Vehicle Sales Authority
of British Columbia

Neutral Citation: 2017-BCRMD-003

Hearing File Nos. 16-04-001/16-05-003
Investigation File No. 15-08-110

RE: THE *MOTOR DEALER ACT* R.S.B.C. 1996 C. 316 and the *BUSINESS PRACTICES AND CONSUMER PROTECTION ACT* S.B.C. 2004 C. 2

BETWEEN:

VEHICLE SALES AUTHORITY

Complainant

AND:

OLYMPIC MOTORS (WC) III CORPORATION *DBA* RICHMOND KIA (Dealer #31149)

Motor Dealer

AND:

OLYMPIC MOTORS (WC) IV CORPORATION *DBA* KIA SOUTH VANCOUVER (Dealer #30460)

Motor Dealer

AND:

LARISA RENE KUNGEL (Salesperson #112104)

Salesperson

AND:

JUSTIN MICHAEL VAN NOORD (Salesperson #118063)

Salesperson

AND:

DANIELLE SCHELINI (Salesperson #109293)

Salesperson

AND:

JODY LYNN FRAZER (Salesperson #116993)

Salesperson

AND:

MIAKI HARA (Salesperson #202414)

Salesperson

AND:

LARISA RENE KUNGEL (Salesperson #112104)

Salesperson

AND:

KRISTINA HARDMAN (Salesperson #101614)

Salesperson

DECISION OF THE REGISTRAR OF MOTOR DEALERS

By way of written submissions.

Introduction

[1] This matter deals with allegations that Olympic (WC) III and Olympic (WC) IV (the “Olympic Dealers”) overcharged consumers for their lien payouts on their

vehicle trade-ins and retained those over-payments naming them as “profit” or “business manager upgrades” in internal dealer documents.

[2] Staff of the Authority and the Olympic Dealers, along with lawyers for each, engaged in discussions to see if these matters could be dealt with by way of Undertakings pursuant to section 154 of the *Business Practices and Consumer Protection Act* (the “BPCPA”).

[3] From the evidence, the Authority presented draft Undertakings to the Olympic Dealers and the two groups met on September 21, 2016, where they appear to have come to an agreement. From emails passing between the lawyers for the Authority and the two Olympic dealers, the agreement was to accept the Undertakings proposed by the Authority with modifications as detailed in an email from the Authority’s lawyer to the lawyer for the Olympic Dealers with one clarification as to the amount of the administrative penalty and costs agreed to on September 21, 2016.

[4] Olympic was to finalize the Undertakings and present them to the VSA staff through its lawyer who would review them before presenting them to the Registrar.

[5] Between September 21, 2016, and January 13, 2017, when Olympic submitted eight Undertakings for the Registrar’s consideration, the Authority staff objected to the form of Undertakings presented by the Olympic Dealers as in their view they did not conform to the agreement reached on September 21, 2016. The Authority has recommended that the Registrar not accept the Undertakings as presented for reasons which will be noted later in these reasons.

[6] For the reasons that follow I will not accept the Undertakings as presented by the Olympic Dealers on January 13, 2017.

Issue

[7] Should I accept Undertakings from the Olympic Dealers as they were presented to me on January 13, 2017?

Form of these reasons

[8] In past decisions, I have appended the Undertakings under consideration to promote transparency and provide proper context so any reasons can be better understood and applied to future cases. In this case, the Authority has provided two proposed Undertakings and the Olympic Dealers have provided eight. Attaching all

ten Undertakings to these reasons would confuse rather than enlighten the reader, and so they will not be attached.

The Legislation

(a) Generally

[9] The BPCPA is consumer protection legislation (as is the *Motor Dealer Act*) and its terms are to be interpreted generously in favour of consumers:

- *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531 (Supreme Court of Canada) at para. 37
- And also see: *Stanway v. Wyeth Canada Inc*., 2012 BCCA 260 (Court of Appeal) at paras. 78 - 81

[10] The BPCPA is a "comprehensive and effective scheme for the administration and enforcement of the statutory rights and obligations it creates".

