

IN THE MATTER OF AN APPEAL BY

JUSTIN MACK

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 THE PROVINCIAL AUTOMOTIVE SALESPERSON REGISTRATION
OF JUSTIN MACK UNDER THE *FAIR TRADING ACT* ON DECEMBER 21, 2016

REASONS FOR DECISION

Panel Chair: Peter Lokstadt
Members: Mike Daubert
Tony Plett

Appearances: R.Wachowich, legal counsel (Wachowich & Company) for Justin Mack
P.Hale, legal counsel (Shores Jardine LLP) for the Respondent

Appeal Heard: May 2, 2017
Main Boardroom, Capilano Centre
9945 50 Street
Edmonton, Alberta

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) to cancel the provincial automotive salesperson registration of Justin Mack 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*,
 - (v.1) fails to comply with any other legislation that may be applicable,
 - (vi) 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,
 - (vii) is convicted of an offence referred to in section 125 or is serving a sentence imposed under a conviction, or
 - (viii) fails to pay, in accordance with the notice of administrative penalty and the regulations, an administrative penalty imposed under this *Act*;
- (c) in the opinion of the Director, it is in the public interest to do so.

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

Under section 22(1) of the *Automotive Business Regulation* a person whose registration has been cancelled under section 127 of the *Fair Trading Act* may appeal in accordance with the process established by the Director. Section 22 also gives the Director the authority to establish an appeal process and to form or designate 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.

The Director's decision to cancel the salesperson registration of Justin Mack was issued on December 21, 2016. On January 13, 2016 a Notice of Appeal was filed by counsel on his behalf. A Panel for the appeal hearing was established in accordance with the Appeal Policy.

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. Counsel for Mr. Mack did not raise any objection to the composition or jurisdiction of the Appeal Panel.

Counsel for AMVIC outlined a chronology of events leading up to the Director's decision to cancel Mr. Mack's salesperson registration and entered a collection of documents in support of that chronology as Exhibit 1. Exhibit 1 consisted of a decision of the Director dated July 22, 2016 and additional documents tabbed 2 to 11. Counsel for Mr. Mack did not take issue with the chronology or the documents contained in Exhibit 1, with the exception of the document at Tab 11.

The Panel finds that the events giving rise to the Director's decision to cancel Mr. Mack's salesperson registration were as follows:

- Mr. Mack applied for salesperson registration with AMVIC in the summer of 2016 and the registration application was referred to the Director for consideration;
- The Director conducted an Administrative Review on July 19, 2016. Mr. Mack was in attendance with his counsel;
- On July 22, 2016 the Director issued a decision granting Mr. Mack a conditional automotive salesperson registration subject to certain conditions, which are set out in more detail in the decision, but included:
 - Mr. Mack must meet all upcoming court appearances and ensure his outstanding court matters are properly dealt with;
 - Mr. Mack shall attend a further [REDACTED] course and provide evidence to AMVIC that he has successfully completed the course. Mr. Mack needs to complete a course within three months of being registered

