

IN THE MATTER OF AN APPEAL BY 1802580 ALBERTA LTD.
O/A CALGARY TRUCK & AUTOMOTIVE SALES PURSUANT TO SECTION 179(1) OF
THE *CONSUMER PROTECTION ACT* RSA 2000 c. C-26.3 (FORMER CITATION *FAIR
TRADING ACT* RSA 2000 c. F-2)

AND

IN THE MATTER OF THE DECISION BY THE ALBERTA MOTOR VEHICLE INDUSTRY
COUNCIL (“AMVIC”) TO ISSUE AN ADMINISTRATIVE PENALTY UNDER THE *CPA* ON
JANUARY 11, 2019

DECISION OF THE APPEAL BOARD

APPEAL BOARD: Louise Redmond (Chair), Bill Klasky, Kent Pallister

HEARING: Boardroom, Service Alberta, Centre 70, 7015 MacLeod Trail S.
Calgary, Alberta on November 18, 2019

COUNSEL:

Michael Swanson Q.C.: for the Appellant 1802580 Alberta Ltd. o/a Calgary
Truck & Automotive Sales

Paula Hale for the Respondent the Director of Fair Trading (as
delegated)

Preliminary Matters

1. A Notice of Hearing was issued to the parties on August 20, 2019, scheduling the Appeal Hearing for September 26, 2019. By agreement of the parties, the Appeal Hearing was subsequently adjourned to November 18 and 19, 2019 and an Amended Notice of Hearing was issued to the parties on October 15, 2019.
2. Two preliminary meetings to discuss procedural matters were held with the parties and the Appeal Board Chair by conference call on October 30, 2019 and on November 14, 2019 in order to discuss the possibility of an Agreed Statement of Facts and an Agreed Book of Exhibits. The parties were unable to come to an agreement on those matters.

3. At the start of the appeal hearing on November 182, 2019 the parties confirmed the following:
 - (a) The hearing room was satisfactory;
 - (b) The Appeal Board had jurisdiction to hear the Appeal;
 - (c) No issue was taken with the composition of the Appeal Board;
 - (d) The proceedings would not be recorded.
4. The Appeal Hearing was concluded in 1 day.
5. All witnesses were sworn.

Issues

6. The Appellant 1802580 Alberta Ltd. o/a Calgary Truck & Automotive Sales (“1802580”) by way of its principal Mr. Amil Gader appeals the January 11, 2019 decision of the Director of Fair Trading (as delegated to the Alberta Motor Vehicle Industry Counsel (“AMVIC”)) (the “Director”) to impose an administrative penalty against the Appellant in the amount of \$10,000.00 (the “Director’s Decision”).
7. At the Appeal Hearing the Director alleged that Amil Gader and 1802580, were engaged in activities that demonstrate that 1802850 was “washing” wholesale vehicle transactions for the purpose of facilitating unlicensed consumer sales by his brother (the “Washing Transactions”).
8. In addition, the Director alleges that 1802580 had been engaged in unlicensed activities. (the “Unlicensed Transactions”)
9. In its Notice of Appeal, 1802580 contended that the fine of \$10,000.00 was unnecessary and unfair, that AMVIC had failed to listen to his explanations, and was personally pursuing his company.

The Legislation

Consumer Protection Act RSA 2000, C. 26.3 (the “CPA”)

Section 104(1):

Licence Required – designated businesses

104(1) No person may engage in a designated business unless the person holds a licence under this Act that authorizes the person to engage in that business.

Section 158.1(1):

Notice of administrative penalty

158.1(1) If the Director is of the opinion that a person

(a) has contravened a provision of 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.

Automotive Business Regulation A/R 192/1999

Section 3(1):

New classes of licence

3(1) The following classes of automotive business licence are established:

(a) automotive sales licence;

...

(2) A person who holds an automotive sales licence is authorized to carry on a class or classes of the activity of buying or selling vehicles as specified by the Director, including, but not limited to, selling vehicles as

- (a) a retailer,
- (b) a wholesaler, or
- (c) an agent or broker,

but not including selling vehicles on consignment.

...

(7) A person who holds an automotive business licence is not authorized to carry on any class or classes of activities that are not specified on the licence.

Section 1:

Definitions

1(1) In this Regulation,

(e.1) “consumer” means

- (i) an individual who receives or has the right to receive goods or services for personal use from an automotive business as a result of a purchase, lease, gift, contest or other

arrangement, but does not include an individual who intends to sell the goods after receiving them, or

...

