



Neutral Citation No. 2018-BCRMD-033

**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**

AMY BOUCHARD and INGRID MUNRO

Complainants

And

N.W. AUTO DEPOT LTD.
(Dealer Licence #10578)

Respondent Dealer

And

WESTMINSTER MOTORS LTD.
(Dealer Licence #40469)

Respondent Dealer

And

GORDON VALENTE (Salesperson Licence: #101221)

**DECISION OF THE REGISTRAR OF MOTOR DEALERS
Re: FACTS**

APPEARANCES:

For the MVSA:

Robert Hrabinsky, counsel
Dan McGrath, compliance officer

For the Respondent Dealers:
and Mr. Valente

Seema Lal, counsel

Place and Date of Hearing:

Langley, B.C.
July 17 – 19, 2019

Written Submissions Received:

August 14, 2019
August 30, 2019
September 6, 2019

Introduction

- [1] This case arises from a consumer complaint brought in relation to the March 2018 sale by a North Vancouver dealer of a 1990 Nissan 300ZX and a resulting more general investigation brought by the Motor Dealer Council of British Columbia dba Motor Vehicle Sales Authority of British Columbia ("MVSA") into the dealer's conduct.
- [2] On January 15, 2019, the MVSA issued a hearing notice against N.W. Auto Depot Ltd. ("N.W."), Westminster Motors Ltd. ("Westminster", collectively with N.W., the "Dealers") and their principal Gordon Valente ("Mr. Valente"). The hearing notice indicates that the MVSA seeks orders including the most serious sanction of cancellation of the registration of the Dealers and Mr. Valente's registrations pursuant to sections 5 and 6 of the *Motor Dealer Act*, R.S.B.C. 1996, c. 316 ("MDA").
- [3] In respect of the 1990 Nissan 300ZX, the MVSA alleges that:
- a. in their dealings with Ingrid Munro, the original owner of the vehicle, N.W. and Mr. Valente engaged in deceptive or unconscionable practices and breached the statutory regime by failing to prepare and provide a consignment agreement, by misrepresenting the selling price and improperly by withholding some of the proceeds of sale; and
 - b. in their dealings with Amy Bouchard, the purchaser of the vehicle who later filed a consumer complaint, N.W. and Mr. Valente engaged in unconscionable or deceptive practices and breached the applicable regulations by selling a vehicle that was not compliant with the MVA, by failing to represent the vehicle as being "not suitable for transportation" and by failing to make required declarations in the purchase agreement.
- [4] Prior to the hearing notice being issued, the MVSA had subsequently sought and obtained certain interim orders against the Dealers in September 2018.
- [5] In addition to the allegations relating to the 1990 Nissan 300ZX, the MVSA also alleged that the N.W. breached an undertaking dated March 2, 2018, failed to comply with conditions imposed on its registration on May 24, 2018 and failed to comply with the Registrar's September 4, 2018 interim suspension order.
- [6] By agreement between the parties, the hearing has been broken into two phases: a liability phase and, depending on the outcome of the liability phase, a penalty phase. This decision determines the issues in the liability phase of the proceeding.

- [7] The mode of hearing for the liability phase was the subject of a pre-hearing application. On April 11, 2019, I issued directions as to the mode of hearing which provided for a hybrid hearing process in which the parties would deliver affidavits setting out their evidence in chief and would have a right to cross examine any of the other party's affiants. The cross-examinations proceeded over three days in July 2019.
- [8] Following the conclusion of the cross-examinations, the parties agreed to a schedule for delivery of written closing submissions in August and September 2019.

Legal Framework

- [9] Counsel for the MVSA made detailed submissions with respect to the legal framework applicable to this decision. With one exception, discussed below, counsel for the Dealers and Mr. Valente agreed with the MVSA's description of the applicable legal framework.
- [10] The uncontentious matters relating to the applicable legal framework are as follows:
- a. The Registrar has the authority and power to cancel or suspend the registration of a motor dealer and the licence of a salesperson where it is the opinion of the Registrar that it would not be in the public interest for the motor dealer or salesperson to continue to be registered or licensed: *MDA*, ss. 5 and 6; *Salesperson Licensing Regulation*, ss. 6 and 7.
 - b. The Registrar is vested with further powers and authority to investigate and impose penalties in relation to breaches of the deceptive and unconscionable practices sections of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("*BPCPA*"): *MDA* s. 8.1, *Motor Dealer Act Regulation*, ss. 26, 29.
 - c. A determination that a registered person has committed a deceptive act or practice under the *BPCPA* is grounds for the Registrar of Motor Dealers to determine that it is not in the public interest for the person to be registered: *MDA*, s.8.1(4)(b).
 - d. A deceptive act or practice is broadly defined and generally includes anything "that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor". There is no requirement for an intent to mislead and omissions which have the effect of misleading constitute misleading acts.: *BPCPA*, s. 4; *Cummings v. 565204 B.C. Ltd.*, 2009 BCSC 1009 at para. 21 and 22.

- e. Where there is an allegation of a deceptive act or practice, the burden of proof is on the supplier to establish that such deceptive act or practice was *not* committed or engaged in: *BPCPA*, s. 5(2).
- f. Dealers engaging in consignment sales have special obligations including requirements to obtain a written consignment agreement and to treat proceeds of consignment sales as trust funds: *Motor Dealer Consignment Sale Regulation*, B.C. Reg. 101/95.
- g. Motor dealers have statutory obligations to make certain disclosure, including in relation to material facts about the vehicle and in relation to leases: *MDA Regulation*, ss. 23 and 30.
- h. The Registrar has continuing jurisdiction over registrants and licensees even after registration and license have lapsed.

[11] The one aspect of the legal framework set out by the MVSA that the respondent Dealers and Mr. Valente take issue with is under the heading “MDA-R – Not Suitable for Transportation”. The MVSA made a number of allegations in the hearing relating to the sale of vehicles that it said were “not suitable for transportation” and cited authority for the propositions that:

- a. No person including registered motor dealers may offer for sale or sell a motor vehicle for use on the roads unless it meets minimum safety requirements and all regulations under the *Motor Vehicle Act*: *Re: Golden Year Auto Broker* (decision of the Registrar dated April 28, 2015);
- b. There is a positive duty on motor dealers to inform themselves about the history of a motor vehicle: *Naples v. River City Auto Sales* (February 18, 2013); and
- c. the *Motor Dealer Act Regulation* (ss. 21(2)(e) and (f), 22, and 27(b)) requires motor dealers to represent to consumers whether or not a motor vehicle does or does not meet the requirements of the *Motor Vehicle Act*: *Re: Best Import Auto Ltd. et. al.* (November 28, 2017).

[12] The Respondents take the position that “the MVSA has no authority, under its enabling legislation, or otherwise, to enforce any breaches of the *Motor Vehicle Act*” and notes that the phrase “not suitable for transportation” is not defined in the *MDA*, *MDA Regulation* or the *BPCPA* (Respondents Brief of Argument at para. 5-11).

[13] The issue is described by the Respondents as relevant to the allegations in this proceeding as follows:

The Respondents submit that vehicles in relation to which the CVSE might issue a “Box 1” or “Out of Service” Order are vehicles that are “not suitable for transportation”. However, vehicles in relation to which

a “Box 2” or “Order to carry out repair” within 30 days has been issued are not vehicles that are “not suitable for transportation”. The Respondents concede that such vehicles are not compliant with the *Motor Vehicle Act* and are subject to the requirements of the applicable legislation (Respondents Brief of Argument at para. 13).

[14] The MVSA in reply submits that the “Respondents’ position would completely undermine the legislative purpose behind the prohibition against offering vehicles for sale that are non-compliant with the *MVA* in the absence of a clear statement that the vehicle is “not suitable for transportation” and refers to the comment of the Registrar in *Re: Best Import* that “A motor vehicle that does not meet the safety requirements of the Motor Vehicle Act may not be driven legally on the highways; and it is therefore legally “not suitable for transportation” (para. 21) and that “Ensuring a motor vehicle being offered for sale meets those safety standards is also an important policy goal of reducing death and injuries on the roadways, as well as the related financial harm that can occur from accidents” (para. 28) (MVSA Reply Submission at para. 13).

