



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:

ALBERT TAYLOR AND NORMA TAYLOR

COMPLAINANTS

AND:

**89419 B.C. LTD. dba VERNON TOYOTA CENTRE
(Dealer # 30382)**

MOTOR DEALER

AND:

**LISA LYNNE PROBYN a.k.a. LISA LYNNE DELANNOY
(Salesperson # 103503)**

SALESPERSON

DECISION OF THE REGISTRAR OF MOTOR DEALERS

Date and Place of Hearing: April 21, 2011, at Kelowna, British Columbia

Appearances for:

The Motor Vehicle Sales Authority Denis Savidan, Manager of Compliance and
Investigations
Chris Hoy, Compliance Officer

Complainants Glen Taylor

Vernon Toyota Centre Dave Rehill
Martin Steele

Lisa Probyn aka Lisa Delannoy No one

INTRODUCTION

1. This hearing was called to review the complaint of Albert and Norma Taylor (the "Taylors") that 89419 B.C. Ltd. dba Vernon Toyota Centre ("Vernon Toyota") breached the deceptive act or practice provisions of the *Business Practices and Consumer Protection Act* ("BPCPA"): Notice of Hearing - Exhibit 1 at the Hearing.
2. The issues at hand relate to a series of transactions from 2004 involving two different dealerships and culminating in the seizure of the Taylor's vehicle by the bank with which they "financed" their purchase. I use the word finance descriptively here as the evidence shows that the Taylors were unaware they had financed their vehicle.
3. In all cases, the Taylors dealt with Lisa Lynne Probyn also known as Lisa Delannoy ("Probyn"), a licensed salesperson pursuant to the *Motor Dealer Act* which is administered by the Motor Vehicle Sales Authority of BC (the "Authority"). Ms. Probyn was an employee of Vernon Toyota at the relevant time. It is important to this case to note that Ms. Probyn is the daughter of the Taylors.
4. Ms. Probyn originally was to be a part of this hearing process to review her licence as a salesperson. During the pre-hearing process, Ms. Probyn retained legal counsel at which time Ms. Probyn surrendered her licence as a salesperson.
5. At issue here is whether Vernon Toyota is vicariously liable for the conduct of its employee – Ms. Probyn.
6. As part of the pre-hearing process, I reviewed affidavit material and became concerned that the evidence falls short of the legal requirements to:
 - (i) find a breach of the BPCPA as there may not have been a consumer transaction as defined by that Act; and
 - (ii) find vicarious liability on Vernon Toyota.

7. To that end, I wrote a letter on April 7, 2011, to all the parties in this matter and expressed my concern. I invited all parties to be prepared to speak to the issue at the hearing on April 21, 2011.

THE LAW

(a) Business Practices and Consumer Protection Act

8. Section 5(1) of the BPCPA prohibits a “supplier” from committing a deceptive act or practice in a “consumer transaction” – generally, a misrepresentation. A deceptive act or practice need not be intentional, it may be innocent, negligent or fraudulent and a consumer may still be entitled to a remedy: *Chyplyck & Trehwitt v. Technique* (June 21, 2011 File 10-70482, Registrar of Motor Dealers) at paragraph 18 citing the following:

Rushak v. Henneken (1991), 59 B.C.L.R. (2d) 250 (BC Court of Appeal) affirming [1986] BCJ No. 3072 (BC Supreme Court)

Mikulas v. Milo European Cars Specialists Ltd. [1995] BCJ No. 638 (BC Court of Appeal) affirming [1993] BCJ No. 2818 (BC Supreme Court)

British Columbia (Director of Trade Practices) v. Landsdowne Pontiac Buick GMC Ltd. [1987] BCJ No. 2325 (BC Court of Appeal.) affirming [1985] BCJ No. 2065 (BC Supreme Court)

The Consumer’s Association of Canada et al v. Coca-Cola Bottling Company et al. 2006 BCSC 863, additional reasons 2006 BCSC 1233 (BC Supreme Court), affirmed by 2007 BCCA 356 (BC Court of Appeal), leave to appeal to the Supreme Court of Canada refused [2007] S.C.C.A. No. 464 (SCC)

Cummings v. 565204 B.C. Ltd. dba Daewoo Richmond 2009 BCSC 1009 (BC Supreme Court)

Casillan v. 565204 B.C. Ltd. dba Daewoo Richmond 2009 BCSC 1335 (BC Supreme Court)

Findlay v. Couldwell [1976] 5 W.W.R. 340 (BC Supreme Court)