- *Koubi v. Mazda Canada Inc.,* 2012 BCCA 310 (Court of Appeal) at para. 65
- And also see *Windmill Auto Sales & Detailing Ltd. v. Registrar of Motor Dealers*, 2014 BCSC 903 (BC Supreme Court) at para. 75.

[11] The BPCPA can be broken into two main parts or purposes. First, there are provisions that promote consumer rights and protections including the granting of remedies for any consumer losses. Second, there are provisions for regulating and licensing suppliers, including enforcement and deterrence.

(b) Undertakings

[12] Section 29(2)(b)(ii) of the *Motor Dealer Act Regulation* empowers the Registrar to use Undertakings in section 154 of the BPCPA to address breaches of the BPCPA by those who are regulated under the *Motor Dealer Act* ("suppliers").

[13] An Undertaking under the BPCPA is a regulatory tool used to: (a) address losses suffered by consumers due to contraventions of that Act, and (b) address supplier non-compliance with the legislation. The former focuses on individual rights by determining and remedying any losses suffered by a consumer. The later requires reviewing a supplier's conduct and identifying a regulatory response in order to deter future misconduct and to protect the general public from future harm.

[14] An Undertaking is offered by a supplier and is a voluntary recognition by a supplier that it has breached the BPCPA and that it is willing to take responsibility to address any harm arising from that breach. Like a compliance order, an Undertaking under section 154 provides a broad discretion as to its terms in order to achieve the policy goals of the BPCPA: see *Windmill,* for this point on compliance orders.

[15] As many in the motor dealer industry do not understand the purpose of an Undertaking or even know of its existence, the VSA policy is to make a supplier being called to a hearing aware that in certain circumstances, Undertakings are a possible means to address non-compliance. If there is an interest in an Undertaking, and it is an appropriate approach in the circumstances, the VSA policy is to have the Manager of Compliance prepare a draft Undertaking for consideration and discussion purposes. That appears to have occurred in this case.

[16] At this point, it is important to note that policy is not mandatory as policy is not law. Policy aids the industry to understand the general approach that a regulator will take in administering the legislation: *Maple Lodge Farms v. Government of Canada*, [1982] 2 SCR 2, 1982 CanLII 24 (SCC)

[17] If the Registrar accepts an Undertaking, the Registrar may end an inspection/investigation or proceeding against the supplier. Section 154 of the BPCPA leaves that decision to the discretion of the Registrar.

(c) Interplay between section 8.1(4)(b) of the Motor Dealer Act and the BPCPA

[18] For the purposes of the discussion that follows, it is important to note section 8.1(4)(b) of the *Motor Dealer Act*, which states:

> (b) contravention of a prescribed provision of Part 2 or 5 of the *Business Practices and Consumer Protection Act* by a person is grounds for the Registrar or director, as the case may be, to determine that it is not in the public interest for the person to be registered or to continue to be registered under this Act and, without limiting paragraph (a) of this subsection, the Registrar or director, as the case may be, may exercise the rights and powers of the Registrar under Part 1 of this Act that may be exercised in the event of that determination,

[19] Part 2 of the BPCPA contains the prohibitions against deceptive acts and unconscionable acts and practices while Part 5 of the BPCPA is the Disclosure of the Cost of Consumer Credit provisions. Section 8.1(4)(b) states that even one breach

of any of these provisions is grounds for the Registrar to cancel a motor dealer's registration to protect the public interest. The discretion to do so is left with the Registrar, which will be dictated by the facts. Even so, it is clear legislative direction to the Registrar that a motor dealer breaching any of those provisions of the BPCPA is to be taken very seriously, and to be considered carefully.

Discussion

[20] For discussion purposes, I intend to address each of the Authority's objections individually while also noting the Olympic Dealers' position on those objections.

