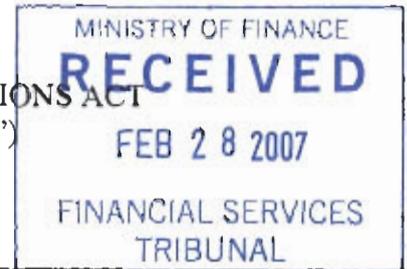


FINANCIAL SERVICES TRIBUNAL
IN THE MATTER OF THE FINANCIAL INSTITUTIONS ACT
R.S.B.C. 1996, c. 141 as amended (the "Act")



BETWEEN

THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

APPELLANT

AND

INSURANCE COUNCIL OF BRITISH COLUMBIA
And
YU XUAN LIU

RESPONDENTS

AND

FINANCIAL INSTITUTIONS COMMISSION OF BRITISH COLUMBIA

RESPONDENT
PARTY BY RIGHT

APPEAL DECISION

DATE OF LAST SUBMISSION: FEBRUARY 12, 2007

BEFORE: JOHN E. D. SAVAGE PRESIDING MEMBER

APPEARANCES: RICHARD FERNYHOUGH FOR THE SUPERINTENDENT
OF FINANCIAL INSTITUTIONS

PATRICK J. SULLIVAN FOR YU XUAN LIU

DAVID T. MCKNIGHT FOR THE INSURANCE
COUNCIL OF BC

DATE OF DECISION: FEBRUARY 28, 2007

I. INTRODUCTION

- [1] The Appellant Superintendent of Financial Institutions (the “Superintendent”) appeals the Intended Decision dated September 18, 2006 (the “Decision”) of the Insurance Council of British Columbia (the “Council”) following its investigation into the conduct of one of its licensees, Yu Xuan Liu (“Liu”).
- [2] The Council conducted an investigation into the conduct of Liu, found there to be misconduct, and pursuant to sections 231, 236 and 241.1 of the *Financial Institutions Act* (the “Act”), ordered that Liu be suspended for two weeks, fined \$1,000, pay half the costs of the Council’s investigation assessed at \$1,012.50, and imposed certain payment requirements.
- [3] The Superintendent appeals the Decision arguing that the penalty imposed is unreasonable and that some findings of the Council were unreasonable. Liu and the Council support the decision of the Council. Pursuant to the Act, the Financial Services Tribunal has determined to hear this appeal by written submissions, and has received submissions from the Superintendent, Liu and the Council.

II. FACTS

- [4] Liu has been licensed as a life insurance agent since December 24, 2002. Acting in association with another agent, Zhongli Wang (“Wang”), Liu jointly sold an RBC Destiny Universal Life insurance policy with level death benefit and YRT cost of insurance (the “Policy”) to Xian Ming Yang (the “Complainant”) in May 2003.
- [5] Liu together with Wang provided the Complainant with a set of illustrations proposing 10 annual payments of \$7,920 based on a 5.5% interest rate. The Complainant signed a copy of these illustrations on May 22, 2003. When the Policy was delivered to the Complainant’s home a second set of illustrations prepared by Liu and dated August 22, 2003 was attached. The second set of illustrations projected a lower interest rate for the first two years of the Policy, lower cash values and investment returns, and showed a higher income tax rate than that shown in the original illustrations.
- [6] The application for the Policy was completed by Wang on behalf of the Complainant. The application indicated that the Complainant did not have any plans to travel outside of North American for over one month in the next 12 months. The Complainant said he advised both Wang and Liu that he typically spent six months of the year outside of Canada and had planned a trip to China in June 2003. The Complainant was actually in China from June 2003 until November 2003. The Council accepted the Complainant’s evidence over that of Wang and Liu.
- [7] The insurance agency, RBC Life Insurance Company (“RBC”), requires that its representatives deliver a policy within 60 days from the date it is issued, and provide a policy delivery receipt. If a policy cannot be delivered within that period an extension may be granted provided an Addendum to Application is signed and verifies that the health condition of the applicant has not changed.

