COPY

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20100413
Docket: S094126
Registry: Vancouver

Re: *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, Motor Vehicle Sales Authority of British Columbia

Between:

Applewood Motors Inc. dba Applewood K/A

Petitioner

And:

Paul Ratte and The Registrar of the Motor Dealer Council of British Columbia doing business as the Motor Vehicle Sales Authority of British Columbia

Respondents

Before: The Honourable Mr. Justice Willcock

Oral Reasons for Judgment

In Chambers
April 13, 2010

Counsel for Petitioner	W.E. Knutson, QC S. Lal
Counsel for Defendant The Registrar of the Motor Dealer Council of BC	P. Hrabinsky
Counsel for Defendant Attorney General of BC	R. Butler
Place of Trial/Hearing:	Vancouver, B.C.

INTRODUCTION

[1] Applewood Motors Inc. ("Applewood") petitions for an order setting aside the April 16, 2008 decision of the Registrar of Motor Dealers imposing an administrative penalty of $2,000 and investigation and recovery costs of $1,670 for engaging in deceptive business practices. The petition is brought under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

BACKGROUND

[2] The decision under review followed a claim made for compensation from the Motor Dealer Customer Compensation Fund by Paul Ratte arising out of his purchase of a 2004 Toyota Tacoma from Applewood on July 6, 2005. Mr. Ratte's complaint initially led to a decision by the Compensation Fund Board on July 11, 2007, to allow a claim in the amount of $1,997. That decision was based on a finding that the dealer had not delivered the motor vehicle contracted for, by not disclosing the rebuilt status of the vehicle.

[3] When a claim is paid by the Fund, a dealer may lose its licence. In this case, Applewood was required by the Board to repay the claim. The circumstances giving rise to a claim for compensation may also lead to an investigation under the *Motor Dealer Act*, R.S.B.C. 1996, c. 306, and disciplinary measures taken following a hearing before the Registrar.

[4] Applewood availed itself of its right to seek reconsideration of the decision by the Compensation Fund Board. Rather than returning immediately to the Compensation Fund Board, the consumer and Applewood, according to the Registrar, "requested that he consider the matter under the authorities vested in him by the *Motor Dealer Act* of British Columbia and the *Business Practices and Consumer Protection Act*".

[5] The parties agree that the Registrar, in determining whether the circumstances warranted disciplinary measures, was purporting to exercise a

statutory power under the *Motor Dealer Act* and that he did not act solely pursuant to the authority conferred upon him by the agreement of the parties.

The Decision Under Review

[6] The Registrar set aside the award to the consumer on the basis that there was no evidence of financial loss but found the dealer's conduct constituted a deceptive trade practice that offended section 4 of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 (the "*BPCPA*").

[7] On April 16, 2008, the Registrar found that Applewood failed to make proper disclosure on the July 6, 2005 sale to Mr. Ratte. The Registrar issued a notice of penalty in the following terms:

> The Registrar, pursuant to section 8.1 of the *Motor Dealers Act* and section 175 of the *[BPCPA]* following a hearing on November 29, 2007 has imposed an administrative penalty of $2,000 and investigation and recovery costs of $1,670 on Applewood for contravening section 4(3)(b)(vi); the representation by a supplier that uses exaggeration, innuendo or ambiguity about a material fact or that fails to state a material fact if the effect is misleading, specifically, failed to disclose to the best of his knowledge and belief whether the motor vehicle still had a manufacturer's warranty remaining. This notice, when registered, has the same force and effect as a court order.

[8] As a formality the compensation claim was reconsidered by the Compensation Review Board on June 26, 2008 and the Board set aside the claim, concluding there was no proof of eligible financial loss.

[9] The petitioner does not dispute the Registrar's jurisdiction to make the findings that resulted in the setting aside of the compensation order.

The Basis of the Application

[10] Applewood seeks to set aside only the decision imposing the administrative assessment on the basis that; (a) the finding that there was a contravention of section 4(3)(b)(vi) of the *BPCPA* is either unreasonable, on one possible standard of review, or incorrect on the lower standard of review of administrative decisions; (b) the Registrar did not have the authority to conduct a hearing or impose a penalty

because he was not appointed pursuant to the *Public Services Act* and therefore did not have any statutory authority; and, (c) a reasonable apprehension of bias arises from the fact that the individual appointed Registrar is also the president of the Motor Dealer Council of British Columbia, the organization responsible for investigation, prosecution and administration of the *Act* generally.

