Motor
Vehicle Sales Authority
of British Columbia

File No. 09-70032

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 *BUSINESS PRACTICES AND CONSUMER PROTECTION ACT* S.B.C. 2004 c. 2

RE:

DAVINDER KAUR SAINI

COMPLAINANT

68323 B.V. LTD. d.b.a. LENUX MOTOR CARS (Dealer # 30116)

MOTOR DEALER

HOSSEIN (TONY) DARVAZEBAN (Salesperson # 108297)

SALESPERSON

PIERRE PAYANT (Salesperson # 108011)

SALESPERSON

File No. 09-70389

RE:

KRISTIN DUMONT

COMPLAINANT

CAL NATIONAL LEASING LTD. (Dealer # 30115)

MOTOR DEALER

68323 B.V. LTD. d.b.a. – PACIFIC KIA - LENUX MOTOR CARS (Dealer # 30116)

MOTOR DEALER

HOSSEIN (TONY) DARVAZEBAN (Salesperson # 108297)

SALESPERSON

DECISION OF THE REGISTRAR OF MOTOR DEALERS ON A MOTION TO DISMISS THE CLAIMS

APPEARANCES

For the Authority	Denis Savidan, Manager of Compliance and Investigations Larry Barteski, Compliance Officer Chris Hoy, Compliance Officer (by Teleconference)
For Davinder Saini	In person (by Teleconference)
For: Cal National Leasing Ltd.; 68323 B.V. Ltd. (Lenux); Hossein (Tony) Darvazeban, and Pierre Payant	Gerhard Pyper Esq., and Michael Carter
Date and Place of Hearing:	April 12, 2010, at Surrey, British Columbia.

INTRODUCTION

[1] The hearing in these matters involves allegations that Cal National Leasing Ltd. (Cal); 68323 B.V. Ltd. dba Lenux Motor Cars (Lenux); Hossein Darvazeban, and Pierre Payant (collectively the "Respondents") did commit deceptive acts or practices contrary to section 5(1) of the *Business Practices and Consumer Protection Act* S.B.C. 2004 c.2 (BPCPA): see Notices of Hearing, Exhibits 1-3. Those same Notices specify the conduct that is in question as well as those provisions of section 4 of the BPCPA which are believed to be applicable to these hearings. The Notices also state that "the evidence gathered into the allegation(s) is contained in the enclosed Affidavit." The enforcement actions available to the Registrar in such a hearing are also described within the Notices.

[2] Counsel for the Respondents moved that these two claims should be dismissed as the *Charter* rights of the Respondents had been breached. Specifically, the Respondents say that the investigation conducted by compliance officer Larry Barteski and, by virtue of the *Motor Dealer Act* R.S.B.C. 1996 c. 316 (Motor Dealer Act), the compulsion of their statements and production of documents to be used at these proceedings violated the Respondents' sections 10(a) and (b) and 11 *Charter* rights. Within that argument, the Respondents are also effectively stating that their *Charter* right against self-incrimination is being violated. Though counsel for the Respondents did not refer to it, the core of that right is found in section 7 of the *Charter* coupled with section 13.

[3] In oral submissions, the Respondents' counsel also spoke of documents having been detained in relation to section 10 of the *Charter*. The *Charter* protection over the search and seizure of documents is properly found in section 8.

[4] While not noted in the written submission but canvassed in oral submissions, counsel for the Respondents spoke of these breaches also being contrary to the common law principles of natural justice and procedural fairness.

[5] The Respondents provided oral evidence as to their involvement in the investigation conducted by Mr. Barteski. They stated they spoke with Mr. Barteski about the complaint. Mr. Hossein said he didn't fully understand the reason for the investigation, nor was he aware that his statements and the business records of Cal and Lenux would be used at these hearings.

[6] Mr. Barteski said he advised Mr. Darvazeban, who is also the owner of Cal and Lenux, that he was conducting an investigation into this matter. Mr. Barteski stated he also spoke with Mr. Payant about his role in these transactions. Mr. Barteski further stated that he advised Mr. Darvazeban that there was the potential for this matter to be brought to a hearing before the Registrar. Mr. Barteski noted he was not conducting an investigation for the purposes of prosecuting an offence. It is common ground that the Authority's compliance officers, such as Larry Barteski, are not peace officers and do not possess the power of arrest or detention that peace officers possess.

[7] While this evidence was only heard in the context of the Saini matter, the Respondents and the Authority agreed that the same factual matrix and legal principles would equally apply to the claim by Kristin Dumont. There is agreement that my determination here would apply to both of the above noted files and claims.

[8] For the reasons that follow, the motions to dismiss these claims for a breach of the *Charter* are denied. I find the *Charter* has no bearing on these matters.

[9] For the reasons that follow, the motions to dismiss these claims for a breach of the Respondents' rights under procedural fairness and natural justice are also dismissed.

DISCUSSION

Statutory Interpretation of B.C. Statutes

[10] In my discussions on the statutory scheme that follows, I apply the principles of statutory interpretation applicable to B.C. statutes: *Yeung (Guardian ad litem of) v. Au* 2006 BCCA 217, 51 B.C.L.R. (4th) 258 at paragraph 32 (unanimous 5 panel Court of Appeal); affirmed [2007] 3 S.C.R. 371 (Supreme Court of Canada).

The Nature of the Claims within the Statutory Scheme

[11] The above claims, as described in the Notices of Hearing, have two aspects to them under the statutory scheme created by the *Motor Dealer Act*.

(a) Registrar's adjudicative function

[12] First, the above noted consumers have complained that the consumer transaction between themselves and the Respondents involved misrepresentations which are termed deceptive acts or practices under the BPCPA. They are invoking their right to have the Registrar of Motor Dealers adjudicate such a claim and provide a remedy to them if any is warranted.

[13] Under section 8.1 of the *Motor Dealer Act* and section 29 of the *Motor Dealer Act Regulation* B.C. Reg. 447/78 (Regulation), the Registrar has been empowered to enforce and apply certain provisions of the BPCPA. The net effect is that the Registrar may adjudicate claims by consumers that a motor dealer or a salesperson has committed deceptive acts or practices (section 5 of the BPCPA) or unconscionable acts or practices (section 9 of the BPCPA) in their consumer transaction. The Registrar has the authority of the B.C. Supreme Court to compel witnesses to testify and produce documents at a hearing into such claims: section 151 of the BPCPA.

[14] The Registrar may issue a compliance order requiring the motor dealer and/or the salesperson to comply with the BPCPA, unwind a transaction, and order a consumer be paid any proven damages. The Registrar may also order the dealer and salesperson to repay the Registrar for his investigation and hearing costs including legal costs: section 155 of the BPCPA. A Registrar's compliance order may be filed in the B.C. Supreme Court and once filed is deemed an order of that Court for all purposes except appeals: section 155 of the BPCPA. In this way the Registrar acts much like a court settling a dispute between parties.

