

April 12, 2023

Administrative Review – 23-02-017
Served via email

Administrative Penalty

ADVANTAGE FORD SALES LTD.
12800 MACLEOD TRAIL SE
CALGARY, AB
T2J 7E5

Attention: Gerald Wood

Dear Gerald Wood:

Re: Advantage Ford Sales Ltd. – Provincial Automotive Business Licence No. B208569

As the Director of Fair Trading (as delegated) (the “Director”), I am writing to you pursuant to Section 158.1(1) of the *Consumer Protection Act* (“CPA”) to provide you with written notice of the Administrative Penalty issued under that section.

Facts

The evidence before me in relation to this matter consists of the material contained in an Alberta Motor Vehicle Industry Council (“AMVIC”) industry standards department application report (the “Application Report”) prepared by an industry standards officer (“ISO”) and the manager of industry standards. A copy of the Application Report is attached as Schedule “A” to this letter. The Supplier provided written representations via email dated April 12, 2023 (attached as Schedule “B”), in response to the Proposed Administrative Penalty, which I have also taken into consideration.

Licensee Status

Advantage Ford Sales Ltd. (the “Supplier”) holds an automotive business licence and is licensed to carry on the designated business activities of new and used sales, leasing, wholesale sales, garage and service station in the Province of Alberta.

Direct communications with the Supplier and its representatives

1. On Jan. 18, 2016, a routine AMVIC industry standards inspection was completed at the business location of the Supplier. A Findings Letter outlining the inspection findings was completed and sent to the Supplier on Feb. 1, 2016. The Findings Letter outlined a number of concerns including but not limited to:

- a) Issues with the status of the registrations of the salespeople designated to act on behalf of the Supplier including one salesperson selling vehicles with an expired salesperson registration and one salesperson had an inactive salesperson registration contrary to the Automotive Business Regulation ("ABR").
 - b) Online advertisements (Kijiji) did not include the AMVIC logo or equivalent wording.
 - c) During the inspection, five deals were reviewed by the ISO and of those five deals, one did not reflect all-in pricing contrary to Section 11(2)(l) of the ABR.
 - d) Various issues with the completion of and/or disclosure of MFAs contrary to Sections 15(1) and 16 of the Vehicle Inspection Regulation ("VIR").
 - e) Issues relating to disclosure of vehicle history information to consumers contrary to Section 6(4)(h) of the ABR.
2. On March 30, 2017, a follow-up AMVIC industry standards inspection was completed on the Supplier. A Findings Letter outlining the inspection findings was completed and sent to the Supplier on April 10, 2017. The Findings Letter outlined a number of concerns including but not limited to:
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- a) Advertising issues contrary to requirements found in Sections 4 and 6 of the Cost of Credit Disclosure Regulation ("COC").
 - b) Advertisements did not include the vehicle's stock number contrary to Section 11(2)(m) of the ABR.
 - c) During the inspection, six deals were reviewed by the ISO and of those six deals, one did not reflect all-in pricing contrary to Section 11(2)(l) of the ABR.
 - d) Various issues with the completion of and/or disclosure of MFAs contrary to Section 15(1) of the VIR.
3. On Jan. 30, 2023, a follow-up AMVIC industry standards inspection was completed on the Supplier. This inspection focused specifically on the Supplier's advertising and compliance with all-in pricing legislation. The inspection conducted on Jan. 30, 2023 was therefore not comprehensive in nature and as such, not all documentation or business practices were reviewed in comparison to the two previous comprehensive inspections conducted in 2016 and 2017. A Findings Letter outlining the inspection findings was completed and sent to the Supplier on Jan. 30, 2023. The Findings Letter outlined the following concern:
- a) During the inspection, 18 deals were reviewed by the ISO and of those 18 deals, five did not reflect all-in pricing contrary to Section 11(2)(l) of the ABR.
4. Selling a vehicle over the advertised price was found in all three of the AMVIC inspections, based on the Findings Letters provided to the Supplier following each AMVIC industry standards inspection. In 2023, the Supplier was found to have sold approximately 28 per cent of the deals reviewed by the ISO over the advertised price. The Supplier is selling vehicles over the advertised price at the highest rate in the most recent AMVIC inspection conducted in 2023, despite being provided education during the previous inspections.
5. The Supplier provided written representations, dated April 12, 2023, in response to the Proposed Administrative Penalty (see Schedule "B"). In their written representations the

Supplier advised they have made immediate changes to ensure compliance with the legislation moving forward.

