Agency did not take sufficient steps to ensure that an unauthorized insurer, with which it placed insurance coverage on behalf of in Canada [sic], was a viable and legitimate entity, could meet its claim payment obligations on policies issued in Canada, and that placing insurance coverage on its behalf, was in the public's best interests; and

(ii) the Licensee and the Agency did not take sufficient steps to ensure that a branch office of the Agency was actively supervised as required.

The two allegations will be referred to in this decision as "the CIC matter" and "the Roswell matter". They were Allegations #1 and #2 respectively in the proceeding before the Council.

The Council's intended decision found the Licensee and the Agency had breached Section 231 of the *Financial Institutions Act*, R.S.B.C. 1996, c. 141 (the "Act") by not acting in a competent manner and in accordance with the usual practice of the business of insurance, as required by Council Rule 3(2). The penalties in the intended decision and the order were imposed under

Sections 231, 236 and 241.1 of the Act in the following terms:

1. the Nominee's licence is downgraded to a Level 2 general insurance agent's licence. Council will not consider an application from the Nominee to upgrade his licence for a minimum period of five years;

2. it is a condition of the Agency's licence, and for a minimum period of five years, that:

   - the Nominee is not permitted to be a director or officer of the Agency;
   - any share holdings, which provide the Nominee with either a direct or an indirect interest in the Agency, be held in a blind trust;
   - the Agency has a director who meets Council's approval; and,
   - the Agency and its employees will not solicit, obtain or take applications for insurance, negotiate for or procure insurance, for any person with an insurer that is not authorized to engage in insurance business in Canada;

3. the Nominee is fined $10,000;

4. the Agency is fined $20,000;

5. the Nominee and the Agency are jointly and severally liable to pay the costs of Council's investigation into this matter assessed at $11,864.50; and,

6. as a condition of this decision, the Nominee and the Agency are required to pay the above mentioned fines and costs by **September 24, 2006**. If the Nominee and the Agency do not pay the ordered fines and costs by this date, their licences are suspended as of **September 25, 2006**, without further action from Council. (bold in original)

The Superintendent's appeal is brought under Section 242(3)(b) of the Act. It is opposed by the Licensee and the Agency (who will be referred to jointly as the "Respondents") and by the respondent Council.

**ISSUES ON APPEAL**

The Superintendent asks the Tribunal to increase the penalties which the Council imposed on the Respondents. The specific grounds of appeal give rise to two issues:

1. Whether the order was supported by adequate reasons and, more particularly, whether the Council considered factors to be taken into account when imposing penalties.

2. Whether the penalty imposed by the Council was reasonable in the circumstances.

## THE COUNCIL'S INTENDED DECISION AND ORDER

The Council's intended decision sets out detailed background information and findings respecting each of the CIC and Roswell matters. I do not intend to repeat all the background information as this is an appeal on the record and the circumstances are sufficiently portrayed by reproducing those portions of the intended decision which contain the Council's findings. On that account, the Council made the following findings regarding the CIC matter:

> Council acknowledged that upon inception of the Nominee's and the Agency's dealings with CIC, there was a shortage of capacity for insurance coverage in the Canadian market which made it difficult to obtain coverage on non-standard risks. As the Agency experienced some of these difficulties and in view of its business model, which is generally to secure coverage on non-standard risks for agencies that cannot obtain coverage for clients through their own insurance markets, Council viewed the Nominee's motivation to find an alternative insurance market, in this case an off-shore market, to be legitimate.
>
> However, in introducing CIC into the Canadian insurance market and facilitating the placement of coverage on its behalf, Council did not believe the Nominee and the Agency conducted sufficient due diligence to determine whether CIC was a viable and legitimate entity, that it could meet claim payment obligations on policies issued in Canada, and that placing insurance coverage on its behalf in Canada was in the public's best interests.
>
> In particular, Council noted the Nominee and the Agency were in possession of information pertaining to CIC, prior to or upon commencing its dealings with this entity, that would have caused concern for a competent agent and led to more due diligence being conducted on CIC before placing coverage on its behalf in Canada. This included:
>
> - CIC financial statements from 2001 and 2002 which showed that CIC was essentially capitalized by gemstones and South American corporate bonds (collateralised against land based in Costa Rica), and that in each of these

years, its cash position was less than $35,000. The financial statements also showed that between 2001 and 2002, the same gemstones had increased from $16,009,623 to $30,024,068, based on a re-appraisal by the individual who had conducted the original appraisal on the gemstones; and,

- That CIC was not regulated as an insurer in any jurisdiction worldwide.

