



Motor  
Vehicle Sales Authority  
of British Columbia

File No. 08-70880

**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:**

**ABHYUDAYA PANSE**

**COMPLAINANT**

**AND:**

**MARINE DRIVE IMPORTED CARS LTD. dba  
VANCOUVER HONDA  
(Dealer # 8185)**

**MOTOR DEALER**

**DECISION OF THE REGISTRAR OF MOTOR DEALERS**

Appearing for the Authority:	Denis Savidan, Manager of Compliance and Investigations Anna Gershkovich, Compensation Fund Claims Manager Hong Wong, Manager of Licensing
Appearing for the Complainant:	Mr. Abhyudaya Panse, and Mrs. Aishwarya Panse
Appearing for Vancouver Honda:	Nelson Cheung, General Sales Manager Ibby Ahmad, Sales & Leasing Consultant
<b>Date and Place of Hearing:</b>	<b>April 29, 2009, at Surrey, British Columbia</b>

## **INTRODUCTION**

1. In the hearing held before me it was alleged that Marine Drive Import Cars Ltd., doing business as Vancouver Honda (Dealer # 8185), (“Vancouver Honda”) 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 it, by words or by conduct, represented that a \$500 deposit (regarding the purchase of a 2008 Honda Civic) it received from Abhyudaya Panse was refundable when it was not.

2. A Notice of Hearing was sent to Vancouver Honda on March 18 and it acknowledged receiving that Notice. Mr. Panse was also sent a copy of the Notice and acknowledged its receipt. The Notice of Hearing was entered as Exhibit 1. Sent with the Notice was the Affidavit of Anna Gershkovich, sworn March 6, 2009. Both parties acknowledged receiving that Affidavit and it was entered as Exhibit 2 at the hearing. The parties both gave additional evidence under affirmation at the hearing. 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**

3. Over the course of several days, starting on or about September 26, 2008, Mr. Panse and representatives of Vancouver Honda were negotiating the purchase and sale of a 2008 Honda Civic. It appears Mr. Ibbby Ahmad was the lead salesperson on this transaction. Mr. Panse specifically requested a silver Honda Civic but agreed to a second colour choice of blue if silver could not be located. Mr. Panse was asked to provide a \$500 deposit which Vancouver Honda admitted would be fully refundable if they could not locate Mr. Panse’s desired car.

4. Vancouver Honda determined that silver was unavailable in B.C. They contacted Mr. Panse to see if he wanted to go ahead with the purchase of a blue Honda Civic, which they would arrange to have brought to their dealer location. Vancouver Honda says Mr. Panse was well aware they would have to bring a car in as they had neither a silver nor blue Honda Civic. Apparently inventory was getting low within the Province. Mr. Panse considered the offer and asked if the dealer would agree to provide three free oil changes if he purchased the blue Honda Civic. Vancouver Honda agreed.

5. At this point the two parties stories part ways. Mr. Panse states he did not provide a final OK to purchase the blue Honda Civic after negotiating the three free oil changes. He also says he obtained Vancouver Honda's assurance that the deposit was still fully refundable should he decide not to purchase the blue Honda Civic. He called sometime later and asked Vancouver Honda to beat the deal by a further \$200. Vancouver Honda said no.

6. Vancouver Honda states that after agreeing to the three free oil changes, they obtained a final OK from Mr. Panse to purchase the blue Honda Civic. It obtained such a vehicle from another dealer and incurred costs to have it transported to their site. Vancouver Honda states Mr. Panse called after giving his approval for purchasing the blue Honda Civic to get out of the deal. Vancouver Honda says they agreed to cancel the deal but would keep \$250 of the deposit to cover its costs in having the blue Honda Civic brought to their location. It now says they have incurred additional costs related to flooring interest and believe they should be entitled to keep the full \$500; and may or may not consider further legal action to recoup the remainder of their losses.

7. Mr. Panse did not receive any written terms regarding the deposit and there is nothing in writing to say the deposit is non-refundable.

## **ISSUES**

8. The issue before me is whether Vancouver Honda committed a "deceptive act or practice" as that term is defined in the BPCPA, regarding the deposit.

## **THE LAW**

### ***(a) Deceptive acts***

9. Section 5(1) of the BPCPA prohibits a "supplier" of goods conducting a "consumer transaction" from committing a deceptive act or practice. There is no doubt that the definition of "consumer transaction" in the BPCPA is applicable to the case before me. Vancouver Honda is a "supplier" as that term is defined in the BPCPA.

