

Re: In the Matter of an Appeal by Garry H. Wagstaff o/a Castle Quality Upholstery from the October 11, 2016 Decision of the Director of Fair Trading (as delegated to the Alberta Motor Vehicle Industry Council, "AMVIC") to issue an Administrative Penalty

5 June 2017

Appeal Board: Paul Alpern

Representing the Applicant, Garry H. Wagstaff o/a Castle Quality Upholstery: Allan Sproule, Student-at-Law (Wentworth Chambers)

Representing the Respondent, Alberta Motor Vehicle Industry Council ("AMVIC") and the Director of Fair Trading: Paula D. Hale, legal counsel (Shores Jardine LLP)

Appeal Heard: March 30, 2017 and April 24, 2017

Location: Service Alberta Boardroom, Commerce Place, 10155 - 102 Street, Edmonton, Alberta

An Appeal Board constituted pursuant to section 179 of the *Fair Trading Act*, R.S.A. 2000, c. F-2, the *Appeal Board Regulation* thereunder (Alberta Regulation 195/199) and the Administrative Penalties (Fair Trading Act) Regulation (Alberta Regulation 135/2013) met to hear an Appeal by Garry H. Wagstaff o/a Castle Quality Upholstery from the October 11, 2016 Decision of the Director of Fair Trading (as delegated to the Alberta Motor Vehicle Industry Council - "AMVIC") to issue an Administrative Penalty to Garry H. Wagstaff o/a Castle Quality Upholstery.

THE ISSUES

1. Did Garry H. Wagstaff o/a Castle Quality Upholstery breach provisions of the Fair Trading Act, the Vehicle Inspection Regulation and/or the Automotive Business Regulation?
2. In the circumstances, is it appropriate for this Appeal Board to vary or quash the decision that is being appealed?

RELEVANT LEGISLATION

FAIR TRADING ACT, R.S.A. 2000, C. F-2

Application of Act

- 2.1 *In determining whether this Act applies to an entity or a transaction, a court or an appeal board must consider the real substance of the entity or the transaction and in doing so may disregard the outward form.*

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.*

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, 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

- 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.*

...

Evidence – Carrying on business

- 169 *Evidence that*
- (a) *a person entered into one transaction in a business or activity, or*
 - (b) *a person set out in a letter, advertisement, card or other document issued by or under the authority of the person that the person is carrying on a business or activity*
- is proof, in the absence of evidence to the contrary, that the person was carrying on that business or activity.*

Appeal

- 179(1) *A person*
- (a) *who has been refused a licence or renewal of a licence,*
 - (b) *whose licence is made subject to terms and conditions,*
 - (c) *whose licence has been cancelled or suspended under section 127, or*
 - (d) *to whom an order under section 129 or 157 is directed, or*
 - (e) *to whom a notice of administrative penalty is given under section 158.1(1)*
- may appeal the decision or order by serving the Minister with a notice of appeal within 30 days after being notified in writing of the decision or order.*
- (2) *The Minister must, within 30 days after being served with a notice of appeal under subsection (1) and payment of the fee for the appeal as established by the regulations, refer the appeal to an appeal board appointed in accordance with the regulations or to an appeal board designated under subsection (4).*
 - (3) *The Minister may appoint an individual as the chair of the appeal board who serves as the chair whether or not an appeal is being considered by the appeal board.*
 - (4) *The Minister may designate a board or commission established by or under an Act of the Legislature to be an appeal board for the appeals specified in the designation.*
 - (5) *The Minister may set the time within which an appeal board is to hear an appeal and render a decision and may extend that time.*
 - (6) *An appeal board that hears an appeal pursuant to this section may confirm, vary or quash the decision or order that is being appealed.*
 - (7) *The Minister may set the rates of remuneration for and provide for the payment of reasonable living and travelling expenses to the members of an appeal board.*

- (8) An appeal under this section is a new trial of the issues that resulted in the decision or order being appealed.

