Investigation File #17-03-210
Hearing File # 17-07-002

Neutral Citation: 2017-BCRMD-013

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

BREEZY WEBSTER

Complainant

And

VEHICLE SALES AUTHORITY OF BRITISH COLUMBIA

Complainant

And

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

Respondent Dealer

And

CHAS THOMPSON (#117125)

Respondent Salesperson

By way of written submissions

Pioneer Garage Limited dba Fraser Valley Pre-owned	April 30, 2018, May 1, 2018, and May 10, 2018
Chas Thomson	May 7, 2018

I. Introduction

[1] Pioneer Garage Ltd. dba Fraser Valley Pre-owned dealer # 40190 ("Pioneer") and Chas Thomson salesperson # 117125 apply for reconsideration of:

(a) conditions placed on Pioneer's motor dealer registration under the *Motor Dealer Act*, R.S.B.C. 1996, c. 316 ("MDA"), restricting it from acting as a loan broker, or in any way assisting a consumer to obtain financing, including a lease, for a minimum of one year;

(b) a compliance order issued under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("BPCPA") prohibiting Pioneer from acting as

loan brokers or in any way assisting a consumer to obtain financing, including a lease, for a minimum of one year;

(c) the 30-day suspension of Pioneer's registration as a motor dealer;

(d) various conditions placed on Chas Thomson's salesperson licence prohibiting Mr. Thomson from:

(i) acting as a manager without prior written approval of the Authority;

(ii) acting as a loan broker or in any way assisting a consumer to obtain financing, including a lease, for a minimum of one year;

(iii) finalizing a sale without a manager first reviewing the sale; and

(e) the 30-day suspension placed Mr. Thomson's salesperson licence.

[2] In support of Pioneer's requests for reconsideration, it has supplied two affidavits sworn by Arlene Sater, Comptroller for Pioneer.

[3] Mr. Thomson has supplied a written statement which contains additional information not presented at the original hearing in this case.

II. Grounds for Reconsideration

A. Pioneer

[4] Pioneer made four different requests for reconsideration. Requests one, two, and four seek reconsideration of:

(a) conditions on its registration prohibiting it from acting a loan broker, pursuant to the MDA;

(b) a term of a compliance order prohibiting it from acting as a loan broker, pursuant to the BPCPA; and

(c) a 30-day suspension of its motor dealer registration.

[5] The evidence in support are the two affidavits of Arlene Sater identifying the impact that the condition, the compliance order, and the suspension would have on the business, employees, and on current consumers.

[6] Pioneer submits that it was unaware that it was in jeopardy of having the above noted condition, restricting it from acting as a loan broker, placed on its registration or incorporated into the compliance order. Pioneer advances similar grounds regarding the 30-day suspension. Pioneer submits that the allegations in the Hearing Notice and the Authority's written submissions did not allude to the potential of this type of condition being placed on Pioneer's registration, or a term of the compliance order. Pioneer argues that it should be allowed to make submissions on the imposition of this condition and term of the compliance order, and that it would be procedurally unfair were it not allowed to make those submissions. Pioneer goes on to point out where the Registrar has, apparently, failed to consider the impact on consumers, employees, and the business. Pioneer also advances an argument of the reputational impact this decision will have on the dealership and the larger dealer group. Pioneer also speaks of the other work the dealership does such as repairs and argues that the 30-day suspension may jeopardize the entire business and, if it should close, that consumers may be impacted.

[7] Pioneer's made its third request for reconsideration as it was not certain of the legislative authority of the orders, because:

(a) a term of the compliance order made under the BPCPA requires adherence to the MDA*,* when a compliance order under the BPCPA must relate to a breach of the BPCPA; and

(b) it appears a condition of licence under the MDA, prohibition as a loan broker, was added to the compliance order and whether the prohibition is ordered under the MDA or the BPCPA is not clear.

B. Mr. Thomson

[8] The following is a summary of the grounds on which Mr. Thomson advances his request for reconsideration:

(a) the decision will impact Mr. Thomson's reputation as a salesperson in the industry;

(b) the conditions on his licence would probably mean the loss of his employment within the Pioneer group of dealers and possibly in the industry, and the impact that would have on his family;

(c) he obtained advice not to participate in the hearing and believes it was poor advice and he did not get a fair hearing; and

(d) he has learned from this experience, is sorry for his part in it, and will do whatever it takes to be compliant.

