



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:

KATHERINE CONNELL

COMPLAINANT

AND:

JOE CUNNINGHAM FORD LTD.

MOTOR DEALER

DECISION OF THE REGISTRAR OF MOTOR DEALERS

Appearances

For the Authority:	Denis Savidan, Manager of Compliance and Investigations Mike Dorrان, Compliance Officer
For Katherine Connell	In person and with Mike Paroshy
For Joe Cunningham Ford Ltd.	Joe Cunningham Brett Brenneman
Date and Place of Hearing:	December 7, 2009, at Nanaimo, British Columbia.

INTRODUCTION

1. This hearing was called to consider whether Joe Cunningham Ford Ltd., motor dealer registration # 6754, ("Cunningham Ford") did on or about May 13, 2005 at Parksville, British Columbia, misrepresent to Katherine Connell that a 1992 Chevrolet Corvette (the "Corvette") had no prior accidents, was inspected and in good condition, when in fact it was in an accident with damage over \$2,000 and declared a salvage vehicle, and that such a misrepresentation was 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"). There is also an allegation that Cunningham

Ford failed to properly make its statutory declaration of damage over \$2,000 contrary to section 23(b)(ii) of the *Motor Dealer Act Regulation* B.C. Reg. 447/78 (the "Regulation").

2. Various documents were submitted into evidence by the Authority, Ms. Connell and Cunningham Ford. Included were two affidavits from Mike Dorran a compliance officer with the Motor Vehicle Sales Authority of British Columbia (the "VSA"). Oral testimony came from Mr. Dorran; Mr. Cunningham; Mr. Brenneman; and Ms. Connell. Bill Wright gave oral testimony regarding the damage to the Corvette, as a witness for Ms. Connell. While I may not mention all the evidence that was submitted before me, I have reviewed that evidence and given the appropriate weight that each is due.

BASIC FACTS

3. On or about May 13, 2005 Katherine Connell attended the lot of Cunningham Ford and looked at the Corvette. Her then husband took the Corvette for a test drive with Ms. Connell sitting as a passenger. Ms. Connell agreed to purchase the Corvette at a price of \$22,573.68 before taxes and before a trade-in allowance for her Jeep was applied to that purchase price. Cunningham Ford made its statutorily required declaration regarding damage over \$2,000 by indicating that the Corvette had not previously sustained damage over \$2,000: Purchase Agreement, page 80 of the Affidavit #1 exhibits. That statutory declaration was not made on the ICBC Transfer/Tax Form called an APV9T: page 8 of the Affidavit #1 exhibits. The Purchase agreement show 90,645 for the distance travelled by the Corvette but does not indicate whether this is in kilometers or miles. The APV9T shows this to be kilometers.

4. In June 2009 Ms. Connell states she had a prospective buyer for the Corvette with an agreed to price of \$13,500. Ms. Connell states the deal was subject to a vehicle history search showing clear title. A CarFax report was obtained on the Corvette and it showed a title history indicating the Corvette was declared a salvage vehicle in California and then in Colorado when the Corvette was apparently moved there. From the CarFax report, it appears the Corvette went from Colorado to Texas and the salvage title was lost or removed when registered in Texas: Exhibit K of Affidavit #1. Ms. Connell stated the deal fell through because of the salvage title.

5. Ms. Connell engaged in discussions with Cunningham Ford to see if they could resolve the issue of not declaring the salvage title. In the end, the two could not come to some agreement on this issue. On July 16, 2009, Ms. Connell made a formal complaint to the Motor Vehicle Sales

Authority of B.C which investigated this transaction. This hearing is a result of Ms. Connell's compliant and that investigation.

POSITION OF THE PARTIES

(a) Ms. Connell

6. Ms. Connell states in her complaint she was told by a representative for Cunningham Ford, Denis Foster, that the Corvette was in good condition with very low mileage and was accident free. Ms. Connell also states Cunningham Ford told her the Corvette was brought in from Texas.

7. Ms. Connell advances the position that Cunningham Ford failed to properly research the history of the Corvette before selling it to her. She comes to this position in part due to the investigative finding of Mike Dorran, and her own findings after running a CarFax report.

8. Ms. Connell feels she is left with a vehicle with a salvage title and she does not feel she can in good conscience sell the Corvette to another person. She feels "stuck" with the Corvette and believes Cunningham Ford should buy back the Corvette from her for the \$13,500 she lost in the failed June 2009 private sale.

9. In aid of Ms. Connell's position, Mr. Wright gave opinion evidence about the Corvette. It was his opinion that the Corvette was involved in a major rear-end collision that would have written the car off. Mr. Wright detailed how the Corvette appeared to have been repaired and was of the opinion that while the Corvette is not unsafe or it would not fail a structural integrity test, it may not withstand "hard driving" without causing some serious damage.

10. Ms. Connell provided receipts showing the maintenance history of the Corvette while she has owned it. Also submitted was a package of comparator Corvettes for sale with their current asking price. Ms. Connell also stated the Corvette has been driven only by her and that she has never been in an accident with the Corvette: Transcript of Proceedings page 46. As of September 24, 2009, the Corvette shows 110,250 kilometers: Affidavit #1 at paragraph 24 and Affidavit #2 at paragraph 5. Ms. Connell has travelled about 20,000 km in about 4 years with the Corvette.

(b) Cunningham Ford

11. Cunningham Ford's position throughout is that they did everything they could, following the standards of the time, to research the Corvette when it made its declaration of no prior damage over \$2,000. Cunningham Ford further states that they did not do anything to

intentionally deceive Ms. Connell in this transaction. They do not deny they told Ms. Connell the vehicle was in good condition and accident free. At the hearing, Mr. Brenneman even stated that Cunningham Ford told Ms. Connell that the Corvette had been inspected prior to the sale.

12. Cunningham Ford placed in evidence documents to show that CarProof reports can be wrong and stated the CarProof report showing the salvage title for the Corvette could be wrong: Exhibit 4. Cunningham Ford submitted a letter by Al Descoteau to stress that there is no way of knowing when the damage to the Corvette occurred. Cunningham Ford raises the concern that there is no way to know if the damage occurred after Ms. Connell purchased the Corvette. Other documents were tendered and referred to such as the Canadian Tire inspection at the time of importation to B.C. and other service work done by Cunningham Ford and other repair facilities to indicate that no such damage was noted at any time while Ms. Connell owned the Corvette.

THE LAW

(a) Section 23(b)(ii) of the Regulation

13. Section 23(b)(ii) of the Regulation states:

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:

(b) whether the motor vehicle has

(ii) in the case of a used motor vehicle, sustained damages requiring repairs costing more than \$2,000;

14. The B.C. Court of Appeal in *Brook v. Wheaton Pacific Pontiac Buick GMC Ltd.* (2000), 76 B.C.L.R. (3d) 246 (B.C.C.A.) stated the following purpose of this declaratory section:

34 Examining the words of the Regulation in the context of its whole, and bearing in mind the ordinary meaning of the words “damage” and “repairs”, I do not disagree with the reasoning of the trial judge that the purpose of the Regulation is to provide a prospective purchaser with information about damage to a vehicle so that the purchaser may make inquiries as to the effect of the damage on the value of the motor vehicle. It might be more precise, however, to say that the purpose is to alert the purchaser to the possibility of **hidden existing damage which would affect the value of the vehicle.**

.....