(1) “wholesaler” means an automotive business that buys vehicles from, sells or consigns vehicles to or exchanges vehicles with other automotive businesses exclusively, and includes an automotive business that buys vehicles from members of the public for sale to other automotive business but not to consumers.

Administrative Penalties (Consumer Protection Act) Regulation A/R 135/2013

Section 2:

Amount of administrative penalty

2(1) Subject to section 158.1(3) of the Act and this section, the amount of an administrative penalty for a contravention or failure to comply is the amount set in accordance with this section by the Director.

(2) In setting the amount of the administrative penalty for a contravention or failure to comply, the Director may consider the following factors:

- (a) the seriousness of the contravention or failure to comply;
- (b) the degree of willfulness or negligence in the contravention or failure to comply;
- (c) the impact on any person adversely affected by the contravention or failure to comply;
- (d) whether or not the person who receives the notice of administrative penalty has a history of non-compliance;
- (e) whether or not there were any mitigating factors relating to the contravention or failure to comply;
- (f) whether or not the person who receives the notice of administrative penalty has derived any economic benefit from the contravention or failure to comply;
- (g) any other factors that in the opinion of the Director, are relevant.

Exhibits Entered at Appeal Hearing

10. The following documents were entered as Exhibits at the Appeal Hearing. No objection was made to the admissibility of any of these Exhibits:

| <u>Exhibit #</u> | <u>Description</u> |
|------------------|--|
| 1 | <p>AMVIC Application Report – Investigations – October 2, 2018 with attachments:</p> <ul style="list-style-type: none">(1) Wholesale Business Licence issued by AMVIC to 1802580 issued on January 2, 2018 showing business address of 4507 Forman Crescent S.E., Calgary, Alberta.(2) July 10, 2017 Administrative Review Decision of the Director of Fair Trading to cancel the licence of 1802580 and the salesperson registration of Amil Gader.(3) November 27, 2017 Appeal Board decision in the matter of 1802580's appeal of both of the above licence cancellations.(4) Automotive Salesperson Licence/Registration Certificate issued by AMVIC to Amil Gader registered under 1802580 issued on January 3, 2018 showing registered business address of 4507 Forman Crescent S.E., Calgary, Alberta.(5) Corporate Registry Search of 1802580 showing Amil Gader as Director and Voting Shareholder with registered office as 4507 Forman Crescent, Calgary, Alberta.(6) April 16, 2018 email from Deputy Licence Inspector, Compliance Services, City of Calgary advising that one of the owners of 2444 Cottonwood Crescent S.E. was Amil Gader, and May 14, 2018 email from Enmax showing Amil Gader billing at 2444 Cottonwood Cres. S.E. since 05/08/2017. <ul style="list-style-type: none">(A) Transaction documents for 2008 Lincoln MKX(B) Transaction documents for 2011 Kia Sorento(C) Transaction documents for 2007 Honda Civic(D) Transaction documents for 2007 Subaru Tribeca(E) Transaction documents for 2012 Nissan Titan(F) Transaction Documents for 2008 Acura MDX(G) Transaction Documents for 2009 Nissan Murano(H) Transaction Documents for 2014 Nissan Altima(I) Transaction Documents for 2008 GMC Acadia(J) Transaction Documents for 2010 Audi Q5. |

- 2 September 5, 2014 Decision of the Director of Fair Trading cancelling the business licence of 1802580 and the salesperson registration for Amil Gader.
- 3 Letter from DA to Whom It May Concern.

