

Re: In the Matter of an Appeal by 1290886 Alberta Ltd. o/a Matthew's Auto Centre/Quality Used Tires ("Matthew's Auto") from the Decision of the Director of Fair Trading (as delegated to the Alberta Motor Vehicle Industry Council, "AMVIC") to issue an Administrative Penalty to Matthew's Auto

November 5, 2018

Appeal Board: Paul Alpern, Caren Mueller, Nick Tywoniuk

Representing the Appellant, Matthew's Auto: Robert J. Wachowich (Wachowich & Company)

Representing the Respondent, Alberta Motor Vehicle Industry Council ("AMVIC") and the Director of Fair Trading: Paula Hale (Shores Jardine LLP)

Appeal Heard: 25 September 2018

Location: Service Alberta Boardroom, Commerce Place, 10155 - 102 Street, Edmonton, Alberta

An Appeal Board constituted pursuant to section 179 of the *Fair Trading Act*, R.S.A. 2000, c. F-2, the *Appeal Board Regulation* thereunder (Alberta Regulation 195/199) and the *Administrative Penalties (Fair Trading Act) Regulation* (Alberta Regulation 135/2013) met to hear an Appeal by Matthew's Auto from the 9 November 2017 Decision of the Director of Fair Trading (as delegated to AMVIC) to issue an Administrative Penalty to Matthew's Auto.

THE ISSUES

1. Did Matthew's Auto breach provisions of the Fair Trading Act, the Automotive Business Regulation, the Vehicle Inspection Regulation and/or the Cost of Credit Disclosure Regulation?
2. In the circumstances, is it appropriate for this Appeal Board to vary or quash the decision that is being appealed?

RELEVANT LEGISLATION

FAIR TRADING ACT

Unfair practices

6(1) *In this section, "material fact" means any information that would reasonably be expected to affect the decision of a consumer to enter into a consumer transaction.*

(1.1) *It is an offence for a supplier to engage in an unfair practice.*

(2) *It is an unfair practice for a supplier, in a consumer transaction or a proposed consumer transaction,*

(a) *to exert undue pressure or influence on the consumer to enter into the consumer transaction;*

- (b) *to take advantage of the consumer as a result of the consumer's inability to understand the character, nature, language or effect of the consumer transaction or any matter related to the transaction*
- (c) *to use exaggeration, innuendo or ambiguity as to a material fact with respect to the consumer transaction;*
- (d) *to charge a price for goods or services that grossly exceeds the price at which similar goods or services are readily available without informing the consumer of the difference in price and the reason for the difference;*
- (3) *It is an unfair practice for a supplier*
 - (a) *to enter into a consumer transaction if the supplier knows or ought to know that the consumer is unable to receive any reasonable benefit from the goods or services;*
 - (b) *to enter into a consumer transaction if the supplier knows or ought to know that there is no reasonable probability that the consumer is able to pay the full price for the goods or services;*
 - (c) *to include in a consumer transaction terms or conditions that are harsh, oppressive or excessively one-sided;*
 - (d) *to make a representation that a consumer transaction involves or does not involve rights, remedies or obligations that is different from the fact.*
- (4) *Without limiting subsections (2) and (3), the following are unfair practices if they are directed at one or more potential consumers:*
 - (h) *a supplier's representation that goods have or do not have a particular prior history or usage if that is different from the fact;*

...

Contents of Sales Contracts

35 A written direct sales contract must include

- (a) *the consumer's name and address;*
- (b) *the supplier's name, business address, telephone number and, where applicable, fax number;*
- (c) *where applicable, the salesperson's name;*
- (d) *the date and place at which the direct sales contract is entered into;*
- (e) *a description of the goods or services, sufficient to identify them;*
- (f) *a statement of cancellation rights that conforms with the requirements set out in the regulations;*
- (g) *the itemized price of the goods or services, or both;*
- (h) *the total amount of the direct sales contract;*
- (i) *the terms of payment;*
- (j) *in the case of a sales contract for the future delivery of goods, future provision of services or future delivery of goods together with services, the delivery date for the goods or commencement date for the services, or both;*
- (k) *in the case of a sales contract for the future provision of services or the delivery of goods together with services, the completion date for providing the services or the goods together with services;*
- (l) *where credit is extended,*
 - (i) *a statement of any security taken for payment, and*
 - (ii) *the disclosure statement required under Part 9;*
- (m) *where there is a trade-in arrangement, a description of and the value of the trade-in;*
- (n) *the signatures of the consumer and the supplier.*

License require – designated businesses

104

- (1) *No person may engage in a designated business unless the person holds a licence under this Act that authorizes the person to engage in that business.*

Duty to maintain records

132

- (1) Every licensee and former licensee must create and maintain
 - (a) complete and accurate financial records of its operations in Alberta for at least 3 years after the records are made, and
 - (b) other records and documents described in the regulations for the period specified in the regulations.
- (2) Every licensee and former licensee must make the records referred to in subsection (1) available for inspection by an inspector at a place in Alberta and at a time specified by the inspector.

Delegation to Regulatory Boards

136(8)

A regulatory board may, with the approval of the Minister, collect money by the levy of assessments on licenses and designated agents as defined in section 102 for the purpose of enabling the board to carry out the powers, duties and functions delegated to it under section (5).

