



Investigation File 18-02-131
Hearing File No. 19-07-002

Neutral Citation: 2019-BCRMD-021

**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**

STEPHEN PHAM and BINH XOUNG PHAM

Consumer Complainants

MOTOR VEHICLE SALES AUTHORITY OF BRITISH COLUMBIA

Complainant

And

SUPER SALE AUTO LTD.

(Motor Dealer Registration #40285)

Respondent Dealer

And

NAVID KHOSHBAKHT

(Salesperson Licence #202467)

Respondent Dealer Principal

DECISION OF THE REGISTRAR OF MOTOR DEALERS

Date and location of decision: January 3, 2020 at Langley, British Columbia

By way of written submissions

I. Introduction

[1] Stephen Pham and Binh Xoung Pham, Stephen's father, filed a complaint against Super Sale Auto Ltd. Dealer # 40285 ("Super Sale"). The two were co-purchasers of a 2006 Mazda RX8 (the "Mazda"). The purchase agreement was dated November 26, 2017. They filed their complaint on March 9, 2018.

[2] The allegations are that Super Sale and its owner Navid Khoshbakht did (paraphrasing):

- (a) sell the Mazda as “not suitable for transportation” and then allowed the Mazda to be registered and insured and then driven off the dealer lot,
- (b) breach their Undertaking of November 29, 2016, that they would:
 - (i) abide by the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 (“BPCPA”),
 - (ii) abide by the *Motor Dealer Act Regulation*, B.C. Reg. 447/78 (“MDAR”),
 - (iii) abide by the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 (“MVA”) and
 - (iv) have all vehicles inspected to ensure they meet the safety standards of the Province of British Columbia, and keep documentation of these inspections on file for review by the Motor Vehicle Sales Authority of British Columbia (“Authority”), and
- (c) sell the Mazda to Stephen Pham who was a minor at the time and have Stephen initial disclosures statements on the purchase agreement,
- (d) represented the Mazda as inspected by their own mechanics with no issues on several occasions, but have failed to produce to the Authority any documents to that effect after demands for those documents, and
- (e) sell motor vehicles that were “not suitable for transportation” contrary to the MVA and their Undertaking of November 29, 2016.

[3] In support of the allegations are two investigation reports with attached evidence, statements of Stephen Pham and an audio recording involving Stephen Pham and Navid Khoshbakht.

[4] The first investigation report is from Compliance Officer, Adam Reynolds who investigated the complaint of the Phams’ and is dated June 5, 2018. The second is the investigation report of Compliance Officer, Carrie VanDokkumburg and is dated January 31, 2018. Ms. VanDokkumburg had conducted an inspection of Super Sale to see if it was complying with its Undertaking. Ms. VanDokkumburg’s report alleges Super Sale had continued to sell motor vehicles contrary to the Undertaking.

II. Procedure

[5] This hearing was conducted by way of written submissions. The Authority, Super Sale, Navid Khoshbakht, and Stephen Pham were provided an opportunity to

respond to the allegations and to the presented evidence. The Authority has relied on its Hearing Notice and the evidence described above. Stephen Pham provided evidence in the form of the Consumer Complaint Form and follow up emails with attachments. I have nothing other than its initial dealer response to a complaint from Super Sale and Navid Khoshbakht and the time in which they could provide further submissions has passed.

III. Basic Legal Considerations

A. Vehicles Unsuitable for Transportation

[6] In the case of *Best Imports Auto Ltd. et al.*, I detailed the legal requirements on a motor dealer regarding vehicles being not suitable for transportation. I will summarize those requirements here.

- (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 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 safety 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”, 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).

[7] Section 222 of the MVA, sections 8.01 and 8.02 of the MVAR and related provisions of the MVA (ex. section 219) work together with sections 21(2)(e) and (f), 22 and 27(b) of the MDAR by requiring a motor dealer ensure a vehicle is compliant with the MVA and MVAR even if offered for sale, in order to protect the public. It requires that certain safety components of a motor vehicle meet the identified minimum standards to ensure safe highways 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.

- *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 – the BPCPA

[8] I have discussed in detail the law regarding deceptive acts or practices under the BPCPA in previous decisions. I summarize the pertinent legal principles 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.
- (b) The motor dealer must refrain from such conduct, even if the consumer is a willing or instigating party to the deceptive conduct.
- (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.
- (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.
- (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).

[9] 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*

[10] 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.*

[11] Commission of a 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 by the B.C. Legislature.

C. Burden of Proof

[12] 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 on the Allegations

(a) Not suitable for transportation

[13] The Mazda was declared as not suitable for transportation and sold for parts only on the purchase agreement: Investigation Report, Exhibit A. In the tape recording provided by the complainants of a conversation they had with Mr. Khoshbakt, Mr. Khoshbakt makes mention of this fact. The complainant does not disagree.

[14] The advertising on the dealer website for the Mazda that is in evidence, does not show a declaration of "not suitable for transportation": Investigation Report, Exhibit B. However, the only thing showing in that advertisement is a picture of a Mazda RX-8 and a price. There are other vehicles advertised on the webpage in a similar fashion. I am unaware if there is any other information if one would click on the picture. An interview of the salesperson involved says the Mazda was never advertised as "not suitable for transportation" or "sold as parts.": Investigation Report, page 2, and Exhibit F, page 23 line 2 to page 24, line 6. The dealer has chosen not to respond to this evidence and therefore the allegation and evidence is unchallenged.