Facts and Evidence

Background

11. Amil Gader is the sole owner of 1802580. He has been the sole owner for approximately 6 years. He resides at 2444 Cottonwood Crescent. He testified that he has resided there for 1.5 years.
12. 1802580 is the holder of an AMVIC business licence B2020767 issued on January 2, 2018 authorizing 1802580 to engage in a wholesale automotive business. The mailing and business address on this licence is 4507 Forman Crescent S.E.
13. Amil Gader is the holder of an AMVIC Automotive Salesperson licence issued on January 3, 2018, and registered under 1802580 with the mailing and registered business address on this licence being 4507 Forman Crescent S.E.
14. On July 10, 2017 the wholesale business licence of 1802580 and the salesperson licence of Amil Gader were cancelled by way of a July 10, 2017 decision of the Director. A 120 day suspension (meaning that the suspension ran from July 10, 2017 to November 7, 2017) was substituted for this cancellation by way of a November 27, 2017 Appeal Board decision.
15. Heather Ewasiuk is a peace officer and investigator with AMVIC (the "Investigator"). The Investigator was the sole witness for the Director. She investigates most of the curbing complaints made to AMVIC in Southern Alberta. Curbing was described by the Investigator as selling a vehicle that is not the seller's own personal vehicle without an AMVIC licence to do so.
16. The Investigator testified that two types of business licences are available for vehicle sellers. A wholesale licensee is permitted to sell, buy or consign vehicles with other automotive businesses. A wholesale licence also permits the licensee to purchase a vehicle from a consumer. However, in no circumstance is the holder of a wholesale licence permitted to sell a vehicle to a consumer. In order to sell to a consumer an AMVIC retail licence is required. That form of licence comes with its own set of compliance requirements.

The Washing Transactions - Evidence of the Director

17. On January 17, 2018 AMVIC opened investigation file 18-01-200 in response to an anonymous complaint received about unlicensed vehicle sales activities of Amil Gader's brother ("S") taking place at 2444 Cottonwood Crescent S.E. Calgary. The complaint was assigned to the Investigator.
18. The Investigator received confirmation on April 16, 2018 from the Deputy Chief Licence Inspector, Compliance Services, that one of the owners of 2444 Cottonwood Crescent S.E. was Amil Gader. A May 14, 2018 email from Enmax stated that Amil Gader had been billing at this address since 2017.
19. S was known to AMVIC and had been the subject of previous AMVIC investigations and sanctions. At all material times S did not hold an AMVIC licence permitting him to sell vehicles in any capacity.
20. The vehicle transactions in question were as follows:

2008 Lincoln MKX

21. The date consigned for this vehicle by 1802580 to an auction house was May 3, 2018. A Bill of Sale from the auction house shows the vehicle was then purchased from that auction house by S (address 4507 Forman Cres. SE) on May 9, 2018 for \$614.25.
22. On May 14, 2018 an ad for the 2008 Lincoln MKX was found on Kijiji with a sale price of \$7,500.00. The contact phone number was 587-575-5983. A Registry On-line Administrative Database query indicated that this was S's phone number.
23. Text communication was sent from that phone number in response to a second investigator's covert text inquiry about viewing the vehicle. The information relayed was that the vehicle could be viewed at 4507 Forman Crescent S.E. The second investigator attended at that address and met an individual who identified himself as S. Discussions occurred about the condition of the vehicle and the price. The second investigator took a photograph that confirmed that the VIN number of the 2008 Lincoln MKX for sale by S matched the 2008 Lincoln MKX that had been consigned by 1802850 to the auction house and subsequently purchased by S.

2011 Kia Sorento

24. This vehicle was purchased by 1802580 from a commercial car dealership for \$6,700.00 plus GST by way of a wholesale agreement dated February 27, 2018. The date consigned for this vehicle by 1802580 to an auction house was February 28, 2018. S purchased the Kia Sorento from the auction house

on March 21, 2018. A Bill of Sale dated May 28, 2018 lists S as the seller whose address was 2436 Cotton Wood Cres. S.E. Calgary with the vehicle being sold to an individual for \$7,800.00.

2007 Honda Civic

25. The date consigned for this vehicle by 1802580 to an auction house was February 14, 2018. A Bill of Sale from the auction house shows the vehicle was purchased from the auction house by S (address 4507 Forman Cres. SE) for a total price of \$3,465.00 on February 15, 2018. A Bill of Sale listing S as the seller with the address of 4507 Forman Cres. S.E., Calgary, Alberta shows the purchase of the vehicle by an individual for \$3,700.00.

2007 Subaru Tribeca

26. This vehicle was purchased by 1802850 from a commercial car dealership on January 26, 2018 for a total price of \$5,460.00. The date consigned for this vehicle by 1802850 to an auction house was January 29, 2018. The vehicle was purchased from the auction house by S on February 13, 2018. S had not resold this vehicle at the time of the conclusion of AMVIC investigation 18-01-200.