9. As described in the Notice of Hearing, the pertinent provisions of the BPCPA in this matter are as follows:

1. In this Act

"consumer transaction" means

(a) a supply of goods or services or real property by a supplier to a consumer for purposes that are primarily personal, family or household, or

(b) a solicitation, offer, advertisement or promotion by a supplier with respect to a transaction referred to in paragraph (a),

and, except in Parts 4 and 5, includes a solicitation of a consumer by a supplier for a contribution of money or other property by the consumer;

"supplier" means a person, whether in British Columbia or not, who in the course of business participates in a consumer transaction by

(a) supplying goods or services or real property to a consumer, or

(b) soliciting, offering, advertising or promoting with respect to a transaction referred to in paragraph (a) of the definition of "consumer transaction",

whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of that person and, except in Parts 3 to 5 [*Rights of Assignees and Guarantors Respecting Consumer Credit; Consumer Contracts; Disclosure of the Cost of Consumer Credit*], includes a person who solicits a consumer for a contribution of money or other property by the consumer;

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.

10. Where an allegation is made that a supplier committed a deceptive act or practice, the BPCPA places the onus on the supplier to show that the deceptive act or practice did not occur:

Section 5(2) of the BPCPA

Cummings v. 565204 B.C. Ltd. dba Daewoo Richmond 2009 BCSC 1009 (BC Supreme Court)

Casillan v. 565204 B.C. Ltd. dba Daewoo Richmond 2009 BCSC 1335 (BC Supreme Court)

(b) Vicarious Liability

11. Generally, where an employee commits a wrong during the course of their employment and while carrying out their normal employment duties, the employer will be held vicariously liable for those wrongs. However, not every wrongful act of an employee will make an employer vicariously liable.

12. The leading case on this point is the Supreme Court of Canada's decision in *Bazley v. Curry* [1999] 2 S.C.R. 534 (SCC). In *Bazley*, Madam Justice McLachlin (now Chief Justice) summarized the legal principles at paragraphs 37-41, which I consolidate and paraphrase as follows:

- (a) The wrongful conduct must be closely connected to the employment to impose liability on the employer as "a cost of doing business";
- (b) Consider whether the wrongful act was a normal or expected incident of the employment;
- (c) The fact the employment provides an employee with the "mere opportunity" to commit wrongs is insufficient to find vicarious liability;
- (d) Did the employer gain from the wrongful conduct; and
- (e) The position of power between the employee and the victim and the vulnerability of the victim.

13. Other cases also note that where the employer has not authorized the employee to carry out the type of transaction leading to the wrong in question, or it could not reasonably be said that the employee had the apparent authority to carry

out the type of transaction leading to the wrong; then vicarious liability will not flow into the employer: *Dams Ford Lincoln Sales Ltd. v. Mohtader* 2008 BCSC 204 (BC Supreme Court); and see also *Gives v. Schneider* 1991 CarswellOnt 1548 (Ont. C.J.G.D.). Generally, to find vicarious liability requires an assessment of the evidence and a finding that the employee committed a wrong during the normal course of their normal employment duties.

FACTS

14. In this case, understanding the facts of each of the transactions is important to determining whether each transaction is a “consumer transaction” under the BPCPA, and whether Vernon Toyota is vicariously liable for Ms. Probyn’s conduct.

15. The following facts are not in dispute.

Barnes Nissan Transaction - 2005 Nissan Altima

16. The first transaction occurred at Barnes Nissan. Ms. Probyn was working in the business office at Barnes Nissan as the business manager. The general duties of a business manager in this industry is to arrange financing for consumer purchases as well as sell “add-on” products or services such as warranties; insurance products; under-coating and similar items. In February 2008 Barnes Nissan ceased operations as a motor dealer.

17. On December 9, 2004, the Taylors leased a 2005 Nissan Altima from Nissan Canada which was facilitated through Barnes Nissan.

Affidavit of Chris Hoy #3 sworn December 15, 2010 [Exhibit 4 at the Hearing]

Affidavit of Albert aka Todd and Norma Taylor Sworn April 6, 2011 [Exhibit 5 at the Hearing]

Oral evidence of Glen Taylor – Transcript of Proceedings April 21, 2011 page 10 - 11

Vernon Toyota

(a) 2001 Ford Explorer

18. On November 28, 2005, the Taylors traded-in their 2005 Nissan Altima and used it towards purchasing a 2001 Ford Explorer. Nissan Canada was paid out \$23,984.78 to clear the lien on the 2005 Altima. The lien amount paid for the 2005 Altima was incorporated into the purchase price of the 2001 Ford Explorer. As the business manager at Vernon Toyota, Ms. Probyn arranged the financing on the Ford Explorer sale.

