IN THE MATTER OF THE *FINANCIAL INSTITUTIONS ACT*
(RSBC 1996, c. 141)
(the "Act")

and the

INSURANCE COUNCIL OF BRITISH COLUMBIA
("Council")

and

JAMES McGREGOR
(the "Nominee")

and

ON TRACK INSURANCE SERVICES LTD.
("On Track")

and

HAIG & ASSOCIATES INC.
("Haig")

ORDER

Pursuant to section 237 of the Act, Council convened a hearing at the request of the Nominee, On Track and Haig to dispute an intended decision of Council dated August 16, 2018.

The subject of the hearing was set out in a Notice of Hearing, dated March 28, 2019 and amended May 23, 2019.

A Hearing Committee heard the matter on May 28, 2019 and presented a Report of the Hearing Committee to Council at its October 1, 2019 meeting.

Council considered the Report of the Hearing Committee and made the following order pursuant to sections 231, 236 and 241.1 of the Act:

1. On Track is fined $15,000;

2. Haig is fined $15,000;

3. The fines to On Track and Haig are joint and several;

4. The Nominee is fined $7,500;

5. On Track, Haig and the Nominee are jointly and severally assessed Council's investigative costs of $1,500;

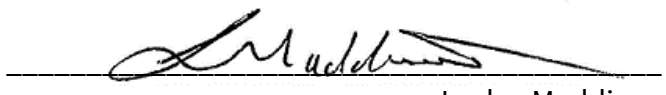
6. On Track, Haig and the Nominee are jointly and severally assessed Council's hearing costs of $7,631.85;

7. A condition is imposed on the Nominee's general insurance licence that failure to pay the $7,500 fine by January 6, 2020 will result in automatic suspension of his licence and he will not be permitted to complete any annual filing until such time as the fine is paid in full;

8. A condition is imposed on On Track's and Haig's general insurance licences that failure to pay their respective $15,000 fines by January 6, 2020 will result in automatic suspension of both their licences and neither will be permitted to complete any annual filing until such time as the fines are paid in full; and

9. A condition is imposed on On Track's, Haig's, and the Nominee's general insurance licences that failure to pay the investigative costs and the hearing costs by January 6, 2020 will result in automatic suspension of all their licences and none will be permitted to complete any annual filing until such time as the investigative costs and hearing costs are paid in full.

This order takes effect on the **8th day of October, 2019**.



Lesley Maddison
Chairperson, Insurance Council of British Columbia

INSURANCE COUNCIL OF BRITISH COLUMBIA
("Council")

REPORT OF THE HEARING COMMITTEE

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

AND

JAMES McGREGOR
(the "Nominee")

AND

ON TRACK INSURANCE SERVICES LTD.
("On Track")

AND

HAIG & ASSOCIATES INC.
("Haig")

Date:	May 28, 2019 10:00 a.m.	
Before:	Chamkaur Cheema Tony Hayes Jason Baughen	Chair Member Member
Location:	Suite 2700 – 700 West Georgia Street, Vancouver, BC	
Present:	Thea Hoogstraten Peter Auvinen James McGregor Michael D. Shirreff/ Elizabeth Allan	Counsel for Council Counsel for the Nominee, On Track and Haig Nominee Counsel for the Hearing Committee

BACKGROUND AND ISSUES

On June 11, 2018, Council made an intended decision, pursuant to sections 231, 236 and 241.1 of the Act, to impose discipline on the Nominee, On Track and Haig (together, the "**Licensees**") arising from allegations that they distributed Guaranteed Asset Protection vehicle insurance ("**GAP**") to British Columbia consumers through motor vehicle dealerships which were not permitted by Council to engage in GAP business ("**Dealerships**").

…/2

On August 16, 2018, in accordance with section 237 the Act, Council provided the Licensees with written reasons and notice of its intended decision. On August 28, 2018, in accordance with section 237(3) of the Act, the Licensees requested a hearing before Council to dispute the intended decision.

As set out in the Amended Notice of Hearing issued May 23, 2019, the purpose of the Hearing was to determine whether the Licensees:

a) Failed to act in a competent manner and in accordance with the usual practice of the business of insurance and in accordance with Council's Rules, Code of Conduct and pursuant to section 231(1)(a) of the Act;

b) Engaged entities to conduct unlicensed insurance activities by contracting with Dealerships to promote GAP, assist with the completion and submission of GAP applications to On Track, collect GAP premiums and applicable sales taxes on behalf of On Track and forward to On Track the premium remittance less a fee retained by the Dealerships ("**Dealer Marketing Fee**");

c) Permitted Dealerships to determine the GAP premium by allowing them to include an undisclosed Dealer Marketing Fee;

d) Failed to disclose to the consumer the Licensees' relationship with the Dealerships and that compensation was paid to the Dealerships for the sale of GAP insurance; and

e) Failed to comply with the provisions of the Act (*inter alia:* sections 75(d), 168, 171(2), 178(1) and the Marketing of Financial Products Regulation).