36 In my view the Legislature has determined, in its wisdom, to qualify the meaning of damage only by the amount of money it costs to repair it. **Once the price of repairs reaches \$2,000 the possibility exists that the vehicle has sustained some type of hidden or even permanent damage. The prospective purchaser should be made aware of this fact so that he or she is free to investigate it.** (emphasis added)

15. B.C. courts have noted that this subsection of the Regulation places a positive duty on a motor dealer to make its own reasonable inquiries about the motor vehicle it intends to sell. A motor dealer may not solely rely on the representations of a prior owner:

Robillard v. Comox Valley Ford Sales (1964) Ltd. and Gordon Leo Rugg (Third Party) and Port Chevrolet Oldsmobile Ltd. (Fourth Party) (1995), B.C.J. No. 436 (B.C. Court of Appeal); *Motley v Regency Chrysler* 2002 BCSC 1885 (B.C. Supreme Court); *Key Lease Canada Ltd. v. Bott* 1994 CanLII 788 (B.C. Supreme Court); *Clark v. Abbotsford Imports (1983) Ltd.* [1992] B.C.J. No. 471 (B.C. Supreme Court); and *Fraser v. Richmond Imports Ltd. dba Richmond Honda* 2001 BCPC 0211 (B.C. Prov. Ct.).

16. In *Key Lease Canada Ltd.* Mister Justice Meiklem of the B.C. Supreme Court stated:

Section 23 of the Motor Dealer Act regulations could not have been intended merely to create a duty to disclose the motor dealer's state of knowledge of the matters set out, whatever that might be, but also to require motor dealers to make informative statements about the specified matters that are deemed to be of concern to the car buying public. This disclosure must be "to the best of his knowledge and belief". These words imply a duty to make reasonable efforts to become informed about the specified matters, and in my view the duty is only met if reasonable inquiry is made.[underlining added]

17. A motor dealer may not solely rely on an inspection conducted by others to discharge its duty to a consumer and avoid any potential liability to a consumer for a misrepresentation: *Cummings v. 565204 B.C. Ltd. dba Richmond Daewoo*, 2009 BCSC 1009 (B.C. Supreme Court) at paragraphs 10 and 21-22; and see *Cheema v. Mario Motors Ltd.* 2003 BCPC 0416 at paragraphs 9-10 (B.C. Prov. Ct.). In *Cummings*, the motor dealer relied on the inspection conducted at the time the motor vehicle was imported into B.C. The Court in *Cummings* held this was insufficient. In *Cheema*, the motor dealer sold a rebuilt motor vehicle to a consumer and relied on the Structural Integrity Assessment Report provided by the rebuilder. The Court in *Cheema* still found the motor dealer liable to the consumer for its misrepresentation of the motor vehicle's quality.

18. Where a car is imported into British Columbia, reliance on an I.C.B.C. vehicle history report alone will generally be insufficient: *Motley v Regency Chrysler* 2002 BCSC 1885 (B.C. Supreme Court). In fact, sole reliance on an I.C.B.C. vehicle history report at all may not meet the motor dealer's duty under the Regulation. In *Fraser*, Judge Romilly stated:

[53] Relying on the above two decisions, I find that neither the Defendant, Richmond Imports Ltd., nor the Third Party, Multiland Investment Ltd., conducted a reasonable assessment of prior damage to the vehicle which I find was apparent and should have been apparent to an experienced automotive repair person. I find that both the Defendant and the Third Party had such experienced automotive repair persons in their employ at the time that they came into contact with this vehicle and were both negligent in the examination of the vehicle before transfer and failed to meet the positive duty placed upon them by the Motor Vehicle [Dealer] Act Regulation quoted above.

[54] I find that it is insufficient for the Defendant to claim that it relied on the representation of the Third Party who did not have access to the records of the Insurance Corporation of British Columbia at the time of the transfer. The fact remains that this "positive duty" demanded by the legislation was in effect prior to the general public having access to such records, and therefore imposed on dealers the requirement to carefully examine vehicles for transfer for prior damage requiring repairs costing in excess of \$2,000.00. I would suggest that access to the records of the Insurance Corporation of British Columbia, merely made it easier for dealers to find out the repair status of vehicles. However the caution remained throughout that damages and repair are not always reported to the Insurance Corporation of British Columbia, and the "positive duty" remains regardless. [emphasis added]

19. From these court decisions, it is clear that the standard of care placed on a motor dealer to make its declarations under the Regulation requires it to make its own careful examination of the motor vehicle prior to transferring it to a consumer. The courts have recognized this standard of care certainly existed in 2001 (*Fraser*) and even as far back as the 1992 decision in *Clark v. Abbotsford Imports (1983) Ltd.* In fact, that duty has existed since the Regulation has been law.

(b) Statutory Duties

20. The existence of a statutory duty is informative of the standard of care imposed on the duty holder: *Ryan v. Victoria (City)* [1999] 1 S.C.R. 201 (Supreme Court of Canada). Strict adherence to the statutory duty may not be sufficient to displace liability on the duty holder from other aspects of the law, either at common law or under another statute. In *Ryan*, the rail company built its rail-crossing with a flange gap within the allowed regulatory requirements. The Supreme

Court of Canada held the railway was negligent by strictly adhering to the regulatory requirements and not going beyond those requirements as the circumstances dictated. The following paragraph in *Ryan*, highlights this principle of law:

29 Legislative standards are relevant to the common law standard of care, but the two are not necessarily co-extensive. The fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness. See *R. in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205. Thus, a statutory breach does not automatically give rise to civil liability; it is merely some evidence of negligence. See, e.g., *Stewart v. Pettie*, [1995] 1 S.C.R. 131, at para. 36, and *Saskatchewan Wheat Pool*, at p. 225. By the same token, mere compliance with a statute does not, in and of itself, preclude a finding of civil liability. See *Linden*, supra, at p. 219. Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent. **This allows courts to consider the legislative framework in which people and companies must operate, while at the same time recognizing that one cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties.** [emphasis added]

(c) *The Business Practices and Consumer Protection Act*

21. Section 5(1) of the BPCPA prohibits a “supplier” of goods or services from engaging in “deceptive acts or practices” during a “consumer transaction”. The BPCPA is consumer protection legislation of general application – it applies to all merchants in B.C. who provide goods or services; including motor dealers. In the specific case before me, the statutory definition of “supplier” applies to Cunningham Ford. The statutory definition of “consumer transaction” applies to the Corvette transaction in the present case.

(i) *Deceptive Act or Practice*

22. The Notice of Hearing indicates the BPCPA provisions being advanced here are:

Deceptive acts or practices

4 (1) In this Division:

“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.

(2) A deceptive act or practice by a supplier may occur before, during or after the consumer transaction.