Notice of administrative penalty

158.1

- (1) If the Director is of the opinion that a person
 - (a) has contravened a provision of this Act or the regulations, or
 - (b) has failed to comply with a term or condition of a licence issued under this Act or the regulations,the Director may, by notice in writing given to the person, require the person to pay to the Crown an administrative penalty in the amount set out in the notice.
- (2) Where a contravention or a failure to comply continues for more than one day, the amount set out in the notice of administrative penalty under subsection (1) may include a daily amount for each day or part of a day on which the contravention or non-compliance occurs or continues.
- (3) The amount of an administrative penalty, including any daily amounts referred to in subsection (2), must not exceed \$100 000.
- (4) Subject to subsection (5), a notice of administrative penalty shall not be given more than 3 years after the day on which the contravention or non-compliance occurred.
- (5) Where the contravention or non-compliance occurred in the course of a consumer transaction or an attempt to enter into a consumer transaction, a notice of administrative penalty may be given within 3 years after the day on which the consumer first knew or ought to have known of the contravention or non-compliance but not more than 8 years after the day on which the contravention or non-compliance occurred.

Right to make representations

158.2 Before imposing an administrative penalty in an amount of \$500 or more, the Director shall

- (a) advise the person, in writing, of the Director's intent to impose the administrative penalty and the reasons for it, and
- (b) provide the person with an opportunity to make representations to the Director.

Vicarious Liability

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For the the purposes of this Act, an act or omission by an employee or agent of a person is deemed also to be an act or omission of the person if the act or omission occurred

- (a) in the course of the employee's employment with the person, or
- (b) in the course of the agent's exercising the powers or performing the duties on behalf of the person under their agency relationship.

Appeal

179

(1) A person

- (a) who has been refused a licence or renewal of a licence,
 - (b) whose licence is made subject to terms and conditions,
 - (c) whose licence has been cancelled or suspended under section 127, or
 - (d) to whom an order under section 129 or 157 is directed, or
 - (e) to whom a notice of administrative penalty is given under section 158.1(1)
- may appeal the decision or order by serving the Minister with a notice of appeal within 30 days after being notified in writing of the decision or order.
- (2) The Minister must, within 30 days after being served with a notice of appeal under subsection (1) and payment of the fee for the appeal as established by the regulations, refer the appeal to an appeal board appointed in accordance with the regulations or to an appeal board designated under subsection (4).
 - (3) The Minister may appoint an individual as the chair of the appeal board who serves as the chair whether or not an appeal is being considered by the appeal board.
 - (4) The Minister may designate a board or commission established by or under an Act of the Legislature to be an appeal board for the appeals specified in the designation.
 - (5) The Minister may set the time within which an appeal board is to hear an appeal and render a decision and may extend that time.
 - (6) An appeal board that hears an appeal pursuant to this section may confirm, vary or quash the decision or order that is being appealed.
 - (7) The Minister may set the rates of remuneration for and provide for the payment of reasonable living and travelling expenses to the members of an appeal board.
 - (8) An appeal under this section is a new trial of the issues that resulted in the decision or order being appealed.

Effect of Appeal

180

- (1) Subject to subsection (2), an appeal under section 179 does not affect the status or enforceability of the decision or order being appealed.
- (2) A person who is appealing a decision or order under section 179(1)(b), (c) or (d) may apply to the chair of the appeal board to stay the decision or order being appealed until the appeal board renders its decision on the appeal.
- (3) On application under subsection (2) and after allowing the Director to make representations, the chair may, if the chair considers it appropriate, order a stay of the decision or order being appealed until the appeal board renders its decision on the appeal.

AUTOMOTIVE BUSINESS REGULATION

Term of licence

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- (1) An automotive business licence has a term of one year and may be renewed for additional one-year terms.
- (2) In a case where, in the opinion of the Director, it is in the public interest to issue or renew a licence referred to in section 3 for a term of less than one year, the Director may do so.

Records

9

In addition to the requirement to create and maintain financial records in accordance with section 132(1) of the Act, every business operator and former business operator must

maintain all records and documents created or received while carrying on the activities authorized by the licence for at least 3 years after the records were created or received.

Advertising

11

- (1) *Every business operator must ensure that the business operator's advertising indicates in a conspicuous manner*
- (a) *the name of the business operator as set out in the licence or the trade name of the business operator as set out in the licence, and*
 - (b) *in the case of print and television advertising, that the business operator holds an automotive business licence under the Act.*
- (2) *A business operator must ensure that every advertisement for an automotive business that promotes the use or purchase of goods or services*
- ...
- (l) *includes in the advertised price for any vehicle the total cost of the vehicle, including, but not limited to, all fees and charges such as the cost of accessories, optional equipment physically attached to the vehicle, transportation charges and any applicable taxes or administration fees, but not including GST or costs and charges associated with financing, and*
 - (m) *includes the stock number of the specific vehicle that is advertised as being available for sale at the time the advertisement is placed.*

General codes of conduct

12

- Every business operator must comply with section 6 of the Act and in addition must*
- (o) *comply with any legislation that may apply to the selling, leasing, consigning, repairing, installing, recycling or dismantling of vehicles.*

Registration

16

- (1) *A salesperson of an automotive sales business operator must be registered for automotive sales before acting on behalf of the business operator;*
- (7) *Where a salesperson ceases to act on behalf of a business operator the salesperson shall forthwith return to the Director the certificate issued in respect of the salesperson's acting for that business operator.*

Salesperson ceases to be authorized

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- (1) *When an automotive sales business operator, automotive leasing business operator or automotive consignment business operator ceases to authorize a salesperson to act on its behalf, the business operator must send to the Director written notification of*
- (a) *the name of the salesperson; and*
 - (b) *the date that the salesperson ceases to be authorized to act on its behalf.*
- (2) *The business operator must notify the Director either before the salesperson ceases to be authorized or within 15 days after the salesperson ceases to be authorized.*