[15] The issues in play vis-à-vis the Claimants and Respondents is a civil proceeding advancing a statutory cause of action pursuant to the *Motor Dealer Act* scheme which includes portions of the BPCPA. It is common ground that the *Charter* is not applicable to such a civil proceeding: *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580* [1986] 2 S.C.R. 573 (Supreme Court of Canada).

(b) The Registrar's regulatory/disciplinary function

[16] The second aspect of the Registrar's authority in play here is regulatory/disciplinary. If a motor dealer or salesperson has contravened prescribed sections of the BPCPA, the Registrar may impose an administrative penalty pursuant to section 164 of the BPCPA of up

to $5,000 on an individual and $50,000 on a corporation. The Legislature has enumerated factors to be considered before imposition of an administrative penalty: section 164(2) of the BPCPA. A review of section 164(2) of the BPCPA suggests an administrative penalty is to address past conduct of the motor dealer of a similar nature and recognizes the importance of corrective measures. The amount of the administrative penalty is payable to the Authority and not to the Province's general revenue fund, nor to the consumer. A notice of penalty issued by the Registrar may be filed in the B.C. Provincial or Supreme Court and once filled is deemed a judgment of the respective court *"and all proceedings may be taken on the notice, as if it were a judgment of that court"*: section 168(2) of the BPCPA.

[17] Further, pursuant to section 8.1(4)(b) of the *Motor Dealer Act*, a finding that a registered person breached Parts 2 or 5 of the BPCPA is grounds for the Registrar to consider that it is not in the public interest for the registered person to continue to be registered. Also, section 6 of the *Salesperson Licensing Regulation* B.C. Reg. 241/2004, allows the Authority to consider a salesperson's past conduct and consider if that conduct is contrary to the public interest, such that the person should not be licensed. A finding that a salesperson committed a deceptive act is certainly past conduct that can be reviewed.

(c) Penal portions of the Statutory Scheme

[18] There is a third aspect to the statutory scheme which is not in play in these proceedings. These are, in my opinion, penal in nature. Section 35(2) of the *Motor Dealer Act*, list sections of the Act the breach of which constitutes an offence. This includes a failure to provide information or documents the Registrar or his delegate requests during an investigation. Section 35.1 of the *Motor Dealer Act* provides for sanctions for those breaches. Those sanctions are a fine of up to $100,000 and or six months incarceration for an individual and a fine up to $200,000 on a corporation. I note that the Registrar has no jurisdiction to determine if an offence under the *Motor Dealer Act* has occurred and he also cannot impose a fine or order incarceration pursuant to section 35.1 of that Act: section 8 of the *Offence Act*, R.S.B.C. 1996 c. 338 and section 2.1(e) of the *Provincial Court Act* R.S.B.C. 1996 c. 379.

[19] Section 189 of the BPCPA provides for offences for breaches of that Act, including deceptive acts or practices and failures to comply with an investigator's request for information and documents under sections 149 to 151 of the BPCPA. I would note that sections 149 to 151 of the BPCPA have been incorporated into the *Motor Dealer Act* and form part of the Registrar's powers of which some have been delegated to compliance officers. Section 190 of the BPCPA provides sanctions for breaches of section 189 which

include a fine of up to $10,000 and/or imprisonment up to 12 months for an individual. A corporation may be liable to a fine up to $100,000. The Registrar has no authority to adjudicate whether an offence has occurred under section 189 of the BPCPA. The Registrar also cannot order a fine or incarceration under section 190 of that Act: section 8 of the *Offence Act* and section 2.1(e) of the *Provincial Court Act*.

The Charter Arguments

[20] The provisions of the *Charter* advanced by the Respondents are triggered where state action is being used to investigate for penal liability. Where the state is exercising statutory authority to compel the production of documents and statements of a person within a regulated field, for regulatory purposes, the *Charter* will generally not be engaged: *R. v. Wigglesworth* [1987] 2 S.C.R. 541, 1987 CarswellSask 385; and *R v. Jarvis* [2002] 3 S.C.R. 757 (Supreme Court of Canada).

[21] Where documents and statements are obtained within the regulatory context by statutory compulsion, their future use in penal proceedings may be restricted or prohibited. This is often called "use and derivative use immunity": *British Columbia Securities Commission v. Branch* [1995] 2 S.C.R. 3; and *R v. White* [1999] 2 S.C.R. 417 (Supreme Court of Canada). These "use immunities" have no application before me as I have no jurisdiction to consider penal liability and none are being pursued here: Notices of Hearing.

[22] The *Charter* analysis starts with determining if the facts even suggest the *Charter* is engaged: *Jarvis*. The test to be applied is whether the predominant purpose of the investigation is the determination of penal liability: *Jarvis*. If yes; then the *Charter* will be engaged. If no; even if the investigation is regulatory in nature, then the *Charter* will generally not be engaged: *Jarvis.* In some cases, the facts of the case will make it clear that the *Charter* is engaged and doing the *Jarvis* analysis is redundant. However, skipping the predominant purpose test set out in *Jarvis* could lead to the incorrect application of the law. As will be set out below in my discussion on each of the *Charter* sections, a proper application of the predominant purpose test shows penal liability is not in play here, the matters before me are within the civil and regulatory realm, and the *Charter* is not engaged.

(a) Applicability of Section 11 of the Charter - What are Penal Sanctions?

[23] In *Wigglesworth*, Justice Wilson for the majority discussed true penal sanctions and distinguished them from sanctions whose aim is the maintenance of a profession or to regulate conduct, as stated at Carswell paragraphs 32-33:

> 32 In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind

of matter which falls within s. 11. It falls within the section because of the kind of matter it is. **This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity**: see, for example, *Law Soc. of Man. v. Savino*, at p. 292; *Malartic Hygrade Gold Mines (Can.) Ltd. v. Ont. Securities Comm.* (1986), 54 O.R. (2d) 544 at 549, 9 O.S.C.B. 2286, 19 Admin. L.R. 21, 27 D.L.R. (4th) 112, 24 C.R.R. 1, 15 O.A.C. 124 (Div. Ct.); and *Re Barry and Alta. Securities Comm.*, supra, at p. 736, per Stevenson J.A. **There is also a fundamental distinction between proceedings undertaken to promote public order and welfare within a public sphere of activity and proceedings undertaken to determine fitness to obtain or maintain a licence. Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, disqualification proceedings are not the sort of "offence" proceedings to which s. 11 is applicable. Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable.** But all prosecutions for criminal offences under the Criminal Code and for quasi-criminal offences under provincial legislation are automatically subject to s. 11. They are the very kind of offences to which s. 11 was intended to apply.

