

IN THE MATTER OF AN APPEAL BY

GREGORY GARBUTT

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")
NOT TO GRANT A PROVINCIAL AUTOMOTIVE SALESPERSON REGISTRATION
UNDER THE *FAIR TRADING ACT* ON JANUARY 19, 2017

REASONS FOR DECISION

Panel Chair: Cindy Clark
Members: Beverly Bell
Asheet Ruparell

Appearances: Gregory Garbutt (self-represented)

Paula Hale, legal counsel (Shores Jardine LLP) for the Respondent

Appeal Heard: April 21, 2017
Holiday Inn Express, 12025 Lake Fraser Drive
Calgary, Alberta

Appearances

1. Introduction

This is an appeal under s. 22 of the *Automotive Business Regulation* from a decision of the Director of Fair Trading (as delegated) not to grant Gregory Garbutt a provincial automotive salesperson registration under s. 127(c) of the *Fair Trading Act*.

2. Jurisdiction

The *Fair Trading Act* and the *Automotive Business Regulation* regulate, among other things, automotive business licences and salesperson registrations in Alberta.

Under s. 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.

Pursuant to s. 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.

The Director's jurisdiction with respect to automotive business licences and salesperson registrations is found in s. 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.

Section 127 of the *Fair Trading Act* applies to both automotive business licences and salesperson registrations.

S. 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.

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.

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.

In accordance with s. 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 Executive Director within 30 days after AMVIC issues notice of its decision to the Appellant.

This is an appeal pursuant to s. 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.

3. Evidence before the Appeal Panel

Counsel for AMVIC reviewed the authority of the Appeal Panel and the relevant legislation as outlined in the previous section. She advised that the facts in relation to the appeal did not appear to be in dispute, and she outlined those facts for the Panel as follows:

- Mr. Garbutt completed a salesperson registration application which disclosed previous criminal convictions. The application was flagged for further review and Mr. Garbutt was asked to attend an Administrative Review with the Director on January 13, 2017.
- At the January 13, 2017 Administrative Review, in response to a direct question from the Director about any outstanding criminal charges, Mr. Garbutt disclosed that he was facing charges for fraud and theft and that he intended to plead guilty to those charges. Those charges had not been disclosed on the original application.
- Mr. Garbutt's criminal record indicated that in addition to the outstanding charges, he had three previous convictions for impaired driving, a conviction for careless driving, four convictions for driving with a blood alcohol level above the legal limit and a conviction for breach of condition.
- Mr. Garbutt had also failed to disclose on his application that he had a previous salesperson registration with AMVIC.

Mr. Garbutt did not take issue with the facts as put forward by counsel for AMVIC. He indicated that he had not been aware that the hearing would be of such a formal nature,

but that he was not in attendance to argue about the facts. He advised that he wished to explain to the Panel his position with respect to the refusal to grant him registration.

Mr. Garbutt put forward a number of reasons why he felt the Director's decision should be revised:

- He felt that at the Administrative Review the Investigator had gathered inaccurate information regarding the dates of his criminal convictions. However, he agreed that the information provided to the Panel with respect to those convictions by Ms. Hale was accurate;
- His current job was as an internet sales coordinator, a job which did not involve negotiating sales with customer, but simply providing information to customers regarding vehicles about which they had expressed interest. He advised that as soon as there was any discussion about price or the potential purchase of a vehicle, he passed the customer along to a salesperson at the dealership;
- He took issue with the suggestion he had failed to disclose his previous sales registration on his application. He said that he found the questions confusing, but that he assumed AMVIC would be aware that he had been registered previously. He pointed out that during the time of his previous registration, he had not been the subject of any complaints or concerns;
- With respect to his outstanding criminal charges, he said that he had explained the circumstances to the Director and that he had simply been trying to help someone and did not realize he had done anything wrong. He advised that he had allowed somebody to go through a bin of discarded electronics located outside his employer's premises. He did so on the understanding that this person intended to restore the electronics and give them to people in need. He did not realize that his employer received money for recycling those electronics through a third party. He said he did not make any personal gain from the arrangement. He did not appear to believe he had done anything deliberately wrong, but said that by pleading guilty, he was trying to take responsibility for his actions. He indicated that he had saved some money in order to make restitution and he was seeking to obtain full-time employment in order to make further restitution.
- He advised that he intended to act in an honest and ethical manner and to contribute in a valuable way to the industry. He said that when he applied for his current position, he was not aware that salesperson registration with AMVIC was a pre-requisite, and that he was only seeking registration because his employer required it and not because he had any intention to engage in sales.

Counsel for AMVIC acknowledged that Mr. Garbutt had been cooperative throughout the process and had brought evidence forward in relation to his own personal circumstances. However, it was her position that notwithstanding those personal circumstances, it was not in the public interest for AMVIC to register Mr. Garbutt as a salesperson.

