



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:

**SADIQ AHMAD MALIWIYA
SHEERIN BANU MALIWIYA
IFTIKAR MALIWIYA**

COMPLAINANTS

AND:

**VICTORIA DRIVE AUTO SALES LTD.
(Dealer No. 29209)**

MOTOR DEALER

AND:

**MORTAZA DARVAZEHBAN
(Salesperson No. 104439)**

SALESPERSON

DECISION OF THE REGISTRAR OF MOTOR DEALERS

I. INTRODUCTION

1. On November 19, 2008, a hearing was held before me where it was alleged that Victoria Drive Auto Sales Ltd. Dealer No. 29209 (“Victoria Drive”), and Mortaza Darvazehban a.k.a. Morrey Zeban, a.k.a. Morey Zeban a.k.a. Moreey Darvazehban, Salesperson Licence Number 104439, on or about June 7, 2004, at or near Port Moody, British Columbia, did commit 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”). Specifically, representing that a 1995 Jaguar XJR6 VIN SAJPN1143SC735162 (the “Jaguar”) was of a particular standard, quality, grade, style or model; no prior damage to the Jaguar, when it in fact had prior damage of approximately \$16,500.00.

2. It is also alleged that on or about May 30, 2008, Mortaza Darvazehban made a false and misleading statement to Bill Jost, a compliance officer with the Motor Vehicle Sales Authority (MVSA), while Mr. Jost was executing his duties under the *Motor Dealer Act* R.S.B.C. 1996 c. 316 (the “MDA”) in investigating this complaint, contrary to section 35(3)(a) of that Act.

3. Mr. Jost provided an affidavit sworn September 18, 2008, at the hearing which was entered as Exhibit 2 (the “Affidavit”). Mr. Darvazehban acknowledged receiving a copy of the Affidavit before the hearing. Mr. Jost was present at the hearing and available to answer any questions. Also present at the hearing were the three complainants of which all answered questions from myself and Mr. Darvezehban. Mr. Darvezehban also provided testimony at the hearing.

4. While I may not comment on all of the evidence, I have reviewed that evidence and given it its due weight.

II. FACTS

5. The main issue before me is whether Victoria Drive misrepresented to the complaints that the Jaguar had no prior accidents when in fact it had some \$16,500.00 in prior accident repairs.

6. On or about June 7, 2004, Iftikar Maliwiya initially attended Victoria Drive and looked at the Jaguar with a female friend. Iftikar Maliwiya states he discussed the Jaguar with a salesperson only identified to me as “Omar” and left. He returned later with his mother and father; the other complainants. During the ensuing conversation about the Jaguar, Iftikar Maliwiya and his mother Sheerin Maliwiya testify that they asked Mr. Darvezehban and Victoria Drive several times if the Jaguar was in any accidents. They state they were told there were no accidents.

7. In the last week of April 2008, Iftikar Maliwiya states that he went to sell the Jaguar and a prospective buyer requested a vehicle claims history. It was then that Iftikar Maliwiya discovered a damage claim for \$16,788.22 which had preceded the Jaguar’s sale: Exhibit A to the Affidavit. Mr. Darvezehban noted Iftikar Maliwiya worked for the Insurance Corporation of B.C. (ICBC) and made much of his knowledge of the industry. Iftikar Maliwiya testified that he is in collections and does not know as much as inferred. As rebuttal evidence, Iftikar Maliwaya provided a letter from ICBC indicating he started working on September 7, 2004; 3 months after the Jaguar was purchased.

8. The complainants provided a copy of their Bill of Sale dated June 7, 2004, which is Exhibit B, page 12, of the Affidavit. That Bill of Sale notes that the sale is conditional on an inspection by MCL; it notes a 1996 Jaguar; and there are no declarations made by the dealer regarding previous damage. Exhibit H of the affidavit is a copy of the MCL invoice for the Jaguar noting a one hour safety inspection. After MCL's inspection, the complainants determined that the Jaguar was a 1995 and state they negotiated a slightly lower price for the vehicle: Iftikar Maliwiya's written statement. The Bill of Sale is in the name of Sheerin Maliwiya who used a Total Loss GST Entitlement – Voucher from ICBC towards the purchase of the Jaguar: Exhibit 3 at the hearing, and the testimony of both parties.

9. Exhibit S5, page 75, of the Affidavit is the I.C.B.C. Transfer/Tax Form, also known as an APV9T. That form shows the transfer of the Jaguar from Victoria Drive to Mr. Sadiq Ahmad Malawiya on June 8, 2004. Sadiq Ahmad Malawiya is father of Iftikar and husband to Sheerin. In the dealers declaration section of that form the "no" box is checked where Victoria Drive declares whether the vehicle has sustained damage over \$2,000.00. In his testimony Mr. Darvezehban admits that his signature appears on that form but claims he did not fill out the form and that maybe the insurance agent filled out the form. He says the agent provides blank forms and he signs them blank and leaves them in his desk. On November 25, 2006, Sadiq Malawiya gifted the Jaguar to his son Iftikar: Exhibit S6.

