



DISCIPLINE DECISION

IN THE MATTER OF A DISCIPLINE HEARING HELD PURSUANT TO THE MOTOR VEHICLE DEALERS ACT 2002, S.O. 2002, C.30, Sch. B

B E T W E E N :

REGISTRAR, *MOTOR VEHICLE DEALERS ACT, 2002*

- AND -

BADANAI MOTORS LTD. o/a BADANAI CHEVROLET CADILLAC
(hereinafter "Dealer")

-AND-

GEORGE BADANAI
(hereinafter "Badanai")

Date of Hearing: December 2 and 3, 2013

Date of Decision: January 9, 2014

Findings: Breach of Section 7 of the Code of Ethics of Ontario Regulation 332/08

Order:

1. The Dealer is ordered to pay a fine in the amount of \$10,000.00 within 90 days of the date of the Discipline Committee Order. The fine is payable to the Ontario Motor Vehicle Industry Council.
2. Badanai is ordered to successfully complete the OMVIC certification course within 90 days of the date of the Discipline Committee Order.
3. All current managers in positions of authority over sales or related activities at the Dealer must successfully complete the current OMVIC certification course within 90 days, and the Dealer shall incur all costs associated with this. This clause shall not apply to managers who have successfully completed the current OMVIC certification course on or after May 9, 2012.
4. The Dealer shall offer to all registered salespeople the opportunity to complete the current OMVIC certification course within 90 days. The Dealer shall incur all costs associated with this. This clause shall not apply to salespeople who have completed the course since May 9, 2012."



5. The Dealer and Badanai shall comply with the Act and Standards of Business Practice, as may be amended from time to time.

Written Reasons:

Reasons for Decision

Introduction

This matter proceeded before a Panel of the Discipline Committee pursuant to Section 17 of the Motor Vehicle Dealers Act 2002. The hearing was held on December 2 and 3, 2013.

The Registrar was represented by Michael Rusek and Laura Halbert, and the Registrant was represented by Shaun Laubman with George Badanai appearing for the Registrants. The Panel consisted of Wennie Lee (Chair), Larry Pringle (Vice-Chair), and Tom Kramer (Vice-Chair). Aaron Dantowitz attended as Independent Legal Counsel to the Panel.

The Panel received the following documents which were accepted and marked as Exhibits:

- Exhibit 1: Notice of Complaint and OMVIC's Book of Documents;
- Exhibit 2: The Respondent's Book of Documents;
- Exhibit 3: The Agreed Statement of Facts.

The Agreed Statement of Facts marked as Exhibit 3, sets out as follows:

Facts:

1. Badanai Motors Ltd o/a Badanai Chevrolet Cadillac, (the "Dealer") was first registered as a motor vehicle dealer in December 2000. George Badanai ("Badanai") was first registered as a motor vehicle salesperson around October 1988 and has owned and operated a General Motors franchise in Thunder Bay since 1991. At all material times, Badanai was sole officer, director and person-in-charge of the Dealer.
2. During an inspection on or about January 31, 2001, a representative of the Registrar reviewed the Standards of Business Practice with a representative of the Dealer, other than Badanai, including the various written disclosure requirements on the Bill of Sale.
3. During an inspection on or about April 5, 2006, a representative of the Dealer, other than Badanai, was reminded by a representative of the Registrar of the Dealer's obligation to ensure former daily rental vehicles are disclosed in writing on the Bill of Sale.