[11] Applewood's attack on the merits of the decision of the Registrar is founded upon the submission that the Registrar incorrectly found that it had engaged in a deceptive act or practice by failing to expressly advise the consumer that a rebuilt vehicle, one having been prepared at a cost in excess of $2,000 would no longer be covered by the manufacturer's warranty. Applewood characterizes this issue as a question of law requiring the interpretation of the provisions of the *BPCPA* and says that the question was wrongly answered.

[12] The attack on the Registrar's authority is founded on the submission that the *Motor Dealer Act* requires the Registrar to be appointed pursuant to the *Public Services Act* and it is common ground that the Registrar was not so appointed. The apprehension of bias argument arises from the fact that the Motor Dealer's Council appointed the President of the Council to be the Registrar and thus made the chief administrative officer the person responsible for exercising *quasi-judicial* functions, giving rise, the petitioner says, to a perception of interest that is not contemplated by the statutory scheme and a breach of the rules of natural justice.

APPLICABLE LAW

[13] The *Judicial Review Procedure Act* describes the court's jurisdiction to review administrative decisions such as the decision of the Registrar in this case. Where there is alleged error of law section 3 provides:

> The court's power to set aside a decision because of error of law on the face of the record on an application for relief in the nature of certiorari is extended so that it applies to an application for judicial review in relation to a decision made in the exercise of a statutory power of decision to the extent it is not limited or precluded by the enactment conferring the power of decision.

[14] It is common ground that the statute establishing the Motor Dealer Council and conferring powers on the Registrar does not contain any privative clause.

[15] The *Judicial Review Procedure Act* provides that the court may direct the tribunal or administrative body whose decision is the subject matter of the application to reconsider and determine the whole or part of any matter, or if an applicant is entitled to a declaration that the decision is unauthorized or otherwise invalid, to set aside the decision.

[16] The *Administrative Tribunals Act*, S.B.C. 2004, c. 45, codifies the administrative law regime applicable to tribunals in British Columbia, but it is agreed that the Registrar in this case was not sitting as a tribunal as defined under that *Act*.

[17] The *Motor Dealer Act* establishes the office of Registrar and its disciplinary powers. The office is defined in s. 1. The Registrar's manner of appointment and functions are described in s. 2:

> (1) A Registrar of Motor Dealers and other employees required to administer this *Act* may be appointed under the *Public Service Act*.
>
> (2) Subject to section 1.1, the Registrar must
>
> (a) establish a registry system,
>
> (b) under the direction of the minister, exercise the powers and perform the duties conferred or imposed on the Registrar under this *Act*,
>
> (c) publish, on direction of the minister, reports respecting the administration and enforcement of this *Act* and the regulations, and
>
> (d) maintain public records of terms or conditions imposed on a registered dealer under section 4(4).
>
> (3) The Registrar, on direction of the minister, may conduct research, hold public hearings, make inquiries, conduct tests, publish studies and inform consumers and motor dealers respecting any aspect of the motor vehicle industry.

[18] The *Act* itself expressly refers to the *BPCPA*, and s. 8.1 describes the Registrar's duties in relation to that *Act*:

> (1) In this section, "director" has the same meaning as in the *[BPCPA]*.
>
> (2) For the purposes of this section, the Lieutenant Governor in Council may prescribe provisions of Part 2, except Division 3, and Part 5 of the *[BPCPA]*.

(3) A regulation made under subsection (2) may also

(a) identify certain rights and powers, including rights and powers in relation to inspections, inquiries and enforcement, and rights and powers to impose enforcement remedies and penalties, that the Registrar or director may exercise under one or more of this *Act* and Part 10 of the *[BPCPA]*,

(b) prescribe which of the rights and powers under paragraph (a), if any, the Registrar or director may exercise in relation to a prescribed provision of Part 2 or 5 of the *[BPCPA]*, and

(c) apply, in whole or in part, one or more provisions of this *Act* and Part 10 of the *[BPCPA]* to any exercise by the Registrar or director of a right or power that the Registrar or director would not, without the regulation referred to in paragraph (b) of this subsection, otherwise be entitled to exercise.