VEHICLE INSPECTION REGULATION

Sale of used motor vehicle

15

- (1) *Subject to subsection (2), a dealer in used motor vehicles shall, before entering into a contract to sell a motor vehicle, give to the buyer a used motor vehicle mechanical fitness assessment that contains the following:*
- (a) *a statement identifying the type of motor vehicle as a truck, motorcycle, bus, van, light truck, automobile or other type of motor vehicle;*

- (b) a statement showing the make, model, year, vehicle identification number, odometer reading in kilometers or miles, licence plate number and province of registration of the vehicle;
- (c) the name and address of the dealer selling the vehicle and the name of the technician who issued the mechanical fitness assessment;
- (d) a statement that the mechanical fitness assessment expires 120 days after the date on which it was issued;
- (e) a statement certifying that at the time of sale the motor vehicle
 - (i) complies with the Vehicle Equipment Regulation (AR 122/2009), or
 - (ii) does not comply with the Vehicle Equipment Regulation (AR 122/2009) and containing a description of the items of equipment that are missing or do not comply with the Vehicle Equipment Regulation (AR 122/2009);
- (f) the signature of the technician who conducted the mechanical fitness assessment;
- (g) the date the mechanical fitness assessment was issued.

Expiry of mechanical fitness assessment

16 A dealer's mechanical fitness assessment provided under section 15(1) for a used motor vehicle expires 120 days after the date on which it was issued.

ADMINISTRATIVE PENALTIES (FAIR TRADING ACT) REGULATION

Notice of administrative penalty

- 1** A notice of an administrative penalty must contain the following information:
- (b) identification of the provision of the Act or regulation that was contravened or not complied with.
- (2)** In setting the amount of the administrative penalty for a contravention or failure to comply, the Director may consider the following factors:
- (a) the seriousness of the contravention or failure to comply;
 - (b) the degree of wilfulness or negligence in the contravention or failure to comply;
 - (c) the impact on any person adversely affected by the contravention or failure to comply;
 - (d) whether or not the person who receives the notice of administrative penalty has a history of non-compliance;
 - (e) whether or not there were any mitigating factors relating to the contravention or failure to comply;
 - (f) whether or not the person who receives the notice of administrative penalty has derived any economic benefit from the contravention or failure to comply;
 - (g) any other factors that, in the opinion of the Director, are relevant.

COST OF CREDIT DISCLOSURE REGULATION

Definitions

17(1) In this Part,

- (a) "assumed residual payment" means
 - (i) for an option lease under which the option price at the end of the term is less than the estimated residual value, that option price, and
 - (ii) in any other case, the estimated residual value plus any amount that the lessee will be required to pay in the ordinary course of events at the end of the term;
- (b) "estimated residual cash payment" means the amount that the lessee will be required to pay to the lessor at the end of the term of a residual obligation lease if the realizable value of the leased goods at the end of the term equals their estimated residual value;
- (c) "estimated residual value" means estimated residual value as defined in section 90 of the Act;
- (d) "implicit finance charge" means the sum of all non-refundable payments required to be made by the lessee at or before the beginning of, or during, the term plus the assumed residual payment, minus the total amount advanced to the lessee;

- (e) "option lease" means a lease that gives the lessee the right to acquire title to or retain possession of the leased goods after the lease expires by making a payment in addition to the payments required under the lease or by satisfying other specified conditions;
- (f) "option price" means the amount of the additional payment that the lessee must make in order to exercise the option under an option lease;
- (g) "payment period" means one of the equal intervals into which the term of a lease is divided for the purpose of determining the amount and timing of payments;
- (h) "periodic payment" means the payment to be made in respect of each payment period;
- (i) "realizable value" has the meaning determined by [section 29\(2\)](#) and [\(3\)](#);
- (j) "residual obligation lease" means a residual obligation lease as defined in section 90 of the Act;
- (k) "term" means term as defined in section 90 of the Act;
- (l) "total lease cost" means the total of any non-refundable payments that the lessee will be required to make in the ordinary course of events.

Disclosure Statement for Lease

19(1) As much of the following information as is applicable is required to be disclosed for the purposes of section 93 of the Act:

- (a) that the transaction is a lease;
- (b) a description of the leased goods;
- (c) the term of the lease;
- (d) the cash value of the leased goods;
- (e) the nature and amount of any other advances received or charges incurred by the lessee at or before the beginning of the term;
- (f) the amount and purpose of each payment made by the lessee at or before the beginning of the term;
- (g) the capitalized amount;
- (h) the amount, timing and number of the periodic payments;
- (i) the estimated residual value of the leased goods;
- (j) for an option lease,
 - (i) how and when the option may be exercised,
 - (ii) the option price if the option is exercised at the end of the term, and
 - (iii) the method for determining the option price if the option is exercised before the end of the term;
- (k) for a residual obligation lease,
 - (i) the estimated residual cash payment, and
 - (ii) a statement to the effect that the lessee's maximum liability at the end of the lease term is the sum of the estimated residual cash payment plus the difference, if any, between the estimated residual value and the realizable value of the leased goods;

