Citation: Chaudhry v. Registrar, Motor Vehicle Dealers Act, 2002, 2021 ONLAT MVDA 12628

Date: 2021-03-11
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Appeal from the Notice of Proposal to Revoke Registration dated February 3, 2020 made by the Registrar under the *Motor Vehicle Dealers Act, 2002*, c. 30, Sch. B

Between:

Babar Chaudhry o/a Cars Dome

Appellant

And

Registrar, *Motor Vehicle Dealers Act, 2002*

Respondent

DECISION AND ORDER

Adjudicator: Joanne E. Foot, Member

Appearances:

For the Appellant: Self-Represented

For the Respondent: Husein Panju, Counsel

Heard by Videoconference: January 25 to 28, 2021

REASONS FOR DECISION AND ORDER

A. OVERVIEW

[1] Mr. Babar Chaudhry operating as Cars Dome (the "**appellant**") has been registered as a motor vehicle dealer under the *Motor Vehicle Dealers Act, 2002*, c. 30, Sch. B (the "**Act**") since November 2008. Terms and conditions were attached to his registration issued in 2008. He describes himself as a low-volume dealer, selling no more than 30 cars per year.

[2] Sometime before March 2018, the appellant applied to become a member of the board of directors of the Ontario Motor Vehicle Industry Council ("**OMVIC**"), the regulator under the Act. His application triggered an automatic review of his history as a motor vehicle dealer. This review disclosed three vehicle trades having a number of alleged deficiencies, namely the failure to disclose information about the three vehicles in question to the purchasers of those vehicles and the failure to maintain repair records for the vehicles.

[3] The matter then came before the discipline committee (the "**Discipline Committee**") of OMVIC, a committee composed of registered motor vehicle dealers. The matter was settled without a hearing and resulted in the decision of the Discipline Committee dated March 18, 2019 (the "**Discipline Committee Decision**"). The Discipline Committee Decision found that the appellant had breached Sections 7 and 9 of the Code of Ethics[1] and imposed a penalty comprising a $3,000 fine, the requirement that the appellant take the Automotive Certification Course in person and that he comply with the Act and the Standards of Business Practice.

[4] A subsequent inspection was commenced in July 2019 and completed in September 2019. This inspection gave rise to alleged infractions relating to 14 vehicle trades. These infractions relate, again, to the appellant's alleged failures to disclose required information and to maintain repair records.

[5] On February 3, 2020, the Registrar under the Act (the "**Registrar**") issued a Notice of Proposal to Revoke Registration relating to the appellant's registration as a motor vehicle dealer under the Act (the "**Notice of Proposal**").

[1] The Code of Ethics is Regulation 332/08 made under the Act

[6] The appellant filed a Notice of Appeal dated February 19, 2020, requesting a hearing on the proposed revocation of his registration as a motor vehicle dealer.

[7] This case is about compliance with the regulations made under the Act relating to required disclosures and maintenance of repair records.

B. ISSUES

[8] Broadly speaking, there are two issues before the Tribunal. The first issue is whether the past conduct of the appellant affords reasonable grounds for belief that he will not carry on his business in accordance with law and with integrity and honesty.

[9] If the Registrar establishes that the appellant's past conduct affords reasonable grounds for belief that he will not carry on his business in accordance with law and with integrity and honesty, the second issue for determination is the appropriate order for the Tribunal to make. In particular, I consider whether it is appropriate for the Tribunal to substitute its opinion for that of the Registrar and order the registration of the appellant as a motor vehicle dealer with terms and conditions. In this hearing, the Tribunal does not owe any deference to the Registrar.

C. RESULT

[10] The Registrar has established that the past conduct of the appellant affords reasonable grounds for belief that he will not carry on his business in accordance with law and with integrity and honesty. This is not a case where the public interest can be adequately protected by ordering registration of the appellant on terms and conditions. I direct the Registrar to carry out its Notice of Proposal to revoke the registration of the appellant under the Act.

D. LAW

Generally

[11] The purpose of the Act is two-fold. First, it provides protection to consumers in relation to what is, for most individuals, a very significant and expensive purchase. Secondly, the Act is intended to promote professionalism of motor vehicle dealers and others involved in the automobile sales industry in Ontario. A person registered under the Act is required to adhere to the Act, the Regulations made under the Act, and the terms and conditions attached to its registration, if any.

[12] An individual applicant for registration as a motor vehicle dealer is entitled to registration unless one of the criteria in s. 6(1)(a) of the Act exists. Section 8(1) of the Act permits the Registrar to revoke a registration if, in his or her opinion, the registrant is not entitled to registration under s. 6. In this case, the Registrar relies upon s. 6(1)(a)(ii) in issuing the Notice of Proposal.

[13] The Registrar bears the burden of proving that the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty. The standard of proof is "reasonable grounds for belief" which is a lower standard of proof than proof on a "balance of probabilities".[2]

[14] In the *Flesh Gordon's*[3] case, the Court of Appeal also articulated that there must be reasonable grounds for belief that the person will, in future, carry on activity in a way that is contrary to the public interest and will not act in accordance with the law, with honesty and with integrity. It emphasized that any and all past or present conduct can and should be considered. In this case, all of the allegations against the appellant arise in the context of his used car dealership, thus establishing the link between past conduct and the business.

[15] Following a hearing, the Tribunal may order the Registrar to carry out its proposal or substitute its opinion for that of the Registrar and may attach conditions to its order or to a registration.

Motor Vehicle Dealer Obligations relating to Disclosure and Record Keeping

[16] As a matter of consumer protection, the Act strives to ensure that, among other things, a consumer has all important information about the vehicle being purchased. A buyer needs to know everything of a material nature in relation to a vehicle and weigh this information in making its purchase decision. There are a number of provisions in Regulation 333/08 made under the Act (the "**Regulation**") which set out requirements for motor vehicle dealers to ensure that this goal is met.

