Motor
Vehicle Sales Authority
of British Columbia

File No. 08-70472

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:

CHARLES SOUTHERN

COMPLAINANT

AND:

AUTOCANADA HOMETOWN MOTORS GP INC.
A GENERAL PARTNER OF HOMETOWN MOTORS LP
dba VICTORIA HYUNDAI
(Dealer # 30622)

MOTOR DEALER

SCOTT ROY SWANBERG
(Salesperson # 103032)

SALESPERSON

DECISION OF THE REGISTRAR OF MOTOR DEALERS

Appearing for the Authority:	Denis Savidan, Manager of Compliance and Investigations John McDonald, Compliance Officer
Appearing for the Complainant:	Charles Southern
Appearing for Victoria Hyundai:	Les Landsberg, Dealer Principal/General Manager
Appearing for Scott Roy Swansberg	Himself
Date and Place of Hearing:	**April 15, 2009, at Victoria, British Columbia**

INTRODUCTION

1. In the hearing held before me it was alleged that AutoCanada Hometown Motors GP Inc. a general partner of Hometown Motors LP, dba Victoria Hyundai (Dealer # 30622), ("Victoria Hyundai") and Scott Roy Swanberg (Salesperson # 103032), 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") in that they, by words or by conduct, represented a 2007 Toyota Yaris VIN: JTDKT923075044394 (the "Yaris") as not being an ex-lease or rental vehicle when it was.

2. It was also alleged that Victoria Hyundai and Mr. Swanberg breached their positive duty to declare that the Yaris was an ex-lease or rental as required by section 23(c) of the *Motor Dealer Act Regulation* B.C. Reg. 447/78 (the "Regulation").

3. Mr. Southern's initial complaint indicated the Yaris may have been in a previous accident and received damage which was also not declared. After investigation, John McDonald found no evidence of a prior accident.

4. The following exhibits were entered at the hearing:

(i) Notice of Hearing to Victoria Hyundai – Exhibit 1;

(ii) Notice of Hearing to Mr. Swanberg – Exhibit 2;

(iii) The Affidavit of John McDonald, sworn December 11, 2008 – Exhibit 3; and

(iv) A warning letter from John McDonald to Victoria Hyundai, dated March 30, 2009 – Exhibit 4.

All parties to this matter acknowledged receiving Exhibits 1 to 3 prior to the hearing.

5. While I may not comment on all the evidence produced at this hearing, I have reviewed all that evidence and given it the appropriate due weight.

BASIC FACTS

6. On August 9, 2007, Mr. Southern purchased the Yaris with the intention of it being used by his daughter. Both his name and that of Janet Southern appear on the purchase agreement: Exhibit N of the Affidavit.

7. Victoria Hyundai had purchased the Yaris with other vehicles from MKA Leasing Ltd., doing business as Discount Truck & Car Rentals, on or about May 15, 2007: Exhibit E to the Affidavit. Victoria Hyundai's internal documents show it knew the Yaris was an ex-rental: Exhibit O to the Affidavit. Mr. Landsberg did not contest these facts.

8. On the Yaris's purchase agreement, the required statutory declarations have not been made. Mr. Swanberg acknowledged that his signature appears on the purchase agreement as the person accepting the offer on behalf of the dealer. During testimony, Mr. Swanberg stated he was only accepting the deal regarding the "numbers". He states the declarations were the responsibility of Mr. Perron at the dealership. On the ICBC Transfer/Tax Form (APV9T), transferring the Yaris from Victoria Hyundai to Charles Southern, the box stating "none of these" is checked off regarding the statutory declarations: Exhibit I of the Affidavit. The evidence given was that this form was probably filled out by the Autoplan agent, although the title given of BMGR (business manager), presumably being Mr. Perron, was on the APV9T.

9. On or about May 29, 2008, the Yaris needed some repairs. This was about nine months after the Yaris was purchased by Mr. Southern. All four brake linings needed replacing as well as a front axle. These were covered by the manufacturer's warranty. The repair invoices are in the name of Carrie Southern: Exhibit C of the Affidavit. It was during this time that Mr. Southern became aware that the Yaris was an ex-rental. It was also at this time it was suspected that the Yaris had been in an accident.

10. Mr. Southern and his daughter contacted Victoria Hyundai about the missed declaration and the possibility of the Yaris having been in a prior accident; facts which were not disclosed to them. During these discussions Mr. Southern stated they were having a difficult time dealing with Victoria Hyundai and not obtaining any satisfactory resolution.