BACKGROUND AND EVIDENCE

1. At the relevant time, Matthew's Auto held an automotive business license and operated an automotive sales business in Alberta.
2. AMVIC conducted two separate inspections of the business, the first on January 25, 2016 and the second on March 27, 2017.
3. A number of deficiencies were identified during the inspections, including:
 - a. The AMVIC logo or wording was not on the supplier's Facebook site, contrary to s. 11(1)(b) of the Automotive Business Regulation;
 - b. Vehicles displayed for sale did not include a stock number, contrary to s. 11(2)(m) of the Automotive Business Regulation;
 - c. Deal jackets did not contain vehicle history, contrary to s. 6(4)(h) of the Fair

- Trading Act;
- d. Matthew's Auto did not maintain at least three years of business records for each vehicle sale, contrary to s. 132 of the Fair Trading Act;
 - e. Matthew's Auto charged \$6.95 for AMVIC levies, not the \$6.25 specified by AMVIC pursuant to s. 136(8) of the Fair Trading Act;
 - f. Matthew's Auto used the phrase "sold as-is" on bills of sale and failed to include any or any appropriate mechanical fitness assessments on all vehicle sale transactions;
 - g. Matthew's Auto was late remitting AMVIC levies;
 - h. The amount of AMVIC fees remitted did not match the records of vehicles sold and Matthew's Auto was not able to produce records to explain the variance;
 - i. Matthew's Auto used a form of lease agreement, but was missing the option to purchase pursuant to s. 19(1) of the Cost of Credit Disclosure Regulation
 - j. One salesperson, Bassam Kamal, had been selling vehicles with an expired registration, contrary to s. 16(1) of the Automotive Business Regulation.
4. AMVIC wrote to Matthew's Auto on February 18, 2016 detailing the deficiencies and contraventions identified during the January 25, 2016 inspection and indicated that a follow-up inspection may be required.
 5. A follow-up inspection was conducted on March 27, 2017 and AMVIC wrote to Matthew's Auto on April 26, 2017 detailing the results of that inspection.
 6. AMVIC alleges that several of the deficiencies identified in the above paragraph 3 (specifically: a, b, c, d, e, f, g and i) were not addressed following the first inspection and remained outstanding at the time of the second inspection.
 7. An administrative penalty of \$10,000 was assessed by AMVIC.
 8. Following communication between AMVIC and Matthew's Auto's legal counsel, Matthew's Auto surrendered its retail automotive business license and indicated that it would operate the facility as a tire shop and wholesale licensee only.
 9. Matthew's Auto requested that the administrative penalty be withdrawn or significantly reduced as there had been no history of violations, no further consumer protection issues given Matthew's Auto's voluntary withdrawal from retail sales and any previous AMVIC complaints were dealt with in a reasonable fashion without any consumers not being fully satisfied.
 10. AMVIC rejected Matthew's Auto's request that the administrative penalty be withdrawn or reduced, arguing that that Matthew's Auto did not implement any changes to their business practices following the first inspection and continued to operate in contravention of the legislation and regulations.
 11. This hearing is being conducted at the request of Matthew's Auto to determine whether the administrative penalty should be upheld, quashed or varied.

AMVIC'S EVIDENCE

Ms. Hale, on behalf of AMVIC called one witness: Roxanne Spiess ("RS"). RS's evidence included:

12. She has been an AMVIC Industry Standards Officer ("ISO") for 3 years.
13. She has worked at AMVIC for over 6 years.
14. Prior to her ISO role, she was a compensation fund coordinator with AMVIC.
15. Prior to her work with AMVIC, she was an accountant with the City of Edmonton.
16. In her role as an ISO, she undertakes inspections of AMVIC licensed businesses.
17. Inspections are random, complaint driven or are conducted on new businesses.
18. For random inspection, RS has discretion to select which licensed businesses to inspect.
19. The goal is to inspect every licensed business in Alberta.
20. Frequency of inspections of any business depends on compliance concerns.
21. Sometimes a business receives notice of an inspection; often there's no such notice.

22. The objective of an inspection is to ensure everything in the licensed business is in compliance with Consumer Protection Act and associated regulations.
23. During typical inspections, RS provides information to the licensee about how they can be compliant and answers questions.
24. She also discusses compliance concerns with the licensee representative and, where compliance concerns are found, shows them the relevant documents and other resources to get compliant.
25. She provides the licensee with a standard AMVIC package – advertising rules and guidelines, form of mechanical fitness assessment (“MFA”), deposit agreements, levy information, how to add/remove salespeople, how to renew registration, etc.
26. Following the inspection, she sends a reporting letter to the owner detailing all the compliance concerns found.
27. She typically advises that there will be a follow up inspection to ensure all the concerns have been addressed.
28. If there are no concerns identified, no follow-up inspection is typically required.
29. Any required follow-up inspection goes through the same process.
30. The inspection for Matthew’s Auto was not initiated as a result of a complaint; it was a random inspection.
31. After a second inspection, if issues identified during the first inspection remain outstanding, RS typically recommends an administration review.
32. An “application report” is prepared summarizing the issues. That report is shared with RS’s manager. If agreed there remain outstanding issues not remedied following the first inspection, the application report goes to the Director.
33. In the Matthew’s Auto case, RS sent a letter to the licensee dated February 18, 2016 explaining the inspection findings including the following:
 - a. Advertising compliance concerns;
 - b. Stock numbers were not displayed on vehicles advertised for sale;
 - c. Vehicle history reports were often not being provided to the consumer;
 - d. 3 years of records not provided during the inspection;
 - e. \$6.95 charged for the AMVIC levy rather than the required \$6.25;
 - f. Some vehicles marked “sold as-is”;
 - g. Discussed use of deposit-agreement;
34. At end of inspection, RS advised the licensee that a follow-up inspection may be required.
35. A follow-up inspection was done on March 27, 2017.
36. Many of the same compliance concerns were found during the second inspection.
37. A follow-up inspection letter was written/sent to Appellant April 26, 2017.
38. Observations arising from that inspection included:
 - a. There were 57 AMVIC levies remitted, but no record of 57 sales;
 - b. Appellant was unorganized. Couldn’t produce complete records;
 - c. The Appellant’s Facebook advertisements contained no indication that the business is licensed as is required under the legislation;
 - d. Bassam Kamal (“BK”) is the principal of the Appellant. BK’s salesperson license had expired on June 29, 2016. It was issued/reinstated on March 23, 2017. BK was operating without a salesperson license for approximately 9 months;
 - e. The Appellant’s levy remittances were late – by default license status goes inactive;
 - f. No stock numbers shown on 2 vehicles. Legislation requires vehicles being advertised for sale must have a stock number shown – identifies specific vehicles advertised for sale and prevents “bait and switch”;
 - g. Vehicle Lease Contract – missing APR, no purchase finance charge, no MFA, no implicit finance charge. The Appellant appears to have created his own vehicle lease contract. The contract did not comply with the Cost of Credit Disclosure Regulation.
39. S. 19(1) of the Cost of Credit Disclosure Regulation outlines the information required to be disclosed to a consumer in a lease agreement:
 - (j) for an option lease,
 - (i) how and when the option may be exercised;
 - (ii) the option price if the option is exercised at the end of the term, and

