



Neutral Citation: 2018-BCRMD-022

IN THE MATTER OF THE *MOTOR DEALER ACT*, R.S.B.C. 1996, C. 316

MOTOR VEHICLE SALES AUTHORITY OF BRITISH COLUMBIA

Complainant

And

WILD GRIZZLY TRANSPORT LTD.
(Unlicensed)

Respondent

And

PASQUALE ZAMPIERI
(Unlicensed)

Respondent

And

JENNIFER AIKEN
(Unlicensed)

Respondent

**DECISION OF THE REGISTRAR OF MOTOR DEALERS
ON APPLICATION FOR RECONSIDERATION**

Written submissions by Pasquale Zampieri and Wild Grizzly Transport Ltd.

Submission dates: June 1, 2, and 5, 2018 by email.

I. Introduction

[1] By way of email, sent to the Authority on June 1, 2018 and as amended on June 2, 2018, Pasquale Zampieri and Wild Grizzly Transport Ltd. apply for reconsideration of my Compliance Order of May 10, 2018, requiring Mr. Zampieri and Wild Grizzly Transport Ltd. to cease and desist acting as a motor dealer, unless and until registered as a motor dealer and to refrain from tampering with motor

vehicle odometers. They also seek reconsideration of my Compliance Order of May 31, 2018, requiring that they pay investigation costs in the amount of \$11,383.61.

[2] The grounds for their June 1 and 2, request for reconsideration is that there was a change in legislation on January 1, 2018, empowering the Registrar to make compliance orders, including costs, but the conduct under review occurred prior to that date. They note that no penalty was sought by the Authority or ordered by me.

[3] By way of email sent June 5, 2018, Pasquale Zampieri and Wild Grizzly Transport Ltd. further amended their request for reconsideration to state that, as Wild Grizzly Transport Ltd. is an importer and exporter of motor vehicles, it enjoys an exemption from the *Motor Dealer Act* R.S.B.C. 1996, c. 316 ("**MDA**"). As such, and because the Motor Vehicle Sales Authority never granted Pasquale Zampieri and Wild Grizzly Transport Ltd. a motor dealer registration, the Registrar was without jurisdiction to issue the May 10 and May 31, 2018 compliance orders.

[4] Mr. Zampieri and Wild Grizzly Transport Ltd. say this whole matter should be dropped.

II. Legal Considerations

A. Reconsiderations

[5] Section 26.11 and 26.12 of the MDA empower the Registrar to reconsider **and vary or cancel a prior "determination", as defined in the Act such as a** compliance order, so long as:

- (a) The request was made within the time required by the legislation;
- (b) There is new evidence or newly discovered evidence that could not have been discovered with reasonable diligence; and
- (c) The new evidence is substantial and material to the determination; that is, the new evidence could or would affect the terms of the original decision.

[6] The Registrar may also reconsider a determination under the common law principles in *Chandler v. Alberta Association of Architects*, [1989] 2 SCR 848 (Supreme Court of Canada) to address an issue of procedural fairness in the initial decision as discovered by the tribunal - the Registrar in this case. In previous decisions, I have described the limited reconsideration available under *Chandler*.

- *Webster et al. v. Pioneer Garage Ltd. dba Fraser Valley Pre-Owned* (May 15, 2018, Hearing File 17-07-002, Registrar on Reconsideration)

- *Harris & Harris v. Windmill Auto Sales & Detailing Ltd. et al.* (August 20, 2013, Hearing File 12-030, Registrar), at paragraphs 19 to 31 denying reconsideration of *Harris & Harris v. Windmill Auto Sales & Detailing Ltd. et al.* (April 10, 2013, Hearing File 12-030, Registrar) and affirmed by *Windmill Auto Sales & Detailing Ltd. v. Registrar of Motor Dealers*, 2014 BCSC 903 (BC Supreme Court).

[7] In *Gill v. Canada* [1987] 2 FC 425, (Federal Court of Appeal), the court found that the tribunal could re-open the case before it, where there had been a change in the law, not considered by the tribunal, and which could affect the rights of the person under review.

B. New legislation and retroactivity/retrospectivity

[8] At common law, newly enacted civil legislation is presumed to be prospective in nature, unless the Legislature expressly states it operates retrospectively/retroactively. See for example section 203 of the *Business Practices and Consumer Protection Act* S.B.C. 2004, c.2.