(a) The Olympic Dealers' delay in resolving the Undertakings since September 21, 2016 necessitate revisiting the terms of the Undertaking, especially the administrative penalties and costs

(i) The Authority

[21] The Authority says that in proposing an Undertaking, Olympic was to admit to certain conduct which was viewed as being deliberate and calculated to deceive. The Authority was amenable to recommending to the Registrar the acceptance of the Undertaking with the proposed $24,000 in administrative penalties and costs, because it appeared the Olympic Dealers accepted the gravity of the issues and misconduct. However, since the September 21, 2016, Olympic has offered Undertakings that do not acknowledge the misconduct as being deliberate and calculated to deceive. Further, a statutory declaration provided by Barry Horne now characterizes the over-payments as an error on the part of the accounting department. Because of this, and the several months of delay in fashioning an Undertaking, additional costs have accrued and the proposed administrative penalties no longer reflect the Olympic Dealers' acceptance of the character of the misconduct.

(ii) The Olympic Dealers

[22] The Olympic Dealers state that nothing has factually changed. The agreement between the Authority and the Olympic Dealers as to costs and administrative penalties reflects the Olympic Dealers' willingness to address these matters voluntarily in relation to the 41 consumers noted in the Undertakings. As the facts captured in the Undertakings have not changed, and the Olympic Dealers agree that by offering the Undertakings they admit to the facts alleged in the Hearing Notice, then there is no principled reason for the penalties to change. As to costs, the Olympic Dealers also say their costs have been accruing, and they have

been attempting to resolve and negotiate the terms of the Undertakings in a vacuum as the Authority has not been forthcoming with why they were objecting.

[23] The Olympic Dealers also point out that if the Authority is concerned about any findings from any subsequent review or audit of consumer transactions, and the Olympic Dealers' (Barry Horne's) method of addressing the findings of such a review, the Undertakings specifically contemplate addressing such issues at a later date.

(iii) Discussion on this objection

[24] Administrative penalties are a regulatory tool to address non-compliance with the BPCPA. They are used in this industry to deter future non-compliance both as against the specific motor dealer and on the industry generally. They are not to be used to punish behaviour – a penal sanction.

- *Cartaway Resources Corp. (Re),* [2004] 1 S.C.R. 672, 2004 SCC 26 (Supreme Court of Canada)
- *Hogan v. British Columbia Securities Commission*, 2005 BCCA 53 (Court of Appeal)
- *Harris v. Windmill Auto Sales & Detailing Ltd.,* (April 10, 2013, Hearing File No. 12-030, Registrar), affirmed by *Windmill Auto Sales & Detailing Ltd. v. Registrar* 2014 BCSC 903 (BC Supreme Court)

[25] In assessing the appropriateness of an administrative penalty, the Registrar must consider those factors noted in section 164(2) of the BPCPA: *Windmill Auto Sales & Detailing Ltd. (Supreme Court)* at paragraph 52.

[26] I do not find a delay in settling the terms of the Undertaking, in and of itself, constitutes grounds to change the amount of the administrative penalty. The penalty amounts address the non-compliance noted within the Undertaking as a means to deter future non-compliance both of the Olympic Dealers and of the industry itself, regarding that identified non-compliance.

[27] The terms of the Undertakings clearly indicate that the investigation is not complete. Specifically, the Olympic Dealers undertake to have a third party auditor, under the direction of the Registrar, audit their dealerships for any further consumers who may have over-paid their lien payouts. If an audit finds any such consumers, the Olympic Dealers are to reimburse them. The Authority will of course monitor the Olympic Dealers' compliance and execution of the remainder of the terms of the Undertakings. The Undertakings reserve the right of the Authority to

take action for any further non-compliance discovered that is not already covered by the Undertakings.

[28] If the Olympic Dealers breach their Undertakings, additional administrative penalties can be levied: section 164(1)(f) of the BPCPA. If the Olympic Dealers make further misrepresentations to consumers in carrying out the terms of the Undertaking, these could be the subject of new compliance action including administrative penalties because "a deceptive act or practice by a supplier may occur before, during or after the consumer transaction": section 4(2) of the BPCPA. Finally a motor dealer who has breached their Undertaking or failed to cooperate with its regulator risks being found to be ungovernable, which may lead to the revocation of their registration.