[17] Section 42 of the Regulation contains an extensive list of required disclosure, that is, information that a motor vehicle dealer is required to provide to potential purchasers. However, item 25. of s. 42 of the Regulation makes clear that all important information about a vehicle must be disclosed by requiring all contracts

[2] *Ontario (Alcohol and Gaming Commission of Ontario) v. 751809 Ontario Inc. (Famous Flesh Gordon's)*, 2013 ONCA 157 (CanLII) ("***Flesh Gordon's***") at paragraph 18.
[3] *Flesh Gordon's*, *supra*, at paragraphs 26-29.

of sale for a used vehicle to disclose “any other fact about the motor vehicle that, if disclosed, could reasonably be expected to influence the decision of a reasonable purchaser … to buy … the vehicle on the terms of the purchase ...”

[18] The requirements of the Regulation relevant in this hearing are (a) disclosure when a vehicle has been declared to be a total loss by an insurance company, (b) disclosure of the costs of accident repair for vehicles, and (c) the maintenance of repair records for vehicles. The Regulation[4] requires a motor vehicle dealer to ensure that any contract it enters into with a consumer include, in a clear and comprehensible manner, certain information including:

> 19. If the total costs of repairs to fix the damage caused to the motor vehicle by an incident exceed $3,000, a statement to that effect and if the registered motor vehicle dealer knew the total costs, a statement of the total costs.[5]
>
> 21. If the motor vehicle is declared by an insurer to be a total loss, regardless of whether the vehicle was classified as irreparable or as salvage under section 199.1 of the Highway Traffic Act, a statement to that effect.[6]

[19] The Regulation also requires a motor vehicle dealer to maintain records for every vehicle that comes into its possession.[7] In particular, s. 52(2)(d) of the Regulation requires these records to include:

> if the registered motor vehicle dealer causes work to be done on the vehicle, including any repair or reconditioning, the full and accurate particulars of the work, the sources of any parts used for the work, the cost of the work and the name of the person doing the work;

E. EVIDENCE AND ANALYSIS

Chronology of Inspections

[20] Over his period of registration of about 12 years, the appellant underwent five inspections by the OMVIC. It is helpful to identify these inspections at the outset to provide context for the past conduct of the appellant being alleged by the

[4] See Regulation, s. 40(2)1. and s. 39(2)22
[5] Item 19 of s. 42 of the Regulation
[6] Item 21 of s. 42 of the Regulation
[7] s. 52(1)

respondent. We heard testimony of Inspector Louise Cohn who conducted four of the five inspections.

[21] The first inspection was conducted in August 2009 (the "**2009 Inspection**"). This inspection was described in the OMVIC inspector's notes as a new dealer inspection report which included a full inspection of the appellant's books and records.

[22] The second inspection was conducted in May 2012 (the "**2012 Inspection**").

[23] The third inspection was conducted in November 2013 (the "**2013 Inspection**").

[24] The fourth inspection was conducted in March 2018 (the "**Discipline Committee Inspection**"). This inspection was initiated in response to the appellant's application to the board of OMVIC. It covers alleged deficiencies arising from three vehicle trades.

[25] The fifth and final inspection was conducted in two parts in July and September of 2019 (the "**Final Inspection**"). This inspection gave rise to alleged deficiencies in 14 vehicle trades.

[26] The focus of the analysis in this decision is on the more recent inspections, being the Discipline Committee Inspection in 2018 and the Final Inspection in 2019. However, reference will be made to the earlier inspections in response to certain of the appellant's assertions relating to the second issue I must consider, being the appropriateness of ordering registration of the appellant on terms and conditions.

ISSUE 1: DOES THE PAST CONDUCT OF THE APPELLANT AFFORD REASONABLE GROUNDS FOR BELIEF THAT HE WILL NOT CARRY ON HIS BUSINESS IN ACCORDANCE WITH LAW AND WITH INTEGRITY AND HONESTY?

[27] I find that the past conduct of the appellant affords reasonable grounds for belief that he will not carry on his business in accordance with the law and with integrity and honesty for the reasons that follow.

The Appellant Repeatedly Failed to Disclose Total Loss Declarations by Insurers

[28] As background, when a customer makes a claim against its insurance company for damage to its vehicle, the insurance company typically obtains an estimate of the cost to repair the damage from an approved body shop. Generally speaking, in cases where the cost to repair reflected in the estimate exceeds the value of the vehicle, the insurance company will declare the vehicle a total loss. This is sometimes referred to as a "write-off" or the vehicle being "written off". Following a

total loss declaration, these vehicles are typically consigned to an auction company that sells the vehicle on behalf of the insurance company. These auction companies (and their auctions) are sometimes referred to as salvage auctions.

[29] As described above in paragraph [18] above, item 21 of s. 42 of the Regulation requires a motor vehicle dealer to disclose in its contract of sale to a consumer that the vehicle has been declared a total loss by an insurance company.

[30] In the Discipline Committee Inspection, the OMVIC inspector identified three vehicles for which the appellant failed to disclose this information. The first of these is a 2008 Honda Civic bearing vehicle identification number ("**VIN**") *3585.[8] The wholesale bill[9] of sale, which evidences the sale from Copart Canada Inc. ("**Copart**"), a salvage auction, to the appellant, shows that the vehicle was sold on June 12, 2017. It notes the seller as "Allstate Insurance Company sold Through Copart". In the body of the bill of sale, the notation "Loss Type COLLISION" appears. The retail bill of sale[10] from the appellant to its customer does not disclose that this vehicle was declared a total loss by the insurer. In the case of the appellant, he agreed that this disclosure would be typically noted in the "Comments" section of the retail bill of sale used by the appellant, being the standard form used vehicle bill of sale published by the Used Car Dealer Association.

[31] The second vehicle identified in the Discipline Committee Inspection is a 2008 Honda Civic bearing VIN *3540. The wholesale bill of sale indicates that the appellant purchased this vehicle on September 1, 2017 and that the seller is Allstate Insurance Company sold through Copart. It notes "Loss Type: COLLISION". The retail bill of sale to the appellant's customer dated September 23, 2017 does not include a statement that the vehicle was declared a total loss by the insurer.

