

IN THE MATTER OF AN APPEAL BY

RYAN MCKENZIE

PURSUANT TO SECTION 127(C) OF THE *CONSUMER PROTECTION ACT*,
BEING CHAPTER C-26.3 OF THE REVISED STATUTES OF ALBERTA, 2000

AND

IN THE MATTER OF THE DECISION BY
THE ALBERTA MOTOR VEHICLE INDUSTRY COUNCIL TO REFUSE THE REGISTRATION
OF THE APPELLANT AS AN AUTOMOTIVE SALESPERSON UNDER THE *CONSUMER
PROTECTION ACT* AND *AUTOMOTIVE BUSINESS REGULATION* ON NOVEMBER 25, 2020

REASONS FOR DECISION

Committee Chair: David Quest

Members: Kirby Soon
Sean Harms

Ally H. Ismail,
Legal Counsel (Emery Jamieson LLP) for the Appeal Committee

Appearances: Ryan McKenzie, Appellant

Yoneke A [REDACTED]
AMVIC Manager of Licensing for the Respondent

Paula Hale,
Legal Counsel (Shores Jardine LLP) for the Respondent

Appeal Heard: February 11, 2021
Via Videoconference

Introduction

1. This is an appeal before the AMVIC Salesperson Appeal Committee (the "Appeal Committee") pursuant to section 22 of the *Automotive Business Regulation*, AR 192/1999 (the "ABR") from a decision of the Director of Fair Trading (as delegated) (hereafter the "Registrar") to refuse the registration of Ryan McKenzie as a provincial automotive salesperson under sections 104 and 127 of the *Consumer Protection Act* (the "CPA").

Jurisdiction

1. The CPA and the ABR regulate, among other things, automotive business licences and salesperson registrations in Alberta.
2. Under section 104 of the CPA, no person may engage in a designated business unless that person holds a licence under the CPA that authorizes them to engage in that business. The automotive sales business is a designated business.
3. Pursuant to section 16 of the ABR, a salesperson of an automotive sales business operator must be registered for automotive sales before acting on behalf of the business operator.
4. The Registrar's jurisdiction with respect to automotive business licences and salesperson registrations is found at section 127 of the CPA:

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,
 - (i.1) fails to repay a fund created under section 137 in respect of amounts paid out in claims against the licensee,
 - (i.2) fails to pay a levy of assessment under section 136(8) or a levy of assessment for a fund created under section 137,
 - (ii) fails to comply with a direction of the Director under section 151(3),
 - (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.

5. "Conviction" is defined in section 125 of the *CPA*:

In this Part, "conviction" means a conviction for an offence under any criminal or other law in force in Alberta or elsewhere that, in the Director's opinion, indicates that the person convicted is unsuitable to be licensed under this Act.

6. Section 18 of the *ABR* states that sections 125, 127 and 128 of the *CPA* apply, with necessary changes, to the registration of salespersons.
7. Section 127 of the *CPA* applies to both automotive business licences and salesperson registrations.
8. Section 22(1) of the *ABR* 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) of the *ABR* 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 section 22(2) of the *ABR*, AMVIC has created the AMVIC Salesperson Appeal Committee Policy (the "Appeal Policy").
10. The Appeal Policy allows an applicant to appeal a decision of AMVIC by delivering a written Notice of Appeal to the Registrar of AMVIC not later than 30 days after the Registrar issues notice of the decision.

11. The role of the Appeal Committee is set out in section 3.2(2)(m) of the Appeal Policy:

The committee shall determine if the decision by the Registrar that is the subject of the appeal is consistent with the provisions of the *Consumer Protection Act*, the Automotive Business Regulation, and the Bylaws and policies of AMVIC.

