



MOTOR VEHICLE SALES AUTHORITY OF BRITISH COLUMBIA
(Previously known as the Motor Dealer Council of B.C.)

**IN THE MATTER OF THE *MOTOR DEALER ACT* R.S.B.C. 1996 C. 316
AND THE *SALESPERSON LICENSING REGULATION* B.C. REG. 241/2004**

RE:

KENNETH McKINNON
(Salesperson License # 103785)

SALESPERSON

DECISION OF THE REGISTRAR OF MOTOR DEALERS

APPEARANCES

For the Authority:	Denis Savidan, Manager of Compliance and Investigations Ron Sharein, Compliance Officer
Kenneth McKinnon	In person
Date and Place of Hearing:	November 26, 2009, at Kamloops, British Columbia.

INTRODUCTION

1. This hearing was to review the license of Kenneth McKinnon, Salesperson License # 103785, pursuant to sections 6 and 7 of the *Salesperson Licensing Regulation* B.C. Reg. 241/2004 (the "Regulation"). Of concern to the staff of the Motor Vehicle Sales Authority of British Columbia (the "Authority"), is whether Mr. McKinnon's past conduct while employed with Butler Auto Sales, Dealer Registration 5333, of Kamloops, B.C. ("Butler") is such that it would not be in the public interest for Mr. McKinnon to continue to be licensed as a salesperson.
2. There are three general allegations of misconduct on the part of Mr. McKinnon.

3. First, that on or about March 24, 2005, Mr. McKinnon received \$5,000 in cash from Mr. and Mrs. Bodlack for the purchase of a 2004 Okanagan 5th wheel trailer and did not remit that money to his employer; Butler. It is alleged Mr. McKinnon converted those proceeds to his own use without his employer's permission.

4. Second, that on or about January 8 and 9, 2006, Mr. McKinnon received \$20,000 in cash from Donald Bezanson for the purchase of a 2002 Volkswagen Jetta TDI and only remitted \$18,690.30 to his employer; Butler. It is alleged Mr. McKinnon converted \$1,309.70 to his own use without his employer's permission.

5. Third, that on or about September 1, 2006, Mr. McKinnon received \$2,500 in cash from Douglas Hunter for the purchase of a 1980 Wilderness trailer and only remitted \$565.00 to his employer; Butler. It is alleged Mr. McKinnon converted \$1,935 to his own use without his employer's permission.

6. During the hearing a fourth concern arose, which is Mr. McKinnon's failure to cooperate during Mr. Sharein's investigation. I will comment further on this below.

7. While I may not mention all the evidence that was placed before me, I have reviewed all that evidence and have given it its due weight. Some of the exhibits in the affidavit of Ron Sharein describe other transactions involving Mr. McKinnon other than the three noted above. I have placed no weight on any evidence that does not relate to the three above noted transactions, and this hearing.

PRELIMINARY ISSUES

(a) Dual Proceedings

8. I am advised that Butler terminated the employment of Mr. McKinnon for cause after becoming aware of the three above-noted transactions and other transactions not currently before me. Mr. McKinnon has commenced proceedings in the B.C. Supreme Court for wrongful dismissal for that termination. Mr. McKinnon states that the issues before me will be issues at the trial in the B.C. Supreme Court.

9. The fact that the above allegations and similar issues that are before me may be heard and decided upon by the B.C. Supreme Court, does not bar me from hearing this matter. The issue before me is whether it is in the public interest that Mr. McKinnon should lose his salesperson license or that it should be suspended. The B.C. Supreme Court does not have jurisdiction to determine what is in the public interest regarding a car salesperson's license, nor can it order its cancellation or suspension. Only the Authority, through the Registrar of Motor Dealers, can make such an order and determination: section 6 and 7 of the Regulation. I therefore have jurisdiction to continue with this matter separate and apart from the B.C. Supreme Court: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 S.C.R. 185 (Supreme Court of Canada); and see also *Chase v. Nortel Networks Ltd*, 2004 CanLII 28734 (Ontario Superior Court).

(b) Post-hearing communications

10. On two occasions after the hearing, Butler attempted to contact me in order to provide me with additional information. Once by email and once by facsimile. Denis Savidan was able to intercept the facsimile and warn me not to review the contents of the email. I have not reviewed the contents of either of these attempted communications. The information within those communications does not form any part of my deliberations.

