



Neutral Citation: 2019-BCRMD-017

**IN THE MATTER OF THE *MOTOR DEALER ACT*, R.S.B.C. 1996, C. 316 and
BUSINESS PRACTICE AND CONSUMER PROTECTION ACT S.B.C. 2004, c. 2**

RE:

MOTOR VEHICLE SALES AUTHORITY OF BRITISH COLUMBIA

Complainant

And

BARNES WHEATON (NORTH SURREY) CHEVROLET BUICK GMC

(Motor Dealer Registration #31268)

Respondent Dealer

And

DEVRON DONALD QUAST

(Salesperson Licence #103747)

Respondent Salesperson

DECISION OF THE REGISTRAR OF MOTOR DEALERS

Date and location of decision: January 20, 2020 at Langley, British Columbia

By way of written submissions

I. Introduction

[1] The Motor Vehicle Sales Authority of British Columbia (the "Authority") alleges the following against Barnes Wheaton (North Surrey) Chevrolet Buick GMC (Dealer #31268) ("Barnes") and Devron Donald Quast (Salesperson #103747) regarding the sale of a 2013 GMC Sierra (the "Sierra") to a consumer (paraphrasing from the Hearing Notice dated October 1, 2019):

- (a) Through its own inspection, Barnes and its employee, Mr. Quast, knew the Sierra had several safety issues yet sold the Sierra to the consumer without making repairs or advising the consumer of the safety issues (Reasons # 4 & 5 in the Hearing Notice).
- (b) As a result of these safety issues, ICBC refused to insure the Sierra (Reason #6 in the Hearing Notice).
- (c) On February 20, 2018, Mr. Quast, an employee and salesperson at Barnes, caused the Sierra to be fraudulently inspected and pass [a Provincial Private Vehicle] inspection by an employee of Air Charge Automotive in Langley (Reason #7 in the Hearing Notice).

[2] The alleged fraudulent inspection and pass of the Sierra (allegation (c)) was brought to the attention of the Authority by the B.C. Ministry of Transportation and Infrastructure's Commercial Vehicle Safety Enforcement Branch ("CVSE"). The CVSE is statutorily mandated to oversee the safety of all motor vehicles on B.C. highways. The CVSE administers the Provincial Private Vehicle Inspection program through a network of provincially Designated Inspection Facilities and provincially Designated Inspectors. The inspection facilities and inspectors operate in the private sector.

[3] Once the CVSE confronted Barnes with the Sierra's non-compliance with the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 ("MVA"), Barnes took steps to purchase the Sierra back from the consumer they sold it to. Subsequently, the Sierra was sold several times within the wholesale market, with the last record of ownership that I am aware of dated July 16, 2018. I am unaware where the Sierra is now.

[4] Allegations (a) and (b) are a result of the Authority's investigation of the events surrounding the consumer transaction involving the Sierra between consumer K.M. and Barnes. The Authority relies on the Investigation Report of Compliance Officer Bill Manhas with its attached exhibits and the Authority's written submissions.

II. Position of the Parties

(a) The Authority

[5] The Authority's main position is stated in the Introduction.

[6] The Authority notes that the Sierra had been inspected by a CVSE inspector and issued what is known as a Box 2 Notice and Order. A Box 2 Notice and Order is an order for the Sierra to be inspected for compliance with the MVA within a certain time frame, usually 30 days. The Notice and Order was issued to the previous owner of the Sierra who traded-in the Sierra to Barnes. When Barnes subsequently sold the Sierra to another customer, the customer could not get the Sierra insured by ICBC because of the outstanding Notice and Order. This is when Barnes says it

first became aware of the existence of the Notice and Order as it did not show up on a CARFAX vehicle history report.

[7] The Authority notes that Barnes¹ then had its own employee, who was a Designated Inspector, inspect the Sierra and who failed the Sierra for compliance with the MVA. The failure focused on three items (a) the front bumper was not of a collapsing type as originally equipped, (b) the EGR was removed – this is an emission component of the exhaust system, and (c) fenders did not extend the full width of the tires.

[8] The Authority says that it was after this failure, and Barnes' inability to convince its employee to change their mind at least on the issue of the bumper, that Barnes had the Sierra inspected at Air Charge Automotive in Langley, which is a third-party Designated Inspection Facility, who passed the Sierra. The Authority notes the investigation by the CVSE of this Langley Designated Inspection Facility and the Designated Inspector resulted in a violation ticket being issued for conducting an improper inspection of the Sierra. Finally, the Authority notes the role it says Mr. Quast played in having the Sierra passed at the Langley Designated Inspection Facility.

[9] The Authority points out that the only payment to Air Charge Automotive in Langley was \$157.70 for the apparent repairs and inspection. The Authority says this payment was made by Barnes' "lot boy", who picked up the Sierra, using his own credit card and who was reimbursed by a wholesaler and not directly by Barnes. The Authority points to Barnes' own admission that such repairs would cost it around \$7,000 if it did the repairs itself. The Authority essentially states that going from \$7,000 to \$157.70 for repairs and an inspection stretches the imagination.

