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Appeal
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August 29, 2008

MEMORANDUM

Re: Guglielmo C. Pucci v. Registrar, Motor Vehicle Dealers Act

Enclosed herewith please find a copy of the Decision of the Licence Appeal Tribunal with respect to this matter.

DISTRIBUTION LIST:

Guglielmo C. Pucci, Applicant
Aviva Harari, Agent for the Respondent

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GUGLIELMO C. PUCCI

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT* R. S. O.
1990, c. M.42

TO REVOKE REGISTRATION

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: GUGLIELMO C. PUCCI, representing himself

M. J. SOUTH, Agent, representing the Registrar, *Motor Vehicle
Dealers Act*

DATES OF
HEARING:

July 7, 9, 16 and 17, 2008

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a Proposal issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Act") to revoke the registration as a salesperson of Guglielmo Pucci (the "Applicant"). The Proposal, dated November 9, 2007, also seeks the revocation of the Applicant's employer, the motor vehicle dealer, Pontiac Plaza Buick GMC Inc. ("PP") and its principal, Robert W. Stein ("Stein"). A Notice of Further and Other Particulars was issued by the Registrar on June 6, 2008. Two weeks later a Consent Order was issued by this Tribunal whereby PP and Stein remained registered, subject to additional terms and conditions. Consequently, this hearing concerns only the entitlement of the Applicant to continue being registered under the Act.

The Proposal provided the following as the ground for revocation of the Applicant's license to trade in motor vehicles:

"The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The registrant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentanglement to registration under the Act"

The Registrar relied on the following relevant Particulars:

"4. The Registrar has received a number of consumer complaints which indicate that Plaza, Stein and Pucci are: failing to return deposits to which consumers are entitled, failing to take steps to resolve legitimate consumer complaints within a reasonable time, failing to respond to consumer complaints, failing to ensure vehicles are of merchantable quality, misrepresenting the purpose of additional charges which are added to customers bills of sale, failing to disclose the true history and condition of vehicles being sold and failing to provide customers with a copy of their bill of sale and failing to comply with OMVICs Standards of Business Practice.

6.The Registrar has received a number of consumer complaints which indicate Pucci is engaging in threatening and intimidating behaviour towards consumers and is providing misleading information to consumers.

7. Despite several warnings from representatives of the Registrar, neither Plaza, Stein or Pucci have taken reasonable steps to resolve the issues set out in clause 4 and 5 above."

The Notice of Further and Other Particulars dated June 6, 2008 added the following:

"1. On or about January 10, 2008, <name deleted> left a \$3,000.00 deposit at Plaza for the purchase of a 2008 GMC Envoy. <Name deleted> did not sign a bill of sale for this vehicle. At a later date, <name deleted> decided he did not wish to take delivery of this vehicle. Prior to <name deleted> contacting OMVIC, Pucci refused to return his deposit."

EVIDENCE:

The hearing took place over four days and included documentation, as well as testimony from 20 witnesses for the Registrar and four for the Applicant. The following is a summary of the relevant material.

Consumer #1: LH

This consumer testified she and her husband attended at the dealership in April of 2007 to discuss the possible purchase of a vehicle. In their negotiations they conferred with a sales manager, Frank Nigro, who reassured them he could make them a deal conditional on their obtaining affordable insurance. LH and her husband signed a Bill of Sale (Exhibit 6) and left a deposit of \$500.00. They neglected to obtain a copy of their Bill of Sale. On learning their insurance would increase due to the newer age of the intended purchase, they called Nigro to advise they could not complete the deal and to

request their deposit be returned. They were told to attend at the dealership to receive their deposit funds.

On arrival Nigro told LH, her brothers and her husband that she was not entitled to her refund as she had signed a contract which makes no reference on its face to either a deposit nor a condition of insurance. Both the Applicant and another employee, Isabel Herreros, were called over. According to LH, the Applicant began yelling at her, telling her she was not entitled to any refund as she had signed the contract, and that he would call the police if she and her family didn't leave the premises. At one point, he offered to pay a portion of her first year insurance costs.

LH contacted the Ontario Motor Vehicle Industry Council (OMVIC) and spoke with a complaints officer named Donny Walker, who suggested she write PP and ask for the return of her deposit funds. She did so (Exhibit 4, Tab 14, p.145), but never received any response. In the end, she agreed to purchase a cheaper vehicle from PP.

Frank Nigro

Nigro is a registered salesperson under the Act. He was employed by PP for three months over the winter of 2007 as New Car Manager. He reported to the Applicant. Generally, when consumers sought a vehicle repair or refund, he would present the case to the Applicant for a decision. Herreros had no such authority. The witness was not aware of Mr. Stein being involved in any such decision-making.

Nigro remembered the consumer LH. The deal for her purchase was "subject to" her getting the appropriate insurance. The Applicant instituted this concept of "subject to" at the dealership. It might refer to the approval of a spouse or the amount for a trade-in, for example. The idea was to have the consumer agree to the deal, get a deposit, and verification could be confirmed later. LH had requested a "subject to" for insurance. This should have been recorded by the Business Office when the documentation was drafted, since all documentation was its responsibility. When LH returned to say she could not get the insurance and wanted to cancel, Nigro advised the Applicant, whom he understood had the authority to issue cancellations.

In cross-examination Mr. Nigro conceded that LH and her family were already upset and disruptive before the Applicant came to speak with them. He agreed that he might have poorly communicated their reason for desiring to rescind and given Mr. Pucci the belief it was because they had found a better deal.

Donny Walker

Mr. Walker has worked as an OMVIC complaints handler since May 2005. He was involved with the LH file. He discussed the complaint with the Applicant, who never advised he needed the approval of Stein, but rather insisted he was prepared to take the consumer to court. Mr. Walker conceded he had advised the Applicant that the

dealer was within its rights to insist on the contract and/or damages in the event the consumer was unable to meet a condition agreed to in the Bill of Sale.

Consumer #2: MZ

Mr. MZ visited PP on February 19, 2007, to purchase a vehicle he had seen on the Internet. He left a \$300.00 deposit. He received a call advising his credit was not approved. The salesperson, however, said he would work to find him another offer of credit, although this would be at a higher interest rate. On February 22 he re-attended the dealership to sign papers, whereby he agreed to finance the purchase at a higher credit rating (Exhibit 4, Tab 10, p 88). In cross-examination Mr. MZ agreed he had not negotiated the deal with the Applicant, and the Applicant had not been present when he signed the Bill of Sale.

A few days later the consumer felt the vehicle pull to one side. He went to PP for service and was reassured all was fine. Soon after, during a snowstorm, he again felt a sharp pull and went back to PP. This time he was referred to the Applicant, who advised it wasn't his problem and Mr. MZ should bring the car in for service. Some days later he had a flat tire and couldn't access the spare. He again went to PP. The Applicant was unable to locate the key and said he could do nothing to assist. Mr. MZ stated he went to PP on a number of occasions and was told to wait for the Applicant. He often waited a number of hours. On one visit the Applicant told him he needed time to think of a solution, but none was forthcoming. On another visit the Applicant told him he would be charged for leaving his vehicle on the lot. Although in examination-in-chief the consumer stated the Applicant did not assist him in seeing the mechanic, in cross-examination he conceded the Applicant had once called a mechanic to assist him.