10. Mr. Darvezehban states the complainants were told about the \$16,500.00 damage and produced a bill of sale signed by Sheerin Malawiya and himself showing the purchase of a 1995 Jaguar, with no subject to clauses and a declaration that the vehicle has sustained damage over \$2,000.00 and a specific notation of damage of \$16,500.00: Exhibit E, page 16 of the Affidavit. Mrs. Malawiya agrees she signed this document but at the time she signed it, the declarations were blank. The complainants also state they did not receive a copy of this bill of sale. Mr. Darvezehban also states he showed Mr. Iftikar Malawiya a copy of the Adesa Auction invoice where Pacific Kia obtained the car then subsequently sold it to Victoria Drive. That Invoice shows a \$16,500 damage declaration: Exhibit F of the Affidavit.

11. During the investigation, Mr. Jost asked Mr. Darvezehban for all the copies of the Bill of Sale and was provided two copies of Exhibit E. Mr. Darvezehban stated to Mr. Jost that he had provided the original white copy to the consumers and that he only has the pink and yellow

copies of the Bill of Sale: Mr. Darvezehban's written statement, Exhibit I, page 20 of the Affidavit.

12. On May 30, 2008, Mr. Jost was reviewing files at Victoria Drive in furtherance of his investigation and found the original white copy of Exhibit E: paragraphs 16-17 of the Affidavit. During questioning by Denis Savidan, Manager of Compliance and Investigations for the MVSA, Mr. Darvezehban stated he did not know what happened to the white copy and "----maybe my accountant take it. Maybe in the ICBC. We sometime send it to ICBC copy usually."

13. There was some discussion on the price of the vehicle and why it was reduced. Mr. Darvezehban states in his written statement that the price was reduced by \$3,500 from \$26,500.00 to \$23,000.00 because the complainants knew the vehicle had damage from the outset. Mr. Iftikar Malawiya states in his written statement, Exhibit J of the Affidavit, that the price was reduced because they determined at MCL that the vehicle was a 1995 and not a 1996 as Victoria Drive had represented.

14. In general, the complainants state they asked if the Jaguar had previous damage and Mr. Darvezehban and Victoria Drive stated it had no prior damage. Victoria Drive and Mr. Darvezehban state they made the appropriate declarations and disclosed the amount of the prior damage.

15. This case will revolve around the credibility of the witnesses and their evidence.

III. THE LAW

(a) Deceptive acts

16. 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 both Victoria Drive and Mortaza Darvazehban. 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 uses the language of section 4(3)(a)(ii) of the BPCPA which states:

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

(ii) are of a particular standard, quality, grade, style or model if they are not,

15. Also relevant would appear to be section 4(3)(a)(iii):

(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,

16. 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.

17. *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).

18. 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...

(b) Burden of Proof

19. Under section 5(2) of the BPCPA, where a consumer (the complainants) provide some evidence sufficient to establish that a deceptive act could have occurred, the evidentiary burden

then shifts to the suppliers (Victoria Drive and Mr. Darvazehban) 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.

20. This provision reduces the evidentiary burden that the general law places on a person advancing a claim. It should be noted that this shift of burden only relates to the deceptive act.

(c) Damage Declarations

21. The statutory declarations of material facts a motor dealer must make under section 23 of the *Motor Dealer Act Regulation* B.C. Reg. 447/78, such as damage over \$2,000.00, has been found to place a positive duty on a motor dealer to make its own inquiries about those facts, and not rely on others to provide that information:

The regulation placed a positive duty on the defendant to make its own assessment of prior damage, not simply to accept the word of a prior owner. That duty is one tested on reasonableness and, where extensive prior damage is apparent to an experienced automotive repair person as it was here but has not been noted and disclosed to a prospective purchaser, then that duty is not met. It is a material requirement that ought to have been met both as to observation and as to its disclosure. There was negligence in not doing so...

Motley v. Regency Chrysler 2002 BCSC 1885 (B.C. Supreme Court), citing *Clark V. Abbotsford Imports* (1983) Ltd., [1992] B.C.J. No. 471 (B.C.S.C.)

22. Where a dealer has been placed on notice that there is damage to a vehicle, such as on an invoice from Adesa, the dealer must make its own inquiries about prior damage and disclose its findings to a consumer.

