



Neutral Citation No. 2018-BCRMD-033

IN THE MATTER OF THE *MOTOR DEALER ACT*, R.S.B.C. 1996, C. 316

MOTOR VEHICLE SALES AUTHORITY OF BRITISH COLUMBIA

Complainant

And

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

Respondent Dealer

And

WESTMINSTER MOTORS LTD.
(#40469)

Respondent Dealer

**DECISION OF THE REGISTRAR ON APPLICATION TO SUSPEND DEALER
REGISTRATIONS**

Hearing dates and location: June 22 and 27 and August 1, 2018 at Surrey,
British Columbia

Appearances:

Motor Vehicle Sales Authority of British
Columbia

Norm Felix, Manager of Compliance
and Investigations

N.W. Auto Depot, Ltd.

Gordon Valente

Westminster Motors

Gordon Valente

I. Introduction

[1] The Vehicle Sales Authority of British Columbia (the "Authority") seeks an interim suspension of the dealer registrations of N.W. Auto Depot Ltd. (#10578) and Westminster Motors Ltd. (# 40469) (together the "Dealers"). The basis of the application is that the Dealers pose a risk to the public by displaying for sale or selling motor vehicles that are not compliant with the *Motor Vehicle Act*, R.S.B.C. 1996, c. 316 ("MVA") and for not representing those vehicles as "not suitable for transportation." The Authority asks that the Dealers' registrations as motor dealers be suspended until its investigation has been completed and a final disposition of the allegations can be rendered by the Registrar. The Authority states that it should be able to present its case to the Registrar by mid to late September 2018.

II. Basic Procedural History

A. Consumer Complaint of April 20, 2018

[2] There are currently two consumer complaints being investigated by the Authority against N.W. Auto Depot Ltd. Westminster Motors Ltd. is a related company with both company's owned by Gord Valente.

[3] The Authority received a complaint from a consumer that they had purchased a Nissan 300ZX from N.W. Auto Depot Ltd.; and a subsequent inspection by an independent repair facility found safety issues with the vehicle. The Authority sought the assistance of the Ministry of Transportation and Infrastructure's Commercial Vehicle Safety Enforcement Branch (the "CVSE")¹ to independently inspect the Nissan 300ZX. The inspection by the CVSE officer showed that the Nissan 300ZX had safety deficiencies making it not compliant with the MVA. The Nissan 300ZX was, legally speaking and using the language of the *Motor Dealer Act Regulation* B.C. Reg. 447/78 ("MDAR"), "not suitable for transportation." The CVSE officer also noted an engine-knock noise and agreed with the repair facility, which had initially inspected the Nissan, that the engine should be repaired. The purchase agreement for this sale also apparently lacks many of the required statutory declarations, including whether the Nissan 300ZX meets the requirements of the MVA.

[4] In the course of its investigation of the sale of the Nissan 300ZX, the Authority determined that the vehicle was originally owned by another consumer and that N.W. Auto Depot Ltd. had sold the Nissan 300ZX on consignment. The original owner of the Nissan 300ZX has made their own complaint against N.W. Auto Depot Ltd. That consumer alleges N.W. Auto Depot Ltd. has withheld about

¹ The CVSE is responsible for administering the safety related provisions of the MVA.

\$1,100 from the sale, while N.W. Auto Depot Ltd claims that there were additional costs of the sale.

B. Dealer Inspection of May 15, 2018

[5] The Authority attended the lot of the Dealers on May 15, 2018, along with two officers from the CVSE. The inspections by the CVSE on that date discovered four vehicles that were advertised or displayed for sale, but were not compliant with the MVA and not represented as “not suitable for transportation.” The Authority also found issues related to the record-keeping requirements of the legislation, that inspection reports for motor vehicles were on the Dealers’ letterhead, and that the inspection facility and technician doing the inspection were not named on the inspection report.

