



Neutral Citation No. 2018-BCRMD-033

**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**

AMY BOUCHARD and INGRID MUNRO

Complainants

And

N.W. AUTO DEPOT LTD.
(Dealer Licence #10578)

Respondent Dealer

And

WESTMINSTER MOTORS LTD.
(Dealer Licence #40469)

Respondent Dealer

And

GORDON VALENTE
(Salesperson Licence: #101221)

**DECISION OF THE REGISTRAR OF MOTOR DEALERS
Re: PENALTY**

APPEARANCES:

For the MVSA:

Robert Hrabinsky, counsel

For the Respondent Dealers:
and Mr. Valente

Self-represented

Introduction

[1] On November 1, 2019, I issued a decision in the liability phase of this proceeding and made the following findings:

[138] In respect of the sale of the 1990 Nissan 300ZX, I find:

- a. N.W. and Mr. Valente's failure to provide a written consignment agreement was in breach of section 2 of the Consignment Sales Regulation.
- b. N.W. and Mr. Valente engaged in deceptive acts or practices in misrepresenting the selling price of the vehicle to Ms. Munro and by improperly withholding funds from the costs of sale and failing to administer payment as required in the Consignment Sales Regulation.
- c. N.W. and Mr. Valente breached the MDA by failing to make required declarations in the purchase agreement with Ms. Bouchard.
- d. The evidence does not establish that the Nissan 300ZX was "not suitable for transportation" at the time it was sold to Ms. Bouchard, nor does it establish that the Respondents engaged in deceptive acts or practices in their dealings with Mr. Cerovic and Ms. Bouchard.

[139] I find that the MVSA has not proven that N.W. failed to comply with conditions imposed on May 24, 2018 by offering motor vehicles for sale that were not identified as "not suitable for transportation", which vehicles did not pass a mechanical and safety inspection. However, the MVSA has proven that the Respondents failed to obtain inspection reports that conformed with the required standards in breach of the May 24, 2018 conditions.

[140] I find that N.W. and Mr. Valente supplied misleading information in breach of section 189(5)(a) of the BPCPA when Mr. Valente provided the "recreated" inspection report to MVSA compliance officers without advising that it was a "recreation" and by providing a cost of sale report created for the investigation.

[141] I find that Mr. Valente's conduct during the July 20, 2018 inspection in not permitting MVSA compliance officers to enter the premises, examine records, obtain keys or discuss inspection issues constitutes obstruction, hindrance or interference with an MVSA investigation within the meaning of section 189(5)(e) of the BPCPA.

[142] I do not consider that the other conduct of the Respondents in relation to the investigation rises to the level of breaches of section 189 of the BPCPA.

[143] I find that the MVSA has not proven that the Respondents failed to comply with the Registrar's September 4, 2018 interim suspension order.

[145] I find that the Respondent Westminster's conduct in relation to leasing vehicles using non-compliant lease agreements and including fees that result in a higher than advertised price being paid by consumers is in breach of the legislative scheme, in breach of the March 2, 2018 Undertaking and constitute deceptive practices under the BPCPA

- [2] I directed that the matter should be reconvened to address the appropriate penalties flowing from the findings I had made. At that time both the Motor Vehicle Sales Authority ("MVSA") and the Respondents N.W. Auto Depot Ltd. and Westminster Motors Ltd. (the "Dealers") and Mr. Valente were represented by counsel: Mr. Hrabinsky was counsel for the MVSA and Ms. Lal was counsel for the Dealers and Mr. Valente.
- [3] The parties took no steps to reconvene this matter until April 2020. On April 7, 2020, I received a letter signed by Mr. Valente dated March 19, 2020 and addressed to me marked "Personal & Confidential" which did not appear to have been copied to either counsel of record. The subject line of the letter was "In the matter of File #18-06-003" and the letter's introductory paragraph described it as an "explanation in rebuttal response to the content of this specific file" (the "Valente submission").
- [4] I caused the Valente submission to be forwarded to Mr. Hrabinsky and Ms. Lal. Counsel advised that the submission had been *ex parte* and Ms. Lal advised that she remained counsel of record for the Dealers and Mr. Valente. Ms. Lal advised that the Valente submissions "were not intended to represent the submissions of the Dealers/Mr. Valente in relation to the penalty phase of these proceedings" (emphasis in original).
- [5] On April 16, 2020, I approved a joint proposal for a schedule of written submissions with respect to penalty as follows:
- May 22, 2020 delivery of MVSA submissions
 - June 12, 2020 delivery of submissions for the Dealers/Mr. Valente
 - June 26, 2020 delivery of reply submissions by MVSA
- [6] On May 25, 2020, Ms. Lal advised that she was withdrawing as counsel for the Dealers and Mr. Valente effective that day and that Mr. Valente would be handling the matter personally on behalf of himself and the Dealers going forward. Ms. Lal also advised that MVSA had not yet delivered their submissions with respect to penalty.
- [7] Counsel for MVSA advised that the May 22 deadline had been missed by inadvertence and delivered MVSA's submissions with respect to penalty shortly thereafter on May 26. MVSA proposed that given the late filing of the MVSA's submissions that the deadlines for the respondents' submissions and the

MVSA's reply be extended by one week so that the respondents' submission would be due on June 17, 2020 and the MVSA's reply by July 3, 2020.