Applicable Legislation

Automotive Business Regulation

Advertising

Section 11

- (2) A business operator must ensure that every advertisement for an automotive business that promotes the use or purchase of goods or services
- (1) includes in the advertised price for any vehicle the total cost of the vehicle, including, but not limited to, all fees and charges such as the cost of accessories, optional equipment physically attached to the vehicle, transportation charges and any applicable taxes or administration fees, but not including GST or costs and charges associated with financing, and

Consumer Protection Act

Interpretation of documents

Section 4

- If a consumer and a supplier enter into a consumer transaction, or an individual enters into a contract with a licensee and the licensee agrees to supply something to the individual in the normal course of the licensee's business, and
- (a) all or any part of the transaction or contract is evidenced by a document provided by the supplier or licensee, and
 - (b) a provision of the document is ambiguous,
- the provision must be interpreted against the supplier or licensee, as the case may be.

Administrative Penalties

Notice of administrative penalty

Section 158.1

- (1) If the Director is of the opinion that a person
- (a) has contravened a provision of this Act or the regulations, or
 - (b) has failed to comply with a term or condition of a licence issued under this Act or the regulations,
- the Director may, by notice in writing given to the person, require the person to pay to the Crown an administrative penalty in the amount set out in the notice.
- (2) Where a contravention or a failure to comply continues for more than one day, the amount set out in the notice of administrative penalty under subsection (1) may include a daily amount for each day or part of a day on which the contravention or non-compliance occurs or continues.
- (3) The amount of an administrative penalty, including any daily amounts referred to in subsection (2), must not exceed \$100 000.
- (4) Subject to subsection (5), a notice of administrative penalty shall not be given more than 3 years after the day on which the contravention or non-compliance occurred.

(5) Where the contravention or non-compliance occurred in the course of a consumer transaction or an attempt to enter into a consumer transaction, a notice of administrative penalty may be given within 3 years after the day on which the consumer first knew or ought to have known of the contravention or non-compliance but not more than 8 years after the day on which the contravention or non-compliance occurred.

Right to make representations

Section 158.2

Before imposing an administrative penalty in an amount of \$500 or more, the Director shall

- (a) advise the person, in writing, of the Director's intent to impose the administrative penalty and the reasons for it, and
- (b) provide the person with an opportunity to make representations to the Director.

Vicarious liability

Section 166

For the purposes of this Act, an act or omission by an employee or agent of a person is deemed also to be an act or omission of the person if the act or omission occurred

- (a) in the course of the employee's employment with the person, or
- (b) in the course of the agent's exercising the powers or performing the duties on behalf of the person under their agency relationship.

Analysis – Did the Supplier fail to comply with the provisions of the ABR?

A routine AMVIC industry standards inspection was completed on Jan. 18, 2016. The inspection findings were discussed with the Supplier and a Findings Letter dated Feb. 1, 2016 was emailed to the Supplier. The 2016 inspection findings identified a number of breaches including the Supplier selling vehicles above the advertised price. A second AMVIC industry standards inspection was completed on March 30, 2017. A Findings Letter outlining the inspection findings was sent to the Supplier on April 10, 2017. The inspection completed in 2017 found a number of breaches consistent with the previous inspection completed in 2016, including the Supplier selling vehicles above the advertised price.

On Jan. 30, 2023 a follow-up AMVIC industry standards inspection was completed on the Supplier. This inspection focused solely on the Supplier's advertising and compliance with all-in pricing legislation. The inspection conducted on Jan. 30, 2023 was therefore not comprehensive in nature and as such, not all documentation or business practices will be reviewed in comparison to the two previous comprehensive inspections conducted in 2016 and 2017. A Findings Letter outlining the inspection findings was completed and sent to the Supplier on Jan. 30, 2023. The ISO identified that the Supplier has continued to sell vehicles over the advertised price contrary to Section 11(2)(l) of the ABR. Based on the facts outlined by in the Application Report and supporting documents (see Schedule "A"), I will be considering the alleged breaches from the 2023 AMVIC industry standards inspection.

