



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

RE:

LCB AUTOS LTD.
(Assigned for reference Registration # 31026)

APPLICANT

DECISION OF THE REGISTRAR OF MOTOR DEALERS

Appearances

For the Authority: Hong Wong, Manager of Licensing
Jaydon Rush, Licensing Officer
Denis Savidan, Manager of Compliance and Investigations

For LCB Autos Ltd.: Laurence Brown

Date and Place of Hearing: March 24, 2010, at Surrey, British Columbia.

Introduction

1. In accordance with sections 5 and 6 of the *Motor Dealer Act* R.S.B.C. 1996 c. 316 (the "Act"), this hearing was to review the application of LCB Autos Ltd. (LCB) for registration as a motor dealer. LCB is to operate in Campbell River, B.C. The staff of the Motor Vehicle Sales Authority (the "Authority") has concerns about LCB being registered. The concerns can be summarized as: LCB's business plan is reliant on being able to conduct consignment sales; LCB, or its directing mind, has little to no prior experience as a motor dealer; and LCB is under-capitalized and has little financial backing.

2. Evidence placed before me was the application package of LCB (Exhibit 2) and oral testimony from Hong Wong, Jaydon Rush and Laurence Brown. Laurence Brown is the declared authorized representative of LCB, the dealer principal, as well as the only declared salesperson. Mister Brown is a 75% shareholder with his wife holding 25% of the shares.

3. During the hearing, I concluded that I would like Mr. Brown to obtain additional information for my consideration. He has done so by way of email to Jaydon Rush, dated March 26, 2010. That email included a letter from a Toyota dealership as an attachment. As

LCB has provided what amounts to confidential and proprietary information in support of its application, I will refrain from disclosing such information except as is necessary to explain what follows. While I may not comment on all the evidence that was presented, I have reviewed and considered all that evidence and given it due consideration.

Licensing/Registration

(a) Purpose of Registration/Licensing - Regulation

4. Mister Justice Cory of the Supreme Court of Canada made clear the purpose of regulation and by extension licensing/registration:

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. [emphasis 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).

5. The purpose of licensing under the *Motor Dealer Act* R.S.B.C. 1996 c. 316 ("MDA") is to review and vet individuals and business proposals to ensure they do not represent a risk to the public interest. In reviewing the MDA and its regulations, the public interest includes reviewing any past unlawful conduct, poor business practices, and poor financial practices. It also looks forward by looking at an applicant's business plan to assess any potential risk to the public interest. On this later point, the legislative intent is clear that prevention of business failures that may harm consumers must be on the forefront of the Registrar's mind: section 5 and 7 of the MDA, section 7 of the *Motor Dealer Act Regulation* (B.C. Reg. 447/78) (the "Regulation") and sections 5(1) (a) and (b) of the *Motor Dealer Customer Compensation Fund Regulation* (B.C. Reg. 102/95) ("Compensation Regulation"). This is

especially so in regards to motor dealers who conduct or wish to conduct consignment sales: section 5(1)(c) of the Compensation Regulation.¹

6. Judge Bowden in *Dong v. Tong & Canadian Lord Enterprises Inc.* 2009 BCPC 133 (B.C. Prov. Ct.), noted the importance of registration under the Motor Dealer Act:

[22] In my view the requirement in the Motor Dealer Act is intended to protect those persons who may acquire a motor vehicle from a person or corporation is not registered under that Statute and who may engage in the sale or other disposition of a motor vehicle in a way that is detrimental to the purchaser or, in this case, the lessee. **The requirement of registration in this regulatory statute and penalties for non-compliance are necessary to try and prevent unqualified and, perhaps, unscrupulous persons from engaging in the sale or other disposition of motor vehicles. In my view the registration requirement is designed to try and prevent just the kind of transaction that has taken place between the Claimant and the Defendants.**

(b) Reviewing the individual applicant

7. In reviewing an applicant for a license/registration, I must review the individual applicant's particular facts. I may not fetter my discretion by blindly applying a policy. However, a policy is an appropriate guide in which to advise the regulated industry and to aid the equal application of the law: *Maple Lodge Farms v. Government of Canada*, [1982] 2 S.C.R. 2 (Supreme Court of Canada).

(c) Procedural Fairness and Natural Justice in Licensing Decisions

8. Procedural fairness and natural justice are common law (judge made) principals which may be set aside by a statute, such as the *Motor Dealer Act*; including the principle against bias: *Ocean Port Hotel v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52 (Supreme Court of Canada) and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (Supreme Court of Canada).