[29] At this time and based on the submissions and evidence presented to me, I do not see a need to increase the amount of the administrative penalty due to the delay in resolving the terms of the Undertakings.

[30] I will discuss the removal of deliberate and calculated to deceive in the next objection.

[31] I will address the issue of additional costs later in these reasons.

(b) The statutory declaration of Barry Horne, the Olympic dealers' Managing Director, and missing terms of the proposed Undertaking indicate the Olympic Dealers have repudiated the terms of the September 21, 2016 agreement.

(i) The Authority

[32] The Authority argues that removing "deliberate" and "calculated to deceive" from the Undertakings coupled with Barry Horne's statutory declaration, dated February 1, 2017, that the accounting department at the dealership made a mistake, indicates the Olympic Dealers are not taking these matters seriously enough and they have materially altered the terms of the Undertakings. These developments and Mr. Horne's statutory declaration require further review and Mr. Horne should be cross-examined at a full hearing.

(ii) The Olympic Dealers

[33] The Olympic Dealers state the language of "deliberate" and "calculated to deceive" is unnecessary because section 4 of the BPCPA does not require mens rea (intention) for there to be a breach of that provision. The Olympic Dealers

submitted that if it this is a sticking point, they are amenable to that language being in the Undertakings.

[34] The Olympic Dealers note that Mr. Horne's statutory declaration of February 1, 2017, contains information of the subsequent review the Olympic Dealers undertook in a proactive manner and to show good faith on the part of the two dealers. The Olympic Dealers say that Mr. Horne is using his own plain language to say the accounting department made errors and that the practice of concern has ended. They further state that the Statutory Declaration of Barry Horne does not challenge the Authority's investigative findings or allegations. The Olympic Dealers say that Mr. Horne was simply explaining the steps he took to review the two dealerships' records to ascertain if there were any other affected consumers. Finally, if the Authority has a concern about information in that statutory declaration, the Authority still has an opportunity to review it and can still take action as necessary, as this is contemplated by the Undertakings.

(iii) Discussion on this objection

[35] When an Undertaking is presented to the Registrar, it must contain the necessary information for the Registrar to determine that any consumer harm has been ameliorated and that the necessary regulatory steps are being taken to ensure the future compliance with the legislation.

[36] Where the conduct requires an administrative penalty as a means to deter future non-compliance, then section 164(2) of the BPCPA requires an assessment of the following factors:

> (2) Before the director [registrar] imposes an administrative penalty on a person, the director must consider the following:
>
> > (a) previous enforcement actions for contraventions of a similar nature by the person;
> >
> > (b) the gravity and magnitude of the contravention;
> >
> > (c) the extent of the harm to others resulting from the contravention;
> >
> > (d) whether the contravention was repeated or continuous;
> >
> > (e) **whether the contravention was deliberate;**
> >
> > (f) any economic benefit derived by the person from the contravention;

(g) the person's efforts to correct the contravention.

[37] As to section 164(2)(g), I note from the email of Robert Hrabinsky of October 11, 2016, that the Olympic Dealers' specifically asked that they have an opportunity to amend the Authority's proposed Undertakings to highlight the proactive steps they did take to correct the contravention. This was agreed to.

[38] It is correct that section 4 of the BPCPA does not have a mens rea component. It is sufficient to grant a consumer a remedy if they have suffered a loss due to a motor dealers' innocent or negligent misrepresentation, as well as a deliberate misrepresentation.

