



Neutral Citation: 2017-BCRMD-006

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

BETWEEN:

VEHICLE SALES AUTHORITY

Complainant

AND:

BEVERLY BARCLAY

Complainant

AND:

**PIONEER GARAGE LIMITED *DBA* FRASER VALLEY PRE-OWNED
(Dealer #40190)**

Motor Dealer

AND:

**DAMIAN SMART
(Salesperson #109080)**

Salesperson

DECISION OF THE REGISTRAR OF MOTOR DEALERS

APPLICATION TO ADJOURN HEARING DATE

By way of written submissions per:

Pioneer Garage Limited *dba* Fraser Valley Pre-Owned Paul W. Schwartz, Lawyer

Damian Smart Himself

The Authority Robert Hrabinsky, Lawyer

INTRODUCTION

[1] Pioneer Garage Limited *dba* Fraser Valley Pre-Owned (“Pioneer”) and Mr. Smart applied to adjourn the hearing in this matter set for Wednesday, July 26, 2017. On July 21, 2017, I granted the adjournment with written reasons to follow. These are those reasons.

POSITION OF THE PARTIES

(a) Pioneer

[2] On July 20, 2017, Pioneer applied for an adjournment for reasons that can be summarized as follows:

- (a) At best, the Co-Respondent, Mr. Damian Smart was served on July 10, 2017, with the Hearing Notice in this matter, by way of email.
- (b) At best, Mr. Damian Smart was served on July 12, 2017, with the 448 page Affidavit of Compliance Officer Vandokkumburg sworn on April 5, 2017, by way of email.
- (c) At best, Mr. Damian Smart has only had two weeks to review these materials while Pioneer has had five weeks to prepare having received those same materials on June 5, 2017.
- (d) Pioneer would be prejudice if the hearing was not adjourned as:
 - (i) Mr. Smart has not had sufficient time to prepare his response and if allegations against Mr. Smart are proven, Pioneer is likely to be held liable for Mr. Smart's conduct, and
 - (ii) Pioneer is not able to fully prepare its own response as Mr. Smart is not in a position to provide informed and focused answers to questions from Pioneer.
- (e) Pioneer has fully refunded the consumer complainant six months ago and there does not appear to be any prejudice to the complainant if the hearing was adjourned. Or alternatively, if there is prejudice to the complainant, the prejudice to Pioneer and Mr. Smart militant in favour of an adjournment.
- (f) Pioneer submits that it should not be responsible for costs associated with the adjournment as it was the Authority's late service on Mr. Smart that necessitated the adjournment.

[3] On July 21, 2017, Pioneer replied to the Authority's submissions and essentially reiterated its above position. Pioneer further notes that if a new hearing date in September 2017 could not be immediately ascertained, the hearing should be adjourned now to a date to be determined later.

[4] Attached to Pioneer's July 20, 2017, submissions are Schedules which are exchanges of emails between Mr. Schwartz and Mr. Hrabinsky.

(b) Damian Smart

[5] On July 21, 2017, Mr. Smart requested an adjournment of the July 26, 2017, hearing date. Mr. Smart's position can be summarized as follows:

- (a) Mr. Smart was unaware of the hearing set of July 26, 2017. While he does not specifically state so, he is inferring he did not receive the email containing the Hearing Notice or the Affidavit of VanDokkumburg.
- (b) Mr. Smart has not seen any of Ms. Barclay's evidence or accusations.
- (c) Mr. Smart advises of certain family commitments and issues he is currently dealing with that interfere with the July 26, 2017, hearing date. Included in these is that Mr. Smart is in the midst of a move to a new home.
- (d) Mr. Smart has provided an address where he can be served the VanDokkumburg Affidavit.

(c) The Authority

[6] The Authority's emails between Mr. Hrabinsky and Mr. Schwartz and the one between Mr. Hrabinsky and Mr. Smart infer the Authority is amenable to an adjournment with preference for the parties to pick a specific date over an adjournment generally with a date to be determined. In an email dated July 19, 2017, Mr. Hrabinsky for the Authority specifically asks Mr. Smart to review the Affidavit once received and determine how much time Mr. Smart believes he needs to prepare for the hearing.

