Vehicle Sales Authority
of British Columbia

Investigation File: 17-01-002
Hearing File: 17-04-001

Neutral Citation: 2017-BCRMD-006

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

BETWEEN:

VEHICLE SALES AUTHORITY

Complainant

AND:

BEVERLY BARCLAY

Complainant

AND:

PIONEER GARAGE LIMITED *DBA* FRASER VALLEY PRE-OWNED (Dealer #40190)

Motor Dealer

AND:

DAMIAN SMART (Salesperson #109080)

Salesperson

DECISION OF THE REGISTRAR OF MOTOR DEALERS

ON APPLICATION TO DISMISS

Date and Place of Hearing: November 30, 2017, at Surrey, British Columbia

Date of Decision: January 18, 2018

Appearances for:

The Authority	Robert Hrabinsky, legal counsel
Pioneer	Paul Schwartz, legal counsel
Damian Smart	No one
Ms. Barclay	Herself

Introduction

[1] Pioneer Garage Limited dba Fraser Valley Pre-Owned ("Pioneer") applies to have Ms. Barclay's complaint dismissed along with the allegations in the Notice of Hearing dated June 5, 2017. The basis for the application is Ms. Barclay's exchange of communications with staff members of the Motor Vehicle Sales Authority

("Authority"), regarding additional evidence she wished to provide, while she was under order not to discuss her evidence with anyone.

[2] The first day of this hearing was October 12, 2017, where Ms. Barclay was called as a witness by the Authority. By the end of the day, Ms. Barclay was in the midst of being questioned by the lawyer for Pioneer. I adjourned the hearing to a date to be set by agreement of the parties. I also ordered Ms. Barclay not to discuss her evidence with anyone because she was in the middle of being cross-examined.

[3] Shortly after the hearing, Ms. Barclay left a voice message with Compliance Officer Vandokkumburg, stating she had some additional evidence she wished to provide. Ms. Vandokkumburg returned Ms. Barclay's call and cautioned Ms. Barclay that they were not permitted to talk about Ms. Barclay's evidence. Ms. Vandokkumburg sought guidance from Daryl Dunn, now the former Manager of Compliance and Investigations at the Authority. A decision was made to have the Authority's hearing coordinator and legal administrative assistant, Ms. Farmer, contact Ms. Barclay. Ms. Barclay spoke with Ms. Farmer and emailed Ms. Farmer a few pages of documents. The Authority disclosed to the lawyer for Pioneer, the Authority's lawyer, and to Mr. Smart those pages that Ms. Barclay provided, along with copies of the communications or notes of communications passing between the Authority and Ms. Barclay.

[4] It is noted that Mr. Damian Smart did not attend the November 30, 2017, hearing date as he was required to do.

Position of the Parties

[5] The position of the parties is summarized below. Again, Mr. Smart did not participate at this hearing.

(a) Pioneer

[6] Pioneer says that the communications between the Authority and Ms. Barclay, regarding Ms. Barclay's evidence, is in contravention of my order that she not to speak to anyone about her evidence. Pioneer notes that this is not a breach of the Registrar's Rules of Practice and Procedure, but is analogous to contempt of court. Pioneer submits that the proper approach by Ms. Barclay and the Authority was to ask the Registrar to vary my order, not disregard that order.

[7] Pioneer submits that this conduct impacts the integrity of the Registrar's authority and hearing process and could undermine the industry's faith in that

process. Pioneer further argues that, given the legislative framework and the seriousness of the transgression, the only sanction the Registrar can impose to place the Authority on notice that it must abide by the orders of the Registrar is the dismissal of Ms. Barclay's complaint and the allegations in the June 5, 2017 Hearing Notice. Pioneer says that absent a dismissal of the complaint and the allegations, Pioneer cannot be assured of a fair process.

[8] Pioneer notes that in dismissing the complaint, Ms. Barclay will not be prejudiced, as she has already been compensated by Pioneer to the extent the legislation would allow. Pioneer submits that if this matter were dismissed, it would not seek any repayment from Ms. Barclay of the compensation she has already received.