[32] The third vehicle identified by the inspector is a 2006 Honda CR-V bearing VIN *3365. The wholesale bill of sale dated January 16, 2018 shows the seller as Impact Auto Auctions Ltd. ("**Impact**"), a salvage auction, and that the vehicle was sold on behalf of Suburban Auto Parts. The following wording appears at the bottom of the first page of the wholesale bill of sale: "*Vehicle has been declared a total loss by the insurer." The retail bill of sale to the appellant's customer dated

[8] Throughout this decision, VIN numbers are abbreviated using an asterisk and the final four digits of the full number
[9] In this decision, a reference to a wholesale bill of sale means the bill of sale evidencing the sale from an auction company to a registered motor vehicle dealer
[10] In this decision, a reference to a retail bill of sale means the bill of sale evidencing the sale from a registered motor vehicle dealer to a consumer

February 8, 2018 makes no mention that the vehicle was declared a total loss by the insurer.

[33] These (and other) findings relating to these three vehicles formed the basis of the Discipline Committee Decision, the finding that the appellant had breached sections 7 and 9 of the Code of Ethics, and the penalties imposed.

[34] I find that, contrary to the item 21 of s. 42 of the Regulation, the appellant failed to disclose that each of the 2008 Honda Civic VIN *3585, the 2008 Honda Civic VIN *3540, and the 2008 Honda CR-V VIN *3365 was declared a total loss by an insurer.

[35] The Final Inspection, being the most-recent inspection of the operations of the appellant, disclosed 14 vehicle trades in respect of which there are alleged deficiencies. In addition to the standard form used vehicle bill of sale published by the Used Car Dealer Association referred to above, the appellant used during this period an additional information sheet published by the Used Car Dealer Association entitled “Important Information Respecting Motor Vehicle Sales” (the “**UCDA Additional Information Form**”). The form has a yes/no “box” for each of the disclosure items listed in s. 42 of the Regulations and, presumably, is designed and intended to facilitate easy disclosure of required information. One such box is labeled “Has vehicle ever been declared a total loss by an insurer”.

[36] The retail bills of sale for the nine of the 14 vehicle trades did not contain information that the vehicle had been declared a total loss. Likewise, in the UCDA Additional Information Form for each of the nine vehicles, the “total loss” box was either indicated as “no” or neither the “yes” nor the “no” box was ticked. My examination of the wholesale bill of sale, the retail bill of sale, and UCDA Additional Information Form for each of the nine vehicles confirms that the appellant failed to disclose that the insurer had declared the vehicle a total loss. Of these nine vehicles, one was purchased from Impact, with the balance having been purchased from Copart.

[37] I find that, contrary to the item 21 of s. 42 of the Regulation, the appellant failed to disclose that each of the following nine vehicles was declared a total loss by the insurer: the 2009 Honda Civic VIN *3138, the 2006 Dodge Caravan VIN *4431, the 2008 Nissan Rogue VIN *4991, the 2012 Nissan Altima VIN *8838, the 2006 Honda Pilot VIN *0667, the 2010 Toyota Corolla VIN *8181, the 2006 Honda CR-V VIN *8572, the 2010 BMW X5 VIN *5490, and the 2010 Toyota Corolla VIN *0205. I next examine if there are any factors mitigating this failure.

What other factors bear on the Appellant's non-disclosure of total loss?

[38] I find that there are no factors that adequately explain or otherwise excuse the appellant's repeated non-disclosure of the total loss declarations by insurers for vehicles sold to consumers referred to above.

[39] The appellant makes a number of assertions that he argues mitigate his non-disclosures of a total loss declaration by an insurer as required by the Regulation. Some of these assertions are of a general nature, and some are specific to the total loss disclosure issue. The more general assertions are dealt with first.

Clean Slate After the Discipline Committee Decision

[40] The appellant argues that he should be considered to have a "clean slate" after the Discipline Committee Decision. To do otherwise, he asserted, potentially exposes him to a second penalty for the same breaches of the Regulation, that is, the breaches considered by the Discipline Committee in making its decision and imposing the penalty in March 2018.

[41] While this argument has some appeal, the *Flesh Gordon's* case is clear that any and all past or present conduct can and should be considered to determine whether or not an appellant will conduct its business activity in accordance with the law and with honesty and with integrity.[11]

[42] As well, the hearing conducted by the Tribunal is a hearing *de novo*, such that the Tribunal is not bound by the findings of the Discipline Committee and is permitted to weigh and consider all relevant evidence.

[43] In conclusion, I do not accept the assertion that evidence relating to the appellant's pre-2019 conduct should not be considered. This conclusion is equally applicable to the other issues considered in this decision.

Appellant Did Not Know or Did Not Understand his Disclosure Obligations

[44] The appellant variously argued that his failure to disclose total loss declarations by insurers resulted from his lack of knowledge that disclosure was required, his lack of understanding of what, exactly, was required, or that no one told him how to do things.

[11] See paragraph [14] above

[45] As noted above, the appellant was registered in 2008 with terms and conditions attached to his registration. Section 20 of these terms and conditions is entitled "Disclosure" and states "The Registrant agrees that it is under a positive obligation to disclose in writing on the bill of sale all material facts about the vehicles it sells … to its customers …" It goes on to state that material facts include "insurance write-off". The appellant initialled this section of the terms and conditions.

[46] The inspector's notes for the 2009 Inspection and the 2012 Inspection refer to a review of disclosure of material facts being conducted with the appellant. The Inspection Findings document dated March 6, 2018, being a document that is left with the motor vehicle dealer following an inspection, states "You must make full & accurate written disclosure of ALL items in section 42 MVDA Regs. A copy was provided to you today & discussed."

[47] The Discipline Committee Decision refers to the appellant's failure to disclose that each of the 2008 Honda Civic VIN *3585, the 2008 Honda Civic VIN *3540, and the 2008 Honda CR-V VIN *3365 was declared a total loss by the insurance company. This is, in part, the basis for the penalty imposed by the Discipline Committee Decision and must be considered as actual notice to the appellant that he is required to make this disclosure.

[48] I note that each of the nine trades noted in paragraph [37] above where the appellant failed to disclose a total loss declaration by an insurer was made *after* the Discipline Committee Decision.