A. Selling Above Advertised Price (11(2)(l) ABR)

During the Jan. 30, 2023 inspection, the ISO found five vehicles sold above the advertised price. Prices advertised need to include all fees the seller intends to charge. The only fee that can be added to the advertised price is the goods and services tax ("GST") and costs associated with financing as per Section 11(2)(l) of the ABR. Pre-installed products such as batteries and anti-theft must be included in the advertised price. Destination fees, documentation fees, finance contract costs, the AMVIC levy and tire recycling levy must be included in the advertised price. In these five consumer transactions the Supplier derived an economic benefit of **\$4,664.76** at the cost of the consumers.

- Stock No. N-1541A was sold over the advertised price by \$930.25;
- Stock No. N-1533A was sold over the advertised price by \$939.25;
- Stock No. N-1416A was sold over the advertised price by \$930.25;
- Stock No. T24583 was sold over the advertised price by \$914.76; and
- Stock No. P-082 was sold over the advertised price by \$950.25.

In the evidence before the Director regarding all five consumer transactions where the Supplier was found to have sold over the advertised price, \$175 was charged to the consumers for wheel locks and nitrogen above the advertised price of the vehicles. The ISO indicated that the Supplier advised the wheel locks and nitrogen are pre-installed but not included in the advertised price as the consumer can ask for them to be removed (see Schedule "A"; Exhibit 6). This is contrary to Section 11(2)(l) of the ABR which states that the advertised price must include optional equipment physically attached to the vehicle. In findings letters provided to the Supplier following the previous AMVIC inspections, they were provided a list of examples of items that cannot be added to the advertised price, including pre-installed products and services, this list of examples included "*Nitrogen/tire protection package*".

In reviewing the documentation relating to the sale of Stock No. N-1533A (see Schedule "A"; Exhibit 6) the purchase price was inflated by \$3,000 to the hide negative equity of the trade-in. Inflating the purchase price on the BOS to hide negative equity is not an accurate representation of the transaction. It is imperative that the Supplier creates and maintains accurate records. Creating and maintaining accurate records is the best way for the Supplier to ensure the consumer is fully aware of all the details and required information during their transaction and is also the best way for the Supplier to demonstrate they are complying with the legislative requirements.

The Findings Letter dated Jan. 30, 2023 states 14 used vehicle and four new vehicle sale files were reviewed. Of the 18 deal jackets reviewed by the ISO, five of the vehicles were sold over the advertised price contrary to Section 11(2)(l) of the ABR.

In 2022, the Supplier submitted the required sales levies to AMVIC showing that they sold 1,875 vehicles over the course of the year. Based on the small sample size of 18 retail sales deal jackets reviewed by the ISO and before me as evidence, the Supplier has derived an economic benefit by charging consumers over the advertised price. This is concerning as the Supplier has been provided the opportunity and education to rectify this business practice, however continues to engage in this practice and derive an economic benefit at the cost of consumers.

The Director further notes that the Supplier is charging consumers over the advertised price in 2023 at a higher rate than was found in the previous inspections completed in 2016 and 2017.

The Director finds that on a balance of probabilities, the Supplier has breached Section 11(2)(l) of the ABR.

B. Other Considerations

In addition to the individual education AMVIC provided the Supplier in the form of the Findings Letters provided after each AMVIC industry standards inspection, AMVIC has issued 18 industry bulletins and newsletters over the past two years explaining all-in pricing and advertising regulations, educating the automotive industry as a whole. As a licensed member of the automotive industry, the Supplier would have received the AMVIC industry bulletins and newsletters and in the opinion of the Director, is expected to have reviewed these education bulletins and newsletters to ensure their business practices are in compliance.

There exists an onus on the Supplier to do their due diligence and ensure they are complying with the legislation that governs the regulated industry they have chosen to be a member of. The Supreme Court of British Columbia in *Windmill Auto Sales & Detailing Ltd. v. Registrar of Motor Dealers, 2014 BCSC 903* addressed the issue of the onus and responsibility the Supplier has when operating within a regulated industry. The court at paragraph 59 stated:

“In my view, it is incumbent upon a party that operates within a regulated industry to develop at least a basic understanding of the regulatory regime, including its obligations under the regime, as well as the obligations, and the authority, of the regulator.”