[15] The webpage advertisement for the Mazda RX-8 does not identify it as being the Mazda which is the subject of the complaint. However, the salesperson's interview confirms the Mazda was not advertised as "not suitable for transportation" as required by section 22 of the MDAR. This constitutes a misrepresentation by omission and deemed a deceptive act or practice contrary to section 5(1) of BPCPA.

[16] On Super Sale's website advertisement is a representation that says, "Let Super Sale show how easy it is to buy a quality used car in Coquitlam." Reading the advertising once and considering the words used, the dealer has made a general representation and left a general impression that it only sells quality used cars: *Richard v. Time Inc.*, 2012 SCC 8 (CanLII), [2012] 1 SCR 265 (Supreme Court of Canada) at paragraphs 56-57. Selling a motor vehicle for parts only and declared as "not suitable for transportation" is clearly inconsistent with the general impression of selling only quality used cars advanced by Super Sale on its website: *Casillan v. 565204 B.C. Ltd.*, 2009 BCSC 1335 at paragraph 28. Further, Super Sale allowed the Mazda to be insured and driven off its lot instead of the recommended practice of requiring the Mazda be towed away. These inconsistencies have the capability of misleading consumers and is a deceptive act or practice contrary to section 5(1) of the BPCPA: *Casillan, supra*.

(b) Breach of prior Undertaking

[17] In paragraph 2(b) above, I note the conditions of Super Sale's Undertaking dated November 29, 2016.

[18] In the above paragraphs I have found Super Sale to have breached the BPCPA and section 22 of the MDAR. These constitute breaches of the Undertaking dated November 29, 2016.

[19] I have no evidence to show the Mazda was not compliant with the MVA at the time of sale.

[20] Super Sale advised Compliance Officer Reynolds that the Mazda was inspected by their mechanics several times. Compliance Officer Reynolds states he requested copies of these inspection reports from Super Sale, which were never produced. In the Licensing Hearing Report of Carrie VanDokkumburg, she indicates several vehicles displayed for sale on Super Sale's lot were inspected in November 2017. The inspections were by Inspectors from the Ministry of Transportation and Infrastructure's Commercial Vehicle Safety Enforcement branch. The Inspectors issued Notices and Orders to have four vehicles inspected at a designated inspection facility on reasonable and probable grounds that they were not compliant with the MVA. A month later, some of those same vehicles were advertised for sale on the dealer's website and on its lot. Super Sale never produced copies of the required inspection reports to the Authority. I am satisfied that Super Sale has breached the condition of its Undertaking to produce to the Authority records of vehicle inspections.

(c) Selling to a minor

[21] One of the allegations is that one of the complainants was a minor when Super Sale sold the Mazda to him as a co-owner and had him initial the disclosures.

[22] It is not "illegal" to sell a product and to contract with a minor. The *Infants Act* sets up a general rule that a minor is not competent to contract and a contract with a minor cannot be enforced against the minor. There are exceptions or conditions when such a contract becomes enforceable against a minor. I note that section 7 of the *MVA* specifically contemplates a minor applying for registration and the licensing of a motor vehicle if certain conditions are met, such as the application is also signed by a parent or guardian. Therefore, merely selling a motor vehicle to a minor cannot be "illegal".

[23] In this case, the purchase agreement is also in the name of the parent of the main complainant. The evidence, including the complainant's own tape recording of his conversation with Mr. Khoshbakt, establishes that the father and the main complainant's sister were present when the purchase agreement was signed and the disclosures initialed. A claim is made that the father did not understand English. Even so, there were others in the claimant's family who were present who did speak English. Finally, I would note that the transaction appears to have occurred over a few days as the negotiation over the price and an inspection of the Mazda took place. Based on the evidence before me, I cannot say there was any pressure placed on the consumers on the part of Super Sale.

[24] I do not find enough evidence to establish any wrong doing on this allegation. This allegation is dismissed.

(d) Vehicles being inspected and failing to produce inspection reports

[25] I have addressed this allegation in paragraph 20 above.

(e) Sell a vehicle not suitable for transportation contrary to the *Motor Vehicle Act & Undertaking*

[26] The Authority alleges Super Sale sold the Mazda as not suitable for transportation contrary to section 222 of the MVA.

[27] The *MVA* does not prohibit the sale of motor vehicles that are not suitable for transportation. If that were the case, then there would be no used cars available to auto wreckers.

[28] As earlier noted, section 222 of the *MVA* requires that certain safety components of a motor vehicle that is displayed for sale, offered for sale and sold for use on the highways, meet certain minimum standards set out in that Act or its regulations. If the motor vehicle does not meet those requirements, then it cannot be sold for "use on the highways". It must be used for purposes other than transportation, such as for parts and declared as "not suitable for transportation" by a motor dealer. Section 222 of the *MVA* prohibits the displaying for sale, the advertising for sale or the sale of motor vehicles for use on the highway, that are legally not suitable for transportation.

[29] There is no evidence that at the time of sale, the components of the Mazda did not meet the minimum standards in the *MVA* or its regulations. What occurred is Super Sale made misrepresentations regarding the Mazda's suitability as transportation in respect of the consumer transaction, contrary to the BPCPA, which I have already addressed above. Those representations were made to indicate Super Sale did not guarantee the fitness of the Mazda if the consumer wanted to purchase it at the discounted price.