Finally a friend advised MZ to contact OMVIC. He did so. Following OMVIC's advice he went again to see the Applicant, at which time a conference call was made by the Applicant to OMVIC. During the call the Applicant suggested it was the first he had heard of Mr. MZ's problems. In the end Mr. MZ received a cheque from the Applicant that covered all his claimed costs.

Andrea Korth

Ms. Korth was a complaints handler for OMVIC in the spring of 2007 when she received a complaint call from Consumer MZ. She recollected from her notes (Exhibit 4, Tab 10, p.84-86) the telephone conversation she had with the Applicant, the consumer and Herreros concerning the consumer's request for a refund of costs. The notes show that OMVIC received a call from the Applicant on March 30, at which time the consumer's complaint was discussed. The Applicant advised he was meeting with the consumer and would inform OMVIC as to their discussion. A later notation refers to a speakerphone conversation initiated by the Applicant with Ms. Korth, with both the consumer and Herreros in the dealer's office. All issues were canvassed and a resolution agreed to. There is no mention of the Applicant declaring this to be the first time he has heard of the problem.

Consumer #3: FZ

On a Saturday in July of 2007 FZ bought a car from a salesperson at PP. When he returned home, he changed his mind about the purchase and called PP to cancel his transaction. The office was closed so he left a voicemail message. Early Monday morning he followed up with a fax (Exhibit 4, Tab 25, p.237) which was carbon copied to the Applicant as Manager. He remembered Mr. Pucci from overhearing him shout at the salespeople when he was making his purchase.

On arrival at the store his salesperson advised him to speak with the Applicant who, in turn, told him to go through Herreros. Both individuals told him he could not cancel his purchase as he had signed the contract. Two days later he received a letter ("seven-day letter") from PP, advising he owed damages for breach of contract in the amount of \$1,079 including \$1,100 for lost profit. FZ called OMVIC for advice. He later received his deposit funds.

Consumer #4 BB

In September 2007 BB signed an Agreement of Purchase and Sale for a Buick with PP (Exhibit 4, Tab 27, p. 245). The Agreement notes a deposit of \$500.00 with another \$4,500.00 payable on delivery as she advised the salesperson she only had \$5,000.00. She agreed, however, to try and find another \$2,000.00 if PP could get her a loan for the balance. BB testified she had only agreed to the down payment of \$7,000.00 over the telephone. When she called to advise she was not able to get the additional funds and could not afford the higher payments, an employee of PP's Business Office told her that the insurance had already been arranged and the paperwork completed. He referred her to the Applicant, who advised her she had signed the Agreement and would lose her trade-in vehicle. She called Andrew Barber at OMVIC. Her deposit funds were returned to her shortly thereafter.

Andrew Barber

Mr. Barber had been an OMVIC complaint handler for just under one year when he received a consumer call from BB concerning the Applicant's threat to take her vehicle unless she followed through with her contract. When the consumer provided Mr. Barber with copies of her sale documentation he agreed her contract was binding, and the dealer was entitled to damages. Nonetheless he called Herreros to discuss the matter. Soon after the Applicant called to tell Mr. Barber PP would no longer be retaining deposits on cancelled sales, so he was perplexed when the very next day Herreros sent him a copy of the dealer's seven-day damages letter (Exhibit 4, Tab 35, p.251). He called Herreros to discuss the reason for the extraordinarily high amount of damages being claimed and was told by the Applicant that there would be no more damage requests sent by PP, and the letter had been sent in error.

Mr. Barber stated the consumer never complained of the issue regarding her changed amount of deposit funds. Had this been raised he would have advised a new contract was required such that the original contract disclosing the \$5,000.00 would no longer be valid.

Jessica Larrera

Another OMVIC compliance officer, Ms. Larrera is familiar with the PP dealership. She testified with reference to her notes at Exhibit 4, Tab 40, p.59/60 concerning Consumer #5, MS, who in January of this year left a \$3,000.00 deposit on a vehicle purchase with PP. When he called to ask for the return of his money (he had not signed a Bill of Sale), the Applicant told him to wait and see the vehicle first as PP had gone to some trouble to locate his request. Ms. Larrera advised the consumer to write PP, which he did, and he received the return of his money. When the OMVIC employee contacted PP on this file, she was advised that no Bill of Sale existed as the consumer request was simply for a "locate".

Tim Hines

Mr. Hines has managed OMVIC's complaints department for three years. By May of 2007 PP had over seven consumer complaints on file with OMVIC, compared to only two the previous year. Only two other dealers in the province had a similar number of complaints, and one of those had employed the Applicant the previous year. By the end of 2007, twenty-nine complaints were recorded against PP. Seven or eight of those were linked directly to the Applicant. Mr. Hines had never before seen such a high number against an individual.

In late May a meeting was held with Stein, principal of PP, at the Deputy Registrar's office, at which time OMVIC's concerns were canvassed. Based on representations made by Stein at that time, the Deputy Registrar decided to write to both him and the Applicant detailing concerns raised of allegations of bullying and threatening, as well as high damage claims. The letters to both these individuals are dated June 6 and 7, 2007, respectively (Exhibit 4, Tabs 18 and 19). Only the letter to Stein (Exhibit 4, Tab 18) itemizes the specific complaints and makes reference to legislative and ethical practice standards. The letter to the Applicant encloses a copy of the Stein letter and requests he review it. It states this is his first and only warning, and that further evidence suggesting improper conduct would lead to a proposal to revoke his license under the Act.

Despite the Applicant calling the Registrar's office acknowledging receipt of the letter, and thanking the Registrar for the opportunity to improve compliance, Mr. Hines noted that complaints continued to come in against the Applicant. He concluded that the Applicant's management of the dealership had resulted in Stein taking a backseat and that with the dealership's sharp increase in sales (40%), came related sharp increases in unacceptable sales practices.

In cross-examination he stated that his experience demonstrated that general managers at dealerships decide how the business is run and what procedures are followed in the Business Office. When asked why the Applicant himself was not called in for an interview, he explained that the letter from the OMVIC office had advised the Applicant of the problems and the changes required. He conceded that it was not usual for a Proposal to be issued based solely on conduct, but noted that this was the highest incidence he had ever seen of conduct complaints against a registrant. He admitted that he was unaware of any complaints against the Applicant for 2008. He further agreed that, even where the issue of deposits was determined not to be under the authority or control of the Applicant, allegations of improper bullying employed by the Applicant with consumers remained a significant concern to OMVIC.

Darren Senensky

A complaint investigator for over three years, Mr. Senensky spoke of a complaint from Consumer #6, AS, who alleged he had signed a "subject to" paper at PP in April of 2007 (Exhibit 4, Tab 13) when he left a deposit on a vehicle purchase and then had been shouted at by the Applicant when trying to cancel the deal, despite never having signed a Bill of Sale. Mr. Senensky advised the consumer to send a registered letter including copies of her documentation. She did so on April 12 (Exhibit 4, Tab 13, p.134). By May 4 there had been no response. Mr. Senensky then contacted the Applicant directly. The Applicant explained that Nigro had been the salesperson, that the consumer had refused to sign a bill of sale, and the dealership had gone to some time and expense to complete the sale. Nonetheless in June the deposit funds were returned to the customer.