In AMVIC's submission the most important fact in considering whether or not the registration should be granted was the nature and currency of the outstanding criminal charges for fraud and theft. These charges are serious charges which involve issues of

honesty and integrity. Counsel for AMVIC emphasised that the purpose behind the *Fair Trading Act* and its associated regulations was to protect consumers from unfair and unethical practices. A number of the practices identified as unfair practices under the legislation regulations involved some type of departure from the requirements of honesty and integrity that were central to the *Fair Trading Act* and to the Code of Conduct in the *Automotive Business Regulation*. Counsel suggested that the public would be surprised that somebody who had only recently pleaded guilty to fraud and theft would be registered by AMVIC in view of the goal of the legislation to provide consumer protection. Counsel also indicated that the relevant fact from the panel's perspective was the Mr. Garbutt was pleading to fraud and theft and not the circumstances that led to those guilty pleas.

Counsel for AMVIC made it clear that it was not her position that a criminal conviction would automatically rule somebody out from salesperson registration, but that the nature of the conviction and the timing of the conviction were the key factors in this particular case. Counsel also acknowledged that it would be open to Mr. Garbutt to demonstrate rehabilitation and that it appeared that he was on the right path to doing so, but that he had not demonstrated that he was rehabilitated and that the public should not be subject to risk during his efforts at rehabilitation.

Mr. Garbutt took issue with any suggestion that he lacked integrity. He admitted that he had issues in his past, but said that he had taken responsibility for those, and had taken and was taking active steps towards rehabilitation. He indicated that his previous convictions for impairment did not pose any danger to the public because he would not be involved in any test drives with customers. He also emphasized that his current position did not put him into a position that would give him any opportunity to steal from or defraud any consumers, that he had no intention of trying to use his registration in order to sell vehicles, and that he was simply trying to obtain registration in order to comply with the wishes of his employer.

Appeal Panel Decision

It is the decision of this Appeal Panel to uphold the decision of the Director not to grant the application of Gregory Garbutt for a provincial automotive salesperson registration. The Panel agrees with the conclusion reached by the Director that it is not in the public interest to grant this registration and agrees that the primary reason for reaching this conclusion is Mr. Garbutt's admission of guilt to the fraud and theft charges currently before the courts, and the recency of the events giving rise to these charges.

The Appeal Panel also took into account Mr. Garbutt's previous criminal convictions for impaired driving and a breach of condition. Although these convictions were older and some dated back a considerable number of years, the Panel felt that these convictions demonstrated a troubling pattern of behaviour and lack of regard for the law.

The Appeal Panel was also concerned about the fact that Mr. Garbutt had not disclosed his outstanding charges on his application form, notwithstanding the wording on the application form which asked:

Have you ever been convicted of and/or found guilty of an offence under **any law** in force in Canada or elsewhere and/or are there any charges pending and/or

outstanding warrants? Make sure to include all conditional discharges, absolute discharges and/or stayed charges.

It is important that all applicants for registration make full disclosure to AMVIC with respect to the questions asked of them, particularly in relation to matters of this nature. Having said that, the Panel did not consider Mr. Garbutt's failure to disclose his AMVIC registration on his application as a factor in its decision. The Panel was prepared to accept that Mr. Garbutt might not have understood the questions or the importance of prior registration, if that prior registration was not cancelled by AMVIC and there were no previous complaints or concerns that had been raised in relation to that prior registration as was the case with respect to Mr. Garbutt.

The Appeal Panel took into consideration Mr. Garbutt's submissions that in his current role he did not engage in sales activities and had no interactions with consumers that could pose a risk to those consumers or the public generally. Based on Mr. Garbutt's description of his job duties, that may well be the case. However, Mr. Garbutt is applying for registration as a "salesperson", which is a term that is broadly defined in the *Automotive Business Regulation* to include a person authorized by an automotive sales licensee to "solicit, negotiate or conclude" an agreement to buy, sell, lease, exchange or consign a vehicle on behalf of a licensee. The Appeal Panel does not consider it appropriate for AMVIC to provide written authorization to an individual to engage in this wide scope of activities on the assurance that the registration will not be used to carry out these activities. A member of the public is entitled to rely on the salesperson's registration on its face. If Mr. Garbutt's employer is not authorizing him to engage in the activities of a salesperson and does not expect or require him to engage in those activities, it may well be that no AMVIC salesperson registration is required, but that is a matter as between Mr. Garbutt and his employer.

The Appeal Panel acknowledges that Mr. Garbutt has been cooperative throughout this process, has taken responsibility for the recent criminal charges by pleading guilty and has indicated that he intends to try to make full restitution. The Panel notes that Mr. Garbutt is not precluded by his criminal record from ever obtaining salesperson registration, but at this time the Panel agrees with counsel for AMVIC that Mr. Garbutt has not demonstrated a sufficient level of rehabilitation that to overcome the concerns raised by his recent conduct in relation to the criminal charges and the non-disclosure of those charges on his application form.

The Appeal Panel is satisfied that Mr. Garbutt understood the nature of the proceedings and that he was given a full opportunity to respond to the Director's decision. Counsel for AMVIC advised that she was prepared to agree to an adjournment should Mr. Garbutt wish to consult or retain counsel, but Mr. Garbutt declined that invitation and indicated that he was prepared to proceed. Having reviewed the appeal material and taking into account the submissions and evidence at the appeal hearing, it is the Panel's unanimous decision to uphold the original decision of the Director as being in the public interest.

"original signed by"

Cindy Clark

Chair - AMVIC Salesperson Appeal Committee

April 25, 2017.

Date