Council also noted that in certain instances, the Nominee failed to obtain objective information about the viability of CIC. The following evidence was cited in this regard:

- The Nominee relied on the representations of CIC officials and express statements on the CIC financial documentation that a gemologist had verified the existence of the gemstones and that the auditor of the financial statements was a certified accountant from Costa Rica;

- The Agency made a written communication available to the public that indicated the Agency's experience with CIC had been good with claims advanced being paid in a timely fashion to the satisfaction of the insured. However, at the time the statement was made, the Agency did not have any claim's experience with CIC. Rather, the statement was based on the Nominee having discussions with CIC about its claims experience resulting from its London business; and,

- The Nominee was led to believe by CIC that it was engaging in insurance business in London through London brokers, however, he did not liaise with the purported London brokers to discuss their experience with CIC.

In terms of the aforementioned written communication about the Agency's experience with CIC making claim payments, Council noted a submission of the Nominee which indicated that neither he nor the Agency recalled sending out this communication and that he believed this communication had been revised and updated over time. Council did not place significant weight on this submission in view of: a previous submission from the Nominee wherein he advised Council staff that the communication had been created by the Agency on March 21, 2003 (which was approximately three months before the Agency had any experience with CIC making a payment on an insurance claim) and that it was made available to the public shortly thereafter; and because the Nominee did not provide evidence showing when and to what extent the communication had been revised and updated.

According to Council, the fact that the Nominee had approximately 32 years of experience in the insurance industry in various capacities, but nonetheless introduced CIC into Canada despite having limited information about CIC at his disposal, reflected on his competency.

> Council acknowledged that the Nominee and the Agency had taken some steps to mitigate the concerns of dealing with an unauthorized and unregulated insurer, such as:
>
> - establishing a $500,000 claim trust fund to be held and administered by the Agency;
> - having CIC policyowners sign a disclosure notice which set out some of the risks of purchasing coverage from an unauthorized insurer; and,
> - notifying the Agency's errors and omissions insurer that it would be placing coverage with an unauthorized insurer.
>
> However, in the face of the CIC financials, which Council viewed as being questionable and arguably raised concerns with CIC's viability, along with the fact that the Nominee understood CIC to be an unregulated entity, Council determined that had the Nominee been acting in a competent manner and in accordance with the usual practice, he would have taken more steps to ensure that the Agency's placement of insurance coverage on behalf of CIC was in the public's best interests. At a minimum, this would include obtaining objective and reliable third party information about CIC, which was for the most part noticeably absent in this case. By not taking such a step and through his general reliance on information and documentation about CIC as provided to him by CIC representatives, Council found that the Nominee and the Agency did not exercise the required level of competence. (pp. 12 - 14)

The intended decision contains these findings regarding the Roswell matter:

> Council was concerned with the manner in which the Agency's branch office was managed and supervised. In particular:
>
> - the branch office was unable to produce records showing that premium refunds owed to ten clients had been distributed to them as required, following the cancellation or reduction of the clients' insurance coverage; and
> - the Nominee was unaware this branch office had engaged in the property/casualty insurance business from which the refunds arose.
>
> Concerns also included that the Nominee was in possession of information respecting this branch office which Council felt should have compelled him to closely monitor the branch and ensure that it was properly managing its insurance business. Specifically, the Nominee had previously been cautioned by Council staff about concerns with the Level 1 licensee at this branch office who had handled the premium refunds. As well, ICBC had raised concerns with the

> Nominee about the conduct of this branch office. However, despite being in possession of this information, the Nominee did not take sufficient steps to ensure the office was operating in accordance with the usual practice. The Nominee and two of his licensed staff attending the Agency office at times to discuss its activities was woefully insufficient.
>
> Council noted a submission of the Nominee indicating that he and George Willie, a Level 3 general insurance agent, regularly attended the branch office. However, Council records showed that George Willie had never been licensed with the Agency as a Level 3 general insurance agent. Rather, during the period in question when premium refunds were owed to clients (January 23, 2004 to August 29, 2005), George Willie was licensed under the Agency as a Level 2 general insurance agent. While he had been licensed as a Level 3 general insurance nominee at a different insurance agency during part of this period, his nominee's licence was terminated effective January 15, 2005.
>
> Ultimately, Council felt that in the circumstances, the level of supervision at the branch office was inadequate and not in keeping with the requirement that the Agency's insurance activities be actively supervised by a Level 3 general insurance agent. Council felt that this reflected on the Nominee's and the Agency's competency. (p. 19)

The above findings regarding the Roswell matter were followed immediately by a section headed "Council's Intended Decision":

> Council found the aforementioned facts constituted a breach of section 231 of the *Financial Institutions Act* (the "Act") in that the Nominee and the Agency did not act in a competent manner and in accordance with the usual practice of the business of insurance, as required pursuant to Council Rule 3(2).
>
> In determining an appropriate disposition in this matter, Council noted that its concerns with the Nominee and the Agency centred around the level of supervision and management at the Agency, rather than the Nominee's ability to competently act as an insurance agent. On this basis, Council believed that a change in the Agency's supervision and management structure could address the concerns and restore the level of public protection provided for in the Act.
>
> Pursuant to sections 231, 236 and 241.1 of the Act, Council made the following intended decision: ... (p. 20)

The six terms reproduced earlier in this decision were then set out, followed by notice to the Licensee and the Agency of their rights if they wished to dispute the intended decision.