(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,

(iii) have a particular prior history or usage that they do not have, including a representation that they are new if they are not,

(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 (emphasis added)

23. It should be noted that section 4(3) of the BPCPA lists conduct that the B.C. Legislature has deemed to be “deceptive acts or practices”. In very recent decisions involving motor dealers, the Courts have re-affirmed the long standing proposition that a deceptive act or practice need not be intentional, but still give rise to liability against the supplier. In *Cummings v. 565204 B.C. Ltd. dba Richmond Daewoo*, 2009 BCSC 1009, Madam Justice Gerow confirmed that liability under the *Business Practices and Consumer Protection Act* does not require a finding of “fault” or “carelessness”, just as was the case under the predecessor *Trade Practices Act*:

[21] The deception may be inadvertent. A supplier cannot escape liability if the misleading act or statement leads to the purchaser’s injuries, even if he honestly believes the representations: Mikulas v. Milo European Cars Specialist Ltd. (1993), 52 C.P.R. (3d) 1 (B.C.S.C.).

[22] In my view, a supplier should not be able to escape liability on the basis that he honestly believed the representations, or that he relied on an inspection done by others, when he is advised of a concern about the vehicle by a purchaser and takes no steps to discover whether the representation is true, and the purchaser is misled by the representation.

See also *Mikulas v. Milo European Cars Specialist Ltd.* (1995), 60 C.P.R. (3d) 457 (B.C. Court of Appeal) affirming (1993), 52 C.P.R. (3d) 1 (B.C.S.C).

24. In *Casillan v. 565204 B.C. Ltd. dba Richmond Daewoo* 2009 BCSC 1335 at paragraph 27, the Court stated:

BPCP Act was recently considered by Gerow J. in *Cummings*. The learned Justice referred to the Trade Practices Act, R.S.B.C. 1996, c. 457 (the predecessor to the BPCP Act), and to cases decided under similar sections of the former legislation. In *Rushak v. Henneken* (1991), 84 D.L.R. (4th) 87, 59 B.C.L.R. (2d) 250 (C.A.), Taylor J.A. said that suppliers must “refrain from any sort of potentially misleading statement”, including the giving of an honest opinion in circumstances where giving the opinion without appropriate qualification may mislead. In *Cummings* at para. 21, Gerow J. said that even an inadvertent deception can found a deceptive practice leading to a claim for damages. Once an allegation of deceptive practice is made, the burden shifts to the supplier, in this case Daewoo, to show either that it did not make the misrepresentation as alleged or that the misrepresentation was in fact true. (emphasis added)

25. In *Rushak v. Henneken Auto Sales and Service Ltd.* (1991), 59, B.C.L.R. (2d) 250 (C.A.), the B.C. Court of Appeal confirmed these principles of law regarding deceptive acts or practices:

1. 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;
2. A deceptive act is one “that tends to lead a person astray into making an error of judgment”;
3. The Act must be construed so as to protect not only potential customers, but also those who are not alert, are unsuspecting and are credulous; and
4. The Act imposes a high standard of candour on a supplier of goods.

26. In essence, the BPCPA requires that a supplier of goods or services stands behind the representations they make about the goods they sell or the services they provide. If their representation later turns out to be untrue; even if the supplier had no intention of deceiving,

honestly believed the representation and acted in a reasonable manner; the supplier is still liable to compensate a consumer for any damages the consumer suffers attributable to that misrepresentation. In the proper circumstances, the misrepresentation may even allow a consumer to void the entire transaction. This later point was highlighted in an older case involving a motor dealer; *Findlay v. Couldwell*, [1976] 5 W.W.R. 340 (B.C. Supreme Court) where “even had the defendant honestly believed the representations he was making” Justice Ruttan stated:

I should note here that a deceptive act does not necessarily involve deliberate intention to deceive. Deception need only have the capability of deceiving or misleading and it may be inadvertent yet still sufficient to void the transaction under the Statute, which is directed to the welfare of the consumer, not the punishment of the vendor. (emphasis added)

See also the court decision in *Casillan* noted above.

(ii) Burden of Proof

27. Under section 5(2) of the BPCPA, once an allegation of a deceptive act or practice has been made, the onus of proof shifts to the supplier (Cunningham Ford) to show that the representations they made were true, or that they did not make the representations as alleged. The Court in *Cummings* at paragraph 25 stated:

[25] Given the allegation, s. 5 of the BCPC Act shifts the burden to Daewoo, as the supplier, to show either that it did not make the representation alleged, or that the representation that was made was true, i.e. the rear tires were fine at the time the Nissan was sold.

See also *Casillan* at paragraph 27.

28. The claims in this matter are civil in nature, even those involving deceptive acts or practices. As such, the burden of proof is the civil burden - on a balance of probabilities: *F.H. v. McDougall* [2008] 3 S.C.R. 41, 2008 SCC 53 (Supreme Court of Canada).

(d) Expert Opinions

29. Mr. Wright and Al Descoteau have provided opinion evidence about the damage to the Corvette. The admissibility of such evidence is set out in *R. v. Mohan* [1994] 2 S.C.R. 9 (Supreme Court of Canada). The expert evidence must also comply with sections 10 and 11 of the *Evidence Act* R.S.B.C. 1996 c. 124, so far as those sections are applicable. If admitted, I must decide the proper weight to be given to that opinion evidence.

(e) Limitation Period

30. A consumer claim of a deceptive act or practice would fall within the 6-year limitation period provided for in section 3(5) of the *Limitation Act* R.S.B.C. 1996 c. 266. Under the circumstances found in sections 6(3) and (4) of the *Limitation Act*, the 6-year period may not begin to run until “a reasonable consumer” has sufficient knowledge to understand they have a claim and can advance that claim. This is subject only to the ultimate limitation period of 30 years as set out in section 8(1)(c) of the *Limitation Act*.

Knight v. Imperial Tobacco 2006 BCSC 172 (B.C. Supreme Court) varied in part by 2006 BCCA 235 (B.C. Court of Appeal); and *Markevich v. Canada* [2003] 1 S.C.R. 94 (Supreme Court of Canada); and *Hupe v. Manitoba (Director of the Residential Tenancies Branch)* [2007] 1 W.W.R. 278 (Manitoba Court of Queen’s Bench).

31. The B.C. Legislature may create laws making certain past conduct a present day wrong by making the law retroactive: *British Columbia v. Imperial Tobacco Canada Ltd.* [2005] 2 S.C.R. 473 (Supreme Court of Canada). Section 203 of the BPCPA has expressly made the deceptive act and practice provisions noted above, applicable to all past and present consumer transactions, subject only to section 203(2) of that Act, which is not applicable in this case.

ANALYSIS

(a) Limitation Period

32. The consumer transaction and alleged misrepresentations occurred on May 13, 2005. Ms. Connell complained to the VSA on July 16, 2009. Her claim is within the 6-year limitation period. The BPCPA deceptive act or practice provisions apply to this consumer transaction.

(b) The Expert Opinions

33. In *Mohan*, the Supreme Court of Canada noted the following four factors that must be considered before admitting opinion evidence:

- (a) relevance;
- (b) necessity in assisting the trier of fact;
- (c) the absence of any exclusionary rule; and
- (d) a properly qualified expert.