The hearing was scheduled to take place May 28-30, 2019. As a result of an Agreed Statement of Facts in which the Licensees admitted the alleged breaches, the submissions of legal counsel focused on the issue of penalty and the hearing completed in one day. The Licensees and their counsel participated via video-conference from Toronto.

Council sought the maximum possible fines against each of the three Licensees for their respective breaches. The Licensees' position was that the maximum possible fines were not warranted on the facts of this case. In conducting GAP business with Dealerships, the Licensees said that they relied on advice received from a third party that those activities were in compliance with this province's regulations, which they were not.

The Hearing Committee has considered the submissions of both Council and the Licensees. For the reasons set out below, the Hearing Committee is not recommending the maximum possible fine against each of the Licensees as sought by Council. Although this matter raises concerns about the Licensees, there was no evidence that this was a deliberate attempt to circumvent the rules and regulations or defraud the public. Indeed, Council was not alleging this. Further, the Licensees admitted their mistakes and have apologized for it. The Licensees were very contrite

during the hearing. The Hearing Committee is of the view that the maximum possible penalty ought to be reserved for misconduct which is intentional, willfully blind, egregious or continually denied and that is simply not the case in this matter. However, the Hearing Committee is of the view that given the Licensees' experience in the insurance industry, when they decided to do business in British Columbia, they ought to have taken further steps to ensure that they were within this jurisdiction's regulatory requirements. The Licensees commenced business in British Columbia without even reviewing Council's Rules and Code of Conduct. In terms of their compliance, the Licensees relied upon the advice of a third party who was not a lawyer and they did not seek advice from Council itself. The Hearing Committee is therefore recommending a fine of $15,000 against each of On Track and Haig, and a fine of $7,500 against the Nominee, as well as Council's costs of the hearing.

EVIDENCE

Exhibits

As touched upon above, the hearing time was greatly reduced as a result of the parties reaching an Agreed Statement of Facts on many issues. The following exhibits were entered by Council during the course of the hearing:

Exhibit 1 – Agreed Statement of Facts
Exhibit 2 – Book of Documents of Council
Exhibit 3 – Book of Documents of the Licensees

Council called one witness, Connel Lewis, an investigator for Council. The Licensees called the Nominee as well as Clayton Leys, the President and sole shareholder of On Track. Their respective evidence is canvassed below.

Agreed Statement of Facts

Council took the Hearing Committee through the Agreed Statement of Facts (Exhibit 1). We will not repeat everything here, but some of the material facts were as follows.

The Nominee became licensed in British Columbia in February 2015 and is the nominee for both On Track and Haig, which are companies incorporated pursuant to the laws of Ontario. Haig has held a general insurance license in British Columbia since October 2002 and On Track has held a general insurance license in British Columbia since March 2015. Neither entity has had any previous disciplinary history with Council. Mr. Leys is not licensed with Council.

On October 5, 2012, Council issued Notice ICN 12-006 which granted restricted general insurance licenses to motor vehicle dealerships which permitted only offering insurance products which were reviewed and approved by Council with an average coverage per policy, including riders, of $15,000 or less. It specifically included language as follows:

> *There are new disclosure requirements to ensure consumers have a clear understanding of their right to decline any insurance coverage. Dealerships will be required to provide consumers with a disclosure document, separate from any other vehicle sales transaction document provided, that outlines in clear and concise language:*
>
> *a) That the purchase of the insurance coverage is optional and can be declined by the consumer; and*
>
> *b) The premium (as set by the underwriting insurer) and, separately, an itemized list of fees charged by the Dealership which includes the amount of each fee and a description.*

The Licensees and Mr. Leys were aware that they would have to comply with the applicable laws and regulations in each jurisdiction in which they sold GAP. As such, Mr. Leys reached out to the GAP insurer (the "GAP Insurer") regarding regulatory compliance in British Columbia. The GAP Insurer's response included an email from its Underwriting and Governance Manager, Specialty Warranty, Mr. Y, on August 6, 2014 with a subject line of "On Track GAP / BC Approval" and read:

> *Clayton,*
>
> *We have discussed and confirmed with Legal regarding B.C., and provided that your process flow is identical to the other provinces where you are currently doing business, you have the green light to go ahead immediately.*
>
> *Just a reminder, don't forget to us the B.C. specific Wording, Declaration and Application.*
>
> *Happy sales*
>
> *Regards*
>
> *[Mr. Y]*

In or about July 2015, On Track began marketing GAP in British Columbia through six Dealerships. In May 2016, Council was notified that On Track was marketing GAP through the Dealerships that were not licensed to engage in GAP sales.