19. The documentary evidence shows that Vernon Toyota paid more for the lien payout than they received for the Ford Explorer upon its sale.

Affidavit of Chris Hoy #1 sworn September 30, 2010

Affidavit of Albert aka Todd and Norma Taylor Sworn April 6, 2011 [Exhibit 5 at the Hearing]

(b) 2007 Toyota RAV 4

20. On May 8, 2007, the Taylors received a 2007 Toyota Rav 4 from their daughter; Ms. Probyn. They believed their daughter gave them the Rav 4 as a gift. Their evidence is that they saw no paper work nor signed any documents to purchase or finance the Rav 4. The documentary evidence shows purchase and finance agreements signed by the Taylors. However, the evidence is that those signatures are not those of the Taylors. Comparing signatures from the Altima purchase to these clearly shows they are not the same.

21. The documents for the Rav 4 purchase show the Taylors traded-in their Ford Explorer and paid out a lien of \$16,158.23 on the Ford. The Taylors were unaware the Ford Explorer had a lien on it. Further, Ms. Probyn used her own 2006 Toyota Tacoma as a trade-in on the Rav 4 which also had a lien pay-out for \$30,057.58. Those lien pay outs were part of the financing towards the purchase of the Rav 4. The Rav 4 was seriously over-financed.

Affidavit of Chris Hoy #1 sworn September 30, 2010 and Exhibit H

Affidavit of Chris Hoy #2 sworn November 4, 2010 [Exhibit 3 at the Hearing]
Affidavit of Albert aka Todd and Norma Taylor Sworn April 6, 2011

22. Again and importantly, the Taylors believed the Rav 4 was a gift from their daughter Probyn, and they made no payments towards the Rav 4 nor signed any documents for the Rav 4.

Affidavit of Albert aka Todd and Norma Taylor Sworn April 6, 2011

Affidavit of Chris Hoy #1 page 5

Oral evidence of Glen Taylor – Transcript of Proceedings April 21, 2011 page 8

(c) 2006 Toyota Matrix

23. On or about July 1, 2008, documents from Vernon Toyota show the Taylors purchased a 2006 Toyota Matrix. There was no trade-in. The Matrix is over financed by \$19,105.40. At the request of Ms. Probyn, Vernon Toyota issued three separate cheques payable to Albert Taylor which add up to the \$19,105.40. The evidence shows Ms. Probyn used a joint account she held with her father to cash those three cheques. The evidence also shows that the Taylors were completely unaware of this transaction until their daughter called one day to say they owned another vehicle. Ms. Probyn apparently re-assured them the vehicle would be quickly sold and not to worry. A review of the signatures on the purchase and finance documents for the Matrix indicated they are not those of Albert and Norma Taylor.

Affidavit of Albert aka Todd and Norma Taylor Sworn April 6, 2011

Oral evidence of Glen Taylor – Transcript of Proceedings April 21, 2011 page 9

24. A review of internal "wash-out" documents show the Matrix was sold at Vernon Toyota's cost by Ms. Probyn. Vernon Toyota made no profit on this transaction.

Affidavit of Chris Hoy #1 and Exhibit I attached thereto.

Seizure of the Vehicles

25. On March 26, 2010, the bank took possession of the 2006 Matrix due to non-payment. Ms. Probyn had failed to make payments. The bank elected to seize the Matrix and the Taylors were not held financially liable for any deficiency. However, the Taylors' credit ratings were negatively affected.

Affidavit off Chris Hoy #1 page 3 and Exhibit E (page 44)

26. On April 16, 2010, the bank also took possession of the Toyota Rav 4 due to non-payment by Ms. Probyn. The Taylors were taken completely by surprise as they believed this vehicle was a gift from Ms. Probyn. In the "background," Ms. Probyn had arranged to make the payments on the Toyota Rav 4. The Taylors were not held financially liable for any deficiencies. Again, the Taylors' credit ratings were negatively affected.

Affidavit of Chris Hoy #1 page 3 and Exhibit D (page 42)

Vernon Toyota's Conduct

27. The Taylors' son, Glen Taylor, got involved once the two vehicles were seized.

28. Glen Taylor confronted Vernon Toyota with the issues at hand. Vernon Toyota took steps to provide Mr. and Mrs. Taylor with a loaner vehicle to use at no charge while this matter was being investigated. This continued for about 12 months and for the last 6 or so months, Vernon Toyota has been charging a nominal rate for the Taylors to use the loaner vehicle. Vernon Toyota has also offered to apply any payments made towards purchasing the loaner.