[15] The MVSA argues that an interpretation of the legislative scheme that did not require motor dealers to identify any vehicle that is not compliant with the *MVA* in any respect as “not suitable for transportation” would undermine the policy objectives of the legislative scheme and would be inconsistent with the provisions of the *MDA* and *MDA Regulation* which clearly require motor dealers to identify vehicles that do not comply with safety requirements of the *MVA* as not suitable for transportation.

[16] The MVSA points in particular to section 21(2)(e) and (f) of the *MDA Regulation* which provide as follows:

(2) Where a motor dealer makes a written representation in the form of a sales or purchase agreement respecting the sale by him of a used motor vehicle, he shall include the particulars required for a new motor vehicle under subsection (1) and

...

(e) a statement that the motor vehicle complies with the requirements of the *Motor Vehicle Act*, **and**

(f) in the case of a motor vehicle not suitable for transportation a statement to that effect.

[emphasis added]

[17] The MVSA submits that this provision should be read to require that a motor dealer “must declare on the purchase agreement that the motor vehicle meets the requirements of the *MVA* (section 21(2)(e)), **or** in the case of a motor vehicle not suitable for transportation, a statement to that effect (section 21(2)(f))” (Reply Submission of the MVSA at para. 11(d), emphasis added).

- [18] The argument follows, it submits that these subsections are a “clear juxtaposition” on the one hand between vehicles that comply with the MVA and vehicles that are not suitable for transportation on the other and that “[t]his juxtaposition reveals a clear legislative intent that ‘a motor vehicle not suitable for transportation’ is a motor vehicle that does not comply ‘with the requirements of the Motor Vehicle Act” (Reply Submission of the MVSA at para. 13(b), emphasis in original).
- [19] The submission of the MVSA construes sub-sections 21(2)(e) and (f) of the *MDA Regulation* as disjunctive, ignoring the use of “and” between the two provisions. While I agree with the MVSA that the statutory scheme must be read in a manner that protects public safety such that it prohibits the sale of unsafe vehicles for use on the roads, I do not agree that the statutory scheme provides that vehicles that do not comply with the *Motor Vehicle Act* in any respect are unsuitable for transportation. Nor do I agree with the Respondents that the evidence at this hearing establishes that only a vehicle “in relation to which the CVSE might issue a ‘Box 1’ or ‘Out of Service Order’ may be said to be a vehicle that is ‘not suitable for transportation.’”
- [20] As Registrar Christman held in *Best Import Auto Ltd.*, the provisions of the *Motor Dealer Act Regulation* taken together “compel a motor dealer to represent to consumers whether or not a motor vehicle **meets the safety requirements** of the *Motor Vehicle Act*.” (para. 30, emphasis added). The factual inquiry in determining whether a motor dealer has met their obligations in this regard must be directed at whether any alleged non-compliance with the *Motor Vehicle Act* makes the vehicle unsafe such that it is “not suitable for transportation”. Otherwise put, in my view “not suitable for transportation” should be understood to mean “not safe for consumers to drive”. To the extent alleged non-compliance with the *Motor Vehicle Act* does not relate to the safety of the vehicle, that non-compliance would not in and of itself make the vehicle “not suitable for transportation”. Similarly, if the condition of the vehicle is such that it is unsafe for consumers to drive, the vehicle is unsuitable for transportation, whether or not some technical violation of the *Motor Vehicle Act* can be established.
- [21] The Respondents submit that “vehicles in relation to which a ‘Box 2’ or ‘Order to carry out repair within 30 days’ has been issued are not vehicles that are ‘not suitable for transportation’” (Respondents’ Brief of Argument at para. 13). While the Respondents do not put it this way expressly, I understand this submission to be essentially that Box 2 vehicles, by definition since they were not marked as Box 1 – out of service order, are not unsafe such that they meet the statutory standard of “not suitable for transportation”.
- [22] The evidence at this hearing touched only very briefly on the meaning of “Box 1” and “Box 2” for CVSE vehicle inspections and certainly was not sufficiently comprehensive to permit me to conclude that in no circumstances could a vehicle the CVSE would mark “Box 2” be considered “not suitable for

transportation". While I am not prepared to accept the Respondents' argument that there is no circumstance in which a Box 2 vehicle could properly be considered "not suitable for transportation", I agree with the Respondents that what is important in assessing suitability for transportation is the actual safety of the vehicle. The determination as to whether a motor dealer selling a used car appropriately carried out their duties to ascertain and inform consumers as to the safety or suitability of the vehicle for transportation will require evidence of the actual condition of the vehicle and the impact of any identified necessary repairs on safety of the vehicle.

Issues

- [23] The MVSA seeks findings of non-compliance with various regulations with respect to a lengthy list of allegations against N.W. and Mr. Valente and against Westminster in respect of alleged non-disclosure in relation to leases in breach of the *MDA*. In addition, MVSA seeks findings that certain of the alleged conduct constitute deceptive acts or practices under the *BPCPA* and findings that the Respondents have breached an undertaking, conditions on their licences and the Registrar's interim suspension order.
- [24] In respect of the 1990 Nissan 300ZX, the issues for determination in this phase of the hearing are:
- a. Did the Respondents N.W. and Mr. Valente breach the *Consignment Sales Regulation* or engage in a deceptive act or practice in connection with the sale of the 1990 Nissan 300ZX on behalf of Ingrid Munro? and
 - b. Did the Respondents N.W. and Mr. Valente breach the *MDA* or otherwise engage in a deceptive act or practice in connection with the sale of the 1990 Nissan 300ZX to Amy Bouchard?
- [25] More generally, I must determine:
- a. Did N.W. fail to comply with conditions imposed on its registration on May 24, 2018 by offering motor vehicles that did not pass a mechanical and safety inspection for sale that were not identified as "not suitable for transportation"?
 - b. Did Westminster breach the *MDA* by failing to make disclosure in relation to leases?
 - c. Did the Respondents' conduct breach the March 2, 2018 Undertaking?
 - d. Did N.W. and Mr. Valente breach section 189(5) of the *BPCPA* by their conduct in connection with MVSA's investigation?
 - e. Did N.W. and Mr. Valente fail to comply with the Registrar's September 18, 2018 interlocutory suspension order?

Discussion

- [26] As set out above, evidence in the liability phase of the hearing was tendered by way of affidavit and the parties were given the right to require witnesses to attend for cross-examination before me.
- [27] The evidence relied on by the MVSA was contained primarily in affidavits of Dan McGrath, a MVSA compliance officer who had primary conduct of the investigation into the Dealers and Mr. Valente. Mr. McGrath swore detailed affidavits in June, October and December of 2018 and attended at the hearing and was cross-examined by counsel for the Dealers and Mr. Valente. He also prepared licensing hearing reports and gave evidence before Registrar Christman in preliminary hearings in June and August 2018, the transcripts of which were in evidence before me.
- [28] Mr. McGrath detailed in his affidavits his investigation into the Dealers and Mr. Valente following receipt of a customer complaint from Ms. Bouchard and Mr. Cerovic in April 2018, his involvement in inspections carried out at the Dealers' premises, efforts to obtain documents and information from Mr. Valente and his observations and conclusions as a result of his investigation in support of the allegations set out in the notice of hearing.
- [29] Mr. McGrath's affidavit evidence included as attachments certain affidavits obtained by Mr. McGrath during the course of the investigation, including as will be returned to below, two affidavits obtained in June and September 2018 from Thomas Wong and one of the owners of IB Auto Services (1995) Ltd.
- [30] The MVSA also relied on an affidavit of Godwin Tse, another MVSA staff member, and transcripts of the prior proceedings before Registrar Christman.
- [31] Two of the complainants, Ingrid Munro, who approached Mr. Valente about selling the 1990 Nissan 300ZX for her, and Amy Bouchard who ultimately signed the purchase agreement for the vehicle gave evidence and were cross-examined at the hearing. Damon Cerovic, Ms. Bouchard's former partner who primarily dealt with Mr. Valente in negotiating the purchase, did not give evidence.
- [32] The Respondents filed an affidavit of Gordon Valente who deposed to his 40 years of involvement in the sale of motor vehicles and approximately 15 years (since 2004) as a licensed salesperson and principal of a registered dealer, N.W. with very few customer complaints and no involvement in administrative or disciplinary proceedings until entering into a voluntary undertaking in March 2018.
- [33] Mr. Valente also gave his account of his dealings with Mr. Munro, Mr. Cerovic and Ms. Bouchard in respect of the sale of the 1990 Nissan 300ZX, his participation in the MVSA's investigation of this matter and certain of the more

general issues raised in the hearing notice. Mr. Valente was cross-examined at the July 2019 hearing by counsel for the MVSA.