POSITION OF THE PARTIES

(a) The Authority

11. The position of the Authority is highlighted in the allegations above. The authority called four witnesses – Mr. Ron Sharein; Ms. June Butler; Ms. Bodlack; and Ms. Morton. Mr. Bezanson was unavailable for the hearing as he had a family emergency that took him out of the country one week prior to the hearing. Mr. Sharein stated his investigation determined that Mr. Hunter is now deceased.

12. Mr. Sharein is a compliance officer with the Authority. He was charged with carriage of the investigation of the three allegations noted above. He provided little in the way of oral testimony. Mr. Sharein submitted an affidavit as his evidence and was made available to Mr.

McKinnon for questioning. Mr. McKinnon received a copy of the affidavit well before the hearing. He had no questions for Mr. Sharein.

13. Ms. Bodlack was one of the consumers noted in paragraph 3 above. Ms. Bodlack confirmed she and her husband gave Mr. McKinnon \$5,000 in cash as alleged. Mr. McKinnon provided a receipt for same on one of his business cards. During Ms. Bodlack's oral testimony, Mr. McKinnon spontaneously admitted he received the \$5,000 and also stated he received all the monies as alleged (pages 8-9 of the transcript of proceedings):

18 Mr. McKinnon: I received the \$5,000. I do not deny that whatsoever.
19 ...

24 Mr. McKinnon: I've not denied anything. I received all these monies
25 given to me.

1 The Registrar: Okay.

2 Mr. McKinnon: I'm not denying that. In our discovery we had last
summer in front of their lawyers and my lawyer I did
not deny receiving any money from anybody.

14. Mr. McKinnon had no questions for Ms. Bodlack.

15. Ms. June Butler is President and an owner of Butler and she provided evidence about how she came into possession of various receipts, memo pads and documents now exhibits in the Affidavit of Mr. Sharein. She stated they were in a safe in Mr. McKinnon's office, which only he could open, except for one document which was found under a pile of other documents on Mr. McKinnon's desk. Ms. Butler reviewed each of the three above-noted transactions and stated that Butler did not receive all the monies the consumers have stated they paid to Mr. McKinnon. She described Mr. McKinnon's termination from Butler and how she hired a private investigator to look into various transactions conducted by Mr. McKinnon. Mr. McKinnon asked one question of Ms. Butler – did she ever receive cash from Mr. McKinnon? Ms. Butler replied no.

16. Ms. Morton is the bookkeeper at Butler. Her evidence consisted of explaining the numbers on the three transactions and that she received only the amount of money noted on the purchase agreements and not as shown on the receipts issued by Mr. McKinnon, or by Merv Hanson to the

consumers. Mr. McKinnon only asked Ms. Morton one question. Was she aware of him ever giving June Butler or Joe Butler cash from a sale? Her reply was that she was not aware of anything of that nature. Joe Butler is the other owner of Butler.

17. Mr. Bezanson's written statement, contained within the Affidavit, indicates he gave the \$20,000 to Mr. McKinnon. He saw the Jetta for sale at an off-site sales event and paid for the vehicle at that event; giving the cash to Mr. McKinnon. He then went to Butler's the next day to pick-up the Jetta and did not notice the \$18,690.30 figure on the purchase agreement. He states he was not concerned as he had received a receipt from Mr. McKinnon the day before for the full amount of \$20,000.

18. Mr. McKinnon provided oral evidence on the three above noted transactions.

19. Regarding the transaction involving Ms. Bodlack, Mr. McKinnon admitted receiving the \$5,000. He said he gave the \$5,000 to Joe Butler. He says he suggested to the Bodlack's that they should give him \$5,000 in cash in order to keep it off the paperwork and to evade paying taxes on that amount: transcript of proceedings page 50, line 8 to page 51, line 6. During his testimony he intimated that he was assisting Joe Butler keep revenue off the books to also evade paying taxes. Mr. McKinnon also alleged that Butler laundered money through the company: transcript of proceedings, page 45, lines 14 to 21.