Mr. Senensky also testified concerning the complaint of consumer #7, Mr. S., (Exhibit 4, Tab 23) who had purchased a car from PP in late 2006, before the Applicant was employed there. The vehicle had the wrong mileage disclosed – being in American miles as opposed to Canadian kilometres. In January the consumer complained to PP. Despite OMVIC's involvement, the Applicant failed to resolve the matter until June of 2007.

In cross-examination the OMVIC witness acknowledged that the Applicant was not employed by the dealership at the time of the sale and was not referred to in any documentation provided by the complainant until February 2007. He also admitted that Herreros had advised OMVIC that refunds were not her responsibility, despite being told by Stein to follow up with her, as she was the dealer's contact person. Mr. Senensky agreed he did not know who was responsible for such decision-making at PP. However, it was his experience that generally this fell to the General Manager.

Consumer #8: FM

In February 2007 FM purchased a used Corvette from PP (Tab 34). He was assured that the vibration noted during the test-drive would be corrected prior to his purchase. When he went into sales office to complete the documents, the Applicant advised him

the vehicle had been in a minor accident. He explained to the consumer that there were three types of accident: write-off, repairable and cosmetic, and that his vehicle had sustained the last. When the consumer queried the different hood colour, the Applicant explained it as the previous owner's after-market choice.

The vibration was still apparent when the Corvette was delivered. The salesperson said it could be corrected under the warranty. However, when the consumer took the car in for service, he was advised there was no warranty coverage as the vehicle had been "blacklisted," due to abuse from the prior owner. He had the vehicle towed back to PP. PP refused to do the extensive work required, and did not refund the consumer his purchase price. FM and his wife entered into a number of discussions with the Applicant as the weeks went by. The consumers were on holiday in America when the Applicant allegedly shouted at FM's wife over the telephone. Finally, after contacting OMVIC, the consumer's money was refunded.

In cross-examination FM said he was not certain whether the Applicant had pulled up an accident report showing no activity recorded against the vehicle the day he signed for the purchase.

Consumer #9: BL

In April of 2007 BL agreed to purchase a vehicle from PP. She advised the salesman she had been a bankrupt, and financing might be difficult to arrange. He assured her she could get financing at 8.3% and she signed the Bill of Sale. Within the week it transpired that financing was only available at 16%. She refused and arranged to return to get her deposit funds. On her arrival she was taken to the Business Office where she and her family were advised that PP had worked hard to get the financing and she was pressured into keeping the contract. When she refused, the Applicant was brought in. He shouted at the employees and told the salesman he would be fired if he had promised 8.3%. When she disclosed that she had purchased an alternative vehicle, he told the consumer that a lien would be placed on her home and they would be taken to court. She went to OMVIC who assisted her in drafting a letter, which she sent to PP. Her deposit funds were eventually refunded.

Vince Petitti

A registered motor vehicle salesperson for 22 years, Mr. Petitti advised he had never had any problems with OMVIC. He began work as the Used Car Manager with PP in July of 2006. The Applicant took over as General Manager of the dealer six months later. By May of 2007 Mr. Petitti left due to what he felt was abusive behaviour toward him in front of clients by the Applicant.

Mr. Petitti stated that with the Applicant's management he lost all decision-making authority. Where once he had been able to determine when and whether a consumer was entitled to rescission of their contract and return of their money, such was no longer the case. While, in the beginning, the Applicant did appear to consult with Stein, within a

few weeks all decision-making devolved to the Applicant alone. Even Herreros, hitherto responsible for "lease retention", became nothing more than a "go-for" of the Applicant. He believed that the Applicant only said he was required to defer to Mr. Stein in order to "buy time" but, in reality, the show belonged to him alone.

In cross-examination the witness readily conceded he had numerous altercations with the Applicant.

John McAndrew

A registered salesman for 26 years, Mr. McAndrew worked at PP from April 2007 through to February 2008 when he left to take over another dealer franchise owned by Stein. In March of 2008 he was fired by Stein.

Mr. McAndrew stated that his responsibility vis-à-vis consumer complaints was to try and keep the consumer in the deal. If they were insistent, he would take the consumer to the Applicant. Both the Applicant and Stein were clear that refunds were not available in any circumstance. In the event that the consumer was to be let out of the contract, the Applicant would negotiate the terms of settlement. Stein would then instruct Mr. McAndrew directly to calculate the damages for the seven-day letter, which Herreros was to send to the customer. These damages were based on computer data in the system and Mr. Stein would be carbon copied on the letter.

A change occurred in October 2007 when the Applicant advised that customers were to receive refunds of their deposits if they wanted out of the deal. All cheques were, however, signed by Stein.

Shahryar Khan

Mr. Khan has been licensed under the Act since 1996. He was employed by PP as the General Sales Manager from October through to the end of December 2006. He stated consumer complaints would first be dealt with by the sales staff and then management. Any matters concerning money or financing had to go through Stein, who insisted on having the last word concerning any consumer complaint. He was included in all aspects of complaints and involved in both the decision making as well as signing of any eventual refund cheque.

In cross-examination Mr. Khan agreed that no deposits could be returned to a customer without Stein's direct approval. He also agreed that Mr. Petitti didn't respond well to direction and did not return the goodwill shown to him by the Applicant, but instead, talked about the Applicant behind his back and even threatened the Applicant.

Sheena Naismith

Ms. Naismith has worked with the complaints department at OMVIC for three years. She took a complaint from consumer #10, SZ, who advised he had left a deposit of

\$500.00 pending financing approval with PP when he signed a Bill of Sale with PP on September 18, 2007 (Exhibit 4, Tab 28). When, on September 27, he was told he was not approved for the financing, he purchased another vehicle elsewhere. He asked for the return of his deposit. The Applicant threatened a lawsuit for breach of contract and repossession of his vehicle. On October 10, SZ sent PP a fax requesting rescission of his contract, as advised by Ms. Naismith. On October 17, the letter was resent by Ms. Naismith, who left a voice message for Herreros. On October 31 she was informed a refund cheque had been issued to the customer, signed by the Applicant. (Exhibit 4, Tab 28, p.267)

In cross-examination, Naismith acknowledged that financing had apparently been approved by GMAC (p.266) on September 26, but that the consumer had not been informed of this until after he lodged his complaint with OMVIC. Moreover, the approval had not been based on the original down payment disclosed on the Bill of Sale. Later discussions with the Business Office at PP revealed the financing approval had been predicated on inflation of the value of the customer's trade-in vehicle (Exhibit 5, Tab 36). She acknowledged that it can, and often does, take a number of days for a dealer to obtain financing for a consumer where different lending institutions may be involved.

Ms. Naismith conceded she had not discussed the complaint with the Applicant at any time but had, on the instruction of Stein, dealt with Herreros.

Isabel Herreros

Herreros' only job experience has been with PP where she has worked consistently for nine years. She started as a receptionist, but, by December 2006, had moved into a new position of Customer Relations Manager. In this capacity she reported to the Applicant. She is licensed as a motor vehicle salesperson under the Act.