(4) If the Lieutenant Governor in Council makes a regulation under subsection (2),

(a) the Registrar and director each have and may exercise, in relation to the prescribed provisions of Parts 2 and 5 of the *[BPCPA]*, the rights and powers, if any, prescribed for them under subsection (3) of this section,

(b) contravention of a prescribed provision of Part 2 or 5 of the *[BPCPA]* 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, and

(c) Part 13 of the *[BPCPA]* applies in respect of the contravention of a prescribed provision of Part 2 or 5 of that *Act*.

(5) Nothing in this section affects the rights and powers that the director may exercise in relation to a provision of Part 2 or 5 of the *[BPCPA]* that is not prescribed under subsection (2) of this section.

[19] The *Act* was recently amended as part of an effort to devolve powers from the provincial government to self-regulating bodies.

[20] Section 24.1 and 24.2 became law on April 26, 2004. Section 24.1 provides that the minister may enter into an administrative agreement with an authority to administer provisions of the *Act* and the regulations.

[21] Section 24.2 provides the Lieutenant Governor in Council may by regulation delegate to the authority the administration of any of the provisions of the *Motor*

Dealer Act and the regulations, including any power, function or duty of the minister or Registrar to the Society, except the power to make regulations:

> (1) If the minister enters into an administrative agreement with the authority, the Lieutenant Governor in Council may, by regulation, delegate to the authority the administration of any of the provisions of this Act and the regulations, including any power, function or duty of the minister or Registrar, except the power to make regulations.
>
> (2) The minister must advise the authority if the minister considers that an amendment to the delegation regulation could substantively affect the administrative agreement.
>
> (3) If the Lieutenant Governor in Council repeals a regulation made under subsection (1), the administrative agreement is terminated.

[22] Finally, in terms of the legislative landscape, the *BPCPA* provides as follows in section 4:

> (1) In this Division:
>
> "Deceptive act or practice" means, in relation to a consumer transaction,
>
> (a) an oral, written, visual, descriptive or other representation by a supplier, or
>
> (b) any conduct by a supplier
>
> that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor.
>
> "Representation" includes any term or form of a contract, notice or other document used or relied on by a supplier in connection with a consumer transaction. ...
>
> (3) Without limiting subsection (1), one or more of the following constitutes a deceptive act or practice: ...
>
> (b) a representation by a supplier ...
>
> (vi) that uses exaggeration, innuendo or ambiguity about a material fact or that fails to state a material fact, if the effect is misleading.

[23] These provisions are the statutory successors to the provisions of the *Trade Practices Act*, R.S.B.C. (1996), c. 457. The relevant sections of that *Act*, now repealed, were as follows:

> 3 (1) For the purposes of this Act, a deceptive act or practice includes
>
> (a) an oral, written, visual, descriptive or other representation, including a failure to disclose, and

> (b) any conduct having the capability, tendency or effect of deceiving or misleading a person.
>
> (3) Without limiting subsection (1), one or more of the following, however expressed, constitutes a deceptive act or practice:
>
> (r) the use, in an oral or written representation, of exaggeration, innuendo or ambiguity about a material fact or failure to state a material fact, if the representation is deceptive or misleading;

[24] The significant change that arose from the repeal of the *Trade Practices Act* and the passage of the new provisions of the *BPCPA* are that the words "including a failure to disclose" were removed from the definition of "deceptive practices" generally as it formerly appeared in the *Trade Practices Act*. The following table compares the provisions of the old and the current legislation:

Old Act	**New Act**
Trade Practices Act (R.S.B.C. 1996, c. 457)	*BPCPA* (S.B.C. 2004, c. 2)
3 (1) For the purposes of this Act, a deceptive act or practice includes **(a) an oral, written, visual, descriptive or other representation, including a failure to disclose, and**	4 (1) In this Division: "deceptive act or practice" means, in relation to a consumer transaction, (a) an oral, written, visual, descriptive or other representation by a supplier; or
(b) any conduct having the capability, tendency or effect of deceiving or misleading a person.	(b) any conduct by a supplier that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor; ...
(3) Without limiting subsection (1), one or more of the following, however expressed, constitutes a deceptive act or practice:	(3) Without limiting subsection (1), one or more of the following constitutes a deceptive act or practice:
(r) the use, in an oral or written representation, of exaggeration, innuendo or ambiguity about a material fact or failure to state a material fact, if the representation is deceptive or misleading;	(b) a representation by a supplier **(vi) that uses exaggeration, innuendo or ambiguity about a material fact or that fails to state a material fact, if the effect is misleading..**

ANALYSIS

Administrative Error

[25] The petitioner says the impugned decision ought to be measured by the standard of review of correctness. In my opinion, careful consideration of the alleged error leads to the conclusion that the petitioner challenges the Registrar's

decision on a question open to a range of possible outcomes and ought to be assessed on the standard of reasonableness.