AUTOMOTIVE BUSINESS REGULATION

Definitions

1(1) In this Regulation,

- (b) "automotive business" means the business designated as the automotive business under the Designation of Trades and Businesses Regulation;
- (g) "licence" means a class of automotive business licence established by this Regulation;
- (j) "salesperson" means a person who is authorized by an automotive sales licensee, automotive leasing licensee or automotive consignment licensee to solicit, negotiate or conclude on the licensee's behalf an agreement to buy, sell, lease, exchange or consign a vehicle;
- (k) "vehicle" means
 - (i) a motor vehicle as defined in the Traffic Safety Act, but does not include a motor cycle or off-highway vehicle as defined in that Act, and
 - (ii) a recreational vehicle intended to be towed that combines transportation and temporary living accommodations for the purpose of travel or camping;

New classes of License

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

- (a) automotive sales licence;
- (b) automotive leasing licence;
- (c) automotive consignment licence;
- (d) automotive repair licence.

3(2) A person who holds an automotive sales license 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

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

but not including selling vehicles on consignment.

3(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.

Registration

16(1) A salesperson of an automotive sales business operator must be registered for automotive sales before acting on behalf of the business operator.

(8) The registration of a salesperson is automatically cancelled where the salesperson is no longer authorized to act on behalf of any business operator.

Application for registration

17(1) A person who wishes to be registered or to have a registration renewed under this Regulation must submit to the Director

- (a) an application on a form established by or acceptable to the Director,
- (b) any additional information that is requested by the Director, and
- (c) proof satisfactory to the Director that the applicant has met the education requirements established by the Director.

- (2) *The application and other information submitted under subsection (1) must, on the request of the Director, be verified by affidavit or in another manner that is satisfactory to the Director.*

VEHICLE INSPECTION REGULATION

Sale of used motor vehicle

- 15(1) *Subject to subsection (2), a dealer in used motor vehicles shall, before entering into a contract to sell a motor vehicle, give to the buyer a used motor vehicle mechanical fitness assessment that contains the following:*
- (a) *a statement identifying the type of motor vehicle as a truck, motorcycle, bus, van, light truck, automobile or other type of motor vehicle;*
 - (b) *a statement showing the make, model, year, vehicle identification number, odometer reading in kilometres or miles, licence plate number and province of registration of the vehicle;*
 - (c) *the name and address of the dealer selling the vehicle and the name of the technician who issued the mechanical fitness assessment;*
 - (d) *a statement that the mechanical fitness assessment expires 120 days after the date on which it was issued;*
 - (e) *a statement certifying that at the time of sale the motor vehicle*
 - (i) *complies with the Vehicle Equipment Regulation (AR 122/2009), or*
 - (ii) *does not comply with the Vehicle Equipment Regulation (AR 122/2009) and containing a description of the items of equipment that are missing or do not comply with the Vehicle Equipment Regulation (AR 122/2009);*
 - (f) *the signature of the technician who conducted the mechanical fitness assessment;*
 - (g) *the date the mechanical fitness assessment was issued.*
- (1.1) *Despite section 1(1)(r), for the purposes of subsection (1), “technician” means a person who,*
- (a) *in the case of a mechanical fitness assessment of passenger vehicles and light trucks, holds a subsisting trade certificate in the designated trade of automotive service technician under the Apprenticeship and Industry Training Act, or...*

ADMINISTRATIVE PENALTIES (FAIR TRADING ACT) REGULATION

- 2(2) *In setting the amount of an 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.*

