ALBERTA INSURANCE COUNCIL
(the "AIC")

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

And

1951010 Alberta Ltd. o/a Penhold Car Farmers
(the "Dealership")

As represented by
Kyle Hans Blazenko, Designated Individual
(the "DI")

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

The matter involves an alleged violation of s. 480(1)(a) of the Act. Specifically, it is alleged that the Dealership sold seventeen (17) equipment warranties and collected the premiums, however the payments were not submitted to the insurer. As such, it is alleged that the Dealership acted contrary to s. 480(1)(a) of the Act and is guilty of fraud, deceit, dishonesty, untrustworthiness, and/or misrepresentation.

Facts and Evidence

This matter proceeded by way of a written Report to Council dated September 5, 2023 (the "Report"). The Report was forwarded to the Dealership for review and to allow the Dealership to provide the Council with any further evidence or submissions by way of Addendum.

The Dealership held a Restricted Insurance Agent, Auto Dealership Equipment Warranty Insurance certificate of authority from January 30, 2018 to June 30, 2023.

On April 20, 2022, the AIC investigator received the following documents from [A.M.V.I.C.] [redacted] (hereinafter the "Complainant"):

1. Email dated January 19, 2022 from the Complainant to the Dealership (the "January 19, 2022 Email"); and
2. Email dated February 9, 2022 from the Dealership to the Complainant (the "February 9, 2022 Email").

The January 19, 2022 Email stated:

> […]

> I just spoke to you about getting the warranty documents ([L.W.] [redacted] (hereinafter the "Warranty Provider") from the dealer jacket for the sale of a vehicle to a [G.T.] [redacted] who complained to [the Complainant]. I don't have this document yet.
> […]
> Once you have it, please scan and send to this email.
> […]

The February 9, 2022 Email stated:

> […]
> We dont [sic] have a copy of the warranty as it was never was never [sic] submitted, so we are going to refund the customer for this.
> […]

On May 12, 2022, the Director of Operations for the Warranty Provider sent the AIC investigator the following information:

> […]
> In relation to the 16 warranties that remained unpaid for until March 2022.
>
> The warranties in question (16) were sold by Car Farmers between 11th June 2021 and October 4th 2021 remained unpaid for by the selling dealership (Car Farmers) until March 11, 2022.
>
> The following is the time line [sic] of contact between Car Farmers and [the Warranty Provider] to secure payment on the outstanding 16 warranties.
>
> - November 12th, emailed statement advising of outstanding amount […]
>
> "Attached please find your current Statement of Account. There are applications on your account that remain overdue.
>
> Given the length of time that these applications have been overdue, we request that you proceed with payment upon the receipt of this email immediately. […]"
>
> -
> - November 22nd 2021, [the Warranty Provider's] territory representative spoke with owner who agreed to begin making payments today (oldest to newest) or access would be removed the next day
> - November 23rd 2021, Ability to sell warranties on [the Warranty Provider's] Sales portal removed due to outstanding amount on account, Telephone call made to dealer (left voice mail) Dealer advised access to sell warranties removed, Dealer advised warranties outstanding and will need to be paid in full. Dealer advised has access to portal to pay balance outstanding only.
> - November 25th 2021, phone call made, left message with reception, asking for full payment of account
> - December 3rd 2021, phone call made, left message with reception, asking for full payment of account
> - December 6th. Phone call made, left message with reception, asking for full payment of account
> - December 6th 2021, email sent advising of overdue amount on account, asking for full payment of account […]
>
> "Attached please find your current Statement of Account. There are applications on your account that remain overdue.
>
> Given the length of time that these applications have been overdue, we request that you proceed with payment upon the receipt of this email immediately. […]"
>
> - December 8th 2021, phone call made, left voicemail, advising of outstanding amount, advised payment required immediately.
> - December 10th 2021, phone call made, left message with reception, advising of outstanding amount, advised payment required immediately.

- December 14th 2021, phone call made, left voicemail , [sic] advising of outstanding amount, advised payment required immediately.
- December 17th 2021, phone call made, left voicemail, advising of outstanding amount, advised payment required immediately.
- January 6th 2022, contacted by [the Complainant], provided information advising account not satisfied, advised that all warranties sold by dealer will be honoured regardless of payment status
- January 7th phone call made, left message with reception, advising of outstanding amount, advised payment required immediately.
- January 12th, phone call made, left voicemail, advising of outstanding amount, advised payment required immediately.
- January 24th, phone call made, left message with reception, advising of outstanding amount, advised payment required immediately.
- February 4th 2022, Email sent advising of overdue amount on account, asking for full payment of account […]

"Attached please find your current Statement of Account. There are applications on your account that remain overdue.