(b) Barnes and Devron Quast

[10] The position of Barnes and Mr. Quast is essentially the same.

[11] Barnes and Mr. Quast note the Sierra was safe when sold to the consumer K.M. as noted in its FCPP inspection report. Discussed more below. The reason the consumer could not get the Sierra insured was because of the outstanding Notice and Order and not because the Sierra was unsafe.

[12] As to the Sierra's failed inspection by its own employee, the Designated Inspector, Barnes notes the bumper issue is an error by its employee. Barnes submits the Sierra's bumper is mounted as designed – on fixed steel brackets. As to the fender flair issue, Barnes states this was easily addressed. As to the exhaust issue (EGR), Barnes says it took the advice of a wholesaler who was interested in the Sierra and sent the Sierra to Air Charge Automotive in Langley for the exhaust repairs and inspection. Barnes says it was told that Air Charge Automotive could

¹ Barnes is a Designated Inspection Facility

repair the emissions at a fraction of the costs Barnes could, using used and after-market parts.

[13] Barnes, and Mr. Quast, note that they had no contact with the Designated Inspector at Air Charge Automotive in Langley who conducted the inspection. Barnes notes that when the CVSE investigated Barnes' role in the Sierra's inspection, the CVSE elected not to issue a violation ticket against Barnes due to Barnes' cooperation and the action it took with the consumer.

[14] Overall, Barnes notes there were some errors, but they or Devron Quast did not undertake fraudulent activity. Barnes notes the removal of the EGR – EGR delete kits – is common in the industry. Barnes notes that the industry is probably not aware that removing EGRs is contrary to the MVA and there should be education provided to the industry on this point. Barnes states it has educated its sales staff about this.

III. Legal considerations

(a) MVA compliance

[15] The Authority alleges the Sierra had safety issues which were not repaired or otherwise were not communicated to the consumer. The law requires a consumer be aware of any safety issues prior to purchase so they can make an informed decision in purchasing a vehicle and a dealer must declare such a vehicle in a particular way. A failure to advise a consumer of a material fact, such as safety issues with a vehicle, is deemed to be a deceptive act or practice under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c.2 ("BPCPA").

[16] In previous decisions, I have detailed the legal requirements on motor dealers to only offer for sale, display for sale or sell motor vehicles intended to be used on the highways, if they are compliant with the MVA. That Act and its regulations set certain minimum standards for various safety, emissions and other vehicle components. I summarize those points below:

- (a) The MVA prohibits any person, including a motor dealer, from displaying for sale, advertising for sale or selling a motor vehicle that is intended to be operated on the highways, where certain safety and other components of that vehicle do not meet the minimum standards in that Act or its regulations: section 222 of the MVA.
- (b) The *Motor Vehicle Act Regulation*, B.C. Reg. 26/58 ("MVAR"), specifically prohibits anyone in the business of selling or leasing motor vehicles from doing so unless certain components of the motor vehicle meet the minimum standards of that Regulation: section 8.01 of the MVAR.
- (c) The MVA prohibits a person from operating a motor vehicle on the highways unless it is compliant with the MVA and its regulations. The MVA also places a duty on the owner of a motor vehicle to not allow its

operation on the highways unless the motor vehicle is compliant with the MVA. If a motor vehicle is not compliant with the MVA, it may not legally be operated on the highways and is therefore legally “not suitable for transportation” as that term is found in the MDAR: section 219 of the MVA.

- (d) For a motor dealer to sell a motor vehicle that is “not suitable for transportation” it must ensure it is not sold for use on the highways by declaring the motor vehicle as “not suitable for transportation” and is sold for parts only or for another purpose other than transportation on:
- (i) any advertisements for the motor vehicle,
 - (ii) the purchase agreement,
 - (iii) the motor vehicle itself, and
 - (iv) any other written representation about the motor vehicle.

Sections 21(2)(e) and (f), 22 and 27(b) of the MDAR.

- (e) A failure to properly advertise and inform a consumer that a motor vehicle is “not suitable for transportation”, that is, it is not compliant with the MVA, can be viewed as a misrepresentation, also known as a deceptive act or practice under the BPCPA.
- *Re: Best Import Auto Ltd. et al.* decision on suspension (September 1, 2017, File 17-08-002, Registrar); decision on liability and dealer licence revoked (November 28, 2017) varied but not on these points in *Best Import Auto Ltd. v Motor Dealer Council of British Columbia*, 2018 BCSC 834 (BC Supreme Court).

[17] Many of those motor vehicle standards are contained in the Schedule entitled “Vehicle Inspection Manual” attached to the *Vehicle Inspection Regulation*, B.C. Reg. 256/2010 (the “Inspection Manual”) made under the MVA. The Vehicle Inspection Manual forms a part of the regulations under the MVA and has the force of law. It is also a “regulation” contemplated by section 222 of the MVA as discussed in paragraph 16(a) above.