- [8] Wand and Liu could not obtain a signed policy delivery receipt so they requested and obtained an extension. The Policy delivery receipt was eventually signed by the Complainant in China on August 14, 2003 and dated at that time. When it was eventually submitted to RBC the date was altered to August 24, 2003. An Addendum to Application was submitted. Liu forged the Complainant's signature and the forged signature was falsely witnessed by Wang.
- [9] In rejecting the evidence of Wang and Liu and accepting the evidence of the Complainant the Council considered similar fact evidence relating to two other complainants where the policy owners had purchased similar policies and alleged that their signatures had been forged while in China in similar circumstances. The Council did not follow up the question of whether those complaints were made out because of difficulties in following up with those complainants.
- [10] The Complainant said that Wang and Liu mislead him, falsified documents, and asked that the Policy be cancelled and that the premiums be fully refunded. The Policy was in fact cancelled and premiums refunded by RBC.

III. ISSUES

- [11] The issues posed by the appeal of the Superintendent are (1) whether the finding of the Council that the altered illustrations were not materially different is unreasonable, and (2) whether the penalty imposed is unreasonable.
- [12] The Council raises as an issue the jurisdiction of the Tribunal, arguing that it should not interfere in the penalty imposed, especially in light of guidelines issued by the Council to its licensees. Nor should the Tribunal interfere with findings relating to the Council's expertise, namely, its determination that the altered illustrations were not material and whether the penalty imposed was appropriate.
- [13] Liu supports the decision of the Council. He remains of the position that he was unaware of the altered illustrations. He says he is contrite and apologizes for his mistake.

IV. JURISDICTION OF FINANCIAL SERVICES TRIBUNAL

- [14] The jurisdiction of the Financial Services Tribunal is set out in the provisions of the *Financial Institutions Act*, R.S.B.C. 1996, c. 141:

242.2 (1) [Repealed 2004, c. 45, s. 100(a)]

...

- (5) Subject to subsection (8), an appeal is an appeal on the record, and must be based on written submissions.
- (6) For the purposes of subsection (5), the record consists of the following:
- (a) the record of oral evidence, if any, before the original decision maker;
 - (b) copies or originals of documentary evidence before the original decision maker;
 - (c) other things received as evidence by the original decision maker;
 - (d) the decision and written reasons for it, if any, given by the original decision maker.

...

- (8) On application by a party, the member considering the appeal may do the following:
- (a) permit oral submissions;
 - (b) permit the introduction of evidence, oral or otherwise, if satisfied that new evidence has become available or been discovered that
 - (i) is substantial and material to the decision, and
 - (ii) did not exist at the time the original decision was made, or, did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.

...

- (11) The member hearing the appeal 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.

...

2003, c. 51, s. 29, part; 2004, c. 45, s. 100; 2004, c. 57, s. 12.

[15] As provided in section 242.2(5) an appeal is on the record unless new evidence is permitted, in which case section 242.2(8)(b) provides that the common law rule regarding the adducing of new evidence on appeal, or a reasonable facsimile, is applied to determining whether new evidence should be permitted. A member of the Tribunal hearing an appeal by section 242.2(11) may "...confirm, reverse or vary a decision under appeal, or may send the matter back for reconsideration, with or without directions..." to the original decision maker.

[16] Thus stated, these powers and this jurisdiction are broad indeed. The Tribunal has held, however, after extensive review, that the appropriate standard of review is reasonableness: *Financial Institutions Commission v. Insurance Council of British Columbia and Maria Pavicic*, FST No. 05-009, *Financial Institutions Commission v. Insurance Council of British Columbia and Branislav Novko*, FST No. 05-008.

[17] The Superintendent argues that this standard allows me to vary and indeed reverse findings of the Council both as to whether the altered illustrations were *materially* altered, and whether the punishment imposed was appropriate. The Council argues that I should respect the Council's findings, the Council being comprised, as it is, of respected persons of considerable industry knowledge and experience.

[18] While, as the Tribunal noted in *Maria Pavicic*, supra, "If the Tribunal determines the decision is unreasonable, it should not hesitate to interfere..." that decision can only be made "after considering all of the evidence, the documentation, the assessments regarding credibility" and the findings of fact: *Branislav Novko*. In my opinion, notwithstanding the expertise of the Council, this Tribunal has the jurisdiction to consider the arguments raised by the Superintendent.