BACKGROUND

1. Garry H. Wagstaff ("GHW") operates as Castle Quality Upholstery ("Castle Upholstery") and has been licensed by AMVIC since July 26, 2000 to carry on the automotive business of repairs: specialty service.
2. Castle Upholstery is not registered or licensed to sell vehicles.
3. GHW does not now have and has never had an AMVIC license for automotive retail sales.
4. GHW owned and operated a second business, Castle Auto & Truck Sales ("Castle Auto"), from October 22, 2009 through on or about January 29, 2014 at which time GHW's son, Garry Lee Ryan Wagstaff ("GLRW"), took over Castle Auto both as owner and as registered salesperson.
5. Castle Auto is licensed to sell vehicles to the public.
6. On or about December 9, 2015, a consumer filed a complaint with AMVIC regarding a December 4, 2015 purchase of a 2002 Jeep Liberty (the "Jeep") from GLRW operating as Castle Auto.
7. On or about December 14, 2015, an AMVIC employee called GLRW with respect to this complaint and spoke with GHW. GHW acknowledged selling the Jeep to the complainant but characterized the transaction as a "private sale", not involving GLRW or Castle Auto.
8. The Jeep was advertised on Kijiji as being sold by a "dealer" who could be reached at 780-907-7211. According to GHW, that number is his personal cell phone number.
9. At a May 4, 2016 AMVIC administrative review, GHW stated that he advertises up to 20 personally owned vehicles at a time for sale on-line through Kijiji, that he has many unregistered vehicles stored at his home and for sale and that he makes use of a dealer plate assigned to Castle Upholstery to move his inventory.
10. At the time of the complainant's viewing of the Jeep, it was located at or near the sales lot associated with Castle Auto.
11. The complainant advised AMVIC that he attended at the lot of Castle Auto, that he was handed a business card from a salesperson and that he dealt both with GHW and GLRW.
12. The business card given to the complainant had the name "Castle Auto and Truck", the licensee's business address and telephone number. The same card does not name a salesperson, but contains GHW's email address.
13. The Bill of Sale ("BOS") for the Jeep is dated December 4, 2015. The phone number on the BOS is GHW's personal phone number, the same phone number as in the Kijiji advertisement for the Jeep.
14. The Jeep was sold to the complainant by GHW for \$2,100. Written comments on the BOS include: "as is, were is (sp), cash sale, customer knows of some repairs need front drive shaft, rear speed sensor, and windshield."
15. The complainant was not provided with a mechanical fitness assessment ("MFA") for the Jeep. Upon request, GHW did provide AMVIC with an MFA for the Jeep dated December 1, 2015.
16. An independent mechanical inspection (a different mechanic than the one used by GHW) completed three days after the complainant purchased the Jeep suggests it is unsafe to drive. The inspection indicated several repairs required including a transmission concern, engine running very poorly, engine code lights active.
17. GHW has refused to purchase the Jeep back from the complainant and is not prepared to mitigate the consumer's complaint.
18. AMVIC alleges that the sale of the Jeep by GHW was a retail sale subject to the requirements of the Automotive Business Regulation, including but not limited to: selling vehicles only through a registered salesperson; providing to the buyer an MFA at the time of sale; and remittance to AMVIC of the required vehicle levy for each vehicle sold.
19. AMVIC further alleges that GHW's listing of multiple vehicles for sale to the public

- while representing himself as a dealer is part of scheme to avoid AMVIC's licensing, regulatory and levy requirements.
20. GHW alleges that the sale of the Jeep to the complainant was a private sale from an inventory of vehicles owned personally by him and is not subject to AMVIC's jurisdiction.
 21. AMVIC issued an administrative penalty to GHW in the sum of \$10,000.

AMVIC'S EVIDENCE

AMVIC called one material witness: Megan Doupe

Ms. Doupe's sworn/affirmed evidence included:

22. She is an investigating peace officer at AMVIC and has worked at AMVIC for three years.
23. She has been a peace officer since 2012, having formerly worked at Service Alberta.
24. This file was assigned to her following a consumer complaint to AMVIC against Castle Auto.
25. The complainant was unsatisfied with the Jeep he purchased alleging that he did not receive fair value and the vehicle was unsafe to operate.
26. By law, all dealerships must provide an MFA to consumers prior to sale of a used vehicle.
27. An MFA for the Jeep dated December 1, 2015 was provided by GHW to AMVIC at AMVIC's request, but no MFA was provided to the complainant at any time.
28. The address on the MFA was that of a property adjacent to Castle Auto.
29. The odometer reading of the Jeep as noted on the MFA was 275,573.
30. The complainant, in an email to GHW dated December 7, 2015, confirmed that he went to Castle Auto's lot to purchase the Jeep. The complainant wrote: "Hey there Garry – I was in your lot on Friday. I bought the black Jeep Liberty from you guys. Wondering if you could send me the inspection you had done on this Jeep so I can forward it to my insurance company. Thanks....".
31. The BOS for the Jeep shows the seller as GHW and the address of the seller as 4014 – 118 Avenue, a property adjacent to Castle Auto. The seller's phone number on the BOS is the personal cell phone number of GHW. The odometer reading of the Jeep as shown on the December 4, 2015 BOS was 275,573.
32. The complainant provided AMVIC with a business card from Castle Auto, apparently having received the business card from Castle Auto at the date of the sale on December 4, 2015.
33. As part of her investigation into the complaint, she called Castle Auto and spoke with GLRW who said this was a private sale, that he had nothing to do with it and it's not AMVIC's jurisdiction.
34. The evidence suggested this was not a private sale so she began an enforcement action directed at GLRW and Castle Auto.
35. On April 13, 2016, she recommended the following outcome as against GLRW and Castle Auto:
 - a. An undertaking which follows AMVIC's progressive enforcement model
 - b. That the supplier buys back the vehicle in the full amount of \$2,100.
 - c. That the supplier ensures he pays his levies on time to ensure his license does not lapse.
 - d. A comprehensive inspection within 3-6 months.
 - e. That the supplier ensures all consumers are provided with a compliant MFA prior to the sale of the vehicle.
 - f. That the supplier pay investigation costs of \$1,000.
36. On April 18, 2016, AMVIC wrote to GLRW o/a Castle Auto scheduling an administrative review for May 3, 2016 in respect to the complaint.
37. On the morning of May 3, 2016, Ms. Doupe got a phone call from GHW saying that the Jeep sale was a private sale he had made, that it didn't involve GLRW or Castle Auto and that he (GHW) would be attending the administrative review meeting.
38. During the administrative review meeting, GHW confirmed that 780-907-7211 is his

- personal cell phone number.
39. GHW said that the vehicles he sells are classic cars that do not require an AMVIC license to sell.
 40. Ms. Doupe stated that GLRW is licensed to sell vehicles through Castle Auto, but GHW is not.
 41. GHW has an AMVIC licensed company for Castle Upholstery in respect to specialty sales and repairs, but that license does not permit either GHW or Castle Upholstery to sell vehicles to the public.
 42. Both a retail business license and a licensed salesperson are needed to sell either used or new vehicles to the public.
 43. The purpose of these requirements is consumer protection. Background checks are undertaken on salespeople and there's a regulatory framework in place to protect the public.
 44. While GHW says the Jeep transaction was a private sale, there were numerous red flags suggesting otherwise.
 45. There are no exceptions in the legislation or regulations for "classic" cars.
 46. If a vehicle is registered to an individual personally, that person can sell the vehicle privately.
 47. AMVIC has access to a vehicle registration system called MOVES allowing searches for current and historical registered owners by Vehicle Identification Number ("VIN").
 48. A search of the Jeep by its VIN shows that GHW was not a prior registered owner of the Jeep.
 49. AMVIC also has access to a database called "Hamari" allowing searches by vehicle seller phone numbers.
 50. A search of Hamari by 780-907-7211 (GHW's personal cell phone number) for the period July 2015 through September 2016 shows ~60 vehicles listed for sale linked to that phone number.
 51. Based on the information available following the May 3, 2016 administrative review meeting, AMVIC changed course and issued an administrative penalty to GHW.

On cross-examination by Mr. Sproule, Ms. Doupe gave the following evidence:

50. She doesn't know where the complainant obtained the Castle Auto business card from.
51. There is no way of telling from the Hamari database who posted the advertisements.
52. There is no requirement at law to register a vehicle personally. The fact that the Jeep wasn't personally registered to GHW was a red flag, though.

GHW'S EVIDENCE

GHW's sworn/affirmed evidence included:

53. He is the owner of Castle Upholstery.
54. He has had a repair license for 17 years.
55. He does not engage in commercial auto sales.
56. He is the former owner of Castle Auto.
57. He sold Castle Auto to his son five years ago.
58. He has never had a vehicle sales license.
59. He has never sold a vehicle through or on behalf of Castle Auto.
60. The complainant visited Castle Auto to look at cars, noticed the Jeep in the adjacent parking lot and asked GLRW about it.
61. GLRW called GHW. GHW says he wasn't going to sell the Jeep, that it needed repairs, that he thought he might keep it and that it was a personal vehicle.
62. The complainant was persistent. He called four times in 90 minutes stating he couldn't afford other vehicles on the lot.
63. GHW came to the Castle Auto lot and met with the complainant.