- *Brosseau v. Alberta Securities Commission*, 1989 CanLII 121 (SCC), [1989] 1 S.C.R. 301 (Supreme Court of Canada)
- *Thow v. B.C. (Securities Commission)*, 2009 BCCA 46 (BC Court of Appeal)

[9] However, the presumption does not apply to all statutes:

[24] ...Driedger acknowledges difficulties in defining the precise limits of this third category of statutes; after considering and interpreting a number of cases, he concludes at p. 275:

In the end, resort must be had to the object of the statute. If the intent is to punish or penalize a person for having done what he did, the presumption applies, because a new consequence is attached to a prior event. But if the new punishment or penalty is intended to protect the public, the presumption does not apply.

...

[26] In deciding that the Securities Commission did have jurisdiction to impose sanctions under the new statutory provisions, the Supreme Court of Canada **adopted Driedger's analysis of the presumption against retrospectivity. It quoted from Driedger's article, stating, at p. 319, that the presumption against retrospectivity is**

inapplicable to “enactments which may impose a penalty on a person related to a past event, so long as the goal of the penalty is not to punish the person in question, but to protect the public.” This description of the exception to the presumption against retrospectivity was critical to the decision of the Securities Commission in the case at bar.

[Underlining added.]

- *Thow v. B.C. (Securities Commission)*

[10] The B.C. Court of Appeal in *Thow*, reviewed the legislative changes to the administrative penalty authority granted to the B.C. Securities Commission. In its view, the Commission was only able to impose an administrative penalty in an amount up to what the legislation authorized at the time the conduct in question occurred. The B.C. Court of Appeal noted that the presumption against retrospectivity focuses on punishing past conduct and that it does not prevent an order designed to protect the public into the future:

[46] The exception does, however, appear to be applicable only where a prejudicial sanction is imposed, not for penal purposes, but as a prophylactic measure to protect society against future wrongdoing by that person. While the imposition of such sanctions may, incidentally, inflict hardship on the wrongdoer, the infliction of such hardship is not the goal.

[47] **The concept of “punishment” is an elastic one,** and its meaning must be taken in context. In *Cartaway* and *Asbestos*, the Supreme Court of Canada used the concept to describe those penalties imposed on an offender to mark moral disapprobation of his or her conduct. In *Brosseau*, in contrast, I believe that the Court used the word “punish” in a broader context, to describe all sanctions imposed for the purpose of penalizing an offender. On the other hand, penalties imposed solely for the purpose of protecting society from the offender in the future, were not considered “punishment”, even if they had the effect of placing burdens on the offender.

[11] *Thow* and *Brosseau* did not consider the ability to order costs for conduct that occurred prior to legislation coming into force. Of course, an order of costs is

not a “punishment” for past conduct, but recognition that a successful party is entitled to its costs after a proceeding. The more drawn out a proceeding, the greater the costs. Awarding a successful party their costs supports early resolution of disputes.

[12] In the regulatory context, the prospect of an adverse cost award fosters a non-compliant person’s reasonable and early compliance with the legislation, which is in the public interest and for the public’s protection. Also, a regulator who is funded from industry fees is entitled to receive from a non-compliant person any costs to regulate them. This recognizes that the non-compliant person should pay those costs and not the industry. This is even more important, when the non-compliant person is an unregistered motor dealer who has not paid any fees.

C. Exemption as an exporter or imported of motor vehicles

[13] Pasquale Zampieri and Wild Grizzly Transport Ltd. rely on the exemption as an exporter or importer of motor vehicles as found in section 14(h) of the *Motor Dealer Act Regulation* B.C. Reg. 447/78 (“MDAR”), which states:

14 The following classes of persons are exempt from the Act:

(h) a manufacturer, exporter, importer or distributor of motor vehicles who does not offer the vehicles for sale to the general public;

[Underlining added.]