- *Harris v. Windmill Auto Sales & Detailing Ltd.,* (April 10, 2013, Hearing File No. 12-030, Registrar), affirmed by *Windmill Auto Sales & Detailing Ltd. v. Registrar* 2014 BCSC 903 (BC Supreme Court)

[39] However, the regulatory response by the Registrar requires knowing whether or not the conduct in question was or was not deliberate. First, section 164(2)(e) of the BPCPA specifically requires that the Registrar consider whether or not the conduct was deliberate. From past decisions, the Registrar distinguishes between an innocent, negligent and a deliberate misrepresentation in setting the correct administrative penalty: see for example *Windmill.* Second, if the Registrar finds a motor dealer acted with due diligence to prevent the misrepresentation, then no administrative penalty should be issued: section 10 of the *Business Practices and Consumer Protection Act Regulation.*

[40] Third, knowing whether the breach of Part 2 (deceptive act or practice) of the BPCPA was deliberate, negligent or innocent is also an important consideration for the Registrar in his section 8.1(4)(b) *Motor Dealer Act* analysis. Common sense says the likelihood of the Registrar cancelling a motor dealer's registration to protect the public interest is less if the motor dealer's breach was innocent or negligent than if it was deliberate.

[41] With the words "deliberate" and "calculated to deceive" removed from the Undertakings, the impression left with the Registrar was that the alleged conduct agreed to in the Undertakings were possibly innocent but more likely negligent acts. This would affect the Registrar's consideration of the administrative penalties being proposed as well as his analysis under section 8.1(4)(b) of the *Motor Dealer Act*. Such an analysis could affect whether the Registrar accepts the Undertakings or decides the conduct is of such a seriousness nature that the motor dealer's registration should be reviewed at a hearing to determine if it is in the public interest that they continue to be registered.

[42] The Olympic Dealers did materially change the terms of the Undertakings in a manner that was not agreed to. The fact that the Olympic Dealers now say they are amenable to the words “deliberate” and “calculated to deceive” being placed back into the Undertakings indicates they know and accept that to be the case.

[43] The Undertakings as presented to me on January 13, 2017, do not accurately reflect the agreed to facts. Their alteration by the Olympic Dealers could have had the capability of misleading me about the “gravity” of the contravention and whether they were “deliberate” or not, and could have deprived me of information necessary to carry out my duty to protect the public interest. I would certainly be left wondering how the Notices of Hearing allege deliberate conduct, but the Undertakings instead admit to negligent or innocent conduct. Because of this, I must reject the Undertakings as they were presented to me by the Olympic Dealers.

[44] The above is sufficient to decide not to accept the Undertakings as presented by the Olympic Dealers. Even so, it is important to address the other objections raised by the Authority and consider comments made by the Olympic Dealers.

[45] As to the administrative penalty, the $24,000 global amount for penalties and costs was agreed to by the Authority with the knowledge, and language in the Undertakings, that the conduct was deliberate and calculated to deceive. Nothing has changed other than requiring that language be placed back into the Undertakings. Therefore, I would not change the $24,000 global offer as it relates to the conduct captured within the proposed Undertakings.

(c) The proposed Undertakings from the Olympic Dealers contain unsubstantiated representations and inconsistencies that necessitate a review by way of a hearing.

(i) The Authority

[46] The Authority notes that certain representations within the Undertaking when reviewed against the evidence require further explanation as they appear to be inconsistent or are unsubstantiated. They specifically note the following representations (paraphrased) by the Olympic Dealers and their corresponding concerns:

(a) That the Olympic Dealers have ceased the “Practice” of concern.

Concern: The Authority has not verified this to be the case and must conduct further reviews to know this is so. A mere assertion by the Olympic Dealers is insufficient.

(b) That the Olympic Dealers warrant they have paid the consumers noted in the Undertaking and provided the Registrar satisfactory proof of same.

Concern: The Authority has not been provided sufficient documentation, such as letters to consumers, for the Authority to confirm the consumers have in fact been reimbursed.

(c) That the Olympic Dealers have conducted an audit using a third party accounting firm to review all transactions within 24 months involving a trade-in.

Concern: The Authority has not been provided the source documents to verify the Audit. Instead, the Olympic Dealers have provided Excel Spreadsheets that were prepared by the Olympic Dealers.

(d) That the Olympic Dealers have refunded all material amounts found by the Independent Audit.

Concern: The Authority's review of documents provided by the Olympic Dealers suggests that not all consumers who should have received a refund did so. The statutory declaration of Barry Horne noted that one parameter of their review was to look for any amounts over $100 that were owing to consumers.