## STANDARD OF REVIEW

The appeal obviously concerns the penalty opposed by the Council, and all parties accept the standard of review is reasonableness. The Respondents quote the following passage from my prior decision in *Cheema v. Insurance Council of British Columbia and Financial Institution Commission* (FST 05-019), unreported (June 15, 2006):

> I accept the deference which should be given to decisions by professional bodies where the appeal concerns a disciplinary penalty. The original decision involves an exercise of discretion, and the professional body will typically be in a better position to assess evidentiary factors relevant to the imposition of discipline. Thus, the Tribunal should be reluctant to interfere where the professional body has turned its mind to the relevant factors, unless a particular penalty falls outside an acceptable range and no extenuating circumstances are apparent. (p. 24)

It was earlier said in *Cheema* that a decision "... will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived" (p. 5). In specific reference to penalty, it was necessary in that case to consider "... whether there is a line of analysis within the Council's decision which could reasonably lead it from the evidence to its conclusion that Mr. Cheema's license should be cancelled" (p. 6). See also *Superintendent of Real Estate v. Real Estate Council of British Columbia and Kenneth Scott Spong* (FST 05-007), unreported (January 13, 2006), which cited, among other authorities, *Financial Services Commission v. Insurance Council of British Columbia and Maria Pavicic* (FST 05-009), unreported (November 22, 2005).

## SUBMISSIONS

During the course of my deliberations, I have thoroughly reviewed and considered the submissions made by all counsel. Their most pertinent arguments will be addressed through my analysis in the next parts of this decision.

In general terms, the Superintendent maintains the Council did not adequately address sentencing factors given the seriousness of the conduct disclosed by the intended decision and, as a consequence, wrongly concluded that the penalties imposed were appropriate. Several of the Superintendent's submissions are expressed in language which the other parties describe as inflammatory and say deserve rebuke by the Tribunal. For instance, the Superintendent suggests "[i]t was likely out of a sense of avarice rather than an assessment of client and public interest when the Licensee and Agency flogged [the CIC] policies", and later characterizes the sale of the policies as "nothing less than a fraud upon the public".

The Respondents submit there are four reasons why the arguments in support of an increased penalty cannot succeed on appeal: (i) the Superintendent relies on facts which are not found on the record; (ii) the Superintendent relies on cases which do not involve comparable facts or findings of fault; (iii) the Respondents' complaints history relied upon by the Superintendent on appeal involved minor matters; and (iv) the Superintendent fails to consider the mitigating circumstances. The Respondents additionally assert that this appeal is an inappropriate use of the Superintendent's appeal power, and complain they ". . . are caught in the middle of an unseemly public feud between the Office of the Superintendent and the Insurance Council".

The Council's submission reviews the record and findings in the intended decision at considerable length. The Council argues there is no evidence to support an allegation or inference that the Licensee and Agency were attempting to defraud clients or deceitfully use their positions for personal gain to the disadvantage of their clients. It advises "[it] saw this matter as a competency issue" and relies on several prior decisions dealing with the same type of misconduct. In terms of relief, the Council says the appeal should be dismissed with orders against the Superintendent for its costs as well as the Tribunal's actual costs and expenses.

## ANALYSIS OF GROUNDS FOR APPEAL

I begin with the explanation given by the Council for the penalties imposed on the Respondents. The passage headed "Council's Intended Decision" was reproduced above. The first paragraph

contained the finding that the Respondents had breached Section 231 of the Act and the third paragraph contained the penalties. Thus, the second paragraph comprised the Council's reasons for the penalties:

> In determining an appropriate disposition in this matter, *Council noted that its concerns with the Nominee and the Agency centred around the level of supervision and management at the Agency, rather than the Nominee's ability to competently act as an insurance agent*. On this basis, Council believed that a change in the Agency's supervision and management structure could address the concerns and restore the level of public protection provided for in the Act. (p. 20; emphasis added)

It is difficult, if not impossible, to reconcile the italicized portion of the above paragraph with the intended decision as a whole. It is accurate to state the Roswell matter was more concerned with "the manner in which the Agency's branch office was managed and supervised" (intended decision, at p. 19). In contrast, the CIC matter was largely -- if not exclusively -- a question of competence. And that matter should have been of far greater concern to the Council given the potential harm to the public (not surprisingly, the CIC matter has been the main focus of this appeal). Unfortunately, the Council gave no indication of the extent to which each matter influenced the penalties it imposed on the Respondents.

There should be no debate over whether the Council provided sufficient reasons for its factual findings in both the CIC and Roswell matters after a detailed review of the evidence. However, the issues on appeal are narrower, and concern whether the penalties imposed were supported by adequate reasons and whether they were reasonable in the circumstances. As perhaps foreshadowed by my observations to this stage, I have determined both issues must be answered in the negative. The ensuing paragraphs set out the reasons for my conclusions.

