

May 2, 2023

Administrative Review – 23-03-012
Served Personally

Administrative Penalty

SHERWOOD PARK AUTO SALES LTD.
o/a SHERWOOD KIA
20 BROADWAY BOULEVARD
SHERWOOD PARK, AB
T8C 2C1

Attention: Robert Harms

Dear Robert Harms:

**Re: Sherwood Park Auto Sales Ltd. operating as Sherwood Kia
– Provincial Automotive Business Licence No. B1009796**

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 5, 2023 (attached as Schedule “B”), in response to the Proposed Administrative Penalty, which I have also taken into consideration.

Licensee Status

Sherwood Park Auto Sales Ltd. o/a Sherwood Kia (the “Supplier”) holds an automotive business licence and is licensed to carry on the designated business activities of new and used sales, service station, garage, leasing, and wholesale sales in the Province of Alberta.

Direct communications with the Supplier and its representatives

1. On Jan. 29, 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.18, 2016. The Findings Letter outlined some concerns including but not limited to:

- a) One salesperson was selling vehicles on behalf of the Supplier without being a designated agent as required by the Automotive Business Regulation ("ABR").
- b) Issues with the completion of and/or disclosure of Mechanical Fitness Assessments ("MFAs") contrary to Section 15(1) of the Vehicle Inspection Regulation ("VIR").
- c) Discrepancies were identified in some consumer credit applications in which the consumer's salary being relayed to the financial institution was not accurate, contrary to Section 6 of the CPA.

The Supplier was not found to have breached Section 11(2)(l) of the ABR during this AMVIC industry standards inspection.

2. On June 16, 2017, a followup AMVIC industry standards inspection was completed on the Supplier. A Findings Letter outlining the inspection findings was completed and sent to the Supplier on July 12, 2017. The Findings Letter outlined some concerns including but not limited to:

- a) During the inspection, eight deals were reviewed by the ISO and of those eight deals, four did not reflect all-in pricing contrary to Section 11(2)(l) of the ABR.
- b) Issues with the completion of and/or disclosure of MFAs contrary to Section 15(1) of the VIR.

3. On Sept. 21, 2020, a followup AMVIC industry standards inspection was completed on the Supplier. A Findings Letter outlining the inspection findings was completed and sent to the Supplier on Oct. 1, 2020. The Findings Letter outlined some concerns including but not limited to:

- a) During the inspection, six deal jackets reviewed by the ISO did not reflect all-in pricing and were sold over the advertised price contrary to Section 11(2)(l) of the ABR.
- b) Advertising issues contrary to requirements found in Sections 11 and 12 of the ABR and Section 7 of the Cost of Credit Disclosure Regulation ("COC").
- c) One salesperson was selling vehicles on behalf of the Supplier without being a designated agent as required by the ABR.
- d) Issues with the completion of and/or disclosure of MFAs contrary to Section 15(1) of the VIR.
- e) A number of the bills of sale ("BOS") that were reviewed in the deal jackets had issues contrary to Section 31.2 of the ABR.
- f) Discrepancies were identified in some consumer credit applications in which the consumer's salary and rent being relayed to the financial institution was not accurate, contrary to Section 6 of the CPA.

4. On Feb. 2, 2023, a followup 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 Feb. 2, 2023 was therefore not comprehensive in nature and as such, not all documentation or business practices were reviewed. A Findings Letter outlining the inspection findings was completed and sent to the Supplier on Feb. 16, 2023. The Findings Letter outlined the following concern:

- a) During the inspection, 36 deals were reviewed by the ISO and of those 36 deals, 13 did not reflect all-in pricing contrary to Section 11(2)(l) of the ABR.
5. Selling vehicles over the advertised price was found in three of the four AMVIC inspections, based on the Findings Letters provided to the Supplier following each AMVIC industry standards inspection.
6. The Supplier provided written representations, dated April 5, 2023, in response to the Proposed Administrative Penalty (see Schedule "B"). In their written representations the Supplier was receptive and provided details of their new process put into place to ensure they are complying with Section 11(2)(l) of the ABR.