- (iii) the method for determining the option price if the option is exercised before the end of the term;...
 - (n) the implicit finance charge;
 - (o) the APR.
40. It's not typical for a promissory note to be included with a lease contract, but the Appellant did employ the use of a promissory note.
 41. The Appellant stated to RS that the promissory note gives him comfort that the buyer will pay the full amount of the lease.
 42. RS stated that it's hard to tell from the Appellant's documents whether it's an option lease or a residual obligation lease.
 43. If not an option lease under s. 9(j) of the Cost of Credit Disclosure Regulation, then it's a residual obligation lease under s. 19(k).
 44. Can't tell from the documents what the arrangement is. The documents do not meet the requirements of a sale, an option lease or a residual obligation lease.
 45. There's no evidence of a bill of sale and no evidence of title transfer at the end of the lease term.
 46. The documents are missing finance charges, APR, etc. and there's no evidence of MFAs being consistently provided to consumers.
 47. There's no form of MFA specified in the legislation, but any MFA must cover the items prescribed in the Vehicle Inspection Regulation. RS gave BK a typical MFA form and explained the reasons for the MFA.
 48. An "Automobile Insurance Motor Vehicle Inspection Report" dated June 15, 2016 was provided to RS during her inspection. It's missing the odometer reading, the license plate and province of registration, there's no statement that MFA expires after 120 days and no statement that the vehicle complies with the Vehicle Equipment Regulation as required by s. 15(1)(e) of the Vehicle Inspection Regulation.
 49. A typical bill of sale used/provided by the Appellant during the inspection shows:
 - a. an AMVIC fee of \$6.95 rather than the mandatory \$6.25 AMVIC fee;
 - b. vehicle sold AS-IS. RS discussed with BK that a vehicle can't be sold as-is.
 50. RS confirmed that a licensee cannot sell a vehicle as-is without a valid MFA, but can sell as-is if full disclosure in MFA and compliance with other relevant legislation.
 51. Licensee provided an example MFA to RS. Vehicle Lease Contract provided on March 15, 2016, but MFA dated March 18 – accordingly, the MFA not available at the time vehicle offered for sale, contrary to the legislation.
 52. There were several instances of files reviewed by RS where there were either no MFAs, MFAs but missing odometer reading, or MFAs not signed or dated by the consumer.
 53. MFAs are not required to be signed by the consumer, but without such a signature, there's no evidence that it was provided by the licensee to the consumer.
 54. AMVIC levies need to be remitted every quarter. Upon review of levy payment history, it was noted that levies were due June 30, 2016 but paid late on January 23, 2017.
 55. The levy payment process is very straightforward – licensees log-in online to AMVIC, indicate number of vehicle sales and pay accordingly.
 56. On several occasions, Matthew's Auto's levy remittances were late by more than a month
 57. RS looked at 12 used vehicle sales in the 2nd inspection. She specifically compared the number of levy remittances vs. the number of vehicle transactions she had access to. From April through Dec 2016, 57 vehicle levies remitted, but she was not provided with 57 vehicle transaction records; got only ~ ½ of them; asked for the others, BK said he didn't have them there.
 58. Dealers are required to keep 3 years of transaction records – Matthew's Auto did not do so.

On cross examination by counsel for Matthew's Auto, RS stated as follows:

59. Her training is accounting/auditing.
60. Part of her job as ISO is looking at compliance with legislation, including compliance with advertising.