Both the Superintendent and the Council provided the following excerpt from the respected text by James T. Casey, *The Regulation of Professionals in Canada* (Thomson Carswell, 2003) regarding the "purpose of sentencing":

> Given that the primary purpose of the legislation governing professionals is the protection of the public, it follows that the fundamental purpose of sentencing for

professional misconduct is also to ensure that the public is protected from acts of professional misconduct.

> In cases of professional discipline there is an aspect of punishment to any penalty which may be imposed and in some ways the proceedings resemble sentencing in a criminal case. However, where the legislature has entrusted the disciplinary process to a self-governing professional body, the legislative purpose is regulation of the profession in the public interest. The emphasis must clearly be upon the protection of the public interest, and to that end, an assessment of the degree of risk, if any, in permitting a practitioner to hold himself out as legally authorized to practise his profession. The steps necessary to protect the public, and the risk that an individual may represent if permitted to practise, are matters that the professional's peers are better able to assess than a person untrained in the particular professional art or science.

A number of factors are taken into account in determining how the public might best be protected, including specific deterrence of the member from engaging in further misconduct, general deterrence of other members of the profession, rehabilitation of the offender, punishment of the offender, isolation of the offender, the denunciation by society of the conduct, the need to maintain the public's confidence in the integrity of a profession's ability to properly supervise the conduct of its members, and ensuring that the penalty imposed is not disparate with penalties imposed in other cases. However, it may be argued that the factors of punishment and denunciation should not be given undue emphasis since these factors may more properly be considered to be part of the domain of criminal law. (page 14-5; footnotes omitted)

The Council submits the Tribunal may consider the factors enumerated on the next page of the same reference. These can be restated as: (1) the individual's attitude since the offence was committed; (2) the age and experience of the individual; (3) whether the misconduct was the individual's first offence; (4) whether the individual has accepted responsibility for the misconduct; (5) whether there has been restitution; (6) the good character of the individual; and (7) whether the individual has a long unblemished record of professional service. The Council also notes the considerations identified by Member Hamilton in *Pavicic* (*supra*) which included "the need to promote specific and general deterrents, and thereby protect the public"; "the need to maintain the public's confidence and the integrity of the … profession"; and "the range of sentences in other similar cases".

It is manifest from the intended decision that the Council had regard to the general public interest when it sought to "... restore the level of public protection provided for in the Act" (p. 20). However, it is not evident -- at least not explicitly -- if any specific factors were considered in fashioning a suitable penalty. The Respondents maintain the record demonstrates the Council was aware of the factors to be considered in deciding on the punishment to be imposed, "... including protection of the public, deterring other agents, and deterring this particular Agency and Licensee". However, the passages identified by the Respondents speak broadly to protection of the public. And while publishing the details and outcome to the insurance industry, as well as writing every agency that sub-brokered insurance through CIC and the agency, may have a deterrent effect, there is no indication this was considered when the Council fashioned the terms in the intended decision and order.

In their final submissions under this heading, the Respondents allow "... the Reasons may not be as thorough and methodical as they might be in setting out the reasoning process ..., [but] Council took into account the appropriate factors in arriving at its decision". This is an understatement, and one needs an enormous "leap of faith" to conclude the Council considered anything beyond the general public interest. Once again, the totality of its reasons on penalty are found in the following paragraph:

> In determining an appropriate disposition in this matter, Council noted that its concerns with the Nominee and the Agency centred around the level of supervision and management at the Agency, rather than the Nominee's ability to competently act as an insurance agent. On this basis, Council believed that a change in the Agency's supervision and management structure could address the concerns and restore the level of public protection provided for in the Act. (p. 20)

Unlike the circumstances in *Spong* (*supra*) where a decision was set aside due to the absence of reasons to support a suspension imposed by a hearing committee, the intended decision does not even mention other comparable cases. The Council aptly quotes the following passage from *Stevens v. Law Society of Upper Canada* (1979), 55 O.R. (2d) 405 (Div. Ct.), in its appeal submissions:

> ... A conscious comparison should be made between the case under consideration and similar cases wherein sentences were imposed. If the comparison with other cases is not undertaken, there may well be such a wide variation in the result as to constitute not simply unfairness but injustice. ... (para. 30)

This brings me to some of the authorities cited in the parties' submissions. Those cited by the Superintendent which concerned fraud, forgery or similar malfeasance are of no assistance. The Council and the Respondents correctly maintain no such findings were made in the decision under appeal. The Council effectively adopted the report of the Investigative Review Committee which had met with the Licensee and his counsel on at least two occasions. Neither the Review Committee nor the Council made the more pejorative findings urged by the Superintendent. By way of example, "Council viewed the [Licensee's] motivation to find an alternative insurance market ... to be legitimate" (intended decision, at p. 12). Put simply, the record does not support many of the Superintendent's arguments.