[26] Counsel do not suggest that the decisions of the Registrar of Motor Dealers on deceptive trade practices have been previously the subject of judicial review. Engaging in the process described in *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 62, I cannot find that the existing jurisprudence establishes a standard of review.

[27] Turning then to consider the factors identified in *Dunsmuir* in setting an appropriate standard of review, I consider, (a) the absence of a privative clause; (b) the purpose of the administrative process; (c) the nature of the questions at issue; and (d) the expertise of the tribunal.

[28] In the absence of a privative clause in the enabling statute my role in this review is determined by common law.

[29] There are questions that may come before the Registrar that may be rationally answered in only one way. The determination of such questions should be reviewed on a standard of correctness. Applewood's counsel initially suggested that the decisions of Madam Justice Garson and Madam Justice Satanove (as they then were) in *Blackman v. Fedex Trade Networks Transport and Brokerage (Canada) Inc.* 2009 BCSC 201, and *Knight v. Imperial Tobacco Canada Ltd.*, 2005 BCSC 172, are respectively authority for the proposition that the repeal of the *Trade Practices Act* and its replacement by the *BPCPA* precludes a finding that non-disclosure can constitute a deceptive practice. Had judicial review proceeded on the basis that the Registrar erred in law in determining that non-disclosure in any circumstances could constitute a deceptive trade practice, *that question* is one that might lend itself to a review on the standard of correctness. The Registrar was either right or wrong in considering whether silence on a material point could, at law, be considered to be a deceptive practice under the statute. That determination would be a determination by the Registrar on a point of law of broad application. Notwithstanding that the question of law arose in relation to a statute which the Registrar is called upon to

consider and apply as part of the specialized function of the Motor Dealers Council, the court could review the correctness of the decision as part of its supervisory jurisdiction.

[30] The petitioner's position was moderated in argument, however, to the submission that the *BPCPA* only permits a determination that silence is deceptive where it occurs in relation to certain other representations. That submission acknowledges that the Registrar may conclude that silence is a deceptive trade practice in some circumstances, and asks this court to find that to the Registrar erred in concluding that the non-disclosure in this case occurred in circumstances amounting to a deceptive practice. That determination, in my view, requires the Registrar to address both factual and legal issues. In *Dunsmuir* the court noted, at para. 53, that reasonableness is the ordinary standard for judicial review of questions where the legal and factual issues are intertwined and cannot be easily separated.

[31] Further, it is a question open to a number of reasonable conclusions. It is one clearly within the range of questions referred by the legislature to this specialized tribunal, which is familiar with the market in which the trade practice occurs. There can be, in my view, few clearer examples of a decision of mixed fact and law for which the Registrar is particularly suited.

[32] Whereas the repealed legislation, the *Trade Practices Act*, included failure to disclose facts in the initial description of deceptive practices, the current legislation does away with that wording in the introduction, but retains reference to a failure to state a material fact in section 4(3)(b)(vi). Applewood says this evinces an intention on the part of the legislature to limit the types of non-disclosure that can be said to amount to deceptive practice.

[33] The limitation, according to Applewood, is that in order to offend the current *Act*, non-disclosure must occur in relation to a positive representation by a supplier in the nature of exaggeration or innuendo. It is argued that by repealing the *Trade Practices Act* and enacting the *BPCPA*, the legislature established a regime in which

non-disclosure is not generally considered to be deceptive. By referring only to non-disclosure in section 4(3)(b)(vi), which refers to specific type of representations, the petitioner suggests, the legislature must have meant to require representations in the nature of those specifically described before non-disclosure could be actionable.

[34] The problem with this submission is that it robs significant words in section 4(3)(b)(vi) of any meaning. The *Act* considers a representation by a supplier that uses exaggeration about a material fact to be deceptive if the effect is misleading, even in the absence of non-disclosure. Similarly, the *Act* considers a representation by a supplier that employs innuendo or ambiguity about a material fact to be deceptive if the effect of the innuendo or ambiguity is misleading; again, without non-disclosure. The provision that a representation by a supplier that fails to state a material fact is deceptive, if the effect is misleading, is not necessary in order to address cases where there is exaggeration, ambiguity or innuendo. The legislation permits a finding that there has been deception by silence, even where there has not been exaggeration, innuendo or ambiguity. There needs only to be a representation and non-disclosure of a material fact that has the effect of misleading the consumer.

