

ALBERTA MOTOR VEHICLE INDUSTRY COUNCIL (AMVIC) INVESTIGATIVE REVIEW FINDINGS

1. The purpose of this report is to present the findings of the Operational Review of Investigative Practices (the Review) to AMVIC's Board. The overall intent is to identify the steps necessary to maintain confidence in AMVIC as an industry regulator capable of protecting consumers in a strong and vibrant marketplace.
2. The Review was commenced in August 2014 following concerns expressed to former Minister Griffiths and former Deputy Minister Trimbee from a variety of sources about the quality and consistency of AMVIC investigations. Led by a Service Alberta team with extensive law enforcement experience, the overarching issue appears to be that the organization has become inconsistent, arbitrary and, at times, punitive in relation to the enforcement responsibilities conferred to AMVIC through delegation under the *Fair Trading Act*. While this constitutes a concern about the quality and consistency of service to consumers and fairness to licensees, the government's reputation is also potentially at risk, because AMVIC is a Delegated Administrative Organization accountable to the Minister of Service Alberta.
3. The Review sought to establish whether AMVIC's complaint handling protocol, investigative processes and complaint resolution practices were reaching an appropriate conclusion based on the evidence, while at the same time operating with best business practices, legislated requirements and accepted law enforcement standards. AMVIC investigators are Peace Officers, with their code of conduct and ethics governed by the *Peace Officer Act*, as administered by the Director of Law Enforcement, Ministry of Justice and Solicitor General.
4. The Review found deficiencies in policy and operational conduct, and makes sixteen recommendations based on findings that:
 - The Review identifies instances of misuse of administrative enforcement tools under the *Fair Trading Act*. In a number of cases, AMVIC has failed to meet the standards of natural or administrative justice or has used administrative tools in an inappropriate manner. For example, Undertakings are being used contrary to the *Fair Trading Act*, AMVIC policy and best practices. Specifically, the voluntariness of the Undertaking, which should be negotiated with the relevant party at the conclusion of an investigation, is questionable. Moreover, AMVIC records are deficient in demonstrating a clear and consistent correlation between the costs associated with conducting an investigation and the monetary aspect of the Undertaking levied on a delinquent party. This all leads to serious concerns that actions may not have been taken in a manner that is fair, impartial and open.
 - Basic investigation principles are not being followed; this exposes AMVIC to the risk that charges would fail or appeals of administrative actions would succeed on the basis of the existence of an insufficiently robust evidentiary chain. As a result, public confidence could be negatively affected. This is especially sensitive at a time of increasing scrutiny about the actions of police, government and AMVIC in relation to the Treadz auto consignment case.

- It is apparent the Executive Director has become involved in operational matters directly related to files he will later be responsible for reviewing for the purposes of administrative action. This creates serious issues about bias under the principles of administrative law and natural justice.
 - AMVIC did not fully implement recommendations made by Service Alberta's Compliance and Accountability Unit to deficiencies identified in Operational Reviews conducted in March 2009 and, more recently, in February 2013. Had these recommendations been implemented, the overall standard of investigations may not now be of such serious concern. Specifically, recommendations that dealt with administrative hearings, the accurate recording and reflection of true costs in Undertakings and the necessity for proper review and sign-off when cases are concluded were not addressed in the manner advised by Service Alberta.
 - The *Peace Officer Act* has not been managed by AMVIC with sufficient diligence, leading to lapses in authority and contraventions of the Act and Regulations. As well, a memorandum of understanding (MOU) with a major partner organization essential to enabling AMVIC to do its job well was allowed to lapse, while other MOU files with critical partners could be improved by ensuring current representative data.
 - The combination of voluntary and involuntary staff attrition over the past eighteen months amounts to 33 out of 45 employees (AMVIC's own data shows 27 resigned and six were terminated). In percentage terms, this is a cumulative 73.3 per cent, broken down as 13 per cent terminated and 60 per cent voluntary. As a point of reference, the Conference Board of Canada pegs average voluntary turnover rates at 7.1 per cent. Therefore, this puts AMVIC's voluntary staff attrition at about 8.5 times the average. This is indicative of a core systemic problem where continuous staffing changes, with the associated loss of experience and operational continuity, is likely to adversely affect achievement of reasonable performance standards and AMVIC's ability to achieve its mandate. Interviews with staff generally indicate very low morale.
5. It is relevant and fair to point out that AMVIC has recently reformed online licensing, improved consumer and industry communications, and online sales person education and training. AMVIC has established a proactive inspection program to allow it to better anticipate risks and reduce the risks of business failure in inspected businesses. AMVIC has taken enforcement action against abuses by advertisers and has worked to establish motor vehicle retail industry standards across the spectrum.
 6. The Review concludes that AMVIC has the required legislation, regulatory framework, and tools to be successful. While some aspects of policies require improvement, as they likely would in any organization subject to review, the substantive issue is a failure to follow existing policies. We would expect to find an appropriate balance of corrective strategies, whether enforcement, administrative or education based. However, these elements are neither working optimally nor in harmony. While it is important to protect consumers through a variety of different strategies, some of which require prosecution or administrative action, a disproportionate emphasis is placed by AMVIC through the use of Undertakings, when other actions may have been more appropriate.