(i) Bill Wright

34. Mr. Wright's opinion evidence has met the requirements of sections 10 and 11 of the *Evidence Act*.

35. Mr. Wright has physically examined the Corvette to determine its damage and to provide an opinion on the extent of that damage. The existence or not of damage to the Corvette is a material consideration before me and his evidence is relevant. I find Mr. Wright's evidence is necessary to assist my considerations about the existence of damage to the Corvette and the extent of that damage. He has had an opportunity to examine the Corvette and I have not. Also, Mr. Wright brings his experience in the structural repair of motor vehicles that I do not possess. I find there is no exclusionary rule applicable here.

36. As to Mr. Wright's qualifications; he stated he has been a licensed automotive body repair person since 1964. He went through an apprenticeship program. He has owned his own body shop since 1979. In the Affidavit, Mr. Wright is noted as being an ICBC certified body shop for over 20 years. Mr. Wright is also licensed to conduct Structural Integrity Assessments on motor vehicles. I am satisfied that through experience, training and licensing, Mr. Wright is qualified to provide opinion evidence on the Corvette's damage and I will admit his evidence.

37. Mr. Wright stated he had an opportunity to inspect the Corvette, including putting it on a hoist and checking the underside. He noted that the damage in question was to the area around the rear of the Corvette and specifically around the rear differential. He comes to this conclusion in part because of the brackets which hold the differential to the body. He said these brackets were custom-made in order to make the differential fit with the body. Mr. Wright noted that the need to make such brackets in order to make the differential and body fit together, in his opinion, is evidence of prior major damage. Mr. Wright stated that these brackets were in an area of the body that was tunnel-like and one needed to look into that area with a light to see these brackets and damage. Mr. Wright noted there were other more easily seen signs of damage and repair. He noted that the rear bumper did not align properly with the body: see pictures at pages 52 and 58 of Affidavit #1 exhibits. Mr. Wright also noted cracks repaired in the fiberglass floor under the Corvette: pictures at pages 55 and 56, and 62 and 63 of Affidavit #1 exhibits.

38. Mr. Wright also stated that both mufflers on the Corvette have dents, which in his opinion correspond to impacts with the seat belt bolts on the Corvette's body: pictures at pages 56 and 57,

63 and 64 of Affidavit #1 exhibits. Mr. Wright's opinion is that the mufflers hit these seatbelt bolts due to the Corvette having been in an impact of some sort. Mr. Wright opined that the Corvette's damage would have caused the vehicle to have been "written off", inferring the repaired damage was certainly more than \$2,000. Mr. Wright did say that the Corvette is currently safe, but that it should not be "driven hard."

39. Under questioning by Mr. Brenneman, Mr. Wright stated that the mufflers were still operative and would not fail a safety inspection. Mr. Brenneman questioned the various inspections and service work performed on the Corvette. Mr. Wright noted that the Canadian Tire inspection at the time of importation did not check for frame issues such as the issues in this case. Canadian Tire's inspection was a mechanical safety inspection and he inferred it was not a structural integrity inspection.

(ii) Al Descoteau

40. Al Descoteau's opinion is contained within a letter first submitted by Cunningham Ford at the hearing: Exhibit 7. Mr. Descoteau's written opinion does not comply with section 10(3) of the *Evidence Act*.

41. Applying *Mohan*, I find that Mr. Descoteau's opinion evidence is both relevant and necessary for the same reasons as Mr. Wright's.

42. Mr. Descoteau's written letter is not under oath and he was not available to be questioned. His written opinion is technically inadmissible hearsay evidence, unless an exception applies: *R v. Schwartz* [1988] 2 S.C.R. 443 at 476 (Supreme Court of Canada). Hearsay evidence falls under an exclusionary rule. The factors to allow the admission of this hearsay evidence under the principled exception to the hearsay rule have not been met: *R. v. Khelawon*, [2006] 2 S.C.R. 787 (Supreme Court of Canada). However, as an administrative tribunal, I have the flexibility to admit hearsay evidence where appropriate being careful as to the weight I place on it: Régimbald, Guy: *Canadian Administrative Law* (1st Ed.) (Lexis Nexis, Markham Ont. 2008) pages 265-266.

43. Again, applying *Mohan*, the only evidence of Mr. Descoteau's qualification as an expert are the submissions by Mr. Brenneman that Mr. Descoteau is owner of Terminal Body in Parksville, and Mr. Descoteau's written statement that he has been in the auto body industry for 35 years. While the evidence is scant about his qualifications, training and experience, I will accept that Mr. Descoteau does have experience in the auto body industry. I will admit Mr. Descoteau's

opinion evidence about the Corvette's damage; but I am mindful of the weight I should place on that evidence.

44. Mr. Descoteau examined the Corvette at the request of Cunningham Ford on December 3, 2009. He notes that he did not lift the vehicle on a hoist and thus, could not check the underside of the vehicle. Mr. Descoteau also reviewed the Canadian Tire inspection report and the various service records regarding the Corvette. His opinion is that there is no way to tell when the damage occurred. He also questions why the damage was never discovered until now, considering the amount of persons (service records) who have serviced the Corvette. On the face of it, Mr. Descoteau's written opinion is somewhat influenced by inspections conducted by others.

(c) Damage to the Corvette and salvage title

45. I am satisfied on a balance of probabilities that at the time Cunningham Ford sold the Corvette to Ms. Connell there was damage to the Corvette over \$2,000 and that it was, and is, a salvage vehicle. I come to this conclusion for the following reasons.

46. First, the CarFax report in question (pages 26-28 of the affidavit#1 exhibits) notes "severe damage" and shows a salvage title being issued in California in 1994 with very low mileage (1,315). A salvage title was again issued in 1994 this time in Colorado, again with low mileage (4,190). The salvage title disappears when the Corvette is registered in Texas in 2002.

47. Second, the CarFax vehicle history report is consistent with a CarProof history report: page 10 of the Affidavit Exhibits. CarProof is independent of CarFax, the former being a Canadian run company, the later a USA-based company: see evidence attached to Affidavit #1 and Mr. Brenneman's oral testimony. The CarProof report does not capture the California salvage title, but does identify the Colorado salvage title noting the mileage at 4,190 - being the same as reported by CarFax. The CarProof report also notes the salvage title is lost once registered in Texas and notes the same year as CarFax does - 2002. The CarProof report also notes that an accident involving the Corvette was reported in Houston, Texas on 7/29/2002. Cunningham Ford supplied evidence to suggest that CarProof reports can be wrong. While that may be so, Cunningham Ford's evidence does not say this particular report is wrong.

48. Third, Ms. Connell testified that she called General Motors after she found out about the salvage title. She was informed that GM voided the Corvette's manufacturer's warranty while it

was practically brand new because of a major accident. Apparently, there was evidence in the hands of GM to say this Corvette was in a major accident when it was relatively new. While this evidence is hearsay, I will admit it as it adds to the overall evidence and there is nothing in contradiction. I will give it little weight.

