

IN THE MATTER OF AN APPEAL BY

GREGORY TYMIAK

OF THE DECISION BY

THE ALBERTA MOTOR VEHICLE INDUSTRY COUNCIL ("AMVIC")
DATED AUGUST 27, 2020 TO REFUSE THE REGISTRATION OF THE APPELLANT
AS AN AUTOMOTIVE SALESPERSON UNDER THE
CONSUMER PROTECTION ACT, RSA 2000, C-26.3 ("CPA")
AND THE *AUTOMOTIVE BUSINESS REGULATION*, REG. 192/99, AS AMENDED

REASONS FOR DECISION OF THE APPEAL COMMITTEE

Committee Chair: Erol Yersel
Members: Gerry Lorente
Mike Daubert

Appearances: Gregory Tymiak (self-represented)

Paula Hale (Shores Jardine LLP) counsel for AMVIC
Yoneke A [REDACTED], AMVIC manager of licensing

Mylène Tiessen (Peacock Linder Halt & Mack LLP) counsel to the Appeal
Committee

Appeal Heard: November 3, 2020 by video conference

BACKGROUND

On August 7, 2020, Mr. Tymiak applied for an AMVIC salesperson registration. At the time, he had a criminal record. He had criminal convictions from 2003 and 2005. The 2005 convictions were for [REDACTED]. He was [REDACTED] in January 2013 and between then and 2019 was [REDACTED] and subject to a supervision order which, among other things, prohibits him from [REDACTED] and to obey the law and keep the peace. Mr. Tymiak is subject to the supervision order until 2027. His criminal record shows that he has [REDACTED] from July and October 2019 for alleged breaches of the supervision order. When completing his salesperson registration application Mr. Tymiak answered "Yes" to the eligibility question with respect to whether he had any convictions/offences/charges pending. The details he provided, however, did not mention any [REDACTED].

By letter dated August 12, 2020, the Director of Fair Trading (as Delegated) (the "Director") advised Mr. Tymiak that: the information AMVIC had received when conducting their routine background check caused them concern, the Director was considering the status of his application

and whether or not it was in the public interest to issue a salesperson registration; and that he had scheduled an administrative review.

The administrative review was held August 26, 2020 and the following day, by letter dated August 27, 2020, the Director wrote to Mr. Tymiak and advised that it was his decision not to grant Mr. Tymiak's application for the following reasons:

1. It was not in the public interest to do so.
2. Mr. Tymiak failed to truthfully answer the eligibility question pertaining to his criminality by failing to disclose his [REDACTED] before the court and his failure to disclose his past licensing history of being refused a salesperson registration after failing to attend a scheduled administrative review.
3. Based on the nature of the [REDACTED] before the courts, Mr. Tymiak had not demonstrated that he is capable of meeting the code of conduct requirements or the integrity of a salesperson.

The Director was also of the view that granting a salesperson registration subject to conditions was not appropriate at that time as Mr. Tymiak had not demonstrated his governability and a sufficient length of time had not passed without Mr. Tymiak being charged with any criminal offences.

On September 30, 2020, Mr. Tymiak gave notice to AMVIC of his appeal of the Director's decision.

Pursuant to section 3 of the AMVIC Salesperson Appeal Committee Policy (the "AMVIC Appeal Policy") Mr. Tymiak was, at the November 3, 2020 appeal hearing, given the opportunity to make representations by way of argument and to introduce evidence.

THE APPEAL COMMITTEE

There were no objections raised with respect to the jurisdiction or composition of the Appeal Committee.

LEGISLATIVE AUTHORITY

The CPA governs the registration of salespeople in Alberta. The Director of Fair Trading has delegated its authority relative to the motor vehicle industry in Alberta to AMVIC, including motor vehicle salesperson registrations. Section 16 of the *Automotive Business Regulation* (the "ABR") requires that salespeople be registered before acting on behalf of a business operator. Anyone who wishes to be registered must submit an application to the Director. Section 127 of the CPA gives the Director authority to refuse to issue or renew a licence for any of the reasons enumerated in that section including, but not limited to, that it is the opinion of the Director that it is in the public interest to do so (s. 127(c)). While section 127 specifically refers to business licenses, section 18 of the ABR provides that section 127 (as well as sections 125 and 128 of the CPA) apply, with the necessary changes, to the registration of salespersons.

Section 22 of the ABR permits a person, whose application for registration has been refused, to appeal that decision in accordance with the process established by the Director. That process is set out in the AMVIC Appeal Policy.