V. Findings of Council and Penalty Imposed

[19] The Council investigated 5 allegations of impropriety described as follows:

1. the Licensee provided a client with illustrations different from those that he had reviewed and signed at the time the presentation was made and the life insurance application taken;

2. the Licensee intentionally completed the life insurance application incorrectly with respect to the question referring to the client's plans to travel outside of North America for more than one month in the twelve months following the date of application;
3. the Licensee delivered the insurance policy to the client's family while the client was away in China, therefore, the Licensee did not review the Policy with the client directly, nor did he explain the Policy's ten-day right of rescission provision;
4. the Licensee amended the date on the Policy delivery receipt without the client's knowledge or consent; and
5. the Licensee forged the client's signature on an Addendum to Application form, and then signed as a witness to the forged signature.

[20] With respect to these allegations, the Council made the following findings:

1. the Council found that the Licensee provided a new set of illustrations to the client but there was no material difference between the two sets of illustrations and the differences would not mislead the client;
2. the Council found that Wang and Liu either intentionally or recklessly incorrectly completed the insurance application when describing the client's travel plans, although the actual risk was not materially different and would not have any significant impact on how the Policy would be written;
3. the Council found the third allegation unfounded;
4. the council found the Licensee submitted the Policy delivery receipt knowing the date had been amended without the client's consent or knowledge; and
5. the Council found that the Licensee had falsely executed the Addendum to Application form, by forging the client's signature.

[21] The Council summarized these findings by stating that:

“...these facts constituted a breach of section 231 of the *Financial Institutions Act*... in that the Licensee failed to act in a trustworthy manner, in good faith and in accordance with the usual and proper practice of the business of insurance, as required by Rule 3(2) of the *Council Rules*. In particular, the Licensee incorrectly completed a question on the insurance application, submitted the Policy delivery receipt to RBC knowing that it had been amended without the client's knowledge or consent, and falsely executed the addendum”.

VI. DISCUSSION AND ANALYSIS

A. Were the Original Illustrations Materially Altered?

[22] The Superintendent submits that the Council erred in concluding “there was not a marked difference between the two sets of illustrations that would have persuaded the client one way or the other in his decision to purchase the Policy and these differences were not sufficiently material to mislead the client”. It was acknowledged by the Council that the altered illustrations showed slightly higher cash values and investment returns than the illustrations originally provided.

- [23] The Superintendent argues that the Complainant cited this very reason, the alteration of the illustrations, as the reason he wanted to cancel the Policy, and thus the finding of the Council that the difference in the two sets of illustrations would not have persuaded the Complainant either way was clearly wrong.
- [24] The Complainant's letter of complaint dated January 12, 2005 forms part of the record in this appeal. The Complainant cites the alteration of the illustrations as one part of the complaint asserting that the original illustrations "used unreasonably high return rates". The original illustrations are dated May 21, 2003. Under the column "Equivalent Int. Rate Fixed" it shows a rate of 5.5% for all years of the Policy. On the seventh and last page of the illustration there are two interest rates shown, 5.5% and 4.0%, 4% being shown as an "Alternate". The documents contain a warning that the rates are "used for illustration purposes" and "is not guaranteed". The document is signed by the Complainant.
- [25] The altered illustrations are dated August 22, 2003. For the first two years of the Policy the interest rate shown is 4.0%. In the third and subsequent years the rate increases to 5.5%. There are only six pages to the illustration. The last page which would normally have the insured's signature is missing. There are some other differences in this document, such as the tax rate and the consequential cash surrender values, which were referred to by the Council.
- [26] In my opinion, matters such as the determination whether the substantive alterations to the illustrations were materially misleading, are within the special expertise of the Council, experienced as it is with industry standards and norms, and having knowledge of current and anticipated rates of return within the industry. Moreover, there is nothing before me that would tend to show that the original or altered rates were unreasonable. That said, what seems more important here than whether the altered illustrations materially differed from the original illustrations, is the fact that Wang and Liu substituted new illustrations for those signed by the Complainant at all.
- [27] The original illustration signed by the Complainant was seven pages in length and on the last page is signed by him and by one of the Licensees. It is dated May 22, 2003. Underneath the signature there is a heading "Application Requirements" that lists certain medical examination requirements and "Signed illustration". The illustrations attached to the Policy were different and contained only 6 pages. It was missing the signature page and is dated August 22, 2003. It is stated to be prepared by Michael Liu.