11. Mr. Southern complained to the Motor Vehicle Sales Authority (the "MVSA") on May 27, 2008. An investigation was undertaken by John McDonald. The culmination of that investigation is set out in the Affidavit and resulted in this hearing. Mr. McDonald found the dealer had failed to make its statutory declarations, but found no evidence that the Yaris had been in an accident prior to its sale to Mr. Southern.

12. Subsequent to Mr. Southern purchasing the Yaris, it was in a hit-and-run accident with "minor damage left rear": Exhibit J of the Affidavit.

13. On September 4, 2008, Mr. Southern filed an application for compensation to the Motor Dealer Customer Compensation Fund Board. He seeks from the Compensation Fund $19,182.09: Exhibit J of the Affidavit.

POSITION OF THE PARTIES

(a) Mr. Southern

14. At the hearing Mr. Southern said he brought this complaint in order to bring to my attention the actions of Victoria Hyundai and the difficulties he was enduring in dealing with these issues.

15. He agreed that all the necessary repairs to the Yaris were completed under warranty and there was no cost to him or his daughter for those repairs. The repair invoices support this: Exhibit C of the Affidavit.

16. Mr. Southern also agreed that they are generally happy with the Yaris.

17. Mr. Southern acknowledged that Victoria Hyundai offered him $500.00 as a good will gesture for his troubles and for it having missed the ex-rental declaration. At the hearing he said $500 could not compare to $17,000; being small compensation in his mind. No doubt this point refers to his request for full compensation noted in Exhibit J of the Affidavit. At the hearing, I informed Mr. Southern that my authority would probably not permit me to enlarge this "good will gesture" amount.

(b) Victoria Hyundai

18. Mr. Landsberg spoke for Victoria Hyundai. He admitted that the declaration was missed on the purchase agreement. He says it was not intentional and he has offered $500 to Mr. Southern as a goodwill gesture in compensation.

19. Victoria Hyundai also states that while the declaration was missed, there was no harm done and Mr. Southern has suffered no loss. Victoria Hyundai also emphasized that a change in management had occurred at the dealership since Mr. Southern purchased the Yaris. It states it has been cooperative in the MVSA investigation.

(c) Mr. Swanberg

20. Mr. Swanberg's position is that while he was the signatory to the purchase agreement, as the dealer's authorized representative, his role was to "sign-off" on the "numbers". It was for Mr. Perron to ensure the declarations were properly made.

THE LAW

(a) Statutory Declarations

21. A motor dealer must make certain statutory declarations in accordance with section 23 of the *Motor Dealer Act Regulation* B.C. Reg. 447/78 (the "Regulation"). The requirement to disclose a vehicle as an ex-lease or ex-rental is found in section 23(c) of the Regulation:

> 23. A motor dealer shall ensure that in every written representation in the form of a sale or purchase agreement respecting his offering to sell or selling a motor vehicle he discloses, to the best of his knowledge and belief:
>
> (c) whether the motor vehicle has been used as a lease or rental vehicle;

22. Various decisions of the courts have recognized that this section of the Regulation places a positive duty on a motor dealer to make inquiries about the vehicle it intends to sell and make the necessary statutory declarations to consumers. A failure to make these statutory declarations may be negligence: *Motley v. Regency Chrysler* 2002 BCSC 1885 (B.C. Supreme Court). A review of the cases provides the following guidance:

(i) Section 23 of the Regulation requires a motor dealer to make informative statements about those statutory declarations. To do so, a motor dealer must make its own reasonable inquiries in order to inform itself about those facts it is to declare to a consumer: *Key Lease Canada Ltd. v. Bott* 1994 CanLII 788 (B.C. Supreme Court).

(ii) Reliance on the declarations and representations of a previous owner are insufficient to discharge a motor dealer's positive duty to make inquiries and to disclose. They are to make their own reasonable inquiries. This specifically applies to the declarations as to (i) prior damage; (ii) out of province; and (iii) ex-lease or rental: *Motley v. Regency Chrysler* 2002 BCSC 1885.

(iii) Exclusionary terms in a purchase agreement attempting to bar warranties of any kind do not operate to oust the motor dealer's duty of care to the consumer and to meet its positive duty under the Regulation: *Clark v. Abbotsford Imports Ltd.* [1992] B.C.J. No. 471 (B.C. Supreme Court).

