



**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:**

**SARA AND BENITO BULICH**

**COMPLAINANTS**

**AND:**

**AUTO GALLERY GROUP INC. dba KIA SOUTH VANCOUVER**  
(Dealer License #30460)

**MOTOR DEALER**

**DECISION OF THE REGISTRAR OF MOTOR DEALERS**

Appearing for the Authority: Anna Gershkovich, Compensation Fund Claims Manager  
Denis Savidan, Manager of Compliance and Investigations  
Hong Wong, Manager of Licensing.  
Ross Cote, Compliance Officer.

Appearing for Kia South: No One

Appearing for themselves: Sara Bulich  
Benito Bulich

Date and Place of Hearing: December 17, 2008, at Surrey, British Columbia.

**INTRODUCTION**

1. On December 17, 2008, a hearing was held before me where it was claimed that Auto Gallery Group Inc. dba Kia South Vancouver dealer number 30460 (KIA), committed a deceptive act or practice on or about February 17 to 29, 2008, contrary to section 5(1) of the *Business Practices and Consumer Protection Act* S.B.C. 2004 c. 2 (the "BPCPA"). Specifically that in Vancouver, B.C., Kia took a deposit from the complainants for \$500.00 stating it was fully refundable if the complainants chose not to purchase a 2007 Mazda 3 with VIN

JM1BK32F571631269; and then refused to return the deposit upon request saying it was non-refundable.

2. A Notice of Hearing dated November 5, 2008, was sent to Kia and the Canada Post tracker shows it was delivered on November 7, 2008. That Notice of Hearing details this complaint, the hearing date and time and the authority of the Registrar of Motor Dealers. It was entered as Exhibit 1.

3. As Kia did not show up, several attempts were made by Hong Wong to contact the dealer and locate the representative for the dealership; General Manager Dustin Davis. Mr. Wong informed me that the receptionist was going to forward his message. Mr. Wong made a repeat call and he was informed by the receptionist that the message was given and that Dustin Davis was “out”. The hearing was delayed some 15 minutes to wait and see if Mr. Davis would show up. He did not.

4. I reviewed the Notice of Hearing (Exhibit 1) and concluded that proper notice was given in accordance with section 30(2) of the *Motor Dealer Act* R.S.B.C. 1996 c. 316 (the “MDA”) and sections 183(2)(c)(ii) and 184(a) of the BPCPA. In accordance with section 6(e) of the MDA and Kia’s failure to attend the hearing after proper notice was given, I continued with the hearing. I would note that at the conclusion of the hearing, about 11:30 a.m., no representative of Kia had attended the hearing, nor called Mr. Wong.

## **THE FACTS**

5. The Affidavit of Anna Gershkovich, Compensation Fund Claims Manager with the Motor Vehicle Sales Authority of B.C., (the “VSA”), was entered as Exhibit 2 at the hearing. I note from Exhibit 1, the Notice of Hearing, that the Affidavit was sent to Kia along with that Notice. Anna Gershkovich was present at the hearing to be questioned on the Affidavit. Generally, the Affidavit discusses the complaint by the Buliches and attaches the documents provided to the VSA by the complainants, and a response from Sean Hardman, Sales Manager for Kia.

6. Ms. Sara Bulich provided most of the testimony for the complainants. Mr. Benito Bulich confirmed much of what his wife stated and noted that in trying to deal with Kia, its staff and management were rude. The following facts come from the testimony of the complainants and their written complaint (page 3 of the Affidavit exhibits).

7. Ms. Bulich stated that on February 17, 2008, she attended at Kia and looked at the Mazda with Kia's representative Cody Francoeur. Ms. Bulich states Cody Francoeur told her he needed a signed contract in order to negotiate the price of the Mazda with his manager. The complainants offered \$14,000, and Kia made a counter-offer of \$15,500. Ms. Bulich testified that she was shown a damage history report regarding the Mazda and was concerned that there were two Insurance Corporation of B.C. (ICBC) claims, one for theft and one for collision (page 8 of the Affidavit exhibits). Ms. Bulich states she asked Kia for more detailed information about these claims and was told Kia did not have those details on hand.

8. As it was close to closing time, Ms. Bulich states she wanted time to consider this purchase and let Kia obtain details of the ICBC report. She says she was told by Kia that she needed to leave a \$500.00 deposit to hold the vehicle. Ms. Bulich testified that she works for the Visa Center in Vancouver and wanted assurances that the deposit was fully refundable. She says Dustin Davis of Kia told her it was fully refundable. Mr. Bulich testified that he wanted to ensure that this deal and the provision of the deposit were subject to a 3<sup>rd</sup> party inspection (BCAA) and determining what the ICBC claims were about. The vehicle purchase agreement (page 6 of the Affidavit exhibits) clearly shows the \$500.00 deposit and a note right beside it says: "see subjects @ bottom". On the bottom are noted the subject to 3<sup>rd</sup> party inspection and subject to determining the ICBC claims. These subject to clauses were for the benefit of the purchasers; the Buliches. The Buliches left a \$500 deposit: (page 7 of the Affidavit exhibits).