49. Fourth, is the visual inspection by Mr. Wright. I would note that none of Mr. Wright's evidence about the existence of the damage was successfully challenged. Mr. Brenneman's questioning attempted to show Mr. Wright could not say when the damage occurred. Mr. Wright never said he could tell when the damage occurred, consistent with Mr. Descoteau's evidence. I accept Mr. Wright's evidence as to the extent of the damage over that of Mr. Descoteau's. By Mr. Descoteau's own evidence, he did not do as an extensive examination of the Corvette as did Mr. Wright. Mr. Descoteau did not deny there was damage to the Corvette.

50. Mr. Wright's evidence is that the extent of the damage he viewed would have written off the Corvette. He also noted that the major damage around the differential is hard to see as it is in a "tunnel-like" area of the body around the rear differential. He did note there were outward signs that the Corvette was in an accident, such as the misaligned rear bumper, repairs to the rear quarter panels and repairs to the underside floor area. Mr. Wright's description of the damage was consistent with a major accident and repair.

51. Fifth, is the statutory definition of "salvage" found in the California statutes and the Colorado Motor Vehicle website: Affidavit of Mike Dorran #1, at paragraphs 26-27. Both those definitions state that a salvage title is issued where a motor vehicle is damaged and the cost of repairs exceeds the current retail market value of the vehicle or is otherwise uneconomical to repair. This is informative in the context of the whole of the evidence, but I place only minor weight on these provisions individually.

52. Sixth, I would note the CarFax report warns that the Corvette may have had its title washed when registered in Texas. Mr. Dorran spoke to the investigation departments of the California and Colorado Departments of Motor Vehicles. He obtained some general information about the Corvette's registration in those states. He was also advised by both States that there is a problem in the USA of damaged vehicles being moved to other States and having their titles washed. I note that this evidence is also hearsay evidence and I place little weight on it. However, in the

context of the whole evidence, three different sources warning of title washing, it adds to the reality of what has probably occurred in this matter.

53. Seventh, Ms. Connell testified that she has not had an accident with the Corvette while she owned it. Cunningham Ford provided no direct evidence to suggest the Corvette had been in an accident since selling it to Ms. Connell. This was speculation on Cunningham Ford's part.

54. As for all those times the Corvette was serviced, repaired or inspected, there is no evidence that damage over the differential area was specifically inspected by anyone except Mr. Wright. The Canadian Tire report makes it clear it did not inspect the frame and area that Mr. Wright did. There is no indication that the other services required on the Corvette would lead to an inspection of this area, which Mr. Wright indicated was difficult to inspect. Ms. Connell indicated no drivability problems due to the repairs described by Mr. Wright and thus would have no reason to request it be inspected.

55. Mr. Cunningham testified that his team would have done a safety inspection on the Corvette. I note this evidence is somewhat contrary to the following statement by Mr. Cunningham at the hearing:

We couldn't get under the car to look at it when we were at your place [Mr. Wright's] there, but the car looks good from the top side outside of that one crack on the door. But, you know, I feel like we took the car and traded it in good faith, and we did the due diligence with Canadian Tire. It's all certified perfectly.

Transcript of Proceedings at page 22, question 25.

That statement would seem to infer Cunningham Ford relied on the Canadian Tire inspection to meet its due diligence; opposed to Cunningham Ford doing its own inspection. There is no indication or evidence that Cunningham Ford looked at this particular area of the Corvette prior to selling it to Ms. Connell. No documents were presented about an inspection nor was there evidence from the mechanic who performed Cunningham Ford's inspection of the Corvette prior to its sale to Ms. Connell.

56. It would be reasonable that any cost to repair the Corvette in or around 1994, given the salvage title, would be over \$2,000. This is gauged from the current market value for this Corvette, without a salvage title, is around \$13,500 as stated in the oral and documentary evidence provided by Ms. Connell which is not disputed. Mr. Dorran's own informal research

indicates this figure is realistic: paragraph 30 of the Affidavit. I also note that Cunningham Ford sold the Corvette to Ms. Connell for \$22,573.68 on May 13, 2005 – before taxes and the trade-in were applied.

57. Mr. Brenneman's written statement: Exhibit 8 and oral testimony at the hearing; suggests the salvage title was a one-time keying error sometime in the past that has now transferred to both CarProof and CarFax. This is an assumption on his part based on an error he says occurred in another CarProof report: Exhibit 4. There is no evidence of an actual keying error in this case; that is only speculation. Given the actual existence of damage on the Corvette, which I find is significant; and Ms. Connell's uncontradicted evidence that she has not had an accident with the Corvette, I find it more likely than not that the salvage title on both CarProof and CarFax are accurate and the Corvette has sustained damages in excess of \$2,000 prior to Cunningham Ford selling the Corvette to Ms. Connell. The hearsay evidence, including that General Motors voided the manufacturer's warranty when the Corvette was relatively new, certainly adds to that direct evidence.

**(d) Was Cunningham Ford's conduct reasonable given the standards of the day? –
*Motor Dealer Act Regulation***

(i) ICBC Report

58. Cunningham Ford knew the Corvette was originally from Texas. It was imported into British Columbia on September 2, 2004: importation documents at page 94 of Affidavit #1 exhibits. Cunningham Ford said it relied in part on an ICBC report to research the Corvette's history. The actual ICBC report found in the dealer's file was dated November 20, 2004: Exhibit O of Affidavit #1. This was about 6 weeks after the Corvette was imported from Texas.

59. At the hearing, Mr. Cunningham stated he believed any prior USA damage history on the Corvette would find its way into the ICBC report. Mr. Brenneman's written (and oral statement) says that "[a]ccording to Mike Dorran Car Fax informed the Province of B.C. that there "may be a potential of a salvage" which was ignored by the Province. I believe that is due to the fact there is no Proof": Exhibit 8.

60. Mike Dorran's Affidavit in fact says it was the Canadian Registrar of Imported Vehicles (RIV) who ran a CarFax on the Corvette and forwarded that to the Province of British Columbia. Mike Dorran's Affidavit also states that after running a CarFax, RIV determined it (the Corvette)

did not have a clear title, as originally declared by the Corvette's previous owner, and forwarded on that information to the province: Affidavit at paragraph 21.

61. It is common knowledge that ICBC operates the B.C. provincial registry for motor vehicles. The fact that the salvage title may not appear on an ICBC vehicle history report, may be explained by the disclaimer in the ICBC report of November 20, 2004, which Cunningham Ford relies on. That Report states in part:

The information provided will be from ICBC files only. The information can be incomplete or show "No Details" for any of the following reasons:

1. Past damage to a vehicle could have gone unreported to ICBC if:
 - o The vehicle was not insured by ICBC at the time such damage occurred,
 - o The owner repaired it at their own expense,
 - o The owner did not make a claim to ICBC.

