Vehicle Sales Authority
of British Columbia

Investigation File: 19-05-278
Hearing File: 20-03-001

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

MOTOR VEHICLE SALES AUTHORITY OF BRITISH COLUMBIA

(the "Authority")

AND

LGN ENTERPRISES INC. dba AUTO CLEARANCE CENTRE
(Motor Dealer Licence # 40289)

(Respondent)

AND

A&A AUTO SALES LTD dba
AUTO CLEARANCE DOWNTOWN HASTINGS
(Motor Dealer Licence #40660)

(Respondent)

AND

AYKUT (ALEX) BILGIN
(Salesperson Licence #201174)

(Respondent)

AND

DUSEAN DAVID LEBLANC
(Salesperson Licence #209336)

(Respondent)

AND

MOHAMMAD (GEORGE) LATEEF
(Salesperson Licence #203435)

(Respondent)

DECISION OF THE REGISTRAR OF MOTOR DEALERS

Date and place of decision: November 27, 2020 at Langley, British Columbia

By way of written submissions

Introduction and Procedural History

[1] On March 9, 2020 the Motor Vehicle Sales Authority of British Columbia (the "Authority"), issued a hearing notice against the Respondents. Enclosed with the Hearing Notice was the Investigation Report of Bill Manhas prepared in February of 2020. These were served on the Respondent's through their legal counsel on or about March 9, 2020.

[2] Subsequent to the Hearing Notice being issued, the Authority applied to have the case heard as an oral hearing. By Registrar's Rule 30, Registrar's hearings are by default to be through written submissions with any party able to apply for an oral hearing. In its submissions, the Authority noted the need to cross-examine some of the witnesses due to what it stated was credibility issues. The Respondent's took the position that a written hearing was preferable given the then emerging health concerns of COVID-19, costs and expediency. The Respondent's proposed a process they said balanced a fair process, could address credibility issues and balance the concerns around participant safety.

[3] On August 21, 2020, I issued a decision by Letter of Direction largely agreeing with the Respondent's position of a written hearing, with some modification to ensure a fair process. That modification was that the Parties first exchange the evidence they intended to rely on by way of affidavit. After reviewing each's affidavit material, any party could then request certain witnesses be called for oral cross-examination.

[4] The Authority was first to submit its affidavit material. It requested a two-week extension which was not objected to by the Respondents. The extension was granted with all other dates also being extended by two weeks. Shortly before the Authority's affidavit was due, it applied for a further 30-day extension. The Respondent's objected to the extension identifying the prejudice that they could suffer with a 30-day delay.

[5] I denied the Authority the 30-day extension. I noted the Authority had served its investigation report with the initial hearing notice. It must be taken as doing so knowing the Registrar's hearing was to be a written hearing by default, and the Authority was ready to go. I found there was nothing in the Authority's submissions to say why the Authority could not simply append the Investigator's Report as an exhibit to an Affidavit. I also noted that the rules of evidence before a tribunal are not as stringent as before a court and that any concerns regarding admissibility could be dealt with later. I granted the Authority a few days extension to file their affidavit.

[6] On September 20, 2002 the Authority filed the affidavit of Bill Manhas appending as an exhibit his February 2020 investigation report. On October 21, 2020, the Respondent's filed their affidavits in response. On November 4, 2020 the Authority filed a supplemental affidavit of Dusean Leblanc. The Respondent's object to the filing of the supplemental affidavit of Mr. Leblanc.

[7] Noteworthy, is that there is a statement attributed to Mr. Leblanc in the Investigation Report of Bill Manhas.

Position of the Parties

(a)The Respondents

[8] The Respondent's state the Authority has impermissibly split their case. The Respondent's state the Authority was required to bring forward their entire case when it filed its affidavit. They say any rebuttal affidavits had to address anything new arising from the Respondent's affidavit material. The Respondent's rely on the rule in *Browne v Dunn*. The Respondent's further argue that Mr. Leblanc's hearsay evidence in the investigation report of Mr. Manhas is barely in evidence and the Authority has chosen to only produce one witness by way of affidavit – Mr. Manhas. In their submissions, the Respondent's note the affidavit of Mr. Leblanc is confirmatory of his statement in the Bill Manhas Investigation Report.