[30] This allegation is dismissed.

V. Findings on the Allegations

[31] Based on the above discussion, the following are my findings on the allegations:

- (a) Super Sale committed a deceptive act or practice in respect of a consumer transaction contrary to section 5(1) of the BPCPA, by selling and representing on a purchase agreement that the Mazda was not suitable for transportation, which is inconsistent with the Super Sale's general representation that it sells quality used cars, and

- (b) Super Sale is in breach of its Undertaking dated November 29, 2016 as it:
- (i) Breached the BPCPA as noted in (a) above, and
 - (ii) Failed to provide the Authority records of motor vehicle inspections upon request as required by that Undertaking.

VI. Consumer Requested Remedies

(a) Legal considerations

[32] Any consumer remedy for a misrepresentation under the BPCPA, must still meet the common law elements of such a claim:

- (a) a representation that is untrue or misleading – a misrepresentation,
- (b) the consumer reasonably relied on the misrepresentation,
- (c) the consumer experienced damages due to the misrepresentation, and
- (d) there is some evidence of the amount of damages (legally called quantum of damages) that the consumer suffered due to the misrepresentation.

[33] The BPCPA modifies the first of these common law elements ((a) misrepresentation) in aid of consumer protection in the following ways:

- (a) once there is some evidence that a misrepresentation occurred, the onus shifts to the dealer to show the misrepresentation did not happen, was in fact true or was not misleading: section 5(2) of the BPCPA, and
- (b) deems certain conduct to be misrepresentations: section 4(3) of the BPCPA.

[34] The consumer still has the burden to show that it reasonably relied on the misrepresentation; that the damages it seeks is due to the misrepresentation; and provide some evidence of the amount (quantum) of those damages.

- *Bunyak v. Daryl's Best Buys Auto Sales Ltd.* (October 5, 2015, File 14-12-002, Registrar)
- *Crowston v. Platinum Auto Corporation* (April 26, 2012, File 12-002, Registrar)
- *Casillan v. 565204 B.C. Ltd. dba Daewoo Richmond*, 2009 BCSC 1335 (BC Supreme Court)
- *Vavra v. Victoria Ford Alliance Ltd.*, 2003 BCSC 1297 (BC Supreme Court)

[35] If the misrepresentation was not reasonably relied on by the consumer when they made their decision, they would generally not be entitled to damages. The BPCPA remedies consumer harm due to actions of the supplier (Super Sale in this case) and not remedy errors of judgement by consumers: *Crowston v. Platinum Auto Corporation*. This was noted by Justice Tysoe of the BC Supreme Court:

[88] In *Miller v. Lavoie* (1966), 1966 CanLII 426 (BC SC), 60 D.L.R. (2d) 495 (B.C.S.C.), Wilson C.J.S.C. made the following observation about predecessor legislation dealing with unconscionable transactions:

This Court exists for many purposes and one of these purposes is the protection of unsophisticated and defenceless persons against the exactions of conscienceless persons who seek to take advantage of them. The legislation provides one method of exercising that benevolent authority. But the Courts are not empowered to relieve a man of the burden of a contract he has made under no pressure and with his eyes open, merely because his contract is an act of folly. (p. 501)

- *Bain v. The Empire Life Insurance Company*, 2004 BCSC 1577 (BC Supreme Court)

[36] The Registrar is not empowered to grant remedies for what are known as *Sale of Goods Act* claims. For instance, a claim that a vehicle was not reasonably fit and durable at the time of sale, is a claim under section 18 of the *Sale of Goods Act*. Unless it can be shown the dealer misrepresented the vehicle's condition, the Registrar cannot grant any remedy for such claims.

[37] Finally, obtaining the cancellation of a contract for a misrepresentation is rare. To be able to repudiate (cancel) a contract requires showing the aggrieved person did not receive substantially the thing they bargained for. There may be public policy reasons to allow canceling a contract under the BPCPA, but these too are rare. Generally, the measure of damages for a breach of the BPCPA is contractual; the cost to put the person into the position they would have been had the representation been true.

- *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 (Supreme Court of Canada).
- *Mikulas v. Milo European Cars Specialists Ltd. (1995)*, 1995 CanLII 2431 (BC CA), 60 C.P.R. (3d) 457 (BC Court of Appeal) at para. 9
- *Casillan v. 565204 B.C. Ltd. dba Daewoo Richmond*, 2009 BCSC 1335 (BC Supreme Court) at paragraph 34.
- *Harris & Harris v. Windmill Auto Sales & Detailing Ltd. et al* (April 10, 2013, File 12-030, Registrar) affirmed by *Windmill Auto Sales & Detailing Ltd. v. Registrar of Motor Dealers*, 2014 BCSC 903 (BC Supreme Court).
- *Knapp v. Crown Auto Body and Auto Sales Ltd. et al. (Registrar, File 08-70578, September 21, 2009)* and affirmed by *Crown Auto Body and Auto Sales Ltd. v. Motor Vehicle Sales Authority of British Columbia*, 2014 BCSC 894 (BC Supreme Court).

(b) The consumer’s damage claims

[38] The consumer seeks:

- (i) to have the transaction cancelled and a full refund,
- (ii) costs to replace the radiator and brakes reimbursed,
- (iii) costs to diagnose the check engine light and engine issues, and
- (iv) costs for a fuel cap replaced to address the check engine light.