Summary of Evidence

Background

12. Mr. McKenzie applied for reinstatement of his salesperson registration on November 4, 2020. When Mr. McKenzie's application was reviewed, AMVIC determined that Mr. McKenzie had been convicted of theft over \$5,000 and fraud over \$5,000 on June 22, 2020. As a result, his application was referred to the Registrar. The Registrar conducted an administrative review via teleconference on November 25, 2020 with Mr. McKenzie in attendance.
13. On November 25, 2020, the Registrar issued a decision refusing Mr. McKenzie's reinstatement application for an automotive salesperson registration (the "Decision"). The Decision was as follows:

It is my decision, as Director of Fair Trading (as delegated), to NOT grant the reinstatement application of Mr. Ryan McKENZIE for an automotive salesperson registration under Sections 127(b)(vii), 127(c) and 104 of the CPA based on the following reasons:

1. It is in the public interest under Section 127(c) of the CPA NOT to issue Mr. Ryan McKenzie a salesperson registration at this time.
2. Mr. McKenzie has three recent convictions for serious offences that directly relate to the automotive industry in which his employer was the victim. As a regulatory body, AMVIC must ensure the protection of consumers but also the protection of the industry itself. The public perception to allow an individual to operate in a regulated industry with convictions against his employer whilst in the automotive industry would be detrimental. Under Section 127(b)(vii) of the CPA the Director may refuse to issue a salesperson registration if an applicant is convicted of an offence or is serving a sentence imposed under a conviction.

[Legislation omitted]

3. The Director acknowledges the efforts and steps Mr. McKenzie has undertaken to rehabilitate himself and change his life; however he was only recently released from jail and the recentness, seriousness, and nature of Mr. McKenzie's convictions as it relates to the automotive industry causes the Director concern regarding the financial risk not only to the public but to the industry as a whole. It is the opinion of the Director that Mr. McKenzie has not demonstrated he is capable of meeting the code of conduct requirements and integrity as a salesperson at this time.

14. On December 1, 2020, Mr. McKenzie provided a Notice of Appeal to AMVIC on the following grounds:

I am appealing the refuse decision. Reasons for appeal are that I believe I have served my punishment and have taken full responsibility. I have taken and registered in many courses and [REDACTED] to prevent this from happening again. This is my livelihood and what provides for my family. I have an employer that is aware of what happened and is willing to work with me. I am also willing to take any extra courses or work to be a better all around salesperson in the car industry. I am also willing to do more [REDACTED] along with having conditions or restrictions to follow so I can start working again. My employer is willing to impose these conditions as well.

Evidence of AMVIC

15. At the outset of the appeal hearing, legal counsel for AMVIC reviewed the authority of the Appeal Committee and the relevant legislation as outlined above. Legal counsel for AMVIC also provided the following opening statement:

- The Appeal Committee's task is to determine if the Registrar's decision is reasonable. The facts in this appeal are not in dispute. Mr. McKenzie's recent convictions make him unsuitable for salesperson registration.

16. AMVIC called oral evidence from AMVIC's manager of licensing, Ms. Yoneke A [REDACTED]. Ms. A [REDACTED] provided the following evidence:

- She has been AMVIC's manager of licensing for 18 months. Previously, she was AMVIC's licensing supervisor.
- She described the process for salesperson registration applications. All applications are made online. Applicants are asked if they have ever been convicted or found guilty of a criminal offence, if they have outstanding matters before the court, or if they have any stays or absolute discharges.
- AMVIC's licensing department completes background checks, including a Canadian Police Information Centre ("CPIC") check, a Justice Online Information Network System ("JOINS") search, a background check with other automotive jurisdictions, and an open-source search on the applicant. If any concerns arise, the application is referred to the manager of licensing.
- If there are concerns with an applicant's criminal record, the manager of licensing completes an Application Report for the Registrar's review. The Registrar then schedules an administrative review with the applicant. No decision is made regarding the application until the Registrar has spoken to the applicant during the administrative review.
- Salesperson registrations must be renewed annually. Salespeople can apply for renewal within 90 days of their registration expiring. They must verify if any information has changed in the past 12 months, including their answers to eligibility questions regarding criminal convictions and charges. The answers provided to the eligibility questions can trigger further background checks or an administrative review.