A. Credibility of Witnesses and the “Recreated” Report

- [34] In argument, counsel for the MVSA advanced the submission that Mr. Valente in his evidence “established himself as a person who is fundamentally lacking in honesty and integrity” and that accordingly “[w]here there is any conflict between the evidence of Mr. Valente and any other witness, the evidence of any such other witness is to be preferred.” (MVSA Brief of Argument at para. 122, 127). In support of this submission, counsel for the MVSA points to three aspects of Mr. Valente’s evidence:
- a. Mr. Valente’s admission that he “had prepared a document in his own hand which purported to be a vehicle inspection report certified by a trade qualified automotive technician, which he then provided to MVSA Compliance Officers as part of his response to a consumer complaint” (MVSA Brief of Argument at para. 122). This issue was referred to by Mr. Valente and counsel for the Respondents as a “recreated” report and by counsel for the MVSA as a “fabricated” report.
 - b. Mr. Valente’s suggestion for the first time on the afternoon of July 19, 2019 that he had in fact not sold Ms. Munro’s vehicle on consignment at all but rather had secured a sale, then bought and re-sold the vehicle to Ms. Bouchard (MVSA Brief of Argument para. 123).
 - c. a general tendency in Mr. Valente’s evidence to “simply say[] what he thought, in the moment might be most beneficial to his cause” (MVSA Brief of Argument at para. 126).
- [35] The Respondents “vehemently disagree” with the suggestion that Mr. Valente established himself as a dishonest person whose evidence should be rejected (Respondents’ Brief of Argument at para. 104). For their part, the Respondents allege that Mr. McGrath “commenced this investigation with a biased view against Mr. Valente, being a view that Mr. Valente was not a trustworthy or competent salesperson/motor dealer and needed to be disciplined by the MVSA.” The Respondents submit as a result that where there is a conflict in the evidence between Mr. McGrath’s evidence and Mr. Valente’s evidence, Mr. Valente’s evidence ought to be preferred (Respondents’ Brief of Authorities at para. 102-3).
- [36] While there is some basis in the arguments of both MVSA and the Respondents, in my view the evidence does not suggest that it would be appropriate to make a blanket determination as to which witnesses’ evidence I prefer. Rather, I will assess the evidence with respect to each material issue and consider on a case by case basis how to resolve conflicts in the evidence.

- [37] There are reasons to approach aspects of both Mr. Valente's and Mr. McGrath's evidence with caution where it conflicts with the evidence of other witnesses or documents.
- [38] With respect to Mr. McGrath, I do not agree with the Respondents' submission that the evidence supports the view that Mr. McGrath "commenced this investigation with a biased view against Mr. Valente". To the contrary, as a general matter, while he may have gotten frustrated on a few occasions during his cross-examination, in general Mr. McGrath presented as a thoughtful and careful witness who takes seriously the consumer protection mandate of the MVSA.
- [39] However, as returned to below in the discussion of the "recreated" report, Mr. McGrath at a very early stage in his investigation was provided with inaccurate information by Mr. Wong that painted Mr. Valente in a negative light and may have coloured the conduct of the investigation going forward. Because Mr. Wong's error came to light only after Mr. McGrath's cross-examination had concluded, this suggestion was not put to Mr. McGrath and he did not have an opportunity to give evidence on the subject.
- [40] With respect to Mr. Valente, I agree with the MVSA that Mr. Valente's evidence, particularly where it is inconsistent with documentary evidence should be treated with caution. As returned to below, Mr. Valente demonstrated poor recall of details set out in documents in the record before me and proved unable to explain discrepancies between documents and his evidence.
- [41] One example of this issue is the evidence Mr. Valente gave on cross-examination about whether he had sold Ms. Munro's vehicle on consignment. The Respondents characterize Mr. Valente's evidence of his transaction with Ms. Munro as setting out his "honest view" of the nature of the transaction regardless of whether the transaction may technically be characterized as a consignment sale as defined in the legislation (Respondents' Brief of Argument at para. 106).
- [42] The Respondents do not – and in my view, cannot reasonably – address the inconsistencies between Mr. Valente's evidence on July 19, 2019 that he did not consider the sale for Ms. Munro to have been a consignment sale and documents in which Mr. Valente had referred to a "consignment agreement" and "duration of consign term" in correspondence with the MVSA relating to his dealings with Ms. Munro (see e.g. transcript excerpts reproduced at para. 126 of MVSA Brief of Argument). Overall, a review of the documentary evidence supports the MVSA's submission that Mr. Valente's evidence on the afternoon of July 19 that he did not consider his arrangement with Ms. Munro to have been a consignment agreement was the first time he had taken this position and is inconsistent with the position he had been taking in correspondence with the MVSA investigators for over a year.

- [43] The impact of the issue of the “recreated” document was less clear. In responding to the MVSA’s requests for documents and information about the 1990 Nissan 300ZX as part of its investigation, in the spring of 2018 Mr. Valente provided the MVSA with a document that appeared to be an inspection report of the vehicle obtained by Mr. Valente and signed by “Thomas” at “IB Auto”. Mr. Valente now admits that the document was prepared in his hand and says that in doing so he was attempting to “recreate” from memory an inspection report that he could not locate.
- [44] Mr. Valente initially presented this document to the MVSA investigators as an authentic document. In June 2018, MVSA investigators obtained an affidavit of Thomas Wong of IB Auto Repairs in which Mr. Wong deposed that in October 2017: “my shop performed a brief inspection of a 1997 (sic)¹ Nissan 300ZX VIN: JN1RZ24S1OX000477”, that “We performed a test on the engine only and determined there was a problem with the engine and ran a compression test and checked the idling. . .The engine was running very rough and the vehicle would require expensive repairs so we did not proceed with a full inspection. Gordon Valente was informed of the engine issues when he picked up the vehicle and there was no charge to Gordon Valente as we did not do a full inspection due to the immediate engine issues identified. Gordon Valente was informed there was a big repair job needed on the engine and he took the vehicle away himself”. Mr. Wong went on to say that he had viewed the “recreated” inspection report, that he did not sign that report and that he had “checked with other employees of I.B. Auto Repair and confirmed nobody signed or was provided an inspection report to sign from Gordon Valente”.
- [45] Mr. McGrath gave evidence that he met with both Mr. Wong and Mr. Hirata on or about May 7, 2018 and that they both confirmed the evidence in Mr. Wong’s first affidavit at that meeting. His evidence was that in addition to the “recreated” report, he may have shown Mr. Wong the front – but not the back handwritten page – of the actual inspection report which was at p. 143 of his affidavit. He explained that he did not recognize the handwriting and that Mr. Wong’s name was not on the handwritten notes so he did not think he needed to show it to him.
- [46] The affidavit indicates that a copy of the inspection report Mr. Valente viewed was attached as exhibit A but no exhibit A was in fact included in the version of Mr. Wong’s affidavit that was attached to Mr. McGrath’s affidavit. This appears to have been an administrative oversight on which nothing turns. All parties agree that exhibit A is the recreated report.
- [47] On September 4, 2018, as returned to below, Registrar Christman issued an interim suspension of the Dealers. In respect of the “recreated” inspection report, he commented on the state of the evidence at that time which was that it was clearly not a copy of the actual report provided to the consumer, that

¹ The reference to 1997 appears to be a typographical error as the same VIN is used by Mr. Wong in his second affidavit to refer to a 1990 Nissan 300ZX.

