



Vehicle Sales Authority  
of British Columbia

**Investigation File: 19-06-042**  
**Hearing File: 19-11-005**

**Neutral Citation: 2019-BCRMD-029**

**IN THE MATTER OF THE *MOTOR DEALER ACT*, RSBC, 1996, c. 316 and the  
*BUSINESS PRACTICES AND CONSUMER PROTECTION ACT*, SBC, 2004, c. 2**

**Re:**

**DARRYL'S BEST BUYS AUTO SALES LTD.**  
(Motor Dealer Registration #11019)

**Respondent Dealer**

**And:**

**DARRYL GREGORY WARDROP**  
(Salesperson Licence #105073)

**Owner and Dealer Principal**

**And:**

**JONATHAN BLAINE WATT**  
(Salesperson Licence #212397)

**Licensed Salesperson**

**And:**

**JARET CAMERON BABIN**  
(Salesperson Licence #111870)

**Licensed Salesperson**

**DECISION OF THE REGISTRAR OF MOTOR DEALERS**

**Date and place of decision:** July 7, 2020 at Langley, British Columbia

**By way of written submissions**

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## I. Introduction and Position of the Authority

[1] On April 8, 2019, Cheryl Chang purchased a 2004 Acura TSX ("Acura") from Darryl's Best Buys Auto Sales Ltd. ("Darryl's Best Buys"). Ms. Chang states she dealt with Jonathan Watt. About one week after the purchase, Ms. Chang says that after the Acura sat for a week, she could not start the Acura. Ms. Chang complained to Jonathan Watt who suggested a battery was the issue and promised to assist Ms. Chang install a new battery. That assistance never occurred.

[2] About five to six weeks after the purchase, Ms. Chang experienced further drivability issues and eventually took the Acura to an Acura dealership. After inspection, the Acura dealership noted various needed repairs including a transmission as the clutch packs were burnt out. The dealer estimated the transmission and torque converter would cost about \$5,000 to replace. Adding in the cost of the other repairs, it was the Acura dealership's opinion that it was not worth performing all the repairs given the age of and mileage on the Acura.

[3] Ms. Chang filed her complaint with the VSA which was investigated by Compliance Officer Bill Manhas. During the investigation, Ms. Chang identified that Jonathan Watt was the person she dealt with and was not licensed as a salesperson at the time of the sale. A concern was raised about the accuracy of the odometer reading as noted on the purchase agreement and the ICBC Transfer/Tax Form. Eventually, Darryl's Best Buys agreed to purchase the Acura back from Ms. Chang and did so, providing her with a refund.

[4] On November 21, 2019 a Notice of Hearing was issued against the named Respondents. Officer Manhas' Investigation Report, with its attached exhibits, was shared with the Respondents. Each was able to provide their comments before the matter was brought to my attention for adjudication. The Authority alleges the following breaches of the legislation:

- (a) Against Darryl's Best Buys, Darryl Wardrop and Jaret Babin, General Sales Manager; employing or engaging a person as a salesperson while the person was unlicensed contrary to section 13.1 of the *Motor Dealer Act*, R.S.B.C. 1996, c. 316 ("MDA").
- (b) Against Jonathan Watt; acting as a salesperson while not licensed as such contrary to section 2 of the *Salesperson Licensing Regulation*, B.C. Reg. 202/2017 ("SL-Reg.").
- (c) Against Darryl's Best Buys and Jonathan Watt, breaches of the following provisions of the *Motor Dealer Act Regulation*, B.C. Reg. 447/78:
  - (i) Section 21(2)(d); for failing to list required repairs on the purchase agreement for a used vehicle;
  - (ii) Section 22; for failing to disclose the Acura as not suitable for transportation; and

- (iii) Section 27(b); for advertising the Acura for sale without declaring it as not suitable for transportation.
- (d) Against Jonathan Watt; engaging in a deceptive act or practice contrary to section 5 and as deemed by section 4 of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 (“BPCPA”) by not being forthcoming about the vehicle’s mechanical condition, or about the accuracy of the odometer reading.
- (e) As against all the Respondents, a breach of sections 33(2)(a) [not acting with honesty and integrity] and 33(2)(i) [aid, abet or cause a person to contravene any law or a condition of registration or a licence] of the *Motor Dealer Act Regulation*. These provisions are a part of the Code of Conduct.

[5] The Authority seeks various orders ranging from penalties to suspension and cancellation of registration of Darryl’s Best Buys and of each of the individuals’ salesperson licenses.

## **II. Position of the Parties**

[6] During the investigation, Darryl’s Best Buys provided a written response to Officer Manhas, which can be summarized as follows:

- (a) Ms. Chang came to the dealership looking at vehicles. She Liked the Acura. She test-drove the Acura for 45 minutes with no issues. She tried all the buttons and expressed much interest in the Acura.
- (b) The dealer showed Ms. Chang a CARFAX Vehicle History Report and explained to her how to read the report.
- (c) The various options for warranties were explained to Ms. Chang. Darryl’s Best Buys would honour a 90-day parts and labor dealer discount for future repairs, that the consumer pays. Other aftermarket warranties were also discussed. Ms. Chang declined those after-market warranties.
- (d) Darryl’s Best Buys negotiated a “big” price reduction in exchange for no warranty being provided by the dealer.
- (e) The consumer is lending out her vehicle to others and wondered if they left things on in the Acura draining her battery. Darryl’s Best Buys also suggests these other persons may have driven the vehicle poorly, leading to the issues Cheryl Chang is describing – “someone has broken her car”.

[7] Darryl Wardrop’s submissions on his behalf and on behalf of Darryl’s Best Buys can be summarized as follows:

- (a) Mr. Wardrop states had he been made aware of this issue sooner; he would have acted sooner.
- (b) Jonathan Watt was hired as a lot person. He was subsequently fired because he could not be trusted as an employee of the dealership.
- (c) Jaret Babin, General Sales Manager, did not communicate this issue to Mr. Wardrop in a timely manner as he was required to do.
- (d) Due to the move of the dealership, things were a bit chaotic and Mr. Wardrop may not have been paying as much attention to the day-to-day operations of the dealership as he would have liked.
- (e) Darryl's Best Buys reimbursed the consumer and took back the Acura.
- (f) Darryl's Best Buys has finalized their move. Mr. Wardrop has kept the sales staff small and will be hands-on in the operation of the dealership, including proper training of staff.
- (g) Mr. Wardrop acknowledges his duty as a motor dealer to the industry and to follow the legislation. He would like to continue to operate and is willing to provide any documentation necessary in support of his case.

[8] Jaret Babin's submissions can be summarized as follows:

- (a) Jonathan Watt was hired as the "lot guy" at Darryl's Best Buys and was at no time expected or asked to sell cars. At the time of the sale, the dealership was moving, required to move, and he believes Jonathan Watt may have taken advantage of that confusing time in this transaction. Other concerns about Jonathan Watt had since come up and he was fired. The dealer is also a victim to what Jonathan Watt did during this transaction.
- (b) Jaret Babin responds to VSA inquiries on behalf of Darryl's Best Buys. This often means he gathers information and submits that information even though he personally had nothing to do with the issue or sale.
- (c) Ms. Chang did not raise any concerns with the vehicle running after the test drive and she was able to take the vehicle home without issue.
- (d) Ms. Chang's initial statement said the vehicle only needed a battery and Darryl's Best Buys offered to reimburse her for the battery but did not hear from Ms. Chang.
- (e) The Acura dealership looked at the Acura two months later and, in his view, the price of \$10,000 for repairs appears highly inflated.

- (f) Within close to a month of the Acura dealer inspecting the Acura and giving a \$10,000 repair estimate, Jaret Babin met with Ms. Chang and bought the Acura back for a full refund.
- (g) Jaret Babin stated he kept Ms. Chang in the loop as they discussed a resolution and Ms. Chang was appreciative of Jaret Babin doing so.

