



Vehicle Sales Authority
of British Columbia

Investigation File No. 20-02-302
Hearing File No. 20-09-004

Neutral Citation:

**IN THE MATTER OF THE *MOTOR DEALER ACT*, R.S.B.C. 1996, c. 316,
THE *BUSINESS PRACTICES AND CONSUMER PROTECTION ACT*, S.B.C.,
2004, c. 2, and
THE *SALESPERSON LICENSING REGULATION*, B.C. Reg. 202/2017**

RE:

BRIAN DAVID ROWE
(Salesperson License No. 106494)

Salesperson

AND

THE MOTOR VEHICLE SALES AUTHORITY OF BRITISH COLUMBIA

The "Authority"

Decision of the Registrar of Motor Dealers

**Date and place of decision: December 22, 2020 at Langley, British
Columbia**

By way of written submissions

I. Introduction

[1] The Authority issued a Hearing Notice in this matter on September 22, 2020 to review the salesperson licence of Brian David Rowe (Licence #106494). That Notice, along with the Affidavit of VSA Investigator Bryan Reid sworn July 20, 2020, was served on Brian Rowe, which I will discuss further on in these reasons.

[2] The Authority says (summarizing here) the investigation by Bryan Reid shows Brian Rowe conducted at least 16 sales of motor vehicles posing as a manager of two different motor dealers, when he was not a manager of either and

was not authorized to sell motor vehicles by either dealer. Further, when these sales occurred, one of the dealers had already ceased operations and was no longer a registered motor dealer.

II. Compliance action requested

[3] Based on the conduct described above, the Notice of Hearing in this case seeks the following compliance actions:

- (a) Suspend, cancel or add conditions to the salesperson licence of Brian David Rowe,
- (b) Impose an administrative penalty on Brian David Rowe,
- (c) Award the Authority investigation and hearing costs, and
- (d) Such other relief the Registrar deems just.

[4] The Authority identifies the following legislation as being contravened:

- i. Section 23(b)(ii) [failure to disclose damage over \$2,000] of the *Motor Dealer Act Regulation*, B.C. Reg. 447/78 ("MDA-Reg"),
- ii. Section 23(c) [failure to disclose ex-lease or ex-rental] of the MDA-Reg,
- iii. Section 23(d) [whether vehicle brought into the province for purpose of resale] of the MDA-Reg,
- iv. Section 33(2)(a) [failing to act with honesty and integrity] of the MDA-Reg,
- v. Section 33(2)(f) [adversely affecting the reputation of another] of the MDA-Reg,
- vi. Sections 4(3)(b)(i) and (vi), and 5 of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("BPCPA") [committed deceptive acts or practices], and
- vii. Sections 8(3)(b) and 9 of the BPCPA [committed an unconscionable act or practice].

[5] I will discuss each of these legislative provisions below.

III. Brian Rowe's Participation

[6] During the investigation, Investigator Reid advised Mr. Rowe of the allegations he was investigating and asked Mr. Rowe for a statement. After some back and forth communications and some delay, Mr. Rowe advised Mr. Reid he was not making any statement on the allegations under legal advice. Mr. Rowe then went on to accuse Mr. Reid of, summarizing in my words, being out to get Mr. Rowe. Mr. Rowe's statement also noted he looked forward to addressing these matters directly with the Registrar.

- Affidavit of Bryan Reid, paragraphs 13 to 20 and Exhibits J to P.

IV. Service of the Notice of Hearing

[7] The Authority's Hearing Notice is dated September 22, 2020. Before me is an email from Ana Ramirez, legal assistant at the Authority, dated September 28, 2020. The email notes the service of the Hearing Notice and the inclusion of the Affidavit of Bryan Reid sworn July 20, 2020. Ana Ramirez's email is addressed to the email address of Brian D. Rowe.

[8] The email advises Mr. Rowe of the allegations and his right to provide any written submissions within 21 days of service of the Notice and Affidavit. I note the Notice of Hearing advises Mr. Rowe of his right to also provide any additional evidence as well as his ability to request an oral hearing.

[9] I note that the email used to serve Mr. Rowe is the same email Mr. Rowe used to communicate with VSA investigator Bryan Reid, as evidenced by email communications between them and attached as exhibits to Mr. Reid's Affidavit. See paragraph 6 above.