When a customer complains, or has concerns, her responsibility is to pull the file and then act as a liaison between the customer and the Sales Office (New or Used) involved. At no time has she had any authority to approve refunds or rescission of a contract.

The Applicant oversaw the general management of the dealership with all departments reporting to him, including the Business Office and Service. In cross-examination she acknowledged that the Applicant had serious problems with the Service staff as they were loyal to his predecessor and resented his authority. Stein had little to do with the day-to-day management and she had few dealings with him. He was rarely at the dealership. She did recollect calling him once to confirm information from OMVIC that all future consumer complaints from OMVIC should be handled by her only.

Herreros stated that, over time, the procedure with customer complaints changed. Whereas, originally, she had gone to each individual manager with respect to the issuance of seven-day letters, after OMVIC complaints increased she was told to go to Mr. McAndrew for assistance.

Herreros noted that the atmosphere at the dealership improved tremendously under the Applicant. He was dedicated and always available to staff, working 12 and 13-hour days. He was passionate and energetic "giving 150%" to supporting and training and motivating the sales staff. She had never experienced anything like it. Sales increased dramatically – over 40% by the end of 2007.

As concerns complaints, Herreros testified the Applicant had an "open door" policy, and that she was comfortable discussing all consumer complaints with him. She remembered the case of consumer #2, MZ. She had become involved sometime after he had already sought assistance from the Sales and Service departments. The Service Department was consulting with the Used Vehicle Department to help locate a key. She was present during the OMVIC conversation, and remembered the Applicant agreeing the best resolution was to reimburse the consumer, which he would do once he received the necessary approval.

Herreros recollected that consumer #8, FM, had come in for service when a warranty issue arose, which snowballed into the OMVIC investigation. She had originally been called in to the office by the Applicant when the sale was negotiated, to witness the Applicant inform the consumer of a prior accident. At the time the Applicant had shown FM both the lien history and the accident report history, which consisted of one page and didn't disclose any prior accident history.

She also remembered Consumer #1, LH. The customer had been in the dealership a lot discussing her concerns with a number of the managers, including the Business Office. One day she heard loud screaming, and she and the Applicant had to calm the customer and her family members down as they were causing a disruption. In cross-examination Herreros conceded the salesperson, Nigro, had problems locating the paperwork for this sale.

Consumer #9, BL, had signed a contract and the Applicant simply advised that he had no authority to refund the money. She was present when the customer discussed the matter with the Applicant, but could not recollect any shouting. The consumer was clearly upset. In cross-examination she allowed that once it became clear that the salesperson had guaranteed financing at a percentage he could not get, the Applicant favoured the return of the customer's money.

By September and the complaint of Consumer #4, BB, the Applicant had advised he wanted all consumers with OMVIC complaints to receive their deposit refunds because he wanted no more issues with the regulator. However, in this case, OMVIC's investigator, Mr. Barber, had advised Herreros that the dealer was in the right and so she arranged for issuance of the seven-day letter to the customer. She had not been informed that the money was to be refunded regardless of whether or not the dealership was entitled to the funds.

Herreros testified she never witnessed the Applicant act in anything other than a professional manner with customers. He was never rude or vulgar. She acknowledged that he has a loud, passionate and aggressive personality, but that most consumers seemed to appreciate his joviality and open approach. He did not deal with credit or financing issues, which were under the authority of the Business Office. She noted that the Applicant's arrival at the dealership caused some resentment amongst older staff who felt a continued loyalty to previous management.

Robert Stein

Registered as a salesman under the Act for more than 25 years, Stein hired the Applicant in late December 2006, promoted him to General Manager in January 2007 and, under his direction, witnessed PP's sales increase 30-45%. Under his previous manager there had been significant staff turnover, and sales had dropped. He described the Applicant as a great motivator of sales staff and a strong asset, who remains a trusted employee at another dealership owned by Stein.

Mr. Stein described his management policy as "hands-on", saying that he would often overrule the Applicant, as he often found the Applicant too quick to refund consumers' money. It was, after all, Stein's money and thus Stein's decision, and all management were aware of that. Were the Applicant, or any employee, to refund monies without the owner's approval, there would be the risk that such a refund would come from their own pocket, should Stein not approve their decision.

The Business Office is given 72 hours to complete the transaction in accordance with the conditions of the sale, as agreed to by the consumer. Sometimes, a lot of negotiation was required for lenders to provide financing, which could include increasing the value of the trade-in or providing a larger deposit or cheaper model vehicle. After 72 hours they will consider the sub-prime market. The salesperson will then make the call to the consumer, informing him or her of the situation and, if a change to the terms is required, attempt to convince the consumer to accede. This can be problematic for some staff. The Business Office managers had been employed by PP for over 20 years. They were very good at their job. Any consumer who wanted to back out of an earlier deal would be requested to attend their office to go over the final figures.

Obviously, the policy was that the Business Office was to attempt to, and to keep the consumer in the deal. If this proved difficult, then the Applicant would be called in to try and get the consumer to keep the vehicle. In the end, if any money was to be returned, Stein's approval was required.

When a consumer had a bad credit rating and wanted the dealership to see what was available to them, a deposit would be taken but no Bill of Sale drafted. This practice had been followed, in Stein's experience, since he first joined the industry over twenty years previously. Once a consumer sought a refund, the job of the dealership, which had spent time and money in running credit checks, doing searches, etc., was to find out why and how to keep the customer in the deal. Where no Bill of Sale existed and the

dealer had done everything possible to convince the consumer, then generally approval of the refund would be made. If, however, a Bill of Sale existed for the trade and the consumer simply changed their mind, then Stein would get upset.

When the Applicant was first hired, all of this was carefully explained to him.

At the OMVIC meeting in June of 2007, Stein was made aware of a number of consumer complaints. He understood the regulator's concerns. He tried to "Canadianize" the Applicant, whom he knew to be loud and aggressive. He advised his loyal manager that the dealership needed to "lighten up" and give back consumer deposits unless a consumer had somehow misled the sales staff, at which time damages would be claimed. He also instructed Herreros to take all consumer complaints because he recognized her customer service strengths. However, he failed to follow-up on this, and her initial attempts to adhere to such a policy change soon evaporated. She had no power to make decisions. She was required to go to the Applicant who, in turn, was required to get Stein's approval. Stein acknowledged there were too many levels and the system proved to be unwieldy.

As Stein became more involved in business expansion, he reduced his attendance at the dealership and supervision of the trades, with the consequence that his staff were left to run the operation without sufficient authority. He admitted he was often unavailable or distracted by other business concerns, and would not respond to the Applicant's requests for direction and/or approval of decisions for long periods of time. In retrospect, Stein felt that he had failed to delegate sufficient power to the Applicant while demanding the Applicant take too much responsibility. He verified his respect and admiration for the Applicant, whom he found to be more honest and to show more integrity than many in the business. He believed that had he allowed the Applicant more autonomy of decision-making, these problems would not have surfaced, and correct decisions would have been made promptly.