20. Mr. McKinnon admits to taking the \$20,000 from Mr. Bezanson. Mr. Bezanson agreed to the sale on a Sunday during an off-site event, and paid Mr. McKinnon at that time. Mr. McKinnon says he then gave the money to June Butler at her home that same day. Mr. McKinnon relies in part on Exhibit H to the Affidavit at page 18. That document is an "Offer to Purchase" and a notation in the left corner that says "June cash". He says this means he gave June Butler the \$20,000 in cash. Ms. Butler stated she did not receive the \$20,000. Mr. McKinnon does not know why the \$18,690.30 figure is on the purchase agreement. He says that agreement was completed the next day by Don Peel. Mr. McKinnon says he was busy that day moving cars around and he did not complete that form. A written statement from Don Peel says he was working at a mill in Williams Lake that whole week and could not have completed any purchase agreement on that day.

21. Mr. McKinnon says he had no involvement whatsoever with the Hunter transaction. He says that transaction was done by Merv Hanson.

THE LAW

22. Section 6 of the Regulation provides authority to review a licensee's past conduct and cancel or suspend a salesperson license if it is in the public interest to do so.

23. In considering whether to cancel a license or refuse a license, the B.C. Court of Appeal noted that a person's individual circumstances should be taken into consideration: *Pacific International et al v. B.C. Securities Commission* 2002 BCCA 421 (B.C. Court of Appeal). The B.C. Court of Appeal also stated that when considering licensing; what is in the public interest is the paramount consideration: *Pacific* at paragraph 12.

24. The inherent purpose of licensing is to ensure minimum standards of conduct and care are met. Licensing, and the resulting regulation of an occupation, serves an important societal need to ensure that otherwise lawful conduct is not abused and innocent persons are protected from potential future harm. Mr. Justice Cory of the Supreme Court of Canada made this concept clear:

The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care....

In short, regulation is absolutely essential for our protection and well being as individuals, and for the effective functioning of society. It is properly present throughout our lives. The more complex the activity, the greater the need for and the greater our reliance upon regulation and its enforcement. For example, most people would have no idea what regulations are required for air transport or how they should be enforced. Of necessity, society relies on government regulation for its safety. [underlining added]

R v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154 (Supreme Court of Canada); see also *Zenner v. Prince Edward Island College of Optometrists*, [2005] 3 S.C.R. 645 (Supreme Court of Canada).

25. Where witness credibility is called into question, as in the case before me, it is important to consider the various factors the courts have identified to assist in determining the credibility and reliability of the evidence being submitted – see for example: *R v. J.W.R.* 2007 BCCA 452 at paragraph 73 (B.C. Court of Appeal); *R. v. R.W.B.* [1993] B.C.J. No. 758 (Q.L.) at paragraph 29 (B.C. Court of Appeal); *R v. Essex* 2004 BCSC 445 paragraphs 9-11 (B.C. Supreme Court); and *R v. Kok* 2007 BCPC 0162 at paragraph 8 (B.C. Provincial Court).

26. The burden of proof rests with the Authority and the civil burden applies even where quasi-criminal allegations are made: *F.H. v. McDougall* [2008] 3 S.C.R. 41, 2008 SCC 53 (Supreme Court of Canada).

DISCUSSION

Witness Credibility

27. I have concerns with the evidence of Mr. McKinnon. Mr. McKinnon was evasive when asked questions by Mr. Savidan. As an example, Mr. McKinnon was asked why he kept the receipt books and memo pads locked in his safe. He gave evasive answers before he said Joe Butler told him to put them in his safe. This same evasiveness was repeated when Mr. Savidan asked Mr. McKinnon why he did not give copies of the receipts he issued to consumers to his employer; Butler. He finally inferred that Butler did not want those receipts as they were in essence diverting money from the books to launder it. Regarding the receipt for the Bezanson transaction, Mr. McKinnon finally stated that Joe Butler saw the receipt.

28. I also find Mr. McKinnon's evidence convenient and contradictory. He spoke with conviction that Don Peel completed the purchase agreement for Mr. Bezanson. Don Peel's name does appear on the purchase agreement (page 17 of the Affidavit Exhibits), but Mr. Peel's statement was that he was working in a mill that day. The evidence is that Mr. Peel was part of this sale when it took place the day before, and he would thus be noted on the purchase agreement. I accept the written statement of Mr. Peel that he was at a mill. There is no evidence to contradict that statement. It appears Mr. McKinnon saw Mr. Peel's name on the purchase agreement and then adopted a position that Don Peel filled it out and states so as if he knows this as a fact – while at the same time he says he was busy moving cars around that day and did not know anything about the Bezanson purchase agreement.