64. GHW never gave a business card to the complainant. GHW states that the complainant might have picked up a business card from the Castle Auto office.
65. GHW has a dealer plate. He's had one for 19 years. He uses it for his Castle Upholstery repair license work.
66. The Jeep was parked at the Castle Auto lot because he was using it as his personal vehicle.
67. GHW said GLRW does all the advertising for Castle Auto and that GHW doesn't know how to place an advertisement.
68. He says he received the Jeep from a Castle Upholstery customer as partial payment for an upholstery (convertible top) job.
69. He was going to register the Jeep once it was repaired.
70. GHW says that GLRW placed the Jeep for sale on Kijiji using GHW's phone number.
71. GHW says that he told GLRW not to place the Jeep advertisement on Kijiji, but that GLRW did anyway.
72. GHW confirmed his email address is rag69bird@yahoo.ca.
73. GHW says no one paid for the Jeep advertisement on Kijiji because it was a free advertisement.
74. The Jeep advertisement said for sale by "Dealer" because GLRW placed the advertisement and he's a dealer.
75. In response to the question "why is your personal email address on Castle Auto business cards", GHW said that they were either left over from when he owned the business or were mistakenly reprinted with his email address.
76. The Jeep was a same day sale. GLRW sold the Jeep and signed the BOS on behalf of GHW.
77. No GST was charged because this was not a business sale.
78. No MFA was provided to the complainant because it wasn't available until the following Monday.
79. An MFA was never provided to the complainant but GHW states that he did tell the complainant about everything that was wrong with the Jeep as written on the MFA and noted the problems with the Jeep on the BOS.
80. GHW says that he only sold one vehicle, the Jeep, in 2016.
81. The multiple Kijiji ads posted by GLRW and Castle Auto have GHW's personal cell phone number only for convenience. GHW says he refers callers for Castle Auto Kijiji ad cars to GLRW and gives them GLRW's phone number. GHW says he does this to help his son
82. When asked why the address on the BOS for the Jeep was 4014 – 118 Avenue, Edmonton, GHW said that's the address of his landlord... that he doesn't recall why he used that address.

On cross-examination by Ms. Hale, GHW stated:

83. He doesn't recall when he got the Jeep. He says he might have had it for a couple of months. He thought he'd keep it, so he took it to OK Tire for an inspection.
84. He did not register the Jeep. He used dealer plates to get around in it.
85. Castle Upholstery did lots of work for various car dealers. He needed dealer plates to get unregistered cars to his workplace to do repair work.
86. The MFA for the Jeep dated December 1, 2015 also shows the address of 4014 – 118 Avenue, Edmonton.
87. GLRW posted the Jeep Kijiji advertisement for free. GHW can't explain why there's a Kijiji receipt produced in evidence that shows a listing fee of \$14.98 for the Jeep posting.
88. He can't explain why GLRW used GHW's cell phone number as the primary number for most of Castle Auto's Kijiji vehicle listings.
89. There was no for sale sign on the Jeep when the complainant came to look at it. GHW thinks the complainant might have asked GLRW about the Jeep when the complainant visited the Castle Auto lot because the Jeep had no plate on it at the time.
90. He doesn't remember specifically stating at the May 4, 2016 administrative review meeting that "he advertised 20 cars on Kijiji in 2016... mostly older cars – antiques... sells many cars

on Kijiji so Kijiji recognizes him as a dealer because of the volume.”

On redirect by Mr. Sproule, GHW stated:

91. He sold the Jeep privately, but his son, GLRW, acted as agent.

The hearing was adjourned to give all parties an opportunity to review an audio-visual recording of the May 4, 2016 administrative review meeting involving GHW, Megan Doupe and John Bachinski.

The hearing reconvened at 9 am on April 24, 2017.