[14] The interpretation of this provision, is that an exporter or imported of motor vehicles is exempt from the registration requirements of the MDA, so long as they **do not act as a motor dealer. This is apparent from the definition of “motor dealer”** in section 1(1) of the MDA:

“motor dealer” means a person who, in the course of business,

(a) engages in the sale, exchange or other disposition of a motor vehicle, whether for that person's own account or for the account of another person, to another person for purposes that are primarily personal, family or household,
(b) holds himself, herself or itself out as engaging in the disposition of motor vehicles under paragraph (a), or
(c) solicits, offers, advertises or promotes with respect to the disposition of motor vehicles under paragraph (a),

but does not include a person exempted by regulation or an individual referred to in paragraph (a) of the definition of "salesperson";

[15] The exemption in section 14(h) of the MDAR is not a blanket exemption. It does not mean that, because an aspect of a company's business is the export or import of motor vehicles, they enjoy a complete exemption to then act as a motor dealer. The need for section 14(h) is due to the expansive and all-encompassing definition of "disposition" used in the MDA, and as defined in section 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 and in consideration of section 28(4) of that Act:

"dispose" means to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things;

[16] An exporter or importer transfers motor vehicles and releases motor vehicles and could be captured by the definition of "motor dealer," but for the exemption in section 14(h) of the MDAR. The exemption is to make clear that an importer or exporter is exempt from the MDA, while carrying out those functions. It is not a blanket exemption to act as a motor dealer.

III. Discussion

A. The application

[17] Pasquale Zampieri and Wild Grizzly Transport Ltd. have applied for reconsideration within the legislatively required time. Neither has provided any new evidence. Their objection is that the conduct of concern occurred before the Registrar could make compliance orders under section 26.02 of the MDA and that they are exempt as an exporter or importer. Therefore, their application for reconsideration is premised on the common law principles in *Chandler* and in *Gill*.

B. The May 10, 2018 Compliance Order – Cease and Desist

[18] The May 10, 2018, Compliance Order prohibits Pasquale Zampieri and Wild Grizzly Transport Ltd. from acting as a motor dealer unless and until registered as such under the MDA. That compliance order also prohibits them from tampering with motor vehicle odometers. Both those orders are future looking and for the protection of the public. While those orders may have looked at conduct that occurred before section 26.02 of the MDA came into force on January 1, 2018, the orders are for the protection of the public and do not impose a penalty for that past

conduct. Therefore, the presumption against retrospectivity does not apply to the May 10, 2018, compliance order.

[19] The Authority was correct in not seeking an administrative penalty applying the reasoning in *Thow*. That would have been attaching a new consequence to past conduct as described by the B.C. Court of Appeal in *Thow*.

[20] I would further note that Pasquale Zampieri's and Wild Grizzly Transport Ltd.'s facing the possibility of a cease and desist compliance order is not a new consequence. Under section 31 of the MDA, the Registrar can apply to the B.C. **Supreme Court for such a compliance order and "the court may make an order it considers proper."** **That section was in place prior to the conduct of Pasquale Zampieri and Wild Grizzly Transport Ltd.** that was reviewed. See for example the cease and desist and the contempt orders of the B.C. Supreme Court regarding William Patchet (April 18, 2011 and March 2, 2012, Vancouver Registry Action# S107322) attached to this decision. The addition of section 26.02 of the MDA has provided another procedure/venue to obtain such a compliance order.

[21] I find there is no procedural unfairness in my issuing the Compliance Order of May 10, 2018. The request for reconsideration of the May 10, 2018 Compliance Order on this ground, is denied.

C. The May 31, 2018 Compliance Order - Costs

[22] The Registrar may order costs under section 26.02(4)(d) of the MDA. This provision came into force on January 1, 2018. The impugned compliance order was made after the law was in force. The question is, "Can the conduct prior to January 1, 2018, and the investigation costs that were incurred then, form a cost award after January 1, 2018?" Under the facts of this case, I would say, "yes."

[23] First, as noted, an award of costs does not punish past conduct, but is in recognition of the success of one of the parties in a dispute.

[24] Second, the commencement of the proceedings before me was initiated on February 13, 2018, when Norm Felix, Manager of Compliance gave notice to Mr. Zampieri, Wild Grizzly Transport Ltd. and Jennifer Aiken that the Authority had evidence to show that they were acting as a motor dealer, while not registered, and that they tampered with the odometers on 37 motor vehicles. The notice also **provided the respondents with a copy of the Authority's evidence and warned that** the Authority was bringing the matter before the Registrar. The notice further offered a means to address these concerns voluntarily through an undertaking, without the need for my adjudication or issuing a compliance order. The Authority

sought an early resolution and compliance from Wild Grizzly Transport Ltd. and Mr. Zampieri for the benefit of protecting consumers.