[9] Pioneer submits that it would be prejudiced if this hearing would continue because the results of this case reflect on two applications it has made to register two locations as dealerships. A decision on registering those two locations has been effectively put on hold pending the outcome of this hearing. As earlier noted, Pioneer believes it will also not receive a fair process which is prejudicial to its interests.

[10] Pioneer brings to my attention the decision in *Concord Pacific Developments Ltd. v. Assessor of Area #09 – Vancouver*, 1996 CanLII 1386 (B.C. Court of Appeal).

(b) Vehicle Sales Authority of B.C.

[11] The Authority submits that the communications were more unilateral than bilateral. Ms. Barclay communicated with the Authority. The Authority submits that after the October 12 hearing, Ms. Barclay had reviewed her records and discovered an email that seems to contradict an email she was questioned on by Pioneer's lawyer. Ms. Barclay wanted to talk to someone on how she could ensure that email was placed before me. The Authority submits this email was disclosed to the parties along with copies of the actual communications or phone notes of communications between the Authority's staff and Ms. Barclay. The lawyer for the Authority noted that in some ways the Authority also acts as a court registry accepting information from parties.

[12] The Authority submits that dismissing the complaint and allegations is unnecessary and inappropriate. Based on the email provided by Ms. Barclay, it appears that a falsified document was presented into evidence at the October 12 hearing. The Authority argues that submitting a falsified document also attacks the

integrity of the Registrar's hearing process and that the public interest requires reviewing that allegation, and not dismissing the complaint and allegations outright.

[13] The Authority submits that the communications have not prejudiced Pioneer. The fact that Pioneer is awaiting a decision in this case in relation to applications to register two other locations as dealerships is not prejudice. The Authority submits that Pioneer can argue what weight is to be placed on Ms. Barclay's recently submitted evidence, due to these communications.

[14] The Authority brings to my attention the decision in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.* 1992 CanLII 1832 (BC Supreme Court).

(c) Ms. Barclay

[15] Ms. Barclay said she never discussed her evidence with anyone. She stated further that she had found an email that contradicted an email about which she had been questioned by Pioneer's lawyer. Ms. Barclay said that she just wanted to see that the email was put before me and wanted to talk to someone about how she could do that. Ms. Barclay does not believe that the complaint and the allegations should be dismissed.

Legal Considerations

[16] I have balanced the following legal principles in arriving at my decision.

(a) Registrar's orders and authority

[17] As a statutory creature, the Registrar's authority and powers are derived from the legislative scheme under the *Motor Dealer Act*. The law recognizes that the Registrar also has powers necessary to control his process to ensure that it is fair, efficient, and timely.

(b) *Fraser River Pile & Dredge Ltd.* (Supreme Court)

[18] *Fraser River Pile & Dredge Ltd.* involved a concern with a lawyer who spoke with his witness, regarding that witness' evidence, which had been given during an examination for discovery. It was argued that the prohibition on a lawyer discussing evidence with their witness, while the witness is under cross-examination at a trial, should also apply to the discovery process. The Court refused to extend the prohibition that exists at trial to the discovery process.

[19] The Court noted that during a trial, if a lawyer wished to speak to their witness who is being cross-examined, the lawyer should apply to the court for leave to do so; and that a court should readily agree. The primary purpose for applying for leave is to ensure that the court and the other parties are on notice that the communication was going to occur. The secondary purpose is to allow the court an opportunity to rule against any inappropriate communication, before it occurs.

[20] The reason that a witness under cross-examination is not permitted to speak with their lawyer is to ensure that the lawyer has not coached the witness. By extension, the reason for ordering a witness not to speak to anyone, while they are being cross-examined, is to ensure no one else attempts to coach or influence the witness.

(c) *Concord Pacific Developments Ltd.* (Court of Appeal)

[21] *Concord Pacific Developments Ltd.* involved the late submission of an expert's report by Concord Pacific Development Ltd., in contravention of the Assessment Appeal Board's order, regarding the exchange of expert reports. The Assessor's expert witness had completed his testimony and was in the midst of being crossed examined when this expert report was produced. The lawyer for the Assessor needed to review the newly produced report with his witness, while that witness was being cross-examined. The Assessment Appeal Board admitted the late submission of the expert's report. The Assessment Appeal Board also granted an adjournment and allowed the lawyer for the Assessor to review the new report with his witness, even though that witness was still under cross-examination.

