

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:

SARTAJ POWAR

COMPLAINANT

AND:

FLAG CHEVROLET-CHEVROLET TRUCK LTD.
(Dealer No. 5401)

MOTOR DEALER

AND:

K.S. AUTO MARKET LTD.
(Dealer No. 9987)

MOTOR DEALER

DECISION OF THE REGISTRAR OF MOTOR DEALERS

1. On July 3, 2008, a hearing was held before me whereby it was alleged that Flag Chevrolet-Chevrolet Truck Ltd. Dealer No. 5401 (“Flag”) and K.S. Auto Market Ltd. Dealer No. 9987 (“KS”) each committed a deceptive act or practice contrary to section 5(1) of the *Business Practices and Consumer Protection Act* S.B.C. 2004 c. 2 (the “*BPCPA*”) and also breached section 23(e) of the *Motor Dealer Act Regulation* B.C. Reg. 447/78 (the “*Regulation*”). The Notice of Hearing to KS was entered as Exhibit 1 and the Notice of Hearing to Flag was entered as Exhibit 2. Those Notices detail the allegations against each dealer being that each dealer represented an incorrect odometer reading for a 2000 Mercedes CLK 430 with VIN WDBLJ70G3YF146822 (the “Mercedes”) causing Mr. Sartaj Powar to make an error in judgment. It is also alleged that Flag failed to declare which Out-Of-Province (OOP) jurisdiction the Mercedes had previously been registered in, contrary to section 22(c) of the *Regulation*. This hearing was originally set for May 21, 2008, but adjourned to July 3, 2008, to accommodate the schedule of Flag’s legal counsel.

2. Present at the hearing for Flag was Jared Brandon (salesperson), Desi Nicolas (Business Manager) and Colin Clark (General Sales Manager). Flag was represented by legal counsel, Ms. Seema Lal of Shapiro Hankinson & Knutson Law Corporation.

3. Ken Shalinsky, dealer principal of KS, appeared for KS.
4. The complainant Sartaj Powar also attended the hearing.
5. Holly Childs, a Compliance Officer with the Motor Vehicle Sales Authority of British Columbia (the "VSA") conducted the investigation into this matter. Entered as Exhibit 3 at the hearing was the Affidavit of Holly Childs, sworn on May 2, 2008. Attached as exhibits to the Affidavit are various documents and written statements for my consideration. The Affidavit was provided to Flag and KS at the same time as the Notice of Hearing. There was no objection to the Affidavit being entered. Holly Childs was present at the hearing and made available for questioning on her affidavit.
6. While I may not comment on all the oral and written evidence provided during this hearing, I have reviewed all that evidence and given it all the appropriate consideration and weight.

FACTS

7. The extraordinary part of this case is that the Mercedes had its odometer replaced on two occasions prior to being sold to Mr. Powar. It is the practice of Mercedes to set the odometer to zero after each replacement such that one must somehow record past kilometers traveled in order to state the true kilometers traveled by the Mercedes. Another problem has been the approach taken by various persons in recording the true mileage on forms such as purchase agreements, the ICBC Transfer/Tax Form APV9T or repair invoices. This is important as under B.C. law, a motor dealer must declare "to the best of his knowledge and belief, whether the odometer of the motor vehicle accurately records the true distance travelled by the motor vehicle" section 23(e) of the *Regulation*. It was conceded by all that the true kilometrage of the Mercedes may not ever been known.
8. The evidence indicates that the Mercedes may have had as much as 175,000 km on it at the time of sale. A review of the history and recorded odometer readings shows:

Date	Description	Odometer reading	Mercedes Kilometers
29July02	Odometer replaced by Silver Star of Montreal (pages 74-75 of Exhibits). Odometer reset to zero.	55,317	55,317
27Oct04	KS purchases from DaimlerChrysler Canada via the	40,230	95,547

Adesa Auction (pages 22 and 57 of Exhibits). Declared true kilometers 95,230.