[25] Mr. Zampieri, on behalf of himself, Jennifer Aiken, and Wild Grizzly Transport Ltd., responded on March 13, 2018, and again on April 9, 2018. They did not agree to any voluntary undertaking to comply with the legislation. They argued that the Authority and the Registrar did not have jurisdiction, because all the transactions were done by Wild Grizzly Transport Ltd., a company, and that the Authority and Registrar had no jurisdiction over a company. There was no early resolution to the allegations.

[26] Third, the imposition of costs on an unregistered person, who is the subject of a cease and desist compliance order, is not a new consequence. If the Authority successfully sought such a compliance order in the B.C. Supreme Court, under section 31 of the MDA, the Authority would be entitled to its costs. This was the case in the William Patchet matter as noted in the attached B.C. Supreme Court orders. Section 26.02 of the MDA merely provides a new procedure/venue to obtain a compliance order, including addressing costs.

[27] Under section 26.02(4)(d) of the MDA, the subject person could be liable for the actual legal costs to conduct the inspection or investigation. By contrast, the imposition of legal costs on an unsuccessful party before the B.C. Supreme Court is, subject to exceptions, on a tariff of costs. That is, a successful party does not recover their actual legal costs but a portion of those legal costs. Therefore, the liability for legal costs can be greater before the Registrar under section 26.02 of the MDA, than before the B.C. Supreme Court under section 31 of the MDA.

[28] Under section 26.02 of the MDA, the Registrar can order recovery of actual disbursements - hard costs. This is also true of a cost award in the B.C. Supreme Court, including obtaining a compliance order under section 31 of the MDA. The potential liability to pay disbursements in an order for costs before the Registrar or before the B.C. Supreme Court is the same.

[29] Disbursements can include the actual costs paid to a professional like a doctor or an actuary, who completes a report in support of litigation. Another example is the cost of a private investigator, where it can be shown that the cost was necessary and reasonable **to the successful completion of a party's case.**

[30] Whether they appear before the B.C. Supreme Court under section 31 of the MDA, or before the Registrar under section 26.02 of the MDA, a person, who is the subject of a compliance order from either, can be liable to costs, including actual disbursements. That is not a new consequence. What could be considered a new

consequence, if at all, is the potential liability to pay the actual legal costs before the Registrar which, except in exceptional circumstances, is not awarded by the B.C. Supreme Court.

[31] **In this case, the cost award was for the investigator's time and that of support workers to investigate and bring the case forward.** As I noted in my May 31, 2018 decision, the Authority was not seeking any legal costs or other disbursements. Therefore, the request for costs and the order of costs was akin to **"hard costs" or disbursements, a possibility that Mr. Zampieri and Wild Grizzly Transport Ltd.** could have faced, if this matter had been pursued under section 31 of the MDA. They did not face a new consequence as to costs.

[32] From the forgoing, I find that the May 31, 2018 Compliance Order on costs was

- (a) Not punitive;
- (b) Based on the proceedings before me, which were commenced after section 26.02 of the MDA was in force;
- (c) Made in consideration of the Authority not seeking the recovery of actual legal fees or any legal fees;
- (d) Made in consideration of the Authority seeking only to recover its hard costs to investigate the allegations and bring them forward; and
- (e) Not a new consequence, as the Authority would be entitled to seek its disbursements before the B.C. Supreme Court if it successfully obtained a compliance order under section 31 of the MDA.

[33] I find that the Compliance Order for Costs, made on May 31, 2018, was within my authority to make and that there was no procedural unfairness in the making of that Compliance Order. The request for reconsideration of my May 31, 2018 Compliance Order on costs on this ground, is denied.

D. Exempted from the *Motor Dealer Act*

[34] Pasquale Zampieri and Wild Grizzly Transport Ltd. argue that they enjoy an exemption from the MDA, because they are importers and exporters of motor vehicles. That is a jurisdictional argument, which is not founded on new evidence or a claim of a breach of procedural fairness. There is no legal authority for me to reconsider my two compliance orders on this argument. Even so, the argument is of no consequence, as my written reasons found that Pasquale Zampieri and Wild Grizzly Transport Ltd., were acting as a motor dealer, while unregistered by offering motor vehicles for sale to the general public and selling those vehicles to the

general public. Pasquale Zampieri's and Wild Grizzly Transport Ltd.'s request for reconsideration on this ground is denied.