4. During an inspection on or about October 21, 2008, a representative of the Dealer, other than Badanai, was reminded by a representative of the Registrar of the Dealer's obligation to ensure that former daily rental vehicles are disclosed in writing on the Bill of Sale.
5. By email dated January 9, 2009, Badanai, on behalf of the Dealer, advised the Registrar that although daily rentals were being identified on the Dealer's "Used Stock Sheet", they were not disclosed on the associated Bill of Sale. The Dealer stated in this email that it had since modified its in-house 'Offer to Purchase' forms as part of its efforts to correct this.
6. On or about June 20, 2011, the Dealer purchased a 2010 Chevrolet Suburban, (VIN 1GNUKJE38AR263927) declared as a former daily rental vehicle. On or about January 4, 2012, the Dealer sold this vehicle without providing the purchaser with written disclosure of the previous rental history on the Bill of Sale. This is contrary to section 42(7) of Regulation 333/08, as well as section 7 of the Code of Ethics.
7. On or about June 21, 2011, the Dealer purchased a 2010 Chevrolet Tahoe, (VIN 1GNUKBE06AR239251) declared as a former daily rental vehicle. On or about July 5, 2011, the Dealer sold this vehicle without providing the purchaser with written disclosure of the previous rental history on the Bill of Sale. This is contrary to section 42(7) of Regulation 333/08, as well as section 7 of the Code of Ethics.
8. On or about November 4, 2011, the Dealer purchased a 2010 Chevrolet Cobalt, (VIN 1G1AD5F50A7191557) declared as a former daily rental vehicle. On or about January 6, 2012, the Dealer sold this vehicle without providing the purchaser with written disclosure of the previous rental history on the Bill of Sale. This is contrary to section 42(7) of Regulation 333/08, as well as section 7 of the Code of Ethics.
9. On or about November 8, 2011, the Dealer purchased a 2011 Cadillac DTS, (VIN 1G6KD5E60BU127210) declared as a former daily rental vehicle. On or about November 24, 2011, the Dealer sold this vehicle without providing the purchaser with written disclosure of the previous rental history on the Bill of Sale. This is contrary to section 42(7) of Regulation 333/08, as well as section 7 of the Code of Ethics.
10. The non-disclosure on the Bills of Sale of daily rentals referred to in paragraphs 6, 7, 8 and 9 was discovered during a scheduled inspection of the Dealer by a representative of the Registrar on or about May 9, 2012. The Dealer has since provided the Registrar with written statements from each of the purchasers that they were aware of their vehicle's history at the time of purchase, and which explain that the former daily rental status of the vehicles was disclosed on 'Offer to Purchase' worksheets provided to the purchasers in advance of the purchase, although not on the Bills of Sale.



Decision of the Panel:

Having reviewed and considered the admission of the Respondents to the allegations contained in the Notice of Complaint dated August 8, 2012 and the Agreed Statement of Facts, (Exhibit 1) the Panel of the Discipline Committee hereby concludes the Dealer and Mr. Badanai have breached Section 7 of the Code of Ethics, as set out in Ontario Regulation 332/08, made under the *Motor Vehicle Dealers Act, 2002*.

Reasons for Decision:

Based on the Agreed Statement of Facts the Panel is satisfied that the facts as they appear in the statement represent a violation of subsection 42(7) of the Regulation 333/08 and Section 7 of the Code of Ethics.

Subsection 42 of Regulation 333/08 sets out as follows:

Additional information in contracts of sale and leases

For the purposes of section 30(1) of the Act, the information mentioned in paragraph 22 of subsection 39(2) and paragraph 11 of subsection 41(1) of this Regulation is the following:

7. If any of the following is true of the motor vehicle, a statement to the effect that the vehicle was previously,

(i) leased on a daily basis, unless the vehicle was subsequently owned by a person who was not registered as a motor vehicle dealer under the *Motor Vehicle Dealers Act* or the *Motor Vehicle Dealers Act, 2002*.

Section 7 of the Code of Ethics provides:

7.(1) A registrant shall ensure that all documents used by the registrant in the course of a trade in a motor vehicle are current and comply with the law. O.Reg. 332/08.

Evidence and Submission on Penalty

Although the parties agreed to the facts, including an admission there had been a violation of subsection 42(7) of the Regulation and Section 7 of the Code of Ethics, they were unable to agree on the appropriate penalty.

At the hearing, counsel for OMVIC, Mr. Rusek called 3 witnesses. His first witness, Mr. John Berezcki, an inspector with OMVIC, testified to the inspections conducted at the Registrants' premises. He attended on April 5, 2006 and October 21, 2008, and during these inspections non-disclosure on the Bills of Sale of daily rentals were discovered, a representative of the Dealer was reminded of the Dealer's obligation to ensure former daily rental vehicles were



disclosed in writing on the Bill of Sale. However, on May 9, 2012, on a scheduled inspection, the same problems of non-disclosure on the Bills of Sale were found.

