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:

DOUGLAS PERKINS
COMPLAINANT

AND:

MIDTOWN R.V. LTD.
(Dealer No. 5114)
MOTOR DEALER

AND:

GEORGE K. STAYBERG
(Salesperon License No. 102723)
SALESPERSON

AND:

RANDY WILLIAM RUDNYK
(Salesperson License No. 105613)
SALESPERSON

DECISION OF THE REGISTRAR OF MOTOR DEALERS

Introduction

1. On November 17, 2008 a hearing was held before me in Kelowna, British Columbia, where it was alleged that Midtown R.V. Ltd., Dealer Number 5114 ("Midtown"), George Stayberg, Salesperson Licence Number 102723, and Randy Rudnyk, Salesperson Licence Number 105613, committed a deceptive act or practice on or about April 28, 2007 at or near Penticton, British Columbia, by failing to disclose a material fact to Douglas Perkins contrary to section 5(1) of the *Business Practices and Consumer Protection Act* S.B.C. 2004 c. 2 (the "BPCPA"). Specifically, they failed to disclose that a 1993 Safari Continental motor home with VIN 4CD6EK28N2900378 (the "Safari"), which Perkins purchased from Midtown, was a rebuilt

vehicle from the United States. The details are noted in the Notice of Hearing which was entered as Exhibit 1 at the hearing.

2. The Notice of Hearing also alleges that the above conduct is contrary to the *Motor Dealer Act* R.S.B.C. 1996 c. 316. A failure to declare to a consumer that a used motor vehicle was from out-of-province, or had damage exceeding $2,000 when it does, is contrary to the *Motor Dealer Act Regulation* B.C. Reg. 447/78 (the "Regulation").

3. Chris Hoy was the compliance officer from the Motor Vehicle Sales Authority (the "VSA") who investigated this matter. An affidavit from Mr. Hoy with attached exhibits was entered as Exhibit 2 at the hearing. In those exhibits is a written statement from Mr. Perkins and the documentary evidence Mr. Perkins supplied. Mr. Perkins did not attend the hearing. Mr. Hoy was present at the hearing and provided additional evidence and answered questions from Mr. Stayberg. Mr. Stayberg provided oral testimony and documentary evidence as well. While I may not comment on all the evidence provided, I have reviewed and considered all the evidence and given it its due weight.

4. My jurisdiction is in reviewing the conduct of registered motor dealers and licensed salespersons. I have no jurisdiction over the conduct of a private individual.

Basic Facts

5. Douglas Perkins responded to an advertisement on Craig's list for the Safari. The Safari was owned by a Mr. Henk Dorst who was selling it privately. Mr. Dorst was selling the Safari and wished to apply the proceeds of the sale towards the purchase of a 2000 Holiday Rambler motor home from Midtown. In order to save on the tax Mr. Dorst would have to pay on the Rambler, he arranged and Midtown agreed to have the private sale between Dorst and Perkins of the Safari go through Midtown and appear as a trade-in on the Rambler. The trade-in would reduce the taxes payable on the Rambler. Otherwise, Mr. Dorst would have received a payment for the Safari from Perkins, who would have to pay taxes on that sale, and then pay taxes on the full price of the Rambler using the proceeds of the Safari sale. Mr. Stayberg, who is the dealer principal of Midtown, admitted to knowing this arrangement was to avoid tax: Exhibits F and K, which are documents and statements provided to the VSA by Mr. Perkins, and the evidence of Mr. Stayberg and that of Chris Hoy.

6. Mr. Dorst is not a registered motor dealer or a licensed salesperson.

7. Page 2 of the Exhibits is the purchase agreement showing Perkins purchasing the Safari from Midtown on April 28, 2007. There are no statutory declarations made by Midtown. Page 4 of the Exhibits is the Transfer Tax Form showing ownership of the Safari going to Perkins from Midtown and the Autoplan agents date stamp shows April 29, 2007. Again, there are no statutory declarations made by Midtown on that form. Randy Rudnyk stated he completed both on behalf of Midtown. On page 5 is a copy of the Vehicle Registration for the Safari showing Mr. Perkins as the owner. It also notes the vehicle is a "Foreign Import."