Given the length of time that these applications have been overdue, we request that you proceed with payment upon the receipt of this email immediately. […]"

- February 7th 2022, phone call made, message left with receptionist, advising of outstanding amount, advised payment required immediately.
- February 11th 2022, phone call made asking for full payment of account (voice mail left) , [sic] advising of outstanding amount, advised payment required immediately.
- February 16th 2022, phone call made asking for full payment of account (voice mail left) , [sic] advising of outstanding amount, advised payment required immediately.
- February 18th 2022, Confirmed to [the Complainant] that balance is still outstanding
- February 22nd 2022, phone call made asking for full payment of account (voice mail left) , [sic] advising of outstanding amount, advised payment required immediately.
- February 24th 2022, phone call made asking for full payment of account (voice mail left) , [sic] advising of outstanding amount, advised payment required immediately.
- March 4th 2022,phone [sic] call made asking for full payment of account (voice mail left) , [sic] advising of outstanding amount, advised payment required immediately.
- March 4th 2022, Email copy of statement sent advising of overdue amount of account, asking for full payment of account […]

"Attached please find your current Statement of Account. There are applications on your account that remain overdue.

Given the length of time that these applications have been overdue, we request that you proceed with payment upon the receipt of this email immediately. […]"

- March 10th 2022, phone call made asking for full payment of account (voice mail left)
- March 11th 2022, phone call made asking for full payment of account (voice mail left)
- March 11th 2022, Full payment received on account by credit card
- March 11th 2022, Account closed

[…]

On August 21, 2023, the AIC investigator requested the following from the Warranty Provider:

[…]
[…] After [the Complainant] got involved, did you have more cases where the customer paid for a policy, but you did not receive the paperwork? […]

By way of email dated the same, the Warranty Provider responded to the AIC investigator with the following information:

[…]
Since [the Complainant] got involved we have not had any further contact from customers of Car Farmers enquiring about warranties or not receiving paperwork.
[…]

On September 1, 2023, the Warranty Provided sent the AIC investigator the following information:

[…]
1. The dealership agrees with [the Warranty Provider]
    A. Dealer fills up an online application on [the Warranty Provider's website] [redacted], and submits it requesting to become authorised [sic] to offer [the Warranty Provider's] products for sale.
    B. Information is forwarded to [the Warranty Provider's] representative servicing the geographical area where applicant is based.
    C. Representative carries out a vetting process including verification of relevant / required licensing etc.
    D. Decision Yes or No is made about whether dealer is onboarded or not.
    E. If decision is yes then representative gets required documentation, trains dealership staff and creates user accounts to enable dealership staff to access [the Warranty Provider's] sales portal.
2. [The Warranty Provider] gave the dealership access to the portal.
    A. Every sales person/ manager / accounts payable person has a unique user name and password. Level of access depends on position at dealership.
3. If the dealership sells a warranty, they will enter the client information into the portal.
    A. Sales portal is accessed using a unique username and password.
4. Click send, and [the Warranty Provider] will automatically send the client a copy of the policy.
    A. As soon as an application is submitted to [the Warranty Provider] through our dealer sales portal we immediately assume risk and offer same day coverage regardless of payment status.
    B. A warranty end user will immediately receive a copy of their warranty application documents detailing coverage, plus the terms and conditions by email (automatically) once an application has been submitted through the portal.
    C. A warranty end user will receive a printed copy of their warranty application detailing coverage plus terms and conditions from the dealer after the application has been submitted.
    D. A warranty holder will receive another copy of their document by email or by regular mail (whichever is the preferred method selected by the dealer) once the warranty has been paid for in full by the dealer.
5. <u>How and when must the dealership send you the funds?</u>
    A. A dealer is required to submit full payment to [the Warranty Provider] Within thirty (30) days of the date of sale of the vehicle to the Prospective Warranty / Policy holder.
    B. If a shorter period is required by a Regulator, or a similar governing body of either Party, the Dealer shall submit full payment within the required timeframe; [sic]

[…]
[Emphasis added in original document]

<u>Discussion</u>

In order for the Council to conclude that the Dealership has committed an offence pursuant to s. 480(1)(a) of the Act, the Report must provide on the basis of clear and cogent evidence, that it is more likely than not that the Dealership committed the act as alleged. The requirement of clear and cogent evidence reflects that the Council's findings can dramatically impact an insurance intermediary's ability to remain in the industry. Therefore, the Council must carefully weigh all evidence before it prior to reaching its decision.