[35] Applewood says that representations are made in the course of almost any sale and that the Registrar erred, in this case, by concluding there was a deceptive practice where the non-disclosure of the loss of warranty did not occur in relation to a representation of substance; for example, a statement in relation to the warranty.

[36] The Registrar found that representations were made about the repair history of the car and that the consumer was in fact misled with respect to whether he was obtaining a vehicle with warranty. I cannot find the Registrar was incorrect in finding that the non-disclosure of the effect of the substantial repair on the warranty met the criteria of section 4(3)(b)(vi). More importantly, I find the standard of review of that conclusion is reasonableness and I cannot find the decision to have been unreasonable and I defer to the Registrar's conclusion in that regard.

[37] I wish to add that I would not have acceded to the broader legal argument that it was not open *at all* to the Registrar to find that non-disclosure could amount to a deceptive trade practice. That argument was, in my view, untenable.

[38] In the *Knight* case, Madam Justice Satanove considered an application to certify a class action brought against manufacturers and sellers of light and mild brands of cigarettes. On that application it was necessary to determine whether a case could be made out against the defendants under the old *Trade Practices Act.* The court dismissed the defendant's submission that the repeal of the *Act* and its replacement by the *BPCPA* in effect expropriated the plaintiff's substantive rights. Accordingly, the court's comments on the new *BPCPA* were *dicta* and unnecessary for the decision. In any event, the comments on the effect of the new *Act* do not express the view that non-disclosure cannot ever constitute a deceptive trade practice. Madam Justice Satanove states at para. 19:

> If the *BPCPA* were to be given retrospective effect for all purposes, the plaintiff would be foreclosed from seeking relief for *many of the complaints* which he has particularized in paragraph 13 of his Statement of Claim. (emphasis added)

[39] The court did not say that the plaintiff would be foreclosed from seeking relief with respect to all of the complaints, and nor did the court reproduce in the judgment the provisions of para. 13 of the statement of claim to which the court referred

[40] Further, however, the court said at para. 32:

> As mentioned earlier, the main difference between the *BPCPA* and the *TPA* is in the definition of deceptive act or practice. The *BPCPA* definition states, among other things, that a representation by a supplier that fails to state a material fact is a deceptive act or practice *if the effect is misleading.* Although this revised definition suggests a higher onus of proof with respect to misrepresentation by silence or omission as opposed to misrepresentation by express statement, it does not materially alter the causation requirement in s. 172(3). (emphasis added)

[41] In the *Blackman* case, Madam Justice Garson relied upon *Knight* as authority for the proposition that the removal of the failure to disclose provisions from the former *Trade Practices Act* foreclosed the plaintiffs in a proposed class action from

seeking redress for a complaint that he was deceived by a failure to disclose. There is no express consideration in the judgment of Madam Justice Garson of the provisions of section 4(3)(b)(vi) which retains the failure to disclose provision. And further, Madam Justice Garson says at para. 71: "But in any event I would not find the alleged lack of disclosure to constitute deceptive conduct."

The Registrar's Appointment and Authority

[42] The petitioner says errors in the appointment of the current Registrar, Mr. Ken Smith, rendered him incapable of exercising the statutory power of the Registrar conferred upon him by the legislation.

[43] The Motor Dealer Council of British Columbia was incorporated as a society on July 21, 2003. The Administrative Agreement was entered into on March 24, 2004 between the Crown and the Motor Dealer Council of British Columbia in anticipation of the new legislative scheme that would permit the devolution of powers upon the Society. The agreement delegated the administration of the *Motor Dealer Act* to the Motor Dealer Council as an administrative authority pursuant to section 24(2) of the *Motor Dealer Act*. The agreement provided that the Registrar would be appointed by the board "pursuant to the *Act* and this agreement." Further, it provided that the authority would be governed in accordance with the constitution and the bylaws attached to the agreement.

[44] It provided in article 12 "[t]he Board will appoint a Registrar pursuant to the *Act* who will be an employee of the authority ..." and called for the Registrar to perform certain administrative duties including those described in article 14 involving collection of certain payments.