[18] Section 47 of the MVA requires that emission control devices remain installed and operable on certain classes of motor vehicles, such as the Sierra. Section 223 of the MVA prohibits a motor dealer from modifying or altering a new motor vehicle if those modifications and alterations would not comply with the standards prescribed by the federal *Motor Vehicle Safety Act* (Canada) and its regulations.

[19] Section 222 of the MVA, section 8.01 of the MVAR and related provisions of the MVA (ex. sections 47 and 219) work together with sections 21(2)(e) and (f), 22 and 27(b) of the MDAR by requiring a motor dealer ensure a motor vehicle is compliant with the MVA and its regulations when offered for sale, in order to protect the public. It requires that certain safety and other components of a motor vehicle meet the identified minimum standards to ensure safe highways and meet

environmental concerns and to ensure dealers are either selling compliant motor vehicles or advising consumers through advertising that the motor vehicles are not compliant. This is so consumers can make informed decisions of whether to purchase such vehicles, or even to attend the dealer's lot to look at a vehicle.

- *Re: N.W. Auto Depot Ltd. & Westminster Motors Ltd.* (File 18-06-003, September 4, 2018 decision on suspension) and see paragraph 25.

(b) Deceptive acts or practices under the BPCPA - misrepresentations

[20] The Authority has alleged in the Hearing Notice that Barnes and Mr. Quast failed to disclose to the consumer the safety issues of the Sierra. The Investigation Report speaks of Barnes' failure to advise the consumer of important facts. The Hearing Notice also advises that the Authority seeks the imposition of administrative penalties under the BPCPA. The Authority is alleging that Barnes and Mr. Quast have failed to state a fact to a consumer in the course of a consumer transaction. Making misrepresentations, including by failing to state material facts, is called a deceptive act or practice under the BPCPA: see section 4 generally and section 4(3)(b)(vi) specifically, and 5(1) of the BPCPA. I summarize the pertinent legal principles regarding the BPCPA and failing to disclose safety concerns and/or compliance with the MVA, as it applies to this case:

- (a) The BPCPA prohibits a supplier (a motor dealer or a salesperson) from committing a deceptive act or practice, in respect of a consumer transaction. The representations need not be made to the consumer. It can be made to third parties.
 - (b) The motor dealer must refrain from such conduct, even if the consumer is a willing or instigating party to the deceptive act or practice.
 - (c) A deceptive act or practice is conduct, advertising, or any type of representation that has the capability or tendency to mislead someone.
 - (d) A deceptive act or practice may occur innocently, negligently, recklessly, or deliberately. If a representation is made recklessly, that is considered deliberate and a fraudulent misrepresentation.
 - (e) A consumer, who can show damages, may be entitled to a remedy, even if the deceptive act or practice was innocent.
 - (f) A deceptive act or practice can occur before, during, or after a consumer transaction.
 - (g) A deceptive act or practice may occur by failing to state a material fact. Selling a motor vehicle that is not compliant with the MVA and not advising the consumer of that fact is a deceptive act or practice.
 - (h) The mandatory disclosure requirements within the MDA and its regulations, and under the BPCPA, are material facts.
 - (i) If it is alleged that a motor dealer or salesperson has committed a deceptive act or practice, the onus (burden of proof) is on the dealer and the salesperson to show that there was no deceptive act or practice.
- *Re: Best Import Auto Ltd. et al.* (November 28, 2017, Hearing File 17-08-002, Registrar) varied but not on these points in *Best Import Auto Ltd. et al.*

v Motor Dealer Council of British Columbia, 2018 BCSC 834 (CanLII) (BC Supreme Court).

- *Breezy Webster v. Pioneer Garage Ltd. dba Fraser Valley Pre-owned et al.* (April 27, 2018, File 17-07-002, Registrar)
- *Harris & Harris v. Windmill Auto Sales & Detailing Ltd. et al* (April 10, 2013, Hearing File 12-030, Registrar), affirmed by *Windmill Auto Sales & Detailing Ltd. v. Registrar of Motor Dealers*, 2014 BCSC 903 (CanLII) (BC Supreme Court).
- *Knapp v. Crown Autobody & Auto Sales Ltd. et al* (September 21, 2009, File 08-70578, Registrar), affirmed by *Crown Auto Body and Auto Sales Ltd. v. Motor Vehicle Sales Authority of British Columbia*, 2014 BCSC 894 (CanLII).

[21] In law, making a reckless misrepresentation is considered deliberate conduct: *Casillan v. 565204 B.C. Ltd. dba Daewoo Richmond*, 2009 BCSC 1335 (BC Supreme Court) at paragraph 20. Also, in law, being willfully blind to a set of facts and not making reasonable inquiries can also be considered deliberate conduct: *Wescom Solutions Inc. v. Minetto*, 2019 ONCA 251 (Ont. Court of Appeal). A deliberate misrepresentation is also known as a fraudulent misrepresentation: *Casillan v. 565204 B.C. Ltd. dba Daewoo Richmond*, *supra*.