Stein did remember the case of Consumer #8, FM, whose vehicle purchase came from an in-house prior lease. Consequently, it was not usual practice to run an accident history report. In this case no accident disclosure had been documented. In fact, it took some time for the dealer to complete the necessary investigation into the car's prior history to determine the extent of earlier damage.

As concerns Consumer #1, LH, Mr. Stein supported the Applicant's informing the consumer that she could be sued by the dealership if she didn't abide by her contractual obligations. In such a situation Stein would have instructed Mr. McAndrew to send out a seven-day letter.

Consumer #7, Mr. S, regarding the wrong reported mileage, was a difficult situation and Stein wasn't sure of his liability in such a circumstance. The decision to refund took longer than usual, as he sought legal advice. If it took over four months it was, no doubt, due to his negligence in responding. He has now hired an assistant whose main function is to manage customer complaints.

In cross-examination Stein agreed that Vince Petitti, the Business Office bookkeeper, and the head of Service had all been hired by the Applicant's predecessor, and resented the Applicant's authority over them.

As a result of information from OMVIC, Stein had called the Applicant's previous dealer/employer, who had reassured Stein that the Applicant had been a good employee and there had been no problems. He had been surprised to discover at the June meeting with OMVIC that none of the complaints of the Regulator were against him, but all concerned the Applicant personally. He was also surprised that the Applicant was not also called in by the regulator to give his own account of the situation.

Stein agreed that he had spent a considerable sum of money on legal representation in disputing the Proposal against him and the dealership, which culminated in the Tribunal's Consent Order of June 2008.

He also was perplexed that the meeting with OMVIC suggested there were many complaints against the dealership and the Applicant, rather than the seven or eight in evidence. He concluded that the dealership now feels so manacled in its dealings with consumers that it is losing sales and money.

In response to questions from the Tribunal, Stein advised that he has implemented various procedural changes in PP's consumer dealings, in an attempt to reduce concerns. The main one is the hiring of an Administrative Assistant this past February, whose main function is to administer all consumer complaints. He has also formulated "cancelled deal" sheets, which have been discussed with all managers and include a disclaimer to the consumer that such efforts may take a number of weeks to process. He has hired a new manager for PP, to whom he will be delegating greater authority, and he has brought in instructors to provide staff with updated education on OMVIC requirements.

Mary Jane South

Ms. South, the Deputy Registrar of OMVIC, testified that the sudden increase in consumer complaints received by her office in February of last year alerted her to problems at the PP location. As part of her initial investigation she reviewed the registration history of PP's new manager, the Applicant, and discovered that, while registered since 1992, the only long-term employment held by the Applicant was at another dealership where he worked for one and a half to two years. She called the principal at that location, who advised her he had been satisfied with the Applicant's performance. At some time just prior to the commencement of the hearing she called again, only to receive the same information. She concluded this information was benign, being neither supportive nor critical of the Applicant.

As is the custom at OMVIC with a registrant subject to an abnormally high number of complaints, she decided to have Stein attend a meeting with her. It was her opinion that

the clear increase in sales experienced by the dealership did not sufficiently explain the increase in complaints. She was also concerned with the allegations made by consumers of threatening behaviour from the Applicant, but believed that the dealer principal would speak to his employee, who would also know the Registrar's position by virtue of the letter sent to him following the meeting.

Ms. South corroborated Stein's evidence that he took responsibility for the consumer concerns, based on his admission he had failed to supervise the office management and been distracted from his role as decision-maker for the previous nine months. Ms. South stressed the importance of his ensuring clear and appropriate processes were instituted on the sales floor, in order that the dealership show proactive efforts to resolve consumer concerns, rather than relying on OMVIC to instigate those efforts. In particular, she reminded Stein that a consumer's credit history should be determined prior to signing an Agreement of Purchase and Sale, in order that the Agreement accurately reflect the consumer's financial obligations. She also expressed concerns with the policy of requiring that consumers return to the site to process their refunds, where they could be subject to high pressure sales tactics. Stein appeared to understand and agreed that changes would occur once administrative processes were in place. It was agreed that OMVIC staff would attend to speak to his employees, but neither side followed up.

Complaints continued to be made. While Ms. South acknowledged the dealership was quick to resolve such concerns, it was her belief that the changes Stein had promised had not been made, and that he continued to be remiss in his overseeing the dealership enterprise. In particular, Ms. South referenced complaints which occurred after June 2007, being Consumer #3, FZ, where the allegation was the Applicant had "screamed" at sales staff; Consumer #4, BB, where although no Agreement had been signed the Applicant threatened to place a lien on the consumer's property; Consumer #10, SZ, where the Applicant made threats; and as recently as January of this year with Consumer MS, the subject of the Notice of Further and Other Particulars.

In cross-examination the Deputy Registrar conceded that there had been no prior complaints received against the Applicant, although there had been action taken against his previous employer during the time of his employment there. She also acknowledged that she was not satisfied that Stein was able to manage the dealership and control the Applicant sufficiently to ensure consumer problems did not continue, despite the terms and conditions agreed to by Stein in the Consent Order.

Employee #1

Employee #1 worked as a lot boy with PP. His duties included preparing vehicles for customer showings and shuttling customers for service. He testified that changes in the atmosphere at the dealership, for the better, occurred under the Applicant's management by instilling a positive enthusiasm amongst the staff. Employee #1 never saw the Applicant act aggressively or discourteously with any customer.

As he worked with the vehicles, he was aware that the Service Department Manager reported to the Applicant, who always had the final say in any contentious matter. He also recognized the resentment felt by this individual, who had been hired by the previous Manager, toward the Applicant.

The Applicant once provided Employee #1 with an advance, and always treated him and other employees with great respect. Employee #1 had asked the Applicant if he could testify in this proceeding on his behalf as he felt the Applicant was being wronged in this matter.

In cross-examination he denied the Applicant was ever rude or derogatory, but rather characterized him as "loud".

Witness M

An employee of a trade publication M stated she attended at the showroom on a weekly basis for about one year to meet with the Applicant to discuss advertising. The Applicant's office was on the main floor just outside the showroom, and she observed the day-to-day operations during her meeting time. She never witnessed the Applicant acting in an unprofessional manner and found consumers always came first in his work routines.

Guglielmo Pucci

The Applicant stated he had been hired by Mr. Stein to improve sales and that he took his job responsibilities seriously. It was his first time managing a dealership. Prior to being at PP, he had worked largely as a Sales Manager only. He felt betrayed by his employer, who had negotiated a deal with the OMVIC regulator that did not include him. He stated he had never cheated or misrepresented anything to anyone, but had tried to meet his employer's expectations, and to remain loyal and improve the dealer's sales performance. He understood the regulator's need to protect consumers but believed that in doing so, Ms. South has chosen the wrong individual and in the process unfairly tarnished his reputation. His personal life has suffered as a result of the stress and uncertainty surrounding the Proposal, which includes humiliating allegations made against him regarding his character.