33 This is not to say that if a person is charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline, integrity or to regulate conduct within a limited private sphere of activity, he or she can never possess the rights guaranteed under s. 11. Some of these matters may well fall within s. 11, not because they are the classic kind of matter intended to fall within the section, but because they involve the imposition of true penal consequences. **In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.** In "Annotation to *R. v. Wigglesworth*" (1984), 38 C.R. (3d) 388, at p. 389, Professor Stuart states:

> ... other *punitive* forms of disciplinary measures, such as fines or imprisonment, are indistinguishable from criminal punishment and should surely fall within the protection of s. 11(*h*).

I would agree with this comment but with two caveats. **First, the possibility of a fine may be fully consonant with the maintenance of discipline and order within a limited private sphere of activity and thus may not attract the application of s. 11. It is my view that if a body or an official has an unlimited power to fine, and if it does not afford the rights enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large. Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose. One indicium of the purpose of a particular fine is how the body is to dispose of the fines that it collects. If, as in the case of proceedings under the Royal Canadian Mounted Police Act, the fines are not to form part of the Consolidated Revenue Fund but are to be used for the benefit of the force, it is more likely that the fines are purely an internal or private matter of discipline: Royal Canadian Mounted Police Act, s. 45.** The second caveat I would raise is that it is difficult to conceive of the possibility of a

> particular proceeding failing what I have called the "by nature" test but passing what I have called the "true penal consequence" test. I have grave doubts whether any body or official which exists in order to achieve some administrative or private disciplinary purpose can ever imprison an individual....

[24] In my opinion, under the *Motor Dealer Act* scheme, the Legislature has established administrative penalties in order to regulate the conduct of motor dealers and salespersons in the motor vehicle sales industry. The Legislature has provided more significant financial penalties and incarceration for offences under sections 35.1 of the *Motor Dealer Act* and section 190 of the BPCPA and which the Registrar has no authority to impose. These administrative penalties are not paid to the general revenue fund but are payable to the Authority. The factors found in section 164(2) of the BPCPA, which are to be considered when imposing an administrative penalty, indicate administrative penalties are corrective in nature. Under the scheme, these penalties are to address specific conduct in relation to consumer transactions in the motor vehicle industry, as opposed to a general denunciation by society as a whole. It is my opinion that under the *Motor Dealer Act* scheme, administrative penalties are not penal sanctions contemplated by section 11 of the *Charter*: *Wigglesworth*.

[25] Under the *Motor Dealer Act* scheme, the possibility that a salesperson may loose their licence or a motor dealer may be deregistered after a review of their conduct in a given matter is also not a penal sanction contemplated by section 11 of the *Charter*: *Wigglesworth*.

[26] I find section 11 of the *Charter* has no application to the Respondents in these matters.

(b) Section 7 Charter rights – self-incrimination

[27] While fashioned as submissions under sections 10 and 11 of the *Charter*, counsel for the Respondents asserts that the documents and statements obtained by compliance officer Larry Barteski are being used against the Respondents contrary to their *Charter* rights. Section 7 of the *Charter* embodies the core of the right against self-incrimination as stated in the case law: *British Columbia Securities Commission v. Branch* [1995] 2 S.C.R. 3 (Supreme Court of Canada), *R v. Fitzpatrick* [1995] 4 S.C.R. 154 (Supreme Court of Canada); *Jarvis;* and *R. v. Powers* 2006 BCCA 454 (B.C. Court of Appeal).

[28] As corporations, section 7 of the *Charter* is not available to Cal or Lenux on this application: *Irwin Toy Ltd. v. Quebec (Procureur Général)* [1989] 1 S.C.R. 927 (Supreme Court of Canada).

[29] Section 7 of the Charter is generally not engaged where a person is compelled by statute to provide information by way of statements within a regulatory context and for regulatory purposes: *Jarvis*, *Branch* and *Fitzpatrick*. In *Fitzpatrick*, Justice La Forest writing for the Court stated:

> 40 In making this point, I rely on a form of the "licensing argument" discussed by Cory J. in *Wholesale Travel*, *supra*. **There, Cory J. identified this argument as one rationale for subjecting the fault requirement of regulatory offences to a lower standard of *Charter* scrutiny than that of "true crimes". The licensing argument postulates that regulated actors entering a licensed field should be presumed to know of, and to have accepted, the terms and conditions relevant to the regulated area, and should therefore be held liable for breaching these terms and conditions.** At page 229 of his judgment in *Wholesale Travel*, Cory J. described the licensing argument as follows:
>
> > **The licensing concept rests on the view that those who choose to participate in regulated activities have, in doing so, placed themselves in a responsible relationship to the public generally and must accept the consequences of that responsibility. Therefore, it is said, those who engage in regulated activity should, as part of the burden of responsible conduct attending participation in the regulated field, be deemed to have accepted certain terms and conditions applicable to those who act within the regulated sphere. Foremost among these implied terms is an undertaking that the conduct of the regulated actor will comply with and maintain a certain minimum standard of care.**
>
> The licensing justification is based not only on the idea of a conscious choice being made to enter a regulated field but also on the concept of control. **The concept is that those persons who enter a regulated field are in the best position to control the harm which may result, and that they should therefore be held responsible for it.**
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> Later, at pp. 239-40, he continued on the same theme:
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> > The regulated actor is allowed to engage in activity which potentially may cause harm to the public. That permission is granted on the understanding that the actor accept, as a condition of entering the regulated field, the responsibility to exercise reasonable care to ensure that the proscribed harm does not come about. **As a result of choosing to enter a field of activity known to be regulated, the regulated actor is taken to be aware of and to have accepted the imposition of a certain objective standard of conduct as a pre-condition to being allowed to engage in the regulated activity.**
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> 41 **Though the present case does not raise the issue of fault requirements under the *Charter*, Cory J.'s comments respecting the licensing argument in *Wholesale Travel* are, as I see it, equally relevant to the analysis of the principle against self-incrimination in the present case. Indeed this case would seem to present us with a paradigmatic example of a licensing scheme, in that the appellant literally cannot participate in the commercial fishery without a licence. In accepting his licence, he must accept the terms and conditions associated with it, which include the completion of hail reports and fishing logs, and the prosecution of those who overfish. To the extent**

that the appellant believes himself to be compelled "against his will" to produce hail reports and fishing logs, lest they one day be used against him in a prosecution for overfishing, he is free to resign from the commercial fishery, and thereby to be released from this obligation.