Oral Evidence of Martin Steele, Transcript of Proceedings April 21, 2011 pages 20-21

29. Mr. Glen Taylor notes he does not believe Vernon Toyota did anything wrong in this matter. He also notes that Vernon Toyota has been very cooperative in this matter and provided him and his parents with assistance.

Oral evidence of Glen Taylor – Transcript of Proceedings April 21, 2011 page 27 and 30

30. Mr. Chris Hoy noted Vernon Toyota was cooperative throughout his investigation.

31. Vernon Toyota provided evidence that they uncovered other conduct of concern by Ms. Probyn. Specifically, the selling of warranties and failing to remit proceeds or policies to the warranty provider. Vernon Toyota made good on these policies and ended Ms. Probyn's employment. Vernon Toyota reported these matters to the RCMP and criminal charges were recommended to crown counsel.

Oral Evidence of Martin Steele, Transcript of Proceedings April 21, 2011 pages 22-23

Affidavit of Chris Hoy #1, pages 9-10

Additional Evidence from Glen Taylor

32. Mr. Glen Taylor provided bank records to show the joint account between Ms. Probyn and her father which also showed the deposits of the three cheques issued by Vernon Toyota from the Matrix deal. The evidence tendered is that the joint chequing account was set up because Ms. Probyn could not qualify for a chequing account on her own when she moved to BC from Alberta. Ms. Probyn used this chequing account and her father was unaware of the transactions and had no effective control over the account.

Affidavit of Albert aka Todd and Norma Taylor Sworn April 6, 2011

Oral evidence of Glen Taylor – Transcript of Proceedings April 21, 2011 pages 13-14

33. Also tendered as evidence were filed court documents in the Provincial Court of BC No. VER-P-C-45360 where a credit union sued Lisa Probyn and Albert Taylor for defaulting on a personal loan. Mr. Taylor was the apparent co-signer of that loan. The Payment Order by the court notes Lisa Probyn alone was ordered to make all payments on the default. This loan was agreed to around two months after Mr. Taylor had major surgery and was still recovering from that surgery.

Exhibit 7 at the Hearing

Oral evidence of Glen Taylor – Transcript of Proceedings April 21, 2011 pages 15-17

34. Mr. Glen Taylor wanted to enter evidence from a doctor about Mr. Albert Taylor's health problems throughout much of 2006. These health problems occurred around the time Ms. Probyn approached her father to co-sign the joint account and the above noted personal loan culminating in a Provincial Court action.

Exhibit 8 at the Hearing

Oral evidence of Glen Taylor – Transcript of Proceedings April 21, 2011 pages 15-17

ANALYSIS

35. I will look at each transaction individually.

(a) Nissan Altima

36. This transaction occurred with Barnes Nissan and not with Vernon Toyota. Vernon Toyota was not a "supplier" in this transaction.

(b) Ford Explorer

37. On the evidence before me, I accept this was a consumer transaction with Vernon Toyota as defined by the BPCPA. I find no evidence of there being some sort of a misrepresentation between the Taylors and Vernon Toyota (through Ms. Probyn) in this transaction. The Nissan Altima that was traded-in towards the Ford Explorer had a lien registered by Nissan Canada (the balance of the lease) that needed to be cleared in order for it to be used as a trade-in¹ and the cost for doing so was incorporated into the cost of purchasing the Ford Explorer. This was all arranged by Ms. Probyn, the Taylor's daughter.

38. On the evidence before me, I cannot find a misrepresentation on the part of Vernon Toyota in this transaction. The Taylors may not have understood that the

¹ Section 16(c) of the *Sale of Goods Act* required Vernon Toyota to ensure the Altima was free from any charges before it could resell the Altima.

cost of the Altima lease buy-out was incorporated into the purchase price of the Ford Explorer, but a misunderstanding is different in law than a misrepresentation under the BPCPA. My jurisdiction is only over the latter.

George Mann Sr. v. Ocean Park Ford (May 19, 2009, File 07-70255, Registrar of Motor Dealers) referencing:

- *Bain v. Empire Life Insurance Co.* 2004 BCSC 1577 (BC Supreme Court)
- *Frolick v. Frolick* 2007 BCSC 84 (BC Supreme Court)
- *Outwest Enterprises Ltd v. Timms*, 2007 BCSC 560 (BC Supreme Court)
- *May v. Dunster* 1996 CanLII 3453 (BC Supreme Court)

(c) Toyota Rav 4

39. By admission of the Taylors, the Toyota Rav 4 was a gift from their daughter. They did not sign any documents nor were they expected to make payments on the vehicle and they did not make any payments.