[49] Based on the terms and conditions contained in the appellant's registration, the repeated reminders from OMVIC inspectors regarding disclosure of material facts, and the agreed facts in the Discipline Committee Decision, I am unable to give any credence to the appellant's assertions that he did not know or understand the disclosure requirements under the Regulation relating to total loss declarations made by an insurer or that OMVIC had failed to communicate this information to him.

Appellant Did Not Understand Implications of Buying From Salvage Auctions

[50] In addition to his general assertion of lack of knowledge and understanding of disclosure requirements, the appellant asserted that he lacked specific understanding of the implications of buying vehicles from the Impact and Copart auctions. He referred to himself as "a rookie" in this space and that he was "on a learning curve of how do things properly". Relatedly, he asserted that he didn't know they were total loss vehicles and that he did not understand the concept of a total loss declaration by an insurer.

[51] I heard testimony from representatives of each of Impact and Copart. Each explained that these auctions are wholesale auctions, that is, only open to registered motor vehicle dealers and other industry participants such as parts suppliers, scrap metal dealers, body shops and exporters. All participants must be approved by the auction company in order to participate in its auctions. Each also indicated that it is widely known in the industry and by the participants in their auctions that they deal in "total loss" vehicles, that is, vehicles that have been declared a total loss by an insurer. Significantly, the representative from Impact indicated that they only deal with "informed buyers knowing that they are buying salvage vehicles who will follow the laws if the vehicle goes back on the road".

[52] The inspector discussed the salvage auctions with the appellant at the Discipline Committee Inspection in 2018. Her notes as to what the appellant told her read as follows:

> In 2017, around Feb & March he [the appellant] was introduced to some body shop guys and they told him about buying cars from [sic] impact. In 2017 he started dealing with total loss mvs. He is now exclusively buying at Impact and Copart.

[53] The appellant also asserted that he could not have known that the vehicles purchased from Copart were total loss vehicles as Copart's wholesale bills of sale do not include the words "total loss". As described above, the Impact wholesale bills of sale specifically include the wording "*Vehicle has been declared a total loss by the Insurer". The Copart wholesale bills of sale do not contain this wording but always show that the seller is an insurance company selling through Copart and contains a line that states "Loss Type: COLLISION". The representative of Copart and the OMVIC inspector each indicated that this information is indicative that the vehicle is a "total loss" vehicle. As discussed below, these factors are accepted in the industry to indicate a total loss.

[54] As well, two of the 14 trades identified in the Final Inspection are purchases from Copart where the wholesale bills of sale did not contain the words "total loss". Notwithstanding the absence of these words, the total loss declaration by an insurer *was* disclosed by the appellant on the retail bill of sale or the UCDA Additional Information Form. This is evidence of an understanding by the appellant of both the total loss declaration concept and the necessity of disclosure of a declaration of total loss.

[55] Based on the appellant's statement to the OMVIC inspector in 2018 that he had started dealing in total loss vehicles, commonly accepted industry knowledge, and his actual disclosure of total loss declarations in some cases, I am unable to

conclude that the appellant did not understand what was required of him in this situation. I also find that the appellant has an understanding of the term “total loss”.

Summary re Failure to Disclose Total Loss Declarations by Insurers

[56] The Discipline Committee Inspection disclosed three instances of failure to disclose a total loss declaration. The Final Inspection, which took place after Discipline Committee Decision under which the appellant was assessed a penalty by OMVIC for three previous incidents of non-disclosure of total loss, identified a further nine incidents of failure to disclose a total loss declaration. None of the explanations or excuses offered by the appellant for these failures is credible in the circumstances. Each of the 12 instances of failure to disclose a total loss declaration is contrary to items 21 and 25 of s. 42 of the Regulation.

[57] In consequence, I find that each of these 12 instances amounts to the appellant failing to conduct his business in accordance with law within the meaning of s. 6(1)(a)(ii) of the Act.

[58] Having found that the appellant knew that each of these vehicles had been declared a total loss, I find that each such non-disclosure amounts to the appellant failing to conduct his business with integrity and honestly within the meaning of s. 6(1)(a)(ii) of the Act.

[59] Finally, I find that each non-disclosure is contrary to s. 20 of the terms and conditions of the appellant’s registration and that this amounts to the appellant failing to conduct his business with integrity within the meaning s. 6(1)(a)(ii) of the Act.

The Appellant Repeatedly Failed to Disclose Accident Repair Costs

[60] As described above, before making a total loss declaration for a vehicle, the insurance company will obtain an estimate of the cost to repair the accident damage. This estimate will include the total dollar amount of the cost to repair the vehicle, a detailed list of the work required to be completed, and the parts required to complete the work. It is the lack of disclosure of this information by the appellant to consumers that is at issue here.

[61] For ease of reference, item 19 of s. 42 of the Regulation is repeated below:

> If the total costs of repairs to fix the damage caused to the motor vehicle by an incident exceed $3,000, a statement to that effect and if the registered motor vehicle dealer knew the total costs, a statement of the total costs.

The two distinct parts of item 19 of s. 42 of the Regulation are considered below.

Part 1: Statement that Repair Costs Exceed $3,000

[62] Motor vehicle dealers are required to disclose accidents repair costs exceeding $3,000 in all trades. The appellant failed to make this disclosure in the three vehicle trades[12] that formed the basis of the Discipline Committee Decision in 2018. A review of the documentation relating to these trades discloses that none of retail bills of sale include a statement that accident repair costs to the vehicle exceed $3,000. Similarly, of the 14 trades identified in the Final Inspection, there are three trades[13] for which neither the retail bill of sale nor the related UCDA Additional Information Form disclosed that accident repair costs exceeded $3,000. A review of other documentation provided to the Tribunal, including wholesale bills of sale, screen shots of the on-line auction bidding pages, or third-party vehicle inspection reports discloses accident repair costs or insurance claims in excess of $3,000 for each of these trades.