C. Conditions on the Registrations of the Dealers

[6] By letter dated May 24, 2018, the Manager of Licensing advised the Dealers that the following conditions/restrictions had been added to their respective motor dealer registrations (amalgamated here):

- (a) These conditions must be displayed at the dealership beside the Motor Dealer Licence.
- (b) All motor vehicles offered for sale by [the Dealers] unless identified as “not suitable for transportation,” must pass a Provincial Private Vehicle Inspection (“PVI”), conducted by a Designated Inspection facility, or pass a mechanical and safety inspection, conducted by a facility, using a qualified red seal mechanic using a form that conforms to the Provincial PVI standard, that [the Dealers], in which its officers, directors or employees have no personal or business interest.
- (c) [The Dealers] must provide a copy of the mechanical and safety inspection report that conforms to the Provincial PVI standard to any person considering purchasing a motor vehicle from [the Dealers] before the sale is finalized.
- (d) A copy of the inspection must be presented to the consumer at the time of the sale.
- (e) For each motor vehicle transaction, complete records of sale or lease agreements and related activities must be keep [*sic*] at the dealership’s registered location, and available for inspection during normal business hours.
- (f) These conditions may be reviewed by the Manager of Licensing after November 24, 2018 upon request by the [Dealers].
- (g) No Consignment Permitted.

D. Inspection of the Dealers on June 1, 2018

[7] A follow-up inspection of the Dealers occurred on June 1, 2018. The Authority alleged that the Dealer was not adhering to the conditions of their respective registrations. Notably, the Authority found 41 motor vehicles offered for sale; but the Dealers could only produce inspection reports for 26 motor vehicles. The Authority also was concerned that one motor vehicle appeared not to be compliant with the MVA. The Authority became concerned about public safety and of the cooperation of the Dealers with the Authority as it reflects on their governability by the Registrar. The Authority called a hearing before the Registrar, seeking an interim suspension of the Dealers, pending the conclusion of its formal investigation.

E. Hearing on June 22 and 27, 2018

[8] A hearing of the Authority's application for an interim suspension of the Dealers' registrations was held over the two days of June 22 and 27, 2018. Gord Valente, dealer principal and owner of the two Dealers, appeared on both days and questioned the Authority's witnesses and presented evidence.

[9] At the end of the June hearing, I 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. I was not satisfied, however, that the Dealers' conduct rose to the level of requiring an immediate suspension of their registrations. Specifically, the evidence did not show that the Dealers were continuing to offer or display for sale motor vehicles that were not compliant with the MVA. I cautioned Mr. Valente about the obligations of a motor dealer not to display motor vehicles for sale, including on the internet, unless they complied with the MVA requirements or were otherwise represented as "not suitable for transportation," in accordance with the MDAR. Mr. Valente agreed. I also ordered the Authority to return to the Dealers to inspect motor vehicles offered or displayed for sale to see if they were compliant with the MVA. I left it with the Manager of Compliance and Investigations to make those arrangements.

F. Re-inspection of the Dealers on July 20, 2018

[10] On July 20, 2018, the Authority attended the Dealers' lot along with the CVSE. On that date the CVSE found five motor vehicles that were not compliant with the MVA. Of those five motor vehicles, three were either advertised for sale on the Dealers' website or on the Dealers' lot. The Authority also attempted to obtain motor vehicle transaction records for review but was unsuccessful. The Authority

then called a new hearing, re-instigating their request for an interim suspension of the Dealers' registrations.

G. Hearing of August 1, 2018

[11] The reconvened hearing took place on August 1, 2018. I heard from the Authority and witnesses from the CVSE. Gord Valente attended the hearing, questioned the Authority's witnesses, and presented evidence. Norm Felix, for the Authority, questioned Mr. Valente on his evidence. Norm Felix noted that he was able to access the Dealers' website on his phone, while in the hearing and thereby located advertisements for a Jeep, which had failed the CVSE inspection on July 20. Gord Valente was at a loss for why this was so, as he claimed to have taken down the advertisement. The hearing concluded, and I reserved my decision.