24Nov04	Hundal purchases from KS. KS says verbal declaration of true kilometers to Hundal.	40,500	95,817
09Feb05	Odometer replaced again by Mercedes of North Vancouver (pages 70-71 of Exhibits states the odometer was <u>reading</u> 99,354 km). Odometer reset to zero.	99,354	154,671 [55,317 (odometer 1) + 99,354 (odometer 2)]
29Apr06	Hundal trades in to BMW Store (page 25 of Exhibits – declared to be 115,000 km).	Actual?	Actual?
07Jun06	BMW Store sells to S232 Holdings Ltd. with a verbal declaration that the true kilometrage was current plus 99,000 km (due to odometer replacement) to equal 115,000 (page 26 ad 28 of Exhibits)	16,000 115,000 (declared) – 99,000 (declared odometer replacement)	170,671
17Aug06	S232 Holdings Ltd. sells to Flag via Adesa Auction. Declaration on Adesa form shows odometer read 19,228 and that odometer was replaced at 99,000 to equal 118,228 km. No mention of first odometer replacement.	19,228	173,899 [55,317 (odometer 1) + 99,354 (odometer 2) + 19,228 (Adesa declaration)]
27Jan07	Flag initially declares to Powar 118,928 which means an additional 700 km since the 118,228 km at Adesa (page 29 of Exhibits – dated 2006 incorrectly)	19,928	174,599

Sale: KS to Hundal

9. If I accept all the above evidence, that would mean that from the period November 24, 2004, to February 9, 2005, the Mercedes travelled 58,584 kilometers in four months. I find this hard to fathom. I believe the Mercedes Benz dealer in North Vancouver erred in reporting the odometer reading when it replaced the second odometer or the odometer was otherwise providing a faulty reading.

10. From the evidence it would appear that the BMW store was informed by Mr. Hundal that the odometer was replaced when it showed 99,000 kilometers: page 25 of the Exhibits. This would be consistent with the original odometer reading of 55,317 plus the 40,230 showing as of KS's sale to Hundal, plus approximately 3,453 additional kilometers placed on the Mercedes during the four months he possessed it. This seems more realistic.

Sale: Flag to Powar

11. A purchase agreement dated January 27, 2007, was drawn up between Powar and Flag. That purchase agreement shows 118,928 listed as the kilometers on the Mercedes. Mr. Powar states, and this is not challenged, that he asked Mr. Brandon, the salesperson, to determine the true kilometers of the Mercedes as the reading of about 19,000 km on the Mercedes' odometer did not correspond with the declared 118,928 km. The following day a new purchase agreement was made showing 74,776 km and Mr. Powar has initialed the declaration indicating the odometer does not reflect the true mileage of the Mercedes. Mr Powar says he initialed this as he understood that the 74,776 noted on the purchase agreement did not correspond to the 19,000 kilometers noted on the Mercedes odometer. Ms. Desi Nicolas could not explain how the 74,776 figure got onto the purchase agreement and said it was clearly an error.

12. Evidence was presented to explain this 74,776 figure. It was suggested that the actual odometer reading of about 19,000 km was added to the original odometer reading of 55,317 – which would be very close to 74,776. The inference to be drawn is that Flag was aware of the first odometer reading and replacement. That being so, I find that they would not have got the kilometrage correct in any regard due to the error by Mercedes of North Vancouver in recording the kilometrage when the odometer was replaced the second time. The evidence is clear that the true kilometrage of the Mercedes exceeds the 74,776 represented by Flag. What is important in this case, is that Flag did make a representation as to the true kilometrage of the Mercedes. The question will be is that representation a deceptive act or practice under these facts?