EVIDENCE BEFORE THE APPEAL COMMITTEE

Evidence presented at the appeal hearing consisted of:

1. The following documents:

(a) Materials, prepared by AMVIC, including the following relevant to this appeal:

TAB 1 August 12, 2020 - Letter from the Director to Mr. Tymiak regarding notice of proposed administrative action **(pages 3 - 5)**

August 27, 2020 - Decision letter of the Director **(pages 6 - 13)**

September 30, 2020 – Notice of Appeal **(pages 19 - 20)**

September 30, 2020 – Email from Mr. Tymiak with enclosed reference letter **(page 21)**

October 1, 2020 - Letter from the Director to Mr. Tymiak acknowledging receipt of appeal **(page 22)**

TAB 2 October 2, 2020 - Letter from AMVIC to Mr. Tymiak confirming appeal date and particulars **(pages 23 – 24)**

October 2, 2020 - AMVIC letter to Appeal Committee Chair **(page 25)**

October 2, 2020 - AMVIC letters to Appeal Committee Members **(pages 26 – 27)**

TAB 3 August 11, 2020 - Application Report - Licensing **(pages 28 - 33)**

August 15, 2017 – Decision letter of the Director **(pages 34 – 36)**

(b) Document entitled “Criminal Record” (1 page) **[Exhibit 1]** [Note: July 22, 2020 date on this document incorrect and confirmed during the hearing to be July 22, 2019]

2. Unsworn testimony of:

(a) Yoneke A [REDACTED], AMVIC Manager of Licensing.

(b) Mr. Tymiak and questioning of Mr. Tymiak by counsel for AMVIC and by the Appeal Committee.

AMVIC - Opening Statement

AMVIC submits that there are few facts in dispute. AMVIC further submits that this appeal committee should uphold the Director's decision to refuse Mr. Tymiak a salesperson registration on the basis that he has not demonstrated his governability for a suitable period of time.

Summary of the Testimony of Yoneke A [REDACTED]

Ms. A [REDACTED] has been the manager of licensing for the past year. She has been employed by AMVIC since 2014, initially as the licensing supervisor.

Ms. A [REDACTED] described the salesperson registration process in general. The process is initiated through an online application. As part of the application process the applicant is asked a series of eligibility questions including with respect to any criminal convictions or outstanding charges. Once the application is completed and the applicable registration fee is paid, the application is submitted to the licensing department of AMVIC where background checks are undertaken. These background checks include a Canadian Police Information Centre search, a Justice Online Information Network search, an internet search of the applicant and searches of other regulatory bodies, including searches of automotive industry regulatory bodies in Ontario and British Columbia. If there is anything arising of concern from these searches, an administrative review is requested. Ms. A [REDACTED] confirmed that having a criminal record does not automatically result in an administrative review. Concerns may, however, arise depending on how the answers provided by the applicant compare to the information obtained through the searches conducted by AMVIC; and the severity, recentness and frequency of the criminal charges/convictions.

If there are concerns, they are raised with the manager of licensing and if the manager is also concerned, a report is prepared outlining the nature of the concerns and recommending that an administrative review be undertaken. That report is submitted to the Director. It is the Director, however, who determines the outcome of the registration application including whether an administrative review will be conducted.

With respect to Mr. Tymiak, Ms. A [REDACTED] was shown the application report-licensing (Tab 3) submitted to the Director. Although not prepared by Ms. A [REDACTED], she reviewed it before it was submitted to the Director. According to that report, Mr. Tymiak's August 7, 2020, application for a salesperson registration was not his first. He first applied in 2017. An administrative review was conducted with respect to that application. Mr. Tymiak did not attend the administrative review and did not provide notice to AMVIC that he would not be attending. The Director refused his application for registration. Ms. A [REDACTED] stated that Mr. Tymiak's failure to give notice that he would not be attending the review was disrespectful to the Director and to other applicants who could have had their administrative reviews conducted at that time. Ms. A [REDACTED], when prompted, agreed with counsel that there is an expectation that a person will respond to AMVIC.

At page 5 of the application report-licensing (Tab 3, page 32) as summary of the eligibility questions from the salesperson registration application completed by Mr. Tymiak was provided along with his responses. In the case of the eligibility question concerning criminal convictions and charges, Ms. A [REDACTED] noted that Mr. Tymiak was reasonably forthcoming with respect to his criminal convictions. However, when AMVIC completed its background checks, it was noted

that Mr. Tymiak has [REDACTED] which he did not mention in completing his registration application, but which had been clearly asked about. The concern was the lack of completeness of the application. In addition, the charges were serious, frequent and recent. AMVIC was concerned about issues of governability and that insufficient time had passed since the date of the last [REDACTED] charges.