- [8] Mr. Valente (now representing himself and the Dealers) indicated that he consented to the extension. The revised schedule proposed by MVSA was accordingly approved.
- [9] I did not receive any submission responding to MVSA's penalty submission by June 17, 2020. On June 24, 2020, I received a reply submission from counsel for MVSA and inquired as to what it was replying. Counsel for MVSA then forwarded a copy of what appears to be the same Valente submission dated March 19, 2020¹ which had apparently been sent to the MVSA's offices by email on June 22, 2020.
- [10] The result of this chain of events is that I do not have any submissions on behalf of the Dealers or Mr. Valente that are responsive to MVSA's submissions on penalty, although the respondents have had an opportunity to respond to the MVSA's submissions.
- [11] While the parties had required a procedural order as to the mode of hearing for the liability phase of this proceeding, the parties agreed (the respondents through their former counsel Ms. Lal) that the liability and penalty phases of this hearing should be bifurcated and that this penalty phase should proceed by way of written submissions only. I do not understand Mr. Valente to have changed his position with respect to the mode of hearing in this penalty phase since counsel for the respondents withdrew.

Current Status of the Respondents

- [12] The MVSA explains in its submissions that on September 4, 2018, Registrar Christman made orders suspending the registrations of both Dealers, pending

¹ I have compared the version of the Valente submission sent to me in April with the version sent to me in June. Both versions consist of a letter dated March 19, 2020 signed by Mr. Valente and a series of attachments. The letter in the June version is stamped on each page by a notary public with the indication on the signature page that Mr. Valente signed before the notary public on June 18, 2020 and that the document was "Witnessed only; no legal advice given or sought".

The June version of the letter is signed by Mr. Valente on what was the second to last page of the April version. The last page of the April version contains a paragraph entitled "Personal & Dealer History" which outlines Mr. Valente's career in automotive sales starting in 1975, his service to the industry as a member of the Automotive Retailers Association, "8 years on Board as President or Chair of Board or Division Chair" and his perception of the investigation that he "Now feel[s] victim of the Powers of a few men...with personal motives". While this page was not included in the June version of the letter which is the version to which MVSA addressed its reply, I have considered the information contained on this page. The information on this page is either factual information about Mr. Valente's history in the industry or Mr. Valente's feelings about the investigation, both of which were the subject of Mr. Valente's evidence before me (see e.g. Decision re: Facts dated November 1, 2019 at para. 32, 98). I note as well that the April version of the letter had been forwarded to counsel for the MVSA at my request and accordingly if any of the facts on this page were controversial, MVSA did have an opportunity to refute them.

the full resolution and outcome of the allegations in this matter. The suspension orders were made effective September 5, 2018 and remain in effect until further order of the Registrar.

- [13] At present the Dealers are not registered, their registrations having expired prior to the July 2019 hearing of this matter. Mr. Valente's salesperson licence persists, subject to the suspension, but that license is inactive given that every salesperson must be associated with a registered motor dealer.
- [14] The basis for the interlocutory suspension order was that there was *prima facie* evidence at the hearing "that the Dealers continue to place consumers at risk by advertising or offering for sale motor vehicles that are not compliant with the MVA" and the Registrar considered that "a full hearing into these allegations is now only a few weeks away and that an interim suspension should be relatively short in duration." On the latter point, the September 4, 2018 reasons reflect that Registrar Christman had been advised that the MVSA "should be able to present its case to the Registrar by mid to late September 2018."

(Decision of the Registrar dated September 4, 2018 at para. 1, 32-33)

- [15] The specific evidence that was before Registrar Christman and provided the *prima facie* evidence relied on in suspending the Dealers' registrations was the evidence relating to the inspections of the Nissan 300ZX prior to and after sale to Ms. Bouchard. In particular, the Registrar noted in describing the evidence before him:

[18] The Dealers said that the Nissan 300ZX passed an inspection before it sold. They provided the Authority a copy of the inspection report, which identifies the inspection facility and the technician. The consumer provided the Authority a copy of the inspection report that the consumer was given by the Dealers. A comparison of the two clearly shows that they are not the same report – one is not a copy of the other.