III. Tribunal reconsiderations at common law – *Functus Officio, Procedural Fairness* and *Chandler*

[9] At common law, once a decision-maker has decided on a matter, they are viewed as *functus officio*. That is, with limited exceptions, they may not revisit or reconsider their decision. This includes the Registrar.

- *Chandler v. Alberta Association of Architects*, [1989] 2 SCR 848, 1989 CanLII 41 (Supreme Court of Canada)
- *Fryer v. Motor Vehicle Sales Authority of British Columbia*, 2015 BCSC 279 (B.C. Supreme Court) at paragraph 46.

[10] The limited exceptions applicable to all decision-makers are:

(a) to correct a "slip," such as naming the wrong party within a decision or grammatical errors; and

(b) to express the manifest intention of the tribunal by clarifying a decision, but not change the substance of the decision:

> "… As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, *supra*."
>
> - *Chandler*

[11] The Supreme Court of Canada added another exception for administrative tribunals. The Court in *Chandler* said that, where a tribunal's decision can only be appealed on a question of law, and if the tribunal has made a decision that is a nullity, it should be allowed to revisit its decision and carry-out the statutory duty imposed upon it.

[12] In *Chandler*, a practice review was conducted on an architect pursuant to Alberta's *Architects Act*. In making recommendations, the practice review panel applied the provisions of the legislation and made recommendations reserved for the disciplinary panel, a differently constituted tribunal under the same Act. When the initial review panel decision was quashed, the practice review panel reconvened the original process to complete its statutory duties, accept further submissions, and make appropriate recommendations. The Supreme Court of Canada said this was appropriate. In this case, the practice review panel did not have to restart the process, because it was *functus officio*. It could pick up where it left off in the hearing process and complete its task.

[13] The Supreme Court of Canada also noted that, if there is a denial of natural justice, the tribunal can revisit its decision and start the case afresh. The cases the Supreme Court of Canada cited, as well as subsequent cases, indicate that the denial of natural justice is one discovered by the tribunal and not one that would be advanced on an appeal/review of a decision by an aggrieved party. For instance, where a tribunal has made a final decision and subsequently determined for itself that it did not consider written submissions from a party, due to an administrative error, the tribunal may cure that denial of natural justice by starting the case afresh.

- *Harris & Harris v. Windmill Auto Sales & Detailing Ltd. et al.* (August 20, 2013, Hearing File 12-030, Registrar), at paragraphs 19 to 31 denying reconsideration of *Harris & Harris v. Windmill Auto Sales & Detailing Ltd. et al.* (April 10, 2013, Hearing File 12-030, Registrar) and affirmed by *Windmill Auto Sales & Detailing Ltd. v. Registrar of Motor Dealers*, 2014 BCSC 903 (BC Supreme Court).

IV. Reconsiderations under the BPCPA and the MDA

[14] Legislation may always modify the common law. In this case, the B.C. Legislature has empowered the Registrar to reconsider certain "determinations," including conditions on licence/registration, suspensions, and compliance orders, under sections 26.11 to 26.12 of the MDA, and sections 180 to 182 of the BPCPA.

[15] For the Registrar to vary or cancel a determination under either of the BPCPA or the MDA provisions, the following must be met:

(a) The request must be made within the specified time frame, generally speaking, within 30 days of the reasons for the decision or the determination's having been issued, whichever is later;

(b) There must be new evidence that did not exist at the time of the original decision or, if the evidence did exist, the evidence could not have been discovered through the exercise of reasonable diligence; and

(c) The evidence is substantial and material to the determination.

[16] If these minimum statutory requirements are not met, the Registrar cannot cancel or vary a determination under the authority of the legislation.

[17] The analytical approach is for the Registrar to first assess the application for reconsideration to see if the statutory minimum requirements are met. If they are not met, the Registrar then considers the common law principles in *Chandler* to see if reconsideration is available and appropriate at common law.