H. Post-hearing written submissions

[12] The day after the August 1 hearing, Gord Valente communicated that he would like to submit evidence to address Norm Felix's evidence of accessing the Dealers' website on Mr. Felix's phone and locating an advertisement for the Jeep. Balancing the apparent urgency of the topic of the interim suspension, public safety, and fairness to the Dealers, I ordered a short window for Mr. Valente to provide his evidence and the Authority an opportunity to respond. Submissions were completed on August 22, 2018, with final submissions in the form of an email from Mr. Valente.

III. The Law

[13] In a past decision, I have discussed the law regarding a motor dealer's obligations with respect to motor vehicle safety and the test for ordering an interim suspension.

[14] A motor dealer's obligations, regarding vehicle safety can be summarized as follows:

- (a) A motor dealer may not display for sale, offer for sale or sell a motor vehicle for use on the highways, unless it is compliant with the MVA and all its regulations: section 222 of the MVA and section 8.01 of the *Motor Vehicle Act Regulation*.
- (b) A motor dealer must declare whether a used motor vehicle is compliant with the MVA; or if it is not, the motor dealer must declare in advertisements, on any written documents, including purchase agreements, and on the motor

vehicle itself, that it is “not suitable for transportation” - that is, it is not to be used on the highways: sections 21(2)(e) and (f), 22, and 27(b) of the MDAR.

(c) Declaring a motor vehicle’s compliance with the MVA is a representation about the motor vehicle. As such, how the representation is made must be compliant with the *Business Practices and Consumer Protection Act*, SBC, 2004, c. 2 (“BPCPA”) and specifically, section 5(1) [deceptive acts or practices]. For example, failing to identify a motor vehicle as not complying with the MVA is deemed to be a deceptive act or practice: section 4(3)(b)(vi) of the BPCPA.

(d) Given the statutory duties imposed on a motor dealer, a consumer can presume a motor vehicle offered for sale by a motor dealer is compliant with the MVA, unless specifically advised otherwise. As stated in *Sugiyama v Pilsen dba Southgate Auto Sales* 2006 BCPC 265 (BC Prov. Ct.):

[70] Most people who buy a car from a used car dealer rely on his skill or judgment in that they assume that the dealer has been selective in choosing which cars he will acquire and sell. They also rely upon the dealer to disclose relevant information about the vehicles.

[71] It is also reasonable to assume that most purchasers of used cars want to buy a reliable vehicle for use in driving in safety on the roads. Used car dealers know this without a need for a customer to specifically state it as a specific purpose.

See

Re: Best Import et al. (September 1, 2017, Hearing File, 17-08-002, Registrar) additional reasons (Registrar, November 28, 2017, Hearing File, 17-08-002, Registrar) and varied but not on these points *Best Import Auto Ltd. v Motor Dealer Council of British Columbia*, 2018 BCSC 834 (BC Supreme Court).

Knapp v. Crown Autobody and Auto Sales Ltd. (September 21, 2009, File 08-70578, Registrar), and affirmed by *Crown Auto Body and Auto Sales Ltd. v. Motor Vehicle Sales Authority of British Columbia*, 2014 BCSC 894 (BC Supreme Court).

[15] In considering whether an interim suspension is appropriate in the circumstances, I noted the following in the September 1, 2017 *Best Import* Registrar's decision, which was not varied by the B.C. Supreme Court:

[15] The registrar is empowered to suspend a motor dealer pending the outcome of an investigation: sections 4(6) and 5 of the *Motor Dealer Act*.