Mr. Wong had deposed that he had not prepared the version of the report that bore his name, and that Mr. Valente accused the MVSA investigator of "having intimidated" Mr. Wong so that he could not recall what had really occurred (Reasons of September 4, 2018 at para. 20).

[48] The day after the interim suspension was issued, on September 5, 2018, MVSA obtained a second affidavit from Mr. Wong. The affidavit bears some similarities of form to the first affidavit Mr. Wong signed including that it is printed on MVSA letterhead and reproduces the same opening paragraphs. The typographical error in the year of the car in the first affidavit is corrected so that reference is made to a "brief inspection of a 1990 Nissan 300ZX". It appears that the affidavits were prepared for Mr. Wong's signature by MVSA staff. It is not entirely clear from the affidavits that all of the information contained in the affidavits was included based on information Mr. Wong provided as opposed to information MVSA had obtained in its investigation. In particular, the inclusion of the VIN for the Nissan without any explanation as to how Mr. Wong was able to recall the VIN or had maintained a record of it during the brief inspection he describes suggests that this information was included by the MVSA officer preparing the affidavit as opposed to Mr. Wong directly.

[49] In the second affidavit, Mr. Wong describes his first affidavit as "voluntary", notes that he "was made aware that the vehicle was now the subject of a safety complaint from a consumer" and describes his subsequent dealings with Mr. Valente as follows:

8. I spoke to Gordon after the Compliance Officers attended my repair shop and he was made aware of their attendance in regards to the 300ZX.

9. I did not inform or suggest to Gordon that I or any of my employees felt intimidated by the VSA at any time.

10. While I was dealing with the VSA Compliance Officers I was not threatened or intimidated and did not feel that I was forced to provide any details about the 300ZX when asked.

11. I have not lost any recollection of the events or brief inspection for the 300ZX and have provided the details in my first statement to the best of my memory.

[50] Subsequently, the Dealers and Mr. Valente retained counsel who represented them at the liability phase of the hearing before me. After retaining counsel, the Respondents obtained a third affidavit from Mr. Wong and an affidavit from his colleague Mr. Hirata in May 2019.

[51] In his third affidavit, Mr. Wong deposes that over the past 6-7 years IB Auto Repair has performed numerous vehicle inspections for Mr. Valente and the

Dealers, that in his experience where there are defects or issues noted with the vehicle, Mr. Valente generally follows recommendations and repairs the vehicles.

- [52] Mr. Wong noted that the usual practice in preparing inspection reports is that Mr. Valente will bring in an inspection report which has a description and VIN of the vehicle filled in. IB Auto will then perform the inspection and complete the inspection report. He attached a number of examples of forms of inspection report that he prepared for Mr. Valente. While he does not comment on the fact in his affidavit, a review of the inspection reports attached to his third affidavit reflects that on none of the completed inspection reports is the name of the technician or of the inspection facility filled in.
- [53] Mr. Hirata in his May 2019 affidavit deposed that he is a red seal technician with IB Auto Repair and essentially confirms the evidence of Mr. Wong with respect to the usual practices of IB Auto in filling out inspection reports for Mr. Valente and his observation that Mr. Valente generally follows advice of the mechanics at IB Auto and obtains necessary repairs.
- [54] Evidence of Giovanni Malara of Alba Auto Service Ltd., another auto repair service facility who has performed vehicle inspections for Mr. Valente and the Dealers essentially mirrored the evidence of Mr. Wong in his third affidavit and Mr. Hirata in respect to his experience with Mr. Valente and Alba's practices in filling out inspection reports.
- [55] When Ms. Munro attended at the hearing to be cross-examined, she brought with her some original documents, including the original inspection report she had received from Mr. Valente. While a photocopy of the report had been included in the original materials in support of the hearing notice, the photocopying and pagination of the materials did not indicate clearly that the handwritten notes were on the back of the report rather than a separate document. When he inspected the original, Mr. Valente recognized the handwritten notes on the back of the inspection report as the handwriting of Mr. Hirata.
- [56] Subsequently, mid-hearing new affidavits were obtained from Mr. Wong and Mr. Hirata in which both confirmed that the original inspection report was in fact prepared by Mr. Hirata and that Mr. Hirata had performed a full inspection of the 1990 Nissan 300ZX. Mr. Wong deposed in his fourth affidavit affirmed July 18, 2019, that upon reviewing the original report he had "come to realize that the information provided in [his] June 6, 2018 affidavit was not accurate" and that he now realized the vehicle had been inspected at IB Auto by Mr. Hirata.
- [57] Neither Mr. Wong nor Mr. Hirata was cross-examined at the hearing. The existence of the July 18, 2019 affidavits was not revealed until after counsel for the Respondents had finished her cross-examination of Mr. McGrath and counsel for MVSA had commenced his cross-examination of Mr. Valente. I

heard an application on July 19, 2019 with respect to the admissibility of the late affidavits and ultimately the parties agreed that they should be admitted with certain paragraphs redacted, which is what occurred.

- [58] The totality of the evidence on this issue makes clear that IB Auto did conduct a full inspection of the 1990 Nissan 300ZX, that Mr. Wong was mistaken in his first affidavit when he said that issues sufficiently significant to stop the inspection prior to completing it had been identified by IB Auto, and that the information contained about the condition of the vehicle in the “recreated” report that Mr. Valente provided to MVSA was not substantially different than the original inspection report prepared by Mr. Hirata.
- [59] The MVSA alleges that N.W. and Mr. Valente breached section 189(5) of the *BPCPA* by their conduct in connection with supplying the recreated report to MVSA investigators. Section 189(5)(a) prohibits parties from supplying “false or misleading information to a person acting under this *Act*”.
- [60] The evidence shows that Mr. Valente intentionally “recreated” the inspection report and presented it to MVSA officials in the course of the investigation as if it was an authentic report. It appears that Mr. Valente did not intend to deceive and did not actually deceive MVSA officials as to the fact of the vehicle having been inspected by IB Auto² (since, in fact it had been inspected by IB Auto) or with respect to the general results of the inspection.
- [61] The situation is different, however, with respect to the authenticity of the “recreated” document which he presented as the inspection report prepared by IB Auto without disclosing that he had “recreated” it. Counsel for the Respondents fairly concedes that “it may have been prudent for Mr. Valente to note on the recreated inspection report that this was a report that he had recreated from his memory to assist the MVSA in considering the events surrounding the vehicle” and describes his failure to do so as “an innocent oversight on his part” and not done “in any attempt to deceive the MVSA” (Respondents Brief of Argument at para. 36). I reject this submission. It was deceptive and misleading for Mr. Valente to present the document in the manner that he did in the context of an investigation by his regulator into his conduct.
- [62] The saga of the recreated document unfortunately has a potentially far-reaching impact on this proceeding in other ways. Mr. Wong’s errors about the critical issues of the pre-sale condition of the 1990 Nissan 300ZX and what IB Auto had told Mr. Valente about the vehicle’s condition were communicated to MVSA at an early stage of the investigation in May 2018. From June 2018, Mr. McGrath had affidavit evidence from Mr. Wong that appeared to prove that Mr. Valente was lying about having taken the vehicle into IB Auto for an inspection and the information that they provided to him about its condition.

² Beyond suggesting that it was Mr. Wong rather than Mr. Hirata who carried out the inspection, which I do not consider to be material.

Mr. Valente on the other hand knew that he was telling the truth about the vehicle having been inspected at IB Auto and grew frustrated as he was not able to explain why Mr. Wong had provided the erroneous information he had.