The Supplier’s business practices discussed above leverages the Supplier’s knowledge and position, and does not foster a level playing field between the consumer and the Supplier, leading to financial harm to consumers. It further concerns the Director that the Supplier has continued to breach rather straightforward legislation, to the financial detriment of consumers, despite the education provided by AMVIC.

The aggravating factors in this matter include the resulting financial impact adversely affecting the consumers due to paying over the advertised price, in five transactions the Supplier derived an economic benefit of **\$4,664.76** and continued non-compliance with the rather straightforward requirements of the legislation despite education provided to the Supplier.

This Administrative Penalty is taking into account the number and seriousness of the contraventions of the legislation found during the fourth inspection; and the aggravating factors listed above.

The amount of the Administrative Penalty cannot be viewed as a cost of doing business but rather as a deterrent for continuing to engage in non-compliant business practices.

Action

In accordance with Section 158.1(a) of the CPA and based on the above facts, I am requiring that Advantage Ford Sales Ltd. pay an Administrative Penalty. This is based on my opinion Advantage Ford Sales Ltd. contravened Section 11(2)(l) of the ABR.

Taking into consideration all the representations made by the Supplier and the representations made by AMVIC's industry standards department, the amount of the Administrative Penalty is **\$8,000**.

The amount takes into consideration the factors outlined in Section 2 of the Administrative Penalties (*Consumer Protection Act*) Regulation, AR 135/2013 and the principles referenced in *R v Cotton Felts Ltd., (1982), 2 C.C.C (3d) 287 (Ont. C.A.)* as being applicable to fines levied under regulatory legislation related to public welfare including consumer protection legislation. In particular the Director took into account:

1. The financial harm on the person adversely affected by the contraventions or failure to comply;
2. The seriousness of the contraventions or failure to comply;
3. The economic benefit derived from the contraventions or failure to comply;
4. Administrative Penalties issued in similar circumstances;
5. The maximum penalty under Section 158.1(3) of the CPA of \$100,000; and
6. The deterrent effect of the penalty.

The amount of the Administrative Penalty is \$8,000.

Pursuant to Section 3 of the Administrative Penalties (*Consumer Protection Act*) Regulation, you are required to submit payment within **thirty (30) days** of the date of service of this notice. Failure to pay the Administrative Penalty will result in a review of the licence status. Payment may be made payable to the **"Government of Alberta" and sent to AMVIC** at:

Suite 303, 9945 – 50th Street
Edmonton, AB T6A 0L4.

If payment has not been received in this time period, the Notice may be filed in the Court of King's Bench and enforced as a judgement of that Court pursuant to Section 158.4 of the CPA and further disciplinary action will be considered.

Section 179 of the CPA allows a person who has been served a notice of Administrative Penalty to appeal the penalty. To appeal the penalty, the person must serve the Minister of Service Alberta and Red Tape Reduction

Minister of Service Alberta and Red Tape Reduction
103 Legislature Building
10800 - 97 Avenue NW
Edmonton, AB
Canada T5K 2B6

with a notice of appeal within **thirty (30) days** after receiving the notice of Administrative Penalty. The appeal notice must contain your name, your address for service, details of the decision being appealed and your reasons for appealing.

Pursuant to Section 180(4) of the CPA, service of a notice of appeal operates to stay the Administrative Penalty until the appeal board renders its decision on the appeal or the appeal is withdrawn.

Under Section 4 of the Administrative Penalties (*Consumer Protection Act*) Regulation, the fee for appealing an Administrative Penalty is the lesser of \$1,000 or half the amount of the penalty. As such, the fee for an appeal of this Administrative Penalty, should you choose to file one, would be \$1,000. Should you choose to appeal this Administrative Penalty, you must send the appeal fee to the Minister of Service Alberta and Red Tape Reduction at the above noted address, made payable to the "Government of Alberta".

Yours truly,

"original signed by"

Alberta Motor Vehicle Industry Council (AMVIC)
Gerald Gervais, Registrar
Director of Fair Trading (as Delegated)

GG/kl
Encl.

cc: Evelyn L-J., Manager of Industry Standards, AMVIC