(b)The Authority

[9] The Authority notes that the rule in *Browne v. Dunn* does not prohibit splitting a case, *per se*. It is a rule of fairness regarding the impeachment of a witness. If you are going to present evidence to impeach a witness, it should first be put to that witness so they can comment. The Authority further states that one of the remedies often used to ensure trial fairness, is allowing an opportunity to cross-examine the witness tendering the new evidence, and to recall the witness who is sought to be impeached, so that they do have an opportunity to address the new evidence.

Legal Principles

(a)Evidence before Tribunals

[10] Tribunals such as the Registrar are not bound by the laws of evidence followed by the courts. Tribunals are required to ensure a fair process in receiving evidence and providing persons an opportunity to be heard, to present evidence and address any evidence that is before the tribunal.

[11] For example, tribunals may accept and rely on hearsay evidence so long as they are satisfied the evidence is relevant and fairly regarded as reliable. Hearsay evidence may form the entire basis for a decision. The party impacted by the hearsay evidence must be provided an opportunity to comment on that evidence and to provide contradictory evidence if they so wish. The tribunal need not allow cross-examination. The weight to be attributed to the hearsay evidence is a decision for the tribunal, taking into consideration the reliability of the evidence and in consideration of all the evidence. The B.C. Court of Appeal noted that the admission of a letter in an investigation report when the writer was not called as a witness, was permissible. That Court also noted a case were an investigator's report contained a recount of a hearsay conversation, which was not considered objectionable.

See the discussion in:

- *Cambie Hotel (Nanaimo) Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2006 BCCA 119 (BC Court of Appeal) at paragraphs 28 to 36.

And applied in

- *Crown Auto Body and Auto Sales Ltd. v. Motor Vehicle Sales Authority of British Columbia,* 2014 BCSC 894 (BC Supreme Court)

*(b)*The Rule in *Browne v. Dunne*

[12] I agree with the Authority that the rule in *Browne v. Dunn* is not an absolute prohibition on case splitting. It is a rule of fairness regarding witness impeachment, with discretion left to the trier of fact to ensure a fair trial.

[13] The Authority notes the decision of the Ontario Court of Appeal in *R . v. Quanash*, 2015 ONCA 237, leave to appeal refused (September 22, 2016, File 37013, Supreme Court of Canada). Recently, the B.C Court of Appeal considered the decision in *Quanash* and noted this about the Rule in *Browne v. Dunn*:

> [76] The rule in *Browne v. Dunn* seeks to preserve trial fairness and fairness to witnesses. It generally requires that if counsel is going to challenge the credibility of a witness by calling contradictory evidence, the witness must be given the chance to address the contradictory evidence in cross-examination while he or she is in the witness box: *R. v. Henderson* (1999), 1999 CanLII 2358 (ON CA), 134 C.C.C. (3d) 131 at 141 (Ont. C.A.).
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> [77] Whether the rule in *Browne v. Dunn* applies is a question of law, reviewable on a standard of correctness: *Drydgen* at para. 22. But deference is owed to the factual findings underpinning the trial judge's conclusion on whether or not the rule is engaged: *R. v. Lyttle*, 2004 SCC 5 at para. 65; *Quansah* at para. 90; *R. v. Giroux* (2006), 2006 CanLII 10736 (ON CA), 207 C.C.C. (3d) 512 at para. 49 (Ont. C.A.), leave to appeal ref'd [2006] S.C.C.A. No. 211.
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> [78] The rule is intended, among other things, to avoid the "ambush" of a witness: *R. v. Verney* (1993), 1993 CanLII 14688 (ON CA), 87 C.C.C. (3d) 363 at 376 (Ont. C.A.). A number of authorities make clear that surprise remains a key element of when the rule might be engaged: *Quansah* at para. 86; *Drydgen* at para. 18; *R. v. Ali*, 2009 BCCA 464 at para. 39; *Trillium Motor World Ltd. v. Cassels Brock & Blackwell LLP*, 2017 ONCA 544 at para. 317, leave to appeal ref'd (2018), [2017] S.C.C.A. No. 366; *Liedtke-Thompson v. Gignac*, 2014 YKCA 2 at para. 43.
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> [79] The rule does not apply where it should be obvious that the cross-examiner intends to impeach the witness's testimony. In *Browne v. Dunn*, Lord Herschell wrote at 71:
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> > Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it.