The Respondents adopt the Council's submissions dealing with cases relevant to the present appeal. One of the decisions they put forward as being on point is *Wilson M. Beck Insurance Services (Kelowna) Inc. and Stephen M. Pavelich* (Council decision dated August 11, 2003), which addressed two transactions. In the first transaction, the licensee, who was the agency nominee at the time, provided final performance and payment bonds to a client in advance of the insurer's approval. The insured had previously issued a consent of surety for the client affirming the bonds would be approved. However, upon request by the licensee for final bonds, the insurer sought additional information which was not outstanding at the time the consent of surety was issued. The licensee provided the bonds to the client prior to obtaining the insurer's consent with the expectation the bonds would be approved. When the licensee followed up with the client shortly thereafter, the client advised the licensee that the bonds were no longer required. The licensee had properly invoiced these bonds and, upon an inquiry regarding the outstanding account receivable, advised that the bonds were not required and directed the invoice be reversed. The licensee was instructed to collect the bonds from the client but was advised by the client that the bonds had been destroyed. The bonds were later determined to have been used by the client.

In the second transaction, an insurer requested a new general application, indemnity agreement and financial information from a contractor before approving the bond. The licensee prepared the bond in advance and, when pressed for it by the client, provided it in exchange for the indemnity agreement. However, upon reviewing the indemnity agreement, the licensee discovered it was missing a seal signature and certificate, and returned the agreement to the client to correct. The licensee did not follow up with the client to forward a copy of the bond to the insurer. When questioned by the insurer during a bond audit, the licensee did not admit issuing the bond. The licensee acknowledged he should not have provided the bonds without the completed indemnity agreement or, at least, should have kept a copy of the partially completed indemnity agreement, forwarded it to the insurer, and followed up with the client.

The Council determined in *Pavelich* that the licensee had failed to act in good faith, in a competent manner and in accordance with the usual practice of the business of insurance. It determined the agency had also failed to act in accordance with the usual practice of the business of insurance, and made the following order: the licensee was suspended for one month; the licensee was no longer suitable to act an a nominee; as a condition of the agency's licence, the agency was required to notify all interested parties in writing, including the insurers, the obligees and the principals for each bond issued without authority, of the exact circumstances surrounding the agency's issuance of the applicable bonds, the current status of the bonds and the manner in which the premium money is being handled; and the agency was assessed the cost of Council's investigation.

Another decision cited by the Council and the Respondents is *AIB Insurance Brokers (2000) Inc. and Sophia Khatoon Kahn* (Council decision dated June 19, 2003). The agency had failed to meet a licence condition which required its office to be actively supervised by an individual who was in regular attendance and had a level 3 general insurance agent's licence; and that it pay to the insurer all premiums collected or received, less any commissions or other deductions authorized by the insurer, in accordance with the terms of its agency agreement with the insurer. By failing to ensure the agency was adequately supervised and operating in accordance with the conditions on its license and the requirements of the *Financial Institutions Act*, Council found the licensee, who was the agency's nominee at the time, had failed to act in a competent manner

and in accordance with the usual practice of the business of insurance. As a consequence, the licensee was suspended for two weeks; the agency was fined $5,000 (the maximum fine permitted at the time); as a condition of the agency's licence, any future agency nominee had to be approved by Council; and the agency was assessed the costs of Council's investigation.

The *Carl Rae* (Council decision dated September 4, 2002), a former licensee, while licensed as a level 3 general insurance agent, did not remit underwriting information to insurers in a timely manner; did not ensure that additional insurance coverage was endorsed on a client's commercial insurance policy as requested, and that the policy was renewed prior to its expiry; and did not ensure that a client's policy took effect immediately upon expiry of the client's previous coverage through a different agency. The Council determined the former licensee had failed to act in a competent manner and in accordance with the usual practice of the business of insurance. It ordered that, in the event the former licensee applied for a general insurance agent's licence in British Columbia, he be granted no higher than a level 2 licence, subject to the conditions that he be under the direct supervision of a "named" nominee at the agency where he was licensed and he successfully complete an errors and omissions seminar. The former licensee was also assessed investigative costs.

The next case is *Clarence Rein* (Council decision dated May 31, 2000). The Council reviewed the manner in which the licensee had advised and assisted his client in creating documentation relating to insurance coverage issues for a horse-stabling operation. In particular, the licensee responded to the client's inquiries by drafting a letter which the Council found clearly indicated that first-party liability coverage for a limit of $1,000,000 and animal mortality insurance for up to a limit of $10,000 per animal was available to horse owners who stabled their animals at the ranch. In fact, this coverage did not exist. Despite the licensee's submission that he instructed the client to take the document to his lawyer, the Council concluded it was reasonable to expect that the client would rely on the document provided to him by his insurance agent. The licensee's letter did not indicate that it was a draft document or that it was incomplete, and the licensee acknowledged that he did nothing to follow up with the client to prevent the document being used.