[7] The Authority notes that Mr. Smart was served with the Notice of Hearing by way of email on July 12, 2017, and the VanDokkumburg Affidavit was served in two parts by separate emails later that same day. It notes that by section 30(b)(iii) of the *Motor Dealer Act*, the Hearing Notice and the VanDokkumburg Affidavit may be served by email. The Authority also notes the email address the Authority used for Mr. Smart is the one Mr. Schwartz also gave to the Authority.

[8] Finally, on July 19, 2017, the Authority has committed to delivering the VanDokkumburg Affidavit to Mr. Smart at a mutually agreeable time and place, within the GVRD. Alternatively, Mr. Smart may pick it up from the Authority's office.

REGISTRAR'S RULE 35 - ADJOURNMENT

[9] Under Registrar's Rule 35(4), the following considerations guide the Registrar's decisions for a request for an adjournment:

- (a) the reason for the adjournment,
- (b) whether the adjournment would cause unreasonable delay,
- (c) the impact of refusing the adjournment on the other parties,
- (d) the impact of granting the adjournment on the other parties, and
- (e) the impact of the adjournment on the public interest.

[10] Overall, the Registrar is to weigh the prejudices on the parties and the public interest if an adjournment were granted balanced against the need to ensure administrative fairness and efficiency.

[11] Rule 35(5) notes the Registrar may grant an adjournment on terms or conditions "which may assist with the fair and efficient conduct of the hearing."

DISCUSSION

(a) Reasons for the Adjournment

[12] The main reason for the adjournment is that Mr. Smart says he has not received a copy of the VanDokkumburg Affidavit, nor the Hearing Notice. Given that the Affidavit is over 400 pages in length, Mr. Smart needs more time to prepare his response.

(b) Whether the adjournment would cause unreasonable delay

[13] While no specific new hearing date could be identified by July 21, 2017, it appears the parties are willing to set a hearing date in September or shortly thereafter depending on schedules. This means a new hearing date is about five to nine weeks away.

(c) The impact of refusing the adjournment on the other parties

[14] Given the volume of documents to be reviewed, Mr. Smart would not be in a position to fully prepare his response before the July 26, 2017, hearing date. In my opinion, given the potential penalties that could be levied against him if the allegations are proven, the impact on Mr. Smart if the adjournment were refused is significant.

[15] I do find that there is also the potential for significant prejudice to Pioneer if the adjournment is refused. Pioneer could be held liable for Mr. Smart's conduct and Pioneer may not be able to fully prepare its own case without receiving clear answers to its questions of Mr. Smart. I note that the penalties against Pioneer could also be significant if the allegations are proven up to an including the cancellation of its registration as a motor dealer.

(d) The impact of granting the adjournment on the other parties

[16] I received no submissions indicating that any party would be prejudiced if the adjournment were granted.

(e) The impact of the adjournment on the public interest.

[17] The allegations in this matter are serious and if the allegations are true and continue through the duration of the adjournment, other consumers may be impacted.

(f) Overall

[18] I find it necessary to ensure administrative fairness by allowing Mr. Smart sufficient time to review the evidence so he can make a fulsome response to the allegations, and so Pioneer can question Mr. Smart.

[19] In my opinion, an adjournment would also be more administratively efficient. It is less likely that an adjournment will be needed during the course of the hearing if Mr. Smart is given more time to prepare and gather his own evidence in response.

[20] I find that the prejudices to Mr. Smart and to Pioneer if an adjournment were refused, outweighs the impact on the public interest in granting the adjournment. In granting an adjournment any potential impact on the public interest can be reduced by imposing appropriate terms and conditions. It does not appear the consumer would be affected if an adjournment is granted.

DECISION ON ADJOURNMENT APPLICATION

[21] For the above reasons, I am granting the adjournment of the July 26, 2017, hearing in this matter to a date to be set between the parties, on the following terms and conditions:

- (a) a date is to be set by September 29, 2017, and

- (b) if a later date is required by a party, they are to request that by September 22, 2017, with supporting submissions and evidence.

DECISIONS ON COSTS

[22] Pioneer submitted that it should not be liable for the costs of the adjournment for the reasons stated above. That determination will await the results of the decision in the main case.

Dated: **July 25, 2017**

“Original is signed”

Ian Christman, Registrar