[22] The Assessment Appeal Board placed a stated case before the B.C. Supreme Court to see if it had erred in law in making its decision. The B.C. Supreme Court stated that there had been no error of law. Concord Pacific Developments Ltd. applied for leave to appeal to the Court of Appeal. The Court of Appeal refused leave, making comments on the Assessment Appeal Board's decision, the B.C. Supreme Court's decision, and on the possible mootness of the appeal, given how events had unfolded. I comment more on the Court of Appeal's comments below.

(d) Public interest and fairness

[23] The Registrar's mandate is the administration of the legislative scheme, under the *Motor Dealer Act*. That scheme is the administration of a licensing regime and of consumer protection legislation. The primary aim of such legislation is the protection of the public from potential future harm from those who are regulated under that scheme. An aspect of the legislation also allows remedying harm from past conduct of a regulated person. Public confidence in the industry depends on

knowing that allegations against regulated persons and entities are reviewed, and then rejected or confirmed based upon the evidence. If confirmed, the public interest requires steps be taken to ensure that individual consumers receive remedies for past harms and that the public is protected from future harm.

[24] Another aspect of the public interest is the Registrar's requirement to provide fairness to regulated persons and complainants during a Registrar's hearing. Appropriate fairness exists along a continuum, based on an assessment of various factors such as the nature of the issue before the Registrar, the stakes faced by a regulated person, and the requirements of the statutory scheme. Generally speaking, purely licensing decisions fall on the lower end of the continuum; while adjudicating the rights between parties in conflict falls on the higher end of that continuum: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 1999 CanLII 699 (SCC).[1]

[25] In this case, Ms. Barclay has received compensation from Pioneer. The issue before me is whether Pioneer has breached the Legislation; and if so, to determine the appropriate compliance action to take. Pioneer could face administrative penalties and - by virtue of section 8.1(4)(b) of the *Motor Dealer Act* - revocation of its registration as a motor dealer. Given the potential significance of the decision to Pioneer, I find the level of fairness required to be on the higher end of the continuum.

(e) Prejudice to the Parties

[26] When dismissal of a complaint is being sought by one party, the prejudice to the other parties must be considered. This is especially so where there are multiple parties as in this case. Whether or not there is prejudice to a party is a factor to be weighed against the public interest and whether or not fairness can be achieved without dismissing the complaint. This makes inherent sense as the actions of one party should not automatically deprive the other parties of their rights or remedies, nor the public the protection the legislation is aimed at providing.

Discussion

[27] It is important to note that Ms. Barclay is the first witness called at this hearing, and called by the Authority. Ms. Barclay is in the midst of being cross-examined by Pioneer. Mr. Smart also has an opportunity to question Ms. Barclay in the main case. The Authority would also have a right of re-examination of Ms.

[1] While neither party provided me with the decision in *Baker,* the issue of fairness is a part of this application to dismiss and the *Baker* decision is a well-known leading authority on procedural fairness.

Barclay. As a complainant and a party to this matter, Ms. Barclay has the right to provide her own direct evidence, but has not yet done so. Pioneer and Mr. Smart have yet to give any evidence, if they are electing to do so. As such, there are opportunities for Ms. Barclay to introduce her additional evidence in this hearing. If Ms. Barclay produced that evidence at the hearing without advanced notice, I expect the other parties would want time to review that additional evidence and an adjournment would most likely have been requested. Ms. Barclay making the additional evidence known now and available before the hearing was reconvened is the most practical way to have done so.

[28] The additional evidence tendered by Ms. Barclay is an email she says is in contradiction to an email she was questioned on by Pioneer's lawyer. The email Ms. Barclay was questioned on was entered as Exhibit 2 at the October 12 hearing at the request of Pioneer. Pioneer's lawyer submitted that he obtained what is Exhibit 2 from Mr. Damian Smart. Pioneer's counsel felt that he should question Ms. Barclay about Exhibit 2, as the Authority's lawyer had not done so. Of course, at this early stage of the proceeding, the use and weight I may give to Exhibit 2 cannot be determined. Indeed, Mr. Smart has not yet given his own evidence about Exhibit 2, if he is in fact going to provide such evidence.