[22] If the Registrar finds the commission of a deceptive act or practice, the Registrar is empowered to issue, among other things, a compliance order on terms that the Registrar deems necessary to address that breach and to gain the future compliance of the breaching person. The Registrar may also order the breaching person to pay the investigation and legal costs of the Registrar.

- Section 155 of the BPCPA
- *Windmill Auto Sales & Detailing Ltd. v. Registrar of Motor Dealers*

[23] Further, the Registrar is empowered to issue an administrative penalty of up to \$50,000 - against a company - or \$5,000 - against an individual - to deter any future non-compliance with the BPCPA.

- Sections 164 and 165 of the BPCPA
- *R. v. Samji*, 2017 BCCA 415 (CanLII), leave to appeal to the Supreme Court of Canada refused *Rashida Abdulrasul Samji v. Her Majesty the Queen*, 2018 CanLII 48394 (SCC)
- *Guindon v. Canada*, [2015] 3 SCR 3, 2015 SCC 41 (CanLII) (Supreme Court of Canada)
- *Re: Best Import Auto Ltd. et al.*
- *Breezy Webster v. Pioneer Garage Ltd. dba Fraser Valley Pre-owned et al.*

[24] Commission of even one deceptive act or practice is sufficient grounds for cancelling a motor dealer's registration: section 8.1(4)(b) of the MDA. The discretion to do so has been granted to the Registrar.

(c) Burden of Proof

[25] The burden of proof is on a balance of probabilities, which is often reframed as “it is more likely than not” that the alleged conduct occurred: *F.H. v. McDougall* [2008] 3 S.C.R. 41, 2008 SCC 53 (CanLII) (Supreme Court of Canada) at para. 44. The balancing is based on the existence of sufficiently clear, cogent, and convincing evidence, establishing the fact that is being advanced: *F.H. v. McDougall* at para. 46.

IV. Discussion

(a) Chronology of events

[26] Based on the submissions and documents presented, the following is a high-level chronology of events that is not contested:

Date	Event	Comments
Pre-February 8, 2018	A box 2 Notice and Order is issued against the Sierra.	The Sierra is ordered inspected under the PVI program and must pass the PVI if it is allowed to be on the highways.
February 8, 2018	Barnes takes the Sierra into inventory as a trade-in.	
February 13, 2018	Barnes conducts an inspection on the Sierra for the First Canadian Protection Plan (FCPP), a warranty program. Work Order # 162634.	The technician who conducts this inspection is number WIEH. The technician notes of the Sierra: <ul style="list-style-type: none"> - Has EGR deleted - Aftermarket air induction - DEF system has been removed² - Exhaust system altered - Rotors rusted The noted contact email is dquast@barneswheatongm.com
February 14, 2018	Barnes sells the Sierra to K.M.	On the purchase agreement, Barnes declares the vehicle is suitable for transportation and meets the requirements of the MVA.
Between Feb 14 and 19, 2018	Consumer K.M. is unable to insure the Sierra.	The existence of the Notice and Order on the Sierra is discovered.

² Diesel Exhaust Fluid system – fluid used to reduce harmful emissions in diesel vehicles

February 19, 2018	Barnes has a Provincial Private Vehicle Inspection conducted on the Sierra by an employee of Barnes who is a Designated Inspector Barnes Work Order # 162870.	The Designated Inspector is different than the one who conducted the FCPP inspection. The Sierra fails the inspection – it is not compliant with the MVA. The notations are: <ul style="list-style-type: none"> - Bumpers, not of a collapsible type as originally equipped - Fenders do not cover the entire width of the tires - EGR removed The noted email contact is dquast@barneswheatongm.com
February 20, 2018	The Sierra is sent to Air Charge Automotive in Langley for repairs and a PVI.	The Sierra receives a pass on its Provincial Private Vehicle Inspection.
Late March 2018	CVSE conducts its investigation and involves the Authority.	The Designated Inspector at Air Charge Automotive in Langley is issued a violation ticket for an improper inspection of the Sierra. The Designated Inspector admits to not inspecting the exhaust or checking for the EGR being removed on the Sierra, among other things.
June 22, 2018	Barnes unwinds the sale to K.M.	Barnes provides a full refund and includes payments made on the Sierra by K.M. and repairs completed by K.M.
Late June and early July 2018	The Sierra is sold by Barnes.	The Sierra is sold to a wholesale business and is subsequently resold two more times to wholesalers within about three weeks.

(b) Did Barnes make a misrepresentation regarding the Sierra’s safety at the time of the initial sale to K.M.?