[63] The impact of the erroneous information provided by Mr. Wong on the manner in which Mr. McGrath proceeded with the investigation after June 2018 – under the misapprehension that Mr. Valente had lied about a key issue in the investigation of whether he had the vehicle inspected – cannot be fully determined in retrospect. Similarly the impact of Mr. Valente’s belief that he had been unfairly called a liar by MVSA on his willingness to cooperate with the ongoing investigation cannot be fully determined. It is most unfortunate that the error was not discovered until so much time had passed, the interim suspension had been issued, and the parties positions had become entrenched. The impact of this issue on the parties’ conduct in the latter stages in the investigation may be an area on which counsel may wish to make submissions in the penalty phase.

B. Sale of the Nissan 300ZX

[64] It is uncontroverted that on March 26, 2018, N.W. Auto Depot Ltd. sold a 1990 Nissan 300ZX previously owned by Ingrid Munro to Amy Bouchard. The vast majority of the evidence at the hearing and the allegations made by the MVSA relate to the Respondents’ conduct in relation to this vehicle.

i. Dealings with Ingrid Munro

[65] The MVSA alleges that in dealing with Ms. Munro, N.W. and Mr. Valente:

- i. failed to prepare and provide a consignment agreement as required under the *Consignment Sales Regulation*;
- ii. misrepresented the selling price of the vehicle to Ms. Munro;
- iii. improperly withheld from Ms. Munro the sum of \$1100 from the proceeds of sale; and
- iv. failed to administer payment as required under the *Consignment Sales Regulation*.

[66] Ingrid Munro and Mr. Valente both gave evidence about the dealings between them about the sale of Ms. Munro’s 1990 Nissan 300ZX.

[67] Ms. Munro confirmed that she had been referred to Mr. Valente by Carrie Van Dokkumburg, a former MVSA compliance officer and a personal friend of Ms. Munro’s. Both parties made submissions as to what significance if any I should place on the fact that Ms. Munro was referred to the Respondents by Ms. Van Dokkumburg.

- [68] Counsel for the MVSA suggests that the only inference to be drawn from this fact is “that the conduct of the Respondents as detailed herein may well represent the Respondents at their best, given that that the multitude of violations arose in the context of a transaction involving an individual with a closer-than-usual association with the regulator” (MVSA Brief of Authorities at para. 75). Counsel for the Respondents submitted that Ms. Van Dokkumburg’s referral to Mr. Valente suggests that the Respondents were “clearly in ‘good standing’” with the MVSA at that time. The Respondents also note that they had no administrative or disciplinary proceedings during the period that Ms. Van Dokkumburg was assigned as their compliance officer (Respondents’ Brief of Argument at para. 64-5).
- [69] I agree with the Respondents that Ms. Van Dokkumburg would not have referred her friend to Mr. Valente had she been aware of serious concerns about his conduct and given that she was the Respondents’ compliance officer, it seems likely that if there was a significant issue with their compliance she would have been aware of it.
- [70] Ms. Munro gave evidence about her dealings with Mr. Valente. She had clear recollection of events and her evidence was logical and consistent with the documentary record. Mr. Valente, on the other hand, in describing his interactions with Ms. Munro was defensive and at times inconsistent both with the documents and his prior evidence. To his credit, Mr. Valente was forthright that he was inexperienced with consignment sales and did not understand what the requirements were that applied to them. However, overall, Mr. Valente’s evidence relating to his dealings with Ms. Munro should be treated with caution in my view. To the extent there are conflicts in the evidence between Ms. Munro and Mr. Valente, I am inclined to accept Ms. Munro’s evidence.
- [71] Ms. Munro’s evidence is clear that she took the car to Mr. Valente “for the purposes of consigning” it for sale through N.W. (Munro affidavit at para. 4)
- [72] The documents and all of the evidence other than Mr. Valente’s latterly change of position in his evidence appear to support Ms. Munro’s position as to the nature of the transaction. It is also clear on the evidence that Mr. Valente did not provide Ms. Munro with a written consignment agreement. Accordingly, N.W. and Valente’s conduct breached section 2 of the *Motor Dealer Consignment Sales Regulation*.
- [73] The MVSA also alleges that the Respondents dealt improperly with sale proceeds by failing to inform Ms. Munro about the accurate sale price, failing to treat the proceeds as trust funds, taking inappropriate deduction from the proceeds and by fabricating a misleading cost of sale document to attempt to justify the expenses.
- [74] The documents and evidence with respect to Mr. Valente’s dealings with Ms. Munro support her complaint and the allegations made by the MVSA. Ms. Munro gave evidence that Mr. Valente provided inconsistent and in some cases

inaccurate information to Ms. Munro about the expenses he incurred and ultimately the terms of the sale to Ms. Bouchard. I agree with the submission of the MVSA that Mr. Valente's after the fact description of the expenses incurred which conveniently matches the amount of the purchase proceeds not passed on to Ms. Munro cannot be relied on.

[75] I find that the MVSA has proven the allegations of misconduct of the Respondents in relation to their dealings with Ms. Munro.

ii. Dealings with Amy Bouchard and Damon Cerovic

[76] In respect of the sale to Ms. Bouchard, the MVSA alleges that the conduct of N.W. and Mr. Valente was deceptive in that:

- a. the vehicle was not compliant with the *Motor Vehicle Act* and was not represented as "not suitable for transportation";
- b. N.W. and Mr. Valente committed deceptive acts or practices within the meaning of the *BPCPA* by failing to identify the vehicle as "not suitable for transportation" and by making false and misleading representations; and
- c. N.W. and Mr. Valente failed to make declarations in the purchase agreement as required under the *MDA*.

[77] Amy Bouchard and the respondent Mr. Valente gave evidence about the circumstances that led to the sale of this vehicle to Ms. Bouchard. Ms. Bouchard's evidence was that she and her then-partner Damon Cerovic were looking for a secondary vehicle for Mr. Cerovic to drive.

[78] Although Mr. Cerovic did not give evidence, it appears from the evidence that he was significantly more involved in the purchase of the Nissan 300ZX than was Ms. Bouchard. It was Mr. Cerovic who had the initial contact with Mr. Valente and Ms. Bouchard was not aware of what other discussions Mr. Cerovic had had with the Respondents about the car. Mr. Cerovic wanted to purchase a Nissan 300ZX in particular as he had a friend with the same car and he wanted to have a "matching" vehicle.

[79] Mr. Cerovic did not give evidence. However, the evidence suggests that Mr. Cerovic likely did have some discussions with Mr. Valente about the vehicle's condition prior to Ms. Bouchard purchasing it. Consistent with the impression expressed in Mr. Valente's affidavit that Mr. Cerovic "had a lot of knowledge about vehicles and was an experienced buyer", Ms. Bouchard agreed that Mr. Cerovic was "a bit of a car buff". Ms. Bouchard, to the contrary, agreed that she did not have any direct discussions with Mr. Valente about the vehicle.

[80] There was a conflict in the evidence as to precisely what occurred when Ms. Bouchard and Mr. Cerovic attended at the dealership. Ms. Bouchard said that

she did not attend and that Mr. Cerovic took the test drive with Mr. Valente. Mr. Valente recalled that Ms. Bouchard and Mr. Cerovic both attended at the dealership to view and test-drive the vehicle and that because it was a two-seater he did not accompany them on the test drive.