Ultimately, the Council found in *Rein* that, in response to a request for advice from his client, the licensee drafted a document that was misleading as to the insurance coverage in force, and then provided the document to the client in circumstances where it was reasonable to expect the client would rely on it. The Council found that a reasonable and prudent insurance agent, acting competently and in accordance with the usual practice of the business of insurance, would not have drafted the letter or let it reach the client as it was drafted. The licensee knew or ought to have known that the letter referred to coverage which did not exist and which the licensee did not try to place; further, it was reasonably foreseeable that the client could rely on the letter as part of his stabling operation to the detriment of himself and his clients. The Council also found the licensee's actions exposed the client and the ranch to liability and resulted in financial prejudice to a horse owner, as her claim to recover damages for the death of her horse, while stabled at the ranch, was denied by the insurer. The Council made various disciplinary and remedial orders. These included amending the licensee's level 3 general insurance licence to level 2 for a minimum of one year; prohibiting him from binding any insurance coverage for a minimum of one year (with two exceptions); placing the licensee's insurance activities under the direct supervision of a nominee for a minimum of one year; and paying the costs of the investigation.

The final case to note is *Jordan Michael Clarke and Doug Clarke Insurance Services Inc.* (Council decision dated January 19, 2006). For a period of approximately nine months, the nominee and the agency held themselves out to the public in a manner in which they were not licensed, despite the nominee's earlier written assurance to the Council that he and the agency would not do so. The agency also breached a condition of its insurance licence by permitting Douglas Clarke (the nominee's father and a former licensee) to be directly and indirectly involved with the agency's operations. Additionally, the nominee failed to review insurance client files inherited from Douglas Clarke, despite his written undertaking to the Council that he would do so; he later attempted to mislead the Council's investigators by removing portions of agency client files. The Council noted the nominee's youth and inexperience contributed to the problems which surfaced at the agency, and noted a review of numerous client files did not identify any issues that called into question the nominee's practice as a life insurance agent. The nominee had acknowledged the shortcomings in his nominee duties, and accepted responsibility for his and the agency's conduct.

The Council was satisfied in *Clarke* that "... the primary purposes of sentencing for misconduct, namely, to ensure the public is protected from further acts of misconduct by a licensee and to prevent similar acts by other licensees in the insurance industry, can be achieved in this case by requiring the agency to appoint an independent, arms length and qualified nominee approved by Council and by imposing specific licence conditions aimed towards ensuring their duties as life insurance agents are in compliance with the Act" (p. 12). This included ordering that the nominee was not suitable to hold a life insurance agent nominee license for any corporation, partnership or sole proprietorship other than one in which he would be the only licensed agent. The nominee and agency were fined $5,000 and $10,000 respectively, and were equally liable for the costs of the investigation. As a condition of the agency's license, Doug Clarke (the former licensee) was prohibited from being involved directly or indirectly in the agency's operations.

It is trite to observe that each case must be decided according to its particular facts. At the same time, there must be some measure of consistency to ensure comparable misconduct is addressed by equivalent and proportionate sanctions. The Council argues the penalties imposed on the Respondents are in line with the above cases pertaining to issues of competency and inadequate supervision. With respect, I do not agree. The penalties in *Pavelich* and *Khan* included suspensions of differing periods for more limited and less serious misconduct. There was no suspension in *Rein* but the decision concerned a single incident. The *Rae* decision involved a former licensee (therefore, he could not be suspended); and in *Clarke*, Douglas Clarke -- who seems to have been the cause of the difficulties -- was likewise no longer licensed. Further, as indicated, in the latter case the agency was required to appoint "*an arms length nominee* who meets the current experience and educational requirements and is approved by the Council" (emphasis added).

The disparate outcome in the present case might not be cause for concern if there are adequate reasons to explain "extenuating circumstances". This brings me back to the intended decision. The Council argues the Superintendent has failed to provide any basis to show that the reasons in the decision are inadequate or insufficient. The Council notes the document is 21 pages in length, and says it "meticulously outlines, analyzes, considers and balances the facts that speak

both for and against the Licensee's impugned conduct". It notes in particular pages 12-14, 19 and 20 which have been reproduced fully in this decision.

An additional concern in relation to the first ground of appeal arises from the absence of any reference in the intended decision to the Respondent's prior disciplinary record. I accept the incidents put forward by the Superintendent are relatively minor in the context of the Licensee's 32-year career. But at least one has potential relevance to the CIC matter and, more specifically, the Agency's written communication to the public that its experience with CIC "... has been good with claims advanced being paid in a timely fashion to the satisfaction of the Insured." The Council found that, when the Agency made this statement, it did not have *any claims experience* with CIC. I note the Council "did not place significant weight" (sic) on the Licensee's submission that neither he nor the Agency recalled sending out the written communication, and his belief it had been revised and updated over time (p. 13). The potentially relevant prior discipline was imposed in 2001 when the Licensee and Agency were both fined for license application misstatements, and the Licensee was fined for making a misstatement to the Council during the investigation. The Council states in its appeal submissions that the Licensee's "prior indiscretions" occurred "many years ago"; it says "Council was aware of these decisions but considered they were not germane to the present investigation". Assuming that to be the case (the prior incidents are not mentioned in the intended decision), the point remains that the Council gave no reasons for why they were not considered germane.