[45] The bylaws appended to the agreement provided for the appointment of a president of the Society to be the chief executive officer. The constitution and bylaws were silent with respect to the appointment of the Registrar.

[46] The petitioner says the Registrar derives all statutory power through the *Motor Dealer Act*, and even under the administrative agreement of March 24, 2004 must be appointed "pursuant to the *Act*."

[47] Section 1 of the *Act* defines the Registrar as "The Registrar of Motor Dealers appointed under section 2". Section 2 of the *Act* says: "A Registrar of Motor Dealers and other employees required to administer this *Act* may be appointed under the *Public Service Act*."

[48] By resolution on March 12, 2004, the board of the Motor Dealer Council appointed Mr. Ken Smith, the president of the council, as Registrar. Mr. Smith was not appointed under the *Public Services Act*. Mr. Smith could not be appointed under the administrative agreement that requires him to be an employee of the Society and still be appointed under the *Public Services Act*. In fact, an appointment under the *Public Services Act* would be inconsistent with the stated objective of devolving administration of the *Motor Dealer Act* to the Society. The petitioner says simply that the appointment is not made under the *Act*, and the Registrar therefore has no authority.

[49] The respondent and counsel for the Attorney General say the role of the Registrar may be filled by a person appointed under the *Act* (and the *Act* provides only one way in which a Registrar may be appointed), or by a person appointed by the board pursuant to the administrative agreement. Even if the board-appointed individual, it does not meet the definition of "Registrar" under the *Act*, that person, the board-appointed Registrar, the respondents say, may exercise by delegation all the powers of a statutory Registrar.

[50] The petitioner says the administrative agreement called for the board-appointed Registrar to be appointed under the *Act* and there was, therefore, no agreement to cede to the Society the right to appoint a Registrar or anyone other than someone appointed under the *Public Services Act*.

[51] The respondent says an appointment made pursuant to sections 24.1 and 24.2 is an appointment pursuant to the *Act*. Each argument is, to a certain extent, circular. In my view one is preferable: the argument that is most consistent with the *Act* as a whole, and permits some effect to be given to the legislature's obvious intention.

[52] I find that the definition of "Registrar" in section 1 of the *Motor Dealer Act* is intended to describe the Registrar in relation to the functions set out in section 2 of the *Act*, rather than in relation to the described means of appointment. In other words, what the definition describes the Registrar, for the purpose of this *Act*, as the person appointed to perform the functions set out in section 2(2) and (3) of the *Act*. One manner of appointment of that person is set out in section 2(1) of the *Act*: that the Registrar may be appointed pursuant to the *Public Services Act*.

[53] The *Act* conspicuously does not say that the Registrar must be appointed pursuant to the *Public Services Act*. It would be inconsistent to say that the definition could only include a person appointed under the *Public Services Act* when the wording of section 2.1 is permissive rather than mandatory. Such inconsistency, in my view, should not be read into the statute.

[54] Reading the *Act* in this manner gives some force and effect to the agreement entered into the by the minister that clearly contemplates the appointment of an employee of the Society as Registrar.

Reasonable Apprehension of Bias

[55] No actual bias on the part of the Registrar, Mr. Smith, is alleged in this case. The case is one of perception.

[56] The petitioner says that the president, as chief executive officer of the Society, must exercise some oversight and investigation, hiring and firing of investigators, collection of fines and penalties, and oversees what amounts to prosecution of disciplinary cases. The Registrar on the other hand must play a *quasi-judicial* role in hearing complaints that will potentially lead to the cancellation of

an individual's licence and may result in the imposition of significant penalties. It is suggested that this situation gives rise to an apprehension of bias of the sort discussed by Madam Justice L'Heureux-Dubé in *Brosseau v. Alberta*, (1989), 1 S.C.R. 301, in the following terms at para. 19:

> The maxim *nemo judex in causa sua debet esse* underlies the doctrine of "reasonable apprehension of bias". It translates into the principle that no one ought to be a judge in his own cause. In this case, it is contended that the Chairman, in acting as both investigator and adjudicator in the same case, created a reasonable apprehension of bias. As a general principle, this is not permitted in law because the taint of bias would destroy the integrity of proceedings conducted in such a manner.

[57] The court in *Brosseau* went on to describe the exception to that rule in cases where there is a statutory direction not subject to constitutional challenge that establishes the regime giving rise to a complaint.