I will discuss each of these in turn.

(i) Cancel the contract

[39] In reviewing the evidence and the recording provided by the main complainant, I do not find sufficient evidence that the consumer did not obtain substantially what they bargained for, the Mazda. There may have been mechanical issues after purchase, which I will discuss shortly, but they do not amount to a claim that the consumer did not obtain what they bargained for. There is also no public policy reason to cancel the contract as there was in the case of *Harris & Harris v. Windmill Auto Sales & Detailing Ltd. et al.* More on this when I discuss below the complainant’s request for reimbursement of the engine diagnostics.

(ii) Costs to replace the radiator and brakes

[40] The consumer requests reimbursement for replacing the radiator and brakes on the Mazda as noted in his email of September 27, 2019. Based on a hand-written note from Performance Radiator, an Amazon invoice and an e-Bay print off, the associated costs are as follows:

(a)	Performance Radiator - “radiator”	\$350.00
(b)	Performance Radiator - “fron [sic] and rear brake”	\$380.00
(c)	Amazon - “Aluminum replacement radiator”	\$154.21
(d)	Amazon - various additional parts for radiator	<u>\$138.21</u>
	Total	\$1022.42

[41] The consumer bargained with the dealer over the price of the Mazda. The initial price the dealer wanted was \$6,988. The dealer agreed to lower the price to \$5,000 on condition the consumer accept the Mazda as “not suitable for transportation.” The purchase agreement specifically notes “No further repair from Super Sale Auto selling car for parts”. That notation is initialed by the purchaser. In the recording provided by the consumer, the dealer restates that this was their bargain and the consumer does not disagree. The price reduction was \$1,988.

[42] Before the consumer took possession of the Mazda¹, the dealer insisted that it be inspected. The dealer had this completed the day after the purchase

¹ A person is not deemed to possess a motor vehicle until it is in their or their agent’s actual possession and control: section 5 of the *Sale of Goods Act*.

agreement was signed. The inspection report from International Auto Service notes the radiator and brakes need replacing and there were some burnt out lights, the inspection report otherwise states the "vehicle in good condition". In the recording provided by the consumer, the inspection and Mazda's condition and the need for repairs was also discussed between the dealer principal and the consumer. The consumer did not disagree that they were shown the inspection report before they took possession of the Mazda. In the written email from the main complainant (the son), he noted receiving the "paper saying the problems with the car". The consumer goes on to indicate naivety regarding the rest of the papers provided.

[43] On this evidence, I cannot find how the dealer misled the consumer. The inspection report is clear that the vehicle required brakes and a radiator. The consumer's own evidence affirms they were made aware of these required repairs prior to taking possession of the Mazda. In this case, I cannot say the consumer reasonably relied on the dealer's misrepresentation regarding the suitability of the Mazda as transportation to their detriment, as it relates to the radiator and brakes.

[44] Even if I am wrong on the issue of reasonable reliance, the above costs of \$1022.42 are below the \$1,988 discount the consumer received on the asking price for the Mazda, in recognition that the dealer was not going to be responsible for future repairs. This would include repairs to the radiator and the brakes that the consumer was made aware of prior to taking possession of the Mazda. The consumer has failed to show their damages on this allegation.

(iii) Costs to diagnose check engine light and engine condition

[45] The consumer has provided a receipt from Destination Vancouver Mazda for \$433.44 for diagnosing the Mazda's running condition complaint. Only part of the invoice and the notations on it can be seen. Destination Mazda checked for trouble codes and did some further diagnoses and determined the engine on the Mazda would need to be replaced.

[46] The odometer reading noted on the November 26, 2017, purchase agreement for the Mazda is 152,000 km (even). The odometer reading noted for the Mazda on the November 27, 2017, International Auto Service inspection report is 152,406 km. The odometer reading noted on the January 26, 2018, Destination Vancouver Mazda work order was 153,169 km. The documents suggest that the consumer's complaint of the Mazda engine running condition arose about 60 days and 763 km after purchase.

[47] Returning to the Performance Radiator invoice, there is no notation of the date of those repairs (replacing the radiator and brakes) nor of the odometer reading. The Mazda is not even identified as the vehicle repaired on that invoice. I would note that the invoice appears to be "off" in that the header is of a different shading than the brighter part of the invoice where the hand-written notations of the work done, and price paid are located. It would have been preferable to have seen the original invoice to see if this is in fact how the invoice is laid out. I also note that the consumer appears to have provided the radiator parts to Performance

Radiator as noted on the Amazon and eBay receipts in his personal name. There is no receipt(s) showing the cost of the brake parts that were installed.

[48] In the tape recording by the main complainant, the dealer principal speaks about the consumer driving the vehicle in the red-line as well as driving the Mazda without coolant, which could have affected the engine's performance and damaged the engine. The consumer does not deny those comments from the dealer principal.

[49] Destination Mazda's diagnoses was that the compression rating in the engine's cylinders are lower than specification. Destination Mazda's invoice, as far as I can see, did not state why the engine is in that condition. Destination Mazda did not state the engine issue was a pre-existing condition at the time of sale. Nor did Destination Mazda state the condition occurred after the sale.