62. The first few lines of the above disclaimer dispel Mr. Cunningham's evidence that USA vehicle damage history should be reported on the ICBC vehicle history report. In fact, Cunningham Ford was specifically told by the report it now relies on, that USA vehicle damage history will not be included in ICBC's report. It also appears to answer Mr. Brenneman's argument as to why the salvage title was not reported on ICBC's report. It was not necessarily that it was not believed; but that the salvage title did not originate from an ICBC file, or equally, the information from RIV had not yet reached ICBC. I would note from the evidence that the documents presented to ICBC to register the Corvette in B.C. for the first time, did not note a salvage title.

63. The decision of Judge Romily in *Fraser v. Richmond Imports Ltd.* acknowledges the very limited use such an ICBC report provides. The Court in that case made it clear that not all accidents and repairs get reported to ICBC and motor dealers should not be solely relying on ICBC reports. This case is another example of why that is so.

64. I believe Cunningham Ford's reliance on the ICBC document was ill-founded and inappropriate given the Corvette had only been in B.C. for some six weeks. That report said nothing about the Corvette's previous 12-year history while in the USA and warned that it would not say anything about that history. I find the comments of Justice W.G. Parrett of the B.C. Supreme Court in *Motley v Regency Chrysler*, are closely appropriate:

[17] I cannot leave this issue, however, without saying that the defendant's reliance on an I.C.B.C. vehicle damage inquiry dated November 30th, 1999 as proof that the vehicle had not been damaged is patently unreasonable and wholly inadequate to meet the positive burden cast upon them.

[18] The vehicle in this case had been registered in Ontario for a number of years. It had been brought to British Columbia, apparently, by the broker who sold it to the defendant. The I.C.B.C. Vehicle Damage Inquiry, Exhibit 4, discloses on its face that the vehicle was imported from outside British Columbia on November 23rd, 1999, one week before the damage inquiry was made.

[19] Sanctioning such a blatantly inadequate base for the declaration in question would effectively place in the dealer's hands a tool for completely avoiding the intent and purpose of the legislation.

[20] Were it not for the absence of evidence establishing damage I would have no difficulty finding that the defendant's efforts to fulfill their positive obligation in relation to declaration number 4 were both unreasonable and completely inadequate. (emphasis added)

(ii) Reliance on the Canadian Tire Importation Inspection

65. As already noted, the Canadian Tire importation inspection was a mechanical inspection and did not inspect for the damage subsequently found by Mr. Wright. Also, as already stated, a motor dealer cannot solely rely on the inspections conducted by others in order to discharge its positive duty to "carefully examine vehicles for transfer for prior damage requiring repairs costing in excess of \$2,000.00": *Fraser v. Richmond Imports Ltd.* I would suggest¹ that this is partly the reason why a motor dealer is required to have their own repair facilities or a contract with a repair facility. A motor dealer must inspect the motor vehicles it sells so it can meet its declaratory duties under the Regulation. Also, a motor dealer must inspect a motor vehicle so it can meet its statutory duties under the *Motor Vehicle Act* and its regulation. That duty is to determine whether or not a motor vehicle meets the minimum federal and provincial safety requirements and is equipped as required by federal and provincial law; prior to offering a motor vehicle up for sale to a consumer for their use: section 3(1)(a)(iv) of the *Motor Dealer Act*, sections 21, 22 and 23 of the *Motor Dealer Act Regulation*; sections 222 and 223 of the *Motor Vehicle Act* R.S.B.C. 1996 c. 318 and section 8.01 of the *Motor Vehicle Act Regulation* B.C. Reg. 26/58.

¹ Applying the principles of statutory construction applicable to a B.C. statute: *Yeung (Guardian ad litem of) v. Au* 2006 BCCA 217 at paragraph 32 (unanimous 5 panel B.C. Court of Appeal), aff'd (2007), 70 B.C.L.R. (4th) 1 (Supreme Court of Canada, File No. 31549).

(iii) Visible evidence of damage and Texas origin

66. I am satisfied that there were outward signs of damage on the Corvette at the time of its sale to Ms. Connell; such as the misaligned rear bumper and the repairs to the underside of the floor. These facts coupled with Cunningham Ford's knowledge that the vehicle had recently been imported from Texas and there was some 12 years of unknown USA history about the Corvette, should have caused Cunningham Ford to carefully examine the Corvette for prior damage.

67. Within the Affidavit (page 96) the evidence is that CarProof was available to dealers only by November 2004. This was about the same time that Cunningham Ford ran its ICBC report. Certainly by the time Cunningham Ford took the Corvette in on trade in March 2005 and by the time of the sale to Ms. Connell in May 2005, Cunningham Ford could have run a CarProof report. Cunningham Ford said that CarProof was not well known at that time.

68. Even if CarProof was not known to Cunningham Ford, the evidence is that CarFax was available to Cunningham Ford by 1996, some 8 years prior to Cunningham Ford coming into contact with the Corvette. By 2004, the CarFax vehicle history database surpassed three billion vehicle history records: page 21 of the affidavit exhibits. Given the circumstances and the fact the Corvette originated in the USA, running a CarFax report to determine the Corvette's 12-year history while in the USA could have and should have been undertaken. If Cunningham Ford had done so, it would have discovered the salvage title and the real possibility this vehicle had been in a serious accident.

(iv) Evidence of inspection by Cunningham Ford

69. There is no evidence of what Cunningham Ford inspected on the Corvette prior to its sale to Ms. Connell. Mr. Cunningham said they would do a safety/mechanical inspection as part of its normal procedures. There is no documentary evidence and there was no evidence from the mechanic who actually inspected the Corvette on behalf of Cunningham Ford. As noted above, Mr. Cunningham indicated Cunningham Ford relied on the Canadian Tire inspection. I also note that Mr. Cunningham's evidence was that the motor dealer did not have a body shop at the time the Corvette was sold to Ms. Connell. Based on these facts and my above findings about the location of the damage around the brackets, I find it more likely than not that the damage described by Mr. Wright was overlooked by Cunningham Ford.

(v) Evidence of inspections by others

70. None of the service orders Cunningham Ford relies on, or submitted by Ms. Connell, indicate the differential area of the Corvette was specifically looked at for damage when it was in for servicing. Mr. Wright noted that the replacement of a water pump and an air conditioning inspection does not even require the Corvette be raised on a hoist. This was not contested by Cunningham Ford: Exhibits 5 and 6 at the hearing. Considering the location of the damage described by Mr. Wright, I would not expect a mechanic performing mechanical service work elsewhere on the Corvette, would note this damage and bring it to Ms. Connell's attention; unless asked to do so. The fact that other professionals did not note and report the damage described by Mr. Wright, does not lead to the invariable conclusion that the damage did not exist. It could equally mean it went unreported or unseen as such damage was never looked for as it was unknown that it even existed.

(vi) Summary on this point

71. I am satisfied on the evidence that Cunningham Ford failed to discharge the positive duty it had to carefully inspect the Corvette prior to transferring it to Ms. Connell. Knowing the Corvette was from the USA, had only been in Canada (B.C.) for 6 weeks prior to the ICBC report being generated, and there being outward signs of possible damage, Cunningham Ford should have conducted a careful inspection of the Corvette. Cunningham Ford also could have run a CarFax report. As stated, CarFax is a USA-based company and by running one of its reports, Cunningham Ford would have become better informed about the Corvette's 12-year USA history. Under these facts, a thorough inspection and running a CarFax report was the standard of care Cunningham Ford needed to meet at the time it sold the Corvette to Ms. Connell. Further, while it was the owner of the Corvette, Cunningham Ford could also have called GM and asked about the Corvette's history. Cunningham Ford did not meet this standard, failing to discharge its duty in a reasonable manner as required by section 23(b)(ii) of the Regulation.