[58] As I indicated in argument, there is no statutory requirement that the president of the Motor Dealer Council of British Columbia be appointed as Registrar. The board could have appointed a third party to the position. The appointment appears to have been a matter of convenience. The defence of statutory justification for overlap of functions is not available to the Registrar on the evidence in this case. If he can fulfill both roles it is only because it is not objectionable for him to do so. On that issue, however, I find in favour of the Registrar. There is no suggestion in this case that the president plays any direct role in the investigation of complaints before they are referred to him for determination in his capacity as Registrar.

[59] The suggested bias arises from the Registrar's administrative role as president. This role is distant from the hearing or investigation. It involves no consideration of the merits of cases. It is not even clear that the president will have a specific institutional interest in a finding of misconduct and the expense of a hearing following investigation. It is true that the president has some fiscal responsibility and the collection of large fines may stand to his credit. On the other hand, the Registrar has been conferred some collection role by the minister and the assumption of that role cannot, therefore, in his capacity as president be said to be

inimical to serving as Registrar. The fact that the Registrar will play some administrative role is recognized by the minister's approval of article 12 of the Administrative Agreement.

[60] In order for the apprehension to be such as to justify a remedy it must meet the test described in *R. v. S.(R.D.)*, [1997] 3 S.C.R. cited by Madam Justice Smith in *COPEU v. Telecommunications Workers*, 2007 BCSC 1834 at paras. 191-3:

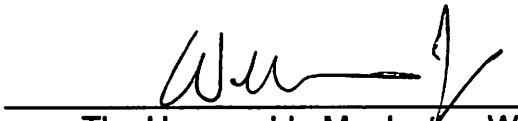
> A succinct summary of the applicable principles is found in *Certain Employees of R.C. Purdy Chocolates Ltd. (Re)*, [2002] B.C.L.R.B.D. No. 25, B.C.L.R.B. Letter Decision No. B25/2002, (Associate Chair Watters at para. 8):
>
> > The threshold for a finding of real or perceived bias is high, and the onus of demonstrating bias lies on the person who is alleging its existence: *R. v. S.(R.D.)*, *supra*, at paras. 113-114. Mere suspicion is not enough: *Adams v. Workers' Compensation Board* (1989), 42 B.C.L.R. (2d) 228 (C.A.). In light of the oath of office taken by both vice-chairs and members of the Board, a rebuttable presumption of impartiality applies: see *Pacific Opera Victoria Association*, [2001] B.C.L.R.B.D. No. 215, B.C.L.R.B. No. B215/2001 at para. 20, and judicial authorities cited therein.
>
> The test for whether there is a reasonable apprehension of bias was stated by L'Heureux-Dubé and McLachlin JJ. in *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at paras. 31-32:
>
> > The test for reasonable apprehension of bias is that set out by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369. Though he wrote dissenting reasons, de Grandpré J.'s articulation of the test for bias was adopted by the majority of the Court, and has been consistently endorsed by this Court in the intervening two decades: see, for example, *Valente v. The Queen*, [1985] 2 S.C.R. 673; *R. v. Lippé*, [1991] 2 S.C.R. 114; *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267. De Grandpré J. stated, at pp. 394-95:
> >
> > > ... the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information ... [T]hat test is "what would an informed person, viewing the matter realistically and practically-and having thought the matter through-conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."
> > >
> > > The grounds for this apprehension must, however, be substantial and I ... refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

> As Cory J. notes at para. 92, the scope and stringency of the duty of fairness articulated by de Grandpré depends largely on the role and function of the tribunal in question.
>
> The question I must determine is whether reasonable and right-minded persons, applying themselves to the question, obtaining the necessary information, and viewing the matter realistically and practically, would think that (more likely than not) the decision-maker on the CUPE application would not decide fairly.

[61] Applying that test, I cannot find that a reasonable and right-minded person applying himself to the question, obtaining the necessary information, and viewing the matter realistically and practically would think it more likely than not that the Registrar serving also as president would not be in take position to decide disciplinary matters fairly.

[62] In coming to that conclusion I am buoyed by the fact that the petitioner itself did not raise this objection before the hearing. An apprehension of bias that arises only after an adverse outcome appears to me to be an apprehension arising more from the outcome than to pre-disposition.

[63] For these reasons I dismiss the petition. The parties will bear their own costs.



The Honourable Mr. Justice Willcock