(d) Witness Credibility

23. The core issue in this case is whether or not Victoria Drive and Mr. Darvezehban misrepresented the Jaguar's prior damage to the complainants. Both parties provide evidence in contradiction to each other. It is therefore important to assess each and their evidence for credibility and reliability.

24. In assessing witness credibility the words of Mr. Justice Crawford in *R v. Essex* 2004 BCSC 445 are of assistance:

[9] There is no question that the Court must consider all of the evidence together.

[10] As well, as put by Rowles, JA., in *R. v. B.(R.W.)* (1993), 40 W.A.C. 1 (B.C.C.A.) at p.9 where, as here, the case for the Crown is wholly dependent on the testimony of the complainant it is essential that the credibility and reliability of the complainant's evidence be tested in the light of all of the other evidence presented.

[11] Mr. Justice O'Halloran's words in *Faryan v. Chorney*, [1952] 2 D.L.R. 354 at 356-7 still bear repetition:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

25. The courts have identified several factors to consider when assessing witness credibility. For instance, a motive to lie is a factor to consider: *R v. J.W.R.* 2007 BCCA 452 at paragraph 73. Some other factors were identified by Judge A.E. Rounthwaite in *R v. Kok* 2007 BCPC 0162:

[8] Factors that courts have found helpful in assessing witnesses' credibility include: whether the testimony makes sense or is inherently improbable; whether it is supported or contradicted by other reliable evidence; and whether the witness changes his evidence, contradicts himself, or gives inconsistent testimony.

26. In assessing the impact inconsistencies have on witness credibility, the B.C. Court of Appeal in *R. v. R.W.B.* [1993] B.C.J. No. 758 (Q.L.) provides the following guidance at paragraph 29:

...[M]inor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause a trier of fact to have a reasonable doubt about the reliability of the witness' evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness' evidence is reliable. This is particularly so when there is no supporting evidence on the central issue, which was the case here.

(e) *Section 35(3)(a) of the MDA*

27. Sections 35(3)(a), (4) and (5) of the MDA provide:

35(3) A person commits an offence if the person does any of the following:

- (a) supplies false or misleading information to a person acting under this Act;
- (b) refuses or fails to provide information as required under this Act.

(4) A person does not commit an offence under subsection (3) (a) if, at the time the information was supplied, the person did not know that it was false or misleading and, with the exercise of reasonable diligence, could not have known that it was false or misleading.

(5) If a corporation commits an offence under this Act, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the commission of the offence also commits an offence, whether or not the corporation is prosecuted for the offence.

28. If a person is found to have committed an offense, that is grounds for me to consider whether it is in the public interest for that person to continue to be registered or licensed, as the case may be: section 5 of the MDA and section 6 of the *Salesperson Licensing Regulation B.C. Reg. 241/2004*.

IV. DISCUSSION

The Evidence

29. Most of the evidence for the complainants was from Iftikar Maliwiya in both oral and written testimony. Iftikar Maliwiya also provided the complainants' documents. Sheerin Malawiya provided oral testimony as to her signature on the Bill of Sale and the GST voucher and questions she asked Victoria Drive about the Jaguar. Mr. Sadiq Ahmad Malawiya mostly provided evidence in support of Sheerin Malawiya and Iftikar Malawiya. Mr. Mortaza Darvazehban provided evidence on his own behalf and that of Victoria Drive.

(a) Evidence of the Complainants

30. I found Iftikar Maliwiya's evidence to be straight forward and consistent in almost all respects with the documentary evidence and that of his mother and father. Considering this transaction occurred some four plus years ago, he admitted he could not recall certain details. I find his admissions of lost details due to the passage of time were appropriate. I note those details were not of great significance such as who drove the Jaguar off Victoria Drive's lot.

31. I also find Iftikar Maliwiya was clear in providing his evidence and where the evidence was not within his knowledge he properly admitted so. For example, he stated the cheque signature

was not his when asked to admit to such. The signature was that of his mother. While being questioned by Mr. Mortaza Darvazehban, his evidence continued to be clear and consistent with his past statements, the documents and generally with his parents' testimony.

32. I recognize that Iftikar Maliwiya and his parents do have a motive to lie, but a motive to lie does not mean they have in fact done so. Whether or not they have lied must be born out in the evidence. I have found no evidence of lying on the part of the complainants.