[16] While it was decided under the *Health Professions Act*, the BC Court of Appeal decision in *Scott v. College of Massage Therapists of British Columbia*, 2016 BCCA 180 provides guidance regarding interim suspensions. A review of that decision notes the following principles:

- (a) at this stage I am not "trying" the facts. I am determining whether the evidence if believed true, indicates the public would be placed at risk of harm if Best Import [the Dealers] continued to operate,
- (b) the test is whether a *prima facie* case has been made out in support of the allegations,
- (c) the three main considerations are:
 - (i) the seriousness of the allegations,
 - (ii) what measures are currently in place to protect the public, and
 - (iii) the probability of harm;
- (d) in reviewing the evidence, I am to be mindful and consider its reliability, plausibility, internal and external consistency and any motivation, and
- (e) I am to balance the interests of Best Import [the Dealers] to continue to operate with that of the public interest and the protection of the public from harm. The public interest is paramount.

IV. Discussion

A. Seriousness of the Allegation

[16] Selling motor vehicles that are not suitable for transportation is very serious. It places occupants of the motor vehicle, those on the highway, and pedestrians off the highway at risk of loss of life, personal injury, and financial damages. The failure of one of a motor vehicle's safety components can have catastrophic effects on multiple persons. Accordingly, the Legislature saw fit to impose the above noted positive duties. There is ample evidence to establish a *prima facie* case that the Dealers have sold and continue to offer for sale motor vehicles that are not compliant with the MVA and continue to fail to advertise or represent those vehicles as "not suitable for transportation."

[17] CVSE officer and inspector R. Spanier inspected the Nissan 300ZX in Saanichton, British Columbia, using the hoist and facilities of the independent repair facility that initially inspected the Nissan for the consumer. The CVSE officer found several violations of the MVA. In the comments section of the inspection report, the CVSE officer noted other repairs recommended by the independent repair facility should also be addressed, but which did not constitute a violation of the MVA. The Dealers speculate that the CVSE inspector felt obligated to confirm the initial findings of the repair facility, as the CVSE inspector used that facility's hoist and tools to complete the investigation. This is not indicated on the face of the CVSE inspector's report. That report differentiates between items, which are not compliant with the MVA, and items that require attention and are not in violation of that Act.

[18] The Dealers said that the Nissan 300ZX passed an inspection before it was sold. They provided the Authority a copy of the inspection report, which identifies the inspection facility and the technician. The consumer provided the Authority a copy of the inspection report that the consumer was given by the Dealers. A comparison of the two clearly shows that they are not the same report – one is not a copy of the other.

[19] The Authority questioned the facility, which is identified as having done the inspection on the Dealer's version of the Nissan 300ZX inspection report. The owner of the facility, and the person named on the Dealer's report as the technician, provided an Affidavit that they did not inspect the Nissan 300ZX. The technician states that the Nissan 300ZX was brought to them by the Dealers for inspection. There was a noise from the engine of the vehicle, which they investigated and determined that the engine required significant and costly repairs. CVSE Inspector

Spanier noted the same issue when he inspected the Nissan 300ZX after the consumer had purchased it.

[20] The owner of the inspection facility states that they did not complete the inspection of the Nissan 300ZX and did not charge the Dealers for the inspection. The owner also says he did not place his name or that of his facility on the Dealer's inspection report. In response, the Dealers accuse the Authority's investigator of having intimidated the inspection facility to the point that the facility cannot remember what really happened. This is denied by the Authority investigator; and I am advised that the facility's owner is willing to provide a statement that they were not intimidated.

[21] The declarations required by the MDAR that the motor vehicle (Nissan 300ZX) complies with the MVA have not been crossed out on the purchase agreement. Therefore, by selling the Nissan 300ZX to the consumer, the Dealers' conduct represents that, at the time of the sale, the vehicle was compliant.

[22] While there is some controversy in the evidence, I am satisfied that a *prima facie* case has been established that the Dealers sold a motor vehicle that was not compliant with the MVA and did not represent that motor vehicle as "not suitable for transportation." The Dealers' speculation that the CVSE inspector was somehow "wrong" in his inspection of the Nissan 300ZX is not sufficient to dispel the *prima facie* case, given the surrounding evidence about the two different inspection reports and the evidence of the owner of the inspection facility that they did not inspect the Nissan 300ZX.