2012 Nissan Titan

27. This vehicle was purchased by 1802580 from a numbered company on January 3, 2018 for a total price of \$12,000.00. The date consigned for this vehicle by 1802580 to an auction house was January 11, 2018. The vehicle was purchased from the auction house by S on March 1, 2018. A registration search performed at the time of the Investigation showed that on March 2, 2018 S registered the vehicle in his personal name. There is no evidence of any further transaction.

Investigator's Conclusions

28. In reviewing the above during her investigation, the Investigator drew a negative inference that "washing" was occurring because she concluded that 1802580, being a holder of a wholesale licence which did not permit it to sell vehicles to the public, had consigned vehicles to the auction house likely knowing that S was going to purchase the vehicles for the purpose of selling the vehicles to consumers. The Investigator concluded that the sales portions of these transactions by S constituted "curbing" because the vehicles were sold by S without having an AMVIC licence permitting S to sell vehicles to consumers.
29. As evidence of the connection between Mr. Gader and his brother, the Inspector pointed out that the initial complaint that resulted in the opening

of the AMVIC investigation file on January 17, 2018 was a report of vehicle sales by S taking place at 2444 Cottonwood Cres. S.E., a residence co-owned by Mr. Gader. In addition, the Bill of Sale for the 2007 Honda Civic from the auction house to S and from S to the individual provides that the address for S was 4507 Forman Crescent S.E., Calgary, Alberta which was the registered business address for 1802580 and Amil Gader on the respective AMVIC Licences issued in January of 2018. As well, the 2008 Lincoln MKX was made available by S for viewing at the 4507 Forman Crescent S.E. address.

30. No evidence was provided by the Inspector as to any communication, plan or financial arrangement existing between Mr. Gader and his brother with respect to the Washing Transactions.
31. As a result of the information uncovered by the Investigator in AMVIC investigation 18-01-200, the Investigator issued an offence notice to S under s. 104 of the CPA. The charges were subsequently stayed because of administrative issues arising at Provincial Court. The Investigator's evidence was that she was not aware of whether the Crown would still proceed with these charges.

The Washing Transactions - Evidence of Amil Gader

32. Mr. Gader testified that he had nothing to do with any of the vehicle purchases made by his brother and that he does not control what his brother does. He explained that his brother goes from job to job and that in the past he has tried to help him out.
33. Mr. Gader's evidence was that anyone can purchase vehicles from the auction house and that he does not know who buys or sells vehicles there. He testified that the procedure followed by the auction house is that if there is an offer on a vehicle 1802580 has consigned he receives a phone call from the auction house asking him if he wants to accept the offer. The cheque 1802580 receives from the auction house does not provide the name of the person who purchased the vehicle.
34. Mr. Gader further testified that the vehicles 1802580 consigned to the auction house in question where S purchased the vehicles from were those Mr. Gader wanted to get rid of because they have issues such as high mileage. He says it would have made no economic sense for him to be participating in washing vehicles through this auction house because the consigner pays a fee, the buyer pays a fee and there is an auction fee as well. If he was washing vehicles he would have to pay all of these fees.
35. Mr. Gader also testified that the 2012 Nissan Titan is in fact a vehicle that his brother still owns.

The Unlicensed Transactions - Evidence of the Director

36. The following transactions were detailed by the Investigator in her evidence. All of these transactions occurred during the period of time that the wholesale licence of 1802580 had been cancelled (licence suspension later substituted):

2008 Acura MDX

37. This vehicle was purchased by 1802580 at an auction house on July 19, 2017. A 1802580 Wholesale Bill of Sale dated July 21, 2017 shows that this vehicle was then sold by 1802580 to DA.

2009 Nissan Murano

38. This vehicle was purchased by 1802580 from an auction house on August 30, 2017. A 1802580 Wholesale Bill of Sale dated September 4, 2017 shows that this vehicle was then sold by 1802580 to DA.

2014 Nissan Altima

39. This vehicle was purchased by 1802580 from an auction house on August 30, 2017. A 1802580 Wholesale Bill of Sale dated September 4, 2017 shows that this vehicle was then sold by 1802580 to DA.

2008 GMC Acadia

40. This vehicle was purchased by 1802580 from an auction house on August 30, 2017. A 1802580 Wholesale Bill of Sale dated September 4, 2017 shows that this vehicle was then sold by 1802580 to DA.