[19] The Authority questioned the facility, which is identified as having done the inspection on the Dealer's version of the Nissan 300ZX inspection report. The owner of the facility, and the person named on the Dealer's report as the technician, provided an Affidavit that they did not inspect the Nissan 300ZX. The technician states that the Nissan 300ZX was brought to them by the Dealers for inspection. There was a noise from the engine of the vehicle, which they investigated and determined that the engine required significant and costly repairs. CVSE Inspector Spanier noted the same issue when he inspected the Nissan 300ZX after the consumer had purchased it.

[20] The owner of the inspection facility states that they did not complete the inspection of the Nissan 300 ZX and did not charge the Dealers for the inspection. The owner also says he did not place his

name or that of his facility on the Dealer's inspection report. In response, the Dealers accuse the Authority's investigators of having intimidated the inspection facility to the point that the facility cannot remember what really happened. This is denied by the Authority investigator; and I am advised that the facility's owner is willing to provide a statement that they were not intimidated.

- [16] Ultimately, Registrar Christman was satisfied on the evidence before him in respect of the Nissan 300ZX that "a *prima facie* case has been established that the Dealers sold a motor vehicle that was not compliant with the MVA and did not represent that motor vehicle as 'not suitable for transportation'.
- [17] It is clear from his reasons that the interlocutory suspension decision was predicated on the determination that there was *prima facie* evidence that the Dealers had sold the Nissan 300 ZX without obtaining an inspection and despite having been told that the "engine required significant and costly repairs", making it not suitable for transportation and that the seriousness of that conduct given the risk of sale of unsafe vehicles to the public justified the order.

(Decision dated September 4, 2018 at para. 16 and 33)

- [18] As set out at para. 43 – 63 of my November 1, 2019 decision, the evidence on this point evolved significantly after the September 4, 2018 interlocutory suspension decision including affidavits being obtained part way through the hearing in which the owner of the facility who the Dealers said had conducted the inspection report resiled from his affidavit that had been before Registrar Christman in September 2018, stating the information contained therein was not accurate, and confirming that the Dealer's account of the inspection of Nissan 300ZX by his facility and the outcome of the inspection was largely accurate, notwithstanding that the report provided to the MVSA by the Dealer was a "recreation" as Mr. Valente put it.
- [19] With the benefit of a more complete evidentiary record on the inspection of the Nissan 300ZX, I found that the evidence did not establish that the Nissan 300ZX was "not suitable for transportation" or unsafe at the time it was sold to Ms. Bouchard. I also found that the MVSA had not proven that N.W. offered vehicles for sale that had not passed a mechanical and safety inspection without identifying them as "not suitable for transportation".
- [20] Ultimately, while the interlocutory suspension had been anticipated to be of short duration given an anticipated full hearing in the fall of 2018, as matters evolved the notice of hearing was not issued until January 2019 and the hearing on the liability portion was not scheduled until July 2019. By the July 2019 hearing before me, the Dealers' registrations had lapsed when they became due for renewal earlier that year.

[21] By July 2019, when the inaccuracy of the information relied on by the MVSA before Registrar Christman was revealed through the late filed affidavits, the interlocutory suspension decision was arguably spent, the registrations of the Dealers having by that time lapsed. In any event, there was no application to set aside or vary the interlocutory suspension order at the July 2019 hearing or at all.

[22] As returned to below, I consider the fact that the Dealers were suspended on the basis of what turned out to be inaccurate information and that I have now found that the evidence does not establish that the Nissan 300ZX was unsafe when it was sold to be an important context for the sanctions the MVSA now seeks to have imposed on the Dealers and Mr. Valente.

MVSA's Submissions on Sanctions

[23] The hearing notice dated January 15, 2019 in this matter indicated that the MVSA was recommending that the Registrar:

- a. cancel the registrations of the Dealers and the licence of Mr. Valente;
- b. order that the Dealers and Mr. Valente be banned from applying for registration and/or for a licence, for a period of time or indefinitely, on the ground that it would not be in the public interest for them to be so registered or licensed;
- c. order that Mr. Valente be banned from applying for registration and/or for a licence, either in his own name, or as an associate and/or representative of another entity, for a period of time, or indefinitely, on the ground that it would not be in the public interest for him, or any entity with respect to which he is an associate or a representative, to be so registered or licensed;
- d. impose an Administrative Penalty; and
- e. issue a Compliance Order providing for, among other things, payment of the MVSA's investigation costs, including costs associated with the hearing.