(iv) Reliance on I.C.B.C. damage history reports, or other similar reports, does not discharge a motor dealer's obligation to make its own independent inquiries about the vehicle it intends to sell. These reports are not always accurate and not all relevant information about a vehicle may be reported: *Fraser v. Richmond Imports Ltd. et al.* 2001 BCPC 211 (B.C. Provincial Court).

(v) There is no corresponding duty under the *Motor Dealer Act* for a consumer to make these declarations regarding their trade-in vehicle: *Bola v. Jim Pattison Industries Ltd.* 2004 BCPC 291 (B.C. Provincial Court).

(b) Deceptive Acts or Practices

23. 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 Hyundai and Mr. Swanberg. Under section 4(3) of the BPCPA, the B.C. Legislature has deemed certain conduct to be deceptive acts or practices. The Notices of Hearing use the language of section 4(3)(b)(vi) of the BPCPA which deems as deceptive:

> 4(3)(b) a representation by a supplier
>
> (vi) that uses exaggeration, innuendo or ambiguity about a material fact or that fails to state a material fact, if the effect is misleading,

24. The deceptive act or practice provisions of the BPCPA are a codification of the common law regarding misrepresentations applied by the courts. In reviewing section 4(3)(b)(iv) of that Act, the allegation here, to be a deceptive act there needs to be proof on all the following elements:

(i) a representation by a supplier;

(ii) that uses:

(a) exaggeration, innuendo or ambiguity about a material fact; or

(b) that fails to state a material fact; and

(iii) the effect of the representation is misleading.

25. To be material, the misrepresentation must have been a significant aspect of the consumer transaction. There must also be proof that the effect of the misrepresentation was misleading. This requires evidence that the consumer relied on that misrepresentation when making their decision to purchase. If a consumer does not rely on a misrepresentation, it cannot have affected

their decision making processes. As will be seen from the discussion below, this is very similar to the common law applied by the courts.

26. The case law provides guidance in the application of the deceptive act or practice provisions of the BPCPA. 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.

27. *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).

28. A deceptive act or practice may occur before, during or after a consumer transaction: section 4(2) of the BPCPA.

29. A finding that a motor dealer or a salesperson 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

30. Under section 5(2) of the BPCPA, where a consumer (Mr. Southern) provides some evidence sufficient to establish that a deceptive act could have occurred, the evidentiary burden

then shifts to the suppliers (Victoria Hyundai and Mr. Swanberg) 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.

31. This reverse onus reduces the evidentiary burden on the consumer that the normal law would impose. The more evidence the consumer provides, the stronger their case and the more evidence the motor dealer will have to provide to meet its burden. If a consumer provides little in the way of evidence, the dealer's evidentiary burden also diminishes. This reverse onus provision only relates to proof of the commission of a deceptive act or practice. It does not change the ultimate burden on the consumer to prove its claim and its damages, on a balance of probabilities: *F.H. v. McDougall* 2008 SCC 53 (Supreme Court of Canada).

DISCUSSION

32. Generally, there are three types of misrepresentations: innocent; negligent; and fraudulent. All may allow a consumer to claim damages. Whether any of these misrepresentations will allow the contract to be completely voided will depend on the facts: *Rainbow Indust. Caterers v. C.N.R.* (1988), 30 B.C.L.R. (2d) 273, 1988 CanLII 178 (B.C. Court of Appeal); affirmed by [1991] 3 S.C.R. 3 (Supreme Court of Canada).

(a) Failure to declare damages over $2,000

33. After his investigation, Mr. McDonald found no evidence that the Yaris was in a prior accident. There is no evidence before me that the Yaris was in an accident with damages over $2,000. Therefore it cannot be proven that Victoria Hyundai misrepresented this fact and this part of the consumer's claim is dismissed: *Motley v. Regency Chrysler* 2002 BCSC 1885 (B.C. Supreme Court).

(b) Failure to declare the Yaris as an ex-rental – Innocent Misrepresentation

34. An innocent misrepresentation is when a seller of goods incorrectly represents those goods, honestly believing in that representation, with there being no evidence in his possession to suggest the representation was untrue: *Rushak v. Henneken Auto Sales & Service* (1991), 59 B.C.L.R. (2d) 250, (C.A.), (BC Court of Appeal); and also see *Cheema v. Mario Motors Ltd.* 2003 BCPC 416 (B.C. Provincial Court).

35. The evidence is clear that Victoria Hyundai had evidence in its possession that the Yaris was an ex-rental vehicle. It cannot be said that Victoria Hyundai or its employees made an innocent misrepresentation.

