

In The Matter of the Fair Trading Act, RSA 2000, c. F-2

And In the Matter of an Appeal from a Decision on September 21, 2015
to Impose an Administrative Penalty pursuant to s.158.1 of the Fair Trading Act

Between:

Xtreme Truck & Toys Ltd.
("Xtreme")

Appellant

-and-

Alberta Motor Vehicle Industry Council
("AMVIC")

Respondent

DECISION

Appeal Board: John Welbourn, C.Arb., MCI Arb.

Hearing: Suite 2800, 10060 Jasper Avenue, Edmonton, Alberta, on May 11,
2016.

Appearing for the Appellant:

Ed Jayasinghe

Counsel for the Respondent:

Vivian Stevenson, Q.C.

Witness for the Appellant:

Ed Jayasinghe

Witnesses for the Respondent:

██████████ (via Skype)
██████████

Preliminary Matters:

1. A teleconference with the parties was held on January 27, 2016 to discuss procedural matters. The meeting was adjourned to February 16 to allow the Appellant to consult a lawyer. That meeting was later rescheduled and eventually held February 26, 2016 at which time the parties agreed on the date, time and place of the appeal hearing, and a deadline for disclosure of AMVIC records. They also agreed that the evidence of all witnesses would be given under oath but not formally recorded. The parties understood that the appeal would be a *de novo* hearing.
2. At the start of the hearing, the parties confirmed that:
 - a. The hearing room was satisfactory;
 - b. The appeal hearing would not be formally recorded;

- c. the evidence of all witnesses would be given under oath or affirmation;
- d. Non-party witnesses would be excluded from the hearing room until asked to testify.

Issue:

- 3. Xtreme appeals from an administrative penalty of \$10,000.00 issued September 21, 2015 by the AMVIC pursuant to s. 158.1(1) of the Fair Trading Act, RSA 2000, c.F-2.

Exhibits:

- 4. The following documents were entered as Exhibits during the hearing:

<u>Exhibit #</u>	<u>Document</u>
1	Bill of Sale dated May 27, 2014
2	Loan Agreement Number: 7560212
3	Mechanical Fitness Assessment dated June 5, 2016
4	██████████ invoice dated 10/11/2014
5	Email complaint letter
6	██████████ invoice 021367
7	Warranty Policy 7359606
8	██████████ invoice 021573
9	AMVIC Investigation Case Number: 14-10-245
10	AMVIC letter dated November 6, 2014
11	AMVIC Application Report - Investigations
12	Xtreme letter dated July 12, 2015
13	██████████ invoice 8684
14	Excerpt from Xtreme website
15	AMVIC letter dated May 4, 2015
16	AMVIC letter dated June 22, 2015
17	AMVIC letter dated September 21, 2015.

Facts:

- 5. As at October, 2014, Xtreme was licensed by AMVIC to carry on the business of retail automotive sales and repairs.
- 6. In May, 2014, ██████████ ("Mr. ████████") purchased a 2006 Ford F350 truck (the "Vehicle") from Xtreme. The transaction was negotiated by phone between Mr. ██████████ and ██████████. The bill of sale states that the Vehicle had 158,857 km and the sale price was \$14,850.00. Mr. ██████████'s evidence was that Xtreme had listed the Vehicle for sale on Kijiji for \$14,000.00 and he did not pursue a lower price. Financing, insurance, delivery of the Vehicle to Grande Prairie, and condition of the

head gasket and injectors were also discussed with [REDACTED]. Mr. [REDACTED] also negotiated a warranty on the vehicle which included coverage on injectors and seals. [REDACTED] later called and asked and Mr. [REDACTED] confirmed that the cost of the warranty should be included in the purchase price. This increased the price to \$14,850.00.