- Mr. McKenzie was first registered with AMVIC in 2014. He has been in and out of the automotive industry for several years. His registration most recently expired on March 31, 2020. He applied for renewal on April 20, 2020. In his application for renewal, he indicated that he did not have any criminal convictions or outstanding charges before the courts. A tip from AMVIC's investigations department resulted in a background check being completed which revealed Mr. McKenzie had outstanding charges before the courts. As a result, an administrative review of Mr. McKenzie's renewal application occurred in May 2020. The Registrar refused Mr. McKenzie's application for renewal at that time.
- If a salesperson registration has been expired for more than 90 days, the applicant must apply for reinstatement. Any application made after a refusal by the Registrar is automatically forwarded for a further administrative review to determine if the applicant can be granted a salesperson registration at that time. Mr. McKenzie applied for reinstatement on November 4, 2020 and was scheduled for an administrative review on the basis that his recent convictions caused concerns for the financial safety of consumers and employers in the industry.
- Background checks revealed that Mr. McKenzie was convicted in June 2020 in relation to incidents that occurred between [REDACTED]. He was convicted of fraud over \$5,000 and theft over \$5,000. [REDACTED] These convictions occurred when Mr. McKenzie was working as a manager for automotive sales businesses. He sold vehicles to a wholesaler for a higher amount than he recorded on the paperwork and kept the difference in price. Mr. McKenzie served [REDACTED] which was approximately [REDACTED] and was [REDACTED]. He was also ordered to pay restitution of \$38,271, which has been paid.
- AMVIC has a consumer protection mandate. Theft and fraud within the automotive industry is especially concerning. AMVIC considers the recency, seriousness, and frequency of convictions when reviewing an applicant's criminal record. The Registrar may consider allowing a person back into the industry once time has passed and there is a history of rehabilitation.
- Mr. McKenzie was also convicted of failing to comply with a recognizance in January 2019. Several other [REDACTED]. This raises concerns about his governability within the industry. If an individual breaches conditions when their freedom is at risk, it raises concerns about their ability to comply with rules meant to protect consumers.

Evidence of the Appellant

17. Mr. McKenzie provided the following evidence:

- When he applied for renewal of his registration in April 2020, he misunderstood the eligibility question regarding criminal offences. He thought that he was only supposed to report criminal convictions, not outstanding charges.
- He does not deny his criminal record. He has shown that he understands the consequences of his actions and has been punished for it. He has paid the money back to the businesses.

- His failure to comply conviction in January 2019 resulted from [REDACTED] [REDACTED] He did not fully understand the restrictions. The conviction was not related to fraud or theft.
- He is doing everything he can to move in the right direction. He has registered for courses and [REDACTED] He told his employer about his convictions, as required by the court. His employer supports him and was present during the administrative review. His employer is willing to work with any conditions that are imposed on his salesperson registration.

18. In response to questions from legal counsel for AMVIC and the Appeal Committee, Mr. McKenzie provided the following evidence:

- He explained the transactions that led to the convictions for fraud and theft. A consumer would trade in a vehicle. The dealership would assign a specific value to the trade-in vehicle. When a wholesaler bid a higher amount for the vehicle he would manipulate the paperwork to record that the wholesaler paid less than they actually did and he would pocket the difference in price. The wholesaler paid in cash, which would allow him manipulate the paperwork and keep the extra money.
- The fraudulent transactions occurred between [REDACTED] and involved [REDACTED] The transactions occurred at two automotive sales businesses. He was charged in August 2017. His employment ended shortly after he was charged. He was completing these transactions up to the point he was caught.
- He took advantage of these opportunities because he was going through a tough time. His [REDACTED] and he subsequently took time off of work. [REDACTED] and was not earning the amount he was accustomed to making. He took advantage of an opportunity when it arose and it was the biggest mistake of his life.
- He was caught when he was [REDACTED] Another manager at the dealership needed a bid from the wholesaler. The amount offered by the wholesaler for the trade-in did not match the values Mr. McKenzie had been submitting in his paperwork in the past. As a result, the dealership looked into his sales and discovered the fraud.
- He paid restitution for the amounts stolen before he was sentenced by the court. The restitution was paid through his lawyer to the court. [REDACTED] half the restitution amount, which he has paid back.
- Before his registration expired at the end of March 2020, he was employed with an automotive business as a salesperson and plans to continue in that role. The staff and his boss support him. His boss attended the administrative review. He provided a letter to his current employer in 2017 with details of his criminal offences as required by the court. He is not currently working, but his employer is willing to employ him if his appeal is allowed.
- He is not currently on probation and is not under any court conditions.