[10] Section 30(b)(iii) of the *Motor Dealer Act* allows services of Notices or Orders to an individual's email address. As noted in the previous paragraphs, Mr. Rowe has communicated with Investigator Reid by way of email, and the same email was used to provide Mr. Rowe the Notice of Hearing and Affidavit of Investigator Reid. Section 30.1(b) of the *Motor Dealer Act* provides that service by email is deemed to be received on the third day¹ after the notice was sent by email. Mr. Rowe is deemed to have been served the Notice of Hearing and Affidavit of Investigator Reid on October 1, 2020. It has been more than 21 days since service has deemed to have occurred, and Mr. Rowe has not provided any submissions or additional evidence.

[11] I am satisfied that Mr. Rowe was given proper notice of the hearing, the allegations, the proposed compliance action, the evidence the Authority intended to rely on, and an opportunity to be heard as well as to submit his own evidence: section 8 of the *Salesperson Licensing Regulation*. I may proceed in the absence of Mr. Rowe's participation.

V. Legal Principles

(a) *Reviewing a salesperson licence – public interest paramount*

[12] Madame Justice Sharma of the BC Supreme Court agreed with the Registrar that the purpose of reviewing the conduct of a salesperson is focused on the protection of the public:

[23] The Registrar states that the requirement to examine a person's past conduct demonstrates an overarching concern with public safety. Past conduct is the statutory tool by which the Registrar can determine if applicants will be

¹ Not counting the day that the email was sent

governable, act in accordance with the law and conduct themselves with honesty and integrity. Salespersons are in a position of trust with the buying public who rely on them to give clear and honest information about buying motor vehicles. The public also expects safety to be a priority if taking a test drive with a salesperson. Lastly, integrity is important because salespersons may be privy to customer's confidential personal information including home address and financial information

- *Fryer v. Motor Vehicle Sales Authority of British Columbia*, 2015 BCSC 279 (BC Supreme Court)

[13] Governability means the licensee will follow the laws and rules that are associated with their licence. It also includes a licensee responding to their regulator's lawful directions and to fully cooperate with an investigation, including into the licensee's own conduct:

[139] In *Wise v. Law Society of Upper Canada*, 2010 ONSC 1937 at para. 19 the court states: "[i]t is well recognized that to ensure the effective discharge of the responsibilities of professional regulators, every professional has an obligation to co-operate with the self-governing body..."

[140] The duty to cooperate is based on the obligations of professional governing bodies to protect the public interest and, in doing so, requires effective investigative powers. Powerful public policy reasons require members of self-governing professions to cooperate with investigations by a regulator. Professionals under investigation by their governing bodies are not entitled to disclosure as a precondition of their cooperation. The failure to cooperate can and does result in delay in investigations; frustration of the governing bodies' fulfilment of its statutory mandate in the public interest; jeopardizing of the collection of evidence and the recollection of witnesses; and erosion of public confidence in the governing body. At the investigative stage, the targets of investigations have less administrative law protections than they do in an adjudicative process, as that would be contrary to public interest: *D'Mello v. Law Society of Upper Canada*, [2015 ONSC 5841](#); *Round v. Institute of Chartered Accountants of Ontario*, [2015 ONSC 7099](#); *Strauts v. College of Physicians and Surgeons (British Columbia)* (1997), [1997 CanLII 3188 \(BC CA\)](#), 36 B.C.L.R. (3d) 106 (C.A.).

- *Independent Investigations Office of British Columbia v Vancouver (City) Police Department*, 2018 BCSC 1804 (BC Supreme Court), affirmed by *Independent Investigations Office of British Columbia v. Vancouver (City) Police Department*, 2020 BCCA 4 (BC Court of Appeal)

[14] In balancing the interests of a person to be licensed in a given profession with the protection of the public and the public's interest, the public interest is paramount: *Pacific International et al v. B.C. Securities Commission* 2002 BCCA 421 (B.C. Court of Appeal) at paragraph 12.

(b) Evidence and Burden of Proof

[15] Mr. Rowe currently has a salesperson's licence and the Authority recommends action against that licence up to and including its revocation. The onus is on the Authority to prove the allegations it advances on a balance of probabilities: *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 SCR 41 (Supreme Court of Canada).

VI. Discussion of the Evidence

(a) Purchase and Sale of 2006 Honda Odyssey

[16] The evidence shows that Mr. Rowe sold a 2006 Honda Odyssey to a consumer posing as the manager of a Minit-Tune store that is a registered motor dealer. Mr. Rowe had obtained the Odyssey from another dealer posing as an authorized person from Minit-Tune. Mr. Rowe was not a person authorized by Minit-Tune to buy vehicles on behalf of Minit-Tune, nor transfer vehicles from Minit-Tune to the consumer. This transaction was discovered by Minit-Tune when the consumer was having some mechanical issues with the Odyssey and called Minit-Tune to discuss those issues. These facts are established by the following:

- (a) A statement from the used vehicle Manager for Wood Wheaton who sold the 2006 Honda Odyssey to Minit-Tune, with Brian Rowe representing he was acting on behalf of Minit-Tune in that sale.
 - (b) The Purchase Agreement selling the Honda from Wood Wheaton to Mini-Tune is signed by Brian Rowe who signs on behalf of Minit-Tune.
 - (c) The ICBC Transfer/Tax Form (APVPT) shows Brian Rowe signing on behalf of Minit-Tune as purchaser of the Honda from Wood Wheaton. Brian Rowe's signature is also on the ICBC Certificate of Ownership and Insurance for the Odyssey, registered to Minit-Tune.
 - (d) A statement from Mr. Cheta, owner of Minit-Tune, saying he has never employed Brian Rowe and never authorized Brian Rowe to act on behalf of Minit-Tune.
 - (e) A statement from the purchasing consumer that they dealt with Brian Rowe who represented that the sale was by Minit-Tune.
 - (f) The ICBC Transfer/Tax Form (APVPT) transferring ownership of the Odyssey from Minit-Tune to the consumer was signed by Brian Rowe.
- Affidavit of Brian Reid at paragraphs 2 to 10 and Exhibits A to F attached to that Affidavit.

[17] There is no evidence to the contrary.

(b) Sales through J & B Auto Brokers

[18] J & B Auto Brokers ceased operations in October of 2018 and its registration as a motor dealer ended on February 20, 2019. Evidence shows that Brian Rowe's name and signature appear on ICBC Transfer/Tax Forms regarding the sale of 15

vehicles by J & B Auto Brokers, when that dealership was out of business and no longer a registered motor dealer. Brian Rowe is indicated on those forms as a manager of J & B Auto Brokers. The evidence of the owner of J & B Auto Brokers is that Brian Rowe was not authorized to transfer vehicles or sell vehicles under the J & B Auto Brokers' name. These facts are based on a review of purchase agreements, review of ICBC Transfer/Tax Forms (APV9T), conversations with other dealers who sold vehicles to J&B Auto Brokers with Brian Rowe's involvement, and an interview with the owner of J & B Auto Brokers. There is no evidence to the contrary.

- Affidavit of Brian Reid at paragraphs 21 to 36 and Exhibits Q to Z attached to that Affidavit.

(c) Consideration of all the evidence

[19] I am satisfied that the evidence contained in the Affidavit of Bryan Reid is relevant and reliable. Hearsay statements in the Affidavit are corroborated by the documentary evidence such as Purchase Agreements, ICBC Transfer/Tax Forms (APV9T), and Certificates of Insurance and Registration. They are all consistent with each other. I have no evidence to suggest that the hearsay statements and the documentary evidence should not be believed. I would note that Mr. Rowe has been given an opportunity to comment on the evidence at both the investigation stage and the hearing process before me. I also note Mr. Rowe was afforded an opportunity to provide contradictory evidence if he so wished: *Cambie Hotel (Nanaimo) Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2006 BCCA 119 (BC Court of Appeal).

[20] On the evidence before me I am satisfied on a balance of probabilities that Brian David Rowe held himself out to consumers as the manager of Minit-Tune and of J & B Auto brokers when he was not. The evidence also shows that Brian David Rowe was involved in the sale of the 16 vehicle sales documented in the Affidavit of Brian Reid. I now turn to the specific contraventions of the law alleged by the Authority.

VII. Alleged contraventions of the law

(a) Contraventions of sections 23(b)(ii), (c) and (d) of the MDA-Reg.

[21] Section 23 of the MDA-Reg. requires that certain disclosures be made on a sale or purchase agreement when a motor dealer offers to sell or sells a motor vehicle. The specific sub-sections allegedly contravened in this case are:

23 A motor dealer must ensure that in every written representation in the form of a sale or purchase agreement respecting the motor dealer's offering to sell or selling a motor vehicle the motor dealer discloses, to the best of that motor dealer's knowledge and belief, the following:

(b)whether the motor vehicle has

(ii)in the case of a used motor vehicle, sustained damages requiring repairs costing more than \$2 000

(c)whether the motor vehicle has been used as a lease or rental vehicle;

(d)whether a used motor vehicle has been brought into the Province specifically for the purpose of sale;

[Underlining added]

[22] Section 23 of the MDA-Reg requires certain disclosures be made on sale or purchase agreements. Section 23 of the MDA-Reg does not itself require a sale or purchase agreement be completed for a transaction. That requirement is in section 21 of the MDA-Reg; with section 21(3) of the MDA-Reg specifically noting the obligation of a motor dealer to provide a duplicate copy of a sale or purchase agreement to the purchaser. A breach of section 21 of the MDA-Reg was not alleged and it would be procedurally unfair to consider that breach without proper notice to Brian Rowe.