7. [REDACTED] faxed documents to Mr. [REDACTED] which he signed and returned on May 27, 2014 with a \$1,000.00 deposit. He paid a further deposit of \$7,000.00 on June 2.
8. Mr. Jayasinghe and another person delivered the Vehicle to Mr. [REDACTED] in Grande Prairie on June 6, 2014. At that time Mr. Jayasinghe gave Mr. [REDACTED] several documents, including a mechanical fitness assessment for the Vehicle dated June 5, 2014 (the "MFA"). Mr. [REDACTED] asked Mr. Jayasinghe for the Vehicle warranty. Mr. [REDACTED]'s evidence is that after checking the documents and not finding any warranty information, Mr. Jayasinghe advised that the warranty would be emailed to him. Mr. Jayasinghe also said he would repair the windshield and deliver a missing key fob and tow button to Mr. [REDACTED].
9. The following day Mr. [REDACTED] drove the Vehicle to Fort St. John, BC, where he parked it in his employer's locked storage yard, and returned to his home in Ontario for 4 months. During that period, Mr. [REDACTED] continued to follow up by phone to Xtreme for the warranty document for the Vehicle. His evidence is that his efforts were ignored. He was advised the warranty would be emailed - it wasn't. He was advised that he would have to talk to Mr. Jayasinghe. However, Mr. Jayasinghe did not return any of his calls. In October, Mr. [REDACTED] was advised that if there was a warranty it would be through [REDACTED]. When he contacted [REDACTED] Mr. [REDACTED] was advised that it had not issued any warranty for the Vehicle.
10. Also in October, Mr. [REDACTED] noticed that there wasn't any fluid in the coolant reservoir. He took the Vehicle to [REDACTED] in Grande Prairie where coolant was added. The following morning, Mr. [REDACTED] noted that the reservoir was again empty and there wasn't any evidence of leakage underneath the Vehicle.
11. On October 21, 2014, Mr. [REDACTED] filed a complaint with AMVIC regarding the missing warranty, and the still undelivered key fob and tow haul button. The windshield had not been repaired.
12. In December, 2014, Mr. [REDACTED] had [REDACTED] in Grande Prairie diagnose the cause of the coolant leak. It was determined that a head gasket or cylinder head was cracked and that injectors were faulty. The cost of the testing was \$627.51. In January, 2015, Mr. [REDACTED] had the recommended repairs completed at a cost of \$8,571.89.
13. In November 27, 2014, Xtreme obtained and sent Mr. [REDACTED] a drive train warranty for the Vehicle. The warranty was limited to \$2,500.00 and did not cover injectors

and gaskets. The warranty was cancelled shortly after the issuer discovered the Vehicle had recently been stolen. The Vehicle was recovered shortly after the theft having suffered minor damage, none of which is relevant to this matter.

14. Mr. Jayasinghe is the principal of Xtreme. He testified that Xtreme had advertised the Vehicle for sale through Kijiji at \$15,995.00 including warranty, and that Mr. [REDACTED] had negotiated the price down to \$14,850.00 without warranty. He did not produce the Kijiji ad and acknowledged that all discussions leading to the sale had been between his [REDACTED], [REDACTED], and Mr. [REDACTED], none of which he had heard.
15. Mr. Jayasinghe stated that a preliminary inspection report on the Vehicle had been included when the initial documents were faxed to Mr. [REDACTED]. Mr. Jayasinghe did not produce a copy but insisted that he had seen the report on his desk within the week prior to the hearing. He also insisted that the report had been provided to AMVIC at the administrative review held April 2, 2015.
16. During his testimony Mr. Jayasinghe presented a document which appears to be a historical invoice from [REDACTED] for an AMVIC Inspection on the Vehicle on June 3, 2014.
17. Mr. Jayasinghe knew that the MFA was dated 9 days after the bill of sale, missing required information including the Dealer name, address and AMVIC license #, and the inspector's signature. On cross-examination he acknowledged that his practice and was to "float" a mechanical fitness assessment delivered with a vehicle he had purchased for intended resale. By doing so he avoided the requirement to obtain another mechanical fitness assessment prior to sale of that vehicle to an Xtreme customer.
18. The Xtreme website contains the following statement:

Why buy from us? All of our vehicles are thoroughly inspected and tested by our team of Certified Mechanics. Anything that does not meet our atrict standards is fixed or replaced with the best factory or aftermarket parts available. Most of the other guys would not dream of taking the measures we do to make sure we are selling vehicles of the highest quality.

In May, 2014, the Xtreme staff consisted of Mr. and [REDACTED] Xtreme did not employ any mechanics at that time.