7. The Review found a systemic issue in relation to how AMVIC, and specifically the Executive Director, use Undertakings as the principle method of concluding either a consumer-generated complaint or an infraction identified and generated from within AMVIC. What is stated in AMVIC's own policies (derived from departmental material) is that Undertakings are used at the Director's discretion when a person has contravened the act or regulations, and the contravention has ceased. Therefore, Undertakings should be used at the conclusion of an investigation and should be negotiated with the individual or business involved. It must be voluntary in nature and the monetary aspect cannot exceed the cost of the investigation and costs associated with the Undertaking. For this to occur, costs must be accurately logged from the onset of the investigation. This issue was identified in a recommendation (Sec 4.3.2) by Audit and Compliance following their scheduled review in 2013, but was only partially implemented by AMVIC. However, the Review found numerous Undertakings where little to no formal investigation had been initiated. Instead of a collaborative approach to altering behaviour at the conclusion of proceedings, the Undertaking process was used in an apparently punitive fashion at the front end, often with costs that had little relation to the time spent on the investigation. Further, some Undertakings were used for businesses with a history of offending and re-offending where there was limited evidence that the business had commenced long-term corrective action. Consideration of another form of administrative action or prosecution would seem a reasonable expectation.
8. Serious concerns exist about the less than voluntary nature of AMVIC Undertakings. Some letters about Undertakings are written in a way that they have been taken as a threat to a business such that, unless they sign the Undertaking and pay the penalty, they will be required to attend a hearing, knowing that:
 - the hearing will be presided over by the author of the letter, the Executive Director, who has already indicated that he has decided that there was a breach, which is the key issue for a hearing, and
 - if, as seems to them highly probable, they fail in their defence, it puts them at risk of a penalty greater than the Undertaking contemplated and which may include the forfeiture of their licence. This appears to be an unreasonable business risk.
9. Therefore, because of the perceived bias of the decision-maker, businesses are being compelled to enter into an "admission of guilt," without the apparent ability to present a defence in order to avoid an unfair administrative process. This alone puts the government's and AMVIC's reputation at significant risk. Service Alberta staff has advised the Executive Director on several occasions that Undertakings cannot be used unilaterally and in a fashion that abuses the system, but the practice has continued seemingly unabated.
10. The quality and methodology of investigations is also a major area of concern. The review of files revealed significant lapses in continuity of record keeping (essential if a case is ever to be successfully prosecuted or defended on appeal), a lack of clarity on which cases were open and which had been concluded, and a lack of accurate record of representations made and participants when an administrative hearing was held by AMVIC. This was pointed out to AMVIC following a scheduled Operational Review in 2009.

It was also repeated within recommendation 4.3.1 of the February 2013 Operational Review, but remains unimplemented.

11. Another area of reputational and legal risk is the personal role the Executive Director takes in certain investigations. There are occasions when he has provided direction or implied to an investigator the course he expects the investigation to take. There are also instances when a decision has been arrived at by the Executive Director apparently without input or recommendation from his investigators. This raises strong concerns about the knowledge of and adherence to the principles of administrative justice by senior management at AMVIC. The current training, feedback and supervision models appear flawed, with the supervision aspect receiving specific criticism for the fact investigators are concluding files without independent / supervisory review of their actions. Again, AMVIC was specifically advised about this deficiency in February 2013.
12. The review found significant morale and personnel issues within AMVIC investigations branch. Commentary is made about the regularity and extent of alleged interference in the course of an investigation by the Executive Director. This has contributed to low morale, frustration and resignations as staff apparently struggle to assert the normal function of conducting investigations in an unbiased, fair and objective manner. As well, the reviewers found no evidence that a formalized training or skill development plan existed at AMVIC for investigators.
13. This complex and sensitive matter cannot ignore the previous and ongoing role of the Board in terms of AMVICs overall health. Any board, in order to fulfill its governance role, must have sufficient visibility into operations to provide an appropriate level of oversight. The extent and nature of findings from this Review require the AMVIC Board to consider if its governance model and oversight is sufficiently robust. Specifically, the Board must determine what needs to be done going forward.
14. This issue is ongoing and requires strong lines of communication to be maintained between AMVIC and Service Alberta.
15. The Minister of Service Alberta will look forward to receiving a draft remediation plan, including specific actions and timelines, from the AMVIC Board by March 31, 2015. This plan, in consultation with senior staff at Service Alberta, will chart the course required to re-establish full confidence in AMVIC as an industry regulator capable of meeting its delegated responsibilities, while adhering to legislative and regulatory requirements and the principles of natural and administrative justice. Going forward, AMVIC should unequivocally employ industry best practices and maintain professional and respectful relationships with employees and stakeholders alike.