[50] In the case of *Sugiyama v Pilsen, dba Southgate Auto Sales* 2006 BCPC 265 (Prov. Court), the court considered whether the dealer was liable to the consumer under the *Sale of Goods Act* where the engine in the consumer's Ford Escort failed after they purchased it from the dealer. The facts that were considered were:

- (a) At the time of the sale, the Escort's mileage was recorded as 140,146 km
- (b) The consumer had the vehicle for 32 days without an issue with the engine,
- (c) The engine failed 616 km after purchase,
- (d) At the time of the sale, the consumer was offered an extended warranty but declined,
- (e) The engine failure was determined to be normal wear-and-tear that could not be determined on a regular inspection, and
- (f) The dealer did not make any other representations about the vehicle's condition or fitness.

[51] The Court in *Sugiyama* did not find the dealer to be liable under the *Sale of Goods Act*, for the following reasons:

- (a) the Escort was a used vehicle,
- (b) the mileage of the Escort at the time of sale - 140,146 km,
- (c) the failure was determined to be due to wear-and-tear after it was disassembled and inspected. The failure or potential for a failure could not be determined with a normal inspection, and there would be no warning of this,
- (d) the dealer provided no guarantee and made no representations about the vehicle's fitness. In fact, the dealer suggested the consumer purchase an extended warranty which should have put the consumer on notice that the vehicle may eventually have a mechanical failure, and
- (e) there was no evidence the dealer was aware of an issue with the engine prior to the sale.

[52] In this case:

- (a) The day after the sale, the Mazda's odometer was recorded as reading 152,406 km,
- (b) The consumer possessed the vehicle for approximately 60 days before the engine issue was diagnosed,
- (c) On the documents submitted, the engine issue occurred about 763 km after purchase,
- (d) The Mazda had repairs done to its radiator/cooling system between the time of the sale and the engine diagnoses. These required repairs were known to the consumer before they took possession of the Mazda,
- (e) There is no date or odometer reading for the Mazda at the time of the repairs to its radiator/cooling system. There was also no indication from Performance Radiator on its invoice of an engine problem,
- (f) Destination Mazda has diagnosed low compression in the engine but has not determined what has caused that low compression, and
- (g) The consumer negotiated a discount price for the Mazda and the dealer expressly stated the vehicle is "not suitable for transportation" and that the dealer was not liable for any future repairs. This clearly put the consumer on notice that the dealer was not guaranteeing the mechanical condition or fitness of the Mazda.

[53] I must be careful in assessing this aspect of the consumer's requested remedy. The question for me is whether there was a misrepresentation by the dealer that induced the consumer into making an error in judgement. If I do not find such a misrepresentation, then that is the extent of my jurisdiction. I cannot then go on to assess whether the Mazda was reasonably fit at the time of the sale. That is a *Sale of Goods Act* issue. If I do find a misrepresentation, then I can continue in determining if a remedy is warranted under the BPCPA for that misrepresentation. I could then consider the *Sale of Goods Act* only to the extent necessary to ensure any remedy I issue is consistent with the law: *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14 (Supreme Court of Canada) at paragraphs 25 to 27.

[54] In this case, I do not find the dealer misled the consumer in relation to the engine's condition. The dealer specifically noted the vehicle was being sold as "not suitable for transportation" and that it was not responsible for future repairs. The consumer was aware of this at the time of the sale and before they took possession of the Mazda.

[55] Further, before the consumer took possession of the Mazda, he was made aware of the radiator needing replacing. There is no indication when the replacement did occur. Destination Vancouver Mazda has not provided any evidence of why the engine failed or whether its condition existed prior to the consumer purchasing the vehicle. Is the engine's condition due to the Mazda overheating while in the possession of the consumer? Applying my experience in the auto repair industry, I know this could be a possibility. The fact that the consumer possessed the vehicle for close to 60 days and drove it some 763 km before requesting the

engine diagnosis suggests the engine condition was not apparent at the time of the sale. This is supported by there being no notation of an engine condition from Performance Radiator when they replaced the Mazda's radiator and brakes.

[56] It cannot be said that the dealer's misrepresentation by declaring the Mazda as "not suitable for transportation" led the consumer to purchase the vehicle resulting in the engine damage and the harm the consumer now claims. In fact, a reasonable consumer would question the purchase of a vehicle the dealer was declaring as "not suitable for transportation" and declaring that the dealer was not responsible for future repairs. There is no legally required causal link between the dealer's misrepresentation noted above and the engine failure.

[57] With no clear evidence linking a misrepresentation made by the dealer to the engine damage the consumer now claims, I must dismiss this aspect of the consumer's claim. I make no comment on whether the consumer would be successful if it brought a *Sale of Goods Act* claim in court.

[58] This aspect of my decision also informs my earlier decision that repudiation of the contract under the BPCPA is not appropriate on the evidence before me.

(iv) Cost of the gas cap

[59] The consumer seeks reimbursement for the cost of a replacement gas cap – \$33.97.

[60] In his email, he admits he tried replacing the gas cap to address the check engine light being on. He stated that this is often the issue when a check engine light is on and simply tried this first. The indication is that replacing the gas cap did not fix the issue.

[61] This requested cost cannot be awarded under my jurisdiction as noted in preceding paragraphs. Further, the cost of the gas cap cannot be said to be related to a misrepresentation by the dealer. It is related to a misdiagnoses of the Mazda's check engine light being on by the consumer. That was the consumer's error.

(v) Summary of findings on consumer remedy

[62] This case does not meet the legal requirements for rescission of the contract under the BPCAP based on the misrepresentations that I have found occurred.