The Dealerships had a retail price sheet for On Track's GAP that provided the Dealerships with flexibility in determining the premium. Dealerships were permitted at their discretion to adjust their fees by up to $2,000 per policy, which would be retained by the Dealerships (the Dealer Marketing Fee) and which was built into the financing of an insured vehicle. On Track and Haig were aware that Dealerships were determining the total premium through this discretionary

assessment. At no time were consumers advised that there was a Dealer Marketing Fee which was determined and retained by the Dealership.

According to the records, 169 GAP policies were sold in British Columbia by six Dealerships for a six month period between July 1, 2015 and December 31, 2015 with premiums ranging from $1,200 to $2,500 per policy. The Dealer Marketing Fee incorporated into the premium typically comprised 50-80% of the premium. Total premiums, including Dealer Marketing Fees, collected for the 169 policies were $328,854 of which $221,346 was retained by the Dealerships as Dealer Marketing Fees. The actual product cost was $107,506, which went to On Track.

The Licensees continued to offer GAP between January 1, 2016 through June 2016 when they ceased selling the product after the GAP insurer terminated its contract to offer the coverage. No data for value premiums and product cost was provided to Council for either before or after the July 1, 2015 through December 31, 2015 time period.

Evidence of Connel Lewis

Council's first and only witness was Mr. Lewis, an investigator with Council since January 2012. Mr. Lewis had conduct of the investigation of this matter. He confirmed that Mr. McGregor was the Nominee and the only authorized person to represent Haig and On Track.

Mr. Lewis identified a bulletin that Council issued in October 2001 which he had retrieved from Council's website in 2016 during the course of his investigation. He confirmed he was not an investigator for Council in 2001 when the bulletin was published. The bulletin contained a heading "Disclosure of Service Fees" which outlined that "when a service fee is charged, it is necessary to disclose, in writing, the amount of such a fee and the fee must be shown separately from the insurance premium". Mr. Lewis' evidence was that this bulletin was mailed to licensees in 2001 and was subsequently re-published on Council's website although he could not say precisely when. He testified it was removed from Council's website approximately one year ago. Mr. Lewis also identified ICN 12-006 which was issued on October 5, 2012 and published on Council's website on or shortly after that date.

Mr. Lewis testified that he wrote to the Nominee on September 21, 2016 regarding his investigation and requested further information from the Licensees by October 12, 2016. The Nominee responded on November 2, 2016 and provided some information and documentation. On April 4, 2018, Mr. Lewis emailed Mr. Leys and requested further materials:

> *Could you please provide copies of documents (quote provided to consumer, application completed by dealership/consumer online and signed by the consumer, confirmation that application was approved, policy contract with terms and conditions, welcome letter and any other transactional documents) for about 3 to 5 GAP purchases in BC?*
>
> *The documents provided in the past were blank documents and not actual transactional documents. You may redact personal client information.*

Mr. Leys responded on April 10, 2018 and stated that it may be difficult to obtain those documents as they allowed the Dealerships to store the original application documents and would likely be in deep storage and, given the departure from the British Columbia market, would not be agreeable to working with them on this. The Hearing Committee asked Mr. Lewis if the documents that he requested were ever provided to him and Mr. Lewis confirmed that they were not.

Mr. Lewis identified a spreadsheet that he created during his investigation after he received the set of documents from the Nominee in November 2016. He extracted information and synthesized the total retail price of each insured vehicle, the fee to On Track and the fee retained by the dealer to arrive at the numbers as set out in the Agreed Statement of Facts (Exhibit 1).

In cross-examination, Mr. Lewis confirmed that at all times the Nominee and Mr. Leys were cooperative with the investigation. Mr. Lewis was asked a series of questions about who had made the complaint about the Licensees to Council and he confirmed that the complaint was made anonymously. Counsel for the Licensees suggested that it may have been a competitor who complained. The Hearing Committee notes that the Nominee suggested the same thing in his interview with Council on September 11, 2017. Upon objection to the question from counsel for Council, counsel for the Licensees maintained that the motives of the complainant may be relevant to the penalty imposed.