33. One concern with the complainants' evidence relates to a question by Mr. Mortaza Darvazehban. In questioning, Iftikar Maliwiya stated he was assisting his mother to buy the Jaguar, which was for her. Later, Sadiq Maliwiya stated "—I wanted a car for him, and we were going to purchase the car for him." The "him" being referred to would be Iftikar Maliwiya. The car was registered in Sadiq Maliwiya's name and I do note the car was purchased by Sheerin using a GST Voucher in her name and that eventually the Jaguar was gifted to Iftikar in 2006. While this appears to be an inconsistency, it is the only inconsistency I noted and do not believe it amounts to much. I am mindful of the B.C. Court of Appeal's caution in *R.W.B.*

(b) Evidence of Mortaza Darvazehban and Victoria Drive

34. Mr. Mortaza Darvazehban's evidence was less clear and less consistent than that of the complainants. On the main issue of whether the complainants were told the Jaguar had \$16,500 in damage, his evidence was contradictory with the documentary evidence.

35. One important piece of evidence relied on by Mr. Mortaza Darvazehban and Victoria Drive is the existence of Exhibit E, a Bill of Sale they say shows the complainants were told about the \$16,500.00 in damage to the Jaguar. Mr. Darvazehban questioned Sheerin Maliwiya about her signature on Exhibit E. She agrees it is her signature, but she says none of the declarations by the dealer were made out when she signed it. She further states that she was never given a copy of Exhibit E at the time of the sale. Sheerin Maliwiya's testimony at the hearing is consistent with her prior written statement: Exhibit L of the Affidavit. In discussing his signature on that Bill of Sale, Mr. Darvazehban made these contradicting statements:

Sheerin Malawiya: Yeah, it's my signature.

Mortaza Darvazeban: The little signature - - no, there is a sig - - this is Omar's signature here. Omar sign it. You didn't see me in the office. Was - I was not in the office.

Whose signature over there?

...

Mortaza Darvazeban: -- in the office.

Could you – can I ask the voucher for ICBC, please? Thank You.

Okay. We got the same time signature from you. Actually, that was me in the office. This is my signature. Not Omar's signature.

36. In his written statement (Exhibit I), Mr. Mortaza Darvazehban comments on the complainant's Bill of Sale, (Exhibit B) stating that his signature does not appear on that Bill of Sale. He goes on to say "I'm the owner – if this was the final bill of sale, my signature would be there." As part of his investigation, Bill Jost obtained several bills of sale concerning various transactions by Victoria Drive during this time period. On the following four bills of sale, there is no signature by a representative of Victoria Drive, let alone by Mr. Mortaza Darvazehban:

- (a) Sale to R.G.P. dated June 9, 2004 – page 26 of the Exhibits;
- (b) Sale to S.J.L dated July 2, 2004 – page 30 of the Exhibits;
- (c) Sale to F.R.G. dated July 22, 2004 – page 33 of the Exhibits; and
- (d) Sale to M.L.P. dated July 24, 2004 – page 34 of the Exhibits.

37. In his written statement, Mr. Mortaza Darvazehban states that the complainants were given the original copy of the Bill of Sale which he and Victoria Drive rely on (Exhibit E). During his investigation, Mr. Jost came across the original (white) Bill of Sale within the files of Victoria Drive: see paragraph 17 of the Affidavit. When questioned about this at the hearing, Mr. Darvazeban stated he only had the red and yellow copy of the Bill of Sale. He said he did not know where the white copy was, "maybe my accountant take it. Maybe in the ICBC. We sometime send it to ICBC copy usually." I found Mr. Darvazehban to have been evasive when answering this question and his oral testimony is inconsistent with his written statement.

38. When discussing the APV9T Transfer/Tax Form (Exhibit S5, page 75) and the fact that Victoria Drive failed to make its declaration as to damage on that form, Mr. Darvazehban stated that while he signed it, he did not fill it out. He stated that it was probably the Autoplan agent who filled it in for Victoria Drive. I again found Mr. Darvazehban somewhat evasive when answering this line of questions. Further, if I were to believe Mr. Darvazehban that he declared

the \$16,500.00 on Exhibit E, why would Victoria Drive go to the effort to make such a specific declaration on the Bill of Sale and not on the Transfer Tax Form?

39. During the hearing, Mr. Savidan asked Mr. Darvazehban if it was his and Victoria Drive's usual practice to make such a detailed declaration of damage on the bills of sale. Mr. Darvazehban said no. In Exhibit O of the Affidavit, Mr. Jost notes that he reviewed 63 of Victoria Drive's sales files from this same time period. After review he noted 22 bills of sale had "yes" checked for damage over \$2,000.00 and none of those files had a notation specifying the damage amount as he claims he did in Exhibit E.

40. Another concern is Omar. Mr. Darvazehban could not provide much information about this salesperson. Mr. Darvazehban admits he was working for Victoria Drive at the time and was part of this sale. It would seem Omar could have corroborated Mr. Darvazehban's evidence, but he was not brought forth as a witness. During his testimony, Mr. Darvazehban said Omar wrote the contract and made the declarations. Mr. Darvazehban simply signed the document. In his written statement he states, "Omar sold this 1995 Jaguar to Mr. Malawiya." He then states later on in that statement, "We – me and Omar were involved in this deal." Considering the details Mr. Darvazehban provided about the sale of this Jaguar, one sale among many over four years ago, it seems odd he cannot remember much about Omar himself. I would note that the MVSA could not identify an Omar working at Victoria Drive at anytime, even though as a salesperson, he should have been licensed with the MVSA.