[63] Having found no legally required causal link between the misrepresentation and the Mazda's engine issue, which occurred approximately 60 days and 763 km after purchase, I cannot issue a remedy. In fact, the dealer's representations were that it does not guarantee the mechanical fitness of the Mazda. There is also the issue of the intervening repairs to the radiator which are not properly documented as to odometer reading and date of repairs. It may very well be that the consumer overheated the Mazda's engine. I make no comment on whether the consumer has

a claim under the *Sale of Goods Act*, as I do not have jurisdiction to consider such a claim.

[64] I find the same missing legally required causal link between the misrepresentations I found to have occurred and the consumer's request to be reimbursed for the radiator and brake repairs the consumer made. The consumer received a discount on the purchase price of the Mazda with the dealer noting the Mazda was "not suitable for transportation" and that the dealer would not be responsible for future repairs. Before the consumer took possession of the Mazda, the vehicle was inspected and the need for a radiator and brake repairs was noted. The consumer elected to take possession of the Mazda with this knowledge. The repair receipts the consumer provided show those repairs have not exceeded the discount they received on the purchase price. I noted that the transaction occurred over a few days as the parties negotiated the price and the Mazda was inspected. I cannot say there was pressure by the dealer.

[65] The cost of the gas cap is due to the consumer's misdiagnosis of the check engine light issue. That is not linked to the misrepresentation by the dealer.

VII. Compliance for Breaches of the BPCPA and MDA

(a) General legal considerations

[66] I have found Super Sale breached the BPCPA. Since the investigation started, Super Sale has vacated its premises and has not established new premises. Super Sale's dealer registration is effective until April 5, 2020, although it has been placed in a "pending" status. Pending status means the dealer is currently not in good standing for some administrative reason, such as not occupying a business premise as required by section 3(1)(a)(vi) of the *Motor Dealer Act*.

[67] As earlier noted, section 8.1(4)(b) of the *Motor Dealer Act* provides that one breach of the BPCPA is grounds to suspend or cancel a motor dealer's registration. Also, the BPCPA provides for administrative penalties for a breach of that Act. If I issue an administrative penalty, then I am to consider the various factors noted in the BPCPA and the facts of the whole case.

[68] The Registrar may also place terms and conditions on a motor dealer's registration to address the non-compliance. The purpose of taking such enforcement action is to deter future misconduct by the dealer, or, if there is no reasonable assurance that the dealer will be compliant in the future, then my duty is to remove the dealer from the industry.

[69] There are also concerns related to Super Sale's breaches of Undertaking by failing to provide inspection reports and their failure to participate in this hearing process that reflect on their registration.

[70] Super Sale has a duty to cooperate with its regulator when it is under an investigation.

- *Independent Investigations Office of British Columbia v Vancouver (City) Police Department*, 2018 BCSC 1804 (BC Supreme Court) at paragraphs 137 – 140.
- *Kuny v College of Registered Nurses of Manitoba*, 2017 MBCA 111 (Manitoba Court of Appeal) at paragraphs 64 – 79.
- *Round v Institute of Chartered Accountants of Ontario*, 2015 ONSC 7099 (Ont. Superior Court).
- *Wise v. LSUC*, 2010 ONSC 1937 (Ont. Superior Court) at paragraphs 52 – 55.

(b) Discussion on Compliance – Super Sale

[71] Super Sale was on an Undertaking not to breach the BPCPA. Super Sale has done so. The B.C. Legislature has deemed this as grounds to suspend or revoke Super Sale’s registration as a motor dealer: section 8.1(4)(b) of the MDA. Super Sale has breached the BPCPA by committing a deceptive act or practice contrary to section 5(1) and 189(2)(a) of that Act, and also by breaching its prior Undertaking: see sections 164(1)(f) and 189(5)(c)(i) of the BPCPA.

[72] Super Sale undertook to provide vehicle inspection records to the Authority upon demand. This requirement is also mandated by the MDA: see sections 7(2), 11, 25 and 26(b) of the MDA; section 7 and 20 of the *Motor Dealer Act Regulation*; and see sections 149 to 151 of the BPCPA. A regulated person must honour their undertakings. Otherwise, such undertakings become meaningless and the public would lose faith in their utility and in any regulated person under an undertaking complying with them: *Webster v. Pioneer Garage Ltd. dba Fraser Valley Pre-Owned et al* (April 27, 2018, File 17-07-002, Registrar) at paragraph 189.

[73] Super Sale was given an opportunity by Compliance Officer, Adam Reynolds to provide the requested inspection reports during the investigation of this consumer complaint and did not. This also constitutes breaches of both those Acts: see section 35(3)(b) of the MDA and section 189(5)(b) of the BPCPA. Super Sale was advised in the Hearing Notice that it could provide any documents, including the inspection reports, in any submissions during the hearing process and it did not.

[74] In reviewing the Licensing Hearing Report of Carrie VanDokkumburg, Super Sale was provided several opportunities and time to produce the requested records for Ms. VanDokkumburg’s inspection to determine Super Sale’s compliance with the Undertaking. What records it did provide were unorganized, voluminous and ultimately could not be matched to specific vehicles to determine Super Sale’s compliance with the Undertaking.

[75] In considering the appropriate action to deter Super Sale from breaching the legislation and ensuring its future cooperation with an investigation, I have considered the range of compliance tools at my disposal.