40. It turned out that behind the scenes, Ms. Probyn had made arrangements to pay for the Rav 4 herself. When that fell through, the vehicle was seized from the Taylors.

41. I cannot say this transaction was a “consumer transaction” as defined by the BPCPA. In order for there to be a consumer transaction, it had to be with a “supplier” “who in the course of business” supplies goods or services. Under these facts, I cannot say the Rav 4 was supplied to the Taylors in the “course of business.” Vernon Toyota is generally not in the business of giving away vehicles.²

42. Under these particular facts, Ms. Probyn was acting as a daughter to the Taylors and not as a business manager for Vernon Toyota. The fact that Ms. Probyn was able to arrange her affairs in the way that she did due to her position as a business manager at Vernon Toyota, is insufficient to find vicarious liability on Vernon Toyota: *Bazley* (Supreme Court of Canada). A reasonable person would not believe that Ms. Probyn had the apparent authority to make significant gifts of

² This could change if the supplier agrees to provide a “gift” in relation to a consumer transaction, such as a promotional sale. The facts of each case will dictate the outcome.

vehicles that belonged to Vernon Toyota: *Dams Ford Lincoln Sales Ltd.* (BC Supreme Court).

43. I find there was no “consumer transaction” with a “supplier” as defined by the BPCPA regarding the gift of the Toyota Rav 4 from Ms. Probyn to her parents. I further find that vicarious liability does not attach to Vernon Toyota because of the wrongful conduct of Ms. Probyn in this transaction.

(d) *The Matrix*

44. Ms. Probyn used both her position at Vernon Toyota and her knowledge and access to her father’s personal information and a joint bank account to arrange the Toyota Matrix transaction in the way that she did. Both of the Taylors were completely unaware of this transaction until after it was complete. The Taylors signed no documents.

45. Similar reasoning applies in this transaction as with the Toyota Rav 4 transaction. Vernon Toyota was not in the business of forging documents and selling vehicles for no profit while over-financing the purchase and issuing cheques for the over-financed amount. A normal transaction has the consumers present or at least they are communicated with in the case of long-distance sales. This transaction was uniquely outside the normal scope of motor vehicle transactions with consumers. Under these facts, I cannot say that vicarious liability could flow into Vernon Toyota.

COMMENTS

46. Based on the uncontested evidence that is before me, I would say that Albert and Norma Taylor are unfortunate victims of their daughter’s conduct. There is no evidence before me that indicates any complicity on the Taylor’s part in any of these transactions. It is unfortunate that their credit ratings should suffer for the transgressions of their daughter. However, I have no jurisdiction to deal with that matter.

47. Mr. Glen Taylor was notably and understandably upset at how these events unfolded and the impact it has had on his parents. At the hearing, he felt someone

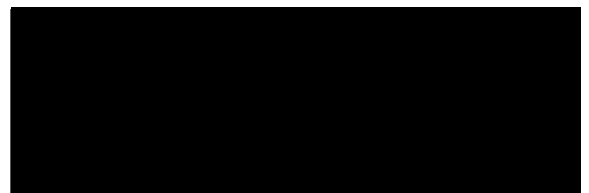
should be held to account for his parents' misfortunes in these matters. He indicated Vernon Toyota or even the Authority. Under these circumstances, it appears the person who should be held to account is incapable or unwilling to right the harm to Albert and Norma Taylor – that person being Ms. Probyn. Sometimes the person committing the harm is solely responsible: *Cooper v. Hobart* [2001] 3 S.C.R. 537 (Supreme Court of Canada)

48. I note Vernon Toyota's co-operation in this matter throughout. At the hearing, I suggested Vernon Toyota may wish to do better background checks on prospective business managers. That specific position has access to consumer personal and financial information and is clearly a significant position of trust. It is the suggestion of the Registrar that apart from reference checks, motor dealers may wish to also perform criminal record and credit history checks on prospective business managers.

SUMMARY - DISPOSITION

49. Under the very unique facts of this case, I find Vernon Toyota did not commit deceptive acts or practices contrary to the BPCPA in this matter. That is the extent of my jurisdiction. I make no comment on whether or not there are other civil remedies available to the Taylors.

Dated: July 25, 2011



Ian Christman LL.B.