The applicable legal test to determine the Dealership's guilt in violating s. 480(1)(a) of the Act is set out in the decision of the Court of Queen's Bench of Alberta, *Roy v. Alberta (Insurance Councils Appeal Board)*, 2008 ABQB 572

(hereinafter referred to as *"Roy"*). In *Roy*, the Life Insurance Council found that an agent violated s. 480(1)(a) of the Act by attesting to completing the required continuing education ("CE") hours when he did not, in fact, complete the required CE hours. The *Insurance Councils Appeal Board* also found the agent guilty on appeal. The agent advanced the decision to the Court of Queen's Bench of Albert.

In his reasons for judgement dismissing the appeal, Mr. Justice Marceau wrote as follows at paragraph 24 to 26:

> [24] The *Long* case, albeit a charge under the *Criminal Code of Canada* where the onus of proof is beyond a reasonable doubt (not on a preponderance of evidence as in this case), correctly sets out the two step approach, namely the court or tribunal must first decide whether the objective one or more of the disjunctive elements have been proven. If so, the tribunal should then consider whether the mental element required has been proved. While the Appeal Board said it was applying the *Long* decision, it did not make a finding as to whether step 1 had been proved with respect to each of the disjunctive elements. Rather it immediately went into step 2 analysis and found that the mental element required for untrustworthiness might be less than the mental element required for fraud (as a given example).
>
> [25] I am of the view that statement was in error if it was made to convey a sliding scale of *mens rea* or intent depending on which of the constituent elements was being considered. In my view, the difference between the disjunctive elements may be found in an objective analysis of the definition of each and certainly, as demonstrated by the *Long* case, what constitutes fraud objectively may be somewhat different from untrustworthiness. However once the objective test has been met, one must turn to the mental element. Here to decide the mental element the Appeal Board was entitled, as it did, to find the mental element was satisfied by the recklessness of the Applicant.
>
> [26] While the language used by the Appeal Board may be characterized as unfortunate, on this review on the motion of the Applicant I need not decide whether the Appeal Board reasonably could acquit the Applicant on four of the disjunctive elements. Rather, the only matter I must decide is whether the Appeal Board acting reasonably could conclude, as they did, that the Applicant's false answer together with this recklessness justified a finding of "untrustworthiness".
> [Emphasis added]

The evidence in these types of cases is based on the concept of *"clear and cogent"* evidence. In *The Matter of the Appeal of Arney Falconer*, Chairperson Hopkins dealt with this principal of clear and cogent evidence and provided as follows:

> The Life Insurance Council stated in the Decision that there is a requirement "for 'clear and cogent evidence' because our findings can dramatically impact an insurance agent's ability to remain in the industry". However, the requirement for clear and cogent evidence does not mean that the evidence is to be scrutinized any differently than it should be in any other civil case. In all civil cases evidence must be sufficiently clear, convincing and cogent to satisfy the balance of probabilities. In *F.H. v. McDougall* 2008 SCC) [sic]; [2008] 3 S.C.R. 41 the Supreme Court of Canada states:
>
> > [45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.
> >
> > [46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.
> [Emphasis added]

Contraventions of s. 480(1)(a) of the Act are *mens rea* offences that require proof of intent, knowledge, or recklessness on a balance of probabilities. Section 480(1)(a) of the Act reads:

> If the Minister is satisfied that the holder or a former holder of a certificate of authority has been guilty of misrepresentation, fraud, deceit, untrustworthiness or dishonesty, […]
>
> the Minister may revoke, suspend or refuse to renew or reinstate one or more of the certificates of authority held by the holder, impose terms and conditions provided for in the regulations on one or more of the certificates of authority held by the holder and impose a penalty on the holder or former holder.

The Report alleged that the Dealership was guilty of fraud, deceit, dishonesty, untrustworthiness and/or misrepresentation as contemplated by s. 480(1)(a) of the Act when the Dealership sold seventeen (17) equipment warranties and collected the premium payments, but did not submit the premiums to the insurer.

Collectively, the Council is comprised of both industry and public members who are well-equipped to assess consumer risk and industry competence. The Council weighed the effects of the alleged actions, the evidence presented, and the accounts of all parties involved when arriving at their conclusion.

The February 9, 2022 Email and the email dated May 12, 2022, were of significance to the Council's decision. In the Council's opinion, these materials demonstrated that the Agent acted in a dishonest, deceitful, fraudulent and/or untrustworthy manner as contemplated by the Act.

The Council took specific issue with the information from the email dated May 12, 2022. The email provided that the Warranty Provider contacted the Dealership twenty-two (22) times by way of email or phone call, in an attempt to collect the outstanding premium amounts. Despite the knowledge that the Dealership did eventually make full payment of the outstanding premium amount to the Warranty Provider, it is the Council's opinion that the Dealership knowingly and intentionally failed to remit premium payments immediately to the Warranty provider, despite the numerous attempts made by the Warranty Provider to collect those premiums.