61. Matthew's Auto's Facebook site – did not have AMVIC logo. This is a requirement for all AMVIC licensees.
62. In response to a questioning by Mr. Wachowich, RS acknowledged that s. 11(1) of the Automotive Business Regulation requires that in "*the case of print and television advertising*" a business operator must indicate that they hold an automotive business license under the Act. RS further acknowledged that Facebook is not print or television advertising and that newer electronic media like Facebook is not yet contemplated by the Automotive Business Regulation.
63. Matthew's Auto produced a form of vehicle inspection report, but it did not meet the Vehicle Inspection Regulation requirements.
64. RS reviewed an MFA and a Vehicle Lease Contract in respect to the same vehicle. The Vehicle Lease Contract was dated March 15; the MFA was dated March 18. S. 15(1) of the Vehicle Inspection Regulation requires a dealer to provide to a consumer an MFA **before** entering into a contract to sell a motor vehicle. RS confirmed that she did not contact that particular buyer to confirm whether the buyer saw the MFA before signing the lease.
65. That said, RS stated that there's a presumption that if the date is March 15 on the lease and March 18 on the MFA that the Lease was entered into before the MFA was available.
66. RS confirmed that there were no consumer complaints that led to these inspections.
67. RS confirmed that the sum total of all late AMVIC levies was less than \$200.
68. In response to a question from Mr. Wachowich, RS agreed that while BK's salesperson license may have expired at one point, there were other licensed salespeople working at Matthew's.
69. RS confirmed that the number of vehicles she observed without stock numbers was under 20.
70. RS had no knowledge of any "bait and switch" occurring at Matthew's Auto.
71. Various Vehicle Lease Contracts reviewed by RS had the "Vehicle Purchase Price" and "Total Lease Payments" as identical values with 12 equal payments in most cases. The payments would satisfy the vehicle purchase price and lease payments.
72. There were no residual payments to be made and no options to be exercised.
73. While some vehicles were sold "As-is; not warranted", they also included a Vehicle Inspection Report.
74. There were approximately 20 vehicles on the lot at Matthew's at the time of RS' inspections.
75. RS confirmed that in 2016 there were 57 levies paid. About 7 vehicles sold per month. Approximately \$50 in levies per month.
76. Matthew's also sells tires.
77. In response to a question about the difference between wholesale sales and retail sales, RS advised that retail sales involves sales to the public; Wholesale sales involves sales/purchase from other dealers.
78. Mr. Wachowich asked whether AMVIC's concern is sales to the public? RS responded that AMVIC's concern is compliance with the legislation whether or not Mathew's Auto's operations involves sales to the public.
79. RS advised that in the course of this investigation, she never contacted any consumers and was not contacted by any consumers. She doesn't deal with consumer complaints.
80. As an ISO, she reports to AMVIC's Manger of Industry Standards.
81. Once her investigation is complete, she prepares an Application Report for her manager; the manager makes any changes and then it goes to the Director of Fair Trading. RS had no discussions with the Director before the administrative penalty in this case was imposed.

On re-examination by Ms. Hale, Ms. Spiess' evidence was as follows:

82. In order to sell vehicles commercially in Alberta, an individual must be registered with AMVIC as a salesperson.
83. A vehicle sales business must also be registered.
84. Any licensed vehicle sales business must have at least one salesperson registered.

85. As an ISO, she never contacts consumers.

MATTHEW'S AUTO EVIDENCE

Mr. Wachowich, on behalf of Matthew's Auto, called one witness: Bassam Kamal. BK's evidence included:

86. He currently owns and runs Dwayne's housing. Houses homeless people and others with mental health issues.
87. He has been in auto sales for a long time too.
88. He also owns Brados restaurant on Stony Plain Road.
89. He has owned other restaurants in the past.
90. He is a businessman.
91. He spends not as much time as he'd like at Matthew's Auto.
92. In response to Mr. Wachowich's question about why his salesperson license went inactive, BK stated it was an oversight. When he went on AMVIC's website, he got frustrated with the upgrades and didn't follow-up.
93. He explained his form of Vehicle Lease Contract as follows: it is an equal installment arrangement over time. Upon completion of payments, the lien is removed and title is transferred. There's no option price because there's no residual value.
94. At the end of the lease payment, buyer would get a Bill of Sale for \$1 consideration.
95. BK stated that he contracts out all Motor Vehicle Inspection Reports. Matthew's doesn't have the facilities on premises to do these inspections.
96. Matthew's did not have a licensed mechanic on site.
97. In response to Mr. Wachowich's question whether Matthews would sell any vehicles without MFAs, BK stated "I would hope we don't. I think we comply 90-99% of the time.
98. A former salesperson likely set up the Facebook site. The business itself did not have a Facebook site.
99. Matthew's didn't do option or residual lease deals. Just equal installment arrangements.
100. Most consumers were less fortunate people. Didn't qualify for credit. BK carried the credit himself.
101. Most consumers didn't fully pay out the term. BK would write it off. Not worth getting bailiffs involved.
102. Business was slow. They sold 4-5 cars per month.
103. There was no budget for formal advertising.
104. Most vehicles were sold for under \$10,000.

AMVIC'S ARGUMENTS

In summarizing AMVIC's position, Ms. Hale stated:

105. There are a number of breaches by Matthew's, including:
 - a. Problematic financial transactions;
 - b. Problems with MFAs;
 - c. Charging improper levies;
 - d. Submitting levies late;
 - e. Failing to keep or display stock numbers;
 - f. No AMVIC logo on advertisements;
 - g. Allowing a salesperson registration to lapse.
106. The penalty imposed wasn't the result of a one-off inspection. There was an initial inspection during which a number of deficiencies were brought to the Appellant's attention. Notwithstanding the efforts of the inspector, many of the breaches found at the second inspection were the same as those identified during the first inspection.
107. BK has voluntarily changed his status and will likely indicate that he will no longer be engaged in retail sales. He may argue that is a mitigating factor. He remains in a