B. Is the Penalty Reasonable?

- [28] The Council in rendering its decision on penalty bundled its discussion of the first allegation with the second allegation. The finding of the Council was that a second set of illustrations were attached to the Policy. These were different illustrations than those provided the Complainant when the Complainant applied for the Policy. They were not signed by the Complainant. The Council rejected the Licensee's contention that some competing agent had prepared the illustrations and attached them to the Policy. In this discussion the Council, wrongly in my view, focused on the materiality of the alteration instead of the fact that altered illustrations were attached to the Policy at all.

- [29] The Council in making its findings on the first and second allegations preferred the evidence of the Complainant to that of the Licensee. On this issue the Complainant's evidence directly contradicted that of the Licensee. Liu's position before the Council was that the Complainant had not told them about his travel to China. As put by the Council, "to the contrary, the client claimed to have advised the Licensee that his business dealings typically required him to spend six months of the year outside of Canada and that he had planned an upcoming trip to China in June 2003". In finding against Wang and Liu the Council characterized their actions as intentionally misleading or reckless. There was also similar fact evidence that supported their findings against Wang and Liu.
- [30] With respect to the first and second allegation it referenced the decision of the Council in *Paul Sih*, Council Investigation File Reference No. 116725-3 dated January 18, 2002. In *Sih*, the Licensee intentionally counseled a client to make misrepresentations to an insurer during the application process and erroneously answered questions on the application either intentionally to mislead or as a result of his carelessness. The Council found as a mitigating factor the fact that the Licensee never submitted the application to the insurance company. A two month suspension was imposed and the Licensee had to pay costs of the Council's investigation of \$2,112.50.
- [31] The Council distinguished *Sih*. It found "...that the Licensee's actions may have caused some confusion to the client, ultimately, neither the client nor the insurer were prejudiced as a result, whereas Sih acted with the intention to deliberately mislead and defraud both his client and the insurer, resulting in much more aggravating and serious consequences". This statement of the Council is difficult to reconcile with the actual report of the case in *Sih*. In *Sih*, the Council said "Having made these findings, the Council took into consideration that the Licensee never proceeded with submitting the application to the insurance company when determining an appropriate penalty". There could not, therefore, in *Sih*, have been "more aggravating and serious consequences" as the Council seemed to have thought. In fact, in the subject case, a policy was issued but ultimately cancelled and the premiums refunded. In *Sih*, no policy was issued as the application was not proceeded with.
- [32] With respect to the fourth and fifth allegations, that Wang and Liu had altered documents and participated in forging the client's signature, the Council cited three cases and a Council policy bulletin in consideration of the appropriate penalty. It considered the conduct in these cases more serious than the subject case.
- [33] In *Financial Institutions Commission v. Insurance Council of British Columbia and Branislov Novko*, FST No. 05-008, Appeal Decision dated August 22, 2005, the Financial Services Tribunal heard an appeal from the Council regarding Branislov Novko ("Novko"). Novko was approached by a former insurance agent, received five insurance applications, and signed these as a witness to the applicant signatures not having actually witnessed such signature or taken the applications. The former agent had advised Novko that she had taken the applications while licensed. He subsequently conducted a needs analysis and determined the coverage appropriate. The Council imposed a two week license suspension and fine of \$1,000. On appeal the Tribunal increased the period of suspension of Novko from two weeks to sixty days.