- [81] Contrary to Mr. Valente's recollection, Ms. Bouchard said that she did not test drive the vehicle before she purchased it, although she admitted that she was "not entirely certain" of the events and while she denied that her recollection was "hazy" she characterized her recollection as recalling "bits and pieces" of the events. She did recall driving the vehicle after the purchase and she recalled that Mr. Cerovic drove the vehicle a second time and that he said it "drove good enough" and that he did not comment on noises coming from the vehicle or any other concerns.
- [82] Mr. Valente specifically recalled that Mr. Cerovic "spent quite a bit of time looking at the vehicle, including popping the hood and looking at the engine". Ms. Bouchard said she did not recall whether Mr. Cerovic popped the hood but admitted that it was possible he did.
- [83] It was Ms. Bouchard's evidence that the Mr. Cerovic negotiated the purchase of the vehicle, that he initially offered \$3300 and that he reported to her that Mr. Valente had told him there was another person potentially interested in purchasing the vehicle. Ms. Bouchard said that she only entered the dealership after Mr. Cerovic had advised her that he intended to purchase the vehicle.
- [84] Ultimately the vehicle was transferred to Ms. Bouchard's name in order to facilitate obtaining collector plates for the vehicle but Ms. Bouchard said that by the time she entered the dealership the documents had already been prepared and she simply signed them. She had no knowledge of what information or documents had been provided to Mr. Cerovic before she entered the dealership to sign the forms. She agreed that she did not see a vehicle inspection report until after she had signed the purchase documentation.
- [85] On April 20, 2018, the MVSA received a complaint from Ms. Bouchard and Mr. Cerovic. The complaint stated that an inspection of the Nissan 300ZX had found safety issues with the vehicle and that the car was being held by the mechanic who was "unwilling to release the car back to [Ms. Bouchard] due to safety concerns".
- [86] The complaint included an inspection report provided by Rocky Mountain Imports Ltd. which the MVSA described as noting "numerous mechanical and safety issues as at April 9, 2018".
- [87] The MVSA sought the assistance of the Ministry of Transportation and Infrastructure's Commercial Vehicle Safety Enforcement Branch (the "CVSE") to independently inspect the Nissan 300ZX.

- [88] The inspection by the CVSE showed safety deficiencies with the Nissan 300ZX and the CVSE officer noted an "engine-knock" noise and agreed with the repair facility that the engine should be replaced.
- [89] On or around May 25, 2018, Mr. Valente had ordered the required parts to repair the Nissan 300ZX and the car was returned to the Dealers on May 28, 2018. Mr. Valente's evidence was that by June 1, 2018 when a subsequent MVSA inspection was carried out, he had not yet had an opportunity to carry out the required repairs on the Nissan 300ZX which had been returned to him only a few days earlier. There is evidence that later in June, Mr. Valente took the Nissan in to be repaired by Michael Thompson and that in September 2018 it passed a provincial inspection.
- [90] I am unable to conclude from the evidence before me that the 1990 Nissan 300ZX was "not suitable for transportation" at the time it was sold to Ms. Bouchard. Mr. Cerovic did not give evidence and Ms. Bouchard was unable to speak to the condition of the vehicle at the time of purchase. Mr. Valente's evidence that it was safe to drive at the time he sold it seems to be supported by the inspection report that as it turns out was in fact, contrary to Mr. Wong's initial evidence, prepared by Mr. Hirata at IB Auto.
- [91] While there was hearsay evidence that two weeks after the sale another inspection by Rocky Mountain repair found issues with the vehicle based on which they refused to return it to Mr. Cerovic and there was uncontroverted evidence from the MVSA that the CVSE inspection identified issues sufficient to classify the car as a "Box 2 – order to carry out repair within 30 days" there was no evidence before me that established that the vehicle was "not suitable for transportation" at the time it was sold to Ms. Bouchard.
- [92] To the contrary, while MVSA disputes the reliability of the evidence because of a failure to properly record the odometer reading, there was some evidence that the vehicle was driven extensively without incident by Mr. Cerovic for the short period of time after he purchased it and before making the consumer complaint. I also agree with counsel for the Respondents that the weight of the evidence suggests that the mileage of the Nissan was around 203,000 kilometers at the time it was purchased by Ms. Bouchard suggesting it was driven over 2000km in less than two weeks by Mr. Cerovic (Respondents Brief of Argument at para. 29-31).
- [93] Ms. Bouchard gave evidence that Mr. Cerovic drove the car back to the island and was the primary driver of the car until he took it to the mechanic. She did not have detailed knowledge of the extent to which he drove the car during that period but she did confirm that she had also driven it a couple of times suggesting the car was driven by either Mr. Cerovic or Ms. Bouchard a number of times before it was taken to Rocky Mountain. Given the inspection conducted by Mr. Hirata at IB Auto did not reflect significant issues, I find that to the extent safety issues were found by Rocky Mountain or CVSE in their subsequent inspections of the 1990 Nissan 300ZX, I agree with the

Respondents' submission (at para. 32 of their Brief of Argument) that it is likely those issues arose from Mr. Cerovic's use of the vehicle subsequent to the purchase on March 26, 2018.

- [94] It is also worth noting the evidence of Michael Thompson a red seal mechanic who ultimately carried out the repairs after Mr. Valente took the car into him in June 2018 gave evidence to the effect that the 1990 Nissan 300ZX was in "good condition" for a 28 year old vehicle. Mr. Thompson was not cross examined on his evidence. Given my finding that any safety issues arose after the sale to Ms. Bouchard, it is not necessary to resolve whether the issues identified by CVSE were such that it was "not suitable for transportation" at that time. (Thompson affidavit made May 24, 2019 at para. 10.)
- [95] I am similarly unable to include that the Respondents engaged in deceptive practices or acts in their dealings with Mr. Cerovic and Ms. Bouchard. Ms. Bouchard had very little knowledge of the content of the communications between Mr. Valente and Mr. Cerovic and Mr. Cerovic did not give evidence. Mr. Valente's evidence that Mr. Cerovic had significant knowledge about cars, conducted a detailed examination of the vehicle and relied on his own inspection of the vehicle in deciding to purchase it was essentially unchallenged.
- [96] The Respondents do not appear to contest and I find that the MVSA has established that N.W. and Mr. Valente failed to make declarations in the purchase agreement with Ms. Bouchard as required under the *MDA*.

C. MVSA Investigation and Alleged Breaches of the May 24, 2018 Conditions

- [97] Following receipt of the April complaint from Ms. Bouchard and Mr. Cerovic, the MVSA commenced an investigation of the Respondents led by Mr. McGrath.
- [98] The Respondents complain that "the MVSA and, Mr. McGrath in particular, appear to be on a mission to do whatever it takes to have the licenses of the Respondents cancelled/revoked" and submit that Mr. McGrath "had already concluded that the Respondents were 'guilty' before he commenced an investigation into the issues that are the subject of these proceedings". (Respondents Brief of Argument at para. 93-4)
- [99] The Respondents focus primarily on the fact that Mr. McGrath did not show a copy of the original inspection report to Mr. Wong (and Mr. Hirata) when they met in May 2018, that Mr. McGrath admitted during his cross-examination that he "conducted more frequent inspections" of the Respondent, and that he did not advise Mr. Valente initially that he was investigating the transaction involving Ms. Bouchard.
- [100] While I do not accept the submission that Mr. McGrath pursued this investigation in a biased manner, as noted above, it is an unfortunate

consequence of the erroneous information provided by Mr. Wong to Mr. McGrath at an early stage of the investigation that Mr. McGrath approached the investigation with a level of urgency and zealotry proportionate to his belief that Mr. Valente had lied about the 1990 Nissan 300ZX having been inspected by IB Auto, that he had been told by IB Auto that the vehicle required significant repairs and had sold an unsafe vehicle to Ms. Bouchard notwithstanding that advice. Mr. McGrath as it turns out was mistaken as to those facts because of the erroneous information he had been provided by Mr. Wong.

[101] While the Respondents attempt to blame Mr. McGrath for failing to show Mr. Wong the original inspection report which would have reminded him that Mr. Hirata had conducted the inspection, it is important to recall that the reason Mr. McGrath was speaking with Mr. Wong in the first place was because Mr. Valente had included the names "Thomas" and "IB Auto" on his "recreated" report. Mr. Valente's deceptive conduct in attempting to pass off the recreated report as a real inspection report started the chain of events leading to Mr. Wong's providing the erroneous information to Mr. McGrath, which does appear to have influenced the urgency with which the investigation was conducted.