E. Other comments

[35] In the June 5, 2018 email, Pasquale Zampieri and Wild Grizzly Transport Ltd. made further arguments about the definition of broker-agent and alluded to Adesa Auctions. Specifically, that Adesa is not a broker or an agent. Those arguments have no bearing on whether or not Pasquale Zampieri and Wild Grizzly Transport Ltd. were acting as a motor dealer while unregistered or tampered with odometers.

[36] In the June 5, 2018 email, Pasquale Zampieri and Wild Grizzly Transport Ltd. seem to complain that I discuss whether or not Pasquale Zampieri and Wild Grizzly Transport Ltd. sold unsafe vehicles. In my written reasons of May 10, 2018, I noted the Authority made that allegation. At paragraph 35 of those written reasons, I also found that the Authority had not proven that allegation and dismissed that allegation as against Pasquale Zampieri and Wild Grizzly Transport Ltd.

IV. Further Review

[37] The requests for reconsideration by Pasquale Zampieri and Wild Grizzly Transport Ltd. are denied.

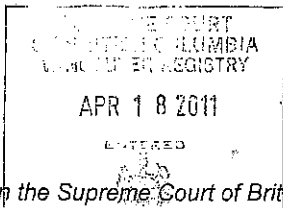
[38] In accordance with section 26.12(4) of the MDA, this decision cannot be reconsidered; and no further reconsiderations can be made.

[39] This decision can be reviewed by petitioning the B.C. Supreme Court for judicial review pursuant to the *Judicial Review Procedure Act*. Such a petition must be filed with that Court within 60 days of this decision being issued: section 7.1(t) of the MDA. In his June 5, 2018 email, Mr. Zampieri noted that if the Registrar refused to set aside the two compliance orders, then the Registrar had to move this case along to the B.C. Supreme Court for judicial review. I strongly caution Mr. Zampieri to seek legal advice as to the process of petitioning the B.C. Supreme Court for judicial review.

Date: June 5, 2018

Original Signed

Ian Christman, J.D., Registrar



No. VLC-S-S-107322
Vancouver Registry

In the Supreme Court of British Columbia

Between:

MOTOR DEALER COUNCIL OF BRITISH COLUMBIA
also known as **MOTOR VEHICLE SALES AUTHORITY OF BRITISH COLUMBIA**

Plaintiff

and

WILLIAM PATCHETT

Defendant

ORDER MADE AFTER APPLICATION

BEFORE)	THE HONOURABLE)	Friday, the
)	MADAM JUSTICE RUSSELL)	18 th day of
))	March, 2011


ON THE APPLICATION of the Plaintiff, Motor Dealer Council of British Columbia, also known as Motor Vehicle Sales Authority of British Columbia, coming on for hearing at Vancouver on March 18, 2011, and on hearing Robert P. Hrabinsky, counsel for the Plaintiff, and William Patchett, the Defendant, and the Plaintiff undertaking to abide by any order which this Court may make as to damages as the result of obtaining the injunctive relief provided herein:

THIS COURT ORDERS that:

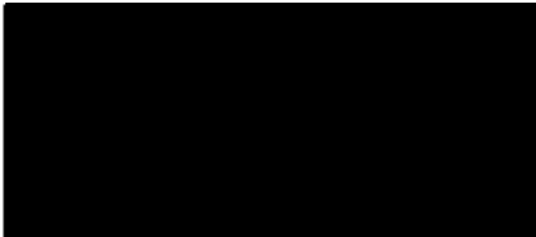
1. Until trial or further order of this Court, the Defendant is restrained and enjoined from:
 - (a) engaging in the sale, exchange or other disposition of motor vehicles to any persons for purposes that are primarily personal, family or household, without being registered as a motor dealer under the *Motor Dealer Act*, R.S.B.C. 1996 c. 316 (the "Act");
 - (b) holding himself out as being engaged in the disposition of motor vehicles for purposes that are primarily personal, family or household, without being registered as a motor dealer under the Act; and