13. A motor dealer is also required to declare if the vehicle was registered in another jurisdiction, and if so, which one. The purchase agreement of January 28, 2007, says the Mercedes was registered outside of B.C and as for jurisdiction it states O.O.P., meaning out of province (testimony of Mr. Clark). Mr. Clark, the acting sales manager at the time acknowledged he made that notation and that it is a discrepancy, but that was not intentional. The vehicle was

represented to Mr. Powar as having come from the U.S.A. (testimony of Jared Brandon), which is incorrect. The vehicle had been registered in Quebec and Ontario with no indication of having been registered in the USA: Carproof report dated December 17, 2007,(pages 58-64 of exhibits). A Carfax report obtained from Flag's file and indicating Desi Nicolas did the search (her email is on the report) shows Flag was aware the vehicle was first registered in Quebec, then went to Ontario before coming to B.C., with no indication it was ever in the USA (pages 33-34 of the exhibits).

THE LAW

14. Section 5(1) of the BPCPA prohibits a supplier of goods conducting a consumer transaction from committing a deceptive act or practice. The definition of supplier applies to Flag and KS. Under section 4(3) of the BPCPA, the B.C. Legislature has deemed certain conduct to be deceptive acts or practices. The Notice of Hearing identifies two such sections in issue here which state:

4(3) Without limiting subsection (1), one or more of the following constitutes a deceptive act or practice:

(a) a representation by a supplier that goods or services

(iii) have a particular prior history or usage that they do not have, including a representation that they are new if they are not,

(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,

15. The case law provides guidance in the application of these provisions. In *Rushak v. Henneken Auto Sales & Service* (1991), 59 B.C.L.R. (2d) 250, (C.A.), (BC Court of Appeal) the following principles emerge:

- a. 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;
- b. a deceptive act is one "that tends to lead a person astray into making an error of judgment;"

- c. 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
- d. the Act imposes a high standard of candour on a supplier of goods.

16. *Henneken* was recently applied 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); leave to appeal to the Supreme Court of Canada refused (December 20, 2007, S.C.C. File No. 32248, 2007 CanLII 66731).

17. Under Section 5(2) of the BPCPA, the onus is placed on the dealer to show that the alleged deceptive act or practice did not occur:

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

18. A finding that a dealer has committed a deceptive act or practice is grounds to consider whether to place a condition on, suspend, or cancel a motor dealers registration under section 8.1(4)(b) of the MDA:

(b) contravention of a prescribed provision of Part 2 or 5 of the *Business Practices and Consumer Protection Act* by a person is grounds for the registrar or director, as the case may be, to determine that it is not in the public interest for the person to be registered or to continue to be registered under this Act and, without limiting paragraph (a) of this subsection, the registrar or director, as the case may be, may exercise the rights and powers of the registrar under Part 1 of this Act that may be exercised in the event of that determination...

DISCUSSION

(A) KS's Conduct

19. It is clear from the evidence that KS knew the Mercedes odometer had been replaced at 55,000 km and that the true kilometrage was 95,230 km when it bought the Mercedes through Adesa: (page 22, Exhibit F to the Affidavit). The purchase agreement between KS and Hundal shows kilometers on delivery as 40,500 and the dealer's declaration that the odometer accurately reflects the true distance traveled has not been crossed out or otherwise qualified. On its face, it is a written representation which may have the capability of misleading Hundal about the prior history of the Mercedes. This would be captured by sections 4(1) and 4(3)(a)(iii) of the BPCPA,

which is prohibited conduct under section 5(1) of that Act. The burden is on KS to prove that this conduct was not a deceptive act.

20. Ken Shalinsky stated that Hundal was verbally told that the odometer was replaced at 55,000 km. Mr. Shalinsky notes the odometer was replaced a second time while Hundal owned the Mercedes and it was reported that the odometer read 99,354 km at the time of replacement. I have already stated that I believe this was inaccurate and accept that Hundal reported the then known true kilometers of the Mercedes to the dealer doing the odometer repair. As Mr. Hundal provided no evidence contrary to this, I accept that it is more likely than not that KS verbally qualified its written representation of the kilometrage to Hundal. As such, I do not find that KS committed a deceptive act or practice.