42 Surely it defies common sense to argue that the state, in seeking to regulate the commercial fishery by attaching certain conditions to a fishing licence, is coercing an individual to furnish information against himself. Quite the opposite in fact is true; the individual is furnishing information that is meant to benefit him or her, through proper and fair distribution of scarce fishing resources. Just because this information may later be used in an adversarial proceeding, when the state seeks to enforce the restrictions necessary to accomplish its regulatory objectives, does not mean that the state is guilty of coercing the individual to incriminate himself. **The state required certain information to be provided, and the individual voluntarily assumed the obligation to do so in deciding to become a fisher in the first place. It ill lies in the mouth of someone who knowingly assumes an obligation for a beneficial purpose to argue later that this obligation has the effect of denying him his rights.**

[30] I would note the Court in *Fitzpatrick* spoke of the application of the *Charter* to the prosecution of regulatory offences. The cases before me are not for the prosecution of a regulatory offence under sections 35 and 35.1 of the *Motor Dealer Act* or sections 189 and 190 of the BPCPA. These are civil matters vis-à-vis the Claimants and the Respondents. If there is any risk of enforcement action by the Registrar on the Respondents, it is disciplinary or regulatory; but not offences as contemplated by the *Charter*: *Wigglesworth* and *Jarvis.*

[31] A motor dealer and a salesperson are required to provide information to the Registrar, or his delegates, with or without a complaint and with or without the request being in writing. Further, a motor dealer's business records must be made available to the Registrar, including financial records: sections 7, 25 and 26 of the *Motor Dealer Act*; sections 7 and 20 of the Regulation; and sections 149-151 of the BPCPA. The Registrar also has the powers of the B.C. Supreme Court in the trial of a civil matter under section 151 of the BPCPA in carrying out an inspection:

> 151 (1) For the purposes of an inspection, the director [read Registrar[1]] has the same powers that the Supreme Court has for the trial of civil actions to do the following:
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> (a) summon and enforce the attendance of witnesses;
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> (b) compel witnesses to give evidence on oath or in any other manner;
>
> (c) compel witnesses to produce records and things.

[1] Section 44 of the *Interpretation Act* R.S.B.C. 1996 c. 238.

[32] If such statements or documents were to be used in pursuit of future penal sanctions, then use immunity may be available to the Respondents depending on the specific context of their future use: *Branch*, *White*, *Jarvis* and *Powers*. I make no definitive finding on that point as the Respondents are not facing penal sanctions before me.

[33] I find section 7 of the *Charter* is not applicable to the Respondents.

(c) Section 8 Charter – search and seizure

[34] The protection from a search and seizure under section 8 of the *Charter* is derived from a reasonable expectation of privacy in the specific property; in this case Cal's and Lenux's business records. A person operating within a regulatory field will generally have a limited to no expectation of privacy, especially over business records, such that section 8 of the *Charter* is not engaged as was stated in *Branch*:

> 53 While the expectation of privacy with respect to criminal matters seems certain, the standard of reasonableness to be applied in the regulatory and administrative realm is less well defined. Wilson J. found in *McKinlay Transport,* at pp. 645-46, that the point was aptly made by A. D. Reid and A. H. Young in "Administrative Search and Seizure Under the Charter" (1985), 10 *Queen's L.J.* 392, at pp. 398-99:
>
> > There are facets of state authority, generically associated with search or seizure, that are so intertwined with the regulated activity as to raise virtually no expectation of privacy whatsoever. . . . **Other activities are regulated so routinely that there is virtually no expectation of privacy from state intrusion. Annual filing requirements for banks, corporations, trust companies, loan companies, and the like are inextricably associated with carrying on business under state licence.**
> >
> > There are other situations in which government intrusion cannot be as confidently predicted, yet the range of discretion extended to state officials is so wide as to create in the regulatee an expectation that he may be inspected or requested to provide information at some point in the future. This may arise in the form of an inspection carried out either on a "spot check" basis, or on the strength of suspected non-compliance. The search may be in the form of a request for information that is not prescribed as an annual filing requirement, but is required to be produced on a demand basis. For the most part, there is no requirement that these powers be exercised on belief or suspicion of non-compliance. Rather, they are based on the common sense assumption that the threat of unannounced inspection may be the most effective way to induce compliance. They are based on a view that inspection may be the only means of detecting non-compliance, and that its detection serves an important public purpose.
> > [emphasis in the original]
>
> ...
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> 62 As our final point, we note the distinction between business records and personal papers. We are of the view that in order to determine the relative privacy rights that attach, the type of document at issue is important. **Documents produced**

in the course of a business which is regulated have a lesser privacy right attaching to them than do documents that are, strictly speaking, personal. Again, the words of La Forest J. in *Thomson Newspapers*, at pp. 517-18, are helpful:

> While such records are not devoid of any privacy interest, it is fair to say that they raise much weaker privacy concerns than personal papers. The ultimate justification for a constitutional guarantee of the right to privacy is our belief, consistent with so many of our legal and political traditions, that it is for the individual to determine the manner in which he or she will order his or her private life. . . . But where the possibility of such intervention is confined to business records and documents, the situation is entirely different. These records and documents do not normally contain information about one's lifestyle, intimate relations or political or religious opinions. They do not, in short, deal with those aspects of individual identity which the right of privacy is intended to protect from the overbearing influence of the state. On the contrary, as already mentioned, it is imperative that the state have power to regulate business and the market both for economic reasons and for the protection of the individual against private power. **Given this, state demands concerning the activities and internal operations of business have become a regular and predictable part of doing business. Under these circumstances, I cannot see how there would be a very high expectation of privacy in respect of records and documents in which this information is contained.**
>
> 63 Therefore, we conclude that those who are ordered under s. 128(1) of the *Securities Act* "to produce records and things" can claim only a limited expectation of privacy in respect of these materials. The operative question becomes whether s. 128(1) unreasonably infringes on this limited expectation of privacy.
>
> 64 In our view it does not. **We have already mentioned that in a highly regulated industry, such as the securities market, the individual is aware, and accepts, justifiable state intrusions. All those who enter into this market know or are deemed to know the rules of the game. As such, an individual engaging in such activity has a low expectation of privacy in business records. In fact, "there will be instances in which an individual will have no privacy interest or expectation in a particular document or article required by the state to be disclosed": *McKinlay Transport, supra*, at pp. 641-42. Under such circumstances, the state authorized inspection of documents under s. 128(1) of the *Securities Act* does not violate s. 8 of the *Charter*.**

[35] Persons who are salespersons and motor dealers know they operate within a highly regulated field. I find that the Respondents knew they were in a highly regulated field and thus they are presumed to know the "rules of the game" and that their license and registration was dependant on obeying those rules. I do not find the Respondents had a reasonable expectation of privacy in Cal's and Lenux's business records to trigger section 8 of the *Charter*: *Branch* and *Fitzpatrick*.