[24] In its submissions on sanctions, the MVSA indicated that it is now recommending the imposition of the following sanctions:

- a. A 5-year ban on the registration of N.W., Westminster and Mr. Valente (either in his own name, or as an associate and/or representative of another entity) as a motor dealer;
- b. A condition should be imposed on Mr. Valente's salesperson licence prohibiting him from engaging in consignment sales;
- c. administrative penalties in the amount of \$55,000 against Mr. Valente personally, comprised of:

- i. \$5000 pursuant to the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 (“*BPCPA*”); and
 - ii. \$50,000 pursuant to the *Motor Dealer Act*, R.S.B.C. 1996, c. 316 (“*MDA*”).
- d. a compliance order against the Dealers and Mr. Valente pursuant to section 155 of the *BPCPA* and section 26.02 of the *MDA* in the following terms:
 - i. that the Respondents, jointly and severally, forthwith pay to Ms. Munro the sum of \$1,100;
 - ii. That the Respondents, jointly and severally, forthwith pay to the Registrar a sum sufficient to reimburse for 85% of actual inspection/investigation and legal costs²;
 - iii. That the Respondents comply with the *MDA*, the *BPCPA*, and the regulations made thereunder.

[25] The MVSA does not address in their submissions the allegations that I found were not proven at the hearing or any implications that should flow from the issuance of the September 4, 2018 interlocutory suspension order in reliance on the evidence relating to the inspection Nissan 300ZX that was subsequently shown to be inaccurate.

The Respondents’ Submissions

[26] As noted above, while they were delivered on June 22, 2020, the Respondents’ Submissions are essentially identical to a letter delivered in April 2020 and are in fact dated March 19, 2020. They do not appear to be responsive in any way to the MVSA’s submissions on penalty delivered in May 2020. As counsel for MVSA notes in his reply submissions, the Valente submissions largely seek to re-litigate the liability findings and other than the summary of “costs” and “investigative costs” set out on the final page are not particularly relevant to the matter before me now which is the appropriate penalty to be imposed in light of the liability findings I have already made.

[27] Counsel for MVSA submits that the respondents’ submission:

further illustrates that Mr. Valente is unfit to serve as a dealer-principal. He has trivialized, or failed entirely to acknowledge the gravity of the contraventions found by the Deputy Registrar. The MVSA respectfully

² The MVSA’s actual investigation costs were said to be \$122,244.10 as of February 12, 2020. 85% of that amount is \$103,907.40.

submits that this is yet another indication that there is no reasonable prospect that future non-compliance can be deterred.

(MVSA Reply submissions re: Penalty at para. 2)

- [28] I agree with counsel for the MVSA that the Respondents' submissions are largely unhelpful on the issue of penalty and, having been drafted in March, prior to the setting of a schedule for submissions, they are wholly unresponsive to the MVSA's submission. However, I do not accept MVSA's submission that I should take the nature and quality of Mr. Valente's submission to indicate anything other than that he was, for the penalty phase of this hearing, a self-represented person who appears to have not fully appreciated the issues that were relevant to this phase of the hearing process.
- [29] It is unfortunate that the Dealers and Mr. Valente were not represented by counsel for this phase of the hearing process as the submissions of counsel for the respondents on penalty would have been helpful. But in my view it would not be appropriate as the MVSA suggests to draw from the quality of a self-represented litigant's submissions a negative inference as to their fitness to serve as a dealer-principal or their willingness to comply with regulatory rules in the future.
- [30] I am mindful of the Supreme Court of Canada's endorsement of the *Statement of Principles on Self-represented Litigants and Accused Persons* (2006) (online) established by the Canadian Judicial Council: *Pintea v. Johns*, 2017 SCC 23. While these principles are intended to guide judges, in my view the references to judges in the statement are equally applicable to administrative decision-makers.
- [31] The commentary regarding the responsibilities of participants in the justice system towards self-represented litigants includes that:

Judges should ensure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented persons.

- [32] In my view it would be unjust to hinder the legal interests of the respondents because of what I perceive to be a lack of understanding of the purpose and nature of the submissions in the penalty phase. I accordingly decline the invitation of the MVSA to take from the nature and quality of the submissions any indication as to Mr. Valente's fitness to serve as a dealer-principal or whether or not there is a reasonable prospect of the respondents' compliance in the future.

Issue

- [33] In light of the findings made in my liability decision, what is the appropriate sanction to impose on the respondents?

Discussion

- [34] Counsel for the MVSA has helpfully reviewed the applicable legislative regime and principles to be applied in determining the appropriate sanctions to be imposed in light of the findings of fact I have made in the liability phase of the hearing. The overriding purposes of the legislative regime are the promotion of public confidence in the motor vehicle industry and consumer protection.
- [35] While I have a duty to act fairly towards the respondents in determining the consequences of the findings I have made, an appropriate sanction for contraventions of the regulatory scheme is to be determined "with a view to protecting the public from potential future harm": *Re: Best Import Auto Ltd. and others* (November 28, 2017) at para. 115.