[102] In my view this context is relevant to the consideration of the MVSA's allegations that the Respondents breached paragraph 189 of the *BPCPA* by failing to provide information required to MVSA investigators and that N.W. and Mr. Valente "obstructed, hindered or interfered" with MVSA investigators' work.

[103] The MVSA sought records from the Respondents and when they were not delivered by the May 7, 2018 deadline, sought and obtained a Production Order on May 10, 2018. The MVSA alleges that the Respondents "failed or refused to comply" with Mr. McGrath's requests for information (MVSA Brief of Argument at para. 45). The Respondents point out that Mr. Valente had provided the original records relating to the vehicle to Ms. Munro when she came to collect her cheque for the sale proceeds which "would explain why he needed a bit of time to gather the documents" (Respondents Brief of Argument at para. 46).

[104] There are other allegations of failure to provide timely production of records and information. Once the records requested were obtained in many cases they revealed a failure of the Respondents to include required declarations, certifications and other information which are themselves breaches of the regulatory scheme.

[105] It was clear from the evidence of both Mr. Valente and Mr. McGrath that the record keeping and file organization of the Respondents is far from perfect. Mr. Valente in his correspondence with Mr. McGrath seems to have been attempting to provide explanations for events he could not recall and about documents he could not find and in some cases did not exist. I have already

found that the delivery of the recreated inspection report was misleading in breach of the *BPCPA*. With the exception of the conduct of Mr. Valente during the July 20, 2018 inspection discussed below, the balance of the conduct described does not in my view raise to the level of obstruction or interference with an inspection or of refusal to provide required information.

[106] On May 15, 2018, MVSA officers attended a lot of the Respondents along with two CVSE officers. The officers who attended noted four vehicles that were advertised or displayed for sale and which they determined were not compliant with the *Motor Vehicle Act*. The MVSA also identified certain record keeping issues including incomplete inspection reports that did not name the inspector and facility that had performed the report.

[107] On May 24, 2018, the Manager of Licensing advised the Dealers that certain conditions/restrictions had been added to their registrations, including that all vehicles offered for sale unless identified as "not suitable for transportation" must pass a Provincial Private Vehicle Inspection ("PVI"), conducted by a Designated Inspection facility or pass a comparable mechanical and safety inspection by an independent facility and that proper records of the inspection must be maintained and presented to consumers at the time of sale. The Dealers were also prohibited from consignment sales.

[108] A follow-up inspection of the Dealers occurred on June 1, 2018. The VSA alleged that the Respondents were not in compliance with the conditions including because there were motor vehicles offered for sale for which inspection reports could not be produced. Following that inspection the VSA called a hearing before the Registrar seeking an interim suspension of the Dealers, pending the conclusion of its formal investigation.

[109] A further inspection was conducted by MVSE and CVSE on July 20, 2018. Mr. McGrath's evidence was that on that date, five vehicles were identified that had varying degrees of safety violations and out of service items present, despite being displayed on the dealership lot. Mr. McGrath gave evidence that the Respondents did not cooperate with that inspection and would not permit MVSA compliance officers to enter into the dealership to examine any records, obtain keys for the vehicles in order to conduct full inspections or discuss the noted inspection issues.

[110] Mr. Valente denied the allegation that he did not cooperate with Mr. McGrath during the course of the July 20, 2018 inspection and said that when Mr. McGrath attended at the office "I was on my way out of the dealership" and that "I calmly requested the VSA officers to make arrangements to attend at another convenient time, as I had an appointment out of the office and I was not in a position to provide the VSA inspectors with full access to the records and/or keys". (Valente Affidavit at para. 51).

[111] This evidence was put to Mr. McGrath on cross-examination who characterized it as "blatantly false". Mr. McGrath said that when he arrived at the dealership

Mr. Valente was not there and when he arrived he walked in and would not let the compliance officers in but instead used his body as a barrier to block their entry. Mr. Valente then stayed with a customer with the door locked and refused to cooperate with the inspection. He then left the dealership saying he had an appointment and then a lady arrived who said she had an appointment at the dealership with Mr. Valente.

[112] Mr. McGrath's evidence was that Mr. Valente said something along the lines of "I don't have time for this today" and was "extremely agitated, anything but calm", he said "you're not getting any documents" and refused to provide any keys to the vehicles.

[113] I accept Mr. McGrath's evidence about Mr. Valente's conduct during the inspection on July 20, 2018 and find that Mr. Valente's conduct constituted a hindrance, obstruction or interference with the MVSA investigation in breach of section 189(5) of the *BPCPA*.

[114] Notwithstanding Mr. Valente's lack of cooperation, the MVSA and CVSE carried out an inspection on July 20, 2018 and CVSE examined five vehicles on the Dealers' lot, resulting in the issuance of five CVSE Notices and Orders details thirteen violations; three out of service deficiencies, and one "pass with caution" item (MVSA Brief of Argument at para. 87).

[115] The MVSA submits that the results of the June 1, 2018 and July 20, 2018 inspection support a finding that that N.W. failed to comply with conditions imposed on its registration on May 24, 2018 "by offering motor vehicles for sale that were not identified as 'not suitable for transportation', which did not pass a mechanical and safety inspection" (MSVA Brief of Argument at para. 128(e)).

[116] The May 24, 2018 licensing conditions required that the mechanical and safety inspection be conducted by a facility, using a qualified red seal mechanic, using a form that conforms with the Provincial PVI standard and that a copy of the inspection report that conforms to the Provincial PVI standard be provided to any person considering purchasing a motor vehicle before the sale is finalized. (MSVA Brief of Argument at para. 80)

[117] While the matter is not addressed directly in the submissions, I understand the parties to be agreed that a form that conforms to with the Provincial PVI standard is one that is certified by the technician who prepared it and indicates the name of the mechanic and facility who performed the inspection. Mr. Valente admits that he did not obtain inspection reports that conformed to this standard even after the May 24, 2018 conditions were imposed, although he says that like the IB Auto inspection of the 1990 Nissan 300ZX, the inspections were in fact performed as required.

[118] The Respondents provide detailed submissions on five of the vehicles inspected on June 1, 2018 and July 20, 2018. In respect of three of the five vehicles

(the Jeep, 1990 Mazda Protege, 2000 Volvo XC70), the Respondents submit that the evidence shows the vehicles were not in fact being offered for sale by the Respondents on the date of the inspection. In respect of one (the 1997 Volkswagen Transporter) the vehicle had been inspected by IB Auto and was being offered for sale for a commercial purpose. In respect of the fifth (the 2008 Honda fit), the evidence reflected that it had been inspected by IB Auto, that the only issue identified by CVSE was a left rear flat tire below 50% air and that the IB Auto inspection report reflected that at the time of inspection that tire had been at 70% air. The Respondents submit that the evidence reflects that the tire deflated during the nine months it had been sitting on the Dealers lot (Respondents' Brief of Argument at para. 70 – 75).

[119] The Respondents also point out that Mr. McGrath confirmed during his cross-examination "that the only vehicles in relation to which the MVSA has gathered evidence to suggest that the Respondents sold a vehicle that was not compliant with the MVSA to a customer, without making the proper disclosures, is the Nissan 300ZX and potentially the 1990 Lincoln Mark VII. With respect to the Lincoln, Mr. McGrath confirmed that the customer purchased that vehicle with the knowledge that it was the subject of a 'Box 1' CVSE Order" (Respondents Brief of Argument at para. 77).

[120] I find that the MVSA has not proven that N.W. failed to comply with conditions imposed on May 24, 2018 by offering motor vehicles for sale that were not identified as "not suitable for transportation", which vehicles did not pass a mechanical and safety inspection. However, the MVSA has proven that the Respondents failed to obtain inspection reports that conformed with the required standards in breach of the May 24, 2018 conditions.

D. September 4, 2018 Interlocutory Suspension Order

[121] Registrar Christman heard the VSA's application for an interim suspension of the Dealers' registrations on June 22 and 27, 2018. Mr. Valente, the principal and owner of the two Dealers appeared in person and questioned the VSA's witnesses and presented evidence.