[36] If the business records in question were later used to seek penal sanctions against the Respondents, they then may be able to invoke "use immunity" contemplated by sections 7 and 13 of the *Charter*: *Branch* and *White.* I make no definitive finding on this point as the

Respondents are not facing penal sanctions before me, and the context of the subsequent use of the records would affect the availability of the "use immunity": *Branch* and *Jarvis*.

(d) Section 10(a) and (b) of the Charter – rights upon arrest or detention

[37] The rights found in sections 10(a) and (b) of the *Charter* are triggered upon an arrest or a detention. A corporation cannot be arrested nor detained and thus Cal and Lenux do not have these rights in the current application: *Canadian Egg Marketing Agency v. Richardson* [1998] 3 S.C.R. 157 (Supreme Court of Canada).

[38] There is no allegation that Mr. Barteski arrested the personal Respondents, or that he physically detained them. The personal Respondents say Mr. Barteski, as an agent of the state and given the compulsion in the *Motor Dealer Act* to answer questions and produce documents, psychologically detained them triggering their section 10(a) and (b) *Charter* rights. The Respondents rely on *R v. Grant* [2009] 2 S.C.R. 353 (Supreme Court of Canada), and *R v. Therens* [1985] 1 S.C.R. 613 (Supreme Court of Canada). For the reasons that follow, I find there was no detention as defined by section 10 of the *Charter*.

[39] The decisions in *Grant* and *Therens*, relied on by the Respondents, are in the context of a police investigation for a crime. There was no need to conduct a *Jarvis* type analysis in those cases as the facts made it clear these were police investigations to determine penal liability. Also, *Jarvis* was a decision that came after *Therens*. In regards to *Grant*, that decision makes it clear that the discussion on "detention" was in the context of police conduct during the investigation for a crime: paragraphs 28 and 44 for example. In regulatory inspections, one must be careful in importing the concept of *Charter* rights applied in the criminal context and involving the conduct of police officers.

[40] I would also note that *Grant* identifies that the *Charter* right to counsel is linked to the right against self-incrimination in section 7 of the *Charter* citing *R. v. Hebert*, [1990] 2 S.C.R. 151: *Grant* paragraphs 19 and 21-22. I have already discussed the applicability of section 7 of the *Charter* in relation to the regulatory inspections by Mr. Barteski.

[41] Justice Estey in *Therens* made clear that detention in section 10 of the Charter has a specific meaning and contextual application:

> I am in agreement that the respondent-defendant was "detained" **within the meaning of** s. 10 of the *Canadian Charter of Rights and Freedoms* **when** the police officers administered the breathalyzer test under s. 235 of the *Criminal Code*.

[42] The Court in *Grant* also made note of the contextual application of the *Charter*. McLachlin, C.J.C. and Charron, J., writing for the majority in *Grant*, stated that minor interferences with liberty will not trigger *Charter* scrutiny; at paragraph 26:

[26] The second interpretation of "detention", reducing it to any interference, however slight, must also be rejected. As held in *Mann*, at para. 19, per Iacobucci J.:

> . . . the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the Charter, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the Charter are not engaged by delays that involve no significant physical or psychological restraint.

It is clear that, while the forms of interference s. 9 guards against are broadly defined to include interferences with both physical and mental liberty, **not every trivial or insignificant interference with this liberty attracts Charter scrutiny. To interpret detention this broadly would trivialize the applicable Charter rights and overshoot their purpose. Only the individual whose liberty is meaningfully constrained has genuine need of the additional rights accorded by the Charter to people in that situation.**

[43] The interpretation of "detention" the Respondents advance is the one rejected by the Supreme Court of Canada at paragraph 26 in *Grant*. They take the view that they were compelled by statute to provide Mr. Barteski the business records of Cal and Lenux and to answer his questions which were specific to the consumer transaction involving the above Complainants. This, they say, means they were psychologically detained. However, as the decision in *Grant* has cautioned, such a "detention" must be <u>significant</u> to trigger *Charter* scrutiny: paragraph 44.

[44] The decision in *Grant* and the term "detention" in section 10 of the *Charter* cannot be construed as broadly as the Respondents suggest. The case law is replete with examples where the production of documents and the answering of questions within the regulatory context does not attract *Charter* scrutiny, including the right to counsel:

(a) Answering questions and providing documentation during a compliance audit by Revenue Canada Agency does not trigger *Charter* scrutiny, including the right to counsel, so long as the predominant purpose is not the determination of penal liability. It does not matter that the inspection was triggered by a "tip" directing the agency to the specific person. This is so even where a person is compelled by statute to provide documents and answer questions, the failure of which could lead to penal sanctions: *Jarvis*.

(b) Detention by Immigration Canada to interview a person is not a "detention" contemplated by section 10 of the *Charter* and no section 10(b) right to counsel is triggered, even where there is a statutory compulsion to answer questions and penal sanctions for failing to do so, or for providing misleading information: *Dehghani v. Canada (Minister of Employment & Immigration)* [1993] 1 S.C.R. 1053, 1993 CarswellNat 57 (Supreme Court of Canada).

(c) Inspections for compliance with provincial employment laws do not attract *Charter* scrutiny, even where the inspection is triggered by a complaint: *Comité*

paritaire de l'industrie de la chemise c. Sélection Milton [1994] 2 S.C.R. 406 (Supreme Court of Canada).

(d) Traffic stops to inspect a motor vehicle, to interview the driver and to review documents pursuant to the *Motor Vehicle Act* do not attract *Charter* scrutiny: 2009 CarswellBC 691 (B.C. Court of Appeal).

(e) A motor vehicle search authorized by provincial statute due to open liquor in the vehicle will not trigger *Charter* scrutiny: *R v. Annett* (1984) 17 C.C.C. (3d) 332 (Ont. Court of Appeal); leave to appeal refused [1985] 1 S.C.R. v (Supreme Court of Canada).

(f) Regulatory inspection of homes, without a warrant, for electrical safety by inspectors authorized by statute to do so; will not attract *Charter* scrutiny: *Arkinstall v. Surrey (City)* (2008), 89 B.C.L.R. (4th) 148 (B.C. Supreme Court), additional reasons (2009), 89 B.C.L.R. (4th) 203 (B.C. Supreme Court).

[45] As highlighted in *Fitzpatrick*, the importance of regulation and inspection for compliance was recognized early in the *Charter* jurisprudence. There is a distinction to be made between true crimes and regulatory inspections for *Charter* scrutiny.

[46] To distinguish regulatory inspections from investigations for penal liability, the Supreme Court of Canada identified the predominant purpose test in *Jarvis*. The Court in *Jarvis* dealt with the *Charter* implications of a Canadian Revenue Agency audit and the auditor's powers and the subsequent investigation for tax evasion of Mr. Jarvis. Mr. Jarvis was never given a *Charter* caution prior to the audit and his provision of statements and documents to the CRA auditor, all of which were compelled by statute, under penalty of penal sanctions for non-compliance. After conducting her audit, the auditor forwarded her file to investigators to review for a possible prosecution for tax evasion - penal liability.