- with AMVIC. Satisfactory evidence of course completion must be provided to AMVIC within the three month period;
- Mr. Mack needs to have a conversation with his future employer regarding his past criminal convictions as well as his road rage allegations. AMVIC will require a letter directly from his employer indicating that they have had that discussion and are prepared to employ Mr. Mack and will be cognizant of any [REDACTED] complaints directed towards him. Should Mr. Mack change employers during his conditional registration he must also obtain a similar letter from his new employer and provide it to AMVIC;
 - Mr. Mack will keep the peace and remain in full compliance with all laws and regulations relating to the motor vehicle industry including the Fair Trading Act and the Criminal Code. New charges of any kind will place the conditional salesperson registration in jeopardy;
 - The salesperson registration will remain conditional until such time as Mr. Mack makes an application to the Director to withdraw the conditional status.
- Mr. Mack agreed to the conditions on July 24, 2016 by signing a copy of the Director's decision on that date;
 - On August 8, 2016 AMVIC received a letter from Mr. Mack's employer as required;
 - In mid-September Mr. Mack changed his place of employment;
 - On November 15, 2016 the Director wrote to Mr. Mack reminding him of the conditions and emphasizing that those conditions included providing AMVIC with evidence of completion of an [REDACTED] course within 3 months and in the event that he changed employment providing AMVIC with a letter from his new employer. The Director asked Mr. Mack to provide the necessary documentation on or before November 23, 2016.
 - On November 22, 2016 Mr. Wachowich advised AMVIC that Mr. Mack had a change in employment and had requested a confirmation letter from his new employer. Mr. Wachowich also advised that his client was registered to attend an [REDACTED] course, although the course did not begin until December 2, 2016. Mr. Wachowich requested an extension of the November 23, 2016 deadline;
 - On November 23, 2016 Mr. Mack forwarded a letter from his employer indicating that the employer had been advised of Mr. Mack's criminal record, that they were happy to have him as a permanent Sales Consultant and that Mr. Mack had attended to his court matters and had all of them handled promptly. Mr. Mack also advised that he was waiting on a confirmation call for his [REDACTED] course and that "all court matters have been dealt with accordingly";
 - On November 24, 2016 the Director advised Mr. Wachowich that prior to granting the extension he required further information regarding the [REDACTED] course;
 - On November 25, 2017 Mr. Mack provided AMVIC with confirmation of on-line registration in an [REDACTED] course to be held on January 27 and 28, 2017;

- On November 26, 2017 the Director wrote to Mr. Wachowich expressing concern about the fact the [REDACTED] course commenced in January. The Director indicated that AMVIC had been led to believe in November that Mr. Mack was already enrolled in the program, but that it now appeared he had enrolled as a result of the follow-up from AMVIC. The Director requested proof of earlier registration;
- On December 2, 2016 the Director asked Mr. Wachowich that the requested documentation be provided by December 5, 2016;
- On December 21, 2016 the Director issued a decision cancelling Mr. Mack's conditional salesperson registration under section 127(c) on the basis that this it was in the public interest to do so.

Counsel for AMVIC also called oral evidence from Stephanie P [REDACTED] AMVIC's Manager of Licensing and Consumer Services. Ms. P [REDACTED] explained to the Panel the process followed by licensing in relation to an application for salesperson registration and some of the due diligence done by AMVIC in relation to those applications. Ms. P [REDACTED] also testified that she had made some more recent inquiries about Mr. Mack including a search of the Canadian Police Information Centre ("CPIC") search, a search of the Justice Online Information Network ("JOIN") and a Google search.

In relation to the JOIN search, Ms. P [REDACTED] noted some entries in October of 2016 which appeared to relate to payment of a fine. She indicated that the CPIC search suggested that some charges had been dealt with at that time. She also noted an entry in the JOIN search on April 27, 2017 with the reference "WBF", which she advised meant "Warrant Brought Forward", and reference to CDS 5(2) which she indicated referenced a drug-related charge. Ms. P [REDACTED] indicated that it appeared from the search that there may have been outstanding court matters in April of 2017, and that those matters might continue to be outstanding, which caused her concern given the conditions on Mr. Mack's registration. Counsel for AMVIC also pointed to reference in the search to what appeared to be an outstanding fine and that a collection letter had been sent.

Mr. Wachowich objected to this evidence. It was his position that the JOIN search was hearsay evidence. He also said that the network was notoriously unreliable and the dates shown on the search simply reflect the dates that information is entered, not the dates that the event referenced actually occurred. Counsel for AMVIC did not take issue to this submission, but indicated that this JOIN search was information that raised some concerns from AMVIC's perspective and it would be open to Mr. Mack to provide an explanation or clarification. In terms of whether or not the search is hearsay, the Panel notes that the Appeal Policy states that it is not bound by the Rules of Evidence. The Panel wished to be able to review the JOIN search, and the search was entered as Exhibit 2.