41. Finally, a recurring theme in Mr. Darvazehban evidence is to attribute any written declarations about the Jaguar to Omar or the Autoplan agent and not himself or Victoria Drive. I found he became evasive when questioned about this, even though his own evidence is that "We – me and Omar were involved in this deal."

(c) Conclusion about the evidence on the core issue

42. Based on the above, and the totality of the evidence reviewed, I prefer the evidence of the complainants over that of Mr. Darvazehban and Victoria Drive. This is especially so on the core issue of Exhibit E and whether the complainants were told about the Jaguar's damage. I believe the complainants never received a copy of Exhibit E with that declaration. I also do not believe that Victoria Drive or Mr. Darvazehban showed the complainants a copy of the Adesa invoice as they claim. I further find that the complainants asked about prior damage to the Jaguar and were

told there was no damage to the Jaguar. A finding that Mr. Darvazehban and Victoria Drive made no declaration of damage is consistent with the APV9T Transfer/Tax Form, Exhibit B, the testimony of the complainants and the preponderance of the evidence as noted above. I find Victoria Drive misrepresented the Jaguar's past history and its quality to the complainants which is deemed a deceptive act or practice: ss. 4(3)(a)(ii) and (iii) of the BPCPA and contrary to section 5(1) of that Act.

43. Also, by Mr. Darvazehban's and Victoria Drive's own admission, they were aware of the Jaguar's damage from the Adesa invoice (Exhibit F, page 17). As such, they were on notice about the damage to the Jaguar which placed a positive duty on them to make further inquiries about that damage and to, at minimum, declare what they knew to the claimants: section 23 MDA Regulation and *Motley*, supra. They both failed to discharge that duty.

44. An employer is vicariously liable for the conduct and representations of its employees where they are acting in the normal course of their employment. Omar's conduct and that of Mr. Darvazehban in the present case are attributable to Victoria Drive.

V. COMPLIANCE ORDER

45. I have found that Victoria Drive and Mortaza Darvazehban have committed deceptive acts or practices contrary to the BPCPA. Based on all of the evidence, I further find that Victoria Drive and Mortaza Darvazehban were aware of the \$16,500.00 damage to the Jaguar (Adesa Invoice) and deliberately withheld that information from the complainants even after the complainants had asked if the Jaguar had been damaged in an accident.

46. In order to rectify a deceptive act, section 155(4) of the BPCPA provides that I may make a compliance order on any or all of the following terms:

155(4) The director may include one or more of the following orders in a compliance order:

(a) that a person reimburse any money or return any other property or thing received to a consumer or a class of consumers;

(b) that a person compensate other persons or a class of persons who have suffered loss or damage as a result of a contravention of this Act or the regulations;

(c) that a person take specified action to remedy an act or practice by which the person is contravening, is about to contravene or has contravened this Act or the regulations;

(d) that a person reimburse to the director all or a portion of the actual costs of any inspection, including actual legal costs, incurred by the director for the inspection of that person in respect of the contravention referred to in the compliance order.

(a) Proof of Damages

47. In order for the complainants to receive compensation for damages due to a deceptive act, the complainants must prove those damages:

[34] Section 22(1)(a) of the TPA and s. 171(1) of the BPCPA clearly require a consumer to prove loss or damage suffered by the consumer (as an individual) in reliance upon the alleged deceptive act or practice (*McKay v. CDI Career Development Institutes Ltd.* 1999 CanLII 5599 (BC S.C.), (1999), 64 B.C.L.R. (3d) 386 (S.C.); *Rushak v. Henneken* 1991 CanLII 178 (BC C.A.), (1991), 84 D.L.R. (4th) 87 (B.C.S.C.); and *Robson v. Chrysler Canada Inc.* 2002 BCCA 354 (CanLII), (2002), 2 B.C.L.R. (4th) 1 (C.A.)).

Knight v. Imperial Tobacco Canada Ltd. 2005 BCSC 172 (B.C. Supreme Court), varied but not on this point 2006 BCCA 235 (B.C. Court of Appeal).

48. While discussed in terms of a case brought in the courts, the principal expressed above in *Knight* is equally applicable in a hearing before the Registrar of Motor Dealers.