21. I would note that there was no other evidence presented that would have shown KS properly qualified its written representation about the odometer. If that had been the case, I would have found that KS committed a deceptive act, as defined by the BPCPA and applied by the courts, and I would have had to consider the appropriate remedy under section 8.1 of the MDA – to cancel, suspend or place a condition on KS’s registration. Given the reverse onus provision of the BPCPA, it would be prudent for KS’s own protection to document in writing all its qualifications regarding its sales, have consumers sign those qualifications and keep a copy on file.

(B) Flag’s Conduct

22. It is clear from the evidence that knowing the true kilometrage of the Mercedes was important to Mr. Powar and affected his decision to purchase the Mercedes. He asked Jared Brandon to determine the true kilometrage of the Mercedes and the evidence shows the sale was delayed by one day for that purpose. The purchase agreement shows Flag represented the Mercedes as having 74,776 true kilometers. There is no evidence that this was qualified. While knowing the true kilometrage would be almost impossible at this point, everyone agreed that the Mercedes certainly had more than 74,776 km on it at the time it was sold to Mr. Powar. While Mr. Powar did initial the dealer’s declaration that the odometer does not accurately record the true distance traveled by the Mercedes, this is because the Mercedes’ odometer showed just over 19,000 km which is different than the 74,776 km on the purchase agreement. I would also note

that 74,776 km would be contrary to the evidence in the hands of Flag indicating the Mercedes had at least 118,928 km.

23. Ms. Desi Nicolas says the 74,776 km was an error she missed and does not know how it got on the purchase agreement. She relies on what the sales department provides her. Mr. Clark said he does not have the time to do the research Holly Childs did to ascertain the true kilometrage of the Mercedes. This may be the case; however, if Flag is not going to put in the requisite time, it must then properly qualify its representation of the Mercedes kilometrage and not leave the impression that the 74,776 was the true kilometrage. Mr. Powar's evidence is that he would not have purchased the Mercedes if he had know the kilometrage was as high as noted in paragraph eight (8) above.

24. Mr. Jared Brandon has admitted to having told Mr. Powar the Mercedes was from the U.S.A. Mr. Brandon truly believed that to be the case. Mr. Clark had placed a notation that the vehicle was O.O.P "out-of-province" which he differentiates from an out-of-country declaration. However, this differentiation may not be known to a consumer, as a vehicle from Washington State is as much out-of-province as a vehicle from Alberta. Mr. Powar clearly did not know the difference and said he understood the vehicle was from the U.S.A. Mr. Powar said he would not have purchased the Mercedes had he known it was from back east out of concern for rust arising from road salting.

25. While inadvertent, Flag has represented the Mercedes as having 74,776 true kilometers at the time of purchase which affected Mr. Powars decision to purchase the vehicle. While Jared Brandon honestly believed the Mercedes was from the U.S.A., it was an incorrect representation that affected Mr. Powars decision to purchase the Mercedes. I find that both these representations satisfy section 4(3)(a)(iii) and are deemed to be deceptive acts and they led Mr. Powar into making an error of judgment.

REMEDY

(a) Compliance Order

26. Under section 155 of the BPCPA, I may make a compliance order to remedy a breach of that Act. What is an appropriate remedy will be based on the facts of each case. I am satisfied that in this case, Mr. Powar would not have purchased the Mercedes had he known all the facts. There is no evidence as to the actual value of the Mercedes if its true origin and its true kilometers had

been known. Therefore there is no evidence of the Mercedes devaluation in order to compensate Mr. Powar with a particular monetary award: see *Parsons v. Zagrodzki* 2005 BCPC 384 (B.C. Prov. Ct J.) and the cases cited therein. It is therefore my opinion that the appropriate remedy would be to have the deal unwound and the purchase price refunded to Mr. Powar.