AMVIC'S ARGUMENTS

In summarizing AMVIC's position, Ms. Hale stated:

92. If you are in the business of selling cars, you need a license.
93. GHW was in the business of selling cars.
94. GHW never had a sales license.
95. The purpose of the Fair Trading Act is consumer protection.
96. Regardless of how many sales are made, the evidence is clear that GHW advertises numerous and varied cars on Kijiji all the time.
97. The Hamari report shows 60 cars associated with GHW listed for sale on Kijiji between July 2015 September 2016.
98. Section 2.1 of the Fair Trading Act allows this Appeal Board to consider the substance of the transaction, not just the form.
99. Section 104 of the Fair Trading Act requires a person engaging in a designated business to hold a license.
100. Section 169 of the Fair Trading Act provides that evidence that GHW engaged in just one regulated transaction (a dealer sale or an advertisement of a dealer sale) is proof, in the absence of evidence to the contrary, that the person is carrying business.
101. There is no reliable evidence to the contrary from GHW as to why so many vehicles are advertised for sale by or associated with him.
102. It is clear that GWH is selling or attempting to sell cars to the public on a consistent basis.
103. To sell cars commercially, GHW needs to be licensed to do so or needs to do so through a registered salesperson.
104. GHW has not been truthful before this Appeal Board. He continues to reject the authority of AMVIC. That justifies a substantial penalty.
105. There is no licensing exception in the Fair Trading Act or Automotive Business Regulation for the sale of antique, collectible or hobbyist cars.
106. The Jeep:
 - a. is a vehicle as defined in the legislation;
 - b. was advertised as a dealer sale;
 - c. was sold at or adjacent to the premises of Castle Auto;
 - d. was sold without providing the consumer with an MFA;
 - e. was never registered to GHW;
 - f. was one of several vehicles concurrently advertised for sale by GHW;
107. The purpose of the legislation is consumer protection. By requiring automotive businesses and salespersons to be licensed affords consumers an opportunity to investigate who they're buying from, access to MFAs, comfort that salespeople have been subject to some training and recourse to a regulator in the event of disputes.
108. There were inconsistencies in GHW's statements at the May 4, 2016 administrative review meeting and at this Appeal Board hearing, particularly in respect to who posted Kijiji

- advertisements. At the administrative review meeting, GHW was definitive that he posted the advertisement for the Jeep (and other personal vehicles) and that he has his own Kijiji account and personally pays for his advertisements. Those statements contradict GHW's testimony at this Appeal Board hearing where he gave evidence that all advertisements were placed by GLRW and that GHW doesn't know how to place a Kijiji advertisement.
109. In contradiction to GHW's sworn testimony that he wasn't certain that we wanted to sell the Jeep at the time he received a call from GLRW about the complainant's interest in the vehicle on December 4, 2015, the evidence is clear that the Jeep was listed for sale by GHW on November 20, 2015, approximately two weeks before the December 4, 2015 sale.
 110. There is no bright line test in respect to the number or nature of vehicles sold or advertised to determine whether a transaction is a private sale or a dealer sale subject to the Fair Trading Act and Automotive Business Regulation. Each situation is assessed on a case-by-case basis.
 111. "Private Sale" is not defined in the Fair Trading Act.
 112. Does an individual have to have a vehicle registered in her/his name to sell it privately? No, but if it is registered personally, that's a good indication that the transaction is a private sale.
 113. There's no credible evidence as to why the BOS in question does not show GHW's personal address.
 114. This was not a spur-of-the-moment transaction. GHW had posted the Jeep for sale on November 20, 2015.
 115. The Hamari report shows 60 cars associated with GHW's personal cell phone number, 34 of which have GHW's number as the primary contact and the balance having Castle Auto's number as the primary contact.
 116. There appears to some comingling of GHW's sales efforts and Castle Auto's sales efforts.
 117. If GHW answers the phone for Castle Auto, he's selling cars for Castle Auto.
 118. If Kijiji identifies GHW as a dealer because of the volume of vehicles he's advertising for sale, that tends to indicate GHW is selling cars on a commercial basis.
 119. I don't know what the threshold is for private sales, but it's less than advertising 34 vehicles for sale in a year.
 120. There's no need to prove the issues in dispute beyond a reasonable doubt. The standard of care is on a balance of probabilities.
 121. By his own admission of "always having done business this way", GHW has a long history of breaching the Fair Trading Act.
 122. GHW could register as licensed salesperson easily enough, but he chooses not to.
 123. Based on the evidence of ongoing repeated breaches, the penalty is justified.
 124. GHW's belief that the rules don't apply to him calls for a sizeable penalty to act as a deterrent.
 125. GHW accepted responsibility for the sale of the Jeep but stated that his son must have placed the Kijiji advertisement.
 126. GHW made numerous inconsistent statements.
 127. GHW advertises a significant volume of vehicles for sale on Kijiji.
 128. He continues to reject the notion that he requires an automotive sales license.
 129. GHW will say whatever he thinks he needs to say to attempt to avoid AMVIC's jurisdiction and a fine.
 130. GHW is "curbing" vehicles.
 131. The primary purpose of AMVIC is to regulate sales to the public.
 132. It is appropriate to levy a significant penalty.
 133. GHW has shown no remorse, his evidence has been generally not credible, he refuses to submit to the jurisdiction of AMVIC and there is a question about his governability.