Recommendations

The following recommendations, with context, require urgent consideration by AMVIC:

RECOMMENDATION 1 : That the Executive Director not engage or perceive to engage in the direction or fact finding of an active investigation conducted by AMVIC investigators. The Executive Director role is akin to a law enforcement agency's senior management, which will receive updates in relation to progress and anticipated timelines or the approval of additional financial or personnel requests. This position would not be actively or directly involved in any fashion with the investigation.

- By virtue of the authority under the *Fair Trading Act*, the Director (as delegated) is responsible for the independent and objective review of matters, conduct of hearings and administration of penalties arising from any and all Administrative Actions associated with AMVIC. In conducting this duty, the Director (as delegated) is bound by the applicable rules of evidence and the requirement to be both actually and perceptually unbiased.
- During interviews with AMVIC investigators in Calgary and Edmonton, the majority of investigators indicated that they are frequently provided direction, either directly or implied, as to how to proceed with an investigation. This direction was from the Executive Director himself or passed on through the Senior Manager of Investigations.
- Any conduct adverse to the principles of a fair and objective investigation is not an acceptable investigational practice and early involvement of the Executive Director would create an apprehension of bias in administrative law

RECOMMENDATION 2: That AMVIC follow its policy related to Undertakings as set forth in the AMVIC Administrative Action Policy.

- AMVIC has a good Administrative Actions Policy in place currently. During the Review, a number of instances were found where AMVIC practices did not follow their own policy. Specifically,
 - The cost assessment on Undertakings for investigative time spent.
 - The lack of documentation to indicate that recommendations for administrative action were being derived from an investigation.
 - The suspect voluntariness of Undertakings.
- Undertakings being issued where there is no indication that the contraventions had ceased. In fact, evidence exists that they had not.

RECOMMENDATION 3: That AMVIC formalizes a standardized investigation format and system to ensure complete and defensible investigations that comply with modern investigative practices that would withstand scrutiny and/or compliance with lawful disclosure requests. It is further recommended that AMVIC dedicate an interview suite equipped with a recording system capable of both video and audio capture.

- During the review, there were a variety of approaches taken based on investigator style or preference as opposed to a standardized reporting structure.
- Examples encountered during the review were:
 - No consistent reporting structure or format.
 - Lack of standardization of reports or forms utilized by investigators.
 - The case file Complaint Cover Sheet was very often found to indicate “Open” with no conclusion date, despite the file having apparently been concluded. There was also no indication that the file had been reviewed or approved by a supervisor.

RECOMMENDATION 4: That a formalized and structured review and approvals process be utilized for all investigative reports to ensure they meet an acceptable standard for an enforcement body.

- During the Review, examples were found where it did not appear that the file had undergone supervisory review and lacked signatures to indicate that it had, files were often found to be in “Open” status, when they had clearly been concluded.
- Many instances were found in which a file had been assigned by and assigned to the Senior Manager of Investigations and contained no indication of subsequent review by their supervisor. It was apparent that the file had been drawn on behalf of the Executive Director and that the Manager of Investigations did not conduct an investigation into the matter as there was no indication of any notes, inquiries or actions performed.

RECOMMENDATION 5: That AMVIC ensure all investigative staff receives training where required in the principles and practices involved in conducting and recording an investigative report.

- Examples encountered during the review were:
 - There were references made within files to letters, correspondence, reports and emails that were not contained within the file itself.
 - Investigator notes were found in a number of cases to be inadequate. Many were recorded on various types of paper, written on the file jacket or stuck somewhere in the file on post-it notes. Although there are occasions where the recording of investigator notes will be on different mediums, these notes have to be captured in a fashion that will not be lost and suitably included and disclosed within the file.