5-Year Ban on Registration as a Motor Dealer

- [36] The MVSA seeks a 5-year ban on both Dealers applying for registration as a motor dealer. While it is not entirely clear from the MVSA's submission when it proposes that the 5-year period should start to run, I take it from the submission that the proposal is that the 5-year period of ban would commence from the date of my decision, notwithstanding the time that has passed since the Dealers were suspended by Registrar Christman in September 2018.
- [37] The MVSA submits that "[i]f there is no reasonable prospect that future non-compliance can be deterred, the public interest can only be protected by removing the offender from the industry". In seeking a 5-year ban on applying for registration as a motor dealer, the Authority takes the position that my prior findings "reveal that Mr. Valente is unfit to serve as a dealer-principal, and that there is no reasonable prospect that future non-compliance can be deterred".

(MVSA Submissions re: Penalty at para. 29-30)

- [38] In seeking this penalty, the MVSA does not distinguish between N.W. and Westminster and focuses on the conduct of Mr. Valente as the principal of both dealers.
- [39] In my liability phase decision, I noted the submission of counsel for the Respondents that Westminster was not involved in the sale of the 1990 Nissan 300ZX which was the main issue in these proceedings and that the allegations (and ultimately my findings) against Westminster were limited to conduct in relation to leasing vehicles using non-compliant lease agreements and including fees that result in a higher than advertised price being paid by consumers.
- [40] I noted in respect of this issue that it "may be an appropriate subject of further submissions during the penalty phase of the hearing".

(Decision dated November 1, 2019 at para. 136)

[41] Neither party made submissions about whether a distinction should be drawn between the conduct of N.W. and Westminster with respect to penalty.

[42] MVSA provides four reasons that they say a 5-year ban is appropriate:

- a. contraventions concerning consignment sales are among the most serious violations of a motor dealer's duty to consumers;
- b. the Dealers were found to be guilty of multiple deceptive acts and practices under the BPCPA and "a single deceptive act or practice can provide grounds for cancellation of a motor dealer's registration."
- c. "Mr. Valente engaged in various effort[s] to deceive and mislead the regulator"; and
- d. "Mr. Valente's conduct reveals that he is undeterred by other regulatory measures".

The over-arching submission is that in the MVSA's submission a 5-year ban is necessary "to deter future misconduct".

(MVSA Submissions re: Penalty at para. 30-1)

[43] MVSA cites *Pugliese v. British Columbia (Registrar of Mortgage Brokers, financial Services Tribunal)*, 2008 BCCA 130 and the decision of the Registrar in *Best Import Auto (November 28, 2017)*, for the proposition that by necessary implication flowing from the authority to cancel a dealer's registration provided by s. 8.14(4)(b) of the *Motor Dealer Act*, that I have the statutory authority to make an order of the nature requested by the MVSA.

[44] I accept the MVSA's position that I have the statutory authority to issue a 5-year ban on registration of dealers in this circumstance. Whether or not such an order is appropriate in the circumstances is a matter of discretion.

[45] For the reasons that follow, I do not consider that a 5-year ban on registration is appropriate in the circumstances of this case but I am prepared to order a ban for a shorter period.

[46] As an initial matter, the submissions of MVSA while noting the findings of liability I made against the Dealers ignore entirely the serious allegations which were made against the Dealers and Mr. Valente at the hearing which I have found were not proven. In particular, the allegations that the Dealers had offered for sale unsafe motor vehicles without identifying them as "not suitable for transportation" were not proven.

[47] A significant focus of the hearing was the allegation of MVSA that the Nissan 300ZX had been unsafe when it was sold to Ms. Bouchard and that Mr. Valente had actual knowledge of safety issues based on the information he had been provided by Mr. Wong at IB Auto. As set out above, there was a significant shift in the evidence on this issue when Mr. Wong effectively recanted his prior evidence and I found that the MVSA had not proven its allegations relating to safety of the Nissan 300ZX.

[48] While I do not wish to minimize the seriousness of the infractions that I did find were proven, the allegations that the respondents had offered unsafe vehicles for sale to the public were the allegations which most squarely engaged the mandate to protect public safety. That those allegations were not proven after a full hearing and the fact that a significant piece of evidence relied on in the notice of hearing was ultimately proven to be unreliable are relevant in my view to the lens through which at least some of Mr. Valente's conduct should be viewed and to the appropriate sanction.