8. Page 19 (Exhibit H) is an unsigned purchase agreement dated April 18 showing Mr. Dorst buying the Rambler and receiving a $49,900 credit for his trade-in. Page 12 of the Affidavit Exhibits is the Transfer Tax Form showing Mr. Dorst transferring ownership of the Safari to Midtown. The Autoplan agent date stamp shows April 28, 2007. Mr. Randy Rudnyk has signed that form on behalf of Midtown, the purchaser. There are no declarations made by Mr. Dorst.

9. In Mr. Perkins statement (Exhibit A) he says:

> No indication was given on the transfer/tax form that the vehicle had been registered outside of BC, or that there was any damage to the vehicle over $2,000.00. Unfortunately, at the time of purchase I did not check the mileage against the sales agreement or ask proof about out of province or damage.

10. This year, Mr. Perkins went to consign the Safari with Wheels West RV Ltd. Wheels West wanted a history check done on the Safari and that is when Mr. Perkins ran an AutoCheck report on July 14, 2008. There, it is noted that the Safari was branded salvage in 1995 by the State of Alabama. In 1998, the Safari was branded a rebuilt by Alabama. There was a three year lapse between the salvage title and rebuilt title. There is nothing in the evidence to suggest Wheels West was able to see damage to the Safari. Mr. Perkins has had the vehicle for just over one year, and has not noted any observable damage to the Safari.

11. Mr. Stayberg testified that in some States, they title a vehicle as salvage where it has been stolen and the consumer paid out by the insurance company – a total loss. If it is subsequently recovered, the vehicle may be titled a rebuilt so that it may be resold. Mr. Denis Savidan, Manager of Compliance and Investigations with the VSA, also testified that was the case for some American States. Neither Mr. Stayberg nor Mr. Savidan could recall if Alabama was such a state. I would note the following definitions of salvage and rebuilt in the Autocheck report includes:

Salvage:

A salvage vehicle is a vehicle...declared a total loss by the insurer; declared a total loss by reason of theft...

Rebuilt:

The vehicle was a salvaged vehicle that was refurbished with new or used parts. An affidavit of repair from the rebuilder or individual making repairs, stating what repairs were made to the vehicle and that the vehicle is now rebuilt and road operable, may be required to obtain a rebuilt/rebuildable title. These vehicles must also pass a safety inspection before being allowed back on the road.

12. It is therefore possible that the Safari had been stolen and recovered some three years later. We do not know. Also, neither the AutoCheck report (pages 6-9 of the exhibits) nor the CarFax report obtained by the VSA (Exhibit D) provide any idea of the actual damage, if any, or the amount of repairs, if any, made to the Safari. Finally it is to be noted that the Safari was branded as rebuilt ten years ago.

13. Mr. Stayberg provided a letter dated September 19, 2008 which was entered as Exhibit 3. That letter informs Mr. Perkins that Midtown would purchase the Safari back from him at the current wholesale value found in the N.A.D.A. (National Automobile Dealers Association) Recreational Vehicle Appraisal Guide. Mr. Stayberg asked him to come to Midtown with the Safari for an appraisal. Mr. Stayberg states Mr. Perkins has not responded to the offer.

14. Mr. Stayberg says a representative of Midtown never spoke with Mr. Perkins about the sale of the Safari. Mr. Dorst was selling the Safari and Midtown just did some paperwork. He now realizes he committed "administrative stupidity"; but that is all. Neither he nor Midtown has ever made any representations to Mr. Perkins about the Safari.

15. The evidence provided by Mr. Perkins confirms that he dealt with Mr. Dorst and did not discuss this sale with a representative from Midtown. Also, his evidence notes that the Safari was located in the Lower Mainland and he never travelled to Midtown in Penticton, B.C.