I have accordingly determined there is merit to the first ground of appeal, and find the Council's decision is not supported by sufficient reasons to show it considered the factors to be taken into account when imposing penalties. Aside from a general reference to protection of the public, the specific factors considered by the Council are left to speculation, and "there is no line of analysis" which could reasonably lead the Council from its findings to its conclusions on penalty. I have already reviewed the prior Council decisions which bear the closest resemblance to the present facts and resulted in suspensions. If anything, the Respondent's actions presented a far greater potential for harm to the public. By late 2004, there were more than 250 CIC policies in effect in British Columbia, and more than 200 such policies in effect elsewhere in

Canada (intended decision, at para. 32). The Respondents placed this insurance coverage while knowing, among other things:

- the CIC financial statements from 2001 and 2002 showed that CIC was essentially capitalized by gemstones and South American corporate bonds (collateralised against land based in Costa Rica), and that in each of these years, its cash position was less than $35,000. The financial statements also showed that between 2001 and 2002 the same gemstones had increased from $16,009,623 to $30,024,068 based on a re-appraisal by the individual who had conducted the original appraisal on the gemstones; and,

- CIC was not regulated as an insurer in any jurisdiction worldwide.

The Council also noted certain instances where the Licensee failed to obtain objective and reliable third party information about the viability of CIC and said this "… was for the most part noticeably absent in this case" (p. 14). The Agency's written communication to the public indicating its claims experience with CIC had been good at a time when it did not have any such experience is more than discomforting. The same communication additionally advised the public: "*Our office has used a variety of non-admitted insurers over the past few years*. Our experience with those we have used has been quite satisfactory" (emphasis added). Contrary to what the reader would reasonably conclude from this statement, the Council found:

> 26. The Agency had not procured insurance coverage on behalf of an unauthorized insurer prior to 2002. Between 2002 and 2004, *the only unauthorized insurer the Agency procured insurance coverage for (other than CIC) was Prime Syndicate*. This insurer was located in the State of Utah and it was the Nominee's understanding that this insurer had a "B" rating. A claims trust fund account was not created for the Prime Syndicate business. Prime Syndicate limits for coverage were low. *The Agency did not write a lot of Prime Syndicate business*. (p. 8; emphasis added)

Despite these and other adverse findings regarding the Respondents' competence, the Council noted its concerns "centred around the level of supervision and management at the Agency, rather than the [Licensee's] ability to competently act as an insurance agent" (p. 20). As stated already, the Roswell matter can be seen as arising from the manner in which the Agency's branch office was managed and supervised. But the CIC matter -- which must be regarded

objectively as far more troubling -- inherently concerned questions of competence. There is no line of analysis within the intended decision which could reasonably lead the Council from its own findings regarding the Respondents' competence in the CIC matter to its final assessment of their conduct. And it is apparent the Council's assessment led directly to the decision on penalty as it next wrote: "*On this basis*, Council believed that a change in the Agency's supervision and management structure could address the concerns and restore the level of public protection provided for in the Act" (p. 20; emphasis added).

Aside from appearing to have disregarded its own findings in the CIC matter, the Council's decision does not explain how the conditions it attached to the Agency's license constitute "a change in the Agency's supervision and management structure" when one recalls that the Licensee and his son were the Agency's only directors and officers. I accept the point made by the Council and the Respondents that the intended decision contains no specific finding against Thomas Willie. Nonetheless, the decision is replete with findings adverse to "the Agency" and it was fined $20,000 (the current maximum under the Act); moreover, the Agency was made jointly and severally liable for the costs of the investigation. The Licensee and Thomas Willie were the only directors and officers at the time, and Thomas Willie was not excluded from the Council's findings regarding the Agency. Thus, even in the absence of a familial relationship, one can fairly ask how a change in management and supervision which omits the requirement for an arms length nominee as in the *Clarke* decision will "restore the level of public protection provided for in the Act". Regrettably, no answer was given by the Council in its reasons.

**REMEDY**

In summary to this stage, I have determined that the Council did not provide sufficient reasons to show it considered factors relevant to the discipline of professionals; and secondly, that the penalty decision was unreasonable. It is thus necessary to determine what remedy should be granted in the circumstances.

Section 242.2 (11) of the Act provides that the Tribunal may "... 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". In some appeals where a body has failed to provide sufficient reasons, the Tribunal has sent the matter back for reconsideration. However, in those situations, the remedy has been dictated by considerations such as credibility and other evidentiary differences: see, for instance, *Cheema* (*supra*). Those concerns do not arise in this appeal, and the question of remedy has been argued fully in the parties' submissions. The time and expense of another proceeding can be avoided.