[29] On their face, Exhibit 2 and the email Ms. Barclay wishes to submit appear contradictory. It is possible that Exhibit 2,the email of Ms. Barclay, or both have been falsified. It is possible that Exhibit 2 and Ms. Barclay's email can be reconciled. Further evidence is necessary to make any determination among those possibilities.

[30] The fact that an inconsistency may exist in the evidence and may be due to a witness or a party falsifying a document engages the public interest. Offering falsified documents affects the integrity of the Registrar's process and the ability of either party to fairly advance or defend their case. The public, and the industry, must feel confident that attempts to mislead the Registrar will be properly reviewed; and when such conduct is found that appropriate steps are taken.

[31] Mr. Smart's failure to attend the November 30 hearing presents an additional concern. Mr. Smart is disobeying the order of the Registrar. This too affects the integrity of the Registrar's process. Regulated persons must obey the Registrar's orders, including attending hearings to which they are called to attend. Absent such respect for the Registrar's order, the regulatory scheme would fail. Dismissing the complaint and the allegations outright would essentially allow Mr. Smart to benefit in the face of his own disobedience of a Registrar's order.

[32] There can be no doubt that Ms. Barclay failed to abide by my order not to discuss her evidence, while in the midst of being cross-examined. It is clear that

the Authority, aware of my order, engaged in communications with Ms. Barclay regarding the additional evidence. As noted above, the appropriate approach would have been to seek a variation of my order on notice to all the parties: *Fraser River Pile & Dredge Ltd.* Of course, seeking such a variation of my order would have required Ms. Barclay to advise someone that she had additional evidence and to submit an application to permit variation of my order. While Ms. Barclay may be excused, as she is not represented by a lawyer, the Authority could and should have made that application. The public interest requires that the Authority abide by my orders; and it was in the better position to take the steps necessary to do so.

[33] Pioneer would suggest that Ms. Barclay's and the Authority's having violated my order is fatal to the procedural fairness owed to Pioneer and Mr. Smart. I disagree.

[34] First, the Registrar provides the fairness during this hearing process. Second, contrary to Pioneer's assertions, any concerns about fairness can be assuaged by ordering that Ms. Barclay's additional evidence be provided to all the parties and allowing them sufficient time to review that evidence before resuming Ms. Barclay's examination. That disclosure has largely already taken place. I do note that Pioneer's lawyer stated that he had not looked at the evidence previously, so as not to be in breach of my order.

[35] This approach to ensuring procedural fairness is similar to the decision relied on by Pioneer, involving the Assessment Appeal Board; a decision which was approved by the B.C. Supreme Court and by the Court of Appeal:

> 22 At p. 313 Macdonell, J. had this to say:
>
> > What needs to be said clearly as this is an interim appeal is that the board, in setting deadlines for exchanging reports, was sensibly expecting that the deadlines would be met and that there would be no surprises at the hearing. As the appellant produced a late report, the spirit of that direction was thwarted. Rather than rejecting the report, which may have contained cogent evidence or material, the board sensibly gave leave to the respondent to review it with his witness so that the witness would not be caught by surprise. In doing this, the board sought to provide substantial justice. What they did was very appropriate in the circumstances.
>
> 23 I am in complete agreement with that observation. In my view there is little prospect of this appeal succeeding on its merits.

- *Concord Pacific Developments Ltd.*

It is also open to Pioneer and to Mr. Smart to argue the weight to be given to the additional evidence tendered by Ms. Barclay, in light of the manner in which it came forward.

[36] Moreover, the following steps have already occurred to provide fairness. At the November 30, 2017, hearing on this application to dismiss, Ms. Barclay gave evidence and was questioned by Pioneer's lawyer about her communications with the Authority staff. The parties have the benefit of the letter from Ms. Farmer, explaining her communications with Ms. Barclay. All parties were provided with the notes of Ms. Vandokkumburg and a copy of the actual voice message left by Ms. Barclay for Ms. Vandokkumburg. Ms. Vandokkumburg was at the November 30, 2017 hearing and could have been questioned about her conversation with Ms. Barclay.

[37] Given my view that procedural fairness can be maintained, I am left to balance the public interests against any prejudice.