[9] Ms. Chang provided a rebuttal to Darryl's Best Buys position noted in paragraph 6 during the investigation. In summary:

- (a) The test drive was not 45 minutes as the Acura did not have enough gas for that.
- (b) The fact the dealer negotiated a big discount indicates the dealer knew of the Acura's mechanical conditions.
- (c) Jonathan Watt did not follow the proper protocol for a licensed salesperson and should have gone over the purchase agreement line-by-line. If he had, Ms. Chang would have seen the declaration that the vehicle was an ex-lease. I would note that this was not an allegation in the Notice of Hearing, and I will not consider it due to that lack of notice.
- (d) The dealer and Jonathan Watt offered to repair the Acura (replace the battery) by a person who was not a mechanic.<sup>1</sup>
- (e) Darryl's Best Buys' warranty offer, restriction of repairs at their approved repair shop, was to a repair shop that was not a properly certified automotive mechanic service.<sup>2</sup>
- (f) Jonathan Watt and Darryl's Best Buys did not provide a Vehicle Safety Inspection Checklist at the time of sale.
- (g) Only Ms. Chang and one other person, a friend, has driven the Acura.

[10] The Authority's Reply Submissions can be summarized as follows:

- (a) The submission of the Respondents and evidence from Ms. Chang confirms Jonathan Watt was acting as a salesperson while not licensed as such.
- (b) The Authority submits that the Respondents have not met the reverse burden of proof on them that they did not commit a deceptive act or practice.
- (c) The Authority submits that there are ways to temporarily mask certain drivability issues such that the Acura test drive would suggest no issues, but months later they appear when the Acura dealer was inspecting the Acura. The Authority further notes that on a balance of probabilities, it is highly unlikely that all these issues would manifest shortly after the vehicle sale.

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<sup>1</sup> In British Columbia there is no licensing of person's as mechanics or as technicians. There are training programs, but it is not mandatory for someone to take or complete a program before they repair motor vehicles.

<sup>2</sup> There is no such thing as a properly certified repair shop in British Columbia. There are various standards that a repair shop can adopt if it wants to, but none are mandatory.

- (d) The Authority can understand that moving a dealer can be chaotic, but that does not alleviate the dealer from its legal responsibilities and responsibility to oversee its staff.
- (e) That the dealer failed to promptly provide Ms. Chang a copy of the ICBC Transfer/Tax Form (Form APV9T) after it bought back the Acura was negligent. Further, the failure to promptly respond to the VSA on this issue was a breach of the Respondents duty to communicate promptly with the regulator. This later submission is not an allegation in the Notice of Hearing and therefore, I will not consider it due to a lack of notice.

### **III. Discussion**

#### **(a) General legal principles**

[11] I will discuss each of the allegations in turn. In doing so I keep in mind the principles applicable to the interpretation of statutes set out in the common law and in the *Interpretation Act*, R.S.B.C. 1996, c. 238: see *Motor Vehicle Sales Authority of B.C. v. One West Auto Ltd. et al* (November 8, 2019, Investigation File 19-09-001, Registrar) at paragraphs 6 to 14.

[12] In considering the evidence, I keep in mind the directions provided by the courts in doing so. For example, I note the importance of internal and external consistency in the evidence, evidentiary alignment between statements and documentary evidence, and the application of common sense in assessing the evidence.

- *Bradshaw v. Stenner*, 2010 BCSC 1398 (BC Supreme Court), affirmed by 2012 BCCA 296 (BC Court of Appeal), leave to appeal to the Supreme Court of Canada refused *Kimberley Shane Stenner v. Lori Noreen Bradshaw et al.*, 2013 CanLII 11302 (Supreme Court of Canada)
- *Crest Realty Westside Ltd. (Re/Max Crest Realty Westside) v. W & W Parker Enterprises Ltd.*, 2014 BCSC 1328 (BC Supreme Court) at paragraphs 43 to 44, affirmed by 2015 BCCA 447 (BC Court of Appeal)

[13] Generally, the burden of proof is on the person advancing an allegation or a fact. Legislation may reverse that burden. The burden of proof is the civil burden known as the balance of probabilities, which is often reframed as "it is more likely than not" that the alleged conduct or fact occurred or is true. That balancing is based on the existence of clear, convincing and cogent evidence establishing the fact or allegation: *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 SCR 41 (Supreme Court of Canada).

#### **(b) Allegation – Jonathan Watt acting as a salesperson while not licensed**

[14] I will deal with allegations (a) and (b) together.

***i. Prohibited under section 2 of the Salesperson Licensing Regulation***

[15] Section 2 of the SL-Reg. prohibits an individual acting as a salesperson unless they are licensed.

***ii. Prohibited under section 13.1 of the Motor Dealer Act***

[16] Section 13.1 of the MDA prohibits a motor dealer from employing or engaging an individual as a salesperson unless they are licensed. The registered motor dealer in this case is Darryl's Best Buys. So, the prohibition is on that entity.

[17] Jaret Babin is an individual salesperson and the General Sales Manager of the dealership. If it can be shown that Jaret Babin is an officer, director or agent of Darryl's Best Buys and he authorized, permitted or acquiesced in the breach of section 13.1 of the MDA, he can be held equally responsible for the dealer's breach: section 26.04(5). An employee that causes a corporation to breach section 13.1 of the MDA is equally liable for the corporation's offence: section 35(5) of the MDA. Further, as a licensee, Jaret Babin must not aid, abet or cause a registered motor dealer to breach any law: section 33(2)(i) of the MDA-Reg [Code of Conduct].

[18] Darryl Wardrop is the dealer principal and owner of Darryl's Best Buys. There is no question that he is an officer of Darryl's Best Buys. Darryl Wardrop is also a licensed salesperson. He may be liable for the corporation's breach under sections 26.04(5) and 35(5) of the *Motor Dealer Act*; and under section 33(2)(i) of the *Motor Dealer Act Regulation – Code of Conduct*.

***iii. salesperson defined***

[19] The definition of salesperson in section 1(1) of the MDA is as follows:

"salesperson" means:

(a) an individual, other than a motor dealer, who, on behalf of a motor dealer and for or in the expectation of a fee, gain or reward,

(i) solicits, negotiates or arranges for the sale of a motor vehicle to a person, or

(ii) in any way participates in the soliciting, negotiating or arranging for the sale of a motor vehicle to a person, or

(b) an individual who is a motor dealer and who

(i) solicits, negotiates or arranges for the sale of a motor vehicle to a person, or

(ii) in any way participates in the soliciting, negotiating or arranging for the sale of a motor vehicle to a person;

[Underlining added]

[20] The paragraph (a) definition is the one applicable here and covers an individual employed or engaged by a motor dealer. The paragraph (b) definition is applicable to an individual who is also acting as a motor dealer – a sole proprietor. A sole proprietor must be registered as a motor dealer and licensed as a salesperson.

[21] The underlined words show that if an individual is expecting a fee, gain or reward and in any way participating in the soliciting, negotiating or arranging a sale (which includes a lease or transfer by any means) they are acting as a salesperson. An actual sale need not occur. Further, the conduct of the salesperson and what they say before, during and after the sale is also regulated conduct requiring that they be licensed.

- See *Re: Best Import Auto Ltd. et al* (File 17-08-002, November 28, 2017, Registrar) at paragraphs 79 to 92.