16. I would note that none of the above facts are in controversy.

The Law

17. 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 Midtown, Mr. Stayberg and Mr. Rudnyk. 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 the following section:

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

18. 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:

(i) 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;

(ii) a deceptive act is one "that tends to lead a person astray into making an error of judgment;"

(iii) the Act must be construed so as to protect not only alert potential customers, but also those who are not alert, are unsuspicious and are credulous; and

(iv) the Act imposes a high standard of candour on a supplier of goods.

19. *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).

20. Under section 5(2) of the BPCPA, the onus is placed on Midtown, Mr. Stayberg and Mr. Rudnyk 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.

21. The statutory declarations of material facts a motor dealer must make under section 23 of the Regulation, such as damage over $2,000.00 and a vehicle being previously from outside of B.C., has been found to place a positive duty on a motor dealer to make its own inquiries about those facts, and not rely on the representations of others to provide that information: *Motley v. Regency Chrysler* 2002 BCSC 1885 (B.C. Supreme Court).

22. A finding that a dealer has committed a deceptive act or practice contrary to the BPCPA is grounds to consider whether to place a condition on, suspend, or cancel a motor dealers registration or a salesperson licence 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

Preliminary Issue – Midtown's ownership of the Safari

23. Midtown raised the argument that it never was the owner of the Safari, and Mr. Dorst was at all times the true owner. In reviewing the evidence it is clear that Mr. Dorst transferred ownership of the Safari to Midtown: Transfer/tax form page 12 of the Exhibits. The date stamp on that form from the Autoplan agent is April 28, 2007. Midtown in turn transferred ownership of the Safari to Mr. Perkins: Transfer/tax form page 4 of the Exhibits. The date stamp on that form from the Autoplan agent is April 29, 2007. Subsequent to the hearing, Midtown provided copies of proof of its remittance of provincial sales tax and the goods and services tax regarding its sale of the Safari to Mr. Perkins. While ownership may have been for a day, or even less than a day, Midtown did own the Safari before it transferred ownership to Mr. Perkins. As such, Midtown was obligated to make its statutory declarations to Mr. Perkins.

I. Motor Dealer Act Regulation

(a) Failure to disclose the rebuilt status

24. Section 23 of the Regulation does not require a motor dealer to disclose that a vehicle is rebuilt *per se*. That section requires disclosure of damage over $2,000.00 on a used vehicle or

when damage exceeds 20% of the value of the vehicle if it is new. There has been no failure to disclose the rebuilt status under the Regulation.

(b) Failure to disclose damage over $2000.00

25. Section 23 places a positive duty on a motor dealer to "the best of his knowledge and belief" disclose damage over $2,000.00 on a used vehicle. That duty is not met where a motor dealer relies on others for that information and does not take its own steps to ascertain damage: *Motley v. Regency Chrysler*. The court in *Motley* stated that a dealer must take reasonable steps in making its own inquiries.

26. I have reviewed both the Autocheck report and the Carfax report placed in evidence. Neither indicates that there was damage to the vehicle nor provides a dollar amount. It has been assumed here that because the salvage status and then rebuilt status have been placed on the vehicle, it has had damage in excess of $2,000.00. The Autocheck report, relied on by Mr. Perkins, indicates that these titles may be placed on a stolen then later recovered vehicle. The evidence of Mr. Stayberg and Mr. Savidan confirms this is the practice in some States. I note that there was a three year gap between the salvage status and the rebuild status. It is odd that a damaged vehicle would sit some three years before being rebuilt and resold. I find that it is equally possible that the Safari was a stolen/recovery or a damage/rebuilt.

27. I find there is insufficient evidence to substantiate that the Safari has sustained damage over $2000.00. Even had Midtown run the same damage history report as Mr. Perkins did, it would not have determined if the Safari had any damage. Also, the evidence does not indicate there is any noticeable damage to the Safari. On page 1 of Exhibit A, Mr. Perkins states, "I am now in a position where Wheels West does not want to sell the vehicle because of the history." There is no evidence that Wheels West has noted damage to the Safari. It is possible that had Midtown inspected the Safari, it too would not have noticed any damage.