B. What measures are currently in place

[23] Once the Authority was aware of the allegation of selling vehicles not compliant with the MVA and the initial CVSE inspection report on the Nissan 300ZX, the above noted conditions were placed on the Dealers' registrations (See paragraph [6] of this Decision).

[24] During the hearing of June 22 and 27, the Dealers took the position that they were entitled to advertise motor vehicles on their website as being "available" for purchase, even if the motor vehicles did not comply with the MVA requirements. In their opinion, this was allowed so long as, if a consumer wished to purchase the motor vehicle, the Dealer would then take steps to make it suitable for transportation. At the conclusion of that hearing, I cautioned the Dealers that this was not correct. The purpose of ensuring a vehicle is compliant, even when offered for sale, is clearly required by the legislation as supported by case law. I noted

concerns with bait and switch issues, *i.e* that a vehicle maybe advertised but is actually unavailable for purchase, and then the motor dealer tries to sell the consumer another vehicle. I noted for the Dealers that their practice should have been not to advertise motor vehicles for sale (offer or display a motor vehicle), including on the internet, unless it complied with the MVA, or was otherwise advertised as "not suitable for transportation." Mr. Valente on behalf of the Dealers, agreed.

[25] From a policy perspective, prohibiting offering or advertising a motor vehicle for sale for use on the highway by the seller, the Dealers in this case, better achieves consumer protection and public safety. With the law as it currently stands, the Registrar, with the assistance of the CVSE, may inspect vehicles at a dealership to ensure their compliance with the MVA: section 26(d) of the MDA. If I were to accede to the Dealers' view of advertising non-compliant vehicles as "available" so long as they are sold as compliant, then ensuring compliance with the MVA would require inspecting a motor vehicle while it was in the possession of the consumer who had already purchased it. Having to identify purchasers and arranging to inspect vehicles after purchase is administratively cumbersome, and adds a layer of complexity if the vehicle is not compliant. There then becomes the issue of steps to be taken to make the motor vehicle compliant and the consumer being unable to drive the vehicle until it is compliant: section 219 of the MVA. This would lessen and not enhance consumer protection and the other policy goal of ensuring safe vehicles are on the roads.

C. The probability of harm

[26] Based on evidence presented at the August 1, 2018, hearing, the probability of harm is high.

[27] As noted above, the CVSE re-attended the Dealers' lot, randomly selected a few motor vehicles for inspection, and determined five motor vehicles on the Dealers' lot were not compliant with the MVA. Of those, three were being offered for sale. On one of those three motor vehicles, the violation was a flat tire. I advised the Authority, as I did in the June 22 and 27 hearing, that if the only violation were a flat tire, I would not be too concerned. Tires go flat on dealer's lots all the time and may be undiscovered for some time. Of the two remaining motor vehicles offered for sale, the Jeep is the one of most concern.

[28] The CVSE issued what is called a "box 1 order" on the Jeep in question. This means that: (1) in its present condition, it may not be used on the highway; and (2) it must be repaired and re-inspected for compliance with the MVA before it can be used on the highway. In the case of the Jeep, the striking issue is its exhaust

was missing about mid under-carriage, ending before the rear axle, as well as missing the over-axle pipe, muffler and tailpipe. This is compounded as there was a hole in the floor board within a few inches of where the exhaust ended. This would allow exhaust fumes to enter the passenger compartment of the Jeep, especially while idling at a traffic stop, posing serious risk to the occupants. As noted by the CVSE inspector, while he was not a doctor, the concern was that a person may be rendered unconscious while in control of the Jeep. I would note that the CVSE was able to determine these concerns without the benefit of a hoist or keys to the Jeep. It was readily visible by looking under the Jeep. It is also readily visible in the pictures taken of the area of concern around the Jeep's exhaust.