#### ***iv. Discussion of the evidence***

[22] Ms. Chang provided evidence that she was dealing with Jonathan Watt during the sale of the Acura. She did not identify someone else as the person she dealt with at the dealership during the time of the sale. Darryl's Best Buy, Darryl Wardrop and Jaret Babin did not deny Jonathan Watt was the salesperson for this transaction. Their submissions state that Jonathan Watt was not hired to sell motor vehicles to consumers, but to be the lot guy. Jaret Babin's submissions suggest Jonathan Watt was expected to deal with consumer complaints after a sale. Importantly, Darryl's Best Buys, Jaret Babin and Darryl Wardrop do not identify anyone else as the licensed salesperson involved in the initial sale. For example, the submissions of Darryl's Best Buys during the investigation stated that Ms. Chang dealt with "a salesman"; and never identified who. In formal submissions for this hearing process, Darryl Wardrop suggested that in relation to this transaction, Jonathan Watt may have taken advantage of the chaos around the dealership while the dealership was moving.

[23] Ms. Chang also provided copies of her text messages with Jonathan Watt after the sale of the Acura, regarding the battery issue and his promise to install a battery for Ms. Chang, which never happened. In the text messages, Jonathan Watt advises Ms. Chang to send any complaint files to him and not his boss.

[24] There is one text message exchange I find odd if Jonathan Watt was the salesperson involved in the initial sale of the Acura. On June 3, 2019 at 4:17 pm,



Jonathan Watt asks Ms. Chang if she bought a warranty for the Acura. Ms. Chang responds: "No Warranty This is under 90days It had problems since day 1". If Jonathan Watt was involved in the initial sale, he would be aware that Ms. Chang declined to purchase a warranty. Further, had Jonathan Watt been a part of the initial sale, one would expect Ms. Chang to have answered differently. Instead, Ms. Chang answered in a straight-forward fashion providing Jonathan Watt an answer as if he would not have been aware of the information. It is possible that Jonathan Watt was referring to a warranty obtained outside the dealership.

[25] Despite the one noted discrepancy, I am satisfied on a balance of probabilities that Jonathan Watt was the responsible salesperson at the time of the initial sale of the Acura to Cheryl Chang. I further find that Jonathan Watt made representations to Ms. Chang after the transaction to address the battery issue and with her complaints, which would constitute regulated communications. At the relevant times, Jonathan Watt was not licensed as a salesperson and is in breach of section 2 of the SL-Reg.

[26] A motor dealer has an obligation to properly supervise its employees. Failing to do so that leads to an employee committing fraudulent activity can be grounds to cancel a motor dealer's registration. In *Allright Automotive Repair Inc. (Re)* [2006] OLATD No. 177 (Ont. Lic. Appeal Tribunal) affirmed by *Allright Automotive Repair Inc. v. Ontario (Motor Vehicle Dealers Act, Registrar)* [2008] O.J. No. 1557 (Ont. Superior Court, Div. Crt.), the Tribunal noted:

116 In addition, if control, supervision and monitoring measures had been in place as they should have been, none of this would have happened. The fact that it was not discovered before OMVIC's inspection shows that there were no control measures in place...

- Applied in *Motor Vehicle Sales Authority of British Columbia v. Barnes Wheaton et al.* (April 16, 2020, File 19-07-004, Registrar).

[27] Darryl Wardrop explains how this occurred in the time of chaos during the dealer's move and that Jonathan Watt took advantage of the situation. Darryl Wardrop also describes what he has done since, including terminating the employment of Jonathan Watt, to try and ensure this does not happen again.

[28] The Authority advances that the move and this transaction occurred sufficiently far apart and questions this explanation. The basis of that is the date in which Darryl's Best Buys submitted their change of address notification to the Authority. The fact that the dealer submitted a document to notify of a change of address does not in and of itself prove that Darryl's Best Buys had fully completed their move by that time.

[29] On the submitted evidence, I am satisfied on a balance of probabilities that Darryl's Best Buys was negligent in the supervision of its employee allowing Jonathan Watt to act as a salesperson while not licensed. The question is, is this a breach of section 13.1 by Darryl's Best Buys?

[30] As worded, section 13.1 of the MDA is about a deliberate act of the dealer to employ or engage an individual to act as a salesperson while not licensed. In civil law, acting recklessly is sufficient to find a person acting deliberately: *Casillan v. 565204 B.C. Ltd. dba Daewoo Richmond*, 2009 BCSC 1335 (BC Supreme Court). So, a motor dealer employing an individual to act as a salesperson and taking no steps to verify they are licensed can be considered deliberate conduct and a breach of section 13.1. Further, leaving an employee completely unsupervised leading to misconduct, could also be considered reckless conduct.

[31] In this case, the evidence shows Darryl's Best Buys employed Jonathan Watt to be the lot guy. Jaret Babin did say that Jonathan Watt was to deal with the "heat" customers after purchases. In what capacity he was to do so is not clear. It may be that he was to provide assistance, if there were mechanical breakdown issues as the text messages suggest he was attempting to do. I would note that in the text messages, Jonathan Watt stated he would have to talk to his boss to get authorization to purchase a battery. Also, in those text messages, Jonathan Watt advises Ms. Chang to direct all complaint documents to him and not his boss. This appears an attempt by Jonathan Watt to keep Ms. Chang's complaint from his boss. I also note it was Jaret Babin who eventually dealt with Ms. Chang to resolve the dispute.

[32] On the evidence before me, I find that Jonathan Watt took advantage of the confusion during Darryl's Best Buys move. I am not satisfied on a balance of probabilities that Darryl's Best Buys deliberately or recklessly engaged or employed Jonathan Watt to be a salesperson. Darryl's Best Buys may have been negligent in their supervision of Jonathan Watt, but that is not sufficient for a breach of section 13.1 of the *Motor Dealer Act*. It could be a foundation to review a dealer's licence under section 5 of the *Motor Dealer Act*, but that was not alleged in the Notice of Hearing.

[33] I would dismiss this allegation against Darryl's Best Buys. Having dismissed this allegation against Darryl's Best Buys, it is also dismissed as against Darryl Wardrop and Jaret Babin.

**(c) Allegation – Darryl's Best Buys and Jonathan Watt breached sections 21(2)(d), 22 and 27(b) of the MDA-R.**

***i. Section 21(2)(d) MDA-R - failure to list repairs***

[34] I turn to discuss the alleged breach of section 21(2)(d) of the MDA-R which states:

(2) If a motor dealer makes a written representation in the form of a sales or purchase agreement respecting the motor dealer's sale of a used motor vehicle, the motor dealer must include the particulars required for a new motor vehicle under subsection (1) and

(d) an itemized list of any repairs to be effected and the additional cost, if any,

[underling added]

[35] First, it is to be noted that the statutory duty is on the motor dealer to provide the itemized list on the purchase agreement. In this case, Darryl's Best Buys is the registered motor dealer.

[36] Second, the provision speaks of "repairs to be effected and the additional cost, if any". Based on a reading of section 21, the provision's purpose is to capture the contractual obligations of the parties and the general contractual requirements of identifying the parties, the consideration and the subject matter of the transaction and other contractual terms such as a deposit. It captures the meeting of the minds of each party and any additional information required by the Regulation, such as declarations by the dealer that the vehicle is suitable for transportation. When section 21(2)(d) says "repairs to be effected and additional cost, if any," this means repairs that have been identified and the consumer and dealer have agreed would be made, as part of the transaction. This forms part of the transaction's terms and consideration to be documented and itemized on the purchase agreement: *Dian Greene v. Affordable Auto Sales and Services Inc.* (March 13, 2020, Hearing File 19-12-001, Registrar).

[37] No evidence was placed before me that Cheryl Chang and Darryl's Best Buys, or Jonathan Watt, had agreed that certain repairs would be made to the Acura as part of the transaction. In fact, a notation on the purchase agreement expressly states, "Dealer not responsible for any repairs on car from date of purchase". As such, I cannot find that Darryl's Best Buys breached section 21(2)(d) of the MDA-Reg. This allegation is dismissed against Darryl's Best Buys. For the same reason, and because Jonathan Watt was not the motor dealer, this allegation is dismissed as against Jonathan Watt.