9. The principles of natural justice and procedural fairness are applied on a continuum, with licensing/administrative decisions being at the lower end of that continuum and functions approaching that of a court (settling a *lis* between parties) at the higher end: *Ocean Port Hotel; Baker and Lorindale Holdings et al v. B.C. Assets and Land Corp. et al* 2004 BCCA 352 (B.C. Court of Appeal). In *Lorindale*, Mr. Justice Donald writing for the Court stated:

¹ Applying the principles of statutory interpretation applicable to B.C. statutes: *Yeung (Guardian ad litem of) v. Au* 2006 BCCA 217 at paragraph 32 (5 panel Court of Appeal), aff'd 2007 SCC 45 (Supreme Court of Canada).

[25] In my judgment, the appellants' application was at the low end of the continuum. It was akin to a licence application, which required an exercise of discretion in accordance with policy. The appellants had to meet an eligibility requirement for their application to be considered, namely that the application, if granted, would not create a stacking of tenures. The appellants did not make it over the threshold. Therefore, in my view, no *lis* arose between them and Odyssey.

[26] Here the appellants' application failed to meet a basic qualification and it was rejected at the outset. As the reviewing judge held, correctly in my respectful view, the rejection was in accordance with a rational policy for managing a public resource. [underlining added]

10. The granting or suspension of a license is an exercise of the executive power of the Province; and not a judicial function: *Ocean Port Hotel*.

11. When considering licensing issues, the public interest is paramount over the desire of a person to work in a specific licensed field: *Pacific International et al v. B.C. Securities Commission* 2002 BCCA 421 (B.C. Court of Appeal). Mr. Justice Smith in *Pacific International et al* cited approvingly:

[12] However, the right to participate in the securities business is not a right of the same order. As Hollinrake, J.A., speaking for this Court in *Rak v. British Columbia (Superintendent of Brokers)* (1990), 51 B.C.L.R. (2d) 27, commented aptly in another context, at 34:

In my view, trading in securities is not a profession in the sense that doctors, lawyers, architects, engineers, accountants and other professionally-trained persons can be said to be engaged in a profession. In my opinion it cannot be said that a trader in securities is deprived of his ability to pursue a profession because his exemptions under the *Securities Act* are lifted.

He went on to cite with approval, the following passage from the reasons for judgment of Robertson, C.J.O. of the Ontario Court of Appeal in *Re the Securities Act and Morton*, [1946] O.R. 492 at 494:

A registered broker or salesman has no vested interest that is to be weighed in the balance against the public interest. I have no doubt the Commission will, on proper occasions, give consideration to the possible serious consequences of taking away a man's livelihood, and of making the business of a broker or salesman a precarious occupation. Such considerations may have their proper place in determining what is in the public interest. **It is, however, the public interest that is to be served by the Commission, and no private interests or the interest of any profession or business, in the exercise of the Commission's powers of suspension or cancellation of the registration of any broker or salesman.** [emphasis added]

The Consignment Sales Policy of the Registrar

12. As a policy, the Registrar has determined that a new applicant with no prior history in the motor dealer industry will generally not be allowed to sell motor vehicles on consignment. The applicant will generally be required to operate in the industry for three years in order to gain necessary experience before being considered for authorization to sell on consignment. That time also provides the Registrar with some business history from the motor dealer that is directly under the Registrar's jurisdiction and from which he can review in detail: sections 7 and 26 of the MDA; sections 8.1 of the MDA, 29 of the Regulation, and 149-152 of the *Business Practices and Consumer Protection Act* S.B.C. 2004 c. 2; and section 7 of the Regulation.

13. This type of restriction for selling on consignment is a restrictive condition placed on the registration of a new motor dealer, which the Registrar is empowered to do: *Southwest R.V. v. Motor Dealer Council of British Columbia*, 2007 BCSC 1140 (B.C. Supreme Court).

14. It should be noted that this is an additional requirement to conduct consignment sales, along with providing a letter or credit in an amount the Registrar deems appropriate in the circumstances: sections 3(1)(a)(ii), 4(4) and (5) of the *Motor Dealer Act*. The applicant must also satisfy the Registrar that its proposed business plan and past prior conduct (including that of its directing minds and their financial histories), does not pose a risk to the public interest: sections 5 and 7 of the *Motor Dealer Act*.

15. Where the Registrar places a condition on registration, there is no right to a hearing: sections 4(4), (5) and (6) of the *Motor Dealer Act*. If the Registrar intends to refuse registration or renewal of registration, or to suspend or cancel a registration, then the motor dealer has a right to a hearing: section 6 *Motor Dealer Act*. As a matter of policy and fairness, the Registrar will hear from a new applicant who wishes to do consignment sales, upon their request, to consider whether they have adequate alternative experience to meet the three-year experience requirement: *Maple Lodge Farms*.