[38] First, the public interest requires that my orders be followed by the Authority, by witnesses, and by regulated persons. Second, the public interest requires that allegations of misconduct by a regulated person should be dispensed with based on a review of all of the evidence. Third, the public interest requires that any allegations that falsified documents have been placed before me in the context of a hearing be dispensed with based on an assessment of all the evidence. Given that the purpose of the legislative scheme is to protect the public from potential future harm, an assessment of the risk of potential future harm should be made on the evidence.

[39] Ms. Barclay has been compensated by Pioneer to the extent the legislation allows. It would appear Ms. Barclay would not be directly prejudiced by this case being dismissed. As a complainant, Ms. Barclay has an interest in knowing that her complaint was or was not correctly brought before the Authority. As a member of the public, Ms. Barclay does have an interest in this case being adjudicated on the evidence and not being dismissed outright to have solace that Pioneer does not pose a future risk to the public.

[40] The Authority did not articulate any prejudice to it if the case was dismissed.

[41] Pioneer says that it would be prejudiced if this case is not dismissed, because it is awaiting a decision in this case before it reapplies for registration of two dealer locations. I would note that the November 30, 2017, hearing date was the next

scheduled hearing date in this case. Some of the delay from October 12 to November 30 was due to the schedule of Pioneer's lawyer. I do not find that the delay in proceeding with this case would be inordinate or prejudice Pioneer in being able to defend itself against the Authority's allegations. While the financial impact to Pioneer is important to note, as I stated in my decision in denying the two registrations to Pioneer, the *Motor Dealer Act* does not guarantee a registration will be issued simply because one applies. Even if this claim were to be dismissed, Pioneer's request to register the two locations must still be reviewed on the evidence available without guarantee of approval.

[42] Pioneer never articulated any prejudice in its ability to defend against the allegations in this case, due to Ms. Barclay's communication with the Authority.

[43] In considering the noted factors, bearing on the potential for prejudice to Pioneer, and balancing them with the interests of protecting the public from potential future harm - interests, which should be based on an assessment of the evidence - the appropriate approach is not to dismiss the complaint or the allegations in the Notice of Hearing of June 5, 2017. Their disposition should only occur after a full and measured review of all evidence.

[44] That having been said, the Authority's breach must be addressed. I am both empowered and constrained by legislation. The legislation gives me no power to sanction the Authority by either imposing a penalty or requiring it pay the costs of the November 30, 2017, hearing date. These limitations also apply to Ms. Barclay. Though, for the reasons described above, I would be hard-pressed to apply such a penalty to her, especially given that Ms. Barclay is navigating this tribunal process without the benefit of a lawyer.

[45] That said, I am not wholly incapable of fashioning a remedy. Were the Authority to successfully prove its allegations, it would be entitled to an order under section 155(4)(d) of the *Business Practices and Consumer Protection Act,* reimbursing its costs, including its actual legal costs. I can now state that if the Authority is successful in proving its allegations, it will not be entitled to the costs of the November 30, 2017, hearing date, including that of its lawyer.

Disposition

[46] For the above reasons:

(a) Pioneer's application to dismiss the complaint of Ms. Barclay and the allegations in the June 5, 2017, Notice of Hearing is dismissed;

(b) The parties are to receive Ms. Barclay's additional evidence so that they may review that evidence and prepare their cases accordingly; and

(c) If the Authority is successful in proving the allegations in this case, it shall not be entitled to its costs associated with the November 30, 2017, hearing date – the application to dismiss brought by Pioneer.

[47] Mr. Smart is on notice that his failure to attend the November 30, 2017, hearing is to be reviewed by the Registrar during the course of this hearing and may result in a sanction.

[48] The hearing in this matter is to be reconvened on a date to be agreed to by the parties. If no date can be agreed to by January 26, 2018, any party is at liberty to apply to me to set the next hearing date in this matter.

Dated: January 18, 2018

_____**Original Signed**_____
Ian Christman, J.D.
Registrar of Motor Dealers

[NOTE: This decision includes a correction to the originally released decision in the first sentence of Paragraph 31, which was changed to correct a double negative, by removing the word "not" from between "to" and "attend."]