***ii. Section 22 MDA-R – not suitable for transportation***

[38] Next is the alleged breach of section 22 of the MDA-R, which states:

22 A motor dealer must ensure that any written representation including every purchase order, sales agreement or form of contract used in a consumer transaction for the purchase of a motor vehicle not intended for transportation contains a statement that the motor vehicle is not suitable for transportation and is sold for parts only or purposes other than transportation.

[underlining added]

[39] Various Registrar decisions have noted that the duty to declare a motor vehicle as not suitable for transportation, is related to a motor dealer's duty to

declare that a motor vehicle meets the minimum standards set by the *Motor Vehicle Act* if it is sold for use on the highways. If a motor vehicle does not meet those minimum standards, section 222 of the *Motor Vehicle Act* (“MVA”) prohibits it being advertised for sale or sold for use on the highways. For a dealer to still sell such a motor vehicle, the motor dealer has a duty to declare, in several ways, that the vehicle is offered for sale for a purpose other than use on the highways – “not intended for transportation”. For example, the motor dealer may declare that the motor vehicle is offered for sale as parts only and then it must also be declared as “not suitable for transportation”.

- *Re: Best Import Auto Ltd. et al* (Hearing File 17-08-002, Registrar) varied but not on this point *Best Import Auto Ltd. v Motor Dealer Council of British Columbia*, 2018 BCSC 834 (BC Supreme Court)

[40] Whether or not a motor vehicle meets the requirements of the MVA is assessed by inspecting the vehicle’s various components against the legislated standards. Bringing my experience in managing service departments and a provincially designated inspection facility authorized to inspect motor vehicles for compliance with the MVA, there is very little subjectivity in this assessment. Either a component is within the standards set by the legislation, or it is not.

[41] The evidence before me is that two months after the sale there were various mechanical issues identified by the Acura dealership as listed on invoice 106914. Included in that list is what I will simply say is a worn-out transmission and torque converter.

[42] The Acura dealer technician notes on the work order that the alternator is failing/about to fail because of a noisy bearing and low output of 14.1 volts @ 30 amps. The technician does not state it has failed. I note this as Officer Manhas’ report says the alternator was not holding a charge. Applying my experience in managing service departments, alternators create a charge and do not hold a charge. A battery holds a charge. The list of items also notes various components leaking and a worn-out power steering pump (noisy).

[43] Included with the invoice is a multi-point Inspection Report. The Inspection Report has three categories for each item checked, (a) passed inspection, (b) may require attention, and (c) requires attention. None of the items were checked off as requires attention. Several, such as the power steering, were checked off as may need attention. One, the battery, was noted as NA, but notes on the multi-point Inspection Report gives the battery a marginal pass. About half the mechanical items on the Inspection Report were checked as passed inspection. The Acura dealership advises Ms. Chang it is not worth repairing the Acura, given the cost to do so and the age and mileage on the Acura.

[44] None of the evidence before me states that the Acura does not meet the legislated minimum standards of the MVA and did not at the time of sale. Yes, the Acura needs repairs, the transmission is worn out and the repairs are costly. And, the Acura did stall on the Second Narrows Bridge. Understandably, this could lead

one to believe the Acura was not suitable for transportation as that phrase is understood in the ordinary sense.

[45] Whether the Acura did or did not legally meet the minimum requirements of the MVA at the time of sale, is assessed by way of an inspection looking at the various components and their minimum standards set by that legislation. I do not have any evidence before me that the Acura was not compliant with those minimum legislated standards at the time of the sale. The view that it was not compliant appears to be an assumption based on the Acura dealership's findings about two months after purchase, the cost of repairs and that the vehicle stalled on the bridge. An assumption is insufficient to find a breach of the legislation. In contrast see *Best Import, supra*, where the B.C. Ministry of Transportation inspectors inspected vehicles for compliance with the MVA and determined, based on an objective standard, that the vehicles in that case did not comply and did not comply at the time of the sale.

[46] In the absence of evidence that the Acura did not meet the minimum standards set by the MVA, I cannot find the Acura was legally "not suitable for transportation" at the time of sale. As such, I cannot find Darryl's Best Buys failed to make this declaration as required by section 22 of the MDA-Reg.

***iii. Section 27(b) of the MDA-R: Advertising not suitable for transportation***

[47] I now consider the alleged breach of section 27(b) of the MDA-R, which states:

27 A motor dealer exhibiting or offering for sale a used motor vehicle must affix to it in a clear and legible manner information concerning it as follows:

(b) if it is a vehicle that is not suitable for transportation, the statement "Not Suitable for Transportation".

[Underlining added]

[48] Given my findings above regarding section 22 of the MDA-R, this claim would also have to be dismissed. Even if I were wrong regarding my finding on section 22, the duty here is to affix to the motor vehicle a declaration of "not suitable for transportation" if that were the case. In reviewing the Investigation Report and the submissions, I see no evidence about whether such a warning was or was not "affixed" to the Acura. It does not appear Ms. Chang was asked if there was such a warning affixed to the Acura.

[49] In the absence of evidence showing "not suitable for transportation" was or was not affixed to the Acura itself, this allegation would not be proven in any regard.

**(d) Jonathan Watt committed a deceptive act or practice contrary to section 5 and as deemed by section 4 of the *Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2* ("BPCPA") by not being forthcoming about the vehicle's mechanical condition, or about the accuracy of the odometer reading.**

[50] I note that the Notice of Hearing specifically singled out Jonathan Watt for this alleged breach. The Authority did not make this allegation against Darryl's Best Buys, Mr. Wardrop or Mr. Babin. It would be procedurally unfair to consider this allegation against the latter three as they were not put on notice of this allegation so they could defend their position. As such, I must confine my considerations to Jonathan Watt's conduct.

[51] A deceptive act or practice (the law of misrepresentation) can occur, innocently, negligently or deliberately, which includes being reckless. The representation can occur before, during or after the consumer transaction. A deceptive act or practice can also occur by failing to state a material fact. If it is shown that the deceptive act or practice was made innocently, then no enforcement action is taken as a mistake occurred. However, the consumer may still be entitled to a remedy.

- *Knapp v. Crown Autobody & Auto Sales Ltd et. al* (September 21, 2009, File 08-70578, Registrar) affirmed by *Crown Autobody and Auto Sales Ltd. v. Motor Vehicle Sales Authority of British Columbia*, 2014 BCSC 894 (BC Supreme Court)
- *Harris & Harris v. Windmill Auto Sales & Detailing Ltd. et al.* (April 10, 2013, File 12-030, Registrar), affirmed by *Windmill Auto Sales & Detailing Ltd. v. Registrar of Motor Dealers*, 2014 BCSC 903 (BC Supreme Court)
- *Re: Best Import Auto Ltd. et al.* (November 28, 2017, Hearing File 17-08-002, Registrar), varied but not on these points in *Best Import Auto Ltd. et al. v. Motor Dealer Council of British Columbia*, 2018 BCSC 834 (BC Supreme Court)
- *Webster v. Pioneer Garage Ltd. dba Fraser Valley Pre-Owned* (April 27, 2018, File 17-07-002, Registrar)
- *Bunyak v. Darryl's Best Buys Auto Sales Ltd.* (October 5, 2015, File 14-12-002, Registrar)
- Section 10 of the *Business Practices and Consumer Protection Act Regulation*

[52] The common law elements to prove a misrepresentation continue for a consumer to obtain a remedy for a breach of the deceptive act or practice provisions of the BPCPA. They are:

- (a) A representation is made that is untrue or is otherwise misleading, or there has been a failure to state a fact,

- (b) The consumer reasonably relied on the representation, or if the claim was a failure to state a fact, the fact would be a material fact within the transaction, which is assessed objectively,
- (c) There is a connection between the proven misrepresentation and the harm or damage the consumer experienced and is claiming, and
- (d) There is evidence of the quantum/amount of that harm or damage.