- *Hamman v. Insurance Corporation of British Columbia,* 2020 BCCA 170 (Court of Appeal)

[14] See also the decision of the BC Supreme Court in *Friebel v. Omelchenko*, 2014 BCSC 1039, where the Court noted the following about the Rule in *Browne v. Dunn*:

> [167] The rule is a sound principle, of general application, that a witness should be given an opportunity to respond to attacks on his or her credibility: *R. v. Cormier,* 2012 NBCA 76 at para. 33; *R. v. Drygden*, 2013 BCCA 253 at para. 17.
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> [168] The rule is not an absolute or inflexible rule of evidence. The rationale for the rule is fairness. As such, the applicability of the rule and whether it has been violated must be assessed within the context of the particular case. The rule requires the alternate version of events of one witness should be suggested to a witness during cross-examination. This is done so as to allow the witness an opportunity to explain or deny that version. The rule does not say that the alternative version must be ignored, but a judge may consider the absence of cross-examination as a factor in assessing the credibility of the evidence given on the point: *Fast Trac Bobcat & Excavating Service v. Riverfront Corporate Centre Ltd.,* 2008 BCSC 848 at para 9.
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> [underlining added]

[15] Regarding the applicability of the rule in *Browne v. Dunn* to affidavit evidence, the Respondents relied in part on the BC Supreme Court decision in *Nagy v. BCAA Insurance Corporation*, 2019 BCSC 930. The BC Court of Appeal overturned that decision noting the trial judge erred in applying the rule in *Browne v. Dunn* and confirmed the rule is one of fairness:

> [91] With respect, without attempting to define in what circumstances the rule in *Browne v Dunn* can properly be applied in a summary trial proceeding, I am satisfied that the rule was not applicable in the circumstances of this case.
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> [92] The difficulty in part arises from the position BCAA took before the trial judge. The summary trial application was brought by BCAA. The respondents opposed it. But BCAA maintained that the case was suitable for determination by summary trial, and the judge ultimately agreed. This was notwithstanding the judge's recognition at para 15 of her reasons that "credibility is a critical factor".
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> [93] Here, any problem of trial fairness, given that credibility was a critical factor, arose from the procedure followed, in which neither party sought to cross-examine on the affidavits, and in which cross-examination was not available in the trial process given its summary nature; see *Mayer v Mayer*, 2012 BCCA 77 at paras 78–83.
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> …
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> [97] Moreover, the rule in *Browne v Dunn* applies to the weighing of evidence and cannot justify making findings of fact unsupported by the evidence where those findings are an essential part of what is to be weighed. That is what effectively occurred here.
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> [98] In my respectful view, the judge's use of the rule in *Browne v Dunn* to "give less weight to BCAA's submissions that the totality of the evidence supports a finding the April 29 Call did not occur", was, in the circumstances, wrong in law.

- *Nagy v. BCAA Insurance Corporation*, 2020 BCCA 270 (Court of Appeal)

[16] While the BC Court of Appeal did not specifically over-turn the Supreme Court's application of the rule in *Browne v. Dunn* on affidavit evidence in a summary trial, the above comments from the Court of Appeal suggest placing little weight on the Supreme Court's application of the rule in *Browne v. Dunn* in the *Nagy* decision.

Discussion

(a)The applicability of Browne v. Dunn

[17] In my opinion, the rule in *Browne v. Dunn* does not apply in this case for the following reasons.