9. Ms. Bulich testified that Mr. Davis was going to obtain details of the ICBC damage and provide them to her. She testified that it was very difficult to obtain that information from Mr. Davis. The complainants say they were told that the information could not be obtained from ICBC due to privacy reasons. A Carfax report, a vehicle history report from a USA-based reporting agency, was run by the complainants and no details were found. The complainants state Mr. Davis offered to obtain a CarProof report, a vehicle history report from a Canadian-based reporting agency. The complainants testified they were concerned about not getting information about the Mazda's prior collision and theft claim and choose not to purchase the Mazda and requested the refund of the deposit. The Buliches noted that subsequent to this, the Mazda was advertised for about \$1,000.00 less by Kia.

10. In April 2008 (appears to be the 24<sup>th</sup> page 10 and 11 of the Affidavit exhibits), Anna Gershkovich sent a letter to the Dealer Principal/General Manager of Kia seeking a response to the claim filed by the complainants. Enclosed with that letter were the written submissions of the complainants being page 3 of the Affidavit Exhibits.

11. Dustin Davis faxed a response written by Sean Hardman, Sales Manager of Kia, which was received by the VSA on May 21, 2008. Mr. Hardman states he was able to show the complainants the information they sought, and even showed how their current car had prior damage, which the complainants were not aware of. Mr. Hardman states that the complainants attempted to renegotiate the contract and Mr. Hardman said there was a deal in place and he had no authority to issue refunds to consumers. Mr. Hardman referred to the vehicle being ready for delivery and that the complainants had twice confirmed a delivery date and time and their acceptance to take the vehicle.

12. Mr. Ross Cote, compliance officer with the VSA, provided some evidence of his attempts to obtain information and try and resolve this issue. Entered as Exhibit 3 were 23 pages of emails highlighting Mr. Cote's attempts to obtain information and a resolution to this complaint. Mr. Cote noted that he tried to deal with someone at Kia's parent company. Mr. Cote also noted that Mr. Dustin Davis did not return his phone calls for over a month.

## **THE LAW**

### *(a) Deceptive acts*

13. 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 consumer transaction in section 1(1) of the BPCPA would include the taking of a deposit.

14. The definition of supplier in section 1(1) of the BPCPA applies to Kia. 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 refers to section 4(3)(b)(vi) of the BPCPA which states:

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,

15. Also relevant would appear to be section 4(3)(b)(iv):

(iv) that a consumer transaction involves or does not involve rights, remedies or obligations that differs from the fact,

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 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 supplier, Kia, 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) Witness Credibility*

21. It is important to consider the various factors the courts have identified to assist in determining the credibility and reliability of the evidence being submitted – see for example: *R v. J.W.R.* 2007 BCCA 452 at paragraph 73 (B.C. Court of Appeal); *R. v. R.W.B.* [1993] B.C.J. No. 758 (Q.L.) at paragraph 29 (B.C. Court of Appeal); *R v. Essex* 2004 BCSC 445 paragraphs 9-11 (B.C. Supreme Court); and *R v. Kok* 2007 BCPC 0162 at paragraph 8 (B.C. Provincial Court).

*(d) Deposit versus a Partial Payment*

22. I note from the purchase agreement, the \$500 is applied as a “partial payment” as it is pre-printed on that form. I would note that in law a deposit and a partial payment generally come with differing legal rights and obligations: *Coal Harbour Properties Partnership v. Liu* 2006 BCCA 385 (B.C. Court of Appeal) and *Bradley Brothers (Oshawa) Ltd. v. A to Z Rental Canada Ltd.* 1973 CarswellOnt 398 (Ont. H.C.J.). However, in this case the parties were clear it was to be a deposit – the complainants believing it to be refundable.

**DISCUSSION**

23. Based on all the evidence presented, I prefer the evidence of the complainants over that of Kia. I note specifically that the Purchase Agreement makes the provision of the deposit and entering into the agreement subject to determining the ICBC damage history and a third party inspection. There is a specific notation about the “subject to” right beside where the deposit/partial payment of \$500 is noted. The written statement of the complainants is consistent with the response of Kia, except that the complainants say they tried to renegotiate the contract as

the new salesperson they spoke with said it was month end and he could probably get them a better discount. They said Mr. Hardman then refused to accept another contract or any renegotiations and instead offered some gas for the vehicle. This is consistent with Mr. Hardman's response and the complainants' written recitation of events was provided some two months before Mr. Hardman's response. I believe the facts unfolded as the complainants have stated.