A summary of Mr. Tymiak's criminal record was provided to Ms. A [REDACTED]. She noted the 2005 convictions for aggravated assault and possession of a weapon. She understands that Mr. Tymiak was [REDACTED] as a result of these convictions. She agreed with AMVIC's counsel that these were serious and although the convictions are dated she stated that Mr. Tymiak is currently subject to a supervision order with conditions as a result of these convictions and that breaches of these conditions are the basis for his [REDACTED]. It was confirmed that the charges arise from July and October 2019.

Ms. A [REDACTED] also noted that in the case of the eligibility question regarding past applications to AMVIC that while Mr. Tymiak stated that he made an application in roughly 2015, the application was made in 2017.

Ms. A [REDACTED] stated that AMVIC's primary concern with respect to Mr. Tymiak's criminal record is that he is seeking to enter a regulated industry that is subject to rules and expectations. There are concerns with respect to Mr. Tymiak's governability in the face of his criminal record. Will he be able to follow the rules and laws that govern the automotive industry as a registered salesperson? AMVIC's mandate is consumer protection. If Mr. Tymiak breaches any of the conditions of his supervision order [REDACTED]

Mr. Tymiak had no questions for Ms. A [REDACTED].

Summary of Opening Statement and Testimony of Gregory Tymiak

On obtaining confirmation that the appeal committee had read his written appeal submission, Mr. Tymiak made the following submissions.

Mr. Tymiak explained that in the face of his criminal past and his understanding of a very small likelihood of succeeding in appealing the Director's decision that he felt like giving up on the appeal process but decided to attend the hearing and explain his situation.

Mr. Tymiak acknowledged that he rushed to complete the August 2020 salesperson registration application. With respect to his previous AMVIC application he stated that he made that application in roughly 2015. In retrospect, he acknowledged that he should have contacted AMVIC to confirm the information. He did not intend to deceive AMVIC nor did he intend to be disrespectful in failing to advise AMVIC that he would not be attending the 2017 administrative review as part of that application. He explained that at the time he suffered from a [REDACTED] and was [REDACTED]. He did not have access to a telephone or email. [REDACTED]

Mr. Tymiak spoke about his criminal past. At 21 years old he [REDACTED]
[REDACTED]
[REDACTED]

Mr. Tymiak did point out that in his August 2020 application he identified a different motor vehicle dealership than the one he was employed by, explaining that the name of his employer was not an option available when he completed the application and so he used the name provided. Mr. Tymiak also explained that section of the eligibility questions does not ask about [REDACTED]. He did, however, state that another section of the form does ask about [REDACTED] and, in that case, he answered "no". He does not know why he did, he explained that he was probably just rushed when he completed the application.

His life has changed. At the time of the hearing Mr. Tymiak was taking Metis pipeline training in Oyen. He still has a good relationship with [REDACTED].

Counsel sought some clarity with respect to the 2013 to 2019 timeframe. Mr. Tymiak explained that he was [REDACTED]. He was on parole for two years. He breached the conditions of his parole by [REDACTED]. He [REDACTED]. He was again [REDACTED] on parole and was subsequently [REDACTED]. It was during that time that he made his first application to AMVIC before he [REDACTED]. He had been [REDACTED] before the 2019 breaches.

He is subject to a supervision order. The conditions of that order, including keeping the peace, require him to be a nearly perfect member of society. There is zero tolerance. He must be mindful of what he does in public.

On being questioned by the Appeal Committee Chair, Mr. Tymiak explained that [REDACTED] is aware of his criminal history. He has discussed it with them. They are very supportive of him, see automotive sales as his natural gift and want him to succeed.

With respect to the supervision order – that order is in place until 2027. He is on parole and subject to that order. One of the conditions of the order is that he cannot [REDACTED]. He will be 45 when the supervision order ends. It has forced him to change his life.

SUMMARY OF CLOSING SUBMISSIONS OF THE PARTIES

Closing Submissions on Behalf of AMVIC

AMVIC emphasized that this is not a punitive process, it is a regulatory one. The purchase of a motor vehicle is one of the largest a person will make. The automotive sales industry is highly regulated. Entry to that industry is not a right, it is a privilege. AMVIC has a gatekeeping function with respect to entry to that industry. AMVIC exercises its discretion in determining who will be granted registration. Integrity of the industry is of importance as is the governability of its members. AMVIC relies on the integrity of its registrants. The expectation is that its members will conduct themselves honestly and with integrity.