[47] The Supreme Court of Canada held that if the predominant purpose of the audit was to ensure compliance with the law, then the *Charter* would not be triggered. The Court said that when the investigation turned to the investigation of penal liability that Mr. Jarvis was entitled to *Charter* protection; including being properly cautioned. The Supreme Court said it was also permissible for the auditor to have handed her file to investigators so they may start their own investigation for penal liability.

[48] The Court in *Jarvis* said the potential for penal liability for failing to answer questions and provide documents does not trigger *Charter* protection, at paragraph 55:

> 55 **To be effective, self-enforcing regulatory schemes require not only resort to adequate investigation, but also the existence of effective penalties**: *Thomson Newspapers*, supra, at p. 528; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at p. 250, per Cory J.; *Comité paritaire de l'industrie de la chemise v. Potash,* [1994] 2 S.C.R. 406, at p. 421, per La Forest J. In the ITA context, see Hydro-Québec, supra, at para. 46, and Knox Contracting, supra, at p.

355. To this end, s. 238(1) sets out a summary conviction offence that is triggered by non-compliance with the filing requirements or with other of the Act's provisions -- including ss. 231.1(1) and 231.2(1), and the documentary retention rules imposed by s. 230(1). **Section 238's purpose is inherently pragmatic or instrumental: the offence exists "not to penalize criminal conduct but to enforce compliance with the Act"** (*R. v. Grimwood,* [1987] 2 S.C.R. 755, at p. 756; *McKinlay Transport*, supra, at p. 641; *143471 Canada*, supra, at p. 378).

[49] This recognition in *Jarvis* is supported by *Dehghani:*

> It is important to note that **neither the existence of a statutory duty to answer the questions posed by the immigration officer nor the existence of criminal penalties for both the failure to answer questions and knowingly making a false or misleading statement necessitates the conclusion that the appellant was detained within the meaning of s. 10(b)**. These provisions are both logically and rationally connected to the role of immigration officials in examining those persons seeking to enter the country. Indeed, they are required to ensure that border examinations are taken seriously and are effective. Both of these types of provisions also exist in the Customs Act, and as I have already discussed, **this court held in *Simmons* at p. 517 [S.C.R.] that it would be absurd to suggest that routine questioning by a customs officer constitutes a detention for the purposes of s. 10(b).**

[50] In summarizing the law in distinguishing regulatory inspections from investigations for penal liability, the Court in *Jarvis* stated at paragraph 99:

> 99 By way of summary, the following points emerge:
>
> 1. Although the ITA is a regulatory statute, a distinction can be drawn between the audit and investigative powers that it grants to the Minister.
>
> 2. **When**, in light of all relevant circumstances, **it is apparent that CCRA officials** are not engaged in the verification of tax liability, but **are engaged in the determination of penal liability** under s. 239, the adversarial relationship between the state and the individual exists. As a result, **Charter protections are engaged.**
>
> 3. **When this is the case, investigators must provide the taxpayer with a proper warning.** The powers of compulsion in ss. 231.1(1) and 231.2(1) are not available, and search warrants are required in order to further the investigation.

[51] In applying the legal principals to the facts of the case, the Supreme Court of Canada in *Jarvis* noted:

> 101 In our view, although Goy-Edwards's [CRA auditor] conduct throughout her dealings with the appellant and his accountant was not praiseworthy — and at points appears deceptive — **we do not think that the record rises to support a finding that she obtained information under ss. 231.1(1) and 231.2(1) while conducting an investigation, the predominant purpose of which was a determination of Jarvis's penal liability**. While Goy-Edwards did on several

> occasions mislead the appellant and his accountant as to the status of the file, **she did not use misleading tactics in order to obtain information under ss. 231.1(1) and 231.2(1) for the purpose of advancing an investigation into penal liability.** Moreover, there seems to have been but minor contact between Goy-Edwards and Chang from the moment when the file was transferred to Special Investigations on May 4, 1994. In brief, Goy-Edwards should undoubtedly have been truthful when asked about the status of the appellant's file, **but there is no evidence to show that she used her audit powers to obtain information for prosecutorial purposes.**

The Supreme Court of Canada then went on to note:

> 104 We conclude that, on the facts of this case, the April 11 meeting did not constitute an investigation into Jarvis's penal liability under s. 239 of the ITA. It follows that, other than the paragraphs struck from the Information by the trial judge as being erroneous, nothing should have been omitted from the application for the search warrant, and the warrant was therefore validly issued. Based on the application of the relevant factors as discussed above, we differ with the courts below **and find that there was no investigation into penal liability prior to May 4, 1994, when Goy-Edwards filled out the Form T134 and referred her file to Special Investigations.** The record establishes that Chang's efforts to determine whether reasonable grounds to obtain a search warrant commenced upon her receipt of the file, and that she concluded shortly thereafter that such grounds existed.

[52] The Supreme Court of Canada found the audit inspection did not attract *Charter* scrutiny. It also found that the search warrant issued in large part due to the information obtained in the audit was lawful.

[53] In the case before me, Mr. Barteski is a compliance officer and not a peace officer. The Respondents are compelled by the *Motor Dealer Act* and the BPCPA to provide documents and truthful information to Mr. Barteski under threat of prosecution for an offence if they do not do so. The potential of penal sanctions for non-compliance with these informational requirements does not trigger *Charter* protection. It is when the predominant purpose of the investigation is to determine penal liability that the *Charter* protections engage: *Jarvis*.

[54] Mr. Barteski does not have the power of arrest or detention that a peace officer possesses. His evidence is that he was never investigating the Respondents for an offence under the *Motor Dealer Act* or the *BPCPA*. Again, I note that the Registrar has no jurisdiction to determine if a registered person or a salesperson has committed an offence and issue the sanctions noted in section 35.1 of the *Motor Dealer Act* or section 190 of the BPCPA.

[55] The Respondent's requirement to provide business records and statements to Mr. Barteski to determine their compliance with the *Motor Dealer Act* and the BPCPA was regulatory. It was focused on the two complaints noted and the Respondent's liberty was not

significantly hindered. For the above reasons, I find the *Charter* was not applicable in these circumstances, including section 10(b): *Jarvis.*

Procedural Fairness and Natural Justice Arguments

[56] The Respondents also state that their rights under procedural fairness and natural justice were violated during the inspection by Mr. Barteski. They say they had a right to legal counsel during the investigative stage. They also infer they did know the particulars of the case at the investigative stage and that the notices for the hearing are not sufficiently particularized so they know the case to be met. On these last points the Respondents rely on *Jory v. College of Physicians and Surgeons of British Columbia* [1985] B.C.J. No. 320 (B.C. Supreme Court).[2]

(a) Right to Counsel

[57] The right to counsel during a tribunal hearing is not automatic and is dependant on a weighing of various factors: *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 (Supreme Court of Canada). This is not a concern in the present case, as the Respondents were granted an adjournment to obtain legal counsel and are now represented by legal counsel before me.