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
- (l) 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. 29, 2016. The inspection findings were discussed with the Supplier and the Findings Letter was emailed to the business on Feb. 18, 2016. Two subsequent AMVIC industry standards inspections were completed in 2017 and 2020. As a result of each inspection, a Findings Letter was completed and provided to the Supplier after each inspection providing education to the Supplier. In both of these inspections, the Findings Letters addressed a number of legislative breaches including the Supplier selling vehicles above the advertised price.

On Feb. 2, 2023 a followup 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 Feb. 2, 2023 was therefore not comprehensive in nature and as such, not all documentation or business practices were reviewed in comparison to the three previous comprehensive inspections conducted in 2016, 2017 and 2020. A Findings Letter outlining the inspection findings was

completed and sent to the Supplier on Feb. 16, 2023. The ISO identified that the Supplier sold 13 vehicles over the advertised price contrary to Section 11(2)(l) of the ABR. Based on the facts outlined 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 Feb. 2, 2023 inspection, the ISO reviewed 17 used and 19 new vehicle deal jackets. Of the 36 deal jackets reviewed by the ISO, 13 of the vehicles were sold over the advertised price contrary to Section 11(2)(l) of the ABR. 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, the AMVIC levy and tire recycling levy must be included in the advertised price. In these 13 consumer transactions the Supplier derived an economic benefit of **\$17,437.25** at the cost of the consumers:

- Stock No. PRX4706 was sold over the advertised price by \$1,021.50;
- Stock No. PRX4833 was sold over the advertised price by \$1,620.25;
- Stock No. PFR6295 was sold over the advertised price by \$1,620.25;
- Stock No. PFR6455 was sold over the advertised price by \$1,017.25;
- Stock No. PFR7654 was sold over the advertised price by \$1,025.50;
- Stock No. PSS5239 was sold over the advertised price by \$3,920.25;
- Stock No. PFR2536 was sold over the advertised price by \$1,945.50;
- Stock No. PSS8894 was sold over the advertised price by \$2,620.50;
- Stock No. PSP58431 was sold over the advertised price by \$505.25;
- Stock No. 16B9845 was sold over the advertised price by \$505.25;
- Stock No. 22E82841 was sold over the advertised price by \$505.25;
- Stock No. PSP40211 was sold over the advertised price by \$625.25;
- Stock No. 17R27971 was sold over the advertised price by \$505.25.

In 2022, the Supplier submitted sales levies to AMVIC that indicated they sold 705 vehicles over the course of the year. Based on the sample size of 36 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 more than ample 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.

During the inspection, the Supplier's employee confirmed with the ISO that the "*Winter Package*" is a mandatory package that must be purchased with all new vehicles. Any product or service that is mandatory with the purchase of the vehicle must be included in the advertised price.

The Director notes that stock numbers PRX4706, PFR7654, PSS5239, PFR2536, and PSS8894 were sold over the advertised price, however the amount they were sold over the advertised price were miscalculated in the Application Report (see Schedule "A"; Exhibit 5). The above noted amounts reflect the accurate amount the vehicles were sold over the advertised price based on the numbers currently before the Director.

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 industry bulletins and newsletters over the past two years explaining advertising regulations to educate 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 13 transactions the Supplier derived an economic benefit of **\$17,437.25** and continued non-compliance with the rather straightforward requirements of the legislation despite education provided to the Supplier. The Supplier's written representations in response to the Proposed Administrative Penalty (see Scheduled "B") provided details of the new process they have implemented to ensure they are compliant with Section 11(2)(l) of the ABR. The Director accepts their written representations and the implementation of their new process as a mitigating factor.

This Administrative Penalty is taking into account the number and seriousness of the contravention of the legislation found during the fourth inspection; and the aggravating and mitigating 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 Sherwood Park Auto Sales Ltd. o/a Sherwood Kia pay an Administrative Penalty. This is based on my opinion Sherwood Park Auto Sales Ltd. o/a Sherwood Kia pay 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 **\$20,000**.

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 \$20,000.

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