

IN THE MATTER OF AN APPEAL BY

SHANNON WHELAN

TO SECTION 127(c) OF THE *FAIR TRADING ACT*,
BEING CHAPTER F-2 OF THE REVISED STATUTES OF ALBERTA, 2000
AND THE *AUTOMOTIVE BUSINESS REGULATION*, Reg. 152/2013.

AND

IN THE MATTER OF THE DECISION BY
THE ALBERTA MOTOR VEHICLE INDUSTRY COUNCIL ("AMVIC")
TO CANCEL A PROVINCIAL AUTOMOTIVE SALESPERSON REGISTRATION
UNDER THE *FAIR TRADING ACT* ON OCTOBER 27, 2015.

REASONS FOR DECISION

Panel Chair: Cindy Clark
Members: John Shoulders

Representing the Appellant: Halley Carcasole, Legal Counsel (*Miles Davison LLP*)

Representing the Respondent: Stephanie P. [REDACTED] – AMVIC Manager of Licensing & Consumer Services
[REDACTED] – AMVIC Sr. Manager of Investigations

Appeal Heard: March 2, 2016
HOLIDAY INN EXPRESS – AVENIDA CONFERENCE ROOM
12025 Lake Fraser Drive, Calgary AB T2J 7G5

Introduction

1. This is an appeal under section 22 of the *Automotive Business Regulation* from a decision of the Director to cancel the provincial automotive salesperson registration of Ms. Shannon Whelan under section 127(c) of the *Fair Trading Act*.

Jurisdiction

2. The *Fair Trading Act* and the *Automotive Business Regulation* regulate, among other things, automotive business licences and salesperson registrations in Alberta.
3. Under section 104 of the *Fair Trading Act*, no person may engage in the automotive sales business unless that person holds a licence that authorizes the person to engage in that business.

4. Pursuant to section 16 of the *Automotive Business Regulation*, a salesperson of an automotive sales business operator must be registered for automotive sales before acting on behalf of the business operator.
5. The Director's jurisdiction with respect to automotive business licences and salesperson registrations is found in section 127 of the *Fair Trading Act*:

The Director may refuse to issue or renew a licence, may cancel or suspend a licence and may impose terms and conditions on a licence for the following reasons:

- (a) the applicant or licensee does not or no longer meets the requirements of this *Act* and the regulations with respect to the class of licence applied for or held;
 - (b) the applicant or licensee or any of its officers or employees:
 - (i) fails to comply with an order of the Director under section 129 or 157, unless, in the case of an order under section 129 or 157, the order has been stayed,
 - (ii) fails to comply with a direction of the Director under section 151(5),
 - (iii) furnishes false information or misrepresents any fact or circumstance to an inspector or to the Director,
 - (iv) fails to comply with an undertaking under this *Act*,
 - (v) has, in the Director's opinion, contravened this *Act* or the regulations or a predecessor of this *Act*,
 - (vi) fails to comply with any other legislation that may be applicable,
 - (vii) fails to pay a fine imposed under this *Act* or a predecessor of this *Act* or under a conviction or fails to comply with an order made in relation to a conviction, or
 - (viii) is convicted of an offence referred to in section 125 or is serving a sentence imposed under a conviction;
 - (c) in the opinion of the Director, it is in the public interest to do so.
6. Section 127 of the *Fair Trading Act* applies to both automotive business licences and salesperson registrations.
 7. Section 18 of the *Automotive Business Regulation* states that sections 125, 127 and 128 of the *Fair Trading Act* apply, with necessary changes, to the registration of salespersons.
 8. Accordingly, section 22(1) of the *Automotive Business Regulation* states that:

A person

- (a) whose application for registration or renewal of registration has been refused,
- (b) whose registration is made subject to terms and conditions, or
- (c) whose registration has been cancelled or suspended under section 127 of the *Act*

may appeal in accordance with the process established by the Director.