(b) Assumption of depreciation due to a motor vehicle accident

49. In my decision of October 15, 2008, in *Car v. Vancouver Auto Leasing Ltd. & Moghaddam* File No. 08-70094 at paragraphs 26 – 27, I discuss the law regarding the need for proof of depreciation to a vehicle due to a motor vehicle accident/damage and that an assumption of depreciation will not suffice.

50. Paraphrasing Judge Tweedale in *Parsons v. Zagrodzki* 2005 BCPC 384, who noted the law and problems with the experts report in that case:

- i. There must be evidence of damage and a reduction in value of the vehicle – the expert relied on assumptions;
- ii. The expert relied on estimates of repairs and did not review the Structural Assessment Integrity Report of I.C.B.C. which confirms whether there has been “structural damage”, such as frame damage;
- iii. The expert relied too heavily on the notion of a “stigma” attached to vehicles damaged in car accidents; and

- iv. The expert relied too heavily on a survey of dealers who provided a mere opinion on the value of the car. This is not evidence. In the words of Judge Tweedale: "Many people sharing an opinion, which is wrong in fact and law, does not make the opinion accurate."

51. In *Miles v. Mendoza* 1994 CanLII 419 (B.C. Supreme Court), Justice Newbury (now of the Court of Appeal) stated the following about proof of accelerated depreciation of a vehicle due to an accident:

...But where a sale (at arm's length) does not take place immediately or even soon after that date [of the accident], difficulties of proof arise because, as even Mr. Weir acknowledged, the depreciating effect of the accident declines over time. The difficulty may not be so great where the chattel is a "luxury" car, as occurred in *Turnbull v. Gammie et al.* (Vancouver Registry No. B830533, dated February 21, 1985). In that case, the plaintiff adduced very specific and persuasive expert evidence showing that a purchaser with knowledge of extensive repairs (amounting to some \$18,000) to a six-week old Mercedes Benz would pay \$8,000 less for it than for the same car without an accident in its history. There being no evidence to the contrary, Legg, J. (as he then was) awarded \$8,000 for accelerated depreciation. But usually such persuasive evidence does not exist in the absence of a sale: see e.g., *Gunn*, supra, and *Lee v. Hawkins* (Vancouver Registry No. B895355, dated October 22, 1990)...

In the case at bar, Mr. Weir's opinion that a decline in the value of the Miles' car had occurred, was based on the "simple" proposition that any car that has been in an accident necessitating major repairs carries a "stigma". This may make common sense, but in my view it does not amount to proof, in the sense required by the courts in *Gunn*, *Turnbull*, *Lee v. Hawkins*, and *Payton v. Brooks*, supra, of accelerated depreciation. Those cases make it clear that it cannot be "assumed", by virtue of the occurrence of an accident requiring extensive repairs, that a properly repaired vehicle has suffered accelerated depreciation.

In the case at bar, the only "evidence" of depreciation is really an assumption that every car that has been in an accident involving damage in excess of \$2,000 carries a stigma that depreciates its value. There is no arms-length sale from which such depreciation of the Honda Prelude can be inferred, nor is there the kind of evidence that often exists with luxury automobiles which trade to a particular clientele that may be more concerned with investment or resale value than with operation and reliability. In the result, I find that the corporate plaintiff's claim for accelerated depreciation of the vehicle has not been proven.

[underlining is mine]

52. There is no evidence to suggest the Jaguar has accelerated depreciation due to the repaired damage. I note that there is no credible evidence that the Jaguar was reduced in price due to the

damage. I also note there is no evidence that it was sold at fair market value for an undamaged Jaguar.

53. In my decision in *Car*, I determined that it would be unjust to require the claimant to take the risk that the vehicle had depreciated and ordered the motor dealer to take back the vehicle and refund the purchase price. The best remedy that could be attained in *Car* was to put the consumer back in the position he was prior to the purchase of the vehicle in question. In that case, Mr. Car only had the vehicle for less than a year.

54. As in *Car*, I believe it would also be unjust in this case for the claimants to wait and see if they will be damaged when the Jaguar is eventually sold. The claimants here are victims of a deliberate deceptive act, and should not bear the burden of waiting to see what, if any, damages will unfold. Victoria Drive and Mortaza Darvazehban, jointly and severally, should bear that burden and take back the Jaguar from the complainants and refund them the purchase price. They may then resell the Jaguar.