[76] I have rejected adding conditions to the registration of Super Sale as an appropriate option. The Undertaking of November 29, 2016 contains various conditions including that: Super Sale abide by and not breach the BPCPA; and Super Sale will inspect all vehicles for sale and have the inspection reports available for review by the VSA. Super Sale has not abided by those past conditions and there is no evidence to suggest it will do so in the future.

[77] I have considered the imposition of administrative penalties to deter the noted misconduct. Super Sale was issued a \$3,000 administrative penalty in relation to the 2016 Undertaking. Clearly, that administrative penalty has not had its desired deterrent effect. Further, given that Super Sale did not participate in the hearing and that it is not currently occupying a business premise and operating, I cannot see how an administrative penalty would currently deter Super Sale in the future. There is currently no incentive for Super Sale to comply and pay such an administrative penalty, and it could simply ignore such a penalty.

[78] I have also considered the various breaches of the BPCPA noted above and that these are deemed grounds to suspend or cancel the registration of Super Sale.

[79] I have also taken into consideration that Super Sale has not fully cooperated with the investigation of this consumer complaint and that it did not fully cooperate with the 2018 inspection of its records to determine its compliance with the 2016 Undertaking.

[80] The fact that Super Sale is not currently occupying a business premises and operating is also a factor to consider. It helps in gauging the impact that any chosen compliance action may have on Super Sale. Even so, I must put protecting the public and the public interest before the interest of Super Sale to be a registered motor dealer: *British Columbia (Securities Commission) v. Pacific International Securities Inc.*, 2002 BCCA 421 (CanLII) at paragraph 12 and see *Re: One West Auto Ltd. et al* (November 8, 2019, File 19-09-001, Registrar) at paragraphs 10-14.

[81] I have considered the case of *Webster v. Pioneer Garage Ltd. dba Fraser Valley Pre-Owned et al*. In that case the dealer was found to have breached prior Undertakings under the BPCPA and breached the unconscionable act or practices provisions of the BPCPA in relation to the specific consumer complaint. There was no indication that the dealer failed to cooperate with the investigation. The dealer was suspended for 30 days, conditions restricting the type of transaction it may conduct for a year and significant penalties of \$25,000 for the new BPCPA breach and \$12,000 each for breaches of each undertaking.

[82] I have also considered the case of *Kuny v College of Registered Nurses of Manitoba* where the Manitoba Court of Appeal agreed with the disciplinary measures of a four-month suspension, complete a paper and pay \$15,000 in costs for the nurse's refusal to cooperate in an investigation.

[83] In this case, I find on balance that a suspension of four months on the dealer registration of Super Sale Auto #40285, effective the date of this decision is necessary to deter Super Sale Auto. I believe this best addresses the fact that prior enforcement options including administrative penalties have not deterred Super Sale. I have not revoked Super Sale Auto's registration in consideration of the *Pioneer Garage Ltd.* case, where the dealer in that case breached multiple Undertakings but could operate after the suspension and paying administrative penalties, but with conditions on its registration.

[84] I note that this suspension will last beyond the term of Super Sale's current motor dealer registration which expires on April 5, 2020 by operation of the law: section 4(3) of the MDA. Therefore, Super Sale will have to apply for renewal of its registration after the term of the suspension is complete. Whether that renewal will be granted and on conditions if any, will be determined on the facts that exist at the time any such application is received.

(c) Compliance – Navid Khoshbakht

[85] In the Hearing Notice, the Authority also seeks the suspension or cancellation of the salesperson licence of Navid Khoshbakht – the dealer principal.

[86] Generally, if an employee, officer, director or agent of a company that breaches the MDA or the BPCPA authorizes, permits or acquiesces in those breaches, they too have breached the legislation: see sections 26.04(5) and 35(5) of the MDA, and see section 164(5) and 189(8) of the BPCPA.

[87] Caselaw has stated that context of dealership operations are important when assessing the liability of officers and directors for the misconduct of the business. There of course needs to be some evidence of their involvement, of being reckless, or willfully blind to the misconduct. Also, an assessment of the dealership operations helps in determining the level of involvement of those officers and directors. For instance, where the dealership is small and the officers and directors are involved in the day-to-day oversight of the dealership, it is more likely that they would have authorized, permitted or acquiesced in the misconduct. Where the dealership is large and the officers and directors may not be aware of the day-to-day operations, then its less likely that they would have authorized, permitted or acquiesced in the misconduct: *Prestige Toys Ltd. v. Ontario (Registrar, Motor Vehicle Dealers Act)*, 2002 CarswellOnt 4743, 256 O.A.C. 176 (Ont. Superior Court of Justice, Div. Court).

[88] The evidence and information available to the Registrar of Super Sale's registration as a motor dealer, shows that Navid Khoshbakht:

- (a) Approved the selling price of the Mazda and directed that the sale be on condition that the Mazda was sold as not suitable for transportation,
- (b) Represented Super Sale in discussions with the consumer about the consumer's concerns after the sale,

- (c) Is the declared primary contact for the VSA on all regulatory matters,
- (d) Is declared as 100% shareholder of Super Sale Auto Ltd,
- (e) Is the only listed director for Super Sale Auto Ltd. on its January 26, 2016 submitted incorporation record and with no officers identified on that record,
- (f) Was the person Compliance Officer Adam Reynolds requested inspection reports from,
- (g) Was the person who signed the 2016 Undertaking on behalf of Super Sale,
- (h) Was the person Compliance Officer Carrie VanDokkumburg dealt with when she was inspecting Super Sale for compliance with the 2016 Undertaking, and
- (i) Was the person to whom the Notice of Complaint in this case was addressed to and who responded with the dealer's response to complaint.