(c) Failure to declare the Yaris as an ex-rental – Negligent Misrepresentation

36. To find that a negligent misrepresentation occurred, there must be evidence to satisfy the five elements of such a claim as set out in *The Queen v. Cognos Inc.*[1993] 1 S.C.R. 87 (Supreme Court of Canada); and as applied in *Motley v. Regency Chrysler* 2002 BCSC 1885 (B.C. Supreme Court):

(1) there must be a duty of care based on a "special relationship" between the representor and the representee;

(2) the representation in question must be untrue, inaccurate, or misleading;

(3) the representor must have acted negligently in making said misrepresentation;

(4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and

(5) the reliance must have been detrimental to the representee in the sense that damages resulted.

37. On a review of the evidence, I am satisfied that there was a special relationship; the representation was misleading; and that Victoria Hyundai was negligent in making the representation. In *Motley v. Regency Chrysler* 2002 BCSC 1885, Mr. Justice Parret stated failing to make a statutory declaration under section 23 of the Regulation could amount to negligence.

38. As to reliance; there must be some evidence that Mr. Southern relied on the representation in making his decision to purchase the Yaris. Where some evidence exists, reliance may be inferred from that evidence as stated by Madam Justice Neilson in *Hub Excavating Ltd. v. Orca Estates Ltd.*, 2009 BCCA 167 (B.C. Court of Appeal):

> [54] Reliance is a question of fact as to the plaintiff's state of mind. It will be sufficient for the plaintiff to prove that the misrepresentation was at least one factor that induced him to act to his detriment. Where a misrepresentation was calculated or would naturally tend to induce the plaintiff to act on it, reliance may be inferred. The onus of rebutting that inference lies with the representor: *Kripps v. Touche Ross & Co.*, 1997 CanLII 2007 (BC C.A.), [1997] 6 W.W.R. 421, 33 B.C.L.R. (3d) 254 at paras. 101-103 (C.A.).

39. There is no evidence that Mr. Southern specifically asked Victoria Hyundai if the Yaris was an ex-rental. There is also no evidence that he made Victoria Hyundai aware that he did not want a vehicle that was an ex-rental. One would expect that if this was important to Mr. Southern, he would have communicated this fact to Victoria Hyundai. There is also no evidence that Mr. Southern questioned the missing declarations, including ex-rental, on the purchase agreement before the Yaris was transferred into his name.

40. On the evidence before me, I cannot say that Mr. Southern reasonably relied on the misrepresentation about the ex-rental status of the Yaris in deciding to purchase that vehicle. I find on the evidence that the ex-rental issue did not come to his mind until he discovered the Yaris was an ex-rental when it was taken in for some warranty work. This is not a basis to conclude or to infer that he relied on the misrepresentation at the time of purchase.

41. I also do not find any damages have been shown – point 5 above. An assumption of damages is not enough when it comes to valuing a vehicle where there has been a missed declaration. There must be some proof of damage: *Parsons v. Zadgroski* [a motor dealer] 2005 BCPC 384 (B.C. Provincial Court) and the cases cited in that decision. In a claim for a negligent misrepresentation about a vehicle being an ex-rental, a failure to prove damages because of that declaration is fatal to such a claim. In *Motley v. Regency Chrysler* 2002 BCSC 1885 the Court dismissed the consumer's claims as the consumer failed to show how the missed ex-lease declaration caused him damages.

42. In this case, Mr. Southern's evidence is that he (and his daughter) has not suffered any damages due to the missed ex-rental declaration. Any repairs, brakes and front axle, have been covered by the manufacturer's warranty. Mr. Southern has stated they are generally happy with the Yaris. There is no evidence of damage due to the misrepresentation and any claim based on negligent misrepresentation has not been made out and this part of the claim is dismissed.

(d) Failure to declare the Yaris as an ex-rental – Fraudulent Misrepresentation

43. I find the evidence is insufficient to prove the necessary legal elements of a fraudulent misrepresentation. Those legal elements were summarized in *Noble et al. v. Hueson Pharmaceutical Corp. et al* 2002 BCSC 1791(B.C. Supreme Court):

> [64] The elements of the tort of deceit are four in number: first, there must be a false representation of fact; second, the representation must be made with knowledge of its falsity; third, it must be made with the intention that it should be acted on by the plaintiff; and fourth, it must be established that the plaintiff acted upon the statement and in doing so sustained damage (*Diamond v. Bank of London & Montreal Ltd.*, [1979] Q.B. 333 at p. 349).