9. Section 22(2) states that the Director may establish an appeal process for the purposes of subsection (1), including forming or designating an appeal body.
10. In accordance with section 22(2) of the *Automotive Business Regulation*, AMVIC created the AMVIC Salesperson Appeal Committee Policy (the "Appeal Policy"). The Appeal Policy allows an Appellant to appeal a decision of AMVIC by delivering a written Notice of Appeal to the President and Chief Executive Officer not later than 30 days after AMVIC issues notice of its decision to the Appellant.
11. This is an appeal pursuant to section 22 of the *Automotive Business Regulation*. Pursuant to section 3.ii.o) of the Appeal Policy:

The Panel shall determine if the decision by AMVIC that is the subject of the Appeal was consistent with the provisions of the *Fair Trading Act*, the *Designation of the Trades and Business Regulation*, the *Automotive Business Regulation*, and the bylaws and policies of AMVIC.

Evidence before the Appeal Panel

12. At the hearing, Ms. Shannon Whelan was represented by Ms. Carcasole. AMVIC was represented by Ms. P [REDACTED] and Mr. [REDACTED].
13. Ms. P [REDACTED] reviewed the authority of the Director and the relevant legislation.
14. Ms. P [REDACTED] outlined the circumstances leading up to the appeal including Ms. Whelan's involvement in the undertaking of a consignment at her place of business while the business did not hold the required AMVIC licence to engage in consignment sales. Ms. P [REDACTED] also outlined Ms. Whelan's repeated failure to maintain a valid salesperson registration between 2004 and 2014 and a previous administrative review due to her criminal history that led to conditions being placed on Ms. Whelan's registration in 2014.
15. Ms. Carcasole noted that if Ms. Whelan had lapses in her registration, they were inadvertent and that Ms. Whelan had never sold a vehicle while her registration was lapsed. Ms. Carcasole also noted that the nature of Ms. Whelan's business took her from province to province for periods of time and it was during those times that Ms. Whelan was out of province that her registration would lapse. Ms. Carcasole outlined Ms. Whelan's experience in the automotive industry. Ms. Carcasole also noted that Ms. Whelan did not sign any documents at the business where she was working that related to a consignment and that if Ms. Whelan's actions were worthy of a sanction, then it should be a conditional registration and not a cancellation.

16. Ms. P [REDACTED] called two witnesses to speak to the investigation that led to the review of Ms. Whelan's salesperson registration.

[REDACTED]

17. Ms. [REDACTED] is an investigator at AMVIC and currently holds a Peace Officer appointment. Ms. [REDACTED] outlined the details of the investigation and the interactions that took place between Ms. Whelan and the investigators. It was Ms. [REDACTED] evidence that in her opinion, Ms. Whelan was directly involved in the transaction of arranging the consignment agreement between the investigators and the business.
18. Ms. [REDACTED] stated that Ms. Whelan provided knowledge of where to obtain the consignment documents on the AMVIC website but could not confirm whether or not Ms. Whelan had actually printed the documents. It was Ms. [REDACTED] further testimony that Ms. Whelan's boss, Steve Summerell completed all the consignment paperwork.
- [REDACTED]
19. Ms. [REDACTED] is also an investigator at AMVIC and currently holds a Peace Officer appointment. At the time of the investigation, Ms. [REDACTED] was new to AMVIC and was waiting to receive her Peace Officer appointment. She was therefore working together with Ms. [REDACTED].
20. Ms. [REDACTED] confirmed that Ms. Whelan introduced the investigators to her boss. It was also Ms. [REDACTED] testimony that the details of the consignment including the offer, the commission amount and the valuation of their trade-in were completed by Ms. Whelan's boss and not by Ms. Whelan.

Shannon Whelan

21. Ms. Whelan provided evidence through her responses to questions put to her by her legal counsel, AMVIC and the Appeal Panel as follows:
- She has worked in the auto industry throughout the country for 14 years.
 - She was under the impression that only during the time that she worked in Alberta did she need her registration. She did not renew her registration herself as that was something the company that she worked for always looked after. She did not recall ever receiving a notice from AMVIC that her registration was about to lapse or expire and every time she worked in Alberta, her registration was made current.
 - Ms. Whelan acknowledged she is now aware of the requirements for maintaining her AMVIC registration and accepts that it was her responsibility to ensure it is maintained and renewed on time.
 - She confirmed that she knew some things about consignment sales from her experience in Saskatchewan and knew she could get the consignment documents from the AMVIC website. She was not interested in becoming involved in a consignment sale as they had never done one at McNeil Motors and referred the matter to her boss.