(ii) The Olympic Dealers

[47] The Olympic Dealers respond:

(a) The statement that the Olympic Dealers have ceased the "Practice" of concern can be verified by the Authority. It is a statement made at the Olympic Dealers' own risk if they fail to comply with the Undertakings.

(b) The Olympic Dealers warranting payment to consumers noted in the Undertaking is a substantial statement which can be verified by the Authority. It is a statement made at the Olympic Dealers' own risk if they have not complied.

(c) The Olympic Dealers note that the report from KPMG was provided to the Authority after the Authority made its submissions. A review of the KPMG

report indicates they have looked at the source documents. The Authority's investigators are able to review and confirm the findings. The Olympic Dealers draw to my attention that the KPMG report looked at the dealer records up to September 21, 2016, and the Olympic Dealers continue to update their records as cheques to consumers have been cashed.

(d) The Olympic Dealers initially set a limit of $100 or more as a material amount in its search parameters. It has since corrected this to refund all consumers who over-paid on their lien payouts. The Olympic Dealers also note that overages less than $100 were not the subject of the Authority's investigation file no. 15-08-110.

(iii) Discussion on these Objections

(a) The Olympic Dealers statement that the practice has ended.

[48] I agree with the Olympic Dealers that their statement that the practice has ended is a statement that can be verified by the Authority. If the Olympic Dealers have not ended the practice, that is in and of itself reason to take further compliance action.

(b) The Olympic Dealers warrant paying consumers noted in the Undertaking and have provided satisfactory proof.

[49] If the Olympic Dealers had simply warranted they have paid the consumers noted in the Undertaking then I would agree with them that this could simply be verified by the Authority. If they breached the Undertaking, then further action could be taken.

[50] However, the Olympic Dealers also added the words "that it has provided the Registrar with satisfactory proof that it has reimbursed [consumer]." By adding these words, the Olympic Dealers are enlisting the Registrar to review their "proof" and deem it to be satisfactory. In the proposed Undertakings from the Authority, the wording is to pay the consumers and "provide the Registrar with satisfactory proof that such payment has been made." This is different.

[51] At the time the Olympic Dealers submitted their Undertakings, I was not provided any documents to review regarding "proof" of payment. In some of the versions of the Undertakings, there was a table attached as a Schedule listing consumers and their payments. This is not satisfactory proof. The KPMG report dated September 21, 2016, shows KPMG has reviewed payments to consumers and

reconciled them with cheques that have cleared the financial institution. The Olympic Dealers' submissions confirm that the KPMG report was provided to the Authority on February 9, 2017. That is well after the Olympic Dealers provided the Undertakings to me. I would have to have rejected the Undertaking on the basis that I could not say as Registrar that I was provided satisfactory proof of payment to the consumer's as noted in the Undertakings.

[52] The Authority's objection also appears to focus on wanting to see the letters to the consumers to see if the Olympic Dealer's have misled them about the nature of their refund cheque. This would go to the manner in which the Olympic Dealers carried out their obligations in the Undertaking, which would be verified by the Authority after the Undertakings were accepted. If it was found the Olympic Dealer's made misrepresentations to those consumers, that could be the subject of separate compliance proceedings. The proposed Undertakings contemplated such a review would take place. I am not satisfied that not being provided the letters to the consumers who received refunds before the Undertakings were entered into would be a ground to reject the proposed Undertakings.

(c) That the Olympic Dealers have conducted an audit using a third party accounting firm to review all transactions within 24 months involving a trade-in.

[53] The proposed Undertakings from the Olympic Dealers make a statement that the Olympic Dealers have been proactive in conducting their own audit. The fact the Authority had not seen a report or source documents does not take away from this statement. As contemplated by the Undertaking, the Authority would verify this to have occurred and this would include the manner in which it was conducted being satisfactory. If the Olympic Dealers breached this provision of the Undertaking, that could have been addressed by its own separate compliance action. In essence, it appears the Authority was asking to verify before the proposed Undertakings were accepted, what the Undertakings contemplated would be verified after they were accepted. I agree with the Olympic Dealers on this point.