- [34] The Council considered the *Novko* decision and considered the conduct in this case less serious. In *Novko*, the Licensee falsely witnessed applications signed by clients and taken by a former agent who had assured them of their correctness. The falsehood perpetrated was that Novko did not witness the signatures or take the applications but relied on the assurances of others. In this case Wang and Liu altered a date on a document converting it into a false document and participated in the creation of another false document by forging a signature and then falsely witnessing the forged signature. Moreover, the Council found that the Licensees had either intentionally or recklessly completed statements in the application that he knew or ought to have known were false. There is no finding that any of these actions were done with the consent of the Complainant.
- [35] A second case considered by the Council is that of *Financial Institutions Commission v. Insurance Council of British Columbia and Maria Pavicic*, FST No. 05-009, Appeal Decision dated November 11, 2005. In this case the Council had imposed a penalty of a two week suspension and \$1,000 fine where a licensee had received applications from a former licensee and falsely witnessed the applications and applicant's signature. In this case the Licensee herself brought the matter to the attention of the Council prior to any investigation. On appeal to the Tribunal the penalty was increased to a thirty day suspension. The Tribunal carefully analyzed previous decisions and found that the conduct fit between two extremes. It noted that Pavicic did not forge signatures but falsely witnessed applications. In the present case Wang and Liu altered a document, by changing its date, and then jointly participated in forging a contract Addendum.
- [36] Another case considered by the Council is that of the Council in *John Jeremy Davidson*, Council Investigation File Reference Number 006094-3. In *Davidson* the conduct was similar to that in *Pavicic* and *Novko*, namely the false witnessing of signatures on insurance applications. Davidson was forthcoming to the Council and cooperated in the investigation. He also sought to verify statements in the applications with the applicants but was thwarted by third parties. The Council in *Davidson* considered this case less serious than that of *Novko* and imposed a suspension of 30 days and a fine of \$1,000 and cost of the investigation. The *Davidson* case, like that of *Novko* and *Pavicic*, did not involve the intentional forging of signatures but did involve multiple applications.
- [37] The Council in this case also referred to "...Council's recently published Bulletin, which articulates that improper execution of insurance documents by licensees, which is not done for personal gain, will result in a minimum \$500 fine". With respect to penalty, the Bulletin is not particularly helpful, in my opinion, describing a broad range of conduct which is worthy of varying degrees of sanction. It does, however, note that "Insurance licensees must be trustworthy, conducting all professional activities with integrity, reliability and honesty". If the Bulletin was intended to suggest that a \$500 fine for forging documents was appropriate it is, in my opinion, plainly wrong.
- [38] The Superintendent refers to other precedents in arguing that an appropriate penalty is a twelve month license suspension.
- [39] In *Dunlop v. British Columbia (Registrar of Mortgage Brokers)* [1993] B.C.C.O. No. 2, Appeal Decision dated April 15, 1993, the Commercial Appeals Commission imposed a suspension of one year where a sub-mortgage broker altered a comfort letter and forged a

signature on the letter done with a view to inducing a mortgage company to grant a mortgage. The Commission reduced from two years to one year the penalty but agreed with part of the reasoning of the Deputy Registrar in finding "...that common sense dictates that it is never permissible nor acceptable, nor is there any right to change another person's letter, or to sign the name of another person without clearly setting out the capacity in which that signature is made and authorized". In reducing the penalty from two years to one year the Commission "...considered the Appellant's previously unblemished character, his cooperation and admission of blame, his lack of experience in the industry..." While *Dunlop* is not an insurance case it does deal with a regulated industry in the financial services sector and an isolated transaction.

- [40] In *Toews v. British Columbia (Superintendent of Insurance)* [1985] B.C.C.O. No. 6, File CAC-8429, the Commercial Appeals Commission considered an appeal involving the forging of a signature on a release form and submitting such form to another person knowing the document would be relied upon. The Commission ordered a suspension of four months. There are several cases referred to in the reasons where the forging of signatures resulted in suspensions of two and four months. The incident was an isolated transaction.
- [41] In a more recent decision in *Financial Institutions Commission v. Insurance Council of British Columbia and Richard Jones*, FST No. 06-020, Appeal Decision June 29, 2006 this Tribunal referred a matter back to the Council where for forging signatures and other varied improprieties the Council imposed a nine month suspension with the ability to reduce the suspension to 4 months upon payment of certain deferred sales charges. Despite a variety of mitigating circumstances, the Tribunal made it clear that it considered this aspect of the penalty inappropriate as inadequate where the licensee was responsible for fraudulent activities over a period of time.
- [42] The Council in its submission argues that there is a danger of attempting to apply "non-insurance" related regulatory cases to cases involving insurance agents and says the Council rightly considered the insurance related cases, *Sih, Pavicic, Novko, and Davidson*. The problem with that submission is that the insurance related cases considered by the Council are not dealing with the question of forgery. In those cases the agents falsely witnessed signatures they believed to be genuine. That is most serious conduct, but the conduct here involved creating a document through forgery. The document the Licensees knew to be false because they created it themselves, forging the insured's signature and falsely attesting to the forgery by 'witnessing' the forgery. Moreover, the forged document shows its place of execution as being Vancouver. The Complainant was in China.
- [43] Liu raises the decision in *Re Gee* [2004] I.D.A.C.D. No. 58. In that case Gee sent his client three documents for signature that were signed by the client or his wife acting on his behalf but were the wrong documents. Gee forged a signature to the correct document and then sought to have the client sign the correct document. A routine audit uncovered the matter. Gee admitted the matter to his employer and the Council when it was uncovered. Gee was fired from his employment. The Panel noted that Gee had suffered heavily, had been fired by his employer, and was unable to find new employment. These factors were considered in determining the penalty. A fine of \$5,000 was imposed together with conditions that Gee be required to rewrite and pass certain courses and, for the first year of any