- regulated industry and is still required to comply with the law. To date, he has shown a willful disregard for the law.
108. AMVIC acknowledges that none of the issues here arose from a complaint, but that is not a mitigating factor.
 109. The principle purpose of the Fair Trading Act (now the Consumer Protection Act) is consumer protection – but this is one of several regulated industries the Consumer Protection Act sets out a framework for.
 110. It's both the type, number and repetitive nature of the breaches in this case that are of concern. No efforts were made by the Appellant following the first inspection to comply.
 111. A regulated industry requires participants to comply with the rules.
 112. Compliance is part of the scheme to protect consumers.
 113. With respect to the AMVIC logo on Matthew's Auto's Facebook site, it is acknowledged that s. (11)(1) of the Automotive Business Regulation is outdated and far-behind.
 114. BK says he is not responsible for the Facebook page advertising vehicles for sale through Matthew's Auto.
 115. BK states that any MFA's created were the responsibility of others too.
 116. But BK and Matthew's are the licensed entities here.
 117. S. 166 of the FTA states responsibility for agents and employees rests with the licensed entity.
 118. Not providing MFAs, late levies, no stock numbers, expired registration, no AMVIC logo on Facebook; all are recurring breaches by Matthew's Auto.
 119. The nature of the financial transactions are at issue too. It's unclear whether Matthew's entered into lease or sale contracts. By the contents of the documents, they appear to be optional leases; although an argument could be made that they are residual leases. If neither, BK has extended credit, which is also a regulated activity.
 120. The closest compliant transaction that RS identified was an optional lease transaction and RS tried to educate BK on the steps required to comply. There was no compliance evident at the second inspection.
 121. BK may be a decent guy and there may be no complaints, but that's not why we're here. This is a regulated industry. Licensees must comply. Just because there are no complaints, doesn't mean there hasn't been a failure to comply.
 122. The act and the inspection regime are set up to be a preventative system.
 123. If a lawyer misused trust funds or failed to properly account for trust funds, that's a breach, even if no consumer complaints.
 124. Consider the fact of the breaches and the fact that they were not remedied after being given an opportunity to do so.
 125. Being busy/distracted with other businesses does not excuse failure to comply with the legislative requirements.
 126. De minimus arguments fail too – “don't be too hard on the guy”... “he's doing something”.... “the breaches are minor and volume is small”. The legislation doesn't specify different standards for different sizes of dealers. It applies equally.
 127. The regulations are black and white. It's not hard to comply. RS tried to help BK to get compliant. She gave him materials to educate himself. MFA requirements are not new. BK just turned a blind eye and didn't meet the very low bar.
 128. BK cooperated but the continued breaches are clear on the facts.
 129. The Director offered two precedents with similar facts:
 - a. AMVIC and Zane Holdings Ltd. operating as Alberta Honda, where an administrative penalty of \$14,000 was issued; and
 - b. AMVIC and Davis Buick GMC Ltd., where an administrative penalty of \$9,000 was issued.

MATTHEW'S AUTO'S ARGUMENTS

In summarizing Matthew's Auto's position, Mr. Wachowich stated:

130. There are breaches that were discussed in this hearing that are disputed:

- a. With respect to Facebook advertising, the Director can't read in or expand the legislation. The Automotive Business Regulation does not cover Facebook. Failure to include AMVIC's logo on Facebook advertisements for Matthew's Auto vehicles cannot be used against Matthews;
- b. Matthew's Auto's "Lease Agreements" speak for themselves. Matthew's Auto engaged in vehicle transactions including specific terms of payment with equal payments over that time;
- c. There's a definition for option lease agreements and residual lease agreements. The documents produced do not align with either;
- d. The \$10,000 administrative penalty is grossly excessive given the nature of the breaches addressed in a random inspection;
- e. S. 2(2) of the Administrative Penalty Regulation identifies the factors to consider when setting an administrative penalty;
- f. Any breaches by Matthew's Auto, if any, were technical breaches;
- g. Any administrative penalty, if any, should be no more than \$1,500 given the nature of the business and the volume of the business. AMVIC's Intention shouldn't be to bankrupt the business;
- h. If any penalty is warranted, it ought to be nominal;
- i. Matthew's Auto did not benefit in any way from the alleged breaches;
- j. Matthew's Auto's documents aren't perfect but there's some effort to comply
- k. There are no consumer complaints and no consumers were adversely impacted;
- l. The Director's lawyer's trust example is not comparable.

ANALYSIS AND CONCLUSIONS

131. Having considered the evidence and submissions of the parties, and with respect to those provisions of the Fair Trading Act and associated regulations that the Director alleges were breached by Matthew's Auto, this appeal board concludes as follows:

a. Failure to display the AMVIC logo or wording on Facebook posts advertising Matthew's Auto vehicles for sale

This appeal board finds that Matthew's Auto did not breach s. 11(1)(b) of the Automotive Business Regulation. That section refers only to print and television advertising. Given the current wording in the legislation, there is no requirement for Matthew's Auto to indicate on Facebook posts advertising vehicles for sale that it holds an automotive business license under the Fair Trading Act and associated regulations.

b. Failing to ensure that vehicles displayed for sale include the stock number of the specific vehicle that is advertised as being available for sale contrary to Section 11(2)(m) of the Automotive Business Regulation.

This appeal board finds that there was sufficient evidence to conclude that Matthew's Auto breached the provisions of Section 11(2)(m) of the Automotive Business Regulation.

c. Failing to ensure that deal jackets contain vehicle history, contrary to Section 6(4)(h) of the Fair Trading Act.

This appeal board finds that there was sufficient evidence to conclude that Matthew's Auto breached the provisions of Section s. 6(4)(h) of the Fair Trading Act.

d. Failure to maintain at least 3 years of business records for each vehicle

sale, contrary to Section 132 of the Fair Trading Act.