- *Harris & Harris v. Windmill Auto Sales & Detailing Ltd. et al.*

V. Review of the submitted new evidence

[18] Pioneer and Mr. Thomson have requested reconsideration within the time required by the legislation. The next step is to consider the evidence tendered in support of that request.

A. Is it new evidence or newly discovered evidence that could not have been found with reasonable diligence?

[19] The evidence in the Affidavits of Arlene Sater is not new evidence or newly discovered evidence. The Affidavits speak to the impact the condition and term of the compliance order prohibiting Pioneer from acting as a loan broker, and the 30-day suspension would have on Pioneer's business, on approximately 13 of its employees, and on some 111 consumers, with uncompleted finance applications, as well as on pending sales and deliveries. It also speaks to the reputational impact the prohibition would have on Pioneer, and that other consumers may be affected if Pioneer should close. Ms. Sater also states that some consumers, with current financing and leases, contact Pioneer with questions about their financing and leasing. While the number of affected consumers may have changed, all this information was known or discoverable at the time of the hearing. Ms. Sater's first affidavit was sworn on April 30, 2018, the day the determinations were issued and three days after the reasons for my decision were issued. This indicates the evidence in Ms. Sater's affidavit was easily discoverable as it resided with Pioneer itself. The second affidavit, sworn May 10, 2018, is also information that resides with Pioneer and not new evidence.

[20] Mr. Thomson's evidence is about the impact the decision may have on his family and the advice he received. This too was knowable at the time of the hearing and is not new evidence or newly discovered evidence.

B. Is it substantial and material?

[21] The evidence advanced by Pioneer and by Mr. Thomson is substantial and material to them. However, it is not substantial and material "to the determination(s)" in that the evidence might modify the original decision. My reasons for decision considered the impact my compliance action would have on the business of Pioneer, on its employees, and on Mr. Thomson, including whether cancelation of their respective registration or license would be appropriate:

> [144] At the outset, I find on the facts that regulatory action short of canceling Pioneer's registration as a motor dealer can address the public interest concerns arising from Pioneer and Mr. Thomson's conduct and past compliance history. I find the same to hold true for Mr. Thomson in relation to his salesperson licence. I have concluded that the below measures balance protecting the public interest with allowing a business to continue to operate and continue to employee [sic] its staff, and Mr. Thomson to continue to work in this industry.
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> ...
>
> [206] The conduct of Pioneer is certainly more serious than operating without licensed salespersons as in Re: SG Power Products. The seriousness approaches that of the two deceptive acts or practices committed by Mr. Hawes in Parkwood. I also consider that Pioneer will require some time to readjust its internal policies and procedures, as well as to conduct training of its staff to ensure Pioneer does not commit deceptive or unconscionable acts and practices in the future. In considering these factors and the above considerations, I believe a 30-day suspension of Pioneer Garage Ltd. dba Fraser Valley Pre-owned's motor dealer registration # 40190 is appropriate. I also take into consideration the impact this suspension may have on Pioneer's employees. To that end, the suspension will not commence immediately and will commence at 12:00 a.m. on May 27, 2018 and end at 11:59 pm on June 25, 2018. [underlining added]

[22] The fact that some 111 consumers have finance applications pending heightens my concern. That is 111 consumers who are to be protected from the risks I have identified, in allowing Pioneer to provide them with loan brokering services. If those 111 consumers, including the sub-prime consumers of Pioneer,

qualify for financing on their own merits, they do not need Pioneer's services to obtain that financing. Someone else can assist those consumers, or any other consumers, to broker a loan for a vehicle purchased from Pioneer. Pioneer's ability to offer loan brokering services is not an indispensable service to consumers.

[23] Pioneer was identified as having an ongoing non-compliance issue, when providing loan brokering services, especially given it had recently undertaken to comply with the BPCPA, including in relation to financing. One undertaking was accepted on April 19, 2016 (Hearing File 15-09-001) for unconscionable acts in relation to financing, and another undertaking was accepted on May 25, 2016 (Hearing File 16-05-001) for misrepresenting the numbers on the financing documents in another transaction. Ms. Webster's transaction occurred less than a year after each of these two undertakings were signed. Attempts at allowing Pioneer the opportunity to voluntarily correct its internal processes to become compliant have failed. It was time to intervene to protect consumers. Pioneer has been given a year to modify its practices, put in place proper policies and procedures, train its staff, and to prove it can be trusted to provide loan brokering services: see for example paragraphs 147 to 148 of the April 27, 2018 reasons for decision.