[23] There are no purchase agreements in evidence before me between Minit-Tune and the purchasing consumer or between J & B Auto Brokers and the 15 consumers identified by the ICBC Transfer/Tax Forms (APV9T). In fact, the evidence of the consumer who purchased the Odyssey is that there was no purchase agreement: Affidavit of Bryan Reid at paragraph 7. The only sale or purchase agreements in the Affidavit of Bryan Reid are the sales to Minit-Tune or to J&B Auto Brokers. Therefore, I cannot say that Brian Rowe failed to make the required disclosures on the purchase agreements to the consumers identified in the investigation by Bryan Reid.

[24] I would note that the ICBC Transfer/Tax Form (APV9T) is not a sale or purchase agreement. It is the document ICBC requires in order to register a transfer of ownership of a motor vehicle in the vehicle registry, and for the purpose of collecting any taxes owing. It is a form created by ICBC under the authority of the *Motor Vehicle Act*. It is not a purchase agreement as contemplated by the MDA-Reg.

(b) Contraventions of sections 33(2)(a) and (f) of the MDA-Reg.

[25] Sections 33(2)(a) and (f) of the *Motor Dealer Act* Regulation are within the provisions commonly called the Code of Conduct. Those provisions state:

(2)A licensee or registrant, in the course of business,

(a)must act with honesty and integrity,

(f) must not adversely affect the reputation of the authority, a licensee, a registrant or the registrar,

[26] I recently considered these two provisions in *Re: Tibbo* (October 16, 2020, Hearing File 20-08-001, Registrar).

(i) Section 33(2)(a) MDA-Reg, acting with honesty and integrity

[27] Regarding section 33(2)(a) of the MDA-Reg, I noted in *Re: Tibbo* that this provision was straight forward and cited the B.C. Supreme Court decision in *Fryer*, supra.

[28] In the case of Brian Rowe, I am satisfied on the evidence that he has not acted with honesty and integrity. Mr. Rowe falsely represented to selling dealers and to consumers that he was the manager of two dealerships. In the 15 transactions associated to J & B Auto Brokers, his conduct was dishonest to consumers as they would be led to believe they were purchasing from an active registered motor dealer, with all the rights that come with buying from a registered motor dealer.

[29] Mr. Tibbo used to be a salesperson attached to the motor dealer registration of J & B Auto Brokers when it closed its business. Mr. Tibbo used his knowledge of J & B Auto Brokers to purchase vehicles in the company's name and resell those vehicles in the company's name. Mr. Tibbo took advantage of that knowledge and of J & B Auto Brokers being out of business for his own personal gain. That conduct shows a lack of integrity.

[30] I am satisfied that the evidence shows Mr. Rowe did not act with honesty and integrity and is in breach of section 33(2)(a) of the MDA-Reg.

(ii) Section 33(2)(f) MDA-Reg, negatively impacting others' reputation

[31] In *Re: Tibbo* I noted that one main policy reason for section 33(2)(f) of the MDA-Reg was to ensure licensees do not attempt to unfairly compete by making false and negative comments about other licensees and registered motor dealers. Further, this provision also protects the regulatory scheme by requiring licensees not speak negatively about their regulator, which could diminish the trust consumers have in the industry, the regulator and the regulatory regime. This would be contrary to the stated goal of building consumer confidence in the industry.

[32] The evidence before me is inconclusive that Mr. Rowe's conduct negatively impacted the reputation of Minit-Tune or of J & B Auto Brokers. In *Re: Tibbo*, there was evidence such as communications from the manager of the dealership and from the consumers with whom Mr. Tibbo interacted with, to suggest Mr. Tibbo's misconduct had a negative impact on the dealerships' reputation in that case.

[33] There is also no evidence to suggest Mr. Rowe has negatively impacted the reputation of another licensee, the Authority or of the Registrar. Negative conduct by a licensee in and of itself is not sufficient to say it has caused a negative impact on the reputation of another person. There must be some evidentiary foundation showing such a connection.

[34] Mr. Rowe's conduct does negatively impact the reputation of the industry generally, similarly to Mr. Tibbo in *Re: Tibbo*. However, that is not the focus of section 33(2)(f) of the MDA-Reg. The assessment of conduct negatively impacting the industry generally, falls within the Registrar's general authority to review the past conduct of a salesperson and consider whether it is in the public interest that they remain a licensed salesperson: section 7(2) of the *Salesperson Licensing Regulation*. While the allegations in the Hearing Notice do not specifically note section 7(2) of the *Salesperson Licensing Regulation*, that provision is specifically noted on page 4 of the Hearing Notice as the general authority for this review. I am satisfied that Mr. Rowe would not be taken by surprise that I have considered the impact of his misconduct on the reputation of the industry as a whole in coming to my decision below.