Ms. P [REDACTED] also gave evidence regarding a document contained at Tab 11 of Exhibit 1. She testified that she had searched on Google for Mr. Mack on April 28 and that she had printed off this document which she found during her search. She said the website was associated with the employer who had provided the confirmation letter in November of 2016 and had a video of Mr. Mack and two other individuals doing a "walk-around" on the dealer's lot. The document indicated that the walk-around was by the sales team on January 10, 2017, a date after Mr. Mack's registration was cancelled.

Mr. Wachowich objected to this evidence on the basis that it was hearsay and that AMVIC had not called anyone from the dealership to establish that the video had been filmed on January 10, 2017. He said that the video might have been filmed earlier in the year and simply posted in January.

- Mr. Wachowich advised that he would not be asking Mr. Mack to provide evidence at the appeal hearing. He did not indicate why. He made submissions providing the following explanations for the matters that had been raised by counsel for AMVIC in his submissions: the October court appearance related to matters that had been before the Director at the Administrative Review in July of 2016 and Mr. Mack had been addressing those matters as required by the Director. At that time Mr. Mack had agreed to pay certain fines. Mr. Wachowich indicated that it was common for individuals to be given time to pay and that the fines would not be considered outstanding until that time to pay had passed. He also indicated that further extensions of that time could be granted. He indicated that the JOIN entries in February simply related to the October fines. He did not confirm whether or not those fines had been paid.
- The April court appearance related to a warrant that had been issued against Mr. Mack arising out of some events in 2015. He said that the warrant had been issued because of a potential connection between Mr. Mack and a vehicle associated with some drug related charges against other individuals. He said that he was acting for Mr. Mack in relation to these matters, that he had appeared on Mr. Mack's behalf and that there was a further appearance scheduled for May 5 in order to set dates for a preliminary inquiry. He said that in his opinion Mr. Mack had valid defences to the charges involved. He also said that the warrant had been issued after the Notice of Appeal filed on January 13, 2017 which contained the statement that submitted that Mr. Mack "has taken responsibility for his outstanding court matters and that there is (sic) not warrants or any outstanding matters involving Mr. Mack in the court system." In response to a question from the Panel, Mr. Mack confirmed he had been unaware of the warrant until February of 2017.
- In terms of the [REDACTED] course, Mr. Wachowich said that Mr. Mack had tried to register for the December course, but that it had filled up before he could pay. Mr. Wachowich indicated that this was the explanation that had previously been provided to AMVIC in the Notice of Appeal dated January 13, 2017. Mr. Wachowich said that in his experience there was a high demand for these classes because of requirements imposed by the courts in family law matters and that it was often difficult to obtain registration in these sorts of classes. He indicated that this was not something that was within Mr. Mack's control. Mr. Mack told the Panel that he had a problem coming up with the funds to take the course and his mother had ultimately paid for registration in the course he took in January of 2017.

Counsel for AMVIC took issue with these explanations being offered by way of submissions from counsel since she was not in a position to question counsel about the explanations. She also took issue with Mr. Mack making statements to the Panel when his counsel was taking the position he was not being called as a witness and so she was unable to question him on the statements that he made that are referenced above. The Panel confirmed with Mr. Wachowich that he was not offering Mr. Mack as a witness and has taken that fact into account in reaching its decision.

Appeal Panel Decision

It is the decision of this Appeal Panel to uphold the decision of the Director to cancel the conditional salesperson registration of Mr. Mack. The Panel agrees with the conclusion reached by the Director that it was in the public interest to do so.

The main reason for the Panel's decision is the clear evidence that Mr. Mack did not comply with at least one of the conditions imposed upon him by the Director on July 22, 2016. Mr. Mack did not complete the [REDACTED] course and provide evidence of that completion within three months. It was suggested by counsel for Mr. Mack that this condition was outside of the control of Mr. Mack. However, there was no evidence before the Panel as to what efforts Mr. Mack had made to try to register in a course prior to the three month deadline. The only information on behalf of Mr. Mack was through the submissions of his counsel that Mr. Mack had tried to register at some point in time and thought he had a spot in a course, but did not pay in time. The Panel accepts that as a lawyer Mr. Wachowich is an officer of the Court, and acknowledges his statement that he takes this obligation seriously, but submissions of counsel are not evidence, and counsel for AMVIC did not have an opportunity to test this information through cross-examination.