Summary of Arguments

AMVIC's Closing Submissions

19. Counsel for AMVIC argued that the Registrar's Decision should be confirmed. Mr. McKenzie's criminal record is undisputed, and he has provided details of the transactions underlying his convictions. The fraud and theft convictions are serious, recent, and occurred in the automotive sales industry.
20. The Appeal Committee's task is to assess whether Mr. McKenzie's criminal record makes him unsuitable for salesperson registration. In addition to the fraud and theft convictions, Mr. McKenzie was convicted of failing to comply with a recognizance. This conviction is not serious, but it relates to Mr. McKenzie's ability to follow the rules of the industry. He was subject to conditions that, if breached, could result in a jail sentence. Nonetheless, he breached those conditions. His pattern of behaviour suggests that he may put his self-interest above following the rules of the industry.
21. Counsel for AMVIC stated that she did not wish to minimize the difficulties Mr. McKenzie experienced when these fraudulent transactions occurred. However, the way he coped with these difficulties makes him unsuitable for registration at this time.
22. Notwithstanding that Mr. McKenzie has been forthcoming about the convictions, the fraudulent transactions did not end voluntarily. They only stopped because he was caught, and the evidence demonstrates he would have continued with the fraudulent transactions if he had not been caught. He was required by the court to pay restitution.
23. The purpose of the *CPA* is to protect consumers during a significant transaction where they are vulnerable. The unfair practices in the *CPA* and the code of conduct in the *ABR* are examples of the legislature's attempt to legislate fair and ethical conduct in the automotive industry. They are signals about the expectations of entering and remaining in the industry. At this time, without a significant period where Mr. McKenzie has continued to demonstrate compliance with the law, he is not suitable for salesperson registration.

Appellant's Closing Submissions

24. Mr. McKenzie stated that he understood the concerns with his application. However, he has served his punishment and voluntarily paid restitution before he was sentenced. It is hard for him to explain in words the mistakes he made, but he is trying to make the right choices and move forward. He is trying to provide for [REDACTED] and is learning from what he did wrong. He has registered for a lot of [REDACTED] even though he is not required to by the court, because he wants to change his life.

Findings of the Appeal Committee

25. Upon hearing the evidence and arguments put forward by Mr. McKenzie and AMVIC, the Appeal Committee dismisses the appeal and upholds the Decision of the Registrar to refuse the application of Mr. McKenzie for an automotive salesperson registration under sections 104, 127(b)(vii), and 127(c) of the *Consumer Protection Act*.
26. Under section 3.2(2)(m) of the Appeal Policy, the task of the Appeal Committee is to determine if the Decision is consistent with the provisions of the *CPR*, the *ABR*, and the

Bylaws and policies of AMVIC. Based on Mr. McKenzie's criminal convictions related to transactions in the automotive industry, the Appeal Committee finds that the Decision is consistent with the provisions of the CPA, ABR, and the Bylaws and policies of AMVIC.