[35] I find that Mr. Rowe has breached section 33(2)(a) of the MDA-Reg by acting in a dishonest way and by showing a lack of integrity.

[36] I do not find on the evidence before me that Mr. Rowe breached section 33(2)(f) of the MDA-Reg. I find the evidence falls short in showing Mr. Rowe's misconduct negatively impacted the reputation of a licensee, a registrant, the Registrar or the Authority.

**(c) Contraventions of sections 4(3)(b)(i) and 5 of the BPCPA
[misrepresentations]**

[37] The Authority alleges that Mr. Rowe has committed a deceptive act or practice contrary to the BPCPA.

[38] A supplier of goods or services in a consumer transaction is prohibited from committing a deceptive act or practice. In prior decisions, I have canvassed the general law regarding these provisions. A supplier (dealer or salesperson in this case), must refrain from saying anything, doing anything or failing to state a material fact about a transaction where doing so would have the capability or tendency to mislead a consumer. The conduct can occur before (such as advertising), during (such as negotiations) or after (such as reassuring someone about their purchase) a consumer transaction. Once some evidence is advanced establishing a deceptive act or practice, the onus shifts to the supplier to prove their conduct or representations where (a) true, (b) never made, or (c) otherwise not misleading.

- *Re: Best Import Auto Ltd. et al* (November 28, 2017, Hearing File 17-08-002, Registrar) varied but not on this point *Best Import Auto Ltd. v Motor Dealer Council of British Columbia*, 2018 BCSC 834 (BC Supreme Court).

[39] The Authority specifically notes the conduct deemed to be a deceptive act or practice under section 4(3)(b)(i) of the BPCPA:

(3) Without limiting subsection (1), one or more of the following constitutes a deceptive act or practice:

(b)a representation by a supplier

(i)that the supplier has a sponsorship, approval, status, affiliation or connection that the supplier does not have,

[40] From the facts, the Authority is saying Mr. Rowe committed a deceptive act or practice in representing to consumers that he had the approval of the two noted dealerships to conduct the sales on their behalf.

[41] In the case of the sale by Minit-Tune of the Odyssey to the consumers, the evidence is clear they were misled into believing they purchased the Odyssey from Minit-Tune. The fact they called Minit-Tune to discuss the Odyssey's mechanical issues shows they were misled on this point.

[42] In the case of *Parsons v. Zagrodzki* 2005 BCPC 0384 (B.C. Provincial Court), the Court was considering the sale of a 1997 Honda Civic from Mr. Zagrodzki to Ms. Parsons. Ms. Parsons claimed Mr. Zagrodzki made fraudulent misrepresentations during the transaction causing her to suffer damages. One of the claims was Mr. Zagrodzki represented himself as a private seller when he was actually a motor dealer. The Court found:

[22] Ms. Parsons has proven it is more likely than not, that Mr. Zagrodzki intentionally misrepresented the car's background in order to facilitate the sale to her. He should have told Ms. Parsons these material facts:

- Mr. Zagrodzki is a licensed car dealer
- The car was stolen, recovered and declared Salvage by a California insurance company
- Mr. Zagrodzki's export-import company bought the car from the California insurance company in April 2003 and imported it into Canada
- The car theft resulted in repairs worth more than \$2,000
- As a result, the car must be declared Rebuilt
- The odometer reading is not accurate

[23] Mr. Zagrodzki's withholding this information and telling Ms. Parsons that it was his personal car that he was selling to buy a minivan for his family, amounts to fraudulent misrepresentation.

[43] If posing as a private seller when you are a licensed motor dealer is a failure to state a material fact and a fraudulent misrepresentation, it stands to reason that

posing as a motor dealer when you are not, is also a failure to state a material fact. The policy reason for this is that consumers have differing rights when purchasing a motor vehicle from a motor dealer than when purchasing privately. Motor dealers are required to make certain declarations under the *Motor Dealer Act* to consumers that a private seller does not. A motor dealer's transaction is governed by the BPCPA, where a private sale generally is not. A consumer who has suffered certain types of a financial loss when dealing with a licensed motor dealer may apply to the Motor Dealer Customer Compensation Fund for compensation, where a private seller cannot.

