

In The Matter of the Consumer Protection Act, RSA 2000, c. C-26.3

And In The Matter of an Appeal from the Decision of the Director of Fair Trading (as Delegated) made February 1, 2018 to Impose an Administrative Penalty Pursuant to s.158.1(1) of the Consumer Protection Act

Between:

1st Place Auto Ltd.

Appellant

-and-

Alberta Motor Vehicle Industry Council
("AMVIC")

Respondent

DECISION

Appeal Board: John Welbourn

Hearing: 3rd Floor Boardroom, 7015 Macleod Trail SW, Calgary, Alberta, on October 18, 2018.

Appearing for the Appellant:

Marzouk Souraya

Counsel for the Respondent:

Paula D. Hale, Esq.

Witness for the Appellant:

Marzouk Souraya

Witness for the Respondent:

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Preliminary Matters:

1. A preliminary meeting to discuss procedural matters was held with the parties by conference call on July 18, 2018. The date, time and place of the appeal hearing, and disclosure of AMVIC records were scheduled and agreed. The parties were advised that the evidence of all witnesses would be given under oath and not formally recorded, and that the appeal would be a *de novo* hearing.
2. On commencing the hearing, the parties confirmed that:
 - a. The hearing room was satisfactory;
 - b. The Appeal Board had jurisdiction to hear the appeal and issue a decision in writing which would be final and binding on the parties;
 - c. The appeal hearing would not be formally recorded;
 - d. The evidence of each witness would be given under oath or affirmation.

Issue:

3. The Appellant appeals the February 1, 2018 decision of the Director of Fair Trading (as Delegated) to impose an administrative penalty of \$2,500.00. This followed an AMVIC investigation of a consumer's complaint that the Appellant did not refund a deposit paid by the consumer toward the purchase of a 2008 Land Rover Range Rover.
4. The Appellant contends that the consumer's deposit was non-refundable.

Exhibits:

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

<u>Exhibit #</u>	<u>Document</u>
1	AMVIC Application Report - Investigations - October 18, 2017
2	Kijiji advertisement
3	Bill of Sale dated September 6, 2017 and email from "1stplace Auto" dated September 12, 2017
4	Car Proof report dated October 17, 2017
5	Vehicle registration search dated October 6, 2017
6	Corporate Registration System corporation search dated October 6, 2018
7	AMVIC license search dated October 18, 2017
8	AMVIC letter dated September 27, 2017.

Facts & Evidence:

6. Marzouk Souraya ("Mr. Souraya") is the sole shareholder and director of the Appellant which holds an AMVIC automotive business license.
7. In September, 2017, the Appellant posted an advertisement on Kijiji for the sale of a 2008 Land Rover Range Rover Sport (the "Vehicle") for \$15,995.00. The ad stated the Vehicle had been driven 117,000 km.
8. In response to the ad, a consumer contacted the Mr. Souraya. They negotiated a reduced price of \$14,200.00 for the Vehicle. In their discussions, Mr. Souraya testified that he advised the consumer that the Vehicle's odometer was in miles not kilometers. Further, the Vehicle was designated as "Rebuilt". The consumer asked that the designation not be stated on the sale document because he intended to export the Vehicle from Canada and the "Rebuilt" status would affect taxes or import

duties payable in the foreign jurisdiction.

9. Mr. Souraya emailed a bill of sale for the Vehicle (the "Bill of Sale") to the consumer. The consumer sent the Appellant a deposit of \$1,000.00 (the "Deposit") to hold the Vehicle.
10. AMVIC's evidence is that the consumer first sent the Deposit and the Appellant then sent the Bill of Sale. Mr. Souraya's evidence is that he emailed the Bill of Sale to the consumer before the Deposit was sent.
11. The Bill of Sale is dated September 6, 2017 and was signed by Mr. Souraya before it was emailed to the consumer. It states the mileage on the Vehicle is 118,000 miles (not kilometers) and the Deposit is non-refundable. The consumer did not sign and return the Bill of Sale to the Appellant.
12. AMVIC's evidence is that on September 12, 2017, the Appellant provided a Car Proof report to the consumer which disclosed that the Vehicle had been imported from the USA in 2009. Further, the Vehicle had been designated as "Salvage" in March, 2017, and then as "Salvage Rebuilt" and reregistered in June, 2017.
13. On September 13, 2017, the consumer asked for his Deposit to be returned. Mr. Souraya advised the consumer that the deposit was non-refundable. AMVIC's evidence is that the consumer was told by Mr. Souraya that he would have to speak to his boss. The Deposit has not been refunded to the consumer.
14. Mr. Souraya does not dispute that the Appellant did not provide the consumer with a Mechanical Fitness Assessment ("MFA"). His evidence is that he forgot to do so.
15. Mr. Souraya acknowledged that despite the AMVIC investigator's requests, the Appellant has not provided AMVIC with any documentation regarding the matter. He stated that his personal health issues prevented him from complying with the investigator's requests.