(d) That the Olympic Dealers have refunded all material amounts found by the Independent Audit.

[54] The Olympic Dealers also include in their Undertakings the fact that they have already engaged an independent third party accounting firm to review the transaction and have refunded all "material" amounts found by that independent audit. Based on the wording of the Undertaking, this audit done by the Olympic Dealers and verified by KPMG would then be verified by an auditor chosen by the Registrar, and the Olympic Dealers would then undertake to "reimburse to

consumers any amounts found due by the auditor with respect to overages of the amount required to discharge the security interest registered against the consumer's trade-in vehicle." This appears to be consistent with the agreed to amendments noted in the Hrabinsky email of October 11, 2016.

[55] The Olympic Dealers state a material amount was over $100 and note the investigation did not contemplate amounts under $100. This is incorrect. The proposed Undertaking for Olympic IV, Dealer #30460, from the Authority and the corresponding proposed Undertakings from the Olympic Dealers acknowledge Consumer C.D. was "charged $47 more than was necessary to discharge the security interest registered against the trade-in vehicle" and Olympic IV undertakes to refund Consumer C.D. that $47.

[56] The Statutory Declaration of Barry Horne says that by including those consumers owed less than $100, there were another 47 consumers to be compensated between the two dealers. The KPMG report shows one consumer was owed $74.59, another owed $82.93, and another $94.31. The fact that the Olympic Dealers felt consumer C.D. should receive $47, but consumers who were owed $74.59, $82.93, and $94.31 should not receive refunds, is a question that needs to be addressed.

[57] I would agree with the Olympic Dealers that the Authority was to review the audit performed by the Olympic Dealers and as verified by KPMG ("Second Independent Audit"). If the Olympic Dealers were found in breach of the Undertaking regarding the Second Independent Audit, including the manner in which it was conducted, that could have been addressed as a separate compliance issue. This was contemplated by the proposed Undertakings. The Authority appears to have wanted to verify the second audit before accepting the Undertakings, when the proposed Undertakings contemplated verifying the second audit after the Undertakings were accepted. Even so, the fact that the Olympic Dealers initially excluded consumers who were owed less than $100 as not being material is a question to be reviewed.

(d) A full hearing cannot be avoided in any regard as there are still seven other named respondents (salespersons) who must be addressed.

(i) The Authority

[58] The Authority states that hearings will be needed to address the conduct of the various salespersons named in the Hearing Notice. As such, hearings are

necessary and the issues and evidence will be canvassed regardless. Therefore, it is sensible to proceed to a full hearing anyway.

(ii) The Olympic Dealers

[59] The Olympic Dealers state that there is a strong public policy interest in settling litigation: *Sable Offshore Energy Inc. v. Ameron International Corp*., 2013 SCC 37 (Supreme Court of Canada) at paragraph 12. They note that if Undertakings can be agreed to, that may encourage the individual respondents to also enter into Undertakings with the corresponding savings in time and costs. Further, the facts as agreed to in the Olympic Dealers' proposed Undertakings will not have to be proven resulting in further time and cost savings.

(iii) Discussion on this Objection

[60] I am in general agreement with the Olympic Dealers on this point, with one notable exception.

[61] The public interest in settling disputes in civil cases cannot be applied equally within the regulatory context. As noted in *Sable*, settlement is encouraged in civil litigation to promote access to justice and the efficient use of judicial resources to settle disputes between private citizens: paras. 1 and 11. The Registrar has a combined duty of settling disputes as between consumers and regulated persons, as well as a duty to protect the public interest as a whole.

[62] The principle in *Sable* may be applicable where a consumer and a motor dealer have settled their issues as between them. Even then, the Registrar can always review the manner in which the motor dealer settled with the consumer to ensure there was no deception or unconscionable conduct by the motor dealer: sections 4(2) and 8(1) of the BPCPA. Even if a consumer and motor dealer come to a settlement agreement, that agreement does not alleviate the Registrar's duty under the legislation to regulate the industry and to ensure the motor dealer in question is complying with the law and will do so in the future.