[89] Based on the foregoing, I am satisfied that Navid Khoshbakht has oversight of the day-to-day operations of Super Sale. I am also satisfied that Navid Khoshbakht directed the consumer transaction and the declaration of "not suitable for transportation" which I have found under the facts of this case to be a deceptive act or practice in respect of the consumer transaction. I am also satisfied that Navid Khoshbakht did not provide the requested documents. Therefore, Navid Khoshbakht has also committed the deceptive act or practice, and failed to cooperate with the investigation.

[90] Much of the considerations I have noted in paragraphs 71 to 84 in relation to Super Sale are applicable to Navid Khoshbakht. It is to be remembered that corporations act through people and a corporation's noncompliance occurs through individuals' non-compliance.

[91] In the *Pioneer Garage Ltd.* case, the Manager who was directly responsible for the dealer's misconduct in that case:

- (a) Received a 30-day suspension of his salesperson licence;
- (b) Was required to retake the salesperson certification course and their own cost,
- (c) Placed conditions on their licence that they not work in a management role without the prior written consent of the Authority, for a period of 12 months,
- (d) Placed conditions on their licence that they not assist consumers to locate financing, for a period of 12 months
- (e) Placed conditions on their licence that all consumer transactions be reviewed and approved by a manager for a period of 12 months,
- (f) Pay a \$750 administrative penalty, and
- (g) Was held joint and severally liable to repay costs of the investigation.

There was no evidence that the Manager failed to participate in the investigation.

[92] I also take into consideration the four-month suspension in the *Kuny v College of Registered Nurses of Manitoba* case for the nurse in that case failing to cooperate with an investigation.

[93] Based on the evidence before me, it is clear that Navid Khoshbakht being a guiding mind of a dealership is not in the public interest. Navid Khoshbakht's oversight and direction of Super Sale has led to cases of misconduct and a lack of cooperation with the VSA when it is conducting inspections and investigations.

[94] To protect the public interest, to deter future similar misconduct, and balance this with any desire Navid Khoshbakht has in continuing to work in the industry, it is my opinion that Navid Khoshbakht salesperson licence:

- (a) Should be suspended for a period of four months, commencing the date of this decision, and
- (b) The following conditions be added to his salesperson licence:
 - i. Navid Khoshbakht is to retake and successfully complete the Salesperson Certification Course at his own cost before the period of the suspension ends,
 - ii. Navid Khoshbakht may not act in a management role, oversee or be a guiding mind of a registered motor dealer for a period of 12 months from the date of this decision,
 - iii. Navid Khoshbakht shall have all consumer transaction that he participates in reviewed and approved by a manager at any dealership in which he is employed, for a period of 12 months from the date of this decision, and
 - iv. Navid Khoshbakht must advise any dealership that he is employed with of these conditions.

[95] The above conditions will provide time and an opportunity for Navid Khoshbakht to educate himself on the laws that govern his licence, provide him time to show that he can be compliant with those laws, and that he can be trusted to operate a registered motor dealership in accordance with those laws.

VIII. Summary

[96] I have found that Super Sale Auto Ltd. committed a deceptive act or practice contrary to the BPCPA. I have also found that Super Sale Auto Ltd. has breached its Undertaking of 2016. Super Sale Auto Ltd. failed to cooperate with the investigation of this complaint by withholding vehicle inspection records.

[97] While I have found that Super Sale committed a deceptive act or practice in respect of the consumer transaction in this case, I found on the evidence before me a disconnect between that conduct and the claims and remedy sought by the consumer.

[98] I have no jurisdiction to decide whether the consumer would have a claim under the *Sale of Goods Act*. The consumer would have to enlist the assistance of the courts. I make no comment on the consumer's prospects for success on such a claim.

[99] I have suspended the motor dealer registration of Super Sale Auto Ltd. for a period of four (4) months commencing the date of this decision.

[100] I have suspended the salesperson licence of Navid Khoshbakht for a period of four (4) months commencing the date of this decision.

[101] I have imposed various conditions on the salesperson licence of Navid Khoshbakht as outlined at paragraph 94.

IX. Costs

[102] The Authority made no submissions on the recovery of its costs. It may provide written submissions on costs within 21 days of this decision's date and serve a copy of those submissions on Super Sale Auto Ltd. and on Navid Khoshbakht. Super Sale Auto Ltd. and Navid Khoshbakht will have 21 days from the date they are served to provide written submission in response. The Authority will then have seven (7) days to file a Reply. All submissions are to be directed to my Assistant Preet Jassal at preet@mvsabc.com.

X. Review of this Decision

[103] If there is disagreement with this decision it can be reviewed by requesting a reconsideration pursuant to sections 26.11 and 26.12 of the MDA. Such a request must be in writing and made within 30 days of receiving a copy of this decision. The request must identify the reasons for making the request, why the request should be granted and include the required "new evidence" as defined in those sections of the MDA.

[104] 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 must be filed with that court within 60 days of this decision's date: section 7.1(t) of the MDA.

"original is signed"

Ian Christman, J.D.
Registrar of Motor Dealers