16. The policy of three-year's experience operating in the motor dealer business before being considered for an authorization to conduct consignment sales has been set in the public interest. Consignment sales create a special trust relationship between a motor dealer and the consumer (consignor). The motor dealer is to act in the consumer's best interest. The *Motor Dealer Consignment Sales Regulation* (B.C. Reg. 101/95) places further requirements on a motor dealer. That regulation is legislative evidence of the serious concern and review the Registrar is to place on allowing a motor dealer to conduct consignment sales. Also, a motor dealer whose business plan is dependent on consignment

sales is using consumer money (consumer property) to partially finance their operations. In this way, the consumer is taking some risk in the business operations of the motor dealer. If the motor dealer fails, the consumer may find it difficult and expensive to regain their property. Banks and financial institutes can better protect themselves in lending money to a motor dealer (security for the loan) than consumers can when lending their property to a motor dealer. Some recent examples help illustrate this point.

(a) *Southwest RV*

17. Southwest RV and Sport Ltd. (Southwest) applied to be registered as a motor dealer and an authorization to sell on consignment. The dealer principal and owner was financially backing the dealership, had about one-year experience in the industry and had no other financial backing. Southwest's business plan was also dependent on conducting consignment sales. Registrar Smith refused to authorize selling on consignment to Southwest: Registrar's Hearing November 15 and 22, 2006. Southwest unsuccessfully challenged that decision before the B.C. Supreme Court: *Southwest R.V.* About 18 months later, it came to light that Southwest was in financial difficulty and that it had been selling on consignment contrary to its registration. The Registrar issued property freeze orders over all the assets of Southwest and applied to the B.C. Supreme Court to place Southwest into the hands of a receiver-manager: Registrar's decision of November 20, 2009, in omnibus File No. 08-70597 (note that this decision only encompasses some of the consumers affected by this dealers conduct.)

18. Over 35 consumers could not locate their property, or their property was damaged upon return. They, collectively, were paid \$316,768.20 in compensation from the Motor Dealer Compensation Fund. Since the November 20, 2009, decision, two others have been compensated for over \$20,000. In several cases, the compensation amount, capped at \$20,000 by legislation, did not cover the losses of the consumers. In one case, Southwest sold a motor home but failed to discharge the lien and to pay the consignor. Both parties received the statutory maximum from the Compensation Fund but it did not cover the discharge of the lien and the parties are now embroiled in a civil action.

19. The Authority had to indemnify the receiver-manager as Southwest had insufficient assets to cover the receiver-managers' costs and fees. The Authority and the Compensation Fund spent \$467,100.00 on legal fees and the cost of the receiver-manager.

20. There were about 75 individuals whose consigned property was found on Southwest's property. However, Southwest was in arrears in paying the Canadian Revenue Agency for source deductions and GST. In law, the CRA had a super priority to the assets of

Southwest. Those assets included the consumer's property, unless the consumers proved ownership. [Note that proof of registration of a motor vehicle does not necessarily prove ownership. It creates a rebuttable presumption of ownership: section 17 *Motor Vehicle Act* R.S.B.C. 1996 c. 318]. The CRA agreed to a process whereby consumers would provide statutory declarations and any available documents regarding their ownership of the property. Those documents were then presented to the B.C. Supreme Court by the receiver-manager. The B.C. Supreme Court would then order the release of the consumer's property. This was a costly and time-consuming endeavour for the consumers who did not receive their property for several months after it was seized by the receiver-manager.

(b) JDM Wholesale

21. JDM Wholesale operated an import dealership specializing in importing right-hand drive Japanese model vehicles. JDM's business model relied on consumers pre-paying in full for vehicles before they arrived from Japan. After receiving a consumer complaint regarding a B.C. and federally non-compliant vehicle, the Authority looked into the business operation of the dealer. It became apparent that JDM was in arrears in paying PST, had not remitted insurance or warranty premiums to insurers and was in financial difficulty. JDM itself had little financial backing. It became necessary for the Registrar to issue property freeze orders in relation to JDM and to apply to the B.C. Supreme Court for the appointment of a receiver-manager to operate JDM. In all, six consumers came forward who had suffered a financial loss due to JDM. The Authority paid \$43,651.09 in legal costs and to indemnify the receiver-manager. The six consumers received compensation from the Motor Dealer Customer Compensation Fund totaling about \$42,500.00: Registrar's Decision, December 15, 2008.