10. Section 4(1) of the BPCPA defines a deceptive act or practice and a representation as:

"deceptive act or practice" means, in relation to a consumer transaction,

(a) an oral, written, visual, descriptive or other representation by a supplier, or

(b) any conduct by a supplier

that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor;

"representation" includes any term or form of a contract, notice or other document used or relied on by a supplier in connection with a consumer transaction.

11. 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 sections 4(3)(b)(vi) of the BPCPA which states:

(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,

12. Section 4(3)(b)(iv) also states:

(b) a representation by a supplier

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

13. The case law provides guidance in the application of these deceptive act or practice provisions. In *Rushak v. Henneken Auto Sales & Service* (1991), 59 B.C.L.R. (2d) 250, (B.C. 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 unsuspecting and are credulous; and
- (iv) the Act imposes a high standard of candour on a supplier of goods.

14. *Henneken* was 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).

15. 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***

16. Under section 5(2) of the BPCPA, where a consumer (Mr. Panse) provides some evidence sufficient to establish that a deceptive act could have occurred, the evidentiary burden then shifts to the supplier (Vancouver Honda) to show that the alleged deceptive act or practice did not occur:

5(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.

17. 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. The civil burden of proof for a deceptive act or practice, whether deliberate or not, is on a balance of probabilities: *F.H. v. McDougall* 2008 SCC 53 (Supreme Court of Canada).

***(c) Witness Credibility***

18. Where witness credibility may be in issue, it is important to consider the various factors and principles 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) Deposits & Partial Payments***

19. In law, a deposit is an earnest to carry out the terms of the contract and the person receiving the deposit may keep it in its entirety if the other party fails to perform their part of the contract:

*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.). If the contract is performed, the deposit is applied to payment of the contract. Where no terms are expressed about the giving of a deposit, the common law imposes these terms:

...Even in the absence of express contractual provision, it is an earnest for the performance of the contract: in the event of completion of the contract the deposit is applicable towards payment of the purchase price; in the event of the purchaser's failure to complete in accordance with the terms of the contract, the deposit is forfeit, equity having no power to relieve against such forfeiture... [emphasis added]

*Coal Harbour Properties Partnership* (B.C. Court of Appeal) at paragraph 16 citing approvingly *Workers Trust & Merchants Bank Ltd v. Dojap Investments Ltd*, [1993] A.C. 573, [1993] 2 All E.R. 370 (Privy Council).

20. The court in *Coal Harbour Properties* also noted that an agreement that a deposit is a pre-estimate of damages and not a penalty should not be interfered with unless it is "out of all proportion to the damage" or where there has been oppression in the making of the contract by the person taking the deposit.

21. If the payment was a partial payment and there was a default in performing the contract, the person defaulting and having given a partial payment is generally entitled to a refund, less the reasonable costs incurred by the non-defaulting party for having carried out, in whole or in part, its obligations under the contract: *Bradley Brothers (Oshawa) Ltd.*

22. The common law on deposits and partial payments must be read with the requirements of the BPCPA in mind, as statutes may override the common law. Where a supplier of goods misrepresents the nature or terms of a deposit, or acts unconscionably (as defined in the BPCPA), they may lose the benefit of the above law.

## **DISCUSSION**

23. Mr. Panse's written statement and his initial oral testimony was that he went to Vancouver Honda to purchase a silver Honda Civic. He was asked if no silver Honda Civic was available what other colour would he accept and he said blue. He provided a \$500 deposit which he was told was fully refundable if he did not go ahead with the purchase. Vancouver Honda agrees that this was the initial understanding.

24. Mr. Panse's written statement and oral testimony was that he was told no silver Honda Civic was available and was asked if he would take the blue one. Mr. Panse's written and oral statement is that he made no such commitment, and then Vancouver Honda informed him that the car was already on the truck and he would not get a full refund. He would have to pay \$250 for transportation costs.

25. Vancouver Honda countered that this is not what happened. Vancouver Honda said it called Mr. Panse to ask if the blue Honda Civic was still acceptable. According to Vancouver Honda, Mr. Panse asked Vancouver Honda if it would give him three free oil changes if he purchased the blue Honda Civic; as another dealer had made him that offer for a blue Honda Civic. Vancouver Honda testified they agreed to give him three free oil changes. It was their understanding that they had met Mr. Panse's offer to purchase the blue Honda Civic and they had a deal.