2010 Audi Q5

41. This vehicle was purchased by 1802580 from an auction house on September 13, 2017. A 1802580 Wholesale Bill of Sale dated September 18, 2017 shows that this vehicle was then sold by 1802580 to DA.

The Unlicensed Transactions - Evidence of Amil Gader

42. Mr. Gader provided an undated letter that was marked as Exhibit 3 from DA. Mr. Gader asked DA to write this letter (the "DA Letter"). The DA Letter explains that Calgary Truck & Auto (Amil Gader) gave DA permission to use and access 1802580's bidder online account to purchase vehicles for DA's retail store because DA did not have access to its own accounts. DA is said to have been unaware of the suspension of Mr. Gader's AMVIC licence. The DA Letter states that Mr. Gader did not take into consideration that DA was still

using 1802580's account during the period of the licence cancellation/suspension. The DA letter states that after the sale of the 5 vehicles to DA Mr. Gader immediately contacted DA to request that purchases by DA using 1802580's account cease, and that thereafter Mr. Gader helped DA create its own online bidder accounts.

43. The author of the DA letter did not appear as a witness at the Appeal Hearing to give any further evidence on these transactions.
44. Mr. Gader testified as to the procedure followed when DA had used 1802580's account. DA would buy vehicles using 1802580's account. DA would then pick the vehicles up and ask Mr. Gader for a Bill of Sale for DA's files. The auction house would have written a Bill of Sale to 1802580 because it was the company that purchased the vehicles from the auction house, so Mr. Gader had to write up a Bill of Sale in order to complete the transaction for DA's paperwork.
45. Mr. Gader's evidence was that it was a mistake to share his bidder account with DA. He testified that he had no other explanation and that his actions were not intended to be disrespectful. Mr. Gader's evidence was that DA was using 1802580's account even prior to the licence cancellation/suspension and that there was no foul intention involved in the continued use of the account during the period of licence cancellation/suspension. Mr. Gader says he did not think that DA would continue to purchase vehicles with 1802580's account and also testified that he did not really turn his mind to this.

Evidence and Case Law on Penalty

46. The Investigator testified that AMVIC maintains a model of progressive enforcement. She testified that although 1802580 had not been previously fined that there had been prior sanctions of licence cancellation and suspension and so she considered her recommendation regarding the amount of the administrative penalty to be progressive enforcement.
47. The Investigator testified that the director issued an administrative penalty of \$10,000.00 based only on the 5 Unlicensed Transactions. Her recommendation to the Director had been \$2,500.00 for each of the 10 transactions contained in her Application Report, marked as Exhibit 1.
48. Under questioning directly by Mr. Gader the Investigator was asked about penalties in two other cases: the *Showtime Fabrication* case and the *Khalil* case. There was some confusion by the Appeal Board with respect to these cases as it had been understood at the time of the Appeal Hearing that the cases were involved administrative penalties imposed by the Director.

49. At the request of the Appeal Board after the hearing had concluded, counsel for the Director provided the Appeal Board with a transcript of *R. v. Showtime Fabrication Inc.* In that case there were 2 provincial offices under the CTA to which guilty pleas were entered: (1) conducting business during a period of business licence suspension; and (2) failing to supply a food truck or to refund the \$39,350.00 deposit given by the consumer. The AMVIC investigation had revealed that there was a history of consumers placing large deposits and having difficulty receiving the goods and services. The transcript of the decision indicates that other breaches were uncovered during the AMVIC investigation involving failing to employ licensed sales people and failing to maintain proper documentation. Sentencing submissions included that Showtime's director had a drug addiction that had likely resulted in the failure of the business and that he had lost everything. The Court ordered restitution of \$39,350.00 plus a fine of \$2,500.00 for Count 1 and a fine of \$1,000.00 for Count 2.
50. In terms of the *Khalil* case, Mr. Gader put to the Inspector that this case involved a person convicted of selling vehicles to the public without a licence on 5 occasions with the total fine being either \$2,300.00 or \$2,500.00. In response, the Inspector testified that the average fine in AMVIC prosecutions was \$2,500.00 and that her administrative penalty recommendation of \$2,500.00 for each transaction in this case was based on the fact that 1802580 had been subject to other sanctions by AMVIC in the past. On re-direct examination the Inspector testified that the *Khalil* case did not involve previous sanctions. She testified that all past sanctions of 1802580 (licence cancellation and license suspension) had not resulted in compliance and that progressive enforcement therefore merited an escalation in terms of the amount of the administrative penalty.
51. After the conclusion of the Appeal Hearing the Appeal Board requested a copy of the *Khalil* case and was informed by counsel for the Director that this case was an unreported offence prosecution.
52. Mr. Gader testified that \$10,000.00 was a lot of money to pay for what he says was a simple mistake regarding the 5 transactions that occurred during the period of licence suspension. He testified that because 1802580 had never been issued an administrative penalty the \$10,000.00 cannot be seen to represent progressive discipline because there has never been a prior administrative penalty issued against 1802540. He submitted that the amount of \$10,000.00 was out of line with the *Showtime Fabrication* and *Khalil* cases.
53. Mr. Gader further testified that he had not harmed anyone and had not done anything intentionally wrong. He testified that he had taken responsibility when it came to the Unlicensed Transactions. He also testified that when his licence had been cancelled in 2014 he had stayed out of the business for 1