Evidence of Clayton Leys

Mr. Leys gave evidence of his history in the insurance industry including his first experience with the GAP product commencing in 2006. Prior to 2006 he was an independent agent for ancillary products under On Track. His background was in the automotive business before he turned to insurance. He confirmed he had no discipline history with insurance regulators. Mr. Leys also described his involvement in his community, both with girls' hockey and Girl Guides.

In late 2011, he was notified by the insurer he was dealing with at the time that it was going to exit the market with the GAP product and ultimately did so in 2012. When he heard this he began looking for a new provider and made contact with the GAP Insurer, which already had one GAP program at that time. Mr. Leys had discussions with the GAP Insurer about the product, which included contemplation that at some point it may be regulated as an insurance product, so it was determined that a new company should be formed to comply with any eventual regulations of the GAP product. It was also during those discussions that the GAP Insurer agreed to take on any compliance issues. Mr. Leys dealt with Mr. Y at the GAP Insurer and another person whose title he could not recall but who may have been Mr. Y's assistant.

The GAP product was initially sold in Manitoba and then the program was rolled out east across the country through to the Maritimes. Mr. Leys took the Hearing Committee through two memoranda that he had requested from the GAP Insurer confirming that the program was in compliance with provincial regulations in New Brunswick and Nova Scotia. He admitted that a

competitor had suggested that it was not compliant and this concerned him so he requested written confirmation from the GAP Insurer that they were in compliance.

After the eastern rollout of the product, the Licensees looked to British Columbia. Mr. Leys said that the GAP Insurer prepared all of the documents required for the program and the process and workflow was identical to the other provinces. Mr. Leys once again sought assurances from the GAP Insurer that the program was in compliance with British Columbia regulatory requirements and the GAP Insurer assured him that it was, which was the email which was included with the Agreed Statement of Facts and excerpted above. The agreements and amending agreements signed by Mr. Leys to start the GAP program were also marked as being reviewed by the GAP Insurer's Legal Department. The program commenced in British Columbia on August 18, 2014.

Mr. Leys testified that on or about May 17, 2016, the Nominee showed him a letter that he had received from Council about GAP and together they decided that they should shut down the website for creation of GAP applications in British Columbia. This was done by early June 2016.

With respect to the spreadsheet that Mr. Lewis had prepared, he stated that the Dealer Marketing Fee was set at a maximum of $1,500 and if you look at the numbers, many were below that number and none were above it.[1]

Mr. Leys concluded his direct examination by apologizing to Council. He stated he did not mean to come to British Columbia and cause malice and he regrets the inconvenience he has caused.

Mr. Leys agreed with many of the questions put to him in cross-examination: that the majority of the fees paid by the consumer for the GAP product was the Dealer Marketing Fee; that he personally took no steps to ensure compliance with the British Columbia regulatory system; that he depended on the GAP Insurer for compliance; that he reviewed the agreements (and amending agreements) with the GAP Insurer before signing them and that those agreements put obligations on the broker to comply with local laws. Mr. Leys suggested that despite what the agreement specifically stated about the broker's obligations, that was not how compliance works in practice.

In response to questions from the Hearing Committee, Mr. Leys stated that he never informed the GAP Insurer about the May 17, 2016 letter from Council about GAP and its non-compliance with British Columbia requirements. In fact, he said that he has not spoken to the GAP Insurer about the issue since that time. Upon receipt of the letter Mr. Leys and the Nominee decided to take it upon themselves to rectify the issues raised by Council by shutting the program down.

The Nominee's Evidence

The Nominee testified that his insurance career began in September 1964 when he started as a clerk and a junior underwriter. He has worked continuously in the insurance industry since that

[1] The Agreed Statement of Facts entered as Exhibit 1 confirmed that the Dealer Marketing Fee could actually be up to $2,000, although it appears as if no fee was in excess of $1,500.

time with the exception of two years when he was studying for a degree in economics, although he is now semi-retired. He confirmed that he is the Nominee and principal of Haig and its director, officer and sole shareholder. Haig maintains a retail insurance license but with day to day business there are no premiums associated with Haig. It is mainly used to facilitate policies. The Nominee walked the Hearing Committee through his resume in some detail as well as his community activities. He expressed how difficult it was for him to be in this position of disciplinary proceedings before Council after making insurance his life's work.