[24] Pioneer's having its motor dealer registration suspended for 30-days does not stop its repair facilities. If consumers have questions or concerns during those 30-days, they may go elsewhere to have them addressed.

[25] The evidence advanced by Pioneer and Mr. Thomson on their requests for reconsideration is not new evidence or newly discovered evidence within the meanings of sub-section 182(2) of the BPCPA and 26.12(2) of the MDA. That being the case, the Registrar would not be statutorily empowered to vary or cancel the determinations. Even if the evidence can be considered new evidence, it is not material and substantial to the determinations as the original decision did consider the impact the compliance action would have on Pioneer's business, its employees, on Mr. Thomson and was made with protecting consumers in mind.

[26] Both Pioneer and Mr. Thomson ask me to consider the reputational impact my decision and the conditions as to loan brokering will have on them. Licensed professionals, who are found not complying with the law, will always run the risk that their reputation will be reduced within their industry and in the eyes of the customers they serve. That cannot have a bearing on the role of the Registrar, which is to intervene to protect consumers when the circumstances require.

[27] As for Pioneer's third request for reconsideration, I found that Pioneer and Mr. Thomson committed deceptive acts or practices and an unconscionable act or

practice in respect of a consumer transaction, while acting as a loan broker, all as defined in the BPCPA. The term of my compliance order under the BPCPA, prohibiting each from acting as a loan broker for one-year, is due to a breach of that Act. Under section 8.1 of the MDA and section 29(2)(a)(i) of the *Motor Dealer Act Regulation*, that same conduct is also actionable against Pioneer's motor dealer registration, including imposing conditions. The two pieces of legislation have been intertwined under the authority of the Registrar.

[28] For the above reasons, Pioneer's and Mr. Thomson's requests for reconsideration under the provisions of the BPCPA and the MDA are denied.

VI. Procedural fairness – *Chandler*

A. Pioneer

[29] Pioneer advances that it was not procedurally fair for the Registrar to impose the prohibition from acting as a loan broker and the 30-day suspension, without first allowing Pioneer to make submissions on those points. Pioneer says it could not have contemplated such a condition or a 30-day suspension and a myriad of other compliance actions that could have been taken, and speak to them. Pioneer notes that there was no notice of this condition; and the Authority did not make submissions requesting such a condition. Pioneer also says that the 30-day suspension was not specified in the Hearing Notice; and the Authority only made note of a continuous suspension of three to six weeks in the Authority's closing submissions.

[30] The Hearing Notice provided to Pioneer and Mr. Thomson specifically gave notice that the Registrar could add conditions to their respective registration and licence, after the hearing process. The Hearing Notice also noted the same regarding a suspension. The Hearing Notice also said that the Registrar may make a compliance order under the BPCPA after the hearing. The Registrar's process of conducting hearings, with notice of possible compliance outcomes, has been found procedurally fair:

> [52] Moreover, <u>the notice of hearing served on the petitioners sets out the basis of the allegations against the petitioners</u>, namely that they "did in relation to a consumer transaction contravene sections 4 and 5 of the [BPCPA] by making an oral, written, visual, descriptive or other representation … that had the capability, tendency or effect of misleading <u>…", and states that, at the conclusion of the hearing, the Registrar may make orders pursuant to ss. 154, 155 and 164 of the BPCPA</u>, which includes reimbursement of any money received from a consumer. Section 164 in turn provides that in

considering an appropriate administrative penalty, the Registrar must consider whether the contravention in issue was deliberate.

[53] <u>In other words, the notice of hearing specifically put the petitioners on notice that one possible outcome of the process was a finding that they deliberately committed a deceptive act or practice, a finding that is expressly contemplated by the BPCPA</u>.