[27] I turn to the Authority’s first allegation that at the time of the sale to K.M., Barnes and Devron Quast knew the Sierra had several safety issues and sold the

Sierra to K.M. without making repairs or otherwise advising the consumer of those safety issues.

[28] At the time of the initial sale to K.M. on February 14, 2018, Barnes was aware of the FCPP inspection report and the technician notes on its Work Order # 162634. The FCPP inspection report noted a pass for the Sierra. The technician's notes on the Work Order are:

- (a) Has EGR Delete
- (b) Aftermarket Air Induction
- (c) Lift kit on vehicle
- (d) DEF system has been removed
- (e) Exhaust system altered, and
- (f) Rotors rusted.

[29] On their face, these notations do not indicate the Sierra was unsafe. No other evidence was advanced by the Authority that these noted issues, or any other issues made the Sierra unsafe.

[30] When the Designated Inspector at Barnes completed the Provincial Private Vehicle Inspection on February 19, 2018, the Designated Inspector failed the Sierra – it was not compliant with the MVA – noting the following three categories:

- (a) Bumpers – not a collapsing type as originally equipped,
- (b) Body Exterior/Protruding Metal – Fenders do not extend full width of tire tread, and
- (c) Exhaust System & Catalytic Converter – EGR removed.

[31] No evidence was advanced that the removal of the emissions components, the non-OEM style bumper or the fenders not being the full tread-width of the tires rendered the Sierra unsafe. The Designated Inspector's report is that these items rendered the Sierra non-complaint with the *Motor Vehicle Act*.

[32] The Authority did not allege that Barnes and Mr. Quast initially sold the Sierra to consumer K.M. knowing it was not compliant with the *Motor Vehicle Act* and failed to affect repairs to make it compliant or otherwise advise the consumer. As such, it would be procedurally unfair for me to now adjudicate that issue as Barnes and Devron Quast were not given notice of that allegation so they could defend themselves. I am confined to consider whether the Sierra was unsafe at the time of sale as alleged.

[33] There being no evidence establishing that at the time of the sale to K.M. the Sierra was not safe, I must dismiss this allegation.

(c) ICBC refused to insure the Sierra as it was unsafe

[34] The Authority alleges that because the Sierra was unsafe, ICBC refused to insure the Sierra. The evidence establishes that ICBC refused to insure the Sierra because of the outstanding Notice and Order, which is an order to have the Sierra inspected for compliance with the MVA. Therefore, this allegation must also be dismissed.

(d) Did Barnes and Devron Quast arrange for the Sierra to be fraudulently passed by Air Charge Automotive?

[35] I now turn to the allegation of whether Barnes and Mr. Quast arranged for the Sierra to be fraudulently inspected and passed by Air Charge Automotive. From the Investigation Report and the response from Barnes, it is clear Barnes was aware that the allegation was whether they committed a deceptive act contrary to the BPCPA and did so deliberately amounting to a fraudulent misrepresentation. Barnes' submissions are also clear they know the allegation was that they either did so by withholding information from the consumer or knowingly arranged for the Sierra to pass a PVI without the required repairs.

(i) Known facts

[36] At this juncture, it is important to note the uncontested and pertinent facts known to, and conduct undertaken by Barnes once its employee failed the Sierra on the PVI. Those facts can be summarized as follows:

- (a) Consumer K.M. could not insure the Sierra due to the outstanding Notice and Order. That is, an inspection to ensure the Sierra met the requirements of the MVA and its regulations.
- (b) To rectify the inability to insure the Sierra, Barnes' efforts were to have the Sierra pass a PVI so its customer could insure it, which the consumer ultimately did.
- (c) The cost for the FCPP inspection was \$165.21, taxes included, as noted on Work Order # 162634. This was an internal charge from Barnes' service department to Barnes Wheaton (North Surrey).
- (d) The Cost for the PVI conducted by Barnes' employee was \$165.15, taxes included, as noted on Work Order # 162870. This was an internal charge from Barnes' service department to Barnes Wheaton (North Surrey).
- (e) Barnes' submissions admit the cost to make the Sierra compliant with the MVA regarding the emission system components being removed was \$7,000 as estimated by Barnes' own service department.
- (f) Due to this high cost of repairs not being "a viable option" for Barnes, and according to Barnes, at the suggestion of a wholesaler who was also

interested in the Sierra, Barnes sent the Sierra to Air Charge Automotive in Langley for the required repairs and who would reinspect the Sierra. This occurred on February 20, 2018.