22. There are other cases where a motor dealer's business has failed while doing consignment sales without being licensed to do so. Such an example is *Re: DL-Mills* (Registrar's decision, January 8, 2010), which the Authority is still investigating. Even though the investigation is underway, it is clear the dealer has sold consumer property and failed to remit payment to the consumer. There will no doubt be further claims made to the Compensation Fund which has been sorely depleted these last few years due to dealer failures.

Comments during the Hearing

23. During the hearing Mr. Brown asked how many dealers currently are authorized to sell on consignment. He also asked of those so authorized; how many have generated concerns for the Authority. Currently, there are 153 motor dealers who are authorized to sell on consignment. The Authority does not track complaints as between motor dealers

authorized to sell on consignment versus those who are not. To do so would require re-writing the Authority's database program. The Authority tracks issues or complaints as between new, used, RV and motorcycle dealers.

24. Mr. Brown's suggestion at the hearing is that those who are given an authorization to sell on consignment do not cause problems. As I stated to Mr. Brown, it may be that the reason the current dealers who can sell on consignment do not cause problems, is because of the Authority's vetting process and the Registrar's policies and review of individual applicants. It is also a testament to the skill, business acumen, integrity, professionalism, and financial backing of those 153 motor dealers.

25. I would like to stress that a registration and an authorization to sell on consignment is a piece of paper issued by the Registrar. It is not something that ensures the viability of a motor dealer, nor keeps the motor dealer from making bad or sometimes even unlawful business decisions. A case in point is HSBC Bank's recent success in having a receiver appointed under the federal *Bankruptcy and Insolvency Act* to take charge of a motor dealer group consisting of two franchise dealers and a used car dealer: oral reasons and Order of Mr. Justice Burnyeat, March 24, 2010, S.C.B.C. Action No. H100292, Vancouver Registry. That dealer group has been in business within Metro Vancouver for some 9 years before this business failure. There is no indication at this time that it acted outside its registration. It currently appears that bad business decisions, under-funding and the recent economic downturn have impacted this dealer group. Currently, the Authority is working with the court-appointed receiver to ensure liens on used vehicles that consumers traded-in (and which some were subsequently sold to other consumers) are paid and discharged. The motor dealers had failed to do so and consumers are affected by this motor dealer's business failure and caught in a legal process which may or may not protect them.

LCB's Application

26. At the hearing, I expressed some concerns about LCB's application.

27. First, Mr. Brown is providing financial backing for this dealership. He does not have nor does he want any other financial backing. The amount of capital he has in reserve would afford him to secure a \$20,000 letter of credit and enable him to purchase maybe 6 or so cars on his own. He would have little cash left to cover hard costs such as rent, utilities, insurance, and statutory payments such as Worksafe B.C. premiums. The problem with this is that a motor dealer's sales ebb and flow and sometimes in quite a dramatic way. A small used-car dealer may go a month or so before selling enough cars to cover incurred expenses. While a good small used-car dealer can usually make money, it is not constant

and one looks to the year-end profits to gauge success. In my opinion, LCB's financial situation does not afford it the luxury of a zero sales month or two, which is not unheard of in this industry.

28. My second concern is LCB's business plan. It is heavily dependent on consigned vehicles. Mister Brown says he expects to have 20 vehicles on his lot to start. He anticipates 10-15 of the vehicles to come from a local Toyota dealer on consignment. He will provide a few of his own and the rest would be from private consignments from consumers. He says he can currently see many such private cars on the roadside and believes he has a great opportunity to bring them onto one lot. He has about four friends who would be willing to have him sell their vehicles. Mister Brown anticipates his cars would be in the under \$10,000 market.

29. I expressed to Mr. Brown my concern that he is relying on only one dealer to provide him with the majority of the vehicles he wishes to sell on consignment and suggested he contact others. He did so and emailed his results with a letter from the Toyota dealer. The letter says they would supply cars to Mr. Brown if registered, but it does not commit on the number of those cars. Mister Brown advises one other dealer said they would not supply him while two others said maybe.

30. One issue about consignment sales is that the product is often the hard-to-sell vehicles that no one wants. They may sit for many months unsold. New car dealers tend to keep the cars they believe are marketable. While they generally do not keep the under \$10,000 valued vehicles, in the recent economic downturn, many new car dealers have done so in order to generate revenue. LCB's business plan indicates that 25% of its revenues will have to come from consigned vehicles. My concern is that LCB is too dependent on the Toyota dealer and consumers to provide marketable cars that it can sell on a monthly basis (LCB projects 4-8 consignment sales per month over a three-year period in its plan). It is no secret that Toyota is currently having a consumer confidence issue. The flow of cars from the one Campbell River Toyota dealer may turn to a trickle. If so, LCB has little capital to purchase marketable cars on its own to keep its operations going. I have also reviewed Mr. Brown and his wife's credit report and note their credit utilization is very high. As shareholders, it appears they have very little left to loan to LCB if it should need a future infusion of capital.