This appeal board finds that Matthew's Auto did fail to maintain and/or provide at least 3 years of business records contrary to s. 132 of the Fair Trading Act.

- e. Charging \$6.95 in respect to AMVIC levies, not the \$6.25 specified by AMVIC pursuant to Section 136(8) of the Fair Trading Act.**

This appeal board finds that Matthew's Auto did charge incorrect AMVIC levies.

- f. Using the phrase "Sold As-Is" on bills of sale.**

There's no express prohibition against licensees using the phrase "Sold As-Is" in respect to used motor vehicles, provided the licensee complies with the provisions of the Vehicle Inspection Regulation, including providing a valid MFA in accordance with s. 15(1).

This appeal board finds that there is evidence that on at least one occasion (Bill of Sale to Debra Joy McClanaghan dated 7 September 2016), Matthew's Auto sold a vehicle "As Is; not warranted" without including an MFA.

- g. Failure to provide current MFAs to consumers before entering into a contract to sell a motor vehicle contrary to Sections 15 and 16 of the Vehicle Inspection Regulation.**

As above, this appeal board finds that Matthew's Auto did fail to provide MFAs as required by the Vehicle Inspection Regulation.

- h. Failure to remit AMVIC levies on time.**

This appeal board finds that Matthew's Auto did fail to remit AMVIC levies within the time specified by AMVIC.

- i. One salesperson, Bassam Kamal, selling vehicles while his license to do so had expired, contrary to s. 16(1) of the Automotive Business Regulation.**

While this appeal board finds that Mr. Kamal's AMVIC salesperson license expired on June 29, 2016 and was not renewed until March 23, 2017, there is insufficient evidence to demonstrate that Mr. Kamal personally sold vehicles during that time.

- j. Use of a form of lease agreement inconsistent with Section 19(1) of the Cost of Credit Disclosure Regulation.**

Matthew's Auto used a form of "Vehicle Lease Contract" which Matthew's Auto characterized as an "equal installment arrangement" and AMVIC characterized as either: (i) an "optional lease" as defined in s. 17(1)(e) of the Cost of Credit Disclosure Regulation; (ii) a "residual obligation lease" as defined in s. 17(1)(j) of the Cost of Credit Disclosure Regulation; or (iii) sales on credit in breach on s. 35 of the Fair Trading Act and s. 8 of the Cost of Credit Disclosure Regulation.

Matthew's Auto's Vehicle Lease Contracts do not neatly fit any typical characterization of a lease. On balance, this appeal board finds that, in effect, Matthew's Auto's Vehicle Lease Contracts were sales on credit. As such,

Matthew's Auto is required to comply with S. 35 of the Fair Trading Act and s. 8 of the Cost of Credit Disclosure Regulation, which, by the evidence, Matthew's Auto failed to do.

DECISION

For the above reasons and considering:

1. The failure of Matthew's Auto to remedy the following deficiencies noted in AMVIC's February 28, 2016 letter following a first inspection dated January 25, 2016:
 - a. Failing to have or display stock numbers for vehicles listed for sale, contrary to Section 11(2)(m) of the Automotive Business Regulation;
 - b. Failing to ensure that deal jackets contain vehicle history, contrary to Section 6(4)(h) of the Fair Trading Act;
 - c. Failure to maintain at least 3 years of business records for each vehicle sale, contrary to Section 132 of the Fair Trading Act.
 - d. Charging \$6.95 in respect to AMVIC levies, not the \$6.25 specified by AMVIC pursuant to Section 136(8) of the Fair Trading Act.
 - e. Failure to provide current MFAs to consumers before entering into a contract to sell a motor vehicle contrary to Sections 15 and 16 of the Vehicle Inspection Regulation.
 - f. Failure to remit AMVIC levies on time.
 - g. Failure to comply with S. 35 of the Fair Trading Act and s. 8 of the Cost of Credit Disclosure Regulation.
2. Matthew's Auto withdrawal from retail vehicle sales effective on or about October 10, 2017;
3. The seriousness of the contraventions or failures to comply – while there is no evidence of any consumers being negatively impacted by the above deficiencies, Matthew's Auto's inability to comply with the rather straightforward requirements applicable to used car sales do show either negligence, unsophistication or a willful disregard for the rules, notwithstanding efforts by the regulator to assist by clearly communicating areas in need of improvement;
4. Matthew's Auto's history of non-compliance – Matthew's Auto had more than 12 months between AMVIC's first inspection and second inspection to correct the identified deficiencies but failed to comply. Of concern too is the absence of any evidence of even modest efforts to comply;
5. There is no evidence that Matthew's Auto derived any significant economic benefit by the deficiencies noted above;
6. The nature and amount of administrative penalties issued by AMVIC to other business operators in similar circumstances.

the November 9, 2017 decision of the Director to issue an administrative penalty in the sum of \$10,000 to Matthew's Auto is varied. In place of the \$10,000 administrative penalty imposed by the Director, Matthew's Auto is directed to pay an administrative penalty of \$7,000. Payment is to be made to the "Government of Alberta" and submitted to AMVIC within 30 days of receipt of this decision. No costs are awarded to either party.

ISSUED and DATED at the City of Edmonton in the Province of Alberta this 5th day of November, 2018 by the Appeal Board constituted to hear the above referenced matter pursuant to section 179 of the Fair Trading Act and the Appeal Board Regulation thereunder.

Paul Alpern
Caren Mueller
Nick Tywoniuk