- (g) Air Charge Automotive in Langley passed the Sierra on the PVI on February 20, 2018, without completing the emissions repairs.
- (h) The "lot boy" for Barnes who picked up the Sierra from Air Charge Automotive, paid the \$157.50 for their services on his own credit card. The receipt shows payment was made on February 20, 2018 with a time stamp of 14:04:28.
- (i) The "lot boy" was reimbursed by cheque from the wholesaler.
- (j) The consumer K.M. was now able to insure the Sierra and the Owner's Certificate of Insurance and Vehicle Licence shows a "Transaction Timestamp" of 20180220155818. Using my knowledge of this time stamp, this means 2018 February 20 at 15:58:18. I would note the insurance agent stamp 57921 shows February 19, 2018 on that document. I was not advised why the date on the agent's stamp is different than the time stamp.
- (k) The CVSE investigation in March of 2018 concluded that the inspection done by the Designated Inspector at Air Charge Automotive in Langley was improper. This meant the Sierra had not passed the PVI. The Designated Inspector at Air Charge Automotive in Langley was cited with a violation ticket.
- (l) In late March of 2018, the CVSE advised Barnes of the improper inspection by Air Charge Automotive and that the Sierra was still considered not compliant with the MVA. Barnes' submissions admit to this as they state they decided to sell the Sierra on the wholesale market because the cost to make the Sierra compliant was cost prohibitive. This was after Air Charge Automotive was supposed to have made those repairs. Clearly, Air Charge Automotive had not.
- (m) In June of 2018 Barnes bought back the Sierra from consumer K.M. and reimbursed consumer K.M. for various other costs related to K.M.'s ownership.
- (n) The CVSE stated it was not going to cite Barnes with a violation ticket because Barnes was going to address the consumer's harm.

[37] Some other unchallenged facts on the Air Charge Automotive PVI Form are important to note:

- (a) Air Charge Automotive noted the owner of the Sierra as Calgary Elite Auto with a Calgary address on its PVI report form. Not the consumer K.M. or even Barnes. When Barnes conducted the PVI, it noted Barnes as the owner/lessee.
- (b) Air Charge Automotive noted the reason for the PVI was because the vehicle was a first time registered in B.C. vehicle. It was not. When Barnes conducted the PVI, it noted the reason for the PVI as a Notice and Order.
- (c) Air Charge Automotive noted the jurisdiction of the Sierra as SK (Saskatchewan) on the PVI report form. When Barnes conducted the PVI, it noted the jurisdiction as B.C.

(ii) Did Barnes commit a deceptive act or practice?

[38] On February 20, 2019, the Sierra was sent to Air Charge Automotive for repairs to make it compliant with the MVA and where it received a pass on the PVI Inspection sometime that day.

[39] The consumer was clearly advised by Barnes that the Sierra passed the PVI – meaning it was compliant with the MVA - as he obtained insurance on the Sierra that day. Barnes’ submission states it advised the consumer of all three inspections – the FCPP inspection, the Barnes PVI, and the Air Charge Automotive PVI.

[40] The Air Charge Automotive PVI was improperly done and the Sierra had not in fact passed a PVI and was not compliant with the MVA. Barnes’ submissions admit that when they bought the vehicle back from the consumer, the cost to repair the emissions was “cost prohibitive” so Barnes sold the Sierra on the wholesale market making the required declarations. This means Barnes admits that no repairs were done by Air Charge Automotive. Barnes also admits Mr. Quast missed this fact.

[41] Based on the above, Barnes advising the consumer K.M., by words or by conduct, that the Sierra had passed the PVI, and therefore was compliant with the MVA, when it was not, meets the definition of a deceptive act or practice contrary to the BPCPA. See the general definition of deceptive act or practice in section 4(1) of the BPCPA and see also section 4(3)(a)(ii) which deems the following to be a deceptive act or practice.

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

- (a) a representation by a supplier that goods or services
- (ii) are of a particular standard, quality, grade, style or model

if they are not,

[42] Clearly, the Sierra did not meet the standards set by the MVA, as represented to the consumer K.M. by Barnes.

[43] Under the BPCPA, if a dealer relies on the information of a third-party to make its representations to its consumer and the third-party is in error, the dealer has still committed a deceptive act or practice vis-à-vis its consumer by making a false representation. The dealer remains responsible to the consumer and for any harm caused to the consumer by that false representation. If the dealer has suffered harm due to the third-party's misconduct, the dealer needs to pursue that separately with the third-party.

[44] The dealer's reliance on a third-party forms part of the consideration of whether the dealer's breach of the BPCPA was innocent, negligent or deliberate (which in law includes being reckless or willfully blind). That determination helps inform what, if any, compliance and enforcement action is necessary to deter the dealer in the future.

[45] I now turn to consider whether Barnes' representation regarding the Sierra passing the PVI conducted by Air Charge Automotive was innocent, negligent or deliberate.

(iii) Was the misrepresentation innocent, negligent or deliberate/fraudulent?

[46] I find on a balance of probabilities that Barnes and Mr. Quast deliberately arranged for the Sierra to pass the PVI at Air Charge Automotive without having repairs completed. Therefore, their misrepresentation, by words or by conduct to consumer K.M., that the Sierra was compliant with the MVA was deliberate which amounts in law to a fraudulent misrepresentation. My reasons for arriving at these findings of fact are as follows.