29. Mr. McKinnon's evidence was also convenient as he kept saying Joe Butler knew everything that he was doing. Joe Butler was not part of this hearing. This is a point Mr. McKinnon noted and wanted to infer there was some adverse reason for Joe Butler's absence. Mr. Sharein gave evidence that Joe Butler was not spoken to as his name did not come up at anytime during his investigation. I note that Mr. Sharein asked Mr. McKinnon for a statement during the investigation and Mr. McKinnon refused. It seems that if Mr. McKinnon was doing everything under the direction of Joe Butler, his employer, he would have wanted to inform the Authority of that fact during the investigation so it could be thoroughly reviewed. Mr. Joe Butler's evidence could then have been brought to my attention to show Mr. McKinnon was acting under his employer's directions – a significant piece of evidence in Mr. McKinnon's favour, if true. Instead, Mr. McKinnon waited to say something at the hearing, when Mr. Joe Butler was unable to either corroborate or refute Mr. McKinnon's evidence. I find this is also convenient on Mr. McKinnon's part. An equally adverse inference could be drawn against Mr. McKinnon for withholding this information and then delivering it in such a way that it could not be verified at the hearing. I find it unnecessary to make such an inference. However, this is clearly evidence that Mr. McKinnon should have provided during the investigation.

30. Mr. McKinnon made several allegations of serious wrongdoing on the part of Butler. He stated his lawyer has evidence to prove some of these allegations. Mr. McKinnon produced none of that evidence at this hearing – not even copies of that evidence. If the evidence existed, I would have expected some of it to have been produced at the hearing to support Mr. McKinnon's position.

31. Mr. McKinnon's evidence was also inconsistent. He denies having anything to do with the Hunter transaction. He says he took no money at all during this transaction. Mr. McKinnon's denial of involvement in this transaction is inconsistent with his above-noted spontaneous statement where "he did not deny taking any money from anybody."

32. Merv Hanson's written statement is that Mr. McKinnon took \$2,500 cash from Mr. Hunter and directed Mr. Hanson to issue a receipt to Mr. Hunter for \$2,500. Mr. McKinnon then paid Mr. Hanson a \$100 commission in cash. Mr. McKinnon said Mr. Hanson is lying and then stated

Mr. Hanson was recently arrested. I take from this that Mr. McKinnon was trying to attack Mr. Hanson's credibility. However, Mr. McKinnon provided no other evidence of such an arrest.

33. Joel Gobeil, an employee at Butler, also provided a written statement regarding the Hunter transaction. In that statement he says Mr. McKinnon provided Mr. Gobeil with Mr. Hunter's driver's license and asked Mr. Gobeil to "write up a deal" for a price of \$500. Mr. Gobeil also stated that Mr. McKinnon informed Mr. Gobeil that he was taking the trailer to Mr. Hunter's residence. I find the statements of Mr. Hanson, Mr. Gobeil and Ms. Morton to be consistent with each other and with the Hunter purchase agreement. I find Mr. McKinnon's evidence on the Hunter transaction lacks credibility.

34. For the above noted reasons, I do not find Mr. McKinnon to be a credible witness.

35. The evidence from the other witnesses was not directly challenged except for that of Merv Hanson. As to Mr. Hanson's evidence, for the reasons noted in paragraphs 31-34, I prefer Mr. Hanson's evidence to that of Mr. McKinnon. I turn now to discuss the three transactions.

Bodlack Transaction

36. Mr. McKinnon admits to taking the \$5,000 in cash in the Bodlack transaction. He says he gave the cash to Joe Butler. His explanation was that he was assisting his friends, the Bodlacks, and his employer, Butler, to evade paying taxes on that money. Through his evidence, Mr. McKinnon has provided me with two options: (1) accept that he knowingly committed the unlawful act of converting money to his own use as alleged; or (2) accept that he assisted his friends and employer to evade paying taxes. Both are equally unlawful acts of concern to the public interest. In reviewing the evidence submitted, I find it more likely than not that Mr. McKinnon counseled the Bodlacks to pay him \$5000 in cash, explaining they would evade paying taxes on that amount, and that he kept the cash for his own use without Butler's knowledge or consent.