Part 2: Statement of Total Costs of Repair If Known

[63] The second part of item 19 of s. 42 of the Regulation requires a motor vehicle dealer to disclose the total costs of repairs to fix damage caused to the motor vehicle by an incident, if the total cost is known.

[64] Having failed the first part of item 19 of s. 42 of the Regulation, I do not need to consider the six trades referred to in paragraph [62] above in the context of the second part of the test. Rather, I focus on the other 11 trades[14] identified in the Final Inspection. In each of these trades, the appellant disclosed a dollar figure for accident repair costs on the retail bill of sale or UCDA Additional Information Form in excess of $3,000. However, in all these trades, the dollar figures disclosed by the appellant were materially different – lower – than the accident repair costs or the amount of the insurance claim included in documentation produced to the Tribunal.

[65] I conclude that the appellant breached both parts of item 21 of s. 42 of the Regulation. I next examine if there are any factors mitigating this failure.

[12] 2008 Honda Civic VIN *3585, 2008 Honda Civic VIN *3540, and 2006 Honda CR-V VIN *3365
[13] 2006 Honda Pilot VIN *0667, 2010 BMW X5 VIN *5490, and 2010 Toyota Corolla VIN *0205
[14] 2009 Honda Civic VIN *3138, 2006 Dodge Caravan VIN *4431, 2004 Honda Pilot VIN *1381, 2013 Chevrolet Cruze VIN *0100, 2008 Honda Civic VIN *2718, 2008 Nissan Rogue VIN *4991, 2012 Nissan Altima VIN *8838, 2010 Toyota Corolla VIN *8181, 2006 Honda CR-V VIN *8572, 2008 Honda Civic VIN *3288, and 2008 Nissan Altima VIN *4627

What other factors bear on the Appellant's non-disclosure of Accident Repair Costs?

[66] I find that there are no factors that adequately explain or otherwise excuse the appellant's repeated non-disclosure of accident repair costs for the vehicles he sold to consumers.

[67] The appellant asserted a lack of understanding and/or knowledge about disclosure requirements generally and this disclosure requirement in particular. He also asserted that the written estimates of accident repair costs are not always available, that the Copart wholesale bills of sale do not contain this information and that the third-party vehicle history reports do not always disclose accident repair costs. I also consider whether the appellant's disclosure of a dollar amount for total accident repairs which is different than the amount provided to the insurance company (or the amount of the insurance claim made) is adequate to constitute compliance with the second part of item 19 of s. 42 of the Regulation.

Appellant Did Not Know or Did Not Understand his Disclosure Obligations Generally

[68] The appellant made a general assertion that he was not aware of or did not understand his disclosure obligations or that no one told him how to do things. As analyzed in paragraphs [44] to [49] above, the general requirement to disclose material facts was reviewed with him several times over the course of various inspections and he was informed on more than one occasion of what he needed to do to achieve compliance. I do not accept this assertion.

Appellant Did Not Know or Did Not Understand the Accident Repair Costs Disclosure Obligation

[69] The appellant asserted that he did not know or understand his obligation to disclose accident repair costs. The appellant was specifically informed about the requirement to disclose accident repair cost in the Inspection Findings[15] reports dated August 7, 2009 and May 31, 2012. The inspector's notes relating to the Discipline Committee Decision Inspection in 2018, states "that he must disclose the $ value of every accident." Finally, failure to disclose accident repair amounts was one of the bases of the Discipline Committee Decision and the penalty imposed thereunder. The Discipline Committee Decision must be considered to constitute actual notice to the appellant of this requirement.

[15] These are reports prepared by an OMVIC inspector following an inspection that are provided to the registrant

[70] In September 2018, after the Discipline Committee Decision, the appellant wrote to a representative of OMVIC outlining the new processes he intended to implement (the "**New Process Email**"). He writes:

> …I explained to her fully and showed the paper work related to the vehicles, she suggested some areas of improvement and we agreed upon it for future purchases. Now a New Process has been started to rectify those minor discrepancies noticed by the OMVIC Inspector: …
>
> 2. Buying more reports from Carfax than Autocheck
>
> 3. Mentioning damage amount on the bill of sale rather showing estimate reports to them

Item 3. of the New Process Email makes it clear that he understood the requirement to disclose the damage repair costs in the retail bill of sale at this point, September 2018. Each of the 14 trades identified in the Final Inspection Report was completed after that date.

[71] Based on the reminders from OMVIC inspectors, the findings documented in the Inspection Findings reports, the Discipline Committee Decision and the appellant's own acknowledgement of the accident repair disclosure obligation in the New Process Email, I find that the appellant knew and understood this disclosure requirement.

Written Estimates of Accident Repair Costs are Not Always Available

[72] The Copart representative testified that Copart does not receive written estimates of accident repair costs from insurers in all circumstances and that it is not always required to provide them to its wholesale purchaser. I accept this to be the case.

[73] However, this circumstance does not relieve the appellant of his obligation in this respect. There is no question that the appellant was fully aware that each of the 17[16] vehicles in question had been in an accident. Secondly, the terms and conditions of the appellant's registration require him to "disclose as much detail as possible with respect to the nature and severity of the damage." As well, these terms and conditions require that the appellant "make reasonable efforts to

[16] The 3 trades identified in the Discipline Committee Decision Inspection and the 14 trades identified in the Final Inspection

research the history of the vehicle ... to ensure that all material facts are disclosed."

[74] Impact and Copart have different processes for providing accident repair cost information to its auction customers, particularly in relation to information set out in their wholesale bills of sale and how long the information remains accessible to a customer on its website. However, representatives of each testified that accident repair estimates, if available, appear on the auction bidding page on their websites prior to the auction. That is, the information appears on the page where a bidder registers its bid for a vehicle and all bidders have access to this information prior to making a bid. As well, representatives of each auction company testified that the paper copy of an accident repair estimate is provided with the paper copy of the bill of sale when the vehicle is delivered. Finally, representatives from both auction companies indicated that an accident repair estimate will be provided, on request, at *any* time following the sale of a vehicle at auction.