[47] The evidence shows that the Sierra was sent to Air Charge Automotive to have the emissions repaired and the Sierra inspected. Barnes admitted this was the intention as the cost for it making those repairs was prohibitive. Barnes' submissions say that Mr. Quast made those arrangements with Air Charge Automotive. If I accept Barnes' submissions, they were surprised those repairs had not been made. Barnes says this was an error or an oversight on the part of Mr. Quast when he examined the report from Air Charge Automotive. I have difficulty in accepting this explanation.

[48] Applying common sense and my own experience in managing service departments, a service department carries out the service authorized by the requesting party. One does not show up at a service department drop off the keys and then expect the service department to carry out some unmentioned desired service. Further, estimates of the service/repairs must have been discussed and authorized. Finally, if I accept Barnes' contention, this means that Air Charge

Automotive decided on its own to not carry out the emission repairs and forgo the revenue that would generate. This all simply does not make common sense.

[49] Next is the completed PVI Form from Air Charge Automotive. Barnes' submissions indicate that Mr. Quast saw that report. On the Air Charge Automotive PVI Form, the noted person (owner/lessee) requesting the PVI is a Calgary car dealership. It would appear Mr. Quast missed this too when he reviewed that report, but Barnes does not mention that in its submissions. It is extremely odd for Barnes to send the Sierra in for repair work and a PVI but have Air Charge Automotive use a Calgary car dealership as requesting the inspection. Barnes indirectly asks me to accept that Air Charge Automotive must have somehow erred by using the Calgary dealership, when Barnes sent in the Sierra and its lot boy paid for the PVI. That is hard to accept, especially when looking further at the Air Charge Automotive PVI Form and the other evidence.

[50] There are two other out-of-place notations on the Air Charge Automotive PVI Form. First is the reason for the inspection – first time registered in B.C. That was not true. Why would Air Charge Automotive note that as the reason when the vehicle was from Barnes and had been registered in B.C. The Barnes' Designated Inspector noted the reason for Barnes' PVI as – Notice and Order – which was correct. Again, Barnes would ask me to believe this was an error on the part of Air Charge Automotive. Second and related to the first, is the jurisdiction of Saskatchewan was noted. The Sierra was a B.C. vehicle. Again, why would Air Charge Automotive use Saskatchewan as the jurisdiction when the Sierra was a B.C. vehicle?

[51] When looked at together, these three inconsistencies on the Air Charge Automotive PVI Form look deliberately done to keep Barnes' name off the report. The three inconsistencies could make sense if the vehicle was owned by the Calgary dealer selling it to a B.C. resident. It is hard to accept these three inconsistencies were errors on the part of Air Charge Automotive, when they must have known the Sierra was coming from Barnes. It also does not make sense for Barnes' lot boy to pay for the Sierra's inspection purportedly for a Calgary dealer.

[52] Stapled to the invoice is a receipt for \$157.50 paid for by Barnes' lot boy on his personal credit card and who was reimbursed by a wholesaler – not Barnes. The \$157.50 amount approximates the amount Barnes charged itself for its two inspections. It would be abundantly clear that a charge of \$157.50 would not cover repairs that were estimated at \$7,000. That is a stark difference to miss.

[53] Finally, when Barnes bought back the Sierra from the consumer, they did not make the repairs needed to make the Sierra compliant with the MVA. They instead sold the Sierra on the wholesale market. If Barnes was willing to pay Air Charge Automotive to make those repairs for its customer, one would expect they would do so in order to sell the Sierra retail. Again, Barnes' reason for not doing so was because such repairs were cost prohibitive.

[54] I find that what all this evidence shows is a plan to have the Sierra pass the PVI at little cost to Barnes, to keep Barnes out of any official paper trail (the PVI Form) and to be able to blind itself to the realities of how the Sierra obtained its pass from Air Charge Automotive. This was not errors on the part of Air Charge Automotive or anyone else. It was planned and deliberate and at the direction of Barnes and Mr. Quast.

V. Comments on EGR removal knowledge being a violation of MVA

[55] The following are only comments and were not considered in making my findings of fact.

[56] In its submissions, Barnes notes it was not, and the industry is probably not, aware that removing EGRs is not allowed under the MVA and renders a motor vehicle not compliant with that Act. In its research, it notes other dealers selling vehicles and specifically advertising removed EGRs.

[57] Based on the facts, I find this statement to be somewhat disingenuous.

[58] Two of Barnes' technicians noted the removed (deleted) EGR on the Sierra on the FCPP inspection and the PVI conducted by Barnes. Barnes' employee, who is a Designated Inspector, failed the Sierra and noted one reason was the removed EGR. Barnes is a Designated Inspection Facility. In carrying out the duties as such a facility, it is required to know what is and is not compliant with the MVA.