28. Midtown's obligation to disclose damage is to "the best of [its] knowledge and belief." I do not find that Midtown failed to disclose damage over $2000.00 as there is no information in the evidence to suggest that there is any such damage to the Safari.

(c) Failure to declare the Safari as out of province

29. Section 21(2)(c) of the Regulation requires a motor dealer to declare in a written purchase agreement any jurisdiction other than British Columbia in which a motor vehicle has been registered. It is clear from the evidence that had Midtown run a history report, as Mr. Perkins did, they would have discovered the vehicle had been registered in Alabama, then Florida before coming to B.C. in 2004. Running such a history report before selling the Safari would be reasonable. Most dealers in the industry obtain history reports prior to selling vehicles – Wheels West RV for example. I find that Midtown failed to discharge its statutory duty in this regard.

II. The Business Practices and Consumer Protection Act.

30. The claim here is that Midtown committed a deceptive act or practice because of a misrepresentation by omission; it failed to disclose material facts about the Safari. Section 4(3)(b)(vi) of the BPCPA encompasses this type of allegation. For a complainant to be successful on such a claim, he must show two things.

31. First, the Act and the common law requires there be a positive representation made by Midtown about the Safari and a corresponding omission of facts that negates or is contrary to that positive representation; making the representation untrue: *Robson v. Chrysler Canada Ltd.* 2002 BCCA 354 (B.C. Court of Appeal) and see also *Begusic v. Clark, Wilson & Co.* (1992), 69 B.C.L.R. (2d) 273 (B.C. Supreme Court).

32. Second, the complainant must show that the effect of this omission was misleading causing them to make an error of judgment. The mere capability of being misled is insufficient. If a complainant does not believe or does not rely on a representation by a motor dealer in their decision to buy a motor vehicle, it cannot be said that the representation caused the complainant to have made an error of judgment.

33. In this case Mr. Perkins has stated he never discussed the Safari with Midtown. He relies solely on the lack of disclosure on the sales agreement and transfer tax forms. In reviewing those forms there is no positive representations made by Midtown about the Safari with a corresponding omission, making any representation untrue.

34. The sequence of the sale also makes it clear Mr. Perkins made his decision to purchase the Safari before seeing the Transfer/tax form, or the bill of sale from Midtown. Mr. Perkins

provided an email dated April 17, 2007 and signed by Mr. Dorst and Mr. Perkins, where Mr. Perkins provided "[p]ayment of $5,000.00 as a goodwill deposit towards purchase of above vehicle [the Safari], subject to test drive. Price of $49,900 to be negotiated to cover taxes as a trade-in, thus allowing the savings of GST & PST for purchase from dealer." The deposit was provided as evidenced at page 24 of the Affidavit Exhibits, being a bank draft dated April 17 for $5,000.00 payable to Mr. Dorst. Mr. Perkins provided that evidence to the VSA.

35. It is clear from the evidence that the first time Midtown failed to make any proper statutory declarations, damage, out-of-province, or even mileage, to Mr. Perkins was the April 28 Bill of Sale and Transfer/tax form. This is some 11 days after his decision to purchase the Safari, which was subject only to a test drive. It cannot be said that any misrepresentation by omission by Midtown led Mr. Perkins into making an error of judgment; the purchase of the Safari.

36. I also note that in Mr. Perkins' email to Chris Hoy dated July 22, 2008 (Exhibit G of the affidavit) he says "I saw the vehicle had been in the US I never though much about it because I knew that they all came from manufacturers in the US I didn't realize that it only had been brought into Canada in 2004." I find Mr. Perkins had received sufficient information to put him on notice that the vehicle was probably from the U.S. and that he could or should make further inquiries: *CRF Holdings Ltd. v. Fundy Chemical International Ltd.* (1980), 21 B.C.L.R. 345 (B.C. Supreme Court).