[75] Of the 17 trades under consideration, five of the vehicles were purchased from Impact, and 12 from Copart. For the five[17] vehicles purchased from Impact, the amount of the accident repair estimate appeared on the wholesale bill of sale. It is not plausible that the appellant did not have the required information for these five vehicles and I reject this as a possible explanation or excuse for his failure to disclose this information.

[76] Of the 12 Copart trades, the documentation provided to the Tribunal discloses three sales[18] to the appellant for which the accident repair estimate was provided on the website at the time of the auction. Again, it is not plausible that the appellant did not have the required information for these three vehicles and I reject this as a possible explanation or excuse for his failure to disclose.

[77] For the other nine Copart trades, it is necessary to consider the additional steps taken by the appellant to determine vehicle history, more particularly, obtaining third-party vehicle history reports.

Accident Repair Costs Not Disclosed in Third-Party Vehicle History Reports Obtained by the Appellant

[78] As noted above, the appellant is required by the terms and conditions of his registration to make reasonable efforts to research the history of a vehicle to ensure that all material facts are disclosed to the purchaser. In some instances,

[17] 2006 Honda CR-V VIN * 3365, 2009 Honda Civic VIN *3138, 2004 Honda Pilot VIN *1381, 2013 Chevrolet Cruze VIN *0100, and 2008 Nissan Altima VIN *4627
[18] 2008 Honda Civic VIN *2718, 2008 Nissan Rogue VIN *4991, and 2012 Nissan Altima VIN *8838

the appellant obtained third-party vehicle history reports for these trades. The appellant asserted that the accident repair costs were not disclosed in the third-party vehicle history reports he obtained and that, in consequence, he is not responsible for any failure to disclose this information.

[79] A number of different companies provide, for a fee, vehicle history reports. The information provided by each company in their respective reports can be markedly different. For the nine other Copart trades referred to in paragraph [77] above, the documentation provided to the Tribunal included the amount of the insurance claim made by the owner of the vehicle before it was written off by the insurer.

[80] One example, involving a 2010 Toyota Corolla VIN *0205, is particularly illustrative. The retail bill of sale prepared by the appellant contains the notation "No accident". The appellant obtained a Carfax US vehicle history for this vehicle which indicated "no accidents" for this vehicle. It further indicated that damage was reported for this vehicle but did not provide details as to the cause, type or amount of this damage. This report was provided to the appellant's customer. OMVIC obtained a Carfax Canada report for this vehicle which reported that no accident/damage estimates had been found. However, this report went on to disclose that an insurance claim in the amount of $7,882 had been made in respect of this vehicle.

[81] This example shows that vehicle history reports from different companies disclose different information. It also shows that the appellant was willing to provide a vehicle history report to a customer which he knew to be incorrect. The appellant was fully aware that this vehicle had been in an accident and had been declared a total loss by the insurer. It is difficult to see this as anything other than a deliberate attempt to mislead the ultimate purchaser of this vehicle. I note that this vehicle was sold in May 2019, after the Discipline Committee Decision.

[82] The inspector's notes from the Discipline Committee Inspection in 2018 states:

> … It should be buying a vehicle information package that he knew had value. It was his responsibility to ensure that he was making full disclosure of the history of the mv. He knew the report he was buying didn't have the correct information so this was not sufficient.

This note is also evidence that the 2010 Toyota Corolla VIN *0205 was not the first time the appellant had used a third-party vehicle history report that he knew to be incorrect. Furthermore, it demonstrates that the appellant was aware that it was incumbent upon him to obtain a report that disclosed correct information.

[83] Finally, the New Process Email is relevant. It reads:

> Now a New Process has been started to rectify those minor discrepancies noticed by the OMVIC Inspector: …
>
> 2. Buying more reports from Carfax than Autocheck

This demonstrates an awareness on the part of the appellant that information differs between providers of third-party vehicle history reports and that he is required to provide reports that disclose correct information.

[84] I accept that some of the third-party vehicle history reports obtained by the appellant did not contain correct accident damage repair information. I do not accept, however, that this excuses the appellant's requirement to disclose accurate accident repair estimate or insurance claim information; the appellant knew in all cases that this information was not accurate.

Disclosure of an Amount Lower than Accident Repair Estimate Costs or Insurance Claims

[85] As noted above in paragraph [64] above, for each of the 14 trades identified in the Final Inspection, the appellant disclosed a dollar amount for accident repair costs significantly lower than the accident repair estimate obtained from the auction company or the insurance claim amount disclosed by a third-party vehicle history report. While this disclosure satisfies the requirement in the first part of item 19 of s. 42 of the Regulation (disclosure of accident damage in excess of $3,000), I must consider if it satisfies the second part of item 19.

[86] The appellant testified that the numbers disclosed in the retail bills of sale for these 14 vehicles reflected the amounts he actually paid to have the accident damage repaired. The exact wording of the second part of item 19 reads "… if the registered motor vehicle dealer knew the total costs, a statement of the total costs." It appears that the accident repair estimates received by an insurer or the amount of the insurance claim serves, in many cases, as a proxy for the "total costs" of repair, given that these vehicles are not actually repaired by the insurance company and there is no actual out-of-pocket amount paid.

[87] Based on the "total cost" wording, it appears that a motor vehicle dealer is able to achieve compliance with the second part of item 19 by disclosing its actual repair costs. In this case, as described at length below, the appellant did not maintain complete records for the repair work completed on these vehicles and his records included no invoices for labour. In consequence, it is not possible to assess or

confirm, using objective evidence, the appellant's assertion that these were the actual amounts he paid for repair costs. So while it may be theoretically possible to comply with this requirement by disclosing actual repair costs, it has not been established in this case.

[88] A quick comparison of the dollar amounts included in the retail bills of sale to the repair estimate set out in the wholesale bill of sale or the amount of the associated insurance claim also raises concern. For example, the appellant disclosed accident repair costs of $4,038 for the 2009 Honda Civic VIN *3138. This is to be contrasted with the accident repair estimate on the wholesale bill of sale of $8,148 and the insurance claim of $10,396 for that vehicle. While one might expect estimates provided to insurance companies to be somewhat inflated and that the appellant could receive a discount by paying in cash, as a matter of common sense it is unlikely that there would be a difference in excess of 100% if all required repair work was completed. Without objective evidence in the form of invoices and work orders, I am unable to find that the dollar amounts recorded in the appellant's retail bills of sale reflect the actual amount paid to complete required repair work.