44. Those elements are discussed below along with the evidence.

(i) Making a false statement

45. In a claim for fraudulent misrepresentation, silence or a failure to make a representation, in-and-of-themselves, are insufficient to ground this element. This was stated in *Canson Ent. Ltd. v. Boughton & Co.,* 1988 CanLII 3147 (B.C. Supreme Court); affirmed by 1989 CanLII 2806 (B.C. Court of Appeal); and affirmed by [1991] 3 S.C.R. 534 (Supreme Court of Canada):

> [21] Simple reticence or silence does not amount to fraud. There must be a positive assertion which amounted to a misrepresentation: *Sorensen v. Kaye Hldg. Ltd.,* 14 B.C.L.R. 204, [1979] 6 W.W.R. 193 (C.A.)…

46. The context of the case will indicate when silence, joined with a positive representation, may become a false statement. For instance, stating that slag can make good fill; while by itself may be true, becomes a misrepresentation and a false statement when it is not mentioned that the particular slag in question is radioactive: *CRF Hldg. Ltd. v. Fundy Chem. Int. Ltd.* (1981), 19 C.C.L.T. 263 (B.C. Court of Appeal).

47. In this case, Victoria Hyundai was bound by law to make a representation on the purchase agreement whether or not the vehicle was an ex-rental. The standard form contract has a place to do so. Not checking off "yes" or "no" on the purchase agreement is a misrepresentation when viewed in conjunction with the APV9T transfer form which represents that the vehicle was not an ex-rental - the check box saying "none of these" is marked. That box was marked by either an employee of Victoria Hyundai or the Autoplan agent acting on behalf of Victoria Hyundai. There is sufficient evidence to conclude that in view of the whole transaction, a false statement was made.

(ii) Knowing the representation to be untrue

48. The law states that this element must be strictly proven and negligence or carelessness about the truth does not satisfy this element. The representation made must be made knowing it

was false: *Rainbow Indust. Caterers v. C.N.R.* (1988), 30 B.C.L.R. (2d) 273, 1988 CanLII 178 (B.C. Court of Appeal); affirmed by [1991] 3 S.C.R. 3 (Supreme Court of Canada).

49. In law, for a corporation to be found to have acted fraudulently, the necessary knowledge must be found to exist in one of its officers or directors who are one of its "directing minds". Therefore, one must look at whether a misrepresentation by an officer or director was made knowing it to be false: *Rhône (The) v. Peter A.B. Widener (The)* [1993] 1 S.C.R. 497 (Supreme Court of Canada). If an employee has made a misrepresentation, then the motor dealer is vicariously liable for its employee's conduct. The differentiation between employee and an officer or director who is a "directing mind" was summarized in *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670:

> [121] Both Robitaille and the majority reasons in Hollett represent applications of the "identification theory" of corporate liability. Under this theory, the question is whether the wrongdoer was acting as agent or servant of his employer or whether his conduct was the very conduct of the employer itself. The question is answered by applying the test propounded by Iacobucci J. in "Rhone" (The) v. "Peter A.B. Widener" (The), 1993 CanLII 163 (S.C.C.), [1993] 1 S.C.R. 497 at 520-21:
>
> > ...the focus of [the] inquiry must be whether the impugned individual has been delegated the "governing executive authority" of the company within the scope of his or her authority. I interpret this to mean that one must determine whether the discretion conferred on an employee amounts to an express or implied delegation of executive authority to design and supervise the implementation of corporate policy rather than simply to carry out such policy. In other words, the courts must consider who has been left with the decision-making power in a relevant sphere of corporate activity.

50. I cannot find any evidence that at the time of the sale, Mr. Swanberg or Mr. Perron knew that the misrepresentation about ex-rental was untrue. Mr. McDonald's affidavit and the documents show the Yaris was one of many vehicles bought by Victoria Hyundai from the rental company. Mr. McDonald's investigation also notes that some of those cars were properly declared, while others were not. A review of those findings suggests carelessness or sheer laziness in failing to make the ex-rental declaration on the Yaris. Carelessness or laziness does not satisfy this element.

(iii) An intention to deceive

51. There must be proof that the purpose of the misrepresentation was to induce the recipient of the misrepresentation to act upon it: *B.C. Chego Interational Ltd. v. B.C. Hydro & Power Authority* (1990), 4 C.C.L.T. (2d) 161 (B.C. Court of Appeal); affirmed by [1993] 1 S.C.R. 12 (Supreme Court of Canada). Again, intention must be garnered from the conduct of the employees in question and there is simply no evidence of an intention to deceive in this case.