The Nominee gave evidence that his first involvement with GAP was in either late 2012 or early 2013 when his lawyer approached him to see if he could assist On Track in attracting a market for the product. As he had been a President's Club member at the GAP Insurer he approached its specialty lines department. The GAP Insurer confirmed that it would be happy to consider the product. There was an existing GAP program in place at the GAP Insurer but several meetings took place to arrange for this particular GAP product to be offered. During these meetings it became apparent to him that different provinces treated the product differently. Some treated it as a warranty product and some treated it as an insurance product. To address these differences he recommended that a license should be obtained for any jurisdiction the GAP product was to be sold. He became licensed in British Columbia in 2015.

The Nominee confirmed that he was aware of his professional responsibilities as a nominee and he believed that they were compliant in British Columbia. With the benefit of hindsight, he expressed regret that they were not in fact compliant in British Columbia and that they were not more diligent. He relied on the GAP Insurer for compliance in any other jurisdiction in Canada and took its August 2014 email as "gospel". He stated that if he had discovered that they were not compliant prior to Council's involvement that he would have taken immediate steps to remedy the situation. As soon as he received Council's May 17, 2016 letter he asked Mr. Leys about the situation. The Nominee framed the decision to end the program slightly differently than Mr. Leys as he said the decision was somewhat taken out of their hands. He explained that the GAP Insurer was exiting the market and they were working to have another insurer take over the product. In the end that insurer was not interested and there was no one to offer the product any longer.

In response to his counsel's question as to whether there was anything he wished to add to his evidence the Nominee stated that he apologized to Council and that there was no intention behind his actions. He has never had any discipline imposed on him in 54 years in the industry and it was a mistake to rely on the GAP Insurer. As the Nominee, he accepted that responsibility rested with him to be aware of the compliance issues in every province and there was never any attempt to deliberately circumvent the rules in British Columbia. The 2001 bulletin issued by Council was years before they were even present in our province. He thought that they were compliant and were just offering a specific product to British Columbia consumers who were financing vehicles.

In cross-examination the Nominee readily acknowledged that he has an obligation to comply with Council's Rules and Code of Conduct and admitted that he did not read either prior to

becoming licensed in British Columbia or any time thereafter. He agreed that he could have looked up Council's Rules and Code of Conduct online at any time. With respect to his supervisory role within Haig, he said that he was the sole owner and shareholder of Haig and so he was supervising himself. With On Track, he explained that he would meet with Mr. Leys two or four times a year to complete compliance forms for Registered Insurance Brokers of Ontario reporting. As all funds from the sale of GAP went to the On Track trust account, he would receive a monthly statement from On Track that he would review to see the business remitted to the GAP Insurer. The Nominee admitted without hesitation that he did not personally take any steps to ensure compliance in British Columbia and he totally relied on the statement from the GAP Insurer. He had a long business relationship with the GAP Insurer to the point that it even financed a brokerage for him many years before. He said that he had no reason to doubt its statement. He did not make a single inquiry with legal counsel in British Columbia or Council. His question to the GAP Insurer was the extent of his attempt at compliance. He agreed that it was his job to make sure that there were no unauthorized activities and he failed to do so. In his words, "the buck stops here". He did say that practically speaking, despite the wording of the agreement and the amending agreement with the GAP Insurer for the sale of GAP, the GAP Insurer would never rely on any other individual or company for compliance.

In response to questions from the Hearing Committee, the Nominee confirmed that he did not contact the GAP Insurer after seeing the May 17, 2016 letter from Council. He could not say why he did not contact them, only that he and Mr. Leys were focused on responding to Council. He has spoken with the GAP Insurer since then but only to request a copy of Mr. Y's letter. The Nominee confirmed that Mr. Y was not in the GAP Insurer's legal department but was in compliance in specialty lines and warranty work at the GAP Insurer's head office.

SUBMISSIONS OF COUNCIL

Council provided a written submission to the Hearing Committee that emphasized the provisions of the agreement and amending agreement with the GAP Insurer which stated, respectively, that the Broker (Haig) shall be responsible to follow all applicable laws with respect to GAP in the applicable jurisdiction and that it shall provide the GAP Insurer with copies of licenses and regulatory approvals necessary or required where On Track would like to offer GAP. The Licensees had admitted that they read the agreements before signing them but did not comply with these provisions. Council also helpfully set out the applicable provisions of the Act, Regulations, Rules and Code of Conduct which Council alleged, and the Licensees admitted, had been breached. The Hearing Committee will not repeat these submissions but Council referred the Committee to the following guidelines, authorities and legislation:

- Council Notice ICN 12-006;
- Act, ss. 1, 75, 168, 171(2), 178, 231;
- Contravention of Prescribed Provisions Regulation ss. 1 and 2;
- Marketing of Financial Products Regulation s.4;
- Council's Rules 7.6 and 7.8; and

- Council's Code of Conduct: ss. 4.2, 4.3.1, 5.2, 5.3.3, 7.2, 7.3.2, 7.3.3, 13.2 and 13.1.1.