The Applicant acknowledged there was a difference in the Canadian market from that in the US, where he trained and worked in motor vehicle sales for over 15 years, beginning at the age of 22. He worked hard to fit into the Canadian system and always acted professionally. His mother had instilled the proper values in him and was present during the hearing as a support. He knew that there should have been no complaints and he regretted each time he had spoken too loudly, or been perceived to have acted aggressively. He stated he was a loud and emotional person and would, if he could, go back and do things differently. He felt that most of the Deputy Registrar's concerns were a result of perception, though he acknowledged perception can be reality. He also noted that out of the 1450 sales transacted last year at PP, only a half dozen or so claimed he

was rude and/or threatening. While he acknowledged this was half a dozen more than there should have been, for which he apologized, he said that given his long history as a registrant he disputed that this demonstrated a pattern of improper conduct.

The Applicant felt Ms. South had acted unfairly in punishing him when Mr. Stein had acknowledged that the process followed at PP was due to his refusing to provide the Applicant with the necessary authority to deal promptly and responsively to valid consumer complaints. He testified he was paid by way of salary, not commission and had no interest in forcing a sale and losing a customer or risking the dealer's reputation. Rather, he was stymied in his authority to act, and yet remained the front man. He is still, and again, taking the fall for the person truly responsible.

The Applicant challenged the Registrar's allegations that he was dishonest or lacks integrity. He noted that the testimony of the consumers who testified his behaviour was rude and aggressive was contradicted by other witnesses. These latter witnesses were people who knew him and knew that his loud manner was not indicative of bullying and belligerence, but rather of passion. He is not a bad, unethical, or dishonest person. There never was any evidence, or indeed allegations, that he had attempted to steal or defraud or in any way wrongly use consumer funds. The Applicant said he was remorseful and has learnt his lesson. In future he will insist on being given sufficient authority to make decisions on consumer complaints. Or as now, with a smaller dealership owned by Mr. Stein, he would ensure another individual is responsible for all consumer complaint matters, as Mr. Stein's assistant is at present.

With regard to Consumer #4, BB was already upset when she was called in by the sales and Business Office staff, who told her she was responsible for the trade, as she had signed the contract. He only explained to her the legal ramifications of her intended breach or repudiation. He was no doubt loud in doing so; she was upset and the dealership floor is noisy with staff and customers talking, and with music playing.

Despite her complaint to OMVIC, consumer #4, BB, had received financing approval, but that approval was predicated on her putting more money down, which the salesperson said she was willing to do. The information to the Applicant from the Business Manager was that the consumer changed her mind about paying the monthly charges and wanted to purchase a different vehicle elsewhere. Given this, he told the consumer she was effectively breaking her contract, and would be liable for damages. If it was a matter of payments, she should discuss this with the Business Office. He recommended to Stein that this was a case for a seven-day letter. He was not privy to the calculations for the damages claimed in that letter.

In cross-examination the Applicant stated that once a deal had been signed by a sales person, the file went to the Business Office, where he had no role in determining money considerations. When a contract cancellation was approved by Mr. Stein he, again, had no role in determining the calculations for the seven-day letters.

In the case of Consumer #8, FM, the Applicant's evidence was that generally accident histories were not consulted in the sale of used cars. In this case, however, it was common knowledge that the Corvette had been in some sort of accident, but the details weren't clear. As a result, once a salesperson advised him a customer was interested in the vehicle, the Applicant decided he should obtain an accident history report. He did, and it revealed no past accident. He kept the Report in the file. He explained to the customer the different types of accident ratings and concluded that since nothing was recorded, whatever damage had occurred had probably been minor. When the customer later alleged the vehicle required service, the Applicant requested the Service Department take action. However, he was having problems with the management in the Service area, who took the position that the customer could wait. The Applicant attempted to have Mr. Stein impose some direction over the Service department, and Mr. Stein advised he would, but also said he was busy, and it would have to wait. The UCDA Report provided in Exhibit 10 is dated May 15, the time of the Consumer complaint to OMVIC. The Applicant maintained the Report he printed off at the time of sale the previous February was identical in content.

The Applicant stated he had only skimmed over the letter addressed to Stein, and which was attached to his warning letter from OMVIC dated in the first week of June. He stated he did take the situation seriously and was very concerned. Again he relied – to his detriment – on his employer's assertion that he had "dealt with everything," and that he was going to institute an improved process.

In the case of Consumer #2, MZ, the Applicant acknowledged the consumer's many visits to PP seeking service for the vehicle. Again it was the Service Department that was responsible, in the first place, to present the vehicle properly outfitted, and then, on receipt of the complaint, to provide an effective repair. The Applicant had problems with the Service Manager, who told him to tell the customer that the vehicle would be towed off the lot if it remained there. Again, attempts to engage Mr. Stein's assistance were not fruitful.

With regard to Consumer #6, AS, this was a situation in which, once he was made aware there was no Bill of Sale, the Applicant took the risk that Mr. Stein would not support him and processed the refund of the customer's deposit immediately. He took disciplinary action against Mr. Nigro based on the information of Mr. Senensky that there had been no Bill of Sale.

Consumer #1, LH, was another trade involving Mr. Nigro where inadequate documentation was prepared as the "subject to" condition was verbal only and Mr. Nigro failed to inform the Applicant it even existed at the time the customer wished to cancel her Agreement. When the Applicant finally heard that there had been an insurance issue, he offered to assist the customer with her insurance costs as his motivation was, as always, to keep the deal and the customer.

The Applicant was called in by the Business Office to assist with Consumer #9, BL, who had purchased another vehicle from a competitor and wanted out of her Agreement with

PP. He informed her of her liability arising from such a breach. When he later was given the information that her rate for financing was only available at an increase over her original agreement he did not dispute her right to have her deposit monies refunded.

Consumer #7, Mr. S, was a clear-cut case of improper recording of mileage. The Applicant's immediate recommendation to Mr. Stein on discovering this fact was to refund the money.

Consumer #10, SZ, was also a situation where the deal appeared to be proper and the consumer was seeking to renege. The Applicant's role was to advise him of the legal consequences of doing so.

Finally with the case of the January 2008 consumer, MS, the Applicant testified this person was a friend of one of the salesmen, for whom the dealership agreed to do a favour. It would locate a particular vehicle being sought by MS and, in order to ensure the customer was serious, requested he leave a substantial deposit. Before the vehicle had even been delivered, however, MS changed his mind and wanted the deposit back. The Applicant's position was that PP had spent time and money locating the vehicle requested, and he felt the consumer should at least view the car. He was not intending to refuse to return the deposit. Clearly this was something he could not do, given that there had been no signed Bill of Sale.

Gerry Earle

Mr. Earle was the SubPrime Business Manager at PP for the first three months of the Applicant's tenure there. His responsibility was to assist customers with credit problems. His office was located near to the Applicant. He testified that it was a pleasure working with the Applicant, and that he would work with him anywhere. He corroborated the evidence of other witnesses that Mr. Stein held close control of the purse strings, and no money left the dealership "without his say-so." He testified that the Applicant got along well with customers, who enjoyed his joviality. He was never discourteous. The majority of the staff appreciated the changes he had made, including his accessibility. The only problems that occurred were those involving the return of consumer funds and this was not an area where the Applicant had authority to make a decision. Although the Applicant was the General Manager in title, in fact he had little control over the hard decisions.