[54] Similarly, I am not satisfied that the petitioners were denied the right to be heard and to present a full answer due to anything said by Mr. Dunn. <u>Again, the notice of hearing clearly sets out the specific nature of the allegations being advanced against the petitioners and the range of possible outcomes. Further, the petitioners were provided with the Kilback affidavit setting out the evidence in support of the allegations four months in advance of the hearing date.</u>

...

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

[60] Further, the Registrar was under no obligation to remind the petitioners to either read or read carefully the notice of hearing or the statutory provisions referenced therein (see *Moreau-Bérubé v. New Brunswick*, 2002 SCC 11 (CanLII) at paras. 79- 81). <u>Therefore, I find that that [*sic*] there was no breach of natural justice or breach of the duty of procedural fairness owed to the petitioners in the overall context of the hearing of the complaint.</u>

[emphasis added]

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

[31] In its written submissions, the Authority said Pioneer's conduct was deserving of having its registration cancelled or suspended. Certainly, the impact on Pioneer's business, its ability to employ its employees, and the impact on the 111 consumers with pending financing applications would be permanent and immediate, if Pioneer's registration was canceled, or temporarily impacted if Pioneer's

registration were suspended. Clearly, if the impact on Pioneer's business, its employees, and its consumers was a concern, Pioneer could have made those submissions regarding the potential cancelation or suspension of its registration, as was being sought by the Authority and as noted in the Hearing Notice.

[32] Pioneer's written submissions specifically addressed what it believed was the appropriate compliance action. Pioneer took the position that it did nothing wrong other than having failed to make certain declarations required by section 23 of the *Motor Dealer Act Regulation,* which was deserving of only a fine and of an administrative penalty

[33] Mr. Thomson elected not to give evidence at the hearing or provide any written submissions.

[34] The above is not a case of the Registrar's having discovered that he has not provided procedural fairness during the hearing. It is an argument that the Registrar should have undertaken a specific process, under the circumstances, as required by the Registrar's statute and the common law principle of procedural fairness. That is properly an argument to be made before a reviewing court and not an opportunity for the Registrar to reconsider the process he has decided to take, and to try it again: *Windmill.*

B. Mr. Thomson

[35] Mr. Thomson speaks of having obtained poor advice leading to an unfair trial. Mr. Thomson now says, had he participated at the hearing, he believes a different result would have occurred. This, of course, is a speculative argument.

[36] A similar argument was advanced by another salesperson in the Northland Chrysler case. In that case, the salesperson said they took advice from a lawyer, who was also the lawyer for the dealer. The dealer and the salesperson became adverse in interest and the lawyer was in a conflict of interest and should have declared that conflict and withdrawn sooner than the lawyer had. The salesperson argued that he did not receive proper legal representation and that an injustice would occur if the original decision was not reconsidered.

- *AutoCanada Northtown Auto GP Inc. a general partner of Northtown Auto LP dba Northland Chrysler Jeep Dodge, Frederick Brent Marshall, and Murray Leonard Carlson* (January 12, 2016, Hearing File 13-08-001, Registrar) reconsideration denied ("Northland").

[37] In the Northland case, the salesperson was relying on a line of authorities, which allowed the courts to reconsider matters under the *Criminal Code* of Canada, where a claim of an injustice was made. That line of authority was based on a statutory authorization to reconsider such criminal cases, not authority at common law. The request for reconsideration in Northland was denied, as the legal principal advanced was not applicable to the Registrar.

[38] Mr. Thomson received some advice, chose to follow that advice, and not participate in the hearing of this matter. That is an issue to be dealt with between Mr. Thomson and the person from whom he received the advice. The Registrar has no statutory or common law authority to reconsider a decision because a party says they did not participate at the hearing, because of bad advice.

VII. Decision

[39] For the forgoing reasons, Pioneer's and Mr. Thomson's requests for reconsideration of the determinations are denied.

VIII. Further Review

[40] Pursuant to sub-section 26.12(4) of the MDA and sub-section 182(6) of the BPCPA, this decision cannot be reconsidered.

[41] This decision may be reviewed by petitioning the B.C. Supreme Court for judicial review pursuant to the *Judicial Review Procedure Act* within 60 days of this decision being issued: section 7.1(t) of the MDA.

Date: May 15, 2018

Original Signed
Ian Christman J.D.
Registrar of Motor Dealers