Council relied on a series of cases to support the significant penalty sought. The first was *Financial Services Commission v. The Insurance Council of British Columbia and Maria Pavicic,* November 22, 2005 where Chair Hamilton enumerated some of the factors to be considered in sentencing including "the need to promote specific and general deterrence, and, thereby protect the public…the need to maintain the public's confidence in the integrity of the…profession…[and] the range of sentencing in other similar cases".

In terms of the range of sentencing in other similar cases, Council referred the Committee to four decisions that it argued to be relevant with respect to the appropriate penalty, including *NG Williams & Associates Ltd. et al*, August 2014, where the agency and nominee engaged in unlicensed activity. In *NG Williams* the nominee was under the mistaken but honestly held belief that as the agency was an intermediary its staff members were not required to hold general insurance licenses. This fact was similar to the case at hand. What was dissimilar to the case at hand was that when the agency and nominee in *NG Williams* were informed that their belief was mistaken it continued to operate in that manner for at least six months. The agency argued that it was never expressly told by Council to stop conducting unlicensed insurance business and that the activities were technical in nature. The penalty imposed in that case was a fine against the agency in the amount of $10,000, a fine against the nominee in the amount of $5,000 and costs associated with the investigation.

The following year, in *Family Insurance Solutions Inc.*, March 2015, Council determined that the agency permitted unlicensed agents to engage in insurance activities. Although the agency was taking steps to license its staff appropriately, it took almost 16 months for this process to be completed, and the unlicensed staff continued to perform the same activities during that period. Council fined the agency $5,000 and imposed costs associated with the investigation for this breach. As the nominee had taken appropriate steps to inform senior management of its problematic practices, the nominee was not penalized.

More recently in *Ironwood Insurance Agencies Ltd. & Devender Dave Sood*, July 2017, the agency permitted a Level 1 general insurance agent to engage in activities outside of the office and allowed another licensee, not authorized to represent the agency, to engage in insurance activities on behalf of the agency. The nominee of the agency essentially admitted that he did not afford the situation the appropriate due diligence and incorrectly assumed that the Level 1 agent was permitted to work outside the office. Council had difficulty accepting this explanation as the nominee was very experienced and ought to have known better. Council fined the agency $10,000 and did not fine the nominee but imposed conditions on his license.

Finally, in *Park Georgia Insurance Agencies,* November 2018, the agency had knowingly permitted 36 Level 1 general insurance agents to conduct insurance business outside of the office. Because of the number of agents permitted to operate outside of the Rules and the knowing conduct of the agency, Council imposed a fine of $20,000 on the agency and a $5,000 fine on the nominee. Council submitted that this case was similar to the Licensees as it had been

a widespread and repeated issue in that the program was carried out over two years and was not limited to a single misstep.

Council also referred the Hearing Committee to a series of cases which touched upon a due diligence defence. These cases are referred to further below with respect to the Hearing Committee's recommendations.

Council relied on *NG Williams, Family Insurance, Ironwood* and *Park Georgia* as being instructive as to penalty. In this matter, Council submitted allowing the Dealerships to mislead the consumer about actual premium amounts was an aggravating factor, as was permitting the Dealerships to unilaterally assess the fee. Accordingly, the penalty sought by Council was:

1. On Track be fined $20,000;

2. Haig be fined $20,000;

3. The fines to On Track and Haig be joint and several and due within 90 days of the date of the order;

4. The Nominee be fined $10,000 and be required to complete an ethics course, as approved by Council, within 90 days of the date of the order;

5. On Track, Haig and the Nominee be jointly and severally assessed Council's investigative costs of $1,500;

6. Assess On Track, Haig and the Nominee's hearing costs (to be determined) on a joint and several basis; and

7. Require that On Track, Haig and the Nominee pay the required fines, investigative costs and hearing costs within 90 days of Council's Order becoming final.

SUBMISSIONS OF THE LICENSEES

During their examinations in chief, the Licensees admitted the allegations in the Notice of Hearing and apologized to Council for their actions and the events that have culminated in this hearing.

The submissions of the Licensees centered on the fact that this was not the type of conduct which calls for the maximum penalty. Mr. Leys and the Nominee have exemplary records, no prior history and acknowledged their mistake in relying on the GAP Insurer with respect to the British Columbia compliance. They knew that they had to be in compliance with British Columbia requirements and they were attempting to do so. The Licensees argued that the question was whether relying on the GAP Insurer, a sophisticated entity with a large legal department which had structured the GAP program and prepared the documents, was reasonable. Counsel for the

Licensees submitted that given these considerations relying on the GAP Insurer was not unreasonable when one looks at the entirety of the circumstances.