[89] I believe that a motor vehicle dealer is able to comply with the second part of item 19 of s. 42 by disclosing the actual costs incurred to repair accident damage. In this case, however, the appellant has not proved his actual costs of repair and I do not accept that the disclosures he made are accurate or reflective of these costs.

Summary re Failure to Disclose Accident Repair Costs

[90] I have found that the appellant knew that all the vehicles he was selling had been in an accident such that there would be damage to each vehicle. I have also found that the appellant knew and understood his obligation to disclose accident repair costs on his retail bills of sale and that when this information was not provided by the auction company, he was under a positive obligation to obtain the accurate information and disclose it to his customers. Finally, I have found that the appellant knew that some third-party vehicle history reports do not contain accurate information relating to accident repair costs and that he was aware of which reports to use, having received advice from an OMVIC inspector on this point. In consequence, I do not accept the appellant's assertion that he is not responsible to disclose accident repair costs that were not disclosed by the auction company or in the third-party vehicle history reports.

[91] I find that each of six instances[19] of failing to disclose accident repair costs in excess of $3,000 to be a breach of the first part of item 19 of s. 42 of the Regulation that amounts to the appellant failing to conduct his business in accordance with law and with integrity and honesty within the meaning of s. 6(1)(a)(ii) of the Act.

[92] As well, I find that the 11 instances[20] of failing to accurately disclose accident repair costs, if known, to be a breach of the second part of item 19 of s. 42 of the Regulation that amounts to the appellant failing to conduct his business in accordance with law and with integrity and honesty within s. 6(1)(a)(ii) of the Act.

The Appellant Repeatedly Failed to Maintain Repair Records

[93] For ease of reference, s. 52(2)(d) of the Regulation, which requires repair records to be maintained by a motor vehicle dealer, is repeated below:

> if the registered motor vehicle dealer causes work to be done on the vehicle, including any repair or reconditioning, the full and accurate particulars of the work, the sources of any parts used for the work, the cost of the work and the name of the person doing the work;

[94] The 2009 Inspection identified a trade of a 2006 Dodge Caravan where a $400 “admin” fee was charged. In discussions with the OMVIC inspector, the appellant indicated that this charge was for items required to ensure that the vehicle passes the mandatory safety check. The appellant also indicated to the inspector that he did not have a receipt for these items because he pays his mechanic in cash. The inspector’s notes from that inspection indicate her advice to the appellant that he must have repair orders as required by the Act.

[95] As reflected in the inspector’s notes, the 2013 Inspection identified that the appellant did not have any repair orders for safety checks on sold vehicles. She writes “Discussed he needs to keep a copy of any repair order for work done and the source of parts used per [the Act]”.

[96] Repair records were missing for each of the trades that formed the basis of the Discipline Committee Decision. Four invoices were produced for the 2008 Honda Civic VIN *3585 for a total of $457.65. Each was for parts supplied, none was for labour. The insurance claim made in respect of this vehicle was in excess of

[19] See paragraph [62] above
[20] See paragraph [64] above

$11,000. It must be the case that the appellant did not maintain full repair records for this vehicle.

[97] The second vehicle identified in the Discipline Committee Inspection is the 2008 Honda Civic VIN *3540. The appellant produced a single invoice for parts in the amount of $202.27. The insurance claim for this vehicle was $6,077. No invoices were produced for labour.

[98] The third vehicle identified in the Discipline Committee Inspection is the 2006 Honda CR-V VIN *3365. The appellant produced a single invoice for a front bumper in the amount of $84.75. Again, no invoices were produced for labour. The corresponding accident repair estimate showed accident repair costs of $7,760.79.

[99] The inspector's notes from the Discipline Committee Inspection indicates that, on a quick look at the deals the appellant "had laid out on the counter, I could see that there weren't any repair orders …" When asked about this the appellant responded that "he sometimes buys a mv for parts" and that "[S]ometimes he pays the body shop cash and doesn't get a receipt".

[100] In the Inspection Findings document, a copy of which was left with the appellant on the day of that inspection, the inspector noted:

> You must have a repair order for <u>all</u> work done on your vehicles that includes the full & accurate particulars of the work the source of parts, the cost, and the name of the business AS required by Section 52 of the MVDA Regs a copy was provided to you today.

[101] The New Process Email written in September 2018 is also relevant where the appellant writes:

> …I explained to her fully and showed the paper work related to the vehicles, she suggested some areas of improvement and we agreed upon it for future purchases. Now a New Process has been started to rectify those minor discrepancies noticed by the OMVIC Inspector:
>
> 1. Collecting all the repair bills, parts receipts from body shops and mechanics
> …

[102] The Final Inspection was conducted in July and September of 2019. As described above, 14 trades were identified in this inspection. The documentation for each of these 14 trades includes invoices for parts, but no invoices for labour. It is worth remembering that each of these vehicles had been declared a total loss by the insurer and each had accident repair estimates in excess of $3,000. I find that, for each of the 14 vehicles, the appellant failed to maintain full and complete records of the work actually performed and the full amount paid for that work.

[103] When asked at the hearing if paying cash and not obtaining a receipt is okay, he responded that it is “not okay” accompanied by a shrug that suggested that he did not regard it as a matter of importance.

What other factors bear on the Appellant’s failure to maintain Repair Records?

[104] Based on the repeated reminders from OMVIC inspectors regarding the requirement to maintain complete repair records for work done, the agreed facts in the Discipline Committee Decision, and the appellant’s acknowledgements in the New Process Email and at the hearing, I find that there is no possibility that the appellant did not know or understand his obligation to maintain full repair records for the vehicles he sold. I do not find that there are any other factors that adequately explain or otherwise excuse the appellant’s repeated failure to maintain these repair records for vehicles sold to consumers.