Bezanson Transaction

37. The only fact in controversy in the Bezanson transaction is whether Mr. McKinnon gave the \$20,000 to June Butler the day of the sale; or did he give only \$18,690.30 keeping \$1,309.70

for his own use? I have discussed the evidence of this transaction in some detail above. I would note that the document Mr. McKinnon relies on is of no assistance to him. Even if I accept that the notation “June cash” means he gave June Butler the cash from this transaction, that document also shows an amount of \$18,690.30. For reasons already stated, I accept the evidence of June Butler, Ms. Morton and Mr. Bezanson over that of Mr. McKinnon. I find that Mr. McKinnon converted \$1,309.70 for his own use without his employer’s knowledge or consent.

Hunter Transaction

38. For reasons already stated, I find Mr. McKinnon was involved in the Hunter transaction and his explanation of no involvement is rejected. I am satisfied that it is more likely than not that Mr. McKinnon received \$2,500 from Mr. Hunter and remitted only \$565 to his employer, Butler. I am also satisfied on a balance of probabilities that Mr. McKinnon attempted to mislead me about his involvement in the Hunter transaction.

Failing to Cooperate with a Regulatory Investigation

39. Mr. Sharein is a compliance officer with the Authority acting pursuant to a delegation of authority by the Registrar of Motor Dealers. He asked Mr. McKinnon to provide a statement about these allegations which Mr. McKinnon refused to do. As a licensee, Mr. McKinnon is required to provide information the Authority deems necessary during an investigation: section 8 of the Regulation and section 8.1 of the *Motor Dealer Act* R.S.B.C. 1996 c. 316 (“MDA”), section 29 of the *Motor Dealer Act Regulation* B.C. Reg. 447/78, and section 149(a)(ii) of the *Business Practices and Consumer Protection Act* S.B.C. 2004 c. 2. Having regard to section 35(3)(b), and applying the legal principles for interpreting a B.C. statute*, the B.C. Legislature has made it very clear that a regulated person must provide information that is required by the MDA, and its regulations. This includes providing information during an investigation:

35(3) A person commits an offence if the person does any of the following:

(b) refuses or fails to provide information as required under this Act.

**Yeung (Guardian ad litem of) v. Au* 2006 BCCA 217, 51 B.C.L.R. (4th) 258 at paragraph 32 (5 member panel of the B.C. Court of Appeal), aff’d 2007 SCC 45, 70 B.C.L.R. (4th) 1 (Supreme Court of Canada)

40. As a licensee, Mr. McKinnon should not have refused to provide a statement to Mr. Sharein during the regulatory investigation of his conduct: *British Columbia Securities Commission v. Branch* [1995] 2 S.C.R. 3 (Supreme Court of Canada). A failure to cooperate with a regulatory investigation of this nature is grounds to discipline a licensee: *Mathews v. Ontario (Board of Directors of Physiotherapy)* (1986), 54 O.R. (2d) 375 (Div. Ct.), affirmed by 61 O.R. (2d) 475 (Court of Appeal); *Artinian v. College of Physicians and Surgeons of Ontario* (1990), 73 O.R. (2d) 704 (Div. Ct); and see also *The Registrar of Motor Dealers and Brian S. Basset* (File 09-108822, December 2, 2009).

41. Again, I also find Mr. McKinnon has been less than truthful during the hearing before me.

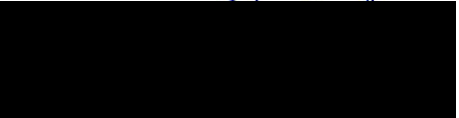
CONCLUSION

42. It is a serious matter if a regulated person refuses to cooperate with a regulator during an investigation of their conduct. It is also a serious matter for a licensee to try and mislead the investigation at a hearing and while under oath. I place considerable weight on these two points in considering whether it is in the public interest for Mr. McKinnon to continue to be a licensed salesperson. Misleading and failing to cooperate with a regulator undermines the regulator's ability to carry out its mandate of reviewing licensees to ensure they are not a risk to the public interest. It is certainly not in the public interest to license a person who refuses to cooperate with its regulator and, in essence, refuses to be regulated.

43. I am also satisfied on the evidence presented that Mr. McKinnon's conduct during the above three transactions is of grave concern to the public interest.

44. For these reasons, Mr. Kenneth McKinnon's salesperson license # 103785 is cancelled effective this date. The conduct exhibited by Mr. Kenneth McKinnon is such that I find it in the public interest that he be refused a salesperson license indefinitely.

Dated: January 5, 2010.


Ian Christman B.A., J.L.B.