THE APPELLANT'S ARGUMENTS

In summarizing GHW's position, Mr. Sproule stated:

134. Comments on the video were consistent with GHW's evidence given at the March 30, 2017 hearing.
135. That GHW had several old cars with a total value of approximately \$2 million that he advertised for sale from time to time, but that he had only sold one – the Jeep.
136. That GHW is not involved with Castle Auto, he doesn't work for them and he doesn't make sales for them.
137. The Jeep was not on the car lot at the time of sale. It was on the property adjacent to the car lot.
138. The Fair Trading Act does not apply to this sale.
139. The sale of the Jeep was not affiliated with Castle Auto.
140. GHW has never been a salesperson under AMVIC.
141. He agreed with Ms. Hale that there is no bright line rule re. private sales vs. dealer sales.
142. The evidence points to a private sale.
143. GHW was driving the Jeep for approximately six weeks prior to selling it on December 4, 2015.
144. GHW didn't register the Jeep because he hadn't decided yet whether he was going to keep it or sell it.
145. The address on the BOS doesn't point to a business sale.
146. GHW had 15-20 vehicles at his house posted for sale over a long period of time.
147. He's been trying to sell them to remove them from his property.
148. This inventory was collected over many years.
149. He was simply trying to avoid nuisance complaints from his neighbors.
150. He was not selling as part of an automotive sales business.
151. He was not engaging in a designated business. This was a private sale.
152. The Vehicle Inspection Regulation does not apply here. No MFA was required to be provided to the buyer. No AMVIC levy was required either.
153. The Fair Trading Act and Automotive Business Regulation are not intended to cover private sales.
154. All relevant information about the Jeep, including its deficiencies, was disclosed to the purchaser in writing on the BOS.
155. AMVIC has no jurisdiction in this case.

ANALYSIS AND CONCLUSIONS

Having considered the evidence and submission of the parties, I find as follows:

156. There were numerous inconsistencies in the evidence of GHW, including:
 - a. At the administrative review meeting, GHW was definitive that he posted the advertisement for the Jeep (and other personal vehicles) and that he has his own Kijiji account and personally pays for his advertisements. Those statements contradict GHW's testimony at this Appeal Board hearing where he gave evidence that all advertisements were placed by GLRW and that GHW doesn't know how to place a Kijiji advertisement.
 - b. Why, if Kijiji advertisements were posted by GLRW, did they have GHW's phone number on them?
 - c. GHW says there was no charge for the Jeep Kijiji advertisement because it was a private sale (not a dealer sale), but there is an invoice for \$14.98 to place the Jeep advertisement in Kijiji as a dealer sale.
 - d. GHW offered no credible explanation as to why GHW's address on the Jeep BOS was a property adjacent to Castle Auto.
 - e. GHW offered no credible explanation as to why GHW's personal email address was on Castle Auto's business cards.
 - f. GHW offered no credible explanation as to why the Jeep was at the Castle Auto