26. I would note that Mr. Panse never offered the information on the oil changes in his written statement or his initial oral testimony. He only admitted to it after Vancouver Honda gave that evidence at the hearing and upon me questioning him on that fact. When I first asked him the question, Mr. Panse did not give a straightforward answer, was elusive, and referred me to his written "chronological" statement. He told me what was said between himself and the dealer was in his written "chronological" statement. Nothing about three free oil changes is in his written "chronological" statement. It was not until I asked him the question a third time that I received a clear concise answer – he did ask for additional free oil changes and Vancouver Honda agreed to those terms in relation to negotiating the purchase of the blue Honda Civic: Transcript of Proceedings page 28, line 25, to page 30, line 6. However, Mr. Panse continued that he was not going to go through with the deal as he already had a better deal elsewhere. He was just trying to see if he could get the best deal possible.

27. Vancouver Honda also provided evidence that once Mr. Panse said yes to the three free oil changes, it made arrangements and commitments with another motor dealer to have a blue Honda Civic brought to their store. They say, and I accept, that they incurred transportation costs amounting to \$250.

28. In testimony, Vancouver Honda admitted that it told Mr. Panse the deposit was fully refundable when it was searching for a silver Honda Civic as they had incurred no cost. Vancouver Honda also admitted that when they called Mr. Panse to confirm he was still

interested in a blue Honda Civic, he was told the deposit was refundable if he did not agree to purchase the blue Honda Civic. Vancouver Honda indicated they wanted to ensure Mr. Panse's seriousness in buying the blue Honda Civic before making efforts to locate one. This is not in controversy and I accept this as fact.

29. Vancouver Honda states that once they located the blue Honda Civic, Mr. Panse then asked if Vancouver Honda would provide three free oil changes with the purchase of the blue Honda Civic. As stated above, Mr. Panse confirmed this occurred. Vancouver Honda agreed and obtained what they believe was confirmation to go ahead with the deal and made their arrangements with the other motor dealer.

30. Mr. Panse apparently then called again saying he wanted an additional \$200 off as another dealer would do so. Vancouver Honda declined this counter-offer from Mr. Panse. Mr. Panse then apparently informed Vancouver Honda he was not going through with the deal. Mr. Panse denies this in part. However, I accept Vancouver Honda's version of these particular events. Vancouver Honda's evidence throughout has been consistent and corroborated by the documents. Also, Vancouver Honda admitted the deposit was refundable at times when doing so could be contrary to their interest. As already noted, Mr. Panse was not forthcoming about his request for three free oil changes. I find him to have been elusive on this topic as it could be contrary to his interest. I also note he initially testified that he was not responding to an advertisement. When I brought to his attention his written statement saying he was responding to Vancouver Honda's advertisement for .9% APR financing; he then agreed the advertisement was in part the reason why he went to the dealership. His testimony changed when confronted with the facts.

31. On the evidence, I am satisfied that what took place was Mr. Panse and Vancouver Honda initially agreed to the purchase and sale of a silver Honda Civic with blue being optional; because silver was hard to come by. Vancouver Honda assured Mr. Panse that the deposit was refundable if he did not agree to the purchase. Next, Vancouver Honda called Mr. Panse to tell him silver was unavailable and to confirm that he was still interested in pursuing the blue Honda Civic to which Mr. Panse indicated yes. I also find that Vancouver Honda repeated that if he did not agree to purchase the blue Honda Civic, the deposit was still refundable. Vancouver Honda then informed Mr. Panse that they could obtain a blue Honda Civic. At this point, Mr. Panse sought Vancouver Honda's commitment to three free oil changes in order for him to purchase the blue



Honda Civic. Vancouver Honda agreed to this term. At this point I find that Vancouver Honda believed a deal was struck having met Mr. Panse's offer and took steps to bring in the blue Honda Civic. Mr. Panse then sought a further \$200 reduction which Vancouver Honda declined. Mr. Panse then said he would not go through with the deal.