year until he was ready to conduct himself properly. The second cancellation was over the gift of a vehicle to his brother which occurred because his brother needed a car and he was trying to help his brother out. In light of that background he felt that a fine of \$10,000.00 was excessive. He submitted that his prior mistakes have been paid for and that his ongoing dealings with AMVIC since 2014 have negatively affected his ability to conduct his business.

Submissions of the Parties

The Director's Submissions

54. The Director submitted that there were 2 issues for the Appeal Board. First whether the Appeal Board should impose a sanction for the Washing Transactions and second whether the Appeal Board agreed with the \$10,000.00 administrative penalty.
55. In terms of the Washing Transactions, the Director argued that it flew in the face of common sense that Amil Gader had no idea that the whole of these transactions were occurring. It was argued that the Appeal Board should draw a negative inference with respect to these transactions.
56. In addressing sanction, counsel for the Director described the licensing history of 1802580. The documents entered as Exhibits by the Director at the Appeal Hearing show the following:
 - Exhibit 2 is a September 5, 2014 decision of the Director. In terms of the history leading up to this decision, it is indicated that Mr. Gader had been a partner in a business with an AMVIC licence that was involved with selling vehicles retail when licensed for wholesale sales only, which resulted in Mr. Gader dissolving that partnership on March 27, 2014. The September 5, 2014 decision deals with activities under a new AMVIC wholesale licence - Mr. Gader selling a vehicle to a consumer while not licensed to do so. The September 5, 2014 decision of the Director cancelled 1802580's wholesale business licence and Mr. Gader's salesperson licence.
 - Exhibit 1, TAB 2 is the July 10, 2017 decision of the Director. This decision describes that on July 15, 2016 1802580 submitted a new application for a wholesale business licence to operate under the name of Calgary Truck and Automotive Sales. Following an administrative review (due to the September 5, 2014 licence cancellation), AMVIC granted a wholesale licence to 1802580 on November 17, 2016.

The July 10, 2017 decision of the Director concluded that Mr. Gader and 1802580 had breached s. 104 of the *CPA* on a number of occasions prior to being granted the November 17, 2016 AMVIC licence by placing advertisements for the sale of vehicles using 3 phone numbers (one of which was in the name of Mr. Gader's brother) and various email addresses. The Director also concluded that on one occasion after being granted that licence Mr. Gader had also breached s. 104 of the *CPA*. That incident involved Mr. Gader's brother attempting to sell a 2007 Nissan Maxima to a consumer (a covert AMVIC buyer). The Nissan Maxima had been initially purchased by 1802580 and had not been registered to Mr. Gader's brother. The Director's July 10, 2017 decision was to cancel the wholesale business licence of 1802580 and the salesperson licence of Amil Gader.

- Mr. Gader appealed the July 10, 2017 licence cancellations. A November 27, 2017 decision of the Appeal Board appointed to hear that appeal (Exhibit 1, TAB 3) indicates the only issue that Appeal Board was prepared to consider was the sale or gift of the Nissan Maxima. The Appeal Board found that particular transaction was a violation of 1802580's wholesale business licence. The November 27, 2017 Appeal Board was not prepared to give significant weight to the advertisements posted prior to July 16, 2016 (the date that 1802580 applied for an AMVIC wholesale licence) on the basis that it seemed that AMVIC could have obtained this information as part of the administrative review prior to granting the November 17, 2016 licence and had granted the licence anyway. As described in paragraph 14 above, the Appeal Board varied the Director's licence cancellation to 120 day licence suspension commencing July 10, 2017.