AMVIC's concerns with respect to Mr. Tymiak relate to governability. AMVIC submits that Mr. Tymiak's convictions, even without the most [REDACTED], would likely have resulted in an administrative review. There were concerns with respect to his salesperson registration. There has been an insufficient period of time for Mr. Tymiak to demonstrate that he is able to function in the world and follow the rules. If this appeal committee were to uphold the Director's decision to refuse Mr. Tymiak's registration, that decision does not mean that Mr. Tymiak is permanently banned from the industry. A further period of no breaches of his supervision order would assist Mr. Tymiak if he were to reapply for registration in the future, although no specifics with respect to length of time could be provided as the decision would be that of the Director.

Finally, AMVIC submits that if this Appeal Committee was to allow Mr. Tymiak's appeal and set aside the Director's decision and grant Mr. Tymiak his salesperson registration, it should impose certain conditions aimed to address AMVIC's concerns of governability. Those conditions should include:

- (a) Immediate reporting to AMVIC (i.e. within two weeks or less) of any new charges/breaches of his supervision order.
- (b) Disclosure to AMVIC of the outcome of his [REDACTED]
- (c) Written confirmation from Mr. Tymiak of full disclosure of his criminal record to his employer and written acknowledgment to AMVIC from the employer of same. This condition would apply to Mr. Tymiak's current employer and any subsequent employer.
- (d) A requirement that any renewal of his salesperson registration be completed within the required timeframe.

AMVIC has continued concerns regarding Mr. Tymiak's governability. Those concerns, however, are not intended to diminish either Mr. Tymiak's efforts to overcome certain obstacles he has faced or the work he has done to date. AMVIC acknowledges that Mr. Tymiak's [REDACTED] is a [REDACTED] issue faced by him. Mr. Tymiak's [REDACTED] are not a ground to refuse his registration. Any circumstance that make him ungovernable is a concern to AMVIC.

Gregory Tymiak's Closing Submissions

His [REDACTED]. He breached his condition [REDACTED]. Eventually this was sorted out. Less the breaches associated with [REDACTED], he has been governable for seven years. Over the last 90 days he has been employed with [REDACTED]. He is responsible for the lock box, working with customers, dropping off vehicles.

Were this committee to allow his appeal, Mr. Tymiak agrees with the granting a salesperson registration with the conditions proposed by AMVIC and submits that he would comply with them.

ISSUE TO BE DETERMINED ON THIS APPEAL

Pursuant to section 3.2 2.m) of the AMVIC Appeal Policy, this Appeal Committee must determine if the August 27, 2020 decision by the Director to refuse to grant a salesperson registration to Mr. Tymiak was consistent with the provisions of the CPA, the ABR, and the Bylaws and policies of AMVIC (collectively the "Governing Authorities").

DECISION

AMVIC regulates the automotive industry in Alberta. Its mandate is to, among other things, provide consumer protection in that industry through mandatory licensing of automotive businesses and salespeople in accordance with the CPA. The Director is given the discretion to refuse to issue a registration for the reasons set out in section 127 of the CPA.

In this case, the Director gave four reasons for refusing to grant Mr. Tymiak's application for a salesperson registration, including that it was not in the public interest to do so, pursuant to section 127(c) of the CPA. In addition, the Director found that Mr. Tymiak failed to truthfully answer eligibility questions regarding his past licensing history and his criminal history which amounted to a furnishing of false information or misrepresented facts or circumstances to the Director, which, pursuant to section 127(b)(iii) of the CPA, is a ground on which the Director may refuse registration. In the Director's opinion granting Mr. Tymiak a salesperson registration was not appropriate given the nature of his [REDACTED] arising from breaches of the supervision order.

Given Mr. Tymiak's explanation of the events surrounding his prior application for salesperson registration in 2017, we are of the view that Mr. Tymiak's response to the eligibility question regarding his past licensing history was not intended to be either false or misleading. At most, it was careless. However, Mr. Tymiak, by his own admission, failed to disclose the existence of his [REDACTED], let alone any details about them, in his application.

In addition to the [REDACTED] from July and October 2019, Mr. Tymiak's [REDACTED] also includes serious [REDACTED] and a longstanding supervision order, which we

understand was imposed by the court as a result of the Mr. Tymiak being declared a [REDACTED]. Given these circumstances a refusal to grant Mr. Tymiak a salesperson registration as being in the public interest is consistent with the provisions of the Governing Authorities and, in particular, s. 127(c) of the CPA. Having exercised his discretion in accordance with the CPA in denying Mr. Tymiak a salesperson registration, it is the unanimous decision of this Appeal Committee that the Director's August 27, 2020 decision was consistent with the Governing Authorities. Mr. Tymiak's appeal is denied.

Dated this 3 day of December 2020.

"original signed by"

 Erol Yersel

Chair – AMVIC Salesperson Appeal Committee