[44] I find sufficient evidence to say Mr. Rowe misled the consumer who purchased the Odyssey by representing the purchase as from Minit-Tune. The evidence supports that this was deliberate conduct on the part of Brian Rowe. The Odyssey was purchased from Wood Wheaton under the name of Minit-Tune and subsequently resold as coming from Minit-Tune. That does not happen as an error or by negligence.

[45] As for the sales involving J & B Auto Brokers, I find the evidence imprecise to say the consumers in those transactions were similarly misled. While one would expect that to be the case, it could be that the consumers actually knew the sales were being put through the name of J & B Auto Brokers but being sold by Mr. Rowe.

(d) *Contraventions of section 8(3)(b) and 9 of the BPCPA*
[unconscionable act or practice]

[46] The Authority's Hearing Notice says Mr. Rowe committed an unconscionable act or practice. In *Re: Tibbo*, I also considered this provision in relation to Mr. Tibbo's conduct.

[47] Section 8(3)(b) and 9 of the BPCPA state:

(3) Without limiting subsection (2), the circumstances that the court must consider include the following:

(b) that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect his or her own interest because of the consumer or guarantor's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;

9 (1) A supplier must not commit or engage in an unconscionable act or practice in respect of a consumer transaction.

(2) If it is alleged that a supplier committed or engaged in an unconscionable act or practice, the burden of proof that the unconscionable act or practice was not committed or engaged in is on the supplier.

[48] Section 9(1) of the BPCPA prohibits a supplier (motor dealer or salesperson in this case) from committing or engaging in unconscionable acts or practices in respect of a consumer transaction. Section 8(3)(b) of the BPCPA is not a deeming provision. If the conduct identified in section 8(3)(b) is proven, that in and of itself does not prove the transaction was unconscionable.

[49] By virtue of section 8(2) of the BPCPA, the Registrar is required to assess the entire consumer transaction in determining if it is unconscionable. In carrying out that holistic assessment, the B.C. Legislature has directed the Registrar to ensure that the assessment includes consideration of the five current factors noted in section 8(3)(b) of the BPCPA. In *Re: Tibbo*, I noted court decisions which say that the ultimate question is; given all the facts of the transaction, is the transaction commercially immoral such that it should be rescinded? That is, did the supplier take advantage of a consumer's inability to protect themselves, resulting in such an unfair transaction that the consumer should be relieved of its terms?

[50] In this case there is no evidence that Mr. Rowe took advantage of a consumer resulting in an unfair transaction that is commercially immoral. As noted in *Re: Tibbo*, wrongful conduct by a person during a consumer transaction is not proof of an unconscionable act or practice. There needs to be some evidence to show the supplier took advantage of a consumer, and the consumer transaction is so unfair that it should not be binding on the consumer. For example, the dealer knew the consumer did not understand how financing works, and was able to arrange financing where the dealer would benefit an additional sum of money unknown to the consumer, and that additional sum of money was significantly inconsistent with other transactions of a similar nature.

[51] I find insufficient evidence to show that Mr. Rowe was in contravention of section 9(1) of the BPCPA.

(e) Summary of findings on contraventions of the law

[52] Based on the above, I find Brian David Rowe contravened the following provisions as alleged:

- (a) Section 33(2)(a) of the MDA-Reg, by acting in a dishonest way and acting without integrity, and
- (b) Section 5(1) of the BPCPA, by misrepresenting a consumer transaction as being with a registered motor dealer when it was not.

VIII. Compliance Selection

[53] Under the MDA legislative scheme, the Registrar can consider both liability and the appropriate compliance action within one hearing process: *Best Imports* (BC Supreme Court), *supra*. I find this case is straight-forward and that fairness does not require the findings of liability be split from determining compliance action. Mr. Rowe was afforded an opportunity to be heard and the Hearing Notice identified the type of compliance action the Authority was seeking. The Hearing

Notice also identified the authority of the Registrar to select an appropriate compliance response along with the range of responses available to the Registrar. The findings I have made are not significantly divergent from that alleged by the Authority.

[54] The role of the Registrar in selecting an appropriate compliance response to legislative breaches is to regain compliance of the licensees, deter that licensee and the general industry from repeating the impugned conduct, all with the goal of protect the public from future harm. The Registrar has varied legislative tools to achieve this goal. If there cannot be reasonable assurance of the licensee complying with the law in the future, posing a risk to the public, then the Registrar's duty is to remove the licensee from the industry.

