

**MOTOR VEHICLE SALES AUTHORITY OF BRITISH COLUMBIA**  
*(Previously known as the Motor Dealer Council of B.C.)*

**IN THE MATTER OF THE *MOTOR DEALER ACT* R.S.B.C. 1996 C. 316 AND  
THE *BUSINESS PRACTICES AND CONSUMER PROTECTION ACT* S.B.C. 2004 c. 2**

**RE:**

**LUCILLE SUZANNE SITOSKI and RODNEY SITOSKI**

**COMPLAINANTS**

**AND:**

**EAGLE RIDGE PONTIAC BUICK GMC LTD.**  
**Dealer Registration No. 8214**

**DEALER**

**DECISION OF THE REGISTRAR OF MOTOR DEALERS**

**Introduction**

1. On April 16, 2008, a hearing was held pursuant to Sections 5 and 6 of the *Motor Dealer Act* R.S.B.C. 1996 c. 316 (the “MDA”) and Sections 154, 155 and 164 of the *Business Practices and Consumer Protection Act* S.B.C. 2004 c. 2 (the “BPCPA”) regarding alleged deceptive and unconscionable acts or practices committed by Eagle Ridge Pontiac Buick GMC Ltd. Dealer No. 8214 (“Eagle Ridge”) on November 17, 2004, in its sale of a vehicle to Lucille and Rodney Sitoski (the “Sitoskis”). The Notice of Hearing (Exhibit 2) sets out the allegations, which I summarize here:

- (1) The Dealer asked for the consumers trust on the Bill of Sale numbers which were ambiguous about the trade in value of the first vehicle, and the retail value of the second vehicle, causing uncertainty and confusion with the consumer contrary to s. 4(3)(b)(vi) of the BPCPA - a deceptive act or practice.
- (2) The Dealer had through a series of ads in the Vancouver Province, advertised new 2004 Pontiac Sunfires at \$9,688, when the Bill of Sale reflected a retail price of \$18,025.00 contrary to s. 4(3)(b)(vi) of the BPCPA – a deceptive act or practice.
- (3) That on November 17, 2004, the Salesman identified as Dennis Madsen is alleged to have told the consumers “Trust me on the numbers, they are going to look a bit weird,” and that on November 17, 2004, the Salesman identified as Dennis Madsen entered a retail price of \$18,025 for the sale of this new Pontiac Sunfire, when all of the ads pertaining to this vehicle indicated a selling price of \$9,688 contrary to s. 8(3) of the BPCPA – an unconscionable act or practice.

2. Present at the hearing for Eagle Ridge were: (i) Adam Isfeld, who represented Eagle Ridge and spoke on its behalf; (ii) Jeff Hokanson – sales manager; (iii) Dan Thistlethwaite – salesperson; and (iv) Robert Strain – sales manager.
3. Present at the hearing for the Motor Vehicle Sales Authority of B.C. (the “VSA”) were Denis Savidan, Manager of Compliance and Investigations, and Bill Jost, Compliance Officer (Investigator).
4. The Sitoskis were also present at the hearing and provided evidence.

### **The Facts**

5. An Affidavit sworn by Bill Jost on March 25, 2008, with its attached exhibits was entered as Exhibit 1 (the “Affidavit”). It is clear that Eagle Ridge had reviewed the Affidavit prior to the hearing as its representative came prepared with questions put to Mr. Jost regarding the Affidavit and the attached Exhibits. Eagle Ridge also brought documents to the hearing which were entered as Exhibits. I have reviewed the Affidavit and its exhibits and the exhibits tendered by Eagle Ridge. I have also considered the given testimony. While I may not refer to all the evidence presented at the hearing, I have reviewed, considered and given all the evidence its due weight.

6. On June 23, 2004, Rodney Sitoski purchased a used 1993 Lincoln Mark VIII with 188,000 km (the “Lincoln”) from Eagle Ridge for \$6,900.00 plus documentation service and taxes. This amount was financed: Exhibit E to the Affidavit. The Sitoskis describes this car as a “lemon”: Exhibit A and G to the Affidavit and Lucille Sitoski’s testimony. I note that there is no pre-purchase inspection report provided by the Sitoskis and it does not appear the Sitoskis had the Lincoln mechanically inspected prior to their purchase.

7. Not wanting to keep the Lincoln, the Sitoskis attended Eagle Ridge on November 17, 2004, to purchase a new 2004 Pontiac Sunfire (the “Sunfire”). They were drawn by ads in the newspaper showing “With any old trade worth \$2000 you can buy...” a New Sunfire for \$9,688.00: Exhibit 3 and Exhibit L attached to the Affidavit. I would note that during this time period, the Motor Dealer Advertising Guidelines were not in effect, but the BPCPA was.

8. Ms. Sitoski says they dealt directly with the sales manager at the time, Dennis Madsen. She states that Dennis offered them \$4,000.00 as a trade-in on the Lincoln. Ms. Sitoski states that they agreed on purchasing the Sunfire that was in the showroom with a \$10,400.00 price tag. “We agreed to this.” Ms. Sitoski continues that Madsen informed them that “the numbers on the Bill of Sale would look a bit funny but trust me, they are all correct”: Exhibit M attached to the Affidavit. While in the business office, Ms. Sitoski says the numbers on the Bill of Sale were not explained to her, including the \$7,900.18 trade-in amount. She testified that Eagle Ridge’s representative just said “sign here, here, and here.” Eagle Ridge stated they hold their business managers extremely accountable and that it is Eagle Ridge’s policy to go through the numbers line-by-line with the customers.

9. The Sitoskis are under the belief that Eagle Ridge has manipulated the numbers on the Bill of Sale to charge them twice for the Lincoln buyout and that they only received \$600.00 for the Lincoln when they were offered \$4000.00. Eagle Ridge states that the numbers look the way they

do because of having to show the bank that there was equity in the transaction for financing purposes. During the investigation, Eagle Ridge provided a break down of the numbers including the \$7,900.18 trade-in value: Exhibit P and paragraph 22 of the Affidavit. A review of the Bill of Sale shows that the Sitoskis have misapprehended the numbers.

10. The Bill of Sale is attached as Exhibit M (page 23) to the Affidavit. It shows a retail price of \$18,025.00 and there is a rebate of \$-1,000.00 noted after the taxes area and before the total balance due. By law, a manufacturer's rebate must be deducted after taxes. This would bring the retail value of the vehicle to \$17,025.00, which is \$1.00 less than the advertised retail price stated in Exhibit 3. The retail price less trade-in allowance of \$7900.18 makes a price difference, as noted on the Bill of Sale, of \$10,124.82. This is again before the \$-1,000.00 rebate is deducted. After deducting the \$-1,000.00 rebate, the price for the Sunfire is then \$9,124.82 which is \$563.18 less than the advertised sale price of \$9688.00 "With any old trade worth \$2,000."

11. Added to the \$9,124.18 price is a documentation fee, an environmental tax, PST and GST, a lien registration amount and \$7,300.00 which Eagle Ridge had to pay to the bank in order to "buy-out" the Lincoln and remove the lien. This \$7,300 was added to the price of the vehicle as the Sitoskis were financing the whole transaction. In essence, the Sitoskis had rolled their debt for the Lincoln and the Sunfire into one transaction. The Bill of Sale reflects all this.

12. The trade-in amount of \$7,900.18 was confusing to the Sitoskis as they were expecting \$4,000.00 for the Lincoln. What also confused the Sitoskis was the corresponding financing agreement which showed a Net Trade-In allowance of \$600.18: Exhibit H. What that meant was the Sitoskis had \$600.18 free cash, after repaying the bank for the Lincoln in order to remove the lien, to apply towards the purchase of the Sunfire (\$7,900.18 trade-in allowance minus \$7,300.00 lien buy out.). This is no different than selling a home for \$400,000.00 and having to repay the bank \$395,000.00 to remove the mortgage, leaving only \$5,000.00 available to purchase another home.

13. Eagle Ridge stated the numbers on the Bill of Sale had to be done in this fashion to avoid what would appear to the bank as a negative equity transaction. If Eagle Ridge had placed \$9688.00 as the retail price of the vehicle, the bank would be led to believe that is all the Sunfire was worth. To the bank, the Sunfire would only be worth about half the \$18,241.26 requested loan, and probably would have declined the loan, as on paper the Sunfire was inadequate security. The actual retail value of the vehicle was placed on the Bill of Sale to reflect the true value of the Sunfire for loan purposes. Incentives and trade-in allowances are deducted afterwards to reflect the selling price. To someone in the industry, this is probably self-apparent, but not necessarily to a consumer and it was not clear to the Sitoskis.

14. While I find the numbers "add up" on the Bill of Sale, a review of the evidence shows that Eagle Ridge failed to provide the Sitoskis the full \$4,000.00 for the trade-in on the Lincoln. Exhibit P to the Affidavit shows that the Sitoskis were provided a trade-in value of \$2440.33 for the Lincoln. This is a difference of \$1559.67, an amount which Eagle Ridge kept. This amount should have been further deducted from the purchase price of the Sunfire which would have reduced the taxable amount to be paid. In total, the Sitoskis' were deprived of \$1778.02 (\$1559.67 + 14% (PST and GST)). I would note that the \$4,000.00 trade-in offer would seem a

reasonable amount for the “lemon” Lincoln given the noted average value for it in the Gold Book: Exhibit F of the Affidavit.

## **The Law**

### *Deceptive Act or Practice*

15. Section 4(3)(b)(vi) of the BPCPA states:

4 (1) In this Division:

"deceptive act or practice" means, in relation to a consumer transaction,

- (a) an oral, written, visual, descriptive or other representation by a supplier, or
- (b) any conduct by a supplier

that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor;

(3)(b) a representation by a supplier

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

16. Section 5 of the BPCPA prohibits deceptive acts or practices and s. 5(2) places the burden of proof on the supplier, Eagle Ridge, to show that the deceptive act or practice did not occur.

17. In *Rushak v. Henneken* (1991), 59 B.C.L.R. (2d) 250, 1991 CanLII 178 (C.A.), the B.C. Court of Appeal provided the following principles in the application of these provisions:

- (1) a deceptive act or practice need not be intentional, may be inadvertent and may arise even if the supplier has an honest belief in the accuracy of the information it relays;
- (2) a deceptive act is one “that tends to lead a person astray into making an error of judgment”;
- (3) the Act must be construed so as to protect not only alert potential customers, but also those who are not alert, are unsuspecting and are credulous; and
- (4) the Act imposes a high standard of candour on a supplier of goods.

18. In *The Consumers' Association of Canada et al. v. Coca-Cola Bottling Company et al* 2006 BCSC 863, additional reasons 2006 BCSC 1233 (B.C. Supreme Court), affirmed by 2007 BCCA 356 (B.C. Court of Appeal), Madam Justice Russell noted that the main consideration appears to be whether the deceptive act “tends to lead a person astray into making an error of judgment”. Madam Justice Russell also noted that to make out a claim for a deceptive act or practice, there needs to be something more than just the capability of misleading.

### *Unconscionable Act or Practice*

19. Section 8 of the BPCPA makes it clear that the individual factors identified in s. 8(3) must be reviewed as a whole. Justice Tysoe in *Bain v. The Empire Life Insurance Company* 2004 BCSC 1577 provided a framework for analyzing a claim of unconscionable conduct and made it clear that one must review the factors under s. 8(3), but that those factors are not determinative of the issue. Justice Tysoe said the guiding principle/test is to consider the whole transaction to see if it is unconscionable:

[72] The test was expressed in different terms in a subsequent decision of the B.C. Court of Appeal, *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166:

That single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded. (p. 177)

This test was recently cited by the B.C. Court of Appeal in *Ma v. MIV Therapeutics Inc.*, 2004 BCCA 483.

20. Justice Tysoe also approvingly cited the following caution:

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

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

21. Section 9 of the BPCPA prohibits unconscionable acts or practices and s. 9(2) places the burden of proof on the supplier, Eagle Ridge, to show that the unconscionable act or practice did not occur.

### **Analysis**

22. The evidence shows that Eagle Ridge was ambiguous as to the \$7,900.18 trade-in allowance noted on the Bill of Sale. The actual trade-in value of the Lincoln was buried within that amount. Eagle Ridge also did not fully and clearly explain the Bill of Sale to the Sitoskis. By doing this, Eagle Ridge made it look like the Sitoskis were getting a higher trade-in value for the Lincoln than the agreed \$4000.00, camouflaging the fact that they only received \$2440.33. This is a material fact going to the heart of the transaction and Eagle Ridge's conduct led the Sitoskis into making an error of judgment. They unknowingly accepted a lesser trade-in amount for the Lincoln than bargained for. I also find that Eagle Ridge has not provided sufficient evidence to discharge its burden of proof that this was not a deceptive act or practice. I find Eagle Ridge's conduct was a deceptive act and allegation number one has been made out.

23. There is no evidence that the advertisements led the Sitoskis into making an error of judgment: *The Consumers' Association of Canada et al.* They went to Eagle Ridge to purchase a new Sunfire at the advertised sale price of \$9688.00. That is what they did and the Bill of Sale shows they actually paid less than \$9688.00. Allegation number two has not been made out.

24. Applying the factors under s.8(3) of the BPCPA to the evidence indicates:

- (1) there was pressure by Eagle Ridge on Lucille Sitoski to sign the Bill of Sale – s. 8(3)(a) of the BPCPA;
- (2) Eagle Ridge took advantage of the Sitoskis' inability to understand the numbers - s. 8(3)(b) of the BPCPA;
- (3) There is no evidence that at the time of the transaction the price paid was outside the industry norm for a similar vehicle – s.8(3)(c) of the BPCPA;
- (4) There is no evidence that at the time of the transaction the total price of the vehicle could not be paid – s. 8(3)(d) of the BPCPA. In fact, the Sitoskis have been paying for three years now; and
- (5) There is no evidence that the terms of the agreement were so harsh or adverse to the consumer as to be inequitable – s.8(3)(e) of the BPCPA.

25. I also consider that Eagle Ridge hid within the \$7,900.18, the amount they were actually giving for the Lincoln which was less than what was bargained for and that the Bill of Sale was not fully and clearly explained to the Sitoskis. I also consider the conduct of Madsen stating to the Sitoskis to “trust him on the numbers.” I find that in consideration of the whole transaction, Eagle Ridge's conduct amounts to an unconscionable act as this is conduct “sufficiently divergent from community standards of commercial morality”; it falls far short of the proper business practices consumers and the motor vehicle sales industry expect of a Registered Motor Dealer. I also find that Eagle Ridge has not provided sufficient evidence to discharge its burden of proof that this was not an unconscionable act or practice. Allegation number three has been made out in so far as it alleges an unconscionable act.

26. Pursuant to Section 155 of the BPCPA, I may make an order to remedy a breach of that Act. I therefore make the following:

**Compliance Order:**

- (1) Eagle Ridge is to refrain from committing deceptive and unconscionable acts or practices and to abide by the *Business Practices and Consumer Protection Act* S.B.C. 2004 c.2 and its regulations;
- (2) Eagle Ridge is specifically directed to detail in writing and explain to consumers all incentives, trade-ins and/or rebates being offered such as it did in Exhibit P to the Affidavit;
- (3) Within 45 days of this decision, Eagle Ridge shall pay to the Sitoskis \$1778.02, being the amount of the Lincoln trade-in value plus tax benefit, which it failed to credit to the Sitoskis; and

- (4) Eagle Ridge shall reimburse the Motor Vehicle Sales Authority of British Columbia for the investigation and hearing costs related to this matter. An invoice of those costs will be provided to Eagle Ridge.

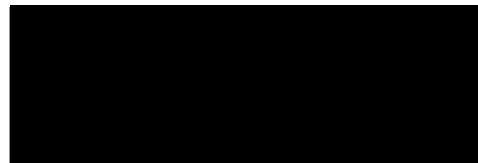
In accordance with s. 157 of the BPCPA this Compliance Order may be filed in the B.C. Supreme Court and if so filed is an enforceable order of that Court.

27. Pursuant to Sub-section 4(6) of the MDA I also make the following a condition of Eagle Ridge's registration: "The Motor Dealer is to detail and provide to consumers a clear written explanation of all incentives, trade-ins and/or rebates being offered." See Exhibit P to the Affidavit as an example. This condition may be reviewed in one year's time.

28. Under sections 164 and 165 of the BPCPA I may impose an administrative penalty of up to \$50,000.00 on a dealer who has contravened the BPCPA. I have considered the various factors found in s. 164(2) of the BPCPA, the totality of this case and considering Eagle Ridge profited from its unconscionable act in the way that it did, it is my opinion that an administrative penalty of \$10,000.00 is appropriate. Section 167 of the BPCPA requires the administrative penalty be paid within 30 days of service of a Notice of Penalty and payment is to be remitted to the office of the VSA at # 150 – 6400 Roberts Street Burnaby, B.C. V5G 4C9. A Notice of Penalty may be filed in the B.C. Provincial or Supreme Court and if so filed is enforceable as an order of the respective court: s. 168(2) of the BPCPA.

29. Pursuant to Sections 155(7), 166(2) and 181 of the BPCPA, a request can be made for this determination to be reconsidered. This can be done by writing the VSA office at #150 - 6400 Roberts Street, Burnaby, B.C. V5G 4C9, attn: Denis Savidan, requesting reconsideration of the determination and outlining the error or mistake that is believed to have been made, and/or, indicating what new and previously unavailable evidence is to be provided.

Dated: May 5, 2008.



Ian Christman B.A., LL.B.