Reasons of the Appeal Committee

27. The facts before the Appeal Committee were not in dispute:
- Mr. McKenzie was granted a salesperson registration in 2014. His registration most recently expired on March 31, 2020. He applied for renewal of his registration in April 2020, but his application was denied as he was facing outstanding criminal charges.
 - In January 2019, Mr. McKenzie was convicted of failing to comply with a recognizance.
 - In June 2020, Mr. McKenzie was convicted of theft over \$5,000 and fraud over \$5,000 in relation to seven or eight fraudulent transactions that he completed while he was a manager at two automotive businesses. He served [REDACTED] and was [REDACTED]. He paid restitution of \$38,271, which was the amount stolen from his employers. [REDACTED]
28. The Registrar found that Mr. McKenzie's recent convictions for serious offences directly related to the automotive industry in which his employer was the victim. As a result, the Registrar found these convictions caused concern regarding the financial risk to the public and the industry as a whole if Mr. McKenzie was granted salesperson registration.
29. The Appeal Committee finds that Mr. McKenzie's convictions are serious, recent, and reasonably cause concern to AMVIC as a regulator. Therefore, these convictions were sufficient basis for the Registrar to refuse to issue a salesperson registration to Mr. McKenzie pursuant to sections 127(b)(vii) and 127(c) of the Act.
30. Section 127(b)(vii) of the CPA grants the Registrar authority to refuse to issue a licence where the applicant "is convicted of an offence referred to in section 125 or is serving a sentence imposed under a conviction."
31. Section 125 of the CPA defines a "conviction" as "a conviction for an offence under any criminal or other law in force in Alberta or elsewhere that, in the [Registrar's] opinion, indicates that the person convicted is unsuitable to be licensed under this Act."
32. The Registrar was also entitled to consider Mr. McKenzie's entire history in the automotive industry, including [REDACTED] in order to properly exercise his mandate to protect the public interest (*Ahmad v Alberta Motor Vehicle Industry Council*, 2010 ABQB 293 at paragraph 29).
33. Mr. McKenzie's convictions in 2020 are serious. These convictions are the direct result of fraudulent transactions he committed in the automotive industry and theft he perpetrated against two employers while he was in a position of trust. The Appeal Committee notes that these fraudulent transactions continued to occur until Mr. McKenzie was caught by his employer and reported to the police.
34. AMVIC has a responsibility to protect the public interest and to maintain the integrity of the automotive industry as a whole. Section 127(c) of the CPA makes it clear that the public

interest must be taken into account in the salesperson registration process. In the Appeal Committee's view, Mr. McKenzie's repeated acts of theft and fraud committed against an employer while registered as a salesperson are especially troubling. As a result, it was reasonable for the Registrar to find that Mr. McKenzie's convictions made him unsuitable to be licenced under the CPA.

35. The Appeal Committee notes that Mr. McKenzie appears to be committed to his rehabilitation. The Appeal Committee appreciates that Mr. McKenzie was forthright and honest during the appeal hearing regarding his past. However, his criminal record is related to fraudulent transactions committed against his employers in the automotive industry, and the convictions are recent. There is a need for public confidence in AMVIC as a regulator. This need could not be met if the Appeal Committee overlooked the seriousness and recency of Mr. McKenzie's convictions and their context in the automotive industry. Given this history and the nature of the automotive sales industry, the Appeal Committee is not persuaded, at this time, that conditions on Mr. McKenzie's registration could adequately protect the public. The Appeal Committee notes that Mr. McKenzie has the ability to apply for salesperson registration in the future.

Conclusion

36. The Appeal Committee finds that the Registrar's decision is consistent with the provisions of the *Consumer Protection Act*, the Automotive Business Regulation, and the Bylaws and policies of AMVIC.
37. Given the seriousness, recency, and context of Mr. McKenzie's criminal convictions, the Appeal Committee finds that the Registrar's Decision, that it is in the public interest not to grant Mr. McKenzie a salesperson registration at this time, is reasonable.

Issued and Dated:

"original signed by"

David Quest
Chair – AMVIC Salesperson Appeal Committee

March 23, 2021

Date