Consumers who purchase warranty products expect that insurance intermediary's will act with the utmost good faith while carrying out their work. Honesty and integrity are the hallmarks of a good insurance intermediary, especially when client funds are involved. It is not unreasonable to expect that a high standard of due diligence be practiced by insurance intermediary's when soliciting warranty products. Understandably, clients can experience severe difficulties when warranties are not in place, when a client believes the warranty is in place, as they expose clients to undue risk.

In light of the evidence provided by the Warranty Provider and the Complainant, it is confirmed that the Dealership sold seventeen (17) equipment warranties and collected the premium payments, but did not submit the premiums to the

insurer, the objective and subjective elements of the applicable legal test under s. 480(1)(a) of the Act are met. This was intentional conduct, and is fraud, deceit, dishonesty, untrustworthiness and/or misrepresentation as contemplated pursuant to s. 480(1)(a) of the Act.

The *Insurance Act* and its Regulations act as a mechanism of public protection. Despite the Warranty Provider confirming they would honour all the warranty products sold by the Dealership, it is the view of the Council that the Dealerships deception was self-serving, as it was deliberate and without any consideration to the risks the former clients were being exposed to. Accordingly, the Council believes a significant civil penalty is warranted under these circumstances.

The Council also took issue with the Dealership's failure to cooperate with the AIC throughout the investigation. As a regulator, the AIC plays a crucial role in maintaining the integrity and fairness of the insurance industry alongside protecting Alberta insurance consumers from the misconduct of insurance intermediaries. Failing to cooperate with the AIC demonstrates a blatant disregard to the insurance industry and the AIC as a regulator.

In terms of the available sanction, the Council may impose a civil penalty for a violation of s. 480(1)(a) of the Act not exceeding $5,000.00 per demonstrated offence against an insurance intermediary, in accordance with s. 36.1(1)(a) of the *Insurance Agents and Adjusters Regulation*, AR 122/2001. Given the seriousness of the offence, the Council orders a civil penalty per demonstrated offence in the amount of $5,000.00 resulting in seventeen (17) offences, equaling a total civil penalty of $85,000.00, be levied against the Dealership.

The penalty must be paid within thirty (30) days of receiving this notice. In the event that the penalty is not paid within thirty (30) days, interest will begin to accrue at the prescribed rate. Pursuant to s. 482 of the Act (excerpt enclosed), the Agency has thirty (30) days in which to appeal this decision by filing a Notice of Appeal with the Office of the Superintendent of Insurance.

This Decision was made by way of a motion made and carried at a properly conducted meeting of the General Insurance Council. The motion was duly recorded in the minutes of that meeting.

Date: November 29, 2023

[Original Signed By]

Chairperson Janice Sabourin,
General Insurance Council

Extract from the *Insurance Act*, Chapter I-3

Appeal

482 A decision of the Minister under this Part to refuse to issue, renew or reinstate a certificate of authority, to impose terms and conditions on a certificate of authority, to revoke or suspend a certificate of authority or to impose a penalty on the holder or former holder of a certificate of authority may be appealed in accordance with the regulations.

Extract from the *Insurance Councils Regulation*, Alberta Regulation 126/2001

Notice of appeal

16(1) A person who is adversely affected by a decision of a council may appeal the decision by submitting a notice of appeal to the Superintendent within 30 days after the council has mailed the written notice of the decision to the person.

(2) The notice of appeal must contain the following:

(a) a copy of the written notice of the decision being appealed;

(b) a description of the relief requested by the appellant;

(c) the signature of the appellant or the appellant's lawyer;

(d) an address for service in Alberta for the appellant;

(e) an appeal fee of $200 payable to the Provincial Treasurer.

(3) The Superintendent must notify the Minister and provide a copy of the notice of appeal to the council whose decision is being appealed when a notice of appeal has been submitted.

(4) If the appeal involves a suspension or revocation of a certificate of authority or a levy of a penalty, the council's decision is suspended until after the disposition of the appeal by a panel of the Appeal Board.

Contact Information and Useful Links for Appeal:

Email: tbf.insurance@gov.ab.ca
Phone: 780-643-2237
Fax: 780-420-0752
Toll-free in Alberta: Dial 310-0000, then the number
Mailing Address: 402 Terrace Building, 9515 – 107 Street Edmonton, AB T5K 2C3
Link: Bulletins, notices, enforcement activities | Alberta.ca – *Interpretation Bulletin 02-2021 – Submitting Notices of Appeal of Insurance Council Decisions*