[29] Mr. Valente agreed with this concern about the Jeep. Mr. Valente described what would be needed to repair the Jeep including some body work. Mr. Valente also agreed that the Jeep had been offered for sale before the June hearing. Mr. Valente was aware, through the conditions on the registration of the Dealers and by my caution of June 27, 2018, that the Jeep must meet the requirements of the MVA, even before it was offered for sale. During the August 1, 2018 hearing Mr. Valente again stated his view that he can advertise a motor vehicle as "available" so long as it complies with the MVA if he sells the motor vehicle. Mr. Valente stated that his opinion and that of the investigator on this point, differ. I reminded Mr. Valente that it was I who had made that point at the conclusion of the June 22 and 27 hearing.

[30] Mr. Valente also stated that there is no consumer complaint in this case and insinuated that this was a rogue investigator, focusing on Mr. Valente's Dealers for some reason. Mr. Valente appears to have forgotten that this all started with a consumer complaint involving the Nissan 300ZX, which have since become two complaints. One from the selling consumer on consignment, and one from the purchaser.

[31] Where there is an indication that a motor dealer may be selling motor vehicles that are not compliant with the MVA, whether there is a complainant or not, the Authority must review such concerns, to protect the public from possible future harm. A regulator does not sit idly by waiting for something harmful to happen. The very purpose of regulation is to prevent harm from occurring in the first place. This is why regulators have pro-active inspection programs, statutory powers of inspection, and even follow-up on credible "tips".

The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of

emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.

[underlining added]

- *R. v. Wholesale Travel Group Inc.*, [1991] 3 SCR 154, 1991 CanLII 39 (Supreme Court of Canada), per Justice Cory
- Approved by the unanimous court in *R. v. Fitzpatrick*, [1995] 4 SCR 154, 1995 CanLII 44 (Supreme Court of Canada)

D. Decision

[32] The evidence presented at the hearing and in the post-hearing written submissions establish a *prima facie* case that the Dealers continue to place consumers at risk by advertising or offering for sale motor vehicles that are not compliant with the MVA. At the August 1 hearing, Mr. Valente, for the Dealers, continued to believe he could advertise non-compliant motor vehicles as available, so long as he made them suitable for transportation after a consumer agreed to purchase the motor vehicle, and before delivering the motor vehicle to the consumer.

[33] Conditions on the Dealers' registrations have not stopped the Dealers' conduct. My personal caution at the end of the June hearing dates has had no effect on the Dealers. I find that the Dealers' conduct here to be similar to the conduct of Best Import, which led to the interim suspension of Best Import's registration to protect the public. I also consider that a full hearing into these allegations is now only a few weeks away and that an interim suspension should be relatively short in duration. Given the above, and my duty to protect the public from potential harm, I am granting the request of the Authority and ordering an interim suspension of the Dealers' registrations.

[34] I would note that my decision here did not consider the advertising of the Jeep, as located by Norm Felix, during the hearing on August 1, 2018. While there may be technical reasons, why that was so, the other evidence presented establishes a *prima facie* case that the Jeep was non-compliant and offered for sale when it was inspected on July 20, 2018, after the conditions were placed on the Dealers' registration, and after my caution to the Dealers on June 27.

[35] The motor dealer registration of N.W. Auto Depot Ltd. (# 10578) and of Westminster Motors Ltd. (# 40469) are hereby suspended, pending the full resolution and outcome of the allegations in this matter. The suspension commences on Wednesday September 5, 2018 and remains in effect until further order of the Registrar.

V. Further Review

[36] My suspension order may be reconsidered in accordance with sections 26.11 and 26.12 of the MDA. A request for reconsideration must be made within 30 days of this decision being received by the Dealers. Such a request must be in writing, identify the grounds for the reconsideration and be accompanied with the additional new evidence as identified and defined in section 26.12(2) of the MDA.

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

Dated September 4, 2018

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