reemployment in the securities industry that he be “subject to close supervision”. The requirement to rewrite and pass courses effectively imposed a period of suspension on Gee and the requirement for supervision during reemployment would have created an obstacle to reemployment.

- [44] As noted by the Superintendent, the insurance industry is part of the regulated financial services sector. Licensees in this sector are required to be competent, honest and trustworthy. As noted by the Council in its decision, its Licensees are required to “...act in a trustworthy manner, in good faith and in accordance with the usual and proper practice of the business of insurance...” In my opinion the requirements of these industries are sufficiently similar that the sanctions imposed in other parts of the financial services sector may, appropriately considered and qualified, be of some assistance in determining the appropriate sanctions in this and other cases.
- [45] With respect to the statements made in an insurance policy, they are the basis on which the underwriters assess the risk. Intentionally or recklessly including wrong statements undermines the ability of the underwriters to assess the risk. Material misstatements can void the Policy. In making an application for insurance the proposed insured receives illustrations that demonstrate the consequences of obtaining the Policy. Substituting new illustrations is improper. Altering the date on documents signed by an insured means that the document is false and may affect whether or when coverage is effective. Forgery can void a policy altogether, and is unacceptable, and known to be unacceptable, in any industry.
- [46] In comparing the *Sih*, *Pavicic*, *Novko*, *Gee* and *Davidson* cases to the present case it is also useful to compare the conduct of the Licensees during the investigation of the complaints.
- [47] In *Sih*, although the report is brief, it appears that the Licensee accepted the findings of the Investigative Review Committee. There is no suggestion in the report that the Licensee was not candid with the investigators. In *Pavicic* it was the Licensee herself who reported the matter to the Council staff to ensure that the insurance applicants “would not be prejudiced in this matter”. In *Novko* the Tribunal found that “it is clear that Mr. Novko admitted to the wrongful witnessing” to the compliance officer. In *Davidson* the Licensee was similarly cooperative. In *Gee* when the matter was uncovered by a routine audit Gee admitted the matter to his employer and to the Council.
- [48] In the instant case the Complainant said that he told the Licensees that he intended to travel to China. Liu told the Council investigator that the Complainant never told them about his travel plans although soon enough Liu had to call the Complainant in China to deal with policy matters. The Council found in favour of the Complainant, finding that the Licensee either intentionally or recklessly completed the application. With respect to the altered illustrations Liu denied providing the altered illustrations, but the Council found that the Licensee provided the illustrations to the Complainant. With respect to the altered delivery receipt, Liu told the investigators that the Complainant altered August 14, 2003 to August 24, 2003: “When he gave the receipt back to Zongli Wang and me in person in Canada, he changed the date to the current date at the sight of us (See attachment 4)”. The Council, however, found based on the Complainant’s evidence and his airline tickets that the

Complainant was away in China from June until November 2003. The receipt was not given back “in person”.

[49] With respect to the forged Addendum to Application, Liu told the investigator that the Complainant was either still in China or busy in Vancouver, and was not available to sign the Addendum to Application form. Wang completed the form and signed as a witness and then Liu forged the Complainant’s signature. The Complainant was not in Vancouver but the Addendum said that he signed it in Vancouver.

[50] In a letter to the Investigator and the Council Liu wrote on August 10, 2005 taking issue with some of what Wang said. He said that:

“This is an insurance case both Wang and me jointly handled. Every action we took in the process was based on thorough communication and mutual consent at the very first moment. There was no such thing that I forged the Complainant’s signature on the form behind Wang and did not tell Wang until much later”.