[49] In my November 1, 2019 decision, I wrote:

[63] The impact of the erroneous information provided by Mr. Wong on the manner in which Mr. McGrath proceeded with the investigation after June 2018 – under the misapprehension that Mr. Valente had lied about a key issue in the investigation of whether he had the vehicle inspected – cannot be fully determined in retrospect. Similarly, the impact of Mr. Valente's belief that he had been unfairly called a liar by MVSA on his willingness to cooperate with the ongoing investigation cannot be fully determined. It is most unfortunate that the error was not discovered until so much time had passed, the interim suspension had been issued, and the parties' positions had become entrenched. The impact of this issue on the parties' conduct in the latter stages in the investigation may be an area on which counsel may wish to make submissions in the penalty phase.

(emphasis added)

[50] Notwithstanding this invitation, this issue was not addressed directly by either party. MVSA's submissions cherry pick the findings from my decision on liability to address only those findings that were adverse to the respondents and simply ignore the aspects of the decision that were favourable to Mr. Valente. MVSA fails to address the implications of the reliance on the inaccurate affidavit and the resulting serious but ultimately false accusations that Mr. Valente was lying when he said he believed the Nissan 300ZX was safe because he had had it inspected by IB Auto.

[51] Similarly, MVSA does not address what should be made of the fact that the Dealers have been out of the industry for over 2 years as a result of first the interlocutory suspension based on the discredited evidence and then due to a lapse of the suspended registrations.

- [52] I must also consider that I have found that a number of contraventions by the respondents were proven, including deceptive acts and practices and that these contraventions engage the consumer protection mandate of the statutory scheme.
- [53] As a general matter, the fact that a dealer has been out of the industry for a period of time – and accordingly keeping out of trouble with the regulator - prior to a sanction being imposed does not necessarily mean a dealer is now suitable to be licensed. It is necessary to “review conduct of the person applying to see whether since the transgression there are indications of rehabilitation, remorse, acceptance of their past conduct, restitution (where appropriate), and positive steps taken to address any aggravating factors that played a part in the persons decision to break the law”: *Re: Ironside* (February 10, 2016 File 16-01-004), at para. 5-6
- [54] In my view, the fact that the parties proceeded for over a year on the basis of Mr. Wong’s original uncorrected evidence and that the Dealers’ registrations were suspended in significant part based on evidence which the witness subsequently recanted is relevant both as a contextual factor in considering the consequences that should flow from Mr. Valente’s conduct during the investigation as well as a factor in determining the length of any period of registration and the date from which it should commence.
- [55] MVSA submits that a 5-year ban is consistent with the approach taken by the Registrar in *Re: Best Import Auto Ltd. (November 28, 2017)*. In that case the Registrar ordered a 10-year ban taking into account:
- a. that the nature of the transgression was serious, placing consumers at risk of personal injury and financial injury;
 - b. the recency of the transgressions; and
 - c. that an attempt to mislead the hearing had been made by the dealer’s principal
- [56] In *Best Import*, the Registrar also considered three other cases:
- a. *Re: A Vancouver Auto Ltd. and Shahram Moghaddam* (April 3, 2017) in which a period of two years was set before an application would be accepted. In that case there was no issue of offering unsafe vehicles for sale, nor was the dealer ungovernable or providing misleading information during a hearing;
 - b. *Re: Peter Fryer* (December 13, 2013) affirmed 2015 BCSC 279 in which Mr. Fryer was banned for life where he had an extensive history of serious crimes, disobeying court orders and was viewed as ungovernable; and
 - c. *Fellner v. Pinnacle Car Sales & Leasing* (November 7, 2016) where there was a history of disobeying previous undertakings and not paying

administrative penalties and where the dealer was found to have sold a vehicle that was not suitable for transportation.

The Registrar noted that whether a registration will be granted in the future is dependent on the facts that exist at the time a future application is made.

(MVSA Submission re: Penalty at para. 34 citing *Best Import*)

- [57] The evidence before me was that Mr. Valente had operated as a dealer-principal for 40 years without significant compliance concerns until the investigation that led to the hearing before me. In my November 1, 2019 decision, I noted that Mr. Valente had been recommended to Ms. Munro by Carrie Van Dokkumburg, a former MVSA compliance officer and wrote that:

I agree with the Respondents that Ms. Van Dokkumburg would not have referred her friend to Mr. Valente had she been aware of serious concerns about his conduct and given that she was the Respondents' compliance officer, it seems likely that if there was a significant issue with their compliance she would have been aware of it.