RECOMMENDATION 6: That a mechanism be developed and implemented that would allow the Director of Fair Trading to ensure that recommendations made pursuant to the provisions of Articles 6.7, 6.8 and 6.9 of the Agreement are discussed, considered and implemented where deemed prudent or in the best interest of AMVIC’s mandate and operations.

- From the recommendations made in the 2013 review, of the six that pertained to this review of investigations, three were not implemented and one only partially implemented.

RECOMMENDATION 7: That the AMVIC Undertaking policy be amended to read – “An Undertaking should typically only be offered if the identified breaches have been resolved and there is a provable breach of the act or regulations.”

- This recommendation refers to the AMVIC Undertaking Policy, Section “3.2.c Considerations.”

RECOMMENDATION 8: That the Undertaking Policy be re-written to be consistent with the Administrative Action Policy or achieve consistency by removing the Undertaking Policy, leaving the Administrative Actions Policy as the single reference source for all Administrative Actions.

- There currently exists as outlined above, conflicting policy relating to the Background (framework) and Guidelines (use) of Undertakings between the two AMVIC policies. The AMVIC Administrative Actions Policy is the document that is favoured and best describes the intent and authority for the use of Undertakings relating to the *Fair Trading Act*.

RECOMMENDATION 9: That AMVIC management review the requirements as specified in the *Peace Officer Act* and related Regulations and take steps to ensure full compliance with those requirements in the future. It is further recommended that AMVIC update all MOUs to ensure that the names of designated AMVIC representatives are current.

- It was found during the review that four individuals, who were no longer employed by AMVIC, had not had their documents returned to the Director of Law Enforcement.
- The Review found that there were several instances where the MOUs contacts were not current, as well as one MOU with a significant partner that had been expired for over a year.

RECOMMENDATION 10: That AMVIC amend the policy contained within Part C, Para 1.4.2 and Para 1.4.4 relating to verbal complaints about Peace Officers.

- Section 14 of the *Peace Officer Act* states, “Any person may, in accordance with the regulations, make a complaint in writing regarding a peace officer to the peace officer’s authorized employer.” There is no provision contained within the *Peace Officer Act* for receiving complaints in verbal format only. Complaints must be in writing.

RECOMMENDATION 11: That AMVIC develop and utilize an informal resolution form for complaints against Peace Officers.

- Both Edmonton and Calgary Police Services have “Informal Resolution” forms for use in these instances. The form identifies the complainant, provides a brief description of the complaint and the resolution agreed upon and indicates that the complainant is satisfied with the resolution and wishes to discontinue the complaint.

RECOMMENDATION 12: That AMVIC amend their Peace Officer Policy, Part D at Para 1.8 by removing reference to any appeal process involving the AMVIC Board of Directors and substitute reference involving appeal to reflect the Director of Law Enforcement.

- The *Peace Officer Act* states at Section 15 that the authorized employer must investigate and dispose of the complaint in accordance with the Act, and that the complainant’s review process is with the Director of Law Enforcement. There is no appeal process to the governing body of an authorized employer.

RECOMMENDATION 13: That AMVIC delete the portion of the investigative services policy contained within Part A, Para 1.2 as it relates to Director Exemption from policy adherence.

- Best business practices do not exclude individuals from conforming to corporate policy based on position.

RECOMMENDATION 14: That AMVIC simplify their charge approval protocol for all charges (except those involving complex circumstances, sensitive issues or when deemed prudent to do so by the Team Lead and/or Senior Manager of Investigations) to allow charge approval to be given by the Team Lead.

- During the staff interview segment, it was found that the charge approval process was very cumbersome and resulted in significant delays.
- This process requires an investigator to obtain pre-charge approval through up to five (5) separate and distinct levels before a charge can be laid. The process appears to be onerous and time consuming.

RECOMMENDATION 15: That AMVIC develop and implement an enquiry / complaint handling flow chart to assist staff in determining the appropriate complaint handling process.

- The complaint handling policy is well written and detailed. However, the policy consists of seven pages and is cumbersome to navigate. Most enforcement agencies use a complaint handling flow chart that permits a quick and visual staff reference guide to determine the appropriate and subsequent activity when receiving a complaint.

RECOMMENDATION 16: That action be undertaken forthwith to address the substandard morale and excessive voluntary staff turnover within AMVIC.

- The attrition rate in the investigations team was around 70 per cent over the past eighteen months. This turnover speaks for itself and causes serious concern about AMVIC's ability to perform its delegated responsibilities.