(e) Did Cunningham Ford commit a deceptive act or practice?

72. I have found that the Corvette was titled as a salvage vehicle and that it had sustained damages in excess of \$2,000 prior to it being sold to Ms. Connell. Cunningham Ford made a written representation that there was no damage over \$2,000. Cunningham Ford also admitted that it told Ms. Connell that the Corvette had been inspected by an inspection facility. Ms.

Connell's evidence at the hearing and in her written complaint was that Cunningham Ford told her the Corvette was "low mileage, perfect condition" and had no accidents. Ms. Connell stated that she relied on these representations and that one reason she buys cars from motor dealers is because she does not want to be in the buyer beware situation: Transcript of Proceedings, page 11, questions 9-12, Exhibit A of Affidavit #1.

73. I accept that Cunningham Ford made the above written and oral representations to Ms. Connell and she reasonably relied on them in deciding to purchase the Corvette. Cunningham Ford has not disputed that they made the above representations. In considering my findings noted above, Cunningham Ford has provided no evidence to meet its burden of proof that the representations were true at the time of the sale: section 5(2) of the BPCPA, *Cummings* and *Casillan*. I am satisfied that Cunningham Ford has committed a deceptive act or practice under the BPCPA, by misrepresenting the quality and history of the Corvette. I also find that in representing the Corvette as having been inspected and in perfect condition, with no accidents, without advising Ms. Connell of the salvage title or prior damage, it has failed to state a material fact about the Corvette, which is also a deemed deceptive act or practice under the BPCPA: *Rushak* and the other court cases discussed above.

74. I note the fact that the damage was over-looked on an inspection or that Ms. Connell did not herself have the Corvette inspected, does not displace the existence of a deceptive act. When Cunningham Ford told Ms. Connell that the Corvette had been inspected, was a low mileage vehicle and in perfect condition, it downplayed Ms. Connell's need to have the Corvette examined. Mister Justice Taylor, writing for the unanimous B.C. Court of Appeal in *Rushak*, stated it thusly:

...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. (emphasis added)

(f) Was the Deceptive Act or Practice deliberate?

75. While determining whether or not the deceptive act or practice was deliberate does not necessarily affect the remedy available to Ms. Connell; it can affect any disciplinary measure taken by the Registrar of Motor Dealers.

76. Cunningham Ford's conduct in this matter cannot be construed as innocent. While Cunningham Ford may have honestly believed its representations to Ms. Connell, it did fail to meet its duty of care to inform itself about the Corvette's history and inform Ms. Connell of damage over \$2,000. It cannot be said that this is a case where Cunningham Ford did all that it reasonably could, to ensure it made truthful and accurate representations to Ms. Connell.

77. I do not find the evidence indicates Cunningham Ford deliberately tried to deceive Ms. Connell, which requires evidence of intent. The law recognizes that intention may be found where a supplier is reckless about the representations it makes: *Casillan* at paragraphs 20-24. In considering the facts of this case and considering the facts in *Casillan*, and the law cited there, I do not find there is sufficient evidence to suggest that Cunningham Ford was reckless as to the truth of its representations. Certainly if Cunningham Ford had solely relied on the ICBC report and the inspection by Canadian Tire, which did not inspect the Corvette entirely, there would be good reason to say it was reckless. However, Cunningham Ford stated it would have done its own inspection of the Corvette and I accept that statement from Mr. Cunningham. There is therefore some evidence that Cunningham Ford did attempt to ascertain the truth about the representations it made and did not disregard its own findings.

78. I have found that Cunningham Ford did not meet the standard of care imposed on a motor dealer in making its statutory declaration over \$2,000. The cases cited above have concluded that such a failure constitutes negligence and negligent misrepresentation at common law: see *Casillan* for example. I am satisfied on the evidence that Cunningham Ford was negligent in making its representations about the Corvette to Ms. Connell. In the circumstances, there was ample evidence before Cunningham Ford to suggest it should make further inquiries and it would have been reasonable for it to have done so.

(g) Remedy – Compliance Order

79. Under section 155 of the BPCPA, I may issue a compliance order to remedy a breach of the BPCPA. What is the appropriate remedy will depend on the facts of the case. In some court cases, damages alone were ordered paid by a motor dealer. For instance, in *Cummings* the consumer was in a motor vehicle accident due to the poor condition of the tires which the dealer failed to inspect and misrepresented. The dealer in that case was ordered to pay for the repairs to the motor vehicle, new tires, 20% of the purchase price of the motor vehicle because of

accelerated depreciation, pain and suffering for the consumers personal injuries, the consumer's cost of future care and special costs. Also see cases such as *Rushak* and *Mikulas* noted above.

80. Other cases have allowed a consumer to cancel a contract and obtain a full refund. In *Casillan*, the consumer was warranted a power train warranty that did not exist on his Audi. The engine malfunctioned and the consumer paid over \$13,000 to repair it. The consumer sought to cancel the contract and require the motor dealer take back the Audi. The court ordered the dealer to refund the consumer the \$13,000 for the engine repair, as well as some other minor costs, plus ordered the contract cancelled with the motor dealer to provide a full refund.

81. Contracts have been cancelled and full refunds ordered even when the item had been damaged and subsequently repaired while in the consumer's possession: *Casillan*, and *Bahry v. Lindell Beach Holiday Resort Ltd.*, 2009 BCSC 632 (B.C. Supreme Court). Contracts have been ordered cancelled and full refunds provided for a material misrepresentation about the type of engine in a motor vehicle, even after the consumer has possessed that motor vehicle for 22 months and placed 40,000 kilometers on the vehicle: *Lasby v. Royal City Chrysler Plymouth* (1987), 59 O.R. (2d) 323 (Ont. Divisional Court), leave to appeal to the Ontario Court of Appeal refused April 27, 1987 (Blair, Goodman and Cory JJ.A); see also *Halleran v O'Neil Brothers Auto Limited*, (1971), 1 Nfld. & P.E.I.R. 455 (NFLD. Court of Appeal).

82. In reviewing the cases cited in this decision and given the circumstances of this particular case, I believe it just that the Corvette should be returned to Cunningham Ford and Ms. Connell be given \$13,500 by Cunningham Ford upon its return. Ms. Connell shall then transfer ownership of the Corvette to Cunningham Ford, or its nominee. I arrive at this remedy for the following reasons.