(Decision of November 1, 2019 at para. 69)

- [58] Mr. Valente's lengthy history as a dealer-principal without significant compliance issues is difficult to reconcile with the MVSA's submissions that "Mr. Valente is unfit to serve as a dealer-principal" and that "there is no reasonable prospect that future non-compliance can be deterred". MVSA does not address Mr. Valente's lengthy history of apparent compliance in making this submission.
- [59] While acknowledging that the infractions that were proven against Mr. Valente and the Dealers, in particular the deceptive acts and practices found, are serious and that the 5-year ban sought by the MVSA is within my statutory authority, in my view the more appropriate period for a registration ban for the Dealers is a 28 month ban on registration running from the date of the interlocutory suspension order, being September 5, 2018. Accordingly, the Dealers will be eligible to apply for registration on or after January 5, 2021.
- [60] The 28-month period reflects that the infractions that were proven against the Dealers include deceptive acts and practices. Accordingly, the period of ban on registration application is longer than the two years ordered in *Re Vancouver Auto*. MVSA noted in its submissions the seriousness of contraventions concerning consignment and while I agree that these infractions are serious, in my view they are more appropriately dealt with by way of the condition that MVSA seeks on Mr. Valente's salesperson's licence.
- [61] The shorter period than that sought by MVSA takes into account Mr. Valente's positive history in the industry, the fact that the contraventions that were proven did not involve the sale of unsafe vehicles, the reliance of MVSA on the

evidence that was found to be unreliable and the impact of MVSA's reliance on that evidence on Mr. Valente's perception of the investigation being undertaken.

- [62] The period of ban is such that it will not be open to the Dealers to apply immediately for registration and this will give Mr. Valente an opportunity prior to making the application to ensure that he is familiar with the applicable regulations and to establish systems at the Dealers to ensure future compliance.
- [63] Whether a registration will be granted in the future is dependent on the facts that exist at the time a future application is made.

Condition on Salesperson's Licence

- [64] MVSA also seeks an order imposing a condition on Mr. Valente's salesperson licence prohibiting him from engaging in consignment sales.

(MVSA Submission re: Penalty at para. 40 and 57(b))

- [65] While MVSA does not suggest the statutory basis on which such an order might be made, it seems to me that such an order could be made including as a compliance order pursuant to section 26.02(3) of the *Motor Dealer Act*.
- [66] Mr. Valente's evidence was that consignment sales were not a significant part of his business and he gave the impression of being unfamiliar with the rules that apply to consignment sales. Moreover, his salesperson license is inactive at this time.
- [67] I am inclined to impose the condition sought by the MVSA that would prohibit Mr. Valente from engaging in consignment sales. Given that there were minimal submissions from MVSA on this condition and Mr. Valente did not address it in his submissions, Mr. Valente shall have leave to apply to vary this condition within 30 days of this decision.
- [68] There was some suggestion in the body of MVSA's submission that MVSA was also seeking the imposition of a condition on Mr. Valente's license that would require him to be "associated with a registered motor dealer who can monitor his conduct" (MVSA Submission re: Penalty at para. 35-9). This relief was not included in the summary of relief sought at paragraph 57 of the submission. In light of my order in respect of the length of the ban on application for registration by the Dealers, I am not inclined to order this condition be imposed on Mr. Valente's license.

Administrative Penalties

[69] MVSA seeks administrative penalties totaling \$55,000, pursuant to section 164 of the BPCPA and section 26.04 of the MDA against Mr. Valente in his capacity as a salesperson as both a general and specific deterrent.

(MVSA Submissions re: Penalty at para. 42-45)

[70] Before imposing an administrative penalty, I am required to consider the following:

- a. previous enforcement actions for contraventions of a similar nature by the person;
- b. the gravity and magnitude of the contravention;
- c. the extent of the harm to others resulting from the contravention;
- d. whether the contravention was repeated or continuous;
- e. whether the contravention was deliberate;
- f. any economic benefit derived by the person from the contravention;
- g. the person's efforts to correct the contravention.

(MVSA Submissions re: Penalty at para. 46)

[71] MVSA points to my findings of breaches of the March and May 2018 Undertakings as evidence of previous enforcement actions for contraventions of a similar nature by the person. Given that these contraventions are among those that are the subject of this penalty decision, they cannot be fairly characterized as "previous" enforcement actions. There are no other enforcement actions referenced by MVSA and I have already referred to Mr. Valente's lengthy period of apparent compliance prior to 2018. I do not consider that this factor militates in favour of an administrative penalty.

[72] With respect to the gravity and magnitude of the contravention, MVSA emphasizes the consignment sale contraventions and the attempts to deceive and mislead the investigator. While I noted above that there were unproven allegations against Mr. Valente, I agree with MVSA that the contraventions that were proven are serious and that this factor supports the appropriateness of an administrative penalty.

[73] MVSA notes that there was harm to Ms. Munro of the infractions in that she has not yet been compensated for the trust funds appropriately withheld and that there was also harm to the public confidence in the regulatory system. I certainly agree that there is at a minimum harm to Ms. Munro that has apparently not yet been corrected. These factors support imposition of an administrative penalty.

[74] MVSA says that "[t]he contraventions may properly be considered to be deliberate in nature". I agree that at least some of the contraventions that I have found were deliberate in nature.