- property without a license plate at the time the complainant visited the Castle Auto lot.
- g. GHW offered no credible explanation as to why the complainant was given or otherwise had in his possession a Castle Auto business card.
 - h. GHW offered no credible explanation as to why he had not registered the Jeep personally, having characterized the Jeep as his "daily driver".
 - i. There is no explanation as to why the MFA dated December 1, 2015 showed the Jeep's odometer reading as 275,573, the same reading as on the BOS dated December 4, 2015. One explanation is that the Jeep hadn't moved from the Castle Auto lot between December 1 and December 4, 2015. Another explanation is that the MFA was back-dated.
 - j. Of note also, the November 26, 2015 Kijiji advertisement for the Jeep lists the mileage as "275,000 km" which suggests the Jeep was not driven much between the date of posting of the Kijiji advertisement and the date of sale.
 - k. GHW's evidence was that he is not selling vehicles for Castle Auto, yet some 60 vehicles were advertised for sale between July 2015 and September 2016 either listing GHW's personal cell phone number as a primary number with Castle Auto's number as a secondary number or vice versa.
 - l. There is no reliable evidence to the contrary as to why so many vehicles were advertised for sale either by GHW personally or by Castle Auto with GHW's personal cell phone number.
 - m. GHW's sworn evidence was that as of December 4, 2015 he had not decided whether to sell the Jeep, yet a Kijiji advertisement listing the Jeep for sale was placed on November 20, 2015, some 14 days before the December 4, 2015 sale.
157. It's apparent that GHW is involved in the sale of vehicles on a commercial basis either personally and/or in association with Castle Auto and has been so engaged for several years despite being unlicensed to do so.
158. GHW is attempting to sell a large volume of personally owned vehicles to the public while representing to the public (through Kijiji advertisements, the use of Castle Auto business cards and the use of Castle Auto premises) that he is a dealer when, in fact, he is not a licensed automotive salesperson.
159. Also, despite not being a licensed salesperson, GHW is assisting GLRW and Castle Auto to sell vehicles to the public by, at a minimum, taking calls from prospective consumer about Castle Auto vehicles advertised for sale.
160. To sell cars commercially as an automotive business either on his own behalf or on behalf of Castle Auto, GHW needs to be licensed to do so or needs to do so through a registered salesperson.
161. The Jeep:
- a. is a vehicle as defined in the legislation;
 - b. was advertised as a dealer sale;
 - c. was sold at or adjacent to the premises of Castle Auto;
 - d. was sold without providing the consumer with an MFA;
 - e. was never registered to GHW;
 - f. was one of several vehicles concurrently advertised for sale by GHW;
 - g. had serious mechanical defects and, according to an independent MFA, was not roadworthy.
162. There is no bright line test in respect to the number or nature of vehicles sold to determine whether a transaction is a private sale or a dealer sale subject to the Fair Trading Act and Automotive Business Regulation. Each situation is assessed on a case-by-case basis.
163. In the present case, I am satisfied, based on:
- a. the number of vehicles GHW had listed for sale both personally and through Castle Auto (but linked to GHW's phone number);
 - b. the comingling of efforts with Castle Auto; and
 - c. the circumstances surrounding the sale of the Jeep to the complainant (including the representation in Kijiji advertisements that he's a dealer and the use of Castle Auto business cards and premises)

that GHW was engaged in an automotive business and as an automotive salesperson despite not being licensed to do so.

164. I found GHW's evidence to be suspect in many respects as noted above. GWH was generally lacking in credibility.
165. I conclude that GHW breached section 104 of the Fair Trading Act, section 15(1) of the Vehicle Inspection Regulation and section 16(1) of the Automotive Business Regulation all as argued by AMVIC.
166. In assessing the amount of an administrative penalty for a contravention of or failure to comply with the Fair Trading Act or its regulations, I rely on the provisions of section 2(2) of the Administrative Penalties (Fair Trading Act) Regulation.
167. I conclude that GHW's breaches as found above were serious, occurring over a long period of time and deliberate.
168. By his own admission of "always having done business this way", GHW has a long history of breaching the Fair Trading Act.
169. GHW could register as a licensed salesperson easily enough, but he chooses not to, rejecting the notion that he requires an automotive sales license.
170. Based on the evidence of ongoing repeated breaches, the administrative penalty assessed by AMVIC is justified.
171. There are no mitigating factors in GHW's favour.

DECISION

For the above reasons, the October 11, 2016 decision of the Director to issue an administrative penalty in the sum of \$10,000 to Garry H. Wagstaff is confirmed. No costs in this proceeding are awarded to either party.

ISSUED and DATED at the City of Edmonton in the Province of Alberta this 5th day of June 2017 by the Appeal Board constituted to hear the above referenced matter pursuant to section 179 of the Fair Trading Act and the Appeal Board Regulation thereunder.

Paul Alpern