32. From this evidence, I cannot see where Vancouver Honda committed a deceptive act or practice in relation to the deposit. To be a deceptive act or practice, any representation about the deposit must have caused Mr. Panse to make "an error in judgment". The evidence does not show this but merely shows the usual back-and-forth of negotiations and the possibility that an offer was made and accepted. In contract law, when an agreement is reached, the deposit is applied to the purchase price of the goods after the contract is completed. If a party backs out of the deal, the law states the non-defaulting party is entitled to keep the deposit, with limited exceptions.

33. What is really in issue here is did a contract arise when Vancouver Honda met Mr. Panse's request for three free oil changes? In contract law, if a person's words or conduct leaves the impression that a deal has been struck they are bound by that conduct. Whether there has been a meeting of the minds is considered objectively: *Calvan Consolidated Oil & Gas Company Ltd. v. M.E. Manning* [1959] S.C.R. 253 (Supreme Court of Canada); *Meyers v. Davies* (1989), 45 B.L.R. 92 (B.C. Supreme Court); *Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.* 2000 BCCA 365 (B.C. Court of Appeal); and *Zynik Capital Corporation v. Faris* 2007 BCSC 527 (B.C. Supreme Court). In-other-words, it matters not that in Mr. Panse's mind he had not fully agreed to purchase the blue Honda Civic. What matters is whether viewed objectively, Mr. Panse's conduct and words gave rise to a reasonable belief by Vancouver Honda that a deal had been struck. This principle was succinctly summarized by Mr. Justice Rice in *Richter v. McKeachie* 2009 BCSC 288 (B.C. Supreme Court):

[30] An offer is a complete statement of the terms on which one party is prepared to deal, made with the intention that it be open for acceptance by the person to whom it is addressed: John Swan, Canadian Contract Law, 1st ed., LexisNexis 2006 at 184. The offeror's intention is not assessed with reference to the subjective intention of the offeror but to the reasonable understanding of the offeree. "The court's task is to decide what each party to an alleged contract would reasonably conclude from the utterances, writings or conduct of the other": Henry Kendall & Sons v. William Lillico & Sons Ltd. [1969] 2 A.C. 31 at 113, 2 All E.R. 444 at 481 (H.L.), per Lord Pearce. A contract will be held to have been made when the offeree accepts an offer that can reasonably and objectively be said to constitute an offer. Mutual assent, in the sense that both parties subjectively intended to enter into a contract, is not required for the formation of a contract; it is only necessary that

there be an objective manifestation of mutual assent: see e.g. *Walton v. Landstock Investments Ltd.* (1976), 13 O.R. (2d) 693 at 696, 72 D.L.R. (3d) 195 (C.A.), leave to appeal refused [1976] 2 S.C.R. ix. Thus although it is often said that there must be a "meeting of minds" or consensus ad idem, "what is important is not what either party actually thought but what each reasonably understood the other to mean": Swan, Canadian Contract Law, at 195. [underlining is added]

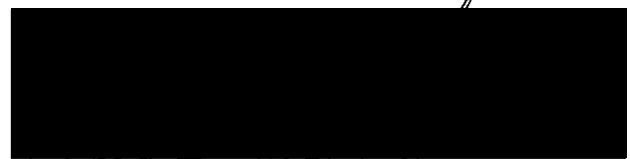
## CONCLUSION

34. I find the terms and conditions about the deposit were clear. If Mr. Panse did not agree to purchase the silver and then the blue Honda Civic, the deposit would be refunded. There is no deceptive act or practice - misrepresentation - on that point. What is not clear is, when viewed objectively, did Mr. Panse, by words and by conduct, indicate to Vancouver Honda his agreement to purchase the blue Honda Civic, after they agreed on the three free oil changes. The answer to that question will go a long way to determining whether or not Mr. Panse is entitled to a refund of the deposit; in whole or in part. Whether a contract arose at this specific time is a contract dispute with which I have no jurisdiction to decide. I make no comment on whether an enforceable contract arose in this matter as that is for the courts to decide.

35. I have found no deceptive act or practice in relation to the deposit given by Mr. Panse to Vancouver Honda. That is the extent of my jurisdiction in this matter. Therefore Mr. Panse's claim on this specific and narrow point is dismissed.

36. As no determination, as that term is defined in the BPCPA, has been made, the parties do not have a right of reconsideration. If either party disagrees with this decision, they may petition the B.C. Supreme Court to review it pursuant to the Judicial Review Procedure Act.

Date July 24, 2009



Ian Christman B.A., LL.B.