Counsel encouraged the Hearing Committee to read the decisions of *NG Williams* and *Family Insurance* carefully and submitted that those cases were distinguishable from the present circumstances. In *NG Williams,* counsel highlighted the following specific passage from the report:

> Even if Council was to accept the Agency and Former Nominee's explanation that they were not aware of the licensing requirements, it noted that Agency staff were permitted to continue to conduct insurance activities for at least six months after learning that they were not in compliance with the Act….Council determined the Former Nominee was willfully blind to his responsibilities as the Agency's nominee.

In the within matter, there was no evidence of a continue breach with GAP. Mr. Leys received the letter in May 2016 and the program was shut down in June 2016.

Counsel also highlighted that, unlike in *NG Williams* where Council found that the nominee "lacked an understanding of his role as nominee", was complacent and along with the agency were "dismissive of, and did not take responsibility for, the requirements with which all insurance agents are governed", the Nominee was aware of his responsibilities as nominee and there was nothing to suggest complacency. There were no further breaches when the compliance issue was discovered. Unlike *NG Williams*, the Licensees did not choose business over compliance. Further, even with those findings in *NG Williams,* the fines were only $5,000 against the nominee and $10,000 against the agency.

In *Family Insurance*, the agency ignored direction which was provided by the nominee and continued to operate despite the compliance issue brought to their attention. Counsel submitted that this fact distinguished the case. Even with these factors, the Licensees highlighted that the fine against the agency was only $5,000.

On behalf of the Licensees, Counsel submitted that when you act intentionally to breach the rules, or are willfully blind to the breach, those are the worst case scenarios which justify the maximum fines. There are also the cases where a mistake was made but no steps were taken to ensure compliance and here there was an honest effort to be compliant. The Licensees did not suggest that because they had relied on the GAP Insurer they should not receive a fine, only that they have expressed remorse, cooperated fully and there would be no issue of specific deterrence. Counsel's closing submission was that the Licensees' conduct was at the "very lowest end of culpability".

FINDINGS OF THE HEARING COMMITTEE

The allegations in the Notice of Hearing have been proven: the Licensees admitted their misconduct in an Agreed Statement of Facts and again before the Hearing Committee.

With respect to the steps the Licensees took to ensure compliance, the Hearing Committee struggled to reconcile the Licensees claimed belief that they were in compliance with British Columbia requirements for GAP when the actual assurances given by the GAP Insurer were examined. The Hearing Committee noted that no party called evidence from the GAP Insurer. The Hearing Committee would have found it helpful to hear the GAP Insurer's position on the series of events. In the memoranda from the GAP Insurer with respect to compliance in New Brunswick and Nova Scotia it states:

> *As per our GAP Program Agreement and how the Ontrack* [sic] *GAP program has been structured, at this time we are compliant with provincial regulations in [New Brunswick/Nova Scotia]*.

The Hearing Committee could not discern what "we are compliant" meant – was the GAP Insurer product compliant? Or were the Licensees compliant with their obligations? In terms of Mr. Y's email to Mr. Leys with the subject "On Track GAP / BC Approval", Mr. Y states that "we" have "confirmed with Legal" and the Licensees have the "green light" to go ahead; however, Mr. Y's specific title is Underwriting and Governance Manager, Specialty Warranty. In light of the importance of compliance the Hearing Committee did not think that second hand, or possibly third hand, information from someone who was not in the GAP Insurer's legal department was reasonable reliance in the circumstances. The Hearing Committee is of the view that there must be some recognition that there is a level of personal responsibility. It does not require a lengthy legal opinion from a British Columbia lawyer (although that was available to them). It only required an inquiry with Council. The Hearing Committee felt that Mr. Y's email did not go far enough to address what was put in place to ensure consumer protection in the British Columbia market.

Additionally, it troubled the Hearing Committee to hear that Mr. Leys did not keep copies of any transactional documents and was unable to produce them upon request to Council. Recordkeeping is very important in the industry. Failure to produce documents during the course of an investigation impedes conduct of the investigation and ultimately impacts the protection of the public.

Despite the initial evidence that as soon as the Licensees found out about their potential breach they ended GAP in British Columbia, while that may have been a factor, the GAP Insurer was exiting the market for this product and a replacement had yet to be secured. The decision was not entirely one of choosing compliance over business. The Hearing Committee certainly accepts that it was a consideration but it was not the only cause.