(i) Conditions on licence

[55] I have considered whether placing conditions on the licence of Mr. Rowe would act as a sufficient deterrent. In my opinion the answer is no. Generally, the conditions added would be to take additional training as the licensee misunderstands their legal duties; to abide by the law, or to refrain from certain conduct while under supervision at a dealership. None of those types of conditions would sufficiently deter Mr. Rowe's proven conduct. Mr. Rowe was acting on his own, unsupervised, and was clearly acting in a manner he had to know was unlawful. As a licensed salesperson, Mr. Rowe would have completed the salesperson certification course which discusses a salesperson's legal duties. Mr. Rowe's conduct was not one of error due to a lack of understanding of his legal obligations.

(ii) Administrative penalty

[56] I am not convinced that imposing any administrative penalty would sufficiently deter Mr. Rowe. Mr. Rowe's conduct in question was to use the business information of other dealers to his advantage. Mr. Rowe represented himself as an authorized employee of the two dealers. Mr. Rowe took advantage of one dealer being out of business, Mr. Rowe's knowledge of that business and used the business' corporate name for his own personal gain. Mr. Rowe was hiding these activities. It is unknown how much of an economic gain Mr. Rowe obtained from these activities. Normally, administrative penalties are designed to make it economically unpalatable to commit the same wrongful conduct, and thus acting as a deterrent. There is insufficient evidence to craft an appropriate administrative penalty for deterrent purposes. See *Motor Vehicle Sales Authority of B.C. v. Barnes Wheaton et al* (April 16, 2020, File 19-07-004, Registrar).

[57] Importantly, I am not convinced that an administrative penalty would deter Mr. Rowe. First, Mr. Rowe chose to deliberately disobey the law and hide his conduct. Mr. Rowe could simply pay any penalty amount and continue in his endeavours, given they are not easy to monitor. Second, Mr. Rowe appears dismissive towards the Authority and his legal obligations as a licensee. The evidence shows Mr. Rowe was not fully cooperative with the investigation. For

instance, Mr. Rowe suggested to Investigator Reid that Mr. Rowe needed 6 months to provide a statement to the allegations. Mr. Rowe then states he is not providing a statement and then goes on to criticize Investigator Reid for being out to get Mr. Rowe. Third, I doubt Mr. Rowe would even pay an administrative penalty. To this point, the consumer who purchased the Odyssey requested they return the Odyssey to Mr. Rowe for a refund and Mr. Rowe has not addressed that issue.

(iii) Suspension of licence for a period of time

[58] I have considered whether a suspension of Mr. Rowe's licence would act as a sufficient deterrent against Mr. Rowe repeating the conduct. For largely the same reasons noted at paragraphs 53 to 57 above, I believe a Suspension Order would not deter Mr. Rowe. The fact is that the conduct Mr. Rowe displayed did not necessarily require a salesperson licence. Suspending his licence would therefore not be a disincentive against repeating that conduct. Further, a suspension of a licence is normally accompanied by conditions to be performed to show the individual has changed their ways (rehabilitated) and can be trusted to resume their licensed duties under some form of conditions, supervision and/or monitoring.

(iv) Licence revocation

[59] Mr. Rowe's conduct during the investigation and his lack of participation in this review of his licence suggests he is not taking the conditions of his licence seriously. I have no evidence that Mr. Rowe is remorseful about his conduct or that he intends on changing his behaviour. This later point also influences why it is my opinion that conditions on licence, an administrative penalty or a suspension of his licence will not deter him from future similar misconduct.

[60] I have found Mr. Rowe acted without honesty and without integrity. I have found Mr. Rowe has deliberately acted contrary to the law and taken advantage of two businesses and at least one consumer. The public would expect Mr. Rowe to exhibit signs of remorse and a change in behaviour before he would be allowed to act as a salesperson serving the general public. I consider the case of *Re: Tibbo* where the salesperson in that case was remorseful, took positive steps to ameliorate the harm he caused by refunding consumers, Mr. Tibbo wrote letters of apology and fully participated in the review of his licence. Mr. Tibbo was allowed to retain his licence with conditions added, a penalty amount and paying costs, because he exhibited remorse and a change in behaviour for the positive. That is not the case with Mr. Rowe.

[61] I, therefore, find it necessary to protect the public interest by revoking Brian David Rowe's salesperson's licence # 106494, with the revocation effective the date of this decision.

(v) Prohibition on applying for a licence

[62] The Registrar may set a time period in which they are not willing to accept an application for licensing or registration from a person whose licence has been

revoked: *Best Imports* (BC Supreme Court). The Hearing Notice notes that revocation of Mr. Rowe's licence was one of the Authority's recommendations to the Registrar. Under the heading "Various Orders the Registrar can make" in the Hearing Notice, Mr. Rowe is advised that the Registrar can order a ban on him re-applying for a licence or for registration as a motor dealer for a period of time, or indefinitely. I am satisfied Mr. Rowe was put on sufficient notice that such a ban could be a result of the hearing process before me: *Best Imports* (BC Supreme Court).