[18] First, the Respondents are not being taken by surprise by the evidence of Mr. Leblanc. They admit Mr. Leblanc's evidence is in the Report of Bill Manhas which was served on them along with the Hearing Notice of March 9, 2020. The Respondent's also admit the evidence of Mr. Leblanc was in the Investigation Report of Bill Manhas that was appended as an exhibit to his Affidavit.

[19] While that evidence may be hearsay evidence, it is still evidence that the Respondents were aware of since March of 2020. I would note that hearsay evidence is not automatically excluded in a trial, even a criminal trial: *R. v. Khan*, 1990 CanLII 77 (SCC), [1990] 2 SCR 531. It also admissible before a tribunal, especially when the tribunal's duty is to the greater public interest and its protection: *Cambie Hotel (Nanaimo) Ltd*. Whether it should or should not be relied on is for the tribunal to determine in consideration of the evidence's relevance and reliability: *Cambie Hotel (Nanaimo) Ltd*.

[20] Second, the Respondents have had an opportunity to provide contradictory evidence in accordance with procedural fairness. They have filed responsive affidavits on October 21, 2020 where they could have raised any evidence to contradict Mr. Leblanc's statement contained in the Investigation Report of Bill Manhas, now appended as an exhibit to his Affidavit.

[21] Third, my Letter of Direction dated August 21 made clear that there would first be an exchange of affidavits and then the Parties could identify any witness they wished to conduct oral cross-examination. If the Respondents wished to question Mr. Leblanc on his purported hearsay statement, they could have requested he be called as a witness for that purpose under Registrar's Rule 27(1).

[22] Finally, it is my view that the Authority having provided the Affidavit of Bill Manhas had not closed their case. My August 21 Letter of Direction made it clear other steps could still take place in this case after the exchange of affidavits, such as cross-examining witnesses.

(b)Admissibility of the Affidavit

[23] Whether Mr. Leblanc's evidence was only that contained in the Investigation Report of Bill Manhas (hearsay) or direct evidence in the form of his affidavit, I am still bound to assess that evidence on the basis of it being relevant, reliable and credible and assign it the

appropriate weight, if any, in my decision. In conducting that assessment, I am also required to consider that evidence in consideration of the totality of the evidence before me.

[24] I find that Mr. Leblanc's affidavit can be admitted. The extent to which it will be relied on, its weight, if at all, is a matter to be determined after all the evidence is in. The Parties also still have an opportunity to make submissions on Mr. Leblanc's evidence.

[25] The filing of Mr. Leblanc's affidavit does require me to address the process we now find ourselves in. I must ensure fairness to the Respondents due to the filing of that affidavit, while bringing finality to the process so this case can move forward.

(c) Providing a Fair process and finality of the process

[26] The Respondents chose to submit their responsive affidavit evidence knowing that Mr. Leblanc's evidence was hearsay. It would be fair to allow the Respondents an opportunity to provide an additional affidavit in response to Mr. Leblanc's, if they wish. The Respondents will have until December 11, 2020 to submit that affidavit with a copy to the Authority. To ensure finality, the Authority will not be allowed to submit any affidavit in rebuttal. If there is objectionable content in any new affidavit filed by the Respondents, that may be dealt with in written submissions.

(d) Next Steps

[27] The next step in the process is for the Parties to identify any witness(es) they wish to call for oral cross-examination. If the Parties do wish to conduct an oral cross-examination of a witness, the Parties are to exchange their list with a copy to the Registrar by December 18, 2020. If the Parties do not intend on conducting oral cross-examination of witnesses, that should also be communicated to each other and to the Registrar by December 18, 2020.

[28] The Parties are both represented by legal counsel. They are encouraged to discuss the exchange of witness lists for cross examinations, identify possible dates for any cross examination and should also discuss the exchange of written submissions. If agreement is reached, the Parties should forward a joint submission to the Registrar by January 8, 2020, for my review.[1] If the Parties cannot agree to the timing of the next steps in the process, any Party may apply to me to convene a Pre-hearing Conference under Registrar's Rule 24, where I will hear from the parties and set the remainder of the process.

"Original is signed"

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Ian Christman, JD
Registrar of Motor Dealers

[1] I have taken into consideration the upcoming holiday season.