19. [REDACTED] the AMVIC investigator, testified that Xtreme did not respond to AMVIC's initial Notice dated November 6, 2015 to produce all records for the Vehicle pertinent to Mr. [REDACTED]'s complaint. The only document Mr. Jayasinghe has provided to AMVIC was an email letter of July 21, 2015 responding to AMVIC's proposed administrative penalty of \$15,000.00 contained in its letter to Xtreme

dated June 22, 2015.

Submissions:

20. AMVIC contends that Xtreme violated s.15(1) of the Vehicle Inspection Regulation, AR 211/2006 (the "Regulation"), and engaged in unfair practices as defined in ss.6(4)(a & b) of the Fair Trading Act.
21. Xtreme failed to provide Mr. [REDACTED] with a mechanical fitness assessment prior to the sale of the Vehicle as required by s.15(1) of the Regulation. Further, the MFA omitted statements and information required by the Regulation. Finally, Xtreme through its website or discussions with Mr. [REDACTED] made statements or opinions that would reasonably deceive or mislead and were relied on by Mr. [REDACTED] to his disadvantage.
22. The administrative penalty of \$10,000.00 is warranted by:
 - a. The cost of the repairs to the Vehicle;
 - b. The failure of Xtreme to provide a properly completed mechanical fitness assessment within the time required;
 - c. The misleading nature of the advertising;
 - d. The failure to provide the warranty negotiated; and
 - e. The failure to address Mr. [REDACTED]'s complaint and respond to AMVIC.
23. Xtreme responds that the only issue is the deficient MFA and that \$10,000.00 is an excessive penalty.
24. The sale transaction did not include any warranty. In providing the drive train warranty in November, 2014, Mr. Jayasinghe was attempting to resolve any issue with Mr. [REDACTED].
25. It is a fact that the injectors and head gaskets in vehicles of similar make, model and year are prone to failure without warning. It is not industry practice to inspect for such potential issues in resale vehicles.
26. The statements contained in Xtreme's website were simply "advertising".

Findings:

27. Mr. [REDACTED]'s evidence is preferred. It was clear and consistent and his actions corroborate his testimony. A warranty covering injectors and seals was included in the purchase price and to be provided. The warranty was not delivered. This is an unfair practice as defined in ss.6(1) and 6(4)(a & b) of the Fair Trading Act. [REDACTED] did not testify. Mr. Jayasinghe's evidence of what she may have

discussed with Mr. [REDACTED] is hearsay and of no assistance.

28. I accept that injectors and head gaskets may be an issue in similar vehicles. Mr. [REDACTED] was aware of the issue which is why he purchased the warranty that was not provided.
29. I do not accept Mr. Jayasinghe's submission that the sale would have been terminated and deposit returned if Mr. [REDACTED] had decided not to proceed with the transaction prior to delivery of the Vehicle.
30. The MFA was incomplete and not given to Mr. [REDACTED] as required by the Regulations. This is a violation of s.15(1) including ss.15(1)(c, d & f). It is not a defence that it may be frequent practice to "float" mechanical fitness assessments. It is that practice which the Regulations aim to eradicate.
31. As of May, 2014, the noted excerpt from Xtreme's website is an overstatement. However, I do not express any finding that it is an unfair practice or not.
32. Mr. Jayasinghe's contention that a preliminary inspection was initially provided to Mr. [REDACTED] is not supported. His evidence that a copy of that inspection was provided to AMVIC at the administrative hearing is directly contradicted by [REDACTED].
33. It appears that AMVIC may have sent Xtreme notice of Mr. [REDACTED]'s complaint by emailing a letter dated November 6, 2014. The letter refers to the attachment of a "Consumer Complaint Form" and a "Supplier Response to Consumer Complaint". Neither is attached to the document in evidence. It is not certain if the email address is correct nor is it certain that Xtreme received the letter. Therefore I do not find that Xtreme failed to respond to the notice.

Decision:

34. AMVIC's decision to impose an administrative penalty of \$10,000.00 is upheld.

Signed at Calgary, Alberta on June 8th, 2016.

"original signed by"

John H. Welbourn