[63] Given the lack of evidence of remorse and of a change in behaviour by Mr. Rowe, I do believe a ban on reapplying to be licensed or registered is in order. There needs to be some history of good behaviour and of good conduct on the part of Mr. Rowe to show that he can be trusted to interact with consumers. In considering the appropriate length of time, I have considered the following decisions:

(a) *Re: Justin Plosz* (October 22, 2019, 19-05-004, Registrar) reconsideration denied (April 9, 2020)

A three-year prohibition on re-applying for not be transparent when providing information to the Authority and not cooperating with the VSA's review of his salesperson licence application. The finding was that Mr. Plosz was not governable and would not abide by the Code of Conduct.

(b) *Re: Bob Shokohi* (October 12, 2018, 18-06-005, Registrar)

Denied a wholesaler licence with a ten-year ban on re-applying due to conduct as a motor dealer including (a) selling unsafe vehicles, (b) not obeying lawful orders, and (c) misleading the Registrar during a hearing.

(c) *Re: Carmel Custom Contracting Ltd. & Jason Coburn* (April 5, 2018, 18-03-001, Registrar)

Coburn's salesperson licence was revoked and a five-year ban on re-applying was imposed. Coburn had misled consumers in consumer transactions, misappropriated consumer money, acted in breach of the law and his licence when conducting consignment sales when not licensed to do so, and was already under a prior undertaking for prior transgressions. Coburn did not cooperate with the review of his licence and was viewed as ungovernable.

[64] Having reviewed those cases, it is clear that evidence of the salesperson's compliance history, if there was one, was an important factor in balancing the salesperson's fairness rights with the protection of the public. That compliance history is important to properly tailor the right ban duration for the protection of the public, while not drifting into the realm of being penal. The Authority's materials do not provide Mr. Rowe's compliance history with the Authority other than to note there is still an active investigation (18-11-187) regarding Mr. Rowe and unlicensed selling activities.

[65] In striking the right balance, I believe Mr. Rowe is ineligible to reapply to be licensed or registered under the *Motor Dealer Act* until the open investigation

against him is complete and the results are known. If that investigation is not completed by June 1, 2021, Mr. Rowe has leave to re-apply as a salesperson and a decision would be made on that request based on the facts that exist at that time. It may be that the application remains premature. Whether Mr. Rowe would be granted a salesperson licence in the future depends on the facts that exist at the time that he re-applies. Evidence of remorse and or rehabilitation will be crucially important as will be evidence showing Mr. Rowe can be trusted to act with honesty and integrity as well as will abide by the law and the conditions of any issued licence.

IX. Costs

[66] Normally in cases such as this, a licensee can be held liable to pay investigation and hearing costs: section 26.02(4)(d) of the *Motor Dealer Act* and section 155(4)(d) of the *Business Practices and Consumer Protection Act*.

[67] The Authority's materials do not speak to costs. The Authority has leave to file submissions and evidence regarding costs with notice to Mr. Rowe. The Authority has until January 22, 2021 to do so.

X. Decision Summary

[68] I have found that Brian Rowe (a) did not act with honesty and integrity contrary to section 33(2)(a) of the *Motor Dealer Act Regulation*; and (b) misrepresented to a consumer that they were dealing with a registered motor dealer when they were not, contrary to section 5(1) of the *Business Practices and Consumer Protection Act*.

[69] I have revoked Mr. Rowe's salesperson licence and prohibited him from re-applying until the results of another active investigation regarding his activities are known, with conditions for early re-application.

[70] The Authority has until January 22, 2021 to file submissions and evidence regarding costs.

XI. Review of Decision

[71] My revocation of Mr. Rowe's licence and associated ban on re-applying may be reviewed by applying for reconsideration under sections 26.11 and 26.12 of the *Motor Dealer Act*. Such an application must be made in writing (electronic included) and be accompanied with the required new evidence as defined in those sections of the *Motor Dealer Act*. The Act requires such an application be made within 30 days of receipt of these reasons or notice of revocation. The application can be filed electronically to hearings@mvsabc.com or mailed to the Authority.

[72] This decision may also be reviewed by petitioning the B.C. Supreme Court for judicial review pursuant to the *Judicial Review Procedure Act*. Such a petition is to be filed with that Court within 60 days of this decisions date: section 7.1(t) of the *Motor Dealer Act*.

Original Signed

Ian Christman
Registrar of Motor Dealers