[122] At the conclusion of the June hearing, Registrar Christman found that the evidence presented established a *prima facie* case that the Dealers were not abiding by some of their reporting requirements imposed as conditions on their registrations. He was not satisfied, however, that the Dealers' conduct rose to the level of requiring an immediate suspension of their registrations." (September 4, 2018 decision at para. 9)

[123] After the July 20, 2018 further inspection the VSA subsequently called a new hearing to renew their request for an interim suspension of the Dealers' registrations. The reconvened hearing took place on August 1, 2018 before Registrar Christman. Again Mr. Valente appeared in person on behalf of the Dealers.

- [124] On September 4, 2018 Registrar Christman ordered an interim suspension of the Dealers' registrations. Registrar Christman had before him the evidence of the "re-created" inspection report but not the July 2019 affidavits of Mr. Wong and Mr. Hirata confirming that they had in fact completed an inspection of the Nissan 300ZX as the "re-created" inspection report reflects. Based on the evidence before him, on the record before him at that time which gave the erroneous impression that IB Auto had not conducted an inspection and had advised Mr. Valente of serious repairs needed after a cursory review, Registrar Christman held that there was a *prima facie* case that the dealers had failed to disclose that 1990 Nissan 300ZX was "not suitable for transportation" when in fact it was not at the time it was sold.
- [125] The MVSA alleges that N.W. and Mr. Valente have failed to comply with the Registrar's September 4, 2018 interim suspension by selling a motor vehicle to Zhi Yuan Tang on September 14, 2018 and to Gary Brian Blakely on September 20, 2018. (MVSA Brief of Argument at para. 128(l)).
- [126] Mr. Valente's evidence was that each of Mr. Tang and Mr. Blakely were exercising their right to buy-out the vehicle under provisions of an existing lease. As a result, Mr. Valente disputes that these were sales in breach of the interim suspension (Affidavit of Gordon Valente at para. 57-8). The Respondents argue that "[i]t is unreasonable for the MVSA to argue the Respondents should have refused to proceed with these lease buy-outs given that the Respondents would have been in breach of their contractual obligations to these customers" (Respondents Brief of Argument at para. 89).
- [127] The MVSA does not address Mr. Valente's evidence on this point in their Brief of Argument or in their Reply. I agree with the Respondents that the interim suspension should not be interpreted to prohibit customers from exercising their contractual rights under existing lease agreements. I find that the MVSA has not proven that the Respondents failed to comply with the Registrar's September 4, 2018 interim suspension order.

E. Alleged Breach of March 2, 2018 Undertaking

- [128] The MVSA makes only one substantive allegation against Westminster Motors: that it failed to make disclosure in relation to leases as required under the *MDA* and that this was also in breach of a March 2, 2018 undertaking between Mr. Valente, N.W. and the MVSA.
- [129] The March 2, 2018 undertaking had been signed in relation to the operation of the then unlicensed motor dealership, Westminster, and in it the Respondents undertook to:
- a. Cease and desist any participation in unlicensed sales or leasing activity;
 - b. Cease and desist any deceptive acts and practices; and

c. Comply with the *MDA* and the *Motor Vehicle Act*.

(MVSA Brief of Argument at para. 110)

[130] Westminster has been the subject of two MVSA inspections and has failed on both occasions. Mr. McGrath's affidavit details communications with Mr. Valente in which he stated he was not leasing any more vehicles until he had new agreements that were compliant with section 30 of the *MDA Regulation* and outlining his efforts to obtain a compliant lease agreement.

(MVSA Brief of Argument at para. 111-2)

[131] Nevertheless in a follow-up inspection conducted on May 15, 2018, MVSA determined that Mr. Valente was continuing to lease through Westminster using non-compliant lease agreements and was continuing to charge undisclosed fees and fail to make required statutory declarations.

(MVSA Brief of Argument at para. 113-4)

[132] The MVSA alleges that the fees charged for leasing vehicles through Westminster Motors "often leads to consumer[s] paying far higher than the advertised price for the vehicle in which the fees can represent over 30-50% of the value of the vehicle".

(MVSA Brief of Argument at para. 117)

[133] In response to the allegations, Mr. Valente says that he "always make[s] full disclosure of all fees charged to customers on the lease agreements and []always ensure[s] that the least customer reviews, approves and is provided with a Consumer Lease Calculation Sheet (prepared using a WS Leasing software program) which clearly sets out all of the fees/charges being paid by the customer and clearly set out the interest rate, the total payments and the total cost of the lease" (Valente affidavit at para. 61)

[134] Mr. Valente does not address the allegations that he was continuing to use non-compliant lease agreements or the evidence that the fees charged result in the consumer paying far higher than the advertised price for leased vehicles through Westminster.

[135] I find that the MVSA has established that Westminster's conduct in relation to leasing vehicles using non-compliant lease agreements and including fees that result in a higher than advertised price being paid by consumers is in breach of the legislative scheme, in breach of the March 2, 2018 Undertaking and constitute deceptive practices under the *BPCPA*.

[136] Counsel for the Respondents points out in submissions that Westminster was not involved in the sale of the 1990 Nissan 300ZX which is the main issue in these proceedings and that the allegations against them are limited to those

relating to non-compliant lease agreements and alleged non-disclosure of leasing fees. (Respondents' Brief of Argument at para. 16-17). This may be an appropriate subject of further submissions during the penalty phase of the hearing.

Summary of Findings

[137] In this liability phase, I make the following findings:

[138] In respect of the sale of the 1990 Nissan 300ZX, I find:

- a. N.W. and Mr. Valente's failure to provide a written consignment agreement was in breach of section 2 of the *Consignment Sales Regulation*.
- b. N.W. and Mr. Valente engaged in deceptive acts or practices in misrepresenting the selling price of the vehicle to Ms. Munro and by improperly withholding funds from the costs of sale and failing to administer payment as required in the *Consignment Sales Regulation*.
- c. N.W. and Mr. Valente breached the *MDA* by failing to make required declarations in the purchase agreement with Ms. Bouchard.
- d. The evidence does not establish that the Nissan 300ZX was "not suitable for transportation" at the time it was sold to Ms. Bouchard, nor does it establish that the Respondents engaged in deceptive acts or practices in their dealings with Mr. Cerovic and Ms. Bouchard.

[139] I find that the MVSA has not proven that N.W. failed to comply with conditions imposed on May 24, 2018 by offering motor vehicles for sale that were not identified as "not suitable for transportation", which vehicles did not pass a mechanical and safety inspection. However, the MVSA has proven that the Respondents failed to obtain inspection reports that conformed with the required standards in breach of the May 24, 2018 conditions.

[140] I find that N.W. and Mr. Valente supplied misleading information in breach of section 189(5)(a) of the *BPCPA* when Mr. Valente provided the "recreated" inspection report to MVSA compliance officers without advising that it was a "recreation" and by providing a cost of sale report created for the investigation.

[141] I find that Mr. Valente's conduct during the July 20, 2018 inspection in not permitting MVSA compliance officers to enter the premises, examine records, obtain keys or discuss inspection issues constitutes obstruction, hindrance or interference with an MVSA investigation within the meaning of section 189(5)(e) of the *BPCPA*.

[142] I do not consider that the other conduct of the Respondents in relation to the investigation rises to the level of breaches of section 189 of the *BPCPA*.

[143] I find that the MVSA has not proven that the Respondents failed to comply with the Registrar's September 4, 2018 interim suspension order.

[144] I find that the Respondent Westminster's conduct in relation to leasing vehicles using non-compliant lease agreements and including fees that result in a higher than advertised price being paid by consumers is in breach of the legislative scheme, in breach of the March 2, 2018 Undertaking and constitute deceptive practices under the *BPCPA*

[145] This matter will be reconvened to address the appropriate penalties flowing from the findings I have made herein.

Dated: November 1, 2019

Original Signed

Claire E. Hunter, Q.C.
Acting Registrar of Motor Dealers