[58] The issue is whether the Respondents should have been told they had a right to and allowed an opportunity to consult legal counsel during Mr. Barteski's regulatory investigation.

[59] The starting point is that in Canada, there is no automatic right in common law or under the foundational constitutional principle of the "rule of law" to have legal representation. If this were so, the express constitutional right to counsel in section 10(b) of the *Charter* would be redundant: *British Columbia (Attorney General) v. Christie* [2007] 1 S.C.R. 873 (Supreme Court of Canada). The Supreme Court of Canada made specific note that even under the Canadian Constitution; the only constitutional right to legal representation is confined to when an arrest or detention occurs: *Christie*.

[60] A statute may of course grant the right to counsel for any given situation. There is nothing in the *Motor Dealer Act* or in the BPCPA that guarantees the Respondents a right to legal counsel during an investigation or even at a hearing before the Registrar.

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[2] Additional reasons regarding costs before the tribunal and the court [1986] B.C.J. No. 3016 (B.C.S.C); extension of time to file an appeal on costs allowed [1986] B.C.J. No. 74 (C.A. [In Chambers]); appeal on costs dismissed [1987] B.C.J. No. 1024 (B.C. Court of Appeal).

[61] In *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission),* [1989] 2 S.C.R. 879 (Supreme Court of Canada) ("SEPQA"), Justice Sopinka stated:

> The investigator, in conducting the investigation, does so as an extension of the [Canadian Human Rights] Commission. I do not regard the investigator as someone independent of the Commission who will then present evidence as a witness before the Commission. Rather the investigator prepares a report for the Commission. This is merely an example of the principle that applies to administrative tribunals, that they do not have to do all the work themselves but may delegate some of it to others. Although s. 36 does not require that a copy of the report be submitted to the parties, that was done in this case.

[62] The Supreme Court of Canada in SEPQA then cited approvingly Lord Denning in *Selvarajan v. Race Relations Board*, [1976] 1 All E.R. 12 (English Court of Appeal):

> In recent years we have had to consider the procedure of many bodies who are required to make an investigation and form an opinion . . . . In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. **The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given.** It need not name its informants. It can give the substance only. Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. **But, in the end, the investigating body itself must come to its own decision and make its own report.**

[63] The fundamental principle that has developed regarding procedural fairness at the investigatory stage is *"[i]f an investigation involves no conclusions or findings as to the rights of the individual, then there is likely no duty to act fairly in the investigation. Simply collecting information and producing a report is not generally sufficient to attract the application of the rules of natural justice":* Casey & Berkenshire, *"The Duty of Fairness in the Investigative Stage of Administrative Proceedings"*: (2002), 40 Admin. L.R. (3d) 50; and see *Guay v. Lafleur* [1965] S.C.R. 12 (Supreme Court of Canada). As stated by Lord Denning, generally it is when the investigative findings will be placed before an adjudicative body that the affected person receives his rights under procedural fairness and natural justice: *SEPQA* and *Irvine v. Canada (Restrictive Trade Practices Commission)* [1987] 1 S.C.R. 181 (Supreme Court of Canada).

[64] Abbot, J. writing for the majority in *Lafleur* stated at pp. 16-17:

> **Hyde and Montgomery JJ. dissenting, held that the investigation conducted by appellant on behalf of the Minister, is a purely administrative matter which can neither decide nor adjudicate upon anything, that it is not a judicial or quasi-judicial enquiry but a private investigation at which the respondent is not entitled to be present or represented by counsel.**
>
> **I am in respectful agreement with Hyde and Montgomery JJ. and there is very little I desire to add to what they have said in their reasons**.
>
> The power given to the Minister under s. 126(4) to authorize an enquiry to be made on his behalf, is only one of a number of similar powers of enquiry granted to the Minister under the Act. These powers are granted to enable the Minister to obtain the facts which he considers necessary to enable him to discharge the duty imposed on him of assessing and collecting the taxes payable under the Act. The taxpayer's right is not affected until an assessment is made. Then all the appeal provisions mentioned in the Act are open to him.
>
> **The fact that a person authorized to make an investigation on behalf of the Minister is given certain limited powers of compelling witnesses to attend before him and testify under oath, does not, in my opinion, change the nature of the enquiry. That view was admirably expressed by Mr. Justice Hyde whose words I adopt:**
>
> > As a purely administrative matter where the person holding the inquiry neither decides nor adjudicates upon anything, it is not for the Courts to specify how that inquiry is to be conducted except to the extent, if any, that the subject's rights are denied him. The taking of sworn statements is a common everyday occurrence. The deponent is frequently examined in subsequent Court proceedings where the interests of another may be affected by the statements of that witness. **I know of no requirement in law that any person likely to be affected in such a way is entitled to be present with counsel when such a sworn statement is originally made**, and I see little distinction from the proceeding in issue.

See also *Irvine* and *Royal Bank v. Bhagwat* 2009 F.C. 1067 (Federal Court, Trial Division), applying *Irvine*.

[65] In *Strauts v. College of Physicians & Surgeons (British Columbia)*, (1997), 36 B.C.L.R. (3d) 106, 1997 CarswellBC 1403 (B.C. Court of Appeal), the Court was considering an appeal by a physician regarding his compulsion to provide documents at the investigatory stage of the college's process. The Court of Appeal noted that the physician had not yet been "charged" and stated that administrative law provisions (natural justice and procedural fairness) should not be imposed at the investigative stage as these protections would be in play at the adjudicative stage:

> 6 The appellant's argument would have the Court interpret the jurisdiction of the College in a strict manner that in my opinion would be contrary to "serve and protect

the public". See s. 2(a) of the *Act*. The approach of the Courts with respect of the College has been to recognize its purpose and functions as being to serve and protect the public. That is clear from the statute itself. **That end is not accomplished by imposing on the College in its investigative function the panoplies of administrative law that protect the members at the adjudicative stage of the College's proceedings. In my opinion the Court should not find itself cloaking the individual member of the College with rights at the stage of investigation - as is the case here - that would or could work contrary to the public interest. Where the stage is adjudicative the member is and must be protected by all of the principles which over the years have been developed by the Courts to ensure fairness at every stage of the adjudicative process.**

7 Here we are concerned with the investigative process and in my opinion the courts must be mindful of the public factor and duties of the College to protect the public interest when it comes to what principles of fairness the College must follow at that stage.