[59] The fact is that Barnes did know that a motor vehicle with a removed EGR is not compliant with the MVA. That knowledge rests with at least one of its employees based on the facts. What Barnes asks of me is to partition a dealer's knowledge between its sales-staff and its service department staff. If that knowledge exists within Barnes, it is deemed to know that fact regardless of where that knowledge lies. It is incumbent upon Barnes to recognize the importance of that knowledge and to train all its staff who need to know that knowledge. As stated by Justice Skolrood:

[59] In my view, it is incumbent upon a party that operates within a regulated industry to develop at least a basic understanding of the regulatory regime, including its obligations under the regime, as well as the obligations, and the authority, of the regulator.

- *Windmill Auto Sales & Detailing Ltd. v. Registrar of Motor Dealers*, 2014 BCSC 903 (BC Supreme Court)

See also *Ontario (Registrar, Motor Vehicle Dealers Act) v. Unity-A-Automotive Inc.*, 2009 CanLII 67420, (Ont. Superior Court of Justice) at CanLII paragraph 27:

[27] The MVDA [Ontario's Motor Vehicle Dealers Act] is consumer protection legislation and, therefore, it is important for an applicant for registration to know his obligations under the governing legislation. However, the respondent

testified that he did not understand the legal side of the business. The Tribunal's reasons fail to address the public policy implications of granting registration to a person who does not understand the statutory requirements and who will have serious difficulty in doing so.

VI. Summary of my findings

[60] I have dismissed the first allegation that Barnes and Devron Quast knew the Sierra had safety issues and did not repair them or advise the consumer of those safety issues. While the Sierra was not compliant with the *Motor Vehicle Act* at the time of the sale to the consumer³, the deficiencies were not shown to be unsafe.

[61] I have dismissed the second allegation that due to Barnes and Mr. Quast selling the Sierra with safety issues, the Sierra could not be insured. The Sierra could not be insured because there was an outstanding Notice and Order that the Sierra be inspected to see if it was compliant with the *Motor Vehicle Act*.

[62] I have found that Barnes and Mr. Quast knowingly took steps to have the Sierra inspected to pass the *Motor Vehicle Act*, without the required repairs to make it compliant with that Act. I further find that Barnes and Mr. Quast, by words and by conduct, advised the consumer the Sierra met the requirements of the *Motor Vehicle Act* when it did not and knowing that it did not. I found Barnes and Mr. Quast to have engaged in a deliberate misrepresentation, a deliberate deceptive act or practice, contrary to the *Business Practices and Consumer Protection Act*.

VII. Next steps

[63] Normally, after making my findings on liability, I would consider if a consumer remedy or compliance action is warranted and costs. In this case, any consumer harm has been addressed by Barnes.

[64] The Registrar is not required to hold separate hearings as to liability and as to compliance/penalty: *Best Import Auto Ltd. v Motor Dealer Council of British Columbia*, 2018 BCSC 834 (BC Supreme Court) at paragraphs 39 to 52. Even so, the facts of an individual hearing may suggest the better approach is to separate liability from penalty in order to have a fair and better-informed decision.

[65] In this case, I would note the various compliance actions the Authority seeks as detailed in the Hearing Notice against Barnes and Devron Quast. They range from conditions on licence, to compliance orders and administrative penalties to cancellation of licences. I note the Authority, Barnes and Mr. Quast provided background of Mr. Quast to consider these compliance options. Less so about Barnes.

[66] If I am to consider issuing administrative penalties for breaching the BPCPA, I need to consider evidence going to the legislatively required considerations in

³ Which the Authority did not allege.

section 164(2) of the BPCPA. More information on those factors would make for a more informed and fairer decision.

[67] Finally, the Authority's recommended compliance action was based on a consideration of the three allegations it advanced. I have only found liability on one of those allegations. My findings here may now allow the Authority to reconsider its position on compliance and refine its recommendations.

[68] Based on all these unique facts, I believe the more appropriate approach in this particular case is to hold a separate written hearing on any compliance action that should be taken in relation to Barnes and Mr. Quast. I direct the following process:

- (a) The Authority is to provide any submissions and evidence for my consideration regarding compliance action and costs within 21 days of this decision's date, serving a copy of the same on Barnes and Devron Quast.
- (b) Once the steps in (a) are complete, Barnes and Devron Quast will have 21 days to provide any submissions and evidence for my consideration in response to the Authority, serving a copy on each other and on the Authority.
- (c) Once the steps in (b) are complete, the Authority will have 14 days to file any Reply, serving a copy on Barnes and Devron Quast.

[69] The parties can direct any submissions and evidence for my consideration to my assistant Preet Jassal at preet@mvsabc.com.

VIII. Review of these findings

[70] As I have not issued a compliance order; a notice of administrative penalty; cancelled or suspended a licence; or added conditions to a licence; there is no "determination" as defined in the MDA or the BPCPCA; and therefore, currently there is no right to request a reconsideration of this decision under those Acts.

"original is signed"

Ian Christman, J.D.
Registrar of Motor Dealers