[53] The BPCPA modifies the common law element noted in paragraph (a) above. It does so by defining what constitutes a deceptive act or practice and deeming specific conduct to be a deceptive act or practice. The BPCPA also provides for a reverse onus of proof on this element of the claim. Once some evidence is provided that a misrepresentation (deceptive act) occurred, including a failure to state a material fact, the onus shifts to the supplier to show the misrepresentation did not occur or was not misleading: section 5(1) of the BPCPA. The stronger the evidence of a misrepresentation, the more evidence the supplier must provide to meet its case. The opposite is also true. The onus remains on the consumer to provide evidence proving on a balance of probabilities, elements (b), (c) and (d).

- *Bunyak v. Darryl's Best Buys Auto Sales Ltd. et al, supra*
- *Vavra v. Victoria Ford Alliance Ltd. et al. 2003 BCSC 1297 (BC Supreme Court)*
- *Crown Auto Body and Auto Sales Ltd., supra, (BC Supreme Court)*
- *Re: Best Import Auto Ltd. et al., supra*

[54] What is a material fact? Generally, a material fact:

- (a) Can be deemed by legislation, such as the disclosures in section 23 of the *Motor Dealer Act Regulation: Webster, supra,*
- (b) Can be communicated by a consumer as a key term for purchasing a motor vehicle. For example, requiring a pick-up truck that can tow a certain weight as was the case in *Vavra, supra,* or
- (c) Is recognized at common law as any fact that a reasonable person would find important to consider in making a decision, given all the circumstances of the transaction. The fact need not be one that would change someone's mind but would be important to their decision making: *Shabern Holding Inc. v. Vancouver Airport Centre Ltd. 2011 SCC 23, [2011] 2 S.C.R. 175 (Supreme Court of Canada).*

[55] It is important to remember that the BPCPA is consumer protection legislation and its interpretation is to be made generously in favour of promoting consumer protection: *Seidel v. TELUS Communications Inc., 2011 SCC 15 (CanLII), [2011] 1 SCR 531 (Supreme Court of Canada)* at paragraph 37. Even so, the BPCPA is not available to alleviate errors made by consumers. The BPCPA exists to alleviate harm to consumers due to the conduct by suppliers that is prohibited by the Act:

[88] In *Miller v. Lavoie* (1966), 1966 CanLII 426 (BC SC), 60 D.L.R. (2d) 495 (B.C.S.C.), Wilson C.J.S.C. made the following observation about predecessor legislation dealing with unconscionable transactions:

This Court exists for many purposes and one of these purposes is the protection of unsophisticated and defenceless persons against the exactions of conscienceless persons who seek to take advantage of them. The legislation provides one method of exercising that benevolent authority. But the Courts are not empowered to relieve a man of the burden of a contract he has made under no pressure and with his eyes open, merely because his contract is an act of folly. (p. 501)

[Underlining added]

- *Bain v. The Empire Life Insurance Company*, 2004 BCSC 1577 (BC Supreme Court) applying the BPCPA

### ***i. accuracy of the odometer***

[56] The Authority alleges that Jonathan Watt misrepresented the Acura's mileage to Ms. Chang by placing the wrong mileage on the paperwork. In support of this allegation is a written statement from Ms. Chang as part of her VSA Consumer Complaint Form that she remembers thinking 210,000 km is the highest miles vehicle she has purchased. Ms. Chang believes Jonathan Watt wrote 201,143 km on the purchase agreement instead of what she believes was probably 210,143 km. Ms. Chang states Jonathan Watt advised her that he has dyslexia. Ms. Chang's statement also makes clear that her evidence is a reflection back on the transaction, so she obviously cannot be sure of the actual kilometers. Ms. Chang's statement that Jonathan Watt had dyslexia is hearsay and while admissible before a tribunal, its use as evidence has limitations.

[57] The purchase agreement itself shows a kilometer reading of 201,143 km. The ICBC Transfer/Tax Form supports Ms. Chang's evidence where the odometer reading is noted as 220,000 km, even. This document was signed by both Darryl's Best Buy's representative and Ms. Chang. The Acura dealership repair order documents the odometer reading as 212,716 km two months after the Acura's sale. Ms. Chang's evidence of an odometer reading of 210,143 km is more in line with the ICBC Transfer/Tax form and the Acura dealership's recorded odometer reading two months after the sale.

[58] I am satisfied on a balance of probabilities that at the time of sale the Acura's odometer reading was closer to the 210,143 km as stated by Ms. Chang. Therefore, Jonathan Watt did misrepresent the odometer reading on the purchase agreement. The best evidence I have for why this occurred is Jonathan Watt's dyslexia. That being the case, I cannot say the misrepresentation was deliberate, reckless or even negligent. It would be an honest error due to a medical condition, making it an innocent misrepresentation, and I so find. Being an innocent



misrepresentation, no compliance action is to be taken against Jonathan Watt on this allegation: section 10 of the *Business Practices and Consumer Protection Regulation* B.C. Reg. 294/2004.

[59] Ms. Chang's evidence is clear that she knew the actual kilometers traveled on the Acura at the time of sale was greater than the 201,143 km noted on the purchase agreement. It cannot be said that Ms. Chang would have been misled by the written representation on the purchase agreement, or on the ICBC Transfer/Tax Form. Ms. Chang never referred to the 220,000 km declaration on the ICBC Transfer/Tax Form. Ms. Chang would therefore not be entitled to a remedy for this representation as the evidence is that she did not reasonably rely on the misrepresentation to her detriment. She knew the mileage was higher than recorded on the purchase agreement.

***ii. not being forthcoming about the vehicle's mechanical condition***

[60] The allegation is that the various mechanical issues with the Acura must have been apparent at the time of sale and Jonathan Watt did not advise Ms. Chang of those issues. The salient provision of the BPCPA being invoked is the deemed deceptive act or practice provision in section 4(3)(b)(vi) of the BPCPA:

(3) Without limiting subsection (1), one or more of the following constitutes a deceptive act or practice:

(b) a representation by a supplier

(vi) that uses exaggeration, innuendo or ambiguity about a material fact or that fails to state a material fact, if the effect is misleading,

[61] For this to be a breach of the BPCPA, the mechanical issues must have:

- (a) existed at the time of the sale,
- (b) those issues must be a material fact in relation to the purchase of the Acura, and
- (c) failing to state these material facts must have the effect of misleading the consumer in consideration of the other representations made.

[62] On element (c) I would note the B.C. Court of Appeal decision applying this provision in *Stanway v. Wyeth Canada Inc.*, 2012 BCCA 260:

[80] Turning to the wording of the *BPCPA* with those principles in mind, it is significant that the definition of a "deceptive act or practice" in s. 4(1), is broadly worded, including "an oral, written, visual, descriptive or other representation by a supplier" (s. 4(1)(a)). The wording of s. 4(3)(b)(vi) – "representation by a supplier ... that fails to state a material fact" – anticipates that an omission can constitute a deceptive practice. As I interpret s.

4(3)(b)(vi) of the *BPCPA*, in light of the definition of a deceptive act or practice in s. 4(1), non-disclosure of a material fact alone, **absent a corresponding oral, written, visual, or descriptive representation**, can ground a cause of action.

[Bolding and underlining added]

- ***Element (b)***

[63] The extent of the issues documented by the Acura dealership service department are significant. Especially the fact that the transmission and torque converter failed. The myriad of leaks from various steering components, a low output alternator and a noisy power steering pump are certainly material facts for a purchaser of a motor vehicle to know if they exist at the time of the sale.