Council spent some time taking the Hearing Committee through several decisions which discussed a due diligence defence. The Hearing Committee does not understand the Licensees' position to be that they sought legal advice and so are absolved of liability. The Hearing Committee understands the Licensees' position to be that they acknowledge liability. They tried to comply by seeking some advice from a third party, not from their solicitor, which distinguishes these circumstances from the cases presented by Council. The Hearing Committee

understood the Licensees to be saying that ultimately that advice fell short and they accept the consequences of that but the attempt to comply should be taken into account when imposing any penalty. The Hearing Committee does believe it is important to take the attempt to comply into account in making its recommendations. Had the Licensees taken no steps at all, the Hearing Committee may very well have made different recommendations. That being said, the Hearing Committee does not accept that the inquiry was sufficient to discharge the Licensees' obligations, and it has made its recommendations accordingly.

The Hearing Committee agreed with Council that one of the most problematic aspects of the sale of GAP in British Columbia was that the Dealer Marketing Fee was not disclosed to consumers. Generally speaking, the industry ought to be transparent to consumers (which is reflected in Principle 4, good faith owed to clients, in Council's Code of Conduct) but the failure to disclose the Dealer Marketing Fee to consumers is also directly contrary to Council's Notice 12-006, Code of Conduct Principle 7.3.3 and s. 4 of the Marketing of Financial Products Regulation.

Separate and apart from any liability to On Track and Haig and their facilitation of unlicensed activity and non-disclosure of fees to the general public is the issue of liability to the Nominee. The Nominee is responsible for ensuring the compliant activities of On Track and Haig, and he failed to do so. Here, the Nominee was the directing mind of Haig and, on his own admission, failed to take any steps personally to ensure appropriate compliance. The Hearing Committee accepts that the facts of this case distinguish it from *Family Insurance* where the nominee was not sanctioned due to his attempts to bring the agency in to compliance but the senior manager did not follow his recommendations and that the Nominee here ought to be sanctioned individually in addition to the corporate entities.

Finally, the Hearing Committee considered the Licensees' position that the complaint to Council may have come from a competitor and that this should impact penalty. There is no evidence that the complaint did in fact come from a competitor. Even if there was solid evidence showing that there was a motivation other than protection of the public in making the complaint, the paramount consideration now in addressing this non-compliance are the factors set out in *Pavicic,* which the Committee has relied on in terms of assessing this matter.

RECOMMENDATIONS OF THE HEARING COMMITTEE

Council sought a fine against each of the three Licensees. It emphasized that unlike *Family Insurance*, the Nominee here should also be fined as he did not take steps to discover and remedy the error as he ought to have done. The Hearing Committee agrees; however, nothing presented by Council supported the imposition of the maximum possible fines against On Track, Haig or the Nominee. There is no suggestion of deceit or fraud and the Hearing Committee does not think that specific deterrence is a concern. The Hearing Committee does not accept the Licensees' position that the conduct is on the "lowest end of culpability" but finds that there was significant complacency in ignoring the Rules and Code of Conduct and relying on a third party in the manner that it did and fines should be high enough to achieve general deterrence and promote public confidence in the profession.

The Hearing Committee therefore recommends as follows:

1. On Track be fined $15,000;

2. Haig be fined $15,000;

3. The fines to On Track and Haig be joint and several;

4. The Nominee be fined $7,500;

5. On Track, Haig and the Nominee be jointly and severally assessed Council's investigative costs of $1,500;

6. Assess On Track, Haig and the Nominee's reasonable hearing costs to be determined in accordance with Council's Costs Assessment Schedule on a joint and several basis; and

7. Require that On Track, Haig and the Nominee pay the required fines, investigative costs and hearing costs within 90 days of Council's Order becoming final.

The Hearing Committee does not think it is necessary to make an order to have the Nominee complete an ethics course. There is no evidence to suggest that the Nominee needs to be further reminded of his ethical obligations. The Nominee, and Mr. Leys, presented as a credible and forthright witnesses who admitted that they did not take all the steps that they could have to ensure compliance. Both admitted their mistakes to Council. While sufficient due diligence and strict compliance is expected, mistakes will be made. The Nominee's actions following discovery of his breach of his obligations are all Council can expect of someone who finds himself in those circumstances and an ethics course would, in the view of the Hearing Committee, not serve any purpose.

Dated in Vancouver, British Columbia, on the **13th day of September, 2019.**

Chamkaur Cheema, Chair of Hearing Committee
Insurance Council of British Columbia