Argument:

16. AMVIC submits that the Appellant contravened ss. 13 and 15(1) of the Vehicle Inspection Regulation (the "VIR"), and s.132(2) of the Consumer Protection Act (the "Act").
17. The Appellant argues that before it was sent, the consumer knew the Deposit was non-refundable and therefore is not entitled to any refund. Further, the Kijiji motor vehicle ad format only allows mileage to be stated in kilometers not miles. Finally, Mr. Souraya advised the consumer of the Vehicle's "Rebuilt" designation in their first conversation.

Findings:

18. The consumer did not testify. AMVIC's evidence of the consumer's communications with Mr. Souraya is therefore hearsay. In this forum hearsay evidence is not inadmissible, however the consumer's direct testimony would have been preferred.
19. Notwithstanding, Mr. Souraya, the Appellant's sole shareholder and director, specifically acknowledged that:
 - a. He forgot to send the MFA for the Vehicle to the consumer but would have done so once the Bill of Sale was signed and returned; and
 - b. The Appellant did not provide any documents to AMVIC despite the investigator's requests to do so.
20. S.15(1) of the VIR expressly requires a dealer in used motor vehicles to give a buyer an MFA before entering into a contract to sell a motor vehicle. The Appellant failed to do so and thereby contravened the statutory obligation.
21. The Appellant would have also contravened the section if the MFA was not provided to the consumer until after the signed Bill of Sale was returned and deposit paid. The MFA must be provided to the consumer before entering into the contract.
22. S.13 of the VIR requires the person selling a salvage motor vehicle to provide the buyer with a subsisting salvage motor vehicle inspection certificate or a written statement that there is no such certificate. The section does not specify that the certificate or statement must be provided with the MFA or before entering into the contract. As there wasn't a contract for the sale of the Vehicle, the Appellant wasn't required to provide the certificate or statement.
23. S.9 of the ABR requires an automotive business operator to maintain all records and documents created or received while carrying on the licensed business for at least 3 years after the records were created or received. S.132(2) of the Act requires the licensee to make all such records available for inspection as specified by an inspector.
24. Mr. [REDACTED], the AMVIC investigator, made 3 requests of the Appellant to provide all records pertinent to the complaint. To the date of hearing of this appeal, the Appellant did not provide to AMVIC any record or document relating to the matter. Mr. Souraya stated that he had [REDACTED] for which he had been and was undergoing [REDACTED] and [REDACTED]. He did not provide any corroboration from any source of his medical condition.
25. The Appellant violated s.132(2) of the Act by failing to make available for inspection

all records pertinent to the consumer's complaint.

Decision:

26. AMVIC has proved the Appellant's contraventions of s.15(1) of the Vehicle Inspection Regulation and s.132(2) of the Consumer Protection Act.
27. The appeal is dismissed and the administrative penalty of \$2,500.00 affirmed. In confirming the amount of the penalty, consideration has been given to the amount of the unrefunded deposit, and the Appellant's apparent disregard for fundamental obligations of its automotive business license.
28. In closing submissions, AMVIC counsel argued for an increased administrative penalty of which no prior notice had been given to the Appellant. Therefore, the submission has not been considered further.

Conclusion:

29. I confirm that I do not have any conflict with either party, counsel or any witness in this matter.

Signed at Calgary, Alberta on November 23rd, 2018.

"original signed by"

John H. Welbourn