[64] These items speak to the quality of the vehicle and its current state of repair which affects its valuation by a purchaser. I note from the submissions that Ms. Chang states she asked to see an Inspection Report regarding the Acura, but Jonathan Watt told her there wasn't a report. It is clear the Acura's mechanical condition was important to her. I am satisfied those mechanical items would be a material fact to a reasonable purchaser within this transaction, if they existed at the time of the sale, and would satisfy the element noted in (b) above.

- ***Element (a)***

[65] At the outset, I want to note that in British Columbia, there is no positive legal duty on a motor dealer to inspect every motor vehicle prior to sale. The *Motor Dealer Act* and the *Motor Vehicle Act* are silent on this. In contrast see Alberta's *Vehicle Inspection Regulation*, A/R 211/2006, section 15 which requires a motor dealer in that province to provide a prospective purchaser of a used motor vehicle a mechanical fitness assessment conducted by a technician. I note this as Ms. Chang's complaint emphasizes that she did not receive a copy of a mechanical inspection checklist and she believes this is wrong.

[66] For the reasons already noted, I am accepting Ms. Chang's evidence that at the time of sale, the odometer reading on the Acura was probably 210,143 km on April 8, 2019. The various issues noted by the Acura dealership's service department were discovered on or about May 30, 2019, when its repair order was opened and with a declared mileage being 212,716 km. This is about two months and 2,573 km after purchase.

[67] Next, I take guidance from court decisions on assessing evidence to determine if mechanical deficiencies found after the sale of a motor vehicle was present at the time of sale.

[68] The case of *Findlay v. Couldwell and Beywood Motors* [1976] 5 WWR 340 (BC Supreme Courts) continues to be an important case in the application of the

deceptive act or practice principles, albeit decided under predecessor legislation. In that case, the consumer had specifically asked for a vehicle that would be reliable for daily use on the highway. The dealer provided verbal assurances of that fact and so, the consumer decided to not ask their mechanic to inspect the vehicle. Five days after the purchase, the engine “blew up”. The direct evidence showed the mechanical failure was not due to the actions of the consumer. The Court found that the representations made by the dealer of the vehicle’s quality led the consumers to make an error in judgement to their detriment – not having the vehicle inspected. Based on all the facts, the Court found an innocent misrepresentation (deceptive act or practice) occurred.

[69] In the BC Court of Appeal decision of *Rushak v. Henneken and Henneken Auto Sales & Service Ltd.*, 1991 CanLII 178 (BC CA), the court found that Mr. Henneken had made laudatory remarks about the used Mercedes being sold, even though the evidence showed he was aware the Mercedes recently had undercoating applied. The Court found on the evidence, that the addition of undercoating should have alerted Mr. Henneken to the potential issue of hidden rust, which eventually turned out to be the case. The hidden rust was discovered on inspection after the sale and the opinion evidence was that the rust most likely pre-existed the selling date. The Court stated that Mr. Henneken made representations about the Mercedes without properly qualifying those representations as to the potential of hidden rust and the evidence showed he had sufficient information to make that determination about potential rust. The Court found Mr. Henneken honestly believed in the representations he made, and so his misrepresentations were considered innocent. Even so, the consumer was entitled to rely on that innocent misrepresentation and had proven the failure to state a material fact.

[70] In *Sugiyama v. Pilsen dba Southgate Auto Sales* 2006 BCPC 0265 (Prov. Crt), the issue was whether a Ford Escort was reasonably fit at the time the consumer purchased it from the dealer. At the time of purchase in 2005, the Escort was eight (8) years old and had 140,146 kms on it. Within 32 days and 616 kilometers later, the engine would not start. It was determined the engine had failed and either needed to be replaced or rebuilt. The consumer sued for the cost of the repairs of about \$4,000.

[71] An inspection of the Ford Escort revealed the engine failure was an internal issue as a result of normal wear and tear that would not be discovered under a normal inspection. There would be no way of predicting such an engine failure. In considering the dealer’s conduct and whether the Escort was or was not reasonably fit at the time of purchase, the Court reviewed various cases and noted that representations about the fitness of the vehicle were important considerations as was any evidence of actual knowledge by the dealer of the vehicle’s condition prior to sale.

[72] In conducting its analysis, the Court in *Sugiyama, supra* noted various facts including the vehicle’s age and that the dealer did not warrant the vehicle’s fitness due to the vehicle’s age and mileage. The Court looked at other cases and noted in

those cases, there was some direct evidence to link the vehicle's condition to the dealer's knowledge at the time of sale. The Court also noted that engines wear out as kilometers are added to a vehicle. The Court stated:

[45] Very much depends upon the particular circumstances of the case. The dealer who sells a used car is not a guarantor of the car's future performance. Anyone buying a used car knows that some problems will inevitably occur. The older a car is and the more kilometres it travels, the more likely it is that something will break down.

[46] Thus, the often-quoted words of Lord Denning M.R. in *Bartlett v Sydney Marcus Ltd* [1965] 2 All ER 753, illustrate how limited the "warranty of fitness" may be for a used car:(at p.755)

"A secondhand car is "reasonably fit for the purpose" if it is in a roadworthy condition, fit to be driven along the road in safety, even though it is not as perfect as a new car.

Applying those tests here, the car was far from perfect. It required a good deal of work to be done on it, but so do many secondhand cars. A buyer should realize that, when he buys a secondhand car, defects may appear sooner or later; and, in the absence of an express warranty, he has no redress. Even when he buys from a dealer the most that he can require is that it should be reasonably fit for the purpose of being driven along the road. "

...

[81] This vehicle was roadworthy and could be driven in safety on the road. The fact that there was a serious engine failure after a month of driving does not disprove that fact. The failure of the valve seats occurred because of the accumulated "wear and tear" of over 140,000 kilometres of driving.

[Underlining added]

[73] The Court in *Sugiyama, supra* found the dealer was not responsible to the consumer under the *Sale of Goods Act* and that the Ford Escort was reasonably fit at the time of sale. I would note that there is no evidence of an express warranty in the case before me – a representation by Jonathan Watt or Darryl's Best Buy. In fact, the opposite is true as the purchase agreement states: "Dealer is not responsible for any repairs on car from day of purchase".

[74] The principle I take from these various cases is that discovering mechanical issues close in time to the sale is not proof that the vehicle was not fit at the time of the sale or the mechanical conditions existed at the time of sale. The amount of time since the purchase and kilometers added to a vehicle are important considerations. Also important is the age and mileage of the vehicle at the time of

the sale. Representations about the vehicle can also be factored into the assessment as a dealer providing warranties of a vehicle's fitness is always considered by a consumer.

[75] From these cases and these principles, there needs to be some direct evidence to link the issues discovered by the service department at the Acura dealership on or about May 30, 2019, to the condition of the Acura at the time of sale on April 8, 2019. That evidence can include evidence from prior owners, opinion evidence of a person qualified to assess mechanical fitness, and documents in the possession of the dealer where knowledge at the time of sale can be shown or reasonably inferred. It can include representations by the dealer.

[76] I have difficulty with the evidence establishing that these mechanical deficiencies existed at the time of the sale. The Authority asks me to draw that inference on the assumption that these types of mechanical issues and their number do not manifest in such a short span of time after purchase. There was no opinion evidence before me to allow me to draw that inference. It is merely a submission of the Authority. The Authority tries to bolster that argument by stating there are ways to temporarily mask some of these types of mechanical issues. While true, the Authority provides no direct evidence at all to suggest that did occur or even may have occurred in this case. It is speculation. I may draw inferences from established evidence. I may not draw inferences from mere speculation and assumptions.