55. I have considered that the complainants have had the use and enjoyment of the Jaguar for some four plus years. I have considered whether a deduction from the purchase price should be made based on the kilometers travelled. This is an approach I used in my decision in *Powar v. Flag Chevrolet-Chevrolet Truck Ltd. and K.S. Auto Market Ltd.* (File No. 07-70978, September 2, 2008). The difference between *Powar* and this case is that Mr. Powar had sufficient evidence/notice that there were issues with the vehicle in question and that it must be accepted that he agreed to take some risk in purchasing that vehicle. In this case, there was no notice of any damage to the Jaguar provided to the complainants and there is no evidence to suggest the complainants agreed to assume any risks from the Jaguar being damaged. I find it would be unjust to allow a deduction for the use of the Jaguar. This could have the effect of rewarding the motor dealer for what I have found to be a deliberate deceptive act. The fact that the Jaguar had a mechanical inspection prior to the complainants purchasing it, does not absolve Victoria Drive and Mortaza Darvazehban of their duty to disclose the damage they knew of or any liability for failing to disclose that damage under the BPCPA, *Rushak*:

That the purchaser had the vehicle inspected by others, who could not see the latent defect, and that she failed to have it inspected by the dealer, as suggested by the defendant, cannot, in my view, change the character of the statement made. It was a statement which

necessarily 'downplayed' the need for such examination, and tended to lead to an error of judgment. [underlining added]

56. The MVSA has incurred costs to investigate this matter and bring it to a hearing before me. In accordance with section 155(4)(d) of the BPCPA, Victoria Drive and Mortaza Darvazehban are jointly and severally responsible for these costs which are \$1,549.21, and are hereby ordered to pay them to the MVSA. An invoice explaining this amount will be provided to Victoria Drive and Mortaza Darvazehban.

IV. ADMINISTRATIVE PENALTY

57. 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 and \$5,000.00 to an individual.

(a) Victoria Drive

58. I note the following factors regarding Victoria Drive and this particular case:

- (a) Section 164(2)(a): Since May 2006 there have been four complaints and investigations against Victoria Drive. Of those, two were determined to be unfounded. In one case, File No. 06-71085, it was claimed that the dealer sold a car to a consumer which was missing options as advertised. After the MVSA started investigating, the motor dealer unwound the transaction. The fourth investigation is this one.
- (b) Section 164(2)(b): This is a serious matter involving consumer money and an attempt to transfer the risk of the damaged Jaguar unto the consumer. I recognize there does not seem to be issues involving the Jaguar's safety.
- (c) Section 164(2)(c): The extent of the harm seems to be confined to the complainants and is monetary in nature.
- (d) Section 164(2)(d): Victoria Drive and Mortaza Darvazehban continued with their deception, including the provision of false statements regarding Exhibit E.
- (e) Section 164(2)(e): I have found this deceptive act was deliberate.

- (f) Section 164(2)(f): Victoria Drive had the benefit of the sale of the Jaguar. The Jaguar was bought at Adesa by Kia Pacific for \$18,500 (Exhibit F, page 17 of the Exhibits) and sold to Victoria Drive for \$18,758 (page 18 of the Exhibits). Victoria Drive sold the Jaguar to the complainants for \$23,000.00 plus a \$795 documentation fee (this is an administrative fee arbitrarily set by individual dealers). The total profit to Victoria Drive was \$5037.00.
- (g) Section 164(2)(g): Victoria Drive has made no effort to resolve this matter, and in fact provided false statements to advance its position.

59. In my decision in *Car*, I reviewed past decisions on administrative penalties where a dealer had been found to have committed a deliberate deceptive act. This case is not too dissimilar than *Car* on its facts. Both involved deliberate deceptions and attempts to hide the truth. Both involved a failure to declare damage or the true extent of the damage. I noted in *Car* that administrative penalties had been as high as \$20,000.00 for deceptive acts that endangered consumers (unsafe vehicles). In *Car*, the motor dealer had no prior enforcement activity against it and a \$7,500.00 administrative penalty was assessed. I have reviewed the evidence in this case and the particular facts relating to Victoria Drive; a \$7,500.00 administrative penalty is appropriate and ordered.

(b) Mortaza Darvazehban

60. I note the following factors regarding Mortaza Darvazehban and this particular case under the BPCPA:

- (a) Section 164(2)(a): I note no enforcement action against Mortaza Darvazehban.
- (b) Section 164(2)(b): This is a serious matter involving consumer money and an attempt to transfer the risk of the damaged Jaguar unto the consumer. I recognize there does not seem to be issues involving the Jaguar's safety.
- (c) Section 164(2)(c): The extent of the harm seems to be confined to the complainants and is monetary in nature.
- (d) Section 164(2)(d): Victoria Drive and Mortaza Darvazehban continued with their deception, including the provision of false statements regarding Exhibit E.
- (e) Section 164(2)(e): I have found this deceptive act was deliberate.

(f) Section 164(2)(f): Mr. Darvazehban is the dealer principal of Victoria Drive and would share in its profits.

(g) Section 164(2)(g): Mr. Darvazehban has made no effort to resolve this matter, and in fact provided a false statement to advance his and Victoria Drive's position.