Dealing first with the penalty imposed on the Licensee, it will be recalled the Council downgraded his level 3 general insurance agent's license to level 2 for a minimum of five years. The Superintendent seeks additional sanctions, including cancellation with a period of ineligibility or a significant period of suspension; a prohibition from being a director, officer or nominee of any agency for a minimum of five years; and a permanent prohibition from dealing with an insurer that is not authorized to engage in the insurance business in Canada.

My analysis thus far should have conveyed the view that a suspension is appropriate in the circumstances. In determining the duration, I have considered the factors identified in the Casey text and *Pavicic* (*supra*), placing primary emphasis on protection of the public. I have also been mindful of the Council's point that there is a balancing aspect to sentencing which involves "a judgmental choice between inflicting hardships on the [professional] and the protection of the public of the province generally": *Re Clough*, [1984] B.C.C.O. No. 3 (C.A.C.), at page 4. The exercise is necessarily discretionary and is not an "exact science".

Public confidence, together with the need for specific and general deterrence, all weigh against the Licensee. He has a long record of professional service but it is not unblemished. On the other side of the scale, the Council found the Licensee's motivation was legitimate; further, there are several mitigating factors such as advising the errors and omissions insurer the Agency would be placing coverage with an unauthorized insurer and establishing a claims trust fund. There were likewise mitigating circumstances in the Roswell matter.

The suspensions imposed in *Pavelich* and *Khan* were one month and two weeks respectively, but the conduct was less pervasive and did not present an equivalent risk to the public. The Superintendent points to the two year suspension in *James E. Parker* (Financial Services Commission of Ontario #AB031-2005), unreported (October 20, 2005); however, the licensee in that case had forged client names on insurance application forms. Other authorities the Superintendent advances likewise involved forgery or other fraudulent conduct, and are not helpful guideposts.

After taking all of the relevant circumstances into account in light of the parties' submissions, I have determined the Council's decision should be varied by suspending the Licensee's license for a period of six months. The length of this suspension reflects several objectives of professional discipline, including deterrence and the need to maintain the public's confidence in the integrity of the insurance industry, while not inflicting undue hardship on the Licensee. Any remaining concern for the public interest can be protected by attaching conditions to his license and the Agency's license beyond those imposed by the Council.

In terms of further conditions, I have determined that the prohibition on the Licensee acting as a director or officer should not be confined to the Agency. The Council notes all applications are reviewed on the merits, and says "… it is unlikely Council would allow him to be an officer and/or director of any other agency", and adds: "In fact, during this process, the Licensee applied for a license with another agency and Council required that the Licensee not be a director or officer". In my view, the Council exercised sound judgment in rejecting the Licensee's recent application. Therefore, and consistent with the condition in the order that the Licensee not be a director or officer of the Agency for a minimum of five years, he should be prohibited from acting in that capacity with any agency in British Columbia during the same period.

It is my further view that the Roswell matter by itself could reasonably result in the Licensee being precluded from acting as a nominee. The downgrade to a level 2 general insurance agent's license would currently have that effect for a minimum of five years. However, it should be made a specific condition of the Licensee's license in case there is a change in the required qualifications. Finally, and again consistent with the Council's decision concerning the

Agency's license, it should be a condition of his license for a minimum period of five years that the Licensee not solicit, obtain or take applications for insurance, negotiate for or procure insurance, for any person with an insurer that is not authorized to engage in the insurance business in Canada.

As for the Agency's license, the Superintendent seeks a prohibition on it having as its nominee a person who is related to the Licensee, or who was an officer or director of the Agency between 2002 and May 2006. For reasons expressed earlier, I have instead determined that the Agency should be required to appoint an arms length nominee who meets current experience and educational requirements and is approved by the Council, and that this should be a condition of the Agency's license for a minimum period of five years.

**CONCLUSION**

The appeal is allowed in part. The Licensee is to be suspended for six months, beginning on a date determined by the Council but no later than July 1, 2007. Paragraph 1 of the Council's order is varied by adding two conditions effective immediately and continuing for a minimum period of five years from the date of the order: first, that the Licensee not be a director, officer or nominee of any agency; and second, that the Licensee not solicit, obtain or take applications for insurance, negotiate for or procure insurance, for any person with an insurer that is not authorized to engage in the insurance business in Canada. Paragraph 2 of the Council's order is varied by adding a condition, effective for the same period, requiring the Agency to appoint an arms length nominee approved by the Council who meets current experience and educational requirements.

No order is made for costs as there has been divided success on appeal (in any event, the Superintendent did not seek an order for costs against the Respondents). That being said, I seriously debated making an order against the Superintendent for part of the Tribunal's actual

costs and expenses given the nature of counsel's submissions.

I reserve jurisdiction to resolve any issues which may arise over implementation of this decision.

DATED at Vancouver, British Columbia, this 23rd day of April 2007.

FOR THE FINANCIAL SERVICES TRIBUNAL

JOHN B. HALL
PRESIDING MEMBER