(iv) Material inducement causing damage

52. There must be evidence that the misrepresentation was material to the decision to purchase the Yaris. The first question to ask is; would the statement have induced the reasonable person to act in reliance on it? If the answer is yes, the next question to ask is whether the consumer actually relied on the misrepresentation: *TWT Enterprises Ltd. v. Westgreen Developments (North) Ltd.* (1992), 3 Alta. L.R. (3d) 124 (Alberta Court of Appeal).

53. The Court in *Barmettler v. Endicott* (1983), 29 Sask. R. 192 at 193 (Court of Queen's Bench) stated it very succinctly:

> A misrepresentation goes for nothing unless it is a proximate and immediate cause of the transaction. It is not enough that it may have remotely or indirectly contributed to the transaction and may have supplied a motive to the other party to enter into it. The representation must be the very ground on which the transaction has taken place.

54. For the same reasoning stated above on negligent misrepresentation, I find no evidence that Mr. Southern detrimentally relied on the misrepresentation nor is there proof of damages occurring because of the misrepresentation. I find no claim can be sustained for a fraudulent misrepresentation.

(e) The general conduct of Victoria Hyundai

55. Much of Mr. Southern's written statements – complaint – and his oral testimony at the hearing focused on Victoria Hyundai's lack of response to his and his daughter's concerns about the Yaris after it was purchased. Mr. Landsberg stated there was a communication issue as the dealer was undergoing a management change. Victoria Hyundai has offered Mr. Southern $500 as a good will gesture for his troubles and its error.

56. My authority is to review a motor dealer's or a salesperson's conduct under the BPCPA for a deceptive act or practice and for unconscionable acts or practices. I have found no deceptive acts or practices as described above. There is certainly no evidence that would satisfy a claim of unconscionability[1] as that is known in the law: *Bain v. Empire Life Insurance Company* 2004 BCSC 1577 (B.C. Supreme Court).

57. One would hope that a motor dealer would be responsive to a consumer's concern and do so in a timely manner. I have not been given any authority to oversee or remedy such a failure to communicate. The B.C. Legislature has seen fit to leave that conduct to the market place to police for itself.

(f) The Missed Declaration

58. A review of the purchase agreement shows Victoria Hyundai has missed making its ex-rental statutory declaration. Mr. Landsberg did not contest this at the hearing. Under section 35(2) of the *Motor Dealer Act* R.S.B.C. 1996 C. 316 it is an offence for a motor dealer to fail in making those statutory declarations found in section 23 of the Regulation. Schedule 2 of the *Violation Ticket Administration and Fines Regulation* B.C. Reg. 89/97 sets the fine for failing to disclose ex-rental at $460 ($400 fine plus $60 surcharge). The Regulation requires a motor dealer ensure this declaration is made and thus the fine goes to the motor dealer. A violation ticket in this amount shall be issued to Victoria Hyundai, if one has not already been issued.

59. If Mr. Swanberg is found to continue to miss declarations on the purchase agreements he is responsible for, such as when he signs as the representative of the motor dealer, that will constitute grounds for the Registrar to consider suspending or cancelling his salesperson license.

CONCLUSION

60. Based on the evidence presented and applying it to the law as set out above, I do not find that a deceptive act or practice under the BPCPA was committed by Victoria Hyundai. Specifically, I do not find any evidence that the missed declaration of ex-rental was reasonably relied on by Mr. Southern in making his decision to purchase the Yaris. I also find no evidence of damage resulting from that misrepresentation.

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[1] Such as taking advantage of a person due to a mental or physical infirmity.

61. A violation ticket in the amount of $460 will be issued to Victoria Hyundai for its missed declaration, if one has not already been issued.

62. While Mr. Swanberg has escaped any liability on this matter, this decision constitutes a warning to him to make the necessary declarations on motor vehicles in which he is responsible to make.

63. As no compliance order or administrative penalty have been ordered, there is no right to a reconsideration pursuant to sections 180 and 181 of the BPCPA.

64. Except for the $460 fine, if any party disagrees with this decision, it may be reviewed by way of a Petition to the B.C. Supreme Court under the *Judicial Review Procedure Act* of B.C. If Victoria Hyundai wishes to dispute the violation ticket, it must do so as directed on that ticket.

Dated: June 23, 2009

[redacted]

Ian Christman B.A., LL.B.