(MVSA Submissions re: Penalty at para. 50)

[75] Accordingly, while I agree with MVSA that an administrative penalty is appropriate, I would not order the full \$55,000 sought by MVSA. Mr. Valente's submissions included details of the significant costs that he has already borne in relation to this investigation, including over \$50,000 in legal fees, costs to his reputation which he describes as "immense" and "damaged forever", an estimated 30% reduction in the value of now outdated or aged inventory given his time out of the industry and other costs in estimated at \$70,000. In the circumstances, a smaller administrative penalty is sufficient to achieve the general and specific deterrence objectives of the legislative scheme.

(Respondents Submissions re: Penalty at p. 7)

[76] I will impose administrative penalties totaling \$10,000 on Mr. Valente, being comprised of a \$5,000 administrative penalty under the *BPCPA* and a \$5,000 administrative penalty under the *MDA*.

Compliance Orders

[77] MVSA seeks compliance orders pursuant to ss. 155 and 157 of the *BPCPA* and section 26.02 of the *MDA* in the following terms:

- a. That the Respondents, jointly and severally, forthwith pay to Ms. Munro the sum of \$1,100;
- b. That the Respondents, jointly and severally, forthwith pay to the Registrar a sum sufficient to reimburse for 85% of the actual inspection/investigation and legal costs; and
- c. That the Respondents comply with the *MDA*, the *BPCPA* and the regulations made thereunder.

(MVSA Submission re: Penalty at para. 55-56)

[78] I agree with MVSA that the compliance orders sought in subparagraphs (a) and (c) above are appropriate and so order.

[79] With respect to (b), MVSA indicates that their investigation costs to date were approximately \$122,244.10. The 85% sought from the Respondents is in excess of \$100,000.

[80] MVSA does not provide any explanation or basis for the submission that it is appropriate in the circumstances for the Respondents to pay 85% of the investigation costs.

[81] While I agree that I have the authority to make an order for the Respondents to pay some or all of the investigation costs pursuant to section 26.02(4)(d)

of the *MDA*, given the manner in which this investigation and hearing unfolded and the fact that success at certain of the allegations advanced at the hearing were unproven, I have reservations about the amount being sought in respect of investigation costs.

[82] I am not prepared to make the order sought without the benefit of further submissions, which address at a minimum, (i) the reasonableness of the costs incurred, (ii) the relationship between the costs incurred and the contraventions that were proven at the hearing and (iii) any authorities that address the subject of investigation costs in circumstances where MVSA was unsuccessful on certain of the allegations advanced.

[83] This aspect of the relief sought by the MVSA is accordingly adjourned. If the MVSA wishes to pursue a claim for reimbursement of investigation costs, they may make further written submissions on the following schedule:

- a. MVSA supplemental submissions delivered by November 18, 2020
- b. Respondents submissions delivered by December 2, 2020
- c. Any reply by December 4, 2020

Summary of Decision on Penalty

[84] In summary, based on the findings of liability, the following compliance action is taken:

- a. The Dealers and Mr. Valente are banned from applying for registration as a motor dealer for a period of 28 months commencing September 5, 2018 and ending January 5, 2021;
- b. A condition is imposed on Mr. Valente's salesperson license prohibiting him from engaging in consignment sales, subject to Mr. Valente's right to apply to vary this order within 30 days of this decision.
- c. Mr. Valente shall pay administrative penalties totaling \$10,000;
- d. A compliance order is issued pursuant to section 155 of the BPCPA and section 26.02 of the MDA that:
 - i. The Respondents jointly and severally, forthwith pay to Ms. Munro the sum of \$1,100
 - ii. The Respondents shall comply with the MDA, the BPCPA, and the regulations made there under.

[85] MVSA's request for reimbursement of 85% of investigation costs is adjourned. The parties are invited to provide supplemental submissions with respect to investigation costs on the following schedule:

- a. MVSA supplemental submissions delivered by November 18, 2020
- b. Respondents submissions delivered by December 2, 2020
- c. Any reply by December 4, 2020

Reviewing this Decision

- [86] If there is disagreement with this decision, it may be reviewed by requesting reconsideration in accordance with sections 180-182 of the BPCPA. The request must be made in writing within 30 days of receiving the decision. The request must be accompanied by the required new evidence as defined in those sections of the BPCPA if the request is to cancel or vary the order.
- [87] This decision may also be reviewed by petitioning the B.C. Supreme Court for judicial review pursuant to the *Judicial Review Procedure Act*. The time to file such a petition is within 60 days of receiving this decision as per section 7.1(t) of the *Motor Dealer Act*.

Dated: November 5, 2020

“Original is signed”

Claire E. Hunter, Q.C.
Acting Registrar of Motor Dealers