The other two witnesses, Ms. Andrea Korth, Business Standards Co-ordinator and Ms. Laura Halbert, Director of Compliance testified that OMVIC issued newsletters, bulletins and educational resources to inform registrants of their disclosure requirements under the law. Ms. Halbert also indicated the importance of daily rental disclosure as viewed by the legislators, who saw it significant enough to allow consumers to trigger a recession of the contract in the event of non-disclosure. The Panel notes that this is provided in section 50 of the Regulations.

Mr. Laubman called three witnesses. Mr. Joseph Salini and Ms. Kim Treichler testified via teleconference. They confirmed orally their written statements provided in Exhibit 2 at Tabs 2 and 6, they were informed by the Dealer at the time of purchase, the vehicle was a Daily Rental and were made aware of the vehicles' history. Mr. George Badanai also testified. He stated that he was aware of the inspections but he was not personally present. He denied being made aware of the Inspection Report of April 5, 2006 found at Tab 5 of Exhibit 1, although his General Sales Manager, Mr. Alvin Rissanen, signed an acknowledgement to forward the Inspection Findings to the dealer principal/owner. He confirms Mr. Rissanen bringing to his attention the Inspection Report of October 21, 2008, found in Tab 5 of Exhibit 5. He testified that he was upset and took the matter seriously. He met with his staff to discuss the matter and have a process in place in order to be compliant, but what was supposed to happen did not. He accepted full responsibility of the failure and understood the intent of the Act to inform and protect consumers. He takes issue with the amount of penalty sought by OMVIC.

Mr. Rusek submitted that the appropriate penalty in the circumstances should be as follows:

FINE

Dealer shall pay a fine of \$10,000 within 90 days.

Badanai shall pay a fine of \$4,000 within 90 days.

The fines are payable to the Ontario Motor Vehicle Industry Council.

EDUCATION

Badanai must successfully complete the current OMVIC certification course within 90 days.

All current managers in positions of authority over sales or related activities at the Dealer must successfully complete the current OMVIC certification course within 90 days, and the Dealer shall incur all costs associated with this. This clause shall not apply to managers who have successfully completed the current OMVIC certification course since May 9, 2012.

The Dealer shall offer to all registered salespeople the opportunity to complete the current OMVIC certification course within 90 days. The Dealer shall incur all costs associated with this. This clause shall not apply to salespeople who have completed the course since May 9, 2012.



COMPLIANCE

The Dealer and Badanai shall comply with the Motor Vehicles Dealers Act, 2002, the Regulations made thereunder and the Standards of Business Practice, as may be amended from time to time.

The Registrants took no issue with the terms of the Education and Compliance proposals sought by OMVIC, however, they disagreed on the quantum of the fine.

Mr. Laubman submitted that the appropriate fine to be imposed should be \$4000 in the circumstances of this case. However, in oral submissions, Mr. Laubman also submitted that OMVIC's prosecution of the matter was unfair and unreasonable and sought costs against OMVIC in the amount of \$4000. Therefore, he submitted the amounts should be offset against each other and the net effect should be zero payable by the Registrants.

OMVIC's Arguments

At the hearing, OMVIC's counsel submitted that a reasonable and appropriate penalty in this case should reflect the regulatory nature of the Act and Regulations, and its objectives. The legislation requires registrants to adhere to specific rules and regulations designed to protect the general public and to create a fair and level playing field for all registrants. In considering the appropriate penalty, counsel urged the Panel to examine factors, such as, the potential harm to the public, prior enforcement history, maximum penalty prescribed by the Act, regulatory standards prescribed by statute, the size of the company, etc; and to arrive at a penalty that is not harsh but appropriate in the circumstance, such that, the amount of the fine is sufficiently felt by the registrants to deter such breaches in the future and serve as deterrence to others as well. Mr. Rusek pointed out that the chronology of facts disclose a similar pattern of non-disclosure of daily rentals in the Bill of Sale and OMVIC's reminder to the Registrants of its obligation to disclose the former daily rental in writing on the Bill of Sale. He argued that the process was not overly complicated to be disclosed on the Bill of Sale. Nor was the law complicated in this regard. Furthermore, OMVIC had conducted campaigns to educate its members of their legal obligations. This was not an issue of lack of proper knowledge on the part of the registrants of its obligations, but they "chose not to comply" or "not caring to comply" with the rules. As such, a stiff but not harsh fine, that is proportionate to the charge should be \$2500 per count for the Dealer Registrant and \$1000 per count to Mr. Badanai personally. Mr. Rusek provided the Panel the following two prior Discipline decisions:

Registrar, *Motor Vehicles Dealers Act, 2002* vs. Luxe Inc. o/a Curve Motors and Amir Hosseini and Hamid Hosseini: Date of Decision, November 4, 2013,

Mattina, D. (Chair), Sherman, S. (Vice-Chair) and Morabito (Vice-Chair).

Registrar, *Motor Vehicles Dealers Act, 2002* vs. Pinewood Ford Limited and Darryl Burton, Date of Decision: April 26, 2013

Poultney, C. (Chair)



These two cases were presented to the Panel as a yardstick to determine the range of penalties that may be imposed, the range being \$1500 - \$7000 per count for failing to disclose former daily rentals.

Registrants' Arguments

The Registrants did not dispute the non-disclosure on the Bills of Sale of daily rentals, but their position is that the purchasers were aware of their vehicle's rental history at the time of their purchase and they claimed the vehicle's history was disclosed on the "Offer to Purchase" worksheets provided to the purchasers in advance of the transaction, although not on the Bill of Sale. Therefore, there was no prejudice to the customers in these instances.

Mr. Laubman argued that the fine should commensurate with the offense, and the amount being sought by OMVIC was excessive. He requested the Panel take into account the mitigating factors such as the early acceptance of responsibility, admission of non-compliance with the strict application of the law, and there was no evidence that any customer was in fact prejudiced. He argued that if the purpose of the law was to ensure that customers were to be informed, they were, *albeit* not in the manner prescribed by law. There were no concerns with customer service and all the customers who were called to testify spoke highly of the registrants. He asked the Panel to note the testimony of Mr. Badanai, that he personally takes the matter seriously, he acknowledged he had issues in the past, he gave instructions for corrective measures to be made but they may not have materialized and he acknowledged there was a failure in the process. He provided the Panel a Book of Authorities containing 7 cases dealing with failure to disclose as a guideline for the appropriate amount of fine to be set. He submitted that the precedent cases range between \$750 to \$1500 per vehicle, and in the present case OMVIC was essentially asking for \$3500 per vehicle for a total of \$14,000, however, the appropriate fine should be \$4000 in total.

Mr. Laubman also sought costs of \$4000 against OMVIC arguing the Registrants were forced to retain counsel at significant costs when the regulator is acting in an unreasonable manner. He argues two reasons why OMVIC is acting unreasonably. First, OMVIC's position to refuse to allow the Registrants' witnesses to testify via teleconference, necessitating the Registrants to bring a motion to seek an order to allow the witnesses to testify via teleconference and secondly, the \$14,000 fine is well beyond the range of fines imposed generally, forcing Registrants to retain counsel to challenge the amount. In sum, he argued the net effect, if the Panel awards costs against OMVIC of \$4000, is that the Registrants will not have to pay any amount of fine, as the fine of \$4000 will be offset against the cost award of \$4000.

OMVIC's Reply Arguments

Mr. Rusek in reply noted this is the first time that OMVIC became aware the Registrants were seeking costs. He asks the Panel to note that OMVIC as the regulator also bears significant costs in prosecuting the matter, it takes on legal costs when the Registrants who have accepted guilt, are refusing to agree to pay the appropriate penalty. There is no malicious prosecution, the matter is properly brought before the Panel. This is not a case where the Panel has found the Registrants not guilty, there is simply no evidence of malicious prosecution.



He pointed out that all 7 cases relied on by the Registrants are in fact cases that settled between the parties in an “uncontested” hearing and as such are of less precedential value in determining the range of penalty that is generally imposed by the Panel.