61. The Registrar has imposed administrative assessments on salespersons for deceptive acts or practices in amounts ranging from \$500.00 (Registrar Smith's decision on January 30, 2008, Glynn Gary Davies) to \$1,250.00 (Massive Truck and Jastej Singh Sidhu and Gurtej Sidhu, August 18, 2008). The later decision involved a deceptive act causing a consumer to purchase an unsafe vehicle. In my decision in *Car*, I assessed an amount of \$750.00 against the salesperson/dealer principal in that case. The conduct of Mr. Darvazehban is very similar to the salesperson/dealer principal in *Car*. In considering the whole of this case and the conduct of Mr. Darvazehban, I order Mr. Darvazehban to pay a \$750.00 administrative penalty.

V. Breach of Section 35(3)(a) of the Motor Dealer Act.

62. In considering the appropriate enforcement step to take, I am mindful of the need for progressive enforcement and that the taking away of a person's ability to make a livelihood, even for a short time, must be carefully considered, but that in cases such as this, the public interest is paramount: *Pacific International et al v. B.C. Securities Commission* 2002 BCCA 421 (B.C. Court of Appeal) and *Dunsmuir v. New Brunswick*, 2008 SCC 9 (Supreme Court of Canada).

63. Mr. Darvazehban has been found to have made a false statement to Bill Jost, a compliance officer with the MVSA, while Mr. Jost was conducting his duties under the Motor Dealer Act. This is contrary to section 35(3) of the Motor Dealer Act. In my decision in *Hurtubise v. Massive Truck Sales Ltd. and Gurtej Sidhu and Jastej Singh Sidhu* (File No. 08-70288, August 18, 2008), I suspended the salesperson in that case for three (3) days for giving a false statement to a compliance officer. I believe that would also be appropriate in this case. For clarity, Mr. Mortaza Darvazehban's salesperson's license will be suspended between March 20, 2009, starting at 12:01 a.m. and ending March 22, 2009, at 11:59 p.m.

64. I note Mr. Darvazehban just completed the upgraded salesperson licensing course a few months ago. That course was not in existence at the time of the Jaguar's sale. I am hopeful, Mr. Darvazehban will be mindful of his legal duties and obligations during the sale of a motor vehicle to a consumer.

VI. DISPOSITION

65. A Compliance Order shall be issued on the following terms:

Victoria Drive Auto Sales Ltd. Dealer No. 29209 and Mortaza Darvazehban a.k.a Morrey Zeban, a.k.a. Morey Zeban a.k.a. Moreey Darvazehban, Salesperson Licence Number 104439, jointly and severally, shall:

- (a) refrain from committing deceptive acts or practices contrary to section 5(1) of the *Business Practices and Consumer Protection Act* S.B.C. 2004 c. 2;
- (b) declare all material facts and the true history, quality, grade or condition, of a motor vehicle they sell to consumers;
- (c) within 30 days of this decision, take back the 1995 Jaguar XJR6 with VIN SAJPN1143SC735162 from Iftikar Maliwiya and refund the full purchase price including taxes of \$27,244.90 to Sheerin Maliwiya, the original purchaser. Mr. Maliwiya will have to sign over ownership at the time the refund is received; and
- (d) pay the Motor Vehicle Sales Authority of B.C. its investigation and hearing costs of \$1,549.21.

66. An Administrative Penalty of \$7,500.00 is ordered against Victoria Drive Auto Sales Ltd. Dealer No. 29209.

67. An Administrative Penalty of \$750.00 is ordered against Mortaza Darvazehban a.k.a Morrey Zeban, a.k.a. Morey Zeban a.k.a. Moreey Darvazehban, Salesperson Licence Number 104439.

68. Mr. Mortaza Darvazehban a.k.a Morrey Zeban, a.k.a. Morey Zeban a.k.a. Moreey Darvazehban, Salesperson Licence Number 104439, is suspended for a period of three (3) days, between March 20, 2009 starting at 12:01 a.m. and ending March 22, 2009 at 11:59 p.m.

VII. RECONSIDERATION

69. Pursuant to sections 155(7), 166(2), 181 and 182 of the BPCPA, an application for reconsideration of the determination on the Compliance Order and Notice of Penalty may be made within 30 days of receiving a copy of them. Such an application must be in writing and there must be new previously unavailable evidence provided in support of that application. The

written request must identify any errors or other grounds for the reconsideration. The application is to be directed to Denis Savidan, Manager of Compliance and Investigations, Motor Vehicle Sales Authority of B.C., #208 – 5455 152nd Street, Surrey B.C. V3S 5A5.

Dated: February 12, 2009



Ian Christman B.A., LL.B.