57. The Director argues that at every turn Amil Gader has been provided with clarity as to what an AMVIC wholesale business licence permits and what it does not permit. The Director points to the history of licensing suspensions that are said to demonstrate that Amil Gader would have had a number of opportunities to know and come to understand the terms of an AMVIC wholesale business licence.

58. The Director acknowledges that there is no evidence of harm to a specific consumer as a result of any of the transactions in issue but argues that the *CPA* imposes a set of rules that everyone must abide by. The Director submits that it is not in the public interest to permit those involved in automobile sales to circumvent the legislation because this strikes at the integrity of the system itself, resulting in a loss of public confidence in the legislative regulation of automobile sales.

59. Finally, the Director argues that the sanction in this case has to be an effective deterrent and something more than a cost of doing business.

1802580's Submissions

60. With respect to the Washing Transactions, it was argued that Amil Gader is not his brother's keeper and that no evidence had been presented by the Director of collusion or collaboration or planning between Amil Gader and his brother to wash vehicles. It was argued that the Appeal Board should not draw a negative inference from the evidence presented.
61. It was argued that Mr. Gader's explanations with respect to all of the 10 transactions should be accepted because he is credible, and he had made comments in the course of his cross-examination that could potentially be construed as against his interest which demonstrated that he is honest. He had not made excuses for his past conduct and had taken some responsibilities.
62. In terms of penalty, it was argued that there was an absence of any harm or potential harm or any known injury to anyone. No evidence had been presented of a grand design or collaboration to defraud the used car consuming public. It was argued that Mr. Gader and 1802580 were small players in the scheme of things and that the *CPA* serves a larger purpose than the types of transactions at issue in this appeal. While it was acknowledged that any penalty should reflect deterrence, it was argued that penalties do not typically start at \$2,000.00 per violation and that in this case a penalty lower than \$10,000.00 could still have a deterrent effect.

Decision of the Appeal Board

63. An appeal under the provisions of the *CTA* of an administrative penalty is an appeal *de novo*. Section 179(8) of the *CTA* reads as follows:

(8) An appeal under this section is a **new trial of the issues that resulted in the decision, order or administrative penalty being reviewed.**

(emphasis added)

64. Section 179(6) of the *CTA* provides:

(6) An appeal board that hears an appeal pursuant to this section may confirm, vary or quash the decision, order or administrative penalty that is being appealed.

65. Counsel for the Director submitted that it was open to the Appeal Board in this appeal to consider all of the ten transactions. However, the "Summary of Investigation" and "Analysis" section in the Director's Decision make it clear that the transactions that led to the \$10,000.00 administrative penalty were

the 5 Unlicensed Transactions. There is no reference in the Director's Decision to the Washing Transactions. Under cross-examination this was confirmed by the Investigator. A Question in re-direct examination of the Investigator made it clear that the penalty under review at the Appeal Hearing was \$10,000.00, which, according to the Director's Decision, was the administrative penalty issued for the 5 Unlicensed Transactions and not the 5 Washing Transactions. The January 11, 2019 Director's Decision seems clear on this point.

66. Even if was open to the Appeal Board to sanction for the Washing Transactions, the standard of proof in an administrative proceeding is the balance of probabilities. The burden of proof at the Appeal Hearing was on the Director. The facts established in this case do establish that 1802580 consigned 5 vehicles to an auction house via a wholesale licence that were then purchased by Amil Gader's brother who either sold or attempted to sell 3 of those vehicles without an AMVIC licence to do so. However the Appeal Board finds that the evidence, while raising suspicions about the activities of Amil Gader and his brother, is insufficient to establish, on a balance of probabilities, that Amil Gader or 1802580 were parties to a plan or arrangement to sell vehicles to consumers without a licence to do so. There is no evidence of any communications, plan, scheme, or financial arrangement between Mr. Gader and his brother with respect to the alleged Washing Activities. As such, on a balance of probabilities it has not been proven that 1802580 was in breach of the CTA of any of the relevant regulations.
67. That leaves the Unlicensed Transactions - i.e. the 5 transactions that occurred during the period of time when 1802580's wholesale licence was cancelled/suspended.
68. Mr. Gader admitted at the Appeal Hearing to the Unlicensed Transactions. His argument was therefore focused on the quantum of the administrative penalty. The Appeal Board has carefully considered the evidence provided by Mr. Gader and the submissions of both Mr. Gader and his counsel on the issue of administrative penalty.
69. The only cases referenced at the Appeal Hearing were the *Showtime Fabrication* case and the *Khalil* case. The Showtime Fabrication case involved conducting business without a license as well as a prior AMVIC history. There were two fines ordered totaling \$3,500.00 as well as a \$39,350.00 restitution order. In terms of the *Khalil* case, absent a transcript it is difficult for the Appeal Board to comment on that case but the evidence of the Investigator regarding 1802580's prior sanction history as well as her impression of the need for progressive enforcement in terms of the amount of administrative penalty in the present case are noted.