24. I also find that Kia had represented to the complainants that the deposit was refundable. This is consistent with the subject to clauses being added to the purchase agreement and the complainants' testimony. Mr. Hardman's response starts off saying that he met Mr. and Mrs. Bulich during their second visit to the showroom. He was not there for the first important visit regarding the taking of the deposit. His response does not deny that Kia had told the complainants that the deposit was refundable. Mr. Hardman merely says, he has no authority to offer refunds and that the complainants never asked for a refund. They certainly did ask for a refund at least by March 8, 2008, in their demand letter to the dealer (page 5 of the Affidavit Exhibits). I do not believe the complainants did not ask for a refund.

25. Based on the all of the evidence, I find Kia represented to the Buliches that the deposit was refundable. I further find, and it is not denied by Kia, that it is now refusing to refund that deposit and takes the position it is non-refundable. This is deemed to be a deceptive act pursuant to section 4(3)(b)(iv) as Kia represented a legal right to a refund, and an obligation on the part of Kia to provide a refund upon request; and it now does not intend to provide that refund. In reliance on Kia's representation about the refundable nature of the deposit and Kia's acceptance of the subject to clauses, Ms. Sara Bulich made an error in judgment and provided Kia the \$500 deposit.

### **COMPLIANCE ORDER**

26. Having found a deceptive act or practice has been committed by Kia, I may issue a compliance order to rectify that 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.

27. In this case, it is appropriate that Kia refund the \$500 deposit being the only proven losses by the complainants.

28. I would also order Kia to abide by the BPCPA and to refrain from making statements to consumers that may mislead them about their legal rights and obligations.

29. The VSA has incurred some investigative and legal costs to bring this matter before me. They are entitled to have those costs refunded: section 155(4)(d) of the BPCPA. I order Kia to reimburse the VSA \$1,038.16, for their investigation and hearing costs. An invoice will be provided to Kia.

#### **ADMINISTRATIVE PENALTY**

30. Under section 164 of the BPCPA I may order 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.

31. I note the following regarding Kia:

(a) Section 164(2)(a): I note no compliance action has been taken against Kia except a warning letter for its advertising being contrary to the BPCPA. I note that in one investigation involving deposits (08-70664), Kia choose to refund the deposit to that consumer. That investigation was subsequent to this complaint.

32. Section 164(2)(b): This contravention regards the taking of \$500 of consumer money. The safety of this consumer is not in jeopardy and the amount is relatively small in comparison with other complaints involving other motor dealers.



33. Section 164(2)(c): These facts indicate that this incident is isolated to this complainant and there is no evidence of potential harm to others.

34. Section 164(2)(d): Kia continued for several months to refuse to refund the deposit. This has been a continuous infraction of the BPCPA.

35. Section 164(2)(e): I find this was a deliberate contravention.

36. Section 164(2)(f): The economic benefit to Kia has been \$500.

37. Section 164(2)(g): Kia has made no efforts to correct this issue.

38. I have considered other similar cases where the Registrar of Motor Dealers has imposed an administrative penalty for a deliberate deceptive act such as *Maliwiya et al v Victoria Drive and Darvazehban* (Feb 12 2009); *Car v Vancouver Auto & Moghaddam* (October 15 2008); and *Hurtubise v. Massive Truck and Sidhu and Sidhu* (August 18, 2008). Generally, administrative penalties have ranged from \$2,000 to \$20,000 for deliberate deceptive acts. The later amount was for a case involving the sale of an unsafe motor vehicle: *Hurtubise*. This is the first case I am aware of where a deceptive act was found in relation to the taking of a deposit.

39. In considering all of the above factors, the evidence placed before me, the compliance order that is to issue and I specifically note the monetary amount involved, I believe an administrative penalty in the amount of \$1,000.00 is appropriate. I believe this amount should be sufficient to act as a general deterrent from Kia repeating this conduct. It is proportionate to the sum of money it tried to keep; it is inline with other past administrative penalties; and it is ordered in the public interest: *Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672 (Supreme Court of Canada); *Hogan v. British Columbia Securities Commission* 2005 BCCA 53 (B.C. Court of Appeal); and *The British Columbia College of Teachers v. P.E.M.* 2005 BCCA 76 (B.C. Court of Appeal).

## **DISPOSITION**

40. A Compliance Order shall be issued requiring Kia to:

(a) Abide by the *Business Practices and Consumer Protection Act* S.B.C. 2004 c. 2;

(b) Refrain from committing deceptive acts or practices and not mislead or be ambiguous about a consumers legal rights and obligations;

(c) Return to Sara Bulich the sum of \$500.00; and

(d) Reimburse the Motor Vehicle Sales Authority of B.C. the sum of \$1,038.16, for its investigation and hearing costs.

41. An Administrative Penalty of \$1,000.00 will be issued against Kia.

42. I do not believe it necessary to exercise my authority under section 8.1(4)(b) of the MDA.

**RECONSIDERATION**

43. 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 152<sup>nd</sup> Street, Surrey B.C. V3S 5A5.

Date: February 19, 2009.



Ian Christman B.A., LL.B.