[77] Ms. Chang's direct evidence provides a sequence of events about the Acura's mechanical issues. In her complaint and various statements to the investigator, Ms. Chang states she did not drive the Acura often as she leaves it in Horseshoe Bay, so that she has a vehicle to drive when in the Vancouver area. Ms. Chang notes she parked the Acura for a week after purchase and then discovered the vehicle would not start. The battery was discussed as being the issue. This would have been around April 15, 2019. Ms. Chang states she had to jump start the Acura a few times after that date.

[78] Ms. Chang then states the next time she drove it, the battery light came on and she had issues with the gears shifting and the vehicle would not operate. She provided text messages starting around May 17, 2019 documenting the back and forth conversations with Jonathan Watt. This is about a month after her initial issue with the battery and about five weeks after the purchase. Sometime in between, Ms. Chang lent the Acura to her friend once, so the friend could go to a wedding. Accepting Ms. Chang's evidence on the mileage and the Acura's use, it would appear Ms. Chang put on about 2,573 km on the Acura while using it maybe 7 or so times. That is about 360 km's per use. That is a significant number of kilometers per use.

[79] When Ms. Chang took the Acura to the Acura dealership, the noted complaint was that the Acura was surging and there was a whining noise. Ms. Chang's evidence does not describe this mechanical issue occurring before then. It is not

even in the text messages between Ms. Chang and Jonathan Watt that span the latter two weeks of May. The Acura dealership's repair order is the first instance in the evidence where the Acura is described as surging and whining.

[80] Ms. Chang's direct evidence, at best, suggests there may have been an issue with the battery close in time to the sale. Even so, the Acura dealership's multi-point inspection checklist notes the battery was tested and received a "marginal pass". The Acura dealership did not fail the battery. The Acura dealership's repair order and multi-point inspection report says the alternator was "failing" and noisy, but the alternator had not yet failed.

[81] The best direct evidence of the mechanical condition of the Acura is the Acura dealership's repair order and multi-point inspection report. That report does not indicate the mechanical issues were present at the time of the sale. That report speaks of burnt out clutch packs in the transmission, on a 15-year-old vehicle with 212,716 km. There is no evidence that this is not normal wear and tear or existed at the time of the sale. The fact Ms. Chang's complaint of problems shifting gears is first documented about five weeks after the sale, suggests it was not.

[82] Asking me to find these problems existed at the time of the transaction based only when they were discovered compared to the date of purchase, and the fact that it is known in the industry that methods can be used to mask these issues, is an insufficient evidentiary foundation to draw the necessary inferences and attach liability. While I understand that under the BPCPA, the burden of proof that a misrepresentation (deceptive act or practice) did not occur is on the supplier, Jonathan Watt in this case, the courts have been clear there needs to be some evidentiary foundation of a misrepresentation occurring, before that shift in burden occurs:

[26] In judicially reviewing both the Original Decision and the Reconsideration Decision it is important to bear in mind that the BPCPA is consumer protection legislation that places a reverse onus of proof on a supplier of goods in a consumer transaction:

5 (1) A supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction.

(2) If it is alleged that a supplier committed or engaged in a deceptive act or practice, the burden of proof that the deceptive act or practice was not committed or engaged in is on the supplier.

[Underlining added]

[27] Accordingly, once there was evidence indicating the odometer reading on the Prius was misstated and the car was sold to a consumer in an unroadworthy state, the onus was then on the petitioners to show that they had not committed a deceptive act or practice in the transaction.

[Underling added]

- *Crown Auto Body and Auto Sales Ltd. v. Motor Vehicle Sales Authority of British Columbia*, 2014 BCSC 894 (BC Supreme Court)

[83] The mere existence of the suggested repair items noted on the Acura dealership's repair order about two months and over 2,500 km after purchase is insufficient to say these issues were present at the time of sale, to trigger the reverse onus provision: *Crown Auto Body and Auto Sales Ltd, supra*. This finding is amplified when one considers that the Acura was 15 years old at the time of the sale with about 210,000 km. The evidence that is before me does not clearly, cogently and convincingly establish that the mechanical deficiencies noted by the Acura dealership, existed at the time of sale. There is some direct evidence from Ms. Chang, that some of the mechanical issues did not exist at the time of the sale as there was no complaint about the vehicle surging or having shifting problems until weeks and 2,573 km after the sale.

[84] A comment on my reliance on *Sugiyama, supra*. That case was brought under the *Sale of Goods Act*. The Registrar is not empowered to make determinations and order remedies under that Act. But the Registrar can consider all laws in rendering decisions that are within the Registrar's jurisdiction to ensure consistency in the law: *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513, 2006 SCC 14 (Supreme Court of Canada). *Sugiyama, supra* was considered in my decision for its guidance on the evidentiary requirements to establish the mechanical condition of a motor vehicle at the time of sale based on a post-sale mechanical failure of the motor vehicle. My determination here is restricted to a finding that the evidence before me does not clearly, convincingly or cogently establish that the mechanical issues noted by the Acura dealership existed at the time of sale. I am not commenting on whether the Acura was reasonably fit at the time of purchase for the purposes of the *Sale of Goods Act*.

- ***Element c***

[85] Even if I am wrong about element b, I find that an assessment of the totality of the consumer transaction and the evidence about the representations made, that the failure to state the material facts would not have been misleading.

[86] Ms. Chang asked to see inspection reports regarding the Acura and was told there were none. Ms. Chang elected to continue with the purchase of the Acura. Ms. Chang and Jonathan Watt spoke about additional warranties on the vehicle. Ms. Chang elected to accept the very limited warranty offered by Darryl's Best Buy of a discount on repair costs and still purchased the Acura. The purchase agreement expressly states: "Dealer is not responsible for any repairs on car from day of purchase". Ms. Chang signed below that statement. The dealer says and Ms. Chang does not deny that the dealer sold the Acura at a discount in consideration of the vehicle not being warranted by the dealer. Ms. Chang was clearly aware the dealer

did not warrant the mechanical condition of the vehicle, which should have alerted her to consider the Acura's age and mileage and the potential need for repairs. Ms. Chang was aware the Acura was 15 years old with 210,000 km. A reasonable person would understand the Acura was not like new and that it likely needed some repairs or would need repairs. Given this high mileage, a reasonable person would also accept the unpredictability of when those repairs may be needed as noted by the Court in *Sugiyama, supra*.

[87] Unlike in the court decisions of *Findlay* and *Rushak*, the evidence before me is that Darryl's Best Buy did not vouch for the Acura's mechanical dependability or make laudatory remarks about the Acura. On the evidence before me, the opposite seems to be the case. This case appears more inline with *Sugiyama* where the dealer made no representations about the vehicle's mechanical fitness and the consumer declined a warranty. It is also more inline with the recent Registrar decision of *Pham et al v. Super Sale Auto Ltd. et al.* (January 3, 2020, File 19-07-002, Registrar) where it was said:

[57] With no clear evidence linking a misrepresentation made by the dealer to the engine damage the consumer now claims, I must dismiss this aspect of the consumer's claim. I make no comment on whether the consumer would be successful if it brought a *Sale of Goods Act* claim in court.

**Allegation (e) – breach of sections 33(2)(a) and (i) of the *Motor Dealer Act Regulation – Code of Conduct***

[88] I have a problem with the particularization of this allegation.

[89] In reviewing the Notice of Hearing "reasons for recommendation", I am unsure what conduct relates to the allegation of not acting with honesty and integrity: section 33(2)(a) of the MDA-R. Is it the whole of the consumer transaction? Aspects of the transaction? Is it the interaction of the dealer with the Authority? Is it the interaction of the dealer with the consumer after purchase? One, some or all the above?

[90] If I am not sure, I can only imagine the Respondents are also not sure and would be unable to fully defend themselves on this allegation. Without clearer particularization, I would find it procedurally unfair to consider whether any of the Respondents did or did not act with honesty and integrity during this consumer transaction. A party accused of wrongdoing should receive sufficient notice of the case they have to meet. That notice need not be perfect, but at least be sufficient to let the accused party know what conduct is brought into question within a specific allegation.