Additional Costs

[63] Both parties appear to have incurred additional costs since the September 21, 2016, meeting in trying to settle the terms of the Undertakings. Both the Authority and the Olympic Dealers appear to say each is the author of these costs, and both have provided evidence and submissions as to why that is the case.

[64] The proposed Undertakings specifically contemplate that there will be additional costs related to the third party review and the Olympic Dealers are to undertake to pay any such reasonable costs. The proposed Undertakings also reserve the Authority's right to pursue any other non-compliance that is discovered during the Authority's subsequent review, which is not already covered by the proposed Undertakings. Therefore, the proposed Undertakings themselves anticipate that all subsequent costs are not frozen by the $24,000 global amount offered by the Olympic Dealers.

[65] The evidence presented indicates that the Olympic Dealers did not submit Undertakings as agreed to with the Authority. Further, the Undertakings included terms such as "has provided the Registrar satisfactory proof that it has reimbursed [consumer]" for which the Registrar was not given such proof at the time the Undertakings were submitted. I found for the Authority on some of its objections but not on all their objections. There is also evidence to suggest the Authority may have better articulated their objections to the Olympic Dealers sooner and maybe have avoided some costs. Based on my findings here and the evidence presented, no additional investigation and legal costs incurred by the Authority from September 21, 2016, (date of the meeting) to the date of this decision will be made against the Olympic Dealers.

Decision

[66] For the above reasons, I am rejecting the Undertakings as presented by the Olympic Dealers.

[67] No additional costs are ordered against the Olympic Dealers as noted in paragraph 65.

Next Steps

[68] In the Authority's submissions they state Undertakings are still possible, but for the Barry Horne statutory declaration, and identify terms that would be acceptable. The Olympic Dealers' submissions appear to indicate they have met most of those terms in the current proposed Undertakings, and are amenable to the others. Therefore, the Olympic dealers may resubmit Undertakings (one for each dealer) taking into consideration my concerns in these reasons, my past decisions, their own agreements in their submissions and the agreement reached September 21, 2016. The have until March 24, 2017 at 4:00pm to do so. If no Undertakings are submitted by that time, this matter will go to a full hearing.

[69] The statutory declaration of Barry Horne involves his conduct and steps taken on behalf of the Olympic Dealers to resolve these issues once they were

brought to their attention. That statutory declaration is new evidence that was submitted after the September 21, 2016, agreement on the Undertakings, and after the Olympic Dealers submitted their Undertakings to me on January 13, 2017.

[70] The manner in which the Olympic Dealers resolve the concerns raised in the Hearing Notices is reviewable by the very terms of the agreed to Undertakings, and by admission of the Olympic Dealers in their submissions. In my view, accepting any Undertakings would not preclude the Registrar's ability to review Barry Horne's conduct generally, and question him as to his statutory declaration or the manner in which he, on behalf of the Olympic Dealers, has addressed the concerns raised in the Undertakings and the Hearing Notices. The Registrar has a duty to protect the public interest. If the Authority has concerns of Barry Horne's management decisions and conduct in resolving these issues that may place consumers at risk in dealing with him or the Olympic Dealers in the future, the Registrar is duty bound to inquire and be satisfied that no such future risk of harm exists.

March 8, 2017 Hearing Date

[71] The hearing date of March 8, 2017, was reserved in case it was necessary to hear argument on whether or not to accept the Undertakings. That hearing date is not necessary for that purpose and is cancelled.

[72] The refusal to accept the Undertakings as presented is authorized by the BPCPA and is reviewable by way of judicial review pursuant to the *Judicial Review Procedure Act*. Section 7.1(t) of the *Motor Dealer Act* incorporates section 57 of the *Administrative Tribunals Act* requiring any judicial review request be filed within 60 days of this decision being issued.

Dated: **March 3, 2017**

Original is signed

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Ian Christman, J.D.