83. First, it is common ground in the industry that a vehicle with a salvage label is difficult to sell. The burden of selling the Corvette under these circumstances should fall to Cunningham Ford. It cannot pass-off this burden to Ms. Connell. Ms. Connell was deprived of an opportunity to freely accept such a burden - salvage title and damage - by Cunningham Ford's misrepresentations. Second, Cunningham Ford had previously offered to sell the Corvette for Ms. Connell on a consignment basis. However, that would still make Ms. Connell liable to accept whatever the market will provide for the Corvette. Again, that is a liability that Cunningham Ford

should bear because Ms. Connell did not freely enter into the contract with the necessary knowledge to accept such a liability – the salvage title and damage.

84. Third, if it becomes necessary to make repairs to the Corvette in order to sell it, Cunningham Ford is in a better position to achieve any such repairs. Fourth, Ms. Connell is only seeking the \$13,500 she lost in the private sale. This is a reasonable position on her part. It is consistent with her evidence on the lost sale and with the documents showing comparator Corvettes tendered in evidence: Exhibit 10. It is also consistent with Mike Dorran's independent review of Corvette's for sale noted in his Affidavit. It is a reflection of what she would have received for the Corvette, had there been no salvage title. I have taken into consideration the stereo and ground effects kit now in the Corvette as was pointed out to me at the hearing. I note that Ms. Connell was willing to sell the Corvette in June 2009 for \$13,500 with those options.

85. Finally, Cunningham Ford will be able to mitigate the \$13,500 it is to pay to Ms. Connell by selling the Corvette. At paragraph 25 of Mike Dorran's Affidavit, there is evidence to suggest there is a market for the Corvette even with the salvage title. There is also the suggestion that the retail market value for the Corvette with the salvage title could be about \$8,000. However, that is only an estimate without inspecting the Corvette, is hearsay evidence, and that dollar figure is of little evidentiary value.

86. Pursuant to section 155(4)(b) of the BPCPA, I also order Cunningham Ford to reimburse Ms. Connell the \$134.40 paid to Mr. Wright for his inspection of the Corvette. I find Mr. Wright's evidence was important to my adjudication of these matters.

87. Pursuant to section 155(4)(c) of the BPCPA, I also order Cunningham Ford to abide by the BPCPA and to properly research motor vehicles it intends to sell so as to properly make its statutory declarations and to refrain from making misrepresentations about the motor vehicles it sells: see paragraph 98(b) below.

88. Pursuant to section 155(4)(d) of the BPCPA, Cunningham Ford is ordered to reimburse the VSA for its inspection/investigation and hearing costs in the amount of \$2,799.95. An invoice will be provided to Cunningham Ford.

(h) Administrative Penalty

89. 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. When considering the appropriate disciplinary approach, or amount of a penalty, its deterrent effect is a factor for consideration: *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).

90. In applying section 164(2), I note the following about Cunningham Ford and the facts of this case:

- (a) I note no past enforcement action for a similar contravention;
- (b) The contravention was serious in that the Corvette was seriously misrepresented, there was the possibility of a significant financial loss to the consumer; however there were no personal injuries such as in *Cummings*;
- (c) The harm to Ms. Connell was financial in nature, noting Mr. Wright's current opinion is that the Corvette is safe to drive;
- (d) I do not find that this contravention was repeated or continuous;
- (e) I have found this to be a negligent act and not a deliberate one;
- (f) Based on the trade-in amount given to the previous owner of the Corvette and the amount Cunningham Ford sold it to Ms. Connell, Cunningham Ford profited roughly \$3600 on the Corvette; and
- (g) I recognize that Cunningham Ford did offer to sell the Corvette for Ms. Connell. However, it was not going to take any financial responsibility for the Corvette under that agreement.

91. In considering the whole of the facts of this case, I note Cunningham Ford could have taken additional steps to become aware of the Corvette's USA history. I note that it was unreasonable to believe the ICBC report would show USA damage history or the salvage title. The disclaimer on the report itself made it clear this would not be the case. In light of the outward signs of damage, I also consider it was unreasonable for Cunningham Ford to rely on the Canadian Tire importation inspection which on the face of it shows it was not a complete vehicle inspection. I also note the amount Cunningham Ford is to pay to Ms. Connell which can be mitigated upon selling the Corvette.

92. I also consider the need for a general deterrence to ensure other motor dealers make adequate inquiries about the used motor vehicles they intend to sell, so as to make properly qualified representations about those vehicles.

93. I have considered past Registrar decisions of a similar nature: see *Ratte v Applewood Kia* (Decision of the Registrar, April 16, 2008); and *Kuzmova v. Eagle Ridge* (Decision of the Registrar, File No. 06-70726, May 5, 2008).

94. Taking all the above factors into consideration, and past precedents, I believe an administrative penalty in the amount of \$2,000 is appropriate and is so ordered against Cunningham Ford.

(i) Breach of the Motor Dealer Act and its Regulation

95. Under section 8.1(4)(b) of the *Motor Dealer Act* a finding that a motor dealer has committed a deceptive act or practice is grounds to cancel the motor dealer's registration. I do not believe it is in the public interest to do so in this case, given the nature of the deceptive act and its resulting harm: see *Knapp v. Crown Autobody & Auto Sales Ltd.* (Registrar's decision, September 21, 2009: File No. 08-70578). Given my compliance order and the above administrative penalty, I am satisfied no disciplinary action needs to be taken on the breach of the *Motor Dealer Act Regulation*.

DISPOSITION - SUMMARY

96. I find that Cunningham Ford did not meet its positive duty to declare damage over \$2,000 as required by section 23(b)(ii) of the *Motor Dealer Act Regulation*.

97. I find that Cunningham Ford made a misrepresentation about the quality and history of the Corvette, and failed to state a material fact - salvage title and damage - which under the above noted facts is a deceptive act or practice contrary to section 5(1) of the *Business Practices and Consumer Protection Act*.

98. A compliance order shall issue against Cunningham Ford on the following terms:

- (a) Cunningham Ford shall abide by the *Business Practices and Consumer Protection Act*.
- (b) Cunningham Ford will properly research motor vehicles it intends to sell so as to properly make its statutory declarations and to refrain from making misrepresentations

about the quality and history of the motor vehicles it sells; and is to state all material facts to consumers.

- (c) Cunningham Ford will arrange to take back the Corvette from Ms. Connell and pay her \$13,500 for the Corvette. Ms. Connell will have to sign over ownership of the Corvette to Cunningham Ford, or its nominee, upon receipt of the \$13,500.
- (d) Cunningham Ford is to reimburse Ms. Connell for the \$134.40 she paid Mr. Wright to inspect the Corvette.
- (e) Cunningham Ford is to reimburse the VSA \$2,799.59 for its inspection/investigation and hearing costs.

99. An administrative penalty of \$2,000 will be imposed on Cunningham Ford.

100. The compliance order and administrative penalty must be carried out within 30 days of Cunningham Ford receiving a copy of each: section 166 of the BPCPA. The Registrar may file a copy of the compliance order and administrative penalty with the B.C. Supreme Court. Once filed, the compliance order and administrative penalty are deemed to be orders of that Court for all purposes except appeals: sections 157 and 168(2) of the BPCPA.

RECONSIDERATION

101. 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 administrative 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 and the supporting new evidence 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 January 21, 2010


Ian Christman B.A., LL.B