[91] The allegation against the Respondents that they are in breach of section 32(2)(i) is clearer. That allegation is that the Respondents aided, abetted or caused a person to breach the law or the conditions of a licence or registration. I find the



“reasons for recommendation” particularize with sufficient clarity what conduct of the Respondents forms the basis of this allegation.

[92] Based on my above findings:

- (a) Jonathan Watt’s conduct of acting as a salesperson while not licensed did not cause Darryl’s Best Buy to breach section 13.1 of the *Motor Dealer Act*.
- (b) I have found that Jaret Babin and Darryl’s Best Buys did not aid and abet Jonathan Watt in breaching section 2 of the *Salesperson Licensing Regulation*. Negligence is not a foundation for a finding of aiding and abetting. Deliberate or reckless conduct must be shown, or willful blindness established.
- (c) I have found the Respondents did not breach the legislation by selling the Acura without properly declaring it as “not suitable for transportation”.
- (d) I have found Jonathan Watt failed to properly declare the odometer reading on the Acura. I found that declaration to be innocent due to his medical condition. Also, that allegation was confined to the conduct of Jonathan Watt and so was my decision on this point. Therefore, it would be inappropriate for me to say the other Respondents aided, abetted or caused Jonathan Watt to breach the legislation. They were not put on proper notice of that possibility in order to defend their position.
- (e) I have found an insufficient evidentiary foundation to say the Respondents breached the BPCPA by failing to state a material fact.

[93] Given these findings, I cannot say any of the Respondents aided, abetted or caused another Respondent to breach the law or a condition of a licence or registration.

### **Similar Fact Evidence**

[94] Ms. Chang and the Authority bring to my attention various court cases where Darryl’s Best Buys has been sued. That evidence is advanced to show Darryl’s Best Buys’ propensity to conduct itself as alleged here. This is legally known as similar fact evidence and can be used to show a person’s established pattern of behaviour.

[95] The use of similar fact evidence is fraught with misuse and there are well established legal rules for its admission. Generally, the evidence must show a link between the conduct in question and the past conduct showing a similar pattern that common sense says cannot be coincidence. The link cannot be trivial and knowing the details of the past conduct is important to compare it to the new conduct to assess their similarity. Next, the probative value of admitting the evidence must outweigh its prejudicial effect. One such prejudicial effect is that

people tend to link past events with current events as proof of guilt, despite evidence to the contrary. This must be guarded against. Further, one must consider the ability of the party whose conduct is under review to respond to the similar fact evidence.

- *R. v. Handy*, 2002 SCC 56 (CanLII), [2002] 2 SCR 908, (Supreme Court of Canada)
- *Northmark Mechanical Systems Inc. v. Watson (Estate)*, 2009 BCSC 1237 (BC Supreme Court) at paragraphs 41 to 44.

[96] In this case, I was not provided details of each of the cases. I am unaware why people sued Darryl's Best Buys. I am unaware of the specific facts regarding the alleged conduct. I am unaware of the disposition of each of those cases. Without that information, I cannot properly assess whether those cases have sufficient similarity to the case before me to even consider their probative value and prejudicial effect. I am asked to consider the mere existence of those cases as impacting negatively on Darryl's Best Buys in this case. That is the core prejudicial effect to be guarded against: *Northmark Mechanical Systems Inc.*, *supra*, at paragraph 43. I have not considered the existence of those cases in my decision.

### **Consumer Remedy**

[97] The Authority recommends that Ms. Chang be compensated \$174.71 she paid for the battery and \$162.40 she paid to have the Acura inspected by the Acura dealership.

[98] In the text messages between Ms. Chang and Jonathan Watt in mid to late-May 2019, Mr. Watt did on behalf of Darryl's Best Buy, offer to cover the cost of a battery. This was a representation made after the consumer transaction but in relation to the consumer transaction and could be captured by section 5 of the BPCPA. I note in the submissions by Darryl's Best Buy that they did offer to cover the cost of the battery at that time, but never heard back from Ms. Chang.

[99] After Ms. Chang made her complaint to the Authority and all her concerns were known and presented to Darryl's Best Buy, the dealer and Ms. Chang came to an agreement where Darryl's Best Buy would buy back the Acura. A purchase agreement was used to memorialize that agreement. On it, is a notation stating: "Customer agrees buy [sic] accepting the amount below and agreed upon on June 25, 2019. The [sic] customer agreed [sic] that the "complaint" Filed with the VSA has been rectafied [sic] and no further action is needed." Ms. Chang signed that document.

[100] In *Sovereign v. Nanaimo Chrysler et al.* (June 12, 2013, File 12-029, Registrar), Ms. Sovereign had purchased a Fiat from Nanaimo Chrysler. Ms. Sovereign noted after the purchase some advertisements by other Chrysler dealers of a cash incentive which she said did not appear on her purchase agreement. Ms. Sovereign raised her concerns with the dealer. The dealer said it did provide the incentive even though there is no specific line item on the purchaser agreement

showing that. The parties continued discussions and the dealer made an offer to re-adjust the selling price to reflect the incentive. Ms. Sovereign agreed to the resolution and the deal was redone. Afterwards, Ms. Sovereign filed her complaint with the Authority. No remedy was provided to Ms. Sovereign as she made an agreement to rectify any harm that she suffered due to what she felt were the dealer's misrepresentations. Ms. Sovereign agreed to a new deal with all the facts known.

[101] The same legal principle applies here as in the *Sovereign, supra* case. Ms. Chang made an agreement to settle her financial claims with Darryl's Best Buys on June 25, 2019 with full knowledge of the concerns and the Acura's mechanical issues. The Acura dealership invoice and the battery cost were known costs at that time. There is no claim that there was a misrepresentation by the dealer in that June 25, 2019 agreement. As such, I am without legal authority to intervene and amend the agreement between Ms. Chang and Darryl's Best Buy of June 25, 2019 to resolve Ms. Chang's further financial claims for the battery and the inspection costs. If Ms. Chang believes she should be able to add these items to her claim after making the June 25, 2019 agreement, she would need to seek the assistance of the courts and she should seek the advice of a lawyer.

### **Compliance Action**

[102] The Authority's Notice of Hearing recommends virtually all the possible compliance actions the Registrar can take. The legislation does permit the Registrar to consider liability and penalty as part of one hearing: *Best Import*, (BC Supreme Court) *supra*. Even so, there may be times where there should be two hearings. Given my findings on liability being so divergent from the allegations, I believe it is more appropriate that the Authority and the Respondents have an opportunity to make submissions on the appropriate compliance action. To that end, I direct the following process:

- (a) Within 21 days the Authority is to provide to me submissions on its recommendation of compliance action with rationale and any additional evidence. The Authority shall provide a copy of those submissions and any additional evidence to the Respondents.
- (b) Within 21 days of the Respondents receiving the Authority's submissions and any evidence under paragraph (a), they may provide the Registrar with any submissions and evidence in response with a copy to the Authority.
- (c) Should the Authority require, they may submit to the Registrar a reply to the Respondent's submissions with 14 days of receiving them, with a copy of the Reply to the Respondents.

## Further Review

[103] As I have not issued a “determination” as that term is defined in the legislation, there is no right of reconsideration under the legislation. If there is disagreement with this decision, it may be reviewed by petitioning the B.C. Supreme Court for judicial review pursuant to the *Judicial Review Procedure Act*. Such a petition is to be filed with that Court within 60 days of the date of this decision: section 7.1(t) of the *Motor Dealer Act*.

“original is signed”

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Ian Christman, J.D.  
Registrar of Motor Dealers