[66] I find that Mr. Barteski's questioning of the Respondents, and production of documents at the investigative stage, did not trigger the rights the Respondents advance under the common law doctrines of procedural fairness and natural justice. There was no common law right to counsel during the investigative stage of these matters. As the discussion below will show, the Respondents know the case they have to meet, now have legal counsel present, and I, and not Mr. Barteski, will be adjudicating this matter.

(b) Knowing the case to be met

[67] In *Jory*, Justice McLachlin (now Chief Justice of Canada) identified four grounds for the appeal before her ladyship. Only one of those grounds was successful regarding insufficient evidence on a critical finding of fact: paragraphs 15-16.

[68] The Respondents are effectively stating that they did not have enough particulars of their case. In *Jory*, McLachlin J. was discussing particulars of a charge for an adjudication process which was mandated by section 50 of the then *Medical Practitioners Act* R.S.B.C. 1979 c. 254. There is no similar requirement under the *Motor Dealer Act* scheme. While particulars were mandated by the *Medical Practitioners Act*; McLachlin J. did not find there needed to be the type of particulars Dr. Jory believed: see paragraph 22. Her ladyship also noted that particulars relate to the facts of the case and not to legal determinations. McLachlin J. stated Dr. Jory needed to only know the case to be met, which was achieved and she dismissed this ground of appeal: paragraphs 21-23.

[69] It should be noted that at the investigative stage, particulars need not be provided so long as the affected person knows the nature of the complaint, if there is one: *Kutsogiannis v. Assn. of Regina Realtors Inc.* (1989), 79 Sask. R. 214 at p. 218 (Queen's

Bench); affirmed 1989 CarswellSask 625 (Saskatchewan Court of Appeal); and see SEPQA. In *Strauts*, the B.C. Court of Appeal noted at Carswell paragraphs 14-16:

> 14 Dr. Strauts maintained that the letter and Resolution were insufficient to inform him of the complaint made against him. He submitted that if there were letters of complaint they ought to be made available to him. He says if the complaint was initiated by the College in Resolution 91-39 it lacked the particularity required for him to respond to the issues. **By the material provided to him Dr. Strauts knew that the College was investigating his practice of chelation therapy. In my view, Dr. Strauts was provided sufficient information to obligate him to open his records to the investigators.** The argument made by counsel for Dr. Strauts was that at this stage of the proceedings Dr. Strauts was entitled to know exactly the complaints against him. He submitted that s. 50(4) creates more than an investigatory process, it creates an adjudicative process. He based his submission on the fact that at the conclusion of the investigation counsel may recommend the appointment of an inquiry committee, dismiss the complaint, or under s. 50(5) reprimand the member.
>
> 15 At first blush this argument seems attractive. We were told that a reprimand which historically has been given only after an inquiry is made orally and is recorded in the member's record. Reprimand is thus a discipline measure. It follows that unless the member consented to the reprimand it would offend natural justice if that member could be disciplined without having an opportunity to meet the case against him or her in some way.
>
> 16 **At this stage in the proceedings however I am not satisfied that Dr. Strauts is entitled to refuse to comply with the request to examine his records. The investigation has barely begun. There is, as yet, no case for Dr. Strauts to meet.**

[70] Mr. Barteski has no authority to decide what sanctions may be levied against a regulated person. As the B.C. Court of Appeal aptly notes, during an investigation, there is generally no case to meet. Therefore particulars and notice of the case to be met need not be given during the investigatory stage. I note Mr. Barteski's evidence is that he informed the Respondents of the purpose for his questioning and request for documents. I find no breach of procedural fairness and natural justice in failing to provide particulars at the investigation stage. I will next discuss proper notice and "particulars" in relation to the case before me.

[71] First, it should be noted that the criminal disclosure requirements in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 do not apply in the administrative law context as stated in *May v. Ferndale Institution*, [2005] 3 S.C.R. 809 (Supreme Court of Canada):

> 91 It is important to bear in mind that the *Stinchcombe* principles were enunciated in the particular context of criminal proceedings where the innocence of the accused was at stake. Given the severity of the potential consequences the appropriate level of disclosure was quite high. In these cases, the impugned decisions are purely administrative. **These cases do**

not involve a criminal trial and innocence is not at stake. The Stinchcombe principles do not apply in the administrative context.

[72] Knowing the case to be met is part of the right to notice within the administrative law context. The substantive parts of the notice requirements (knowing the case to be met) are that "*sufficient information must be given so that the affected individual understands: 1) whether the individual is the subject of the proceeding; 2) relevant issues; 3) the evidence which is before the agency; and 4) the consequences which may flow from the proceeding*": Régimbald, Guy "*Canadian Administrative Law*" (1st) (Lexis Nexis, 2008) page 256, citing *Kane v. University of British Columbia* [1980] 1 S.C.R. 1105 (Supreme Court of Canada); and *Lakeside Colony of Hutterite Brethren v. Hofer* [1992] 3 S.C.R. 165 (Supreme Court of Canada).

[73] Particulars are not mandated under the *Motor Dealer Act* scheme. There is no requirement to specify all the facts of the case. There is also no requirement to particularize the legal determinations to be made: *Jory*. What must be accomplished is the provision of sufficient information so the Respondents know the case to be met.

[74] In reviewing the Notices of Hearing to the Respondents (Exhibits 1-3), I note the Notices:

(a) Identify the case as being founded on allegations of deceptive acts or practices contrary to section 5(1) of the BPCPA;

(b) Identifies the actual deceptive acts or practices in question, a misrepresentation of facts;

(c) Identifies those provisions under section 4 of the BPCPA in play – general definition of a deceptive act as well as provisions deeming certain specifically described conduct as being deceptive acts;

(d) The date and place of the hearing;

(e) The range of enforcement actions available to the Registrar; and

(f) A section entitled "Evidence" which states that an enclosed affidavit contains the evidence that has been gathered regarding the allegations and that the Respondents may bring counsel to the hearing.

[75] In this context, the Respondent's have been given adequate notice, know the issues of concern, know their potential liability and have been furnished with the actual evidence

being relied on to support the allegations. In short, the Respondents know the case to be met.

[76] I find that the Respondents have not had their rights under procedural fairness and natural justice affected during the investigation stage of these matters. Mr. Barteski informed the Respondents of the nature of his inquiries. I also find the Respondents have had adequate notice of the case to be met in this matter.

DISPOSITION

[77] The Respondents motions to stay or dismiss these matters are denied. These hearings may be brought back before me at the earliest opportunity.

Date: May 3, 2010

Ian Christman, B.A., LL.B.