22. In AMVIC's closing statements, the relevant sections of the *Fair Trading Act* were reiterated and a recommendation was made that the Panel uphold the decision of the Director to cancel the registration of Ms. Whelan. Ms. P████ asked the Panel to consider Ms. Whelan's previous registration history, criminal background and involvement in a transaction that the business she worked for was not licensed to engage in.
23. In Ms. Carcasole's closing statement on behalf of Ms. Whelan, she summarized that Ms. Whelan's criminal history dates back several decades and is insignificant to these proceedings. She further stated that Ms. Whelan was unaware the lapses in her registration were an issue until this appeal as she had never been questioned on the lapses previously. Finally, Ms. Carcasole noted that Ms. Whelan's involvement in the consignment transaction was minimal at best as she did not complete any of the documentation, stated her dislike of consignment sales, referred the matter to her boss and did not profit from the transaction. Ms. Carcasole stated that if Ms. Whelan was deserving of a sanction, the sanction should not be the harshest sanction available which is cancellation.

Appeal Panel Decision

It is the decision of this Appeal Panel to quash the decision of the Director to cancel the provincial automotive salesperson registration of Ms. Whelan.

Considering all of the evidence that was presented, the witnesses and the testimony of Ms. Whelan, it is our opinion and decision to allow Ms. Whelan a "conditional" salesperson registration for a period of one year. The conditions of Ms. Whelan's registration will be as follows:

1. Ms. Whelan will take the AMVIC online *Fair Trading Act* course to be completed and passed by the end of April 2016. Ms. Whelan will ensure she is well versed in the requirements as outlined in the *Fair Trading Act*, *Traffic Safety Act*, and related regulations.
2. Ms. Whelan will meet with an AMVIC representative in August 2016, either by phone or in person, to make sure that she is meeting the requirements and that she is not permitting others she works with, or for, to breach any regulations and that she is not complacent to any breaches. This meeting is to guide and train Ms. Whelan to be a successful consumer representative.
3. Ms. Whelan will keep the peace and remain to be in full compliance with all laws and regulations relating to the motor vehicle industry including but not limited to the *Fair Trading Act* of Alberta and the *Criminal Code* of Canada.
4. Ms. Whelan shall not be the subject of any consumer complaints associated with her actions as an AMVIC registered salesperson during the one year conditional period. If any such complaints arise, Ms. Whelan's registration will be reviewed by the Director.

5. Ms. Whelan shall inform AMVIC immediately of any circumstances which would put her in breach or conflict of holding her AMVIC salesperson registration.
6. Ms. Whelan must renew her salesperson registration within the designated time as required or advise AMVIC of her absence from the industry. She will again have a background check and if any new details arise that can or would impact consumer protection, Ms. Whelan's registration will be reviewed by the Director of Fair Trading (as delegated).
7. Ms. Whelan must advise AMVIC of any changes to her employment and personal address immediately.
8. Ms. Whelan must advise her employer(s) of her past criminal history that currently exists on file that pertains to fraud. If the details on her file are removed within the year, she is not required to disclose.

The Panel has based its decision on the following reasons:

- Based on the evidence before it, the Panel did not consider Ms. Whelan's involvement in the consignment transaction such that it was deserving of a sanction.
- Ms. Whelan has relocated her family to Alberta and has considerable experience in the automotive industry. Cancellation of Ms. Whelan's registration would place undue hardship upon her.
- Ms. Whelan is not a risk to consumers and should be given the opportunity to continue in the industry.
- Based on the evidence, it is in the public interest to impose conditions on Ms. Whelan's registration.

This panel is satisfied that the hearing given to Ms. Whelan has been exhaustive and fair. We have reviewed all of the evidence before us. We are satisfied that the panel's unanimous decision to quash the original decision of the Director and to grant Ms. Whelan a conditional salesperson registration for a period of one year is appropriate in the circumstances.

ISSUED and DATED:

"Original signed by"

Ms. Cindy Clark

Chair – AMVIC Salesperson Appeal Panel Committee

Mar 28/16

Date