ANALYSIS

Section 10 of the Act sets out the authority of the Registrar to propose the refusal or revocation of a registration; section 14 describes the jurisdiction and role of the Tribunal in an appeal from such a proposal. By virtue of section 10 (1) (a) (ii) an applicant is entitled to registration or renewal:

...except where,
the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with the law and with integrity and honesty

Section 14 provides the registrant with a right to appeal to this Tribunal for a hearing on the merits from any such proposal issued by the Registrar.

As the statute thus affords a registrant with a right to registration within specified conditions, the onus falls on the Registrar to prove, on a balance of probabilities, that the exceptions to such a registration are met in any particular case, and thus the right of the registrant to registration fails. It is the Registrar who has the burden of proof.

The test to be applied has been considered by the Divisional Court in a number of cases over the years. Most recently the test has been clarified by Justice Lane who, in *Ontario (Motor Vehicle Dealers Act, Registrar) v. Shine Car Sales* [2003] O.J. No. 603, repeated with approval the test as set out in a previous decision of the Court:

The test as set out in para. 12 of *Brenner (v. Ontario (Registrar of Motor Vehicle Dealers and Salesmen)* O.J. No. 1017) is as follows:

"The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with the law and with integrity and honesty. Unless the Tribunal can find it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal."

Justice Lane went on to conclude:

It should be clearly understood that the Tribunal owes no deference to the Registrar's opinion. The Registrar is the investigator. The Registrar is not a trier of fact whose opinion is based upon a hearing and so entitled to deference.

Consequently, this Tribunal needs to be persuaded by the Registrar that on a balance of probabilities, there are reasonable grounds for the belief, based on past conduct, that the Applicant will not carry on business in accordance with the law, and with honesty and integrity. In *Coates v. Ontario (Registrar of Motor Vehicle Dealers and Salesmen)* [1988] 65 O.R. (2d) 526, Reid J. of the Ontario High Court of Justice held that:

Nothing short of clear and convincing proof based upon cogent evidence will justify an administrative tribunal in revoking a licence to ...gain a livelihood in business.

In considering the evidence this Tribunal needs to be convinced that the past conduct of the Applicant affords reasonable grounds to believe he will not meet the standards of conduct as required in section 10 of the legislation. In support of his position that such is the case the Registrar has put forth the evidence of a number of consumers, as well as OMVIC employees' opinions and conclusions based on these and similar allegations by other consumers. Such allegations include both threatening conduct as well as painfully slow response times in dealing with consumer complaints. The Applicant, for his part,

relies on colleagues, his employer and his own testimony to demonstrate his contention that his conduct is a characteristic of his personality, and not indicative of threatening or bullying conduct. Also, he says that his response times were a consequence of his employer's conduct, and not in any way a reflection of his honesty and integrity.

Having heard the evidence and seen the witnesses, and reviewed all the material, the Tribunal finds that the evidence does not support a reasonable conclusion that the Applicant will not, in the future, carry on the business of motor vehicle salesperson in accordance with the law and with honesty and integrity.

In the situation posed by consumer LH, the evidence demonstrated that the salesperson responsible for the transaction was antagonistic toward the Applicant. A number of witnesses, including Mr. Nigro himself, testified that relations between this salesperson and the Applicant were, at best, strained from the beginning. It is therefore not unlikely that ensuing consumer difficulties would be characterized as a failure by the Applicant in the eyes of Mr. Nigro.

The evidence also demonstrated that the consumers themselves were loud and upset, prior to the Applicant's involvement. Stein testified that such situations, upon occasion, required police attendance. There was ample uncontradicted evidence that the Applicant was, at the best of times, a loud and powerful personality. I am unable to conclude that the fact that the Applicant "yelled" at anyone in these circumstances, suggests that he was overly aggressive and intimidating.

The facts also established that consumer #1, LH, was attempting to break a contract which had been entered into without obtaining any written confirmation of their alleged "subject to" condition. Mr. Nigro blamed this failure on the Business Office. Other witnesses, including Ms. Herreros and the Applicant, inferred it was the fault of Mr. Nigro. Whichever the case, the Applicant cannot fairly be penalized for acting under the impression no such document existed when none did. Given his information from the salesman that the reason for the consumer's effort to break the deal was that she had a better deal elsewhere, it was within his rights (and, indeed, his duty as the manager) to advise her of the legal ramifications of breaking the contract. Donny Walker of OMVIC agreed that, without written notice of a condition not met, the dealer was within its rights to claim damages for a breach. To do so cannot be characterized as an improper threat.

Consumer #2, MZ, did not deal with the Applicant until he sought service for what he claimed was inadequate preparation of the vehicle. Again, there was uncontradicted evidence that the Applicant had significant problems with the service personnel of PP when he contacted them in attempts to resolve the complaint and who, loyal to previous management, appeared to take pleasure in not co-operating with the Applicant. Stein was aware of this, but failed to interfere effectively. The evidence falls short of establishing that the Applicant was at fault in the clear inadequacy of service provided to the consumer by PP. Indeed, it is my conclusion that the only individual actually taking a role in attempting to assist this consumer was the Applicant, and that both Stein and the service department remained unresponsive to his requests.

OMVIC alleges that the Applicant only acted once it was involved. The evidence demonstrates to me that, rather, once OMVIC was involved the Applicant could more effectively push Stein into taking action which, hitherto, Stein had avoided.

The information to consumer #2, MZ, that his vehicle could be towed was, it transpired, a direct relay of an assertion made by the Service Department of PP, and not an idle or improper threat. The consumer's allegation that the Applicant portrayed him as a liar in the teleconference call made with OMVIC was not supported by Ms. Herreros, or by the OMVIC investigator's notes.

With reference to consumer #3, FZ, again both of the allegations as to improper conduct do not stand up to scrutiny. The consumer alleged that the Applicant had shouted at his employees – suggesting thereby that he was intimidating to consumers as well who overheard this. However, the evidence of all witnesses who worked at PP, including those called by the Registrar, was that the dealership was a noisy, active environment, such that the level of audible activity was high. Further, everyone who gave testimony spoke of the Applicant's loud personality, which was readily apparent to the Tribunal. I am not persuaded from FZ's testimony that the "shouting" that he implied was negative in tone was, in fact, anything more than what employees at PP had come to expect from the Applicant and which they did not perceive as improper.

FZ also alleged that the amount demanded in the seven-day letter he received was improper. It may be. However, there was not sufficient evidence to lay the calculations so demanded at the feet of the Applicant. Indeed, the evidence was that these figures were determined by another employee at the request of Stein and through data maintained by the Business Office, none of which was under the authority of the Applicant.

One of Ms. South's concerns was that the Applicant had not apparently heeded her warnings in June leading to further consumer complaints. As evidence of this assertion consumer #4, BB, gave evidence that in September of 2007 the Applicant initially supported the Business Office position that she was obligated to abide by her contract. Indeed, the evidence of OMVIC employee Andrew Barber was that he reviewed the consumer's documentation and advised Ms. Herreros he supported the dealer's position in this instance, based on the consumer's information that she wanted out of the sale contract as she had lost her employment. While the Applicant had informed OMVIC that PP would no longer retain damages on cancelled contracts, I find it reasonable to conclude this was meant for legitimate cancellations. Therefore, the decision of PP to demand damages for what was perceived as an illegitimate cancellation can not be considered evidence of dishonesty or a lack of integrity.