- (c) soliciting, offering, advertising or promoting with respect to the disposition of motor vehicles for purposes that are primarily personal, family or household, without being registered as a motor dealer under the Act.
2. Until trial or further order of this Court, the Defendant is directed to comply with the Act and the Regulations thereto.
 3. The Plaintiff shall be entitled to its costs of an incidental to this application in any event of the cause, provided that such costs shall not become payable until final disposition of the cause.
 4. The Plaintiff shall be at liberty to enter this Order without the Defendant's approval as to form if such approval cannot be obtained by the Plaintiff within 5 days from the date that this Order has been delivered to the Defendant in draft form.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:


Signature of lawyer for the Plaintiff,
Motor Dealer Council of British Columbia,
also known as Motor Vehicle Sales Authority
of British Columbia

DISPENSED WITH
Signature of the Defendant,
William Patchett



By the Court


Registrar

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

MOTOR DEALER COUNCIL OF BRITISH COLUMBIA
Also known as **MOTOR VEHICLE SALES AUTHORITY OF
BRITISH COLUMBIA**

PLAINTIFF


AND:

WILLIAM PATCHETT

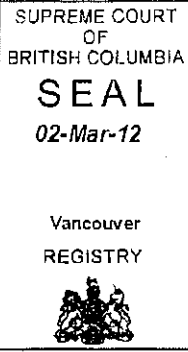
DEFENDANT

ORDER MADE AFTER APPLICATION

13/4.



Affleck Hira Burgoyne LLP
Barristers and Solicitors
700 - 570 Howe Street
VANCOUVER, B.C., V6C 3P1
Telephone: (604) 800-8020



No. VLC-S-S-107322
Vancouver Registry

In the Supreme Court of British Columbia

Between:

MOTOR DEALER COUNCIL OF BRITISH COLUMBIA
also known as MOTOR VEHICLE SALES AUTHORITY OF BRITISH COLUMBIA

Plaintiff

and

WILLIAM PATCHETT

Defendant

ORDER MADE AFTER APPLICATION

BEFORE) THE HONOURABLE) Monday, the
) MADAM JUSTICE BRUCE) 20th day of
)) February, 2012


ON THE APPLICATION of the Plaintiff, Motor Dealer Council of British Columbia, also known as Motor Vehicle Sales Authority of British Columbia, coming on for hearing at Vancouver on February 20, 2012, and on hearing Robert P. Hrabinsky, counsel for the Plaintiff, and William Patchett, the Defendant:

THIS COURT ORDERS that:

1. The Defendant be and hereby is fined the sum of \$10,000.00, which fine is to be paid to the Registrar of this Court on or before March 21, 2012, for the Defendant's contempt of court arising from his wilful disobedience of the Order of Madam Justice Russell made on March 18, 2011, which Order directed the Defendant to comply with the *Motor Dealer Act*, R.S.B.C. 1996 c. 316 (the "Act") and the Regulations thereto, and further restrained and enjoined the Defendant from:
 - (a) engaging in the sale, exchange or other disposition of motor vehicles to any persons for purposes that are primarily personal, family or household, without being registered as a motor dealer under the Act;

- (b) holding himself out as being engaged in the disposition of motor vehicles for purposes that are primarily personal, family or household, without being registered as a motor dealer under the Act; and
 - (c) soliciting, offering, advertising or promoting with respect to the disposition of motor vehicles for purposes that are primarily personal, family or household, without being registered as a motor dealer under the Act.
2. The Defendant shall have until March 21, 2012 to purge his contempt of court by having all vehicles (save for the Defendant's own personal vehicle) which are situate on or at 6629 – 176th Street, Surrey, B.C. (the "Property"), towed off and away from the Property.
 3. The Plaintiff shall be entitled to its costs of and incidental to this application in any event of the cause, which costs are hereby fixed at \$1,000.00 and shall be paid by the Defendant to the Plaintiff on or before May 21, 2012.
 4. The Plaintiff shall be at liberty to enter this Order without the Defendant's approval as to form.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:



Signature of lawyer for the Plaintiff,
Motor Dealer Council of British Columbia,
also known as Motor Vehicle Sales Authority
of British Columbia

By the Court.

Registrar