On the issue of the motion to request witnesses to testify via teleconference, it was an issue of whether the standard practice should be relaxed for witnesses, the motion was thoroughly argued by both parties before another Panel and a reasonable decision was reached by the Chair. At no time during the motion or thereafter, was the issue of costs raised.

Penalty Decision:

Upon careful review of the evidence presented and having assessed the totality of the circumstances, the Panel arrived to the decision that OMVIC's proposal to the Education and Compliance component of the penalty, which were unopposed by the Registrants, shall be Ordered. With respect to the monetary fine, the Dealer is ordered to pay a fine in the amount of \$10,000. No fine is imposed on Mr. Badanai personally.

Reasons for Penalty:

The Panel in reaching the decision to Order the amount of \$10,000 payable by the Dealer, fully considered all the evidence and arguments presented by both parties. Clearly, the legislators considered the importance of disclosing former daily rentals significant enough to allow consumers to cancel the contract pursuant to section 50 of the Regulations. In deciding the appropriate penalty, the cases presented while helpful to determine the range of penalties imposed in similar cases, each case must be determined on its own facts. The Panel examined the facts of this case to reach a conclusion on what is appropriate at bar. On the evidence it was clear the Dealer was aware of its obligation to ensure former daily rental vehicles are disclosed in writing on the Bill of Sale. Also, the chronology of facts shows a prior occasion dating back 6 years, on or about April 5, 2006, where OMVIC reminded a representative of the Dealer of its obligation. Again, on January 9, 2009, Mr. Badanai on behalf of the Dealer, sent an email advising the Registrar that corrective measures were in place to remedy the non-disclosure of the daily rentals on the Bill of Sale. Yet the inspection conducted on or about May 9, 2012, still presented the same problem. The Dealer was given sufficient opportunity and considerable time to ensure compliance, but did not do so. The Panel is therefore satisfied that the amount sought by OMVIC of \$10000 against the Dealer is appropriate taking into account the chronology of facts, also the amount is significant enough to act as a specific deterrent to the Dealer to ensure compliance in the future without being harsh.

As against Mr. Badanai personally, the Panel accepts that he did take the Notice of Complaint seriously, and he co-operated from early on with OMVIC's staff. He also admitted the non-compliance and accepted responsibility. The Panel notes his explanation that there was a failure in the process in the measures taken in the past to try and remedy the non-compliance but that corrective measures are in place now. The Panel is satisfied that Mr. Badanai will take positive steps to ensure compliance with the Act and Regulations. Taking these mitigating factors into account, the Panel does not find it necessary to fine Mr. Badanai personally. However, the Panel does remind Mr. Badanai that he is personally responsible to ensure the compliance with this Order, Code of Ethics and Regulations, and cautions him, in the future fines against him may be warranted.



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Lastly, on the issue of costs, the Panel finds it difficult to accept the submission of Mr. Laubman. The cost provision is set out in 13.01 of the Rules of Practice Before the Discipline Committee.

13.01 The Panel hearing a matter may make an order as to costs payable by one Party to another Party if paragraph 5 of subsection 17(4) of the Act applies (i.e. where the Registrant can be ordered to pay costs to OMVIC) or if the conduct or course of conduct of a Party has been unreasonable, frivolous or vexatious or a Party has acted in bad faith.

There is simply no evidence that the regulator's conduct is unreasonable, frivolous or vexatious or that it acted in bad faith in any manner whatsoever. The Panel notes that proceedings before the Disciplinary Committee are structured as an adversarial process, and the fact that OMVIC's position is not agreeable to the Registrants does not in and of itself give rise to conduct amounting to bad faith. As such, bringing a motion to allow the witnesses to testify via teleconference or deciding to hire counsel to challenge the fine sought by OMVIC are not unusual in the adversarial context. Ultimately, the parties' position is brought before the Panel for adjudication. The Panel must therefore dismiss Mr. Laubman's arguments on costs.

Ontario Motor Vehicle Industry Council
Discipline Panel

A handwritten signature in black ink, appearing to read "Wennie Lee", written over a horizontal line.

*Wennie Lee, Chair
Larry Pringle, Vice Chair
Tom Kramer, Vice Chair*