The Panel is particularly concerned about non-compliance with this condition because of the clear indication that the Director had given to Mr. Mack in July that he had serious concerns about Mr. Mack's criminal record and the various road rage allegations, but that the Director was prepared to give Mr. Mack an opportunity to demonstrate that he was serious about cleaning up his past and being responsible for his commitments. The requirement to take an [REDACTED] course and provide confirmation to AMVIC was not an onerous requirement. At a minimum, if Mr. Mack was having difficulty finding availability in an [REDACTED] course, or lacked the funds to attend one, the Panel would have expected him to make some sort of effort to advise AMVIC of the difficulties he was having and to request an extension. The only evidence before the Panel was that having heard nothing from Mr. Mack, it was AMVIC who followed up with him after the deadline was missed. Because Mr. Mack did not give evidence, it remains unclear to the Panel whether Mr. Mack even attempted to register for a course prior to being contacted by AMVIC on November 15, 2016.

The Panel is also of the view that on the evidence before it, Mr. Mack did not show diligence in complying with the condition requiring him to provide a letter from his employer if he changed employment. The evidence was that Mr. Mack changed employment in mid-September, but did not provide a letter to AMVIC until November 23, 2016. It seems reasonable to conclude from the documents that Mr. Mack only obtained and provided this letter once AMVIC specifically brought the matter to his attention on November 15, 2016. Again, the Panel considers this significant because it demonstrates either that Mr. Mack is not capable of complying with fairly straightforward requirements, or that he is not prepared to do so.

Given the history of this matter, the concerns voiced by the Director in the July 22, 2016 decision and the clear notice that was given to Mr. Mack at the time of that decision of his need to comply with the Director's conditions, the Panel considers these two examples of non-compliance and incomplete compliance as sufficient grounds to uphold the Director's decision.

However, the Panel also concludes that there are other reasons that were raised by AMVIC that would support this result.

First of all, it was not clear to the Panel from the evidence that Mr. Mack had dealt with matters before the Court by paying his fines in a timely fashion and Mr. Mack chose not to clarify this issue.

Secondly, the document arising from the Google search put into evidence by Ms. P [REDACTED] also suggested that Mr. Mack may have been involved in sales activities after the cancellation of his registration. The document references a lot walk-around on January 10, 2017 and contains an invitation from Mr. Mack to consumers to call him regarding a specific vehicle. While the Panel acknowledges that the video might have been shot on another date and that Mr. Mack might not have been involved in posting the ad to the website, Mr. Mack chose not to provide an explanation.

The Panel accepts the position of counsel for AMVIC that it is entitled to draw an inference from the lack of evidence from Mr. Mack that his evidence would not have been helpful to his position on either of these matters. The evidence from AMVIC in relation to these matters causes the Panel some concern as to Mr. Mack's ability or willingness to conduct himself in the manner required by the *Fair Trading Act* and the associated regulations and in the Panel's view demonstrates a lack of respect for AMVIC as the regulator of the automotive industry.

In reaching its decision the Panel took into consideration Mr. Wachowich's submissions about the significant impact this decision will have on Mr. Mack and the personal difficulties that Mr. Mack has faced as a result of a serious injury in a previous line of employment. The Panel is not unsympathetic to these arguments. However, these matters were clearly taken into account by the Director when he granted Mr. Mack a conditional registration and the opportunity to demonstrate that he would act reasonably and responsibly. He did not do so. AMVIC has been delegated the responsibility to protect the public interest with respect to the issuance and review of salesperson registrations and it must exercise that responsibility carefully with a view to consumer protection, particularly given the nature and extent of the interactions between salespersons and members of the public.

"original signed by"

Peter Lokstadt
Chair – AMVIC Salesperson Appeal Committee

MAY 09 2017.
Date