[51] In my opinion the Council erred when considering the penalty in three respects: (1) it erred in failing to appreciate that the material issue before it with respect to altering the illustrations is not whether the Complainant was actually misled, but the fact of the alteration in the first place, (2) it erred in finding that altering a document and participating in the forging and witnessing of a forged and misleading document (shown to be made in Vancouver while the Complainant was in China, contrary to representations in the Policy application), was less serious than the conduct in *Sih, Pavicic* and *Novko*; and (2) it failed to consider appropriately the differences between the conduct of the Licensees in those cases who quickly acknowledged their wrongdoing and even, in one case, brought the matter first forward to the Council, with that of Liu, who gave false explanations and only some admissions.

[52] In my opinion the conduct of the Licensee in this case is at least as serious as that referenced in the *Sih, Pavicic, Gee* and *Novko* cases. While there were multiple applications in three of those cases, and different kinds of conduct involving unlicensed agents, the isolated forgery here (giving the Licensee the benefit of the similar fact evidence not being proved as separate misconduct, although the similar fact evidence involves forgeries and similar circumstances to those described here), and the conduct of the Licensee after the matter was brought to light in my opinion requires that there be a significant penalty.

[53] Moreover, the Council Bulletin notes that “Council is encountering an alarming number of these incidents”. If that is so, then this should be considered in determining the appropriate penalty. As noted by this Tribunal in *Superintendent of Financial Institutions v. Insurance Council of British Columbia and Richard Jones*, FST06-020, June 29, 2006, it is important that fraudulent activities not be met with a “slap on the wrist”. Such a penalty wrongly “amounts to a message to those parties dealing with British Columbia’s insurance agents that activities of the sort undertaken by the Licensee will be met with disapproval by Council but will not be punished in a manner that adequately takes into consideration the

interests of insurance companies with whom insurance agents deal or the best interests of the public” (page 13).

- [54] Liu argues that there are a number of mitigating factors that should be considered. I accept that Liu thought he was acting in the best interests of the Complainant and that the limited audits uncovered no other wrongdoing although there were similar fact complaints that the Council did not resolve, and to my knowledge, has not resolved. Liu was new to the industry and is now contrite.
- [55] While this matter involves one transaction, the findings do not support Liu’s contention that he admitted his conduct. The only available inference from the Council’s findings is that much of what Liu advised the investigators and the Council was not accepted by the Council. Liu in his submission says that he met with the Complainant before the Addendum was filled out, however, a careful reading of the Council’s decision does not support that assertion. While there is no other history of misconduct, it is not reasonable to say that “No clients, consumers or insurers were harmed” as though this suggests that no harm was done. The Complainant cancelled his policy, RBC refunded the premiums, the Council had to conduct an investigation and no doubt the reputation of the insurance industry has suffered in the eyes of all those concerned.
- [56] In varying the penalty imposed by Council I am cognizant of the much more severe penalties imposed in other cases that are cited by the Superintendent. While those penalties may have been appropriate it is, in my view, necessary that the penalties be commensurate with those imposed in similar cases where there are reasoned decisions. There is here a broad range of penalty indicated by the cases which are not, frankly, easily reconcilable, but those cases indicate, in my view, that the penalty imposed by the Council was unreasonable, and a significant period of suspension is appropriate in cases of this kind.

VII. ORDER

- [57] Pursuant to section 242.2(11) of the *Financial Institutions Act*, R.S.B.C. 1996, c. 141, I would vary the penalty imposed by the Council by varying the period of suspension and order that the Licensee is suspended for a period of two months. The other elements of the penalty imposed by the Council’s order are confirmed.
- [58] The penalty then is as follows:
1. The Licensee is suspended for a period of two months;
 2. The Licensee is fined \$1,000.00;
 3. The Licensee must pay half of the Council’s cost of the investigation into this matter assessed at \$1,012.50;
 4. The Licensee is required to pay the above mentioned fine and costs by January 13, 2007. If the Licensee does not pay the ordered fine and costs by this date the Licensee’s licence is suspended as of January 14, 2007, without further order of the Council.

[59] With respect to the costs of this appeal, the Superintendent sought a penalty of twelve months. The Council and Liu sought to uphold the Council's intended decision. I have found that the appropriate penalty is between those sought by the opposing parties.

[60] In the circumstances there has been divided success and there is no order as to the costs of this appeal.

DATED IN VICTORIA, BRITISH COLUMBIA, THE 28TH DAY OF FEBRUARY, 2007.

FOR THE FINANCIAL SERVICES TRIBUNAL



JOHN SAVAGE
PRESIDING MEMBER