31. It is my opinion that LCB is too dependent on consignment sales from too narrow a source. It is also my opinion that it does not have enough capital backing to weather the ebb and flow of used car sales. Also, the capital backing does not allow it to respond to changing

market demand by purchasing, on its own, enough marketable cars while at the same time covering operational costs during the time it takes to bring new inventory to market.

32. My third concern is the industry experience of Mr. Brown. Mister Brown's business and trade experience is in the forestry sector as a forestry road engineer in British Columbia and a silviculturist in Sweden. I accept his many years of owning and running a company in Sweden has given him business acumen. His stated experience in B.C. has also provided him with budgeting and other business skills. However, at the time of the hearing he had less than 3-months experience as a car salesperson. His described experience was with a former new car dealer who was now operating a used car dealership. He described that experience as being "intense", but recognized that the dealer certainly did not need to run a dealership (inferring he did not need the money), and owned the property it was on. That situation is certainly not synonymous with the experience in a start up dealership, or a used car dealership needing to pay rent and so forth. Mister Brown has sold 10 cars in his career as a salesperson. Mister Brown also admitted at the hearing he had never worked in retail before, but he felt he had a natural way and rapport with people. This is all taken into consideration.

33. I asked Mr. Brown how many consumer vehicles he expected to have consigned on his lot at any one time. He expected it would be around 10. Based on his preference for vehicles under \$10,000, I expressed concern that he could have anywhere up to \$100,000 of consumer's property on his lot. Mister Brown acknowledged that amount and my concern. He also understood that concern in relation to a \$20,000 letter of credit – being insufficient security. I asked if he could provide an increased letter of credit. He responded that doing so would reduce the amount of capital he would have to purchase his own vehicles, and preferred not having to do so.

34. Mister Brown was acceptable to conditions being placed on the dealer's proposed registration, such as the dealer's books being open for inspection and that he would be inspected often. These occur by operation of the law (open books) and by reason of policy and do not need a condition on registration.

35. Mister Brown also spoke of innovation (citing the Authority's own 2009 Annual Report). He spoke of how the B.C. Government is encouraging small businesses and getting former forestry workers back into the workforce. These are considerations to take into account. However, those considerations cannot displace the duty of the Registrar to review applicants and approve only those that do not appear to pose a risk to the public interest.

36. Mister Brown also spoke positively about increasing revenue to the Authority through his dealer fees. This may be a concern for the Board of Directors, the President and the

Director of Operations of the Authority. However, such a consideration is an irrelevant one for the Registrar of Motor Dealers carrying out his statutory duties. Generating revenue can never supplant protecting consumers who may deal with a motor dealer.

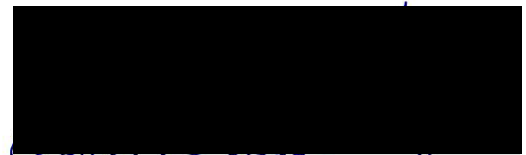
DISPOSITION

37. Based on LCB's application materials, its business plan and the experience Mr. Brown would bring to running a motor dealership, and for the reasons already stated, I do not believe it would be in the public interest to authorize LCB to conduct consignment sales.

38. LCB is free to re-submit its application with a new business plan without consignment sales. I would note that financial backing would still seem to be an issue for LCB. Mister Brown may wish to research the concept of floor planning with a Credit Union, a Bank or with a financing company which specializes in floor planning motor dealers such as Automotive Finance Corporation – sister company to the Adesa Auto Auction. The B.C. industry is still recovering from the economic downturn. While there are signs of increased new car sales, they are due to lower prices through factory incentives. Lower new car prices mean lower used car prices and decreased margins in those prices. This is another current concern for an under-funded start-up motor dealer. Adequate financial backing and reserves are crucial to any motor dealer's survival; especially at this time in the industry's history.

39. I would like to thank Mr. Brown for his clearly well-researched submissions on this matter. I have no concerns with his sincerity to do things right, his veracity of conviction and desire to be successful in business.

Date: April 1, 2010

A large black rectangular redaction box covers the signature area of the document.

Ian Christman B.A., LL.B.