70. Mr. Gader permitted DA to use 1802580's wholesale account to purchase vehicles from two different auction houses during the period of time that 1802580's licence was cancelled/suspended. He then signed five Bills of Sales from 1802580 for those vehicles to DA during a period of time that 1802580's wholesale licence was cancelled/suspended. In light of Mr. Gader's AMVIC licensing history the Appeal Board finds that he had to be well aware that he was precluded under the legislative and regulatory framework from engaging in wholesale vehicle sales when not licensed to do so.
71. Mr. Gader wishes to characterize the Unlicensed Transactions as a simple mistake. The Appeal Board rejects that characterization. Mr. Gader knowingly signed five Bills of Sale from 1802580 to DA on 3 separate dates, resulting in a contravention of s. 104(1) of the *CTA* on five occasions from July to September of 2017. In light of Mr. Gader's licensing history with AMVIC it seems more likely than not that this constitutes willful conduct on the part of Mr. Gader.
72. In terms of the factors set out at section 2(2) of the *Administrative Penalties (Consumer Protection Act) Regulation*, A.R. 135/2013, the Appeal Board finds that Mr. Gader's conduct in the Unlicensed Transactions showed a degree of willfulness in the failure to comply with the requirements of the *CTA* when he sold 5 vehicles on a wholesale basis during a period of time when he knew that 1802580's wholesale licence had been cancelled. There is a history of non-compliance starting in 2014, including a cancellation of 1802580's wholesale licence in 2015 and a subsequent cancellation of the wholesale license on July 10, 2017 (later varied to a 180 day suspension). The Appeal Board finds no evidence of any mitigating factors regarding the conduct of 1802580 in this case with respect to the Unlicensed Transactions.
73. Evidence of actual harm to the public and evidence of economic benefit from the contravention are but two of the factors for consideration under section 2(2) of the *Administrative Penalties (Consumer Protection Act) Regulation*. In addition to Mr. Gader's willful conduct and his licensing history, the Appeal Board finds that another factor relevant to sanction in this case is the general confidence of the public as to the regulation of motor vehicle sales in Alberta. That confidence can be undermined when a party who is required to operate within the bounds of the legislative framework fails to do so on a number of different occasions over time.
74. In the end, previous sanctions do not appear to have had the necessary deterrent effect. They do not appear to have not resulted in compliance.
75. The Appeal Board confirms the January 11, 2019 decision of the Director to issue an administrative penalty to 1802580 in the amount of \$10,000.00, payable to the Government of Alberta and sent to AMVIC at the address provided at p. 6 of the Director's Decision either:

(a) within 30 days of the date of this decision; or

(b) pursuant to the following payment plan:


| | |
|--------------------|------------|
| January 31, 2020 | \$1,000.00 |
| February 28, 2020 | \$1,000.00 |
| March 31, 2020 | \$1,000.00 |
| April 30, 2020 | \$1,000.00 |
| May 29, 2020 | \$1,000.00 |
| June 30, 2020 | \$1,000.00 |
| July 31, 2020 | \$1,000.00 |
| August 31, 2020 | \$1,000.00 |
| September 30, 2020 | \$1,000.00 |
| October 30, 2020 | \$1,000.00 |

76. If 1802580 chooses to utilize the above payment plan it must provide AMVIC with postdated cheques for all of the above dates within 30 days of the date of this decision.

77. AMVIC's remedies in the event of non-payment include those set out at section 158.4 of the CPA.

DECISION DATED December 23, 2019


Bill Klasky, Appeal Board Member


Kent Pallister, Appeal Board Member


Louise Redmond, Appeal Board Chair