[105] The appellant’s failure to maintain repair records is a breach of s. 52(2)(d) of the Regulation that amounts to the appellant failing to conduct his business in accordance with law and with integrity and honesty within s. 6(1)(a)(ii) of the Act.

Summary of Findings Relating to Disclosure Requirements and Repair Records

[106] I have found that during his twelve years of registration as a motor vehicle dealer, the appellant has repeatedly failed to:

1. disclose total loss declarations by an insurer, contrary to item 21 of s. 42 of the regulation;

2. disclose accurate information relating to accident repair costs, contrary to item 19 of s. 42 of the Regulation; and

3. maintain complete repair records, contrary to s. 52(2)(d) of the Regulation.

[107] This is a pattern of conduct that affords reasonable grounds for belief that the appellant will not carry on his business in accordance with law and with integrity and honesty within s. 6(1)(a)(ii) of the Act. The Registrar has fully satisfied its onus to establish this point.

ISSUE 2: HAVING FOUND THAT THE REGISTRAR HAS ESTABLISHED THAT THE PAST CONDUCT OF THE APPELLANT AFFORDS REASONABLE GROUNDS FOR BELIEF THAT HE WILL NOT CARRY ON BUSINESS IN ACCORDANCE WITH LAW AND WITH INTEGRITY AND HONESTY, WHAT ORDER IS APPROPRIATE?

[108] As discussed above, I have found that the Registrar has fully satisfied its onus to show that the appellant's past conduct affords reasonable grounds for belief that he will not carry on his business in accordance with law and with integrity and honesty within s. 6(1)(a)(ii) of the Act.

[109] The next consideration is whether it is appropriate to order that the appellant be registered with terms and conditions imposed on his registration. In some instances, an appellant is deserving of another chance to demonstrate a willingness and ability to comply with the regulatory regime established under the Act. In such a case, attaching terms and conditions to the registration is a means of both protecting consumers and highlighting the areas that require improved performance on the part of the motor vehicle dealer.

[110] This is not such a case. In reaching this conclusion, I have considered the likely effectiveness of conditions, the pattern of conduct of the appellant over his registration history, and his failure to acknowledge and take responsibility for his shortcomings in the conduct of his business. While the appellant indicated that he was agreeable to registration with conditions, the respondent took the position that conditions were not appropriate in this case.

[111] The public interest will not be protected by ordering registration of the appellant as a motor vehicle dealer with terms and conditions.

Likely Effectiveness of Terms and Conditions

[112] The appellant has always had terms and conditions attached to his registration under the Act. As documented above, he has not operated his business in accordance with these terms and conditions, the first instance of this being identified in August 2009, just six months after the appellant was initially registered.

[113] I do not believe that there are any conditions I could impose that will bring about a change in the appellant's ability or willingness to come into compliance with the regulatory regime to which he is subject. Stated simply, conditions will be not be effective to change his behaviour and will not be effective to give effect to the intent and purpose of the Act, being consumer protection, and to protect the public interest.

Pattern of Conduct over Registration History

[114] A clear pattern has emerged of the appellant failing to comply with the regulatory regime to which he is subject. His failure to disclose material facts about a vehicle he is selling spans almost his entire registration history. Likewise, his failure to maintain repair records spans almost the entire period that he has been registered under the Act. These are clears patterns of conduct that continue to exist.

[115] Of significant concern is that this pattern of conduct persisted and worsened after the Discipline Committee Decision in 2018. An OMVIC representative testified that the objective of discipline proceedings is the rehabilitation of the registrant. OMVIC does not proceed directly to revocation of registration but utilizes the intermediate step of discipline proceedings in hopes that a registrant can be rehabilitated. The discipline proceedings are intended to draw to the attention of the registrant areas of concern to OMVIC, indicate that OMVIC views these matters seriously and make it clear that improvement is required. In this case, it is clear that the desired result of rehabilitation was not achieved; unfortunately, the behaviour of the appellant worsened after the discipline process.

[116] The appellant urged us to regard these occurrences as "small mistakes". I accept that this view of each individual occurrence could be accurate when each is viewed as a discrete event and in isolation. However, they are part of an aggregate and a pattern and, as such, cannot be disregarded.

Appellant has not Acknowledged or Taken Responsibility for Shortcomings

[117] At no time during the hearing did the appellant acknowledge his failures, take responsibility for them or express remorse. Rather, he asserted that he was not aware of the requirements to which he is subject, that he did not understand these requirements, that OMVIC was at fault for not telling him what he needed to do, or that the auction companies or the third-party vehicle history providers were at fault for not providing the required information.

[118] The appellant asserted that the other steps he took should be sufficient to constitute compliance under the Act. For instance, the appellant took the position

that he provided pictures of a damaged vehicle to a customer rather than disclosing that the vehicle had been declared a total loss by the insurer and providing the accident repair estimate provided to the insurer, each as required by the Regulation. He asserted that a 10% to 20% error rate in compliance with the Regulation should be acceptable. He stated that he believes he operates his business in compliance with regulatory requirements. Finally, he offered that no consumers have ever complained and that he provides good customer service.

[119] At best, the appellant does not comprehend what it means to carry on business in a regulated environment. A registrant commits to abiding by the Act, the regulations made under the Act, and any terms and conditions of registration when it chooses to operate a motor vehicle dealership in this province. While perfection is not the appropriate standard to be applied, compliance with the regulatory regime is not optional and a registrant is not free to create its own rules.

[120] Given the appellant's persistent pattern of non-compliance with the regulatory regime established by the Act over his registration history, his lack of acceptance of responsibility for his past failures to comply with the requirements of the regulatory regime, and the likely ineffectiveness of terms and conditions to bring the appellant into compliance and protect the public interest, it is not appropriate to order registration of the appellant as a motor vehicle dealer with terms and conditions.

F. ORDER

[121] By its authority under s. 8(5), the Tribunal directs the Registrar to carry out the Notice of Proposal to revoke the appellant's motor vehicle dealer registration under the Act.

LICENCE APPEAL TRIBUNAL

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Joanne E. Foot, Member

Released: March 11, 2021