The consumer MS was the subject of the Notice of Further and Other Particulars of January 2008. The evidence was however, that this consumer was a friend of one of the salespeople, such that PP had gone beyond the usual sales service to attempt to locate a particular vehicle desired by MS. In doing so, it requested a deposit fee. When MS

refused to even view the vehicle, some pressure was exerted by the Applicant that he do so before the deposit was returned. No evidence was provided as to what PP was legally entitled to from these funds in the event the consumer failed to honour the commitment. It is not unreasonable that PP take the position some form of recognition of its efforts to locate the car requested be honoured. While there was no Bill of Sale, there was also no allegation presented that the Applicant had refused to return the deposit. Again, there is no finding from these facts that there was activity illustrating dishonesty or conduct that can be characterized as illegal.

The situation of consumer #6, AS, is more problematic. Clearly, this was a situation where the return of deposit funds was refused, absent a Bill of Sale. Such is prohibited by the Act and therefore illegal. However, the evidence of this trade was hearsay being provided by OMVIC employee, Mr. Senensky, and thus not subject to cross-examination or review. As well, the sale involved Mr. Nigro who had, again, failed to complete required proper paperwork. Moreover, once the nature of the transaction was detailed to the Applicant, the requested refund was provided. While there is evidence he was wrong to deny the consumer the refund in the first place, I do not find this incident sufficient to conclude there is "clear and cogent evidence" of past behaviour from which the Tribunal can reasonably conclude that he will not act within the requirements of section 10 of the Act.

The evidence regarding Consumer #7 was also through Mr. Senensky. There was no dispute that the consumer had been sold a vehicle with American mileage. Once this was discovered, the Applicant attempted to have PP refund the money owing, and the inordinate delay in doing so was not attributable to his behaviour – despite the testimony of OMVIC employee Senensky that he "assumed" the authority to issue any refund lay in the hands of the Applicant as General Manager.

The Tribunal was very sympathetic to evidence provided by consumer #8, FM, concerning the run-around he was given in attempting to have his vehicle repaired. However, again, it fell short of convincing the Tribunal of the Applicant's dishonesty or lack of integrity. Mr. Petitti was allegedly present when the Applicant disclosed the recorded accident history to the consumer. He was never questioned on this, despite his honesty in disclosing he was no friend to the Applicant. The consumer himself was not certain whether such information had been given him at the time of his sale, but was clear that the Applicant had disclosed some prior damage to his vehicle nonetheless. Stein's testimony was that the extent of the prior history was not documented and took time to determine. There was no testimony from any source that the Applicant had knowledge of a vehicle history that he attempted to hide from the consumer. Again, the evidence before the Tribunal was that it was only the Applicant who worked on behalf of the consumer to get PP to assist FM once the extent of the prior damage was known.

Consumer #9's assertions that the Applicant had shouted at his employee over his having promised the consumer a specific rate of financing were only part of the consumer's evidence. The other part was that the consumer had purchased an alternative vehicle and wanted to be let out of her signed Agreement to purchase from

PP. It was not clear from her evidence which came first. It was clear that before the Applicant was asked to intervene, the Business Office of the dealer had told her she was obligated to complete her contract. So too was it uncontradicted that the Applicant had advised her a lien could be placed on her property were she to renege on her contractual obligations. This is not illegal. It was also clear that, once the Applicant was made aware that the consumer had not been provided the finance rate she had initially agreed to, he arranged with Stein that she be refunded her deposit and released from the contract.

Finally, consumer #10's situation was provided by the OMVIC staff dealing with the complaint, and thus not subject to cross-examination. Nonetheless, it revealed a threat by the Applicant to the consumer who requested the return of deposit funds. The consumer believed his financing had not been approved in accordance with the Agreement. In fact, it had, and this was documented by PP. In retrospect it was discovered that the approval was predicated on a higher inflation of the trade-in vehicle than originally given at the time of the sale. This was not known to the consumer, however. Nor was it known to the Applicant whose information was that financing was available, and the consumer had purchased elsewhere. His so-called threats of potential legal ramifications were, therefore, nothing more than information, which, Stein verified, was valid as to what action PP would take on a consumer's breach of contract.

The Tribunal is not able to conclude that the Applicant's past conduct supports a reasonable belief he will not conduct his future business within the Act's requirements. He has been registered since 1992, during which time there is no suggestion he has been outside the industry. There have been no complaints against him during this time. In 2007 while employed by Stein – who, it was conceded, was not available, was preoccupied and distracted and whose business was soaring – a number of complaints arose. In 2008 the Applicant moved to a smaller dealership, where consumer complaints are handled by an administrative assistant. In 2008 the Applicant has not been the subject of any complaints.

The Tribunal concludes from its review that the complaints against the Applicant were not a result of the Applicant's lack of integrity or dishonesty, but rather due to his somewhat bombastic personality which, on the positive side, has also benefited his employer greatly. The complaints were also the result of his naive reliance on Stein to institute a consumer complaint process that would properly address the Registrar's concerns, and which Stein failed to do. In this reliance, the Applicant failed to address the concerns himself, and failed to reacquaint himself with his legal limitations. He is thus partially to blame for the resulting inadequate consumer service provided by PP.

No doubt the Applicant has learned from this process the legal obligations imposed upon him under the consumer protection mandate of the Act, and will work to moderate his mannerisms accordingly. Especially in situations of anxiety where a consumer is attempting to reposition his or herself and, perhaps, be released from a prior contractual obligation, there is a need for the registrant to provide information and proceed in a way that does not unduly harass or pressure the consumer. A big man with a big presence,

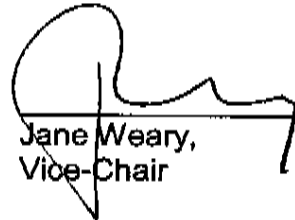
the Applicant understands the importance of presenting himself in a non-threatening manner. He has also come to understand the importance of his ability to actually deliver on the expectations his particular position of authority implies, failing which he needs to ensure that the limitations are clearly evidenced and known to the regulator/consumer. These are matters for him to consider, and are not within the purview of this Tribunal, which is limited in its review of this matter to the Section 10 requirements.

DECISION:

Given the findings of the Tribunal and its analysis of the situation, and the Applicant's repeated acknowledgment of remorse for the perception his strong presence and loud manner has at times created, and given the employer's ready acknowledgement of its repeated inadequacy in authorizing consumer refunds, it is the decision of the Tribunal that the evidence is insufficient for a conclusion that the Applicant is disentitled to continued registration under the Act.

Accordingly, by virtue of the authority provided to it in the Act, the Tribunal directs the Registrar to refrain from carrying out his Proposal with regard to the Applicant.

LICENCE APPEAL TRIBUNAL


Jane Weary,
Vice-Chair

Released: August 29, 2008

File name: 4543.mvda.pucci.doc

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

This decision, which is being released to the parties in this proceeding, will also be posted on the Licence Appeal Tribunal's website www.lat.gov.on.ca in approximately three weeks time. The decision will also be available on Quicklaw at a later date.