37. The facts of this case do not support a claim that Midtown made a misrepresentation by omission, the effect of which was misleading and which caused Mr. Perkins to make an error in judgment; purchasing the Safari.

III. Breach of the Regulation

38. I have found that Midtown failed to declare the out-of-province status of the Safari contrary to the Regulation. Mr. Rudnyk admitted to having filled out both the Bill of Sale and the Transfer/tax form on this transaction, omitting this declaration. Mr. Stayberg also admitted that he was aware that the sale arrangement made was for the purpose of tax avoidance, and that he allowed his dealership to be used for that purpose. I would note that I have found that Midtown did take ownership of the Safari from Mr. Dorst prior to transferring it to Mr. Perkins. Whether or not Mr. Dorst having provided a trade-in and a buyer for that trade-in to Midtown, in the manner that he did here is tax evasion or avoidance is not within my jurisdiction to consider.

39. The Motor Dealer Act and the Salesperson Licensing Regulation provides me with three options in order to address an infraction of the Regulations or conduct that is not within the public interest. I may add conditions to a dealer registration or salespersons license; I may suspend a registration or license; or I may cancel a registration or license. Of course, I may also issue a written warning.

40. Another possibility is to issue an Offence Ticket pursuant to the *Violation Administration and Fines Regulation* B.C. Reg. 89/97 in the amount of $460 as set out in Schedule 2 of that Regulation, for failing to declare out-of-province jurisdiction as required by section 21(2)(c) of the Motor Dealer Act Regulation.

41. It is important that any enforcement be measured and fit the prohibited behaviour with the goal of correcting that behaviour. I also note that a suspension or cancelation of a registration or a license would interfere with the dealership and its employees' ability to earn a livelihood and must be carefully considered and balanced against that with which is in the public interest: *British Columbia (Securities Commission) v. Pacific International Securities Inc.* 2002 BCCA 421(B.C. Court of Appeal).

42. I have considered Mr. Hoy's testimony that this dealership and these two salespeople have not been problems in Mr. Hoy's 18 years as the Compliance Officer in the region. I note that Midtown has been in operation for some 42 years with no indication of complaints. The only warning letter on file dates to June 28, 1982 in regards to advertisements. I note no issues with Mr. Rudnyk. I also recognize that Midtown had offered to purchase back the Safari from Mr. Perkins. I believe that Midtown, Mr. Stayberg and Mr. Rudnyk have realized the problems this type of arrangement causes and will take steps to ensure this does not reoccur. I have also noted that Mr. Perkins was not misled by the failure to declare the out-of-province status of the Safari. Finally, I have considered my September 15, 2008 decision to suspend SG Power Products Ltd's license for three days for habitually operating without licensed salespersons contrary to a condition of its registration. This after receiving a written warning.

43. In considering all of this, and applying the principle of progressive enforcement, I believe Midtown should be issued a Violation Ticket for $460.00 and a written warning shall be placed in its file. A written warning shall be placed in Mr. Rudnyk's file as well. There was no evidence that Mr. Stayberg, in his capacity as a salesperson, failed to make any statutory declarations.

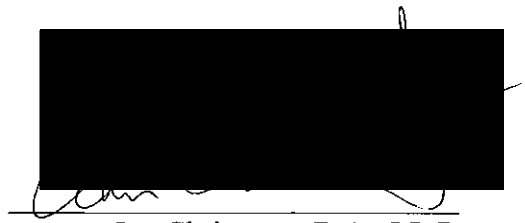
DISPOSITION

44. Mr. Perkins claim against Midtown for restitution for a misrepresentation by omission is dismissed.

45. Midtown will have a Violation Ticket issued against it for $460.00 and a written warning placed in its file.

46. Mr. Rudnyk shall have a written warning placed in his salesperson file.

Dated: November 24, 2008.



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