27. I recognize that Mr. Powar has had the Mercedes for sometime and has placed additional kilometers on the vehicle. I also note that Mr. Powar accepted some risk in purchasing the vehicle which he believed to be from the U.S.A. There is no evidence that he asked if it was from the North Eastern U.S.A., where similar salting and rust problems occur as in Canada. He did know it was from out of province. I also must recognize that Mr. Powar agreed to take some risk knowing the odometer had been changed on the Mercedes. While I would not generally allow for a deduction for kilometrage where a deceptive act by a dealer has caused a consumer to make an error of judgment, the facts of this particular case suggest that the consumer agreed to take some risk when purchasing the Mercedes – he was not entirely misled by the facts. I find it would be just that Flag be entitled to deduct from the refund price .10¢ per each kilometer that Mr. Powar has put on the Mercedes. This figure was arrived at by comparing the Black Book value for an average Mercedes of this type in January 2007 and in 2008 and noting the depreciation which Black Book bases on an average of 24,000 km per year travelled. I would note the Black Book shows that this particular model of Mercedes holds its value well.

28. I therefore make the following compliance order:

- (a) Flag is to abide by the *Business Practices and Consumer Protection Act*;
- (b) Flag is to ensure any representations it makes are properly qualified so as not to mislead consumers;
- (c) Flag is to unwind the deal, take back the Mercedes and refund the purchase price to Mr. Powar less a deduction of .10¢ for every kilometer Mr. Powar has put on the Mercedes. Mr. Powar will be required to sign over ownership to Flag upon receiving his refund; and
- (d) Flag is to reimburse the VSA for its investigation and hearing costs. An invoice will be provided as to the amount.

(b) Administrative Penalty

29. Under section 164 of the BPCPA I may apply an Administrative Penalty for an infraction of that Act. In doing so, I must take into consideration the factors set out in section 164(2) of the

BPCPA and consider the whole of the case. The maximum administrative penalty that may be applied to a corporation is \$50,000.00.

30. I note the following factors regarding Flag:

- (a) There has been no past enforcement action against Flag of a similar nature. Any past enforcement action has been in relation to advertising or signage and dealt with by Flag.
- (b) This contravention was not a serious one such as endangering a consumers life.
- (c) The harm to the consumer was monetary and inconvenience.
- (d) This is not a repeat of past conduct and does not appear to be an ongoing concern with this dealer.
- (e) This was not a deliberate deceptive act – it appears to be an error due to poor communications.
- (f) Flag did benefit from the sale of the Mercedes.
- (g) Flag has attempted to assist Mr. Powar by paying for certain repairs after Mr. Powar purchased the Mercedes.

31. I also note that Flag has been very forthright and cooperative throughout. Mr. Clark and Ms. Nicolas acknowledged errors were made and that salespeople can make errors. At the hearing Mr. Powar noted he had no ill feelings about Flag and that he was treated well by the dealer and its staff. Mr. Powar just feels that Flag should be responsible for the errors it made. In considering all these factors, I believe that Flag understands its obligations and will take steps to learn from this matter and address its internal procedures to try and eliminate such incidents in the future. I therefore believe an Administrative Penalty of \$1,000.00 is appropriate. This amount is less than the \$2,000.00 levied against Barnes Weaton in an incident of a similar nature: Registrar Smith, Hearing date of December 20, 2007. The difference in this case is Flag's recognition that errors occurred, corrective measures should be undertaken, and its attempts to assist Mr. Powar.

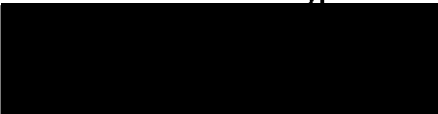

32. This case exemplifies the errors that can occur when salespersons make representations without knowing all the facts, and how information can be lost and/or misrepresented when many people deal with the same consumer during a transaction.

(c) Breach of the Regulation

33. I believe the compliance order and administrative penalty is sufficient to act as deterrence for Flag and that it will, in the future, ensure it properly makes its statutory declarations. I do not believe it necessary to consider whether a condition on Flag's registration or to suspend or cancel its registration is necessary.

34. I dismiss the allegations against KS with a warning that it must ensure it makes proper statutory declarations. Another failure to do so would require the Registrar to consider placing a condition on its